

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *DeFrancesco v. Balla*,
2024 BCSC 367

Date: 20240301
Docket: S87735
Registry: Nanaimo

Between:

Brian John DeFrancesco

Plaintiff

And

Cheryl Balla

Defendant

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

The Plaintiff, appearing in person

B.J. DeFrancesco

The Defendant, appearing in person:

C. Balla

Place and Dates of Trial:

Nanaimo, B.C.
May 1–5 and
June 26–27, 2023

Place and Date of Judgment:

Nanaimo, B.C.
March 1, 2024

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Introduction

[1] The plaintiff, Brian DeFrancesco, and defendant, Cheryl Balla, are brother and sister respectively. In 2017 and 2018, having been advised that they would receive advances on their inheritances from their parents, they decided to invest together in residential properties in the Nanaimo area. Initially, the plan was to purchase one home which would have three living units: one for the plaintiff, one for the defendant, and one for their parents. Later, they decided to acquire two additional residential properties and to rent out two of the three properties.

[2] The parties gave little thought up front as to how to structure their arrangements, the impacts of the defendant sister's greater financial resources, or how they would cover the costs inherent in this enterprise.

[3] Things fell apart in late 2018. Each blames the other for poor business decisions made over the next several months. By July 2020, all three properties had been sold after foreclosure proceedings were commenced. The net sale proceeds have been sitting in trust since then.

[4] The plaintiff asserts that the net sale proceeds should be shared. The defendant says they should all be paid to her.

[5] The primary issue in this case is thus to decide how to divide the monies that are sitting in trust. In order to do that, I will need to consider the basis on which the parties were involved in the enterprise they were involved in, and resolve some of the factual disputes that have arisen.

[6] The defendant also counterclaims for various matters including an alleged assault on her by the plaintiff in November 2018.

[7] The parties were self-represented at trial. That poses challenges in a case like this because, while both were clearly well-versed in the facts, neither has the legal training that would assist in placing those facts into a legal context that potentially involves aspects of contract, trust and partnership law.

Facts

Background

[8] The plaintiff and defendant are brother and sister. Their parents were named Joseph and Margaret DeFrancesco. For ease of reference and meaning no disrespect, I will refer to the parents by their first names. Joseph and Margaret were, by 2017, in their early nineties.

[9] The plaintiff has worked in the construction industry, with specific experience in painting and drywalling. The defendant worked for Michelin and as a court clerk prior to retiring.

[10] Prior to 2017, the defendant and the parents lived in Kitchener, Ontario. The parents owned a home, and the defendant also owned a home.

[11] Prior to late 2017, the plaintiff lived in Parksville, British Columbia. In 2016, he lived with his then-girlfriend, Bonnie Rix. The plaintiff did not own real property and was not in good financial condition. He owed money to the Canada Revenue Agency (“CRA”). He also, in more recent years, developed avascular necrosis (“AVN”), which ultimately required a knee replacement and limited his ability to earn income.

[12] At some point in 2016, it was decided that the defendant and the parents would sell their homes in Kitchener and move to British Columbia. The defendant said that there had initially been a discussion about the parents selling their home and moving into a house with her in Kitchener. After the parents visited the plaintiff and Ms. Rix in Parksville, it was decided to do this in British Columbia instead. As all of this unfolded, the parents were suffering from various health issues, with Joseph in the early stages of dementia and Margaret experiencing significant mobility problems.

[13] In about February 2017, the defendant travelled to Penticton, British Columbia, and found a house that she thought was appropriate (the “Penticton Property”). The purchase of the Penticton Property completed on April 20, 2017. Title to the house was in the name of the defendant. Unfortunately, the bulk of the

evidence with respect to this purchase was verbal—the defendant tendered a one-page reporting letter and a one-page account from a notary public, and testified that those were the only documents remaining from the purchase of the Penticton Property. Her evidence was that the purchase price was \$471,500. Her evidence was that most of the money used to purchase the Penticton Property came from the parents, but that she “ported” a TD Bank mortgage from the home she was selling in Kitchener, and there was some bridge financing from CIBC to allow that to happen.

[14] The sale of the defendant’s home in Kitchener did not complete until early May 2017. She deposited \$304,940 from the sale of her Kitchener house into her account on May 2, 2017. Various withdrawals were made from those funds, such that by May 31, 2017, only \$188,000 remained in the account. The defendant thought that the largest of the withdrawals (\$80,000 on May 3, 2017) had something to do with the Penticton Property, but she was unable to provide further details.

[15] Various work was done to renovate and upgrade the Penticton Property. Some of it was done by contractors paid by the defendant, while the plaintiff also took time off work to travel from Parksville to Penticton and work on the house. The parties do not agree how much work was done by the plaintiff, nor do they agree on whether and to what extent the plaintiff was paid by his parents for the work he did.

[16] The documents in evidence include an unsigned draft cheque number 036 from the parents’ account. This draft cheque is for \$2,200, and contains a note “Parksville-Penticton”. The parents’ bank statement shows that cheque number 035 from that account was processed on May 24, 2017. The defendant’s evidence was that her mother’s practice was to write a cheque, then write a second copy of the cheque on the next cheque in the book in order to create a record of the cheque she had written. The defendant said that she knew nothing about this cheque, and only uncovered it recently when going through her parents’ financial records. Her position, however, was that it should be “coming off” the plaintiff’s “pre-inheritance” money. This transaction was never put to the plaintiff.

[17] At some point, the parents decided to give their children advances on their inheritances, which the parties both referred to as a “pre-inheritance”. It was not clear how the parents were going to accomplish this, as the bulk of their money was tied up in the Penticton Property. The parties had differing recollections as to when this decision was made. The plaintiff at one point suggested that it had happened in 2016. He also said that he was told about it during one of his visits to Penticton between May and July of 2017. The defendant’s evidence was that it was in mid-2017. Her most specific evidence was that after she called the plaintiff to tell him about the pre-inheritance, he immediately flew to Penticton to buy a truck.

[18] The plaintiff agreed that he was in Penticton a couple of times in about May to August of 2017 to work on the Penticton Property. His evidence was that he used some of his pre-inheritance money to purchase a truck—that being \$22,000 for the truck and \$4,000 for the cap.

[19] Documents in evidence record that, on August 2, 2017, a Chevrolet truck was purchased for the plaintiff. The cost of the truck was approximately \$22,000. The evidence indicates that this money came from the defendant’s bank account. The defendant testified that her parents asked her to cover this expense as a matter of convenience.

[20] The defendant also made a cash withdrawal of \$2,000 from her bank account on August 1, 2017. She said this is money she gave to the plaintiff, on behalf of the parents. The plaintiff was not asked about this cash amount.

[21] The defendant suggested that she actually sent \$5,000 to Ms. Rix for the truck cap. The evidence on this was difficult to follow. The defendant pointed to one document that seemed to suggest she had sent money to Ms. Rix on August 31, 2017, and another seeming to show a transfer to Ms. Rix on November 10, 2017. She later identified the November 10, 2017, transfer as a further “advance” on the plaintiff’s inheritance.

[22] I note that Ms. Rix gave evidence that she was paid for work she did on what is described below as the Long Lake Property. The specific transactions referenced in the previous paragraph were not put to Ms. Rix.

[23] At some point in the summer of 2017, it was decided that the defendant and the parents would move to Vancouver Island. The plaintiff's evidence was that the parties' mother in particular did not like the hot weather in Penticton. The defendant agreed that the parents wanted to move to Nanaimo. Her evidence was that this was in part because the plaintiff had agreed to help out with the care of the parents.

Purchase of the Long Lake Property

[24] A residential property was found on Long Lake Terrace in north Nanaimo (the "Long Lake Property"). The plaintiff's evidence was that his sister and parents came to Parksville to visit him and it was on this visit that the property was found. It appears to be common ground that the parties saw this property as ideal because the house on the property could easily be divided into three suites: a ground level suite in front for the parents (which would accommodate the mother's mobility issues), a ground level suite in back for the plaintiff, and an upper level suite for the defendant.

[25] There was some sort of discussion between the parties about jointly investing in this house. It seems clear that the parties understood that the plaintiff's main financial contribution to the investment would come from his pre-inheritance. He had no other available sources of funds to invest. It also seems clear that the intention at the time was that the parties would live in the property.

[26] The defendant's evidence was that the plaintiff proposed, with respect to the Long Lake Property, that "all of us" would share in the home together, which would include sharing "all expenses" such as the mortgage, bills, property taxes, maintenance and so on. She said that she and the parents talked it over and then agreed to the plan.

[27] The contract of purchase and sale for the Long Lake Property was not in evidence. It is not known who was originally shown as a purchaser. The defendant's evidence (not disputed by the plaintiff) was that, because of the plaintiff's poor credit, the Long Lake Property was ultimately purchased in her name only.

[28] The defendant tendered a copy of cheque number 044 from one of the parents' bank accounts. This cheque was unsigned. It was dated August 9, 2017, identified the payee as "Century 21 Harbour Realty In Trust", identified the amount as \$10,000, and contained a note "To Brian 150, + 10 = \$160,000". The defendant's evidence was that this cheque was in her handwriting, that she completed it at her mother's instruction, and that in her view it showed the parents' intention regarding the plaintiff's pre-inheritance (i.e., that the \$10,000 from the cheque plus a further \$150,000 would comprise the plaintiff's pre-inheritance). The defendant's evidence was that her mother simply "forgot" to deduct the earlier pre-inheritance advances from this note.

[29] The account statement for the parents' bank account showed that cheque number 047 in the sum of \$10,000 was processed on August 15, 2017. The defendant's suggestion was that this was the actual cheque related to the draft cheque number 044. I note that, six days after cheque number 047 was processed, the sum of \$10,005.18 was deposited into the parents' account by credit memo—there was no explanation provided for this credit deposit.

[30] I infer from the above that the contract for the Long Lake Property was made in about mid-August 2017.

[31] Notwithstanding the decision to move to Nanaimo, the defendant continued with planned improvements to the Penticton Property. Her evidence was that this was to get it ready to sell. On August 21, 2017, she texted the plaintiff a note that she had had 15 metric tons of gravel placed on the front yard.

[32] On August 22, 2017, the defendant texted the plaintiff saying:

I bought champagne and had a toast with the parents at dinner. As soon as this house sells I will talk to the bank and see what we can do as flipping houses.

[33] The plaintiff responded: “Ok that sounds good.”

[34] The defendant’s evidence was that she and the plaintiff had discussions about purchasing other properties. Apart from a few texts that were put in evidence, it appears to be common ground that these discussions were verbal. The defendant’s evidence was that, generally speaking, she wanted to buy and flip properties, while the plaintiff wanted to purchase properties and rent them out.

[35] In late August 2017, the defendant arranged for a tradesman from Penticton, Mr. Mel Huisman, who had been working on the Penticton Property, to travel to Nanaimo in November to help with the work to be done on the Long Lake Property.

[36] In the latter part of September 2017, the defendant travelled to Mexico. The plaintiff came to Penticton to help care for the parents.

[37] The defendant’s evidence was that a problem arose with respect to the financing of the Long Lake Property, in that due to credit problems on the part of the plaintiff (including the CRA debt), both title to the property and the mortgage would have to be in her name only.

[38] The plaintiff’s evidence was that the defendant took care of all of the finances and set things up with the lawyers, and that he signed papers when the defendant asked him to do so. He understood that all of the money to purchase the Long Lake Property came ultimately from the sale of the parents’ house in Ontario.

[39] The purchase of the Long Lake Property completed on November 1, 2017. The statement of adjustments shows that the purchase price was \$471,500, there was a \$10,000 deposit paid to Century 21, \$70,000 base mortgage from CIBC, and a further \$400,900.31 came from CIBC pursuant to a bridge financing agreement. Bridge financing was necessary because the Penticton Property had not yet sold.

[40] The plaintiff moved into the Long Lake Property immediately after completion of the purchase, and took time off work to do renovations. Some of the work was also done by contractors, including Mr. Huisman, who started work on November 5, 2017. The plaintiff described the work as fully renovating a suite for the parents, including tearing down walls and installing kitchens and floors, as well as preparing a suite for the plaintiff at the rear of the main floor.

[41] The defendant disputed the amount of work done by the plaintiff. She said that, shortly after Mr. Huisman arrived, the plaintiff claimed his gout was acting up and he could not do any more work. This was not put to the plaintiff.

[42] The parties' understanding as to cost-sharing arrangements for additional capital expenses (for such things as renovations) was vague and unclear. It appears that the defendant initially expected the plaintiff to pay one third of any costs of improvements to the property, with the parents also contributing a third. This was notwithstanding that the plaintiff had limited employment income, which was reduced when he took time off work to work on the various houses that were purchased. It became even more of a concern as the plaintiff's ability to work was substantially affected by AVN.

[43] This became a source of tension between the parties. On November 13, 2017, the defendant sent a text to the plaintiff saying:

You don't have to worry about investing in the house. I will give you your money in full when I get to the island. It won't work out and I am not going to fight with you over money. You can get your things out of the house because there is no reason for you to live there. Mom will pay you and [Ms. Rix] for the work you have done.

[44] This text was not acted upon, and the parties continued to work together to prepare the Long Lake Property for all four members of the family to live in. It appears that, from time to time, the parties' mother wrote cheques to help cover expenses. In part, this would have reflected the initial agreed one-third contribution. As well, the plaintiff said that on several occasions he gave his mother cash and she would write a cheque because he did not have a bank account he could use.

[45] On November 14, 2017, there was a withdrawal of \$3,000 from one of the parents' bank accounts. The defendant's evidence was that this money was used to pay half of a bill from Mr. Huisman.

[46] The sale of the Penticton Property completed on November 17, 2017. The sale price was \$540,000. Of those proceeds, \$403,712.01 was paid to CIBC in respect of the bridge financing agreement. After transaction costs, a net amount of \$111,967 was paid to the defendant.

[47] The defendant's evidence was that, once the Long Lake Property was acquired, "all of" the plaintiff's money was in the Long Lake Property. The plaintiff's evidence was that when he asked about any remaining money from his pre-inheritance, he was told that it was in the Long Lake Property.

[48] The defendant and the parents arrived in Nanaimo on November 17, 2017 and moved into the Long Lake Property. The defendant's evidence was that the parties and the parents were sharing mortgage payments, bills, property taxes, house maintenance and other expenses. At this point, the only mortgage was a \$70,000 mortgage from CIBC, for which monthly mortgage payments were \$308.

The Parties Go into Business

[49] The parties continued to have discussions about purchasing further properties. The parties were not necessarily *ad idem* on the purpose of doing so. The plaintiff preferred to purchase properties, fix them up and rent them out. The defendant was more interested in purchasing properties, doing some repairs, and then "flipping" them. The plaintiff's evidence was that they ultimately decided that they would live in one property and rent out additional properties, and then after two and a half to three years, they would reassess the situation and either continue on or sell.

[50] In early 2018, the plaintiff found a property at 1013 Beverly Drive in Nanaimo (the "Beverly Property"). On January 20, 2018, the defendant entered into a contract to purchase the Beverly Property for \$519,000. The defendant's evidence was that

she purchased the Beverly Property as her own personal investment property, but that later on she “added it” to their business plan as an incentive for the plaintiff. The plaintiff’s evidence was that the defendant told him “there is still money left over” that could be used for another property, and that the purchase of the Beverly Property was all part of their plan with respect to buying, fixing up and renting out houses.

[51] The defendant arranged mortgage financing for the Beverly Property from Coastal Community Credit Union.

[52] On February 1, 2018, the defendant opened a bank account at Coastal Community Credit Union. The account was in her name. Her evidence was that the purpose of this account was “the business”. Her intention was to have all of the rents, mortgages and everything pertaining to the business dealt with in one account. Her evidence was that she gave the plaintiff access to the account, and that all rents were deposited in it and all mortgage and other bills related to the properties would be paid from it.

[53] The purchase of the Beverly Property completed on February 7, 2018. The purchase was funded by the mortgage from Coastal Community Credit Union, which generated proceeds of \$339,000. The defendant paid the deposit of \$25,000 as well as a bank draft on the closing date for \$165,304.13. The monthly mortgage payments due to Coastal Community Credit Union were \$1,562.51.

[54] On February 8, 2018, \$15,258.07 was paid to CRA on behalf of the plaintiff. The defendant said that this money came from the parents, and was intended to clear his primary outstanding debt. The defendant believed that this money should be considered a debit to the pre-inheritance. The plaintiff did not give specific evidence with respect to this payment and was not asked about it on cross-examination; generally speaking, his evidence was that the parents were generous with both children, and that any funds his mother gave to him were intended to be a gift and not a loan. He denied having been loaned money by his mother.

[55] The plaintiff and defendant worked together to create two suites at the Beverly Property – one on the ground floor and one on the upper floor. Some of the work was done by the parties, and some was done by a contractor.

[56] The parties disagreed on who took care of finding tenants for the Beverly Property. The plaintiff said that he had a friend who he knew was interested in renting. The defendant said that she found the tenants for both suites.

[57] The defendant sent an email to the plaintiff on February 14, 2018, regarding the “ad to be placed for apartment”. She asked the plaintiff to let her know “what has to be rewritten or changed”. This email clearly related to the Beverly Property.

[58] The upper floor of the Beverly Property was rented to people that the plaintiff knew, who eventually moved in on April 1, 2018, by way of a lease signed February 24, 2018. The lease shows both the defendant and the plaintiff as landlords. The defendant said she only put the plaintiff’s name on the document because he was a “contact person” for any maintenance. Beneath the plaintiff’s name in the landlord box on the form is written the word “maintenance”. The monthly rent was to be \$1,700 (inclusive of utilities).

[59] When the lower floor of the Beverly Property was later rented out by way of a residential tenancy agreement, dated July 13, 2018, only the defendant was listed as landlord.

[60] After the acquisition of the Beverly Property was complete, the parties decided to purchase another property. They found a third property listed for sale at 2902 Glen Eagle Crescent (the “Glen Eagle Property”), which they viewed on March 1, 2018. That same day, the defendant signed a contract of purchase and sale to acquire the Glen Eagle Property for \$640,000.

[61] The parties decided that the Glen Eagle Property was a more suitable property for the parties and the parents to live in. On March 2, 2018, the defendant signed a residential tenancy agreement to lease the Long Lake Property to tenants

for a one-year term, commencing May 15, 2018, at a rent of \$1,350 every half-month, with the tenants to pay for utilities.

[62] As 2018 passed by, the plaintiff's AVN progressed. His employer (a painting contractor) found him some work driving a truck between work sites, but his income was impacted as was his ability to fully contribute to renovations at the parties' properties. There were a number of texts between the parties in late March and April 2018, with the defendant discussing work that was being done to get the Beverly Property ready for tenants. On April 20, 2018, the defendant texted the plaintiff and suggested he make inquiries from the government about forms for "a medical disability".

[63] The completion of the Glen Eagle Property took place on April 30, 2018. Although only the defendant had signed the contract of purchase and sale, title to the Glen Eagle Property was taken in the names of the parties as joint tenants. As part of this transaction, the Long Lake Property was refinanced. In essence, the parties drew down on the equity in the Long Lake Property to generate proceeds to acquire the Glen Eagle Property. As part of these transactions, the plaintiff was added to title for Long Lake Property as a tenant in common with a 1/100 interest. No evidence was given as to why this occurred, and why in an only 1/100 share, but it may be that the mortgage company required the plaintiff's covenant on both mortgages.

[64] On April 27 or 28, 2018, the parties signed two mortgage loan credit agreements with Equitable Bank—one related to the Long Lake Property, the other related to the Glen Eagle Property. In each case, they borrowed on a 36-month closed fixed rate term in the amount of:

- a) \$360,000 at 5.69% interest, with monthly payments totalling \$2,323.57 (including one-twelfth of estimated yearly property taxes), for the Long Lake Property; and

- b) \$384,000 at 4.69% interest, with monthly payments totalling \$2,288.68, for the Glen Eagle Property.

[65] The relevant closing documents for the purchase of the Glen Eagle Property were signed in front of a conveyancing lawyer on April 28, 2018. The plaintiff's recollection of this was vague at best, and he said that he was trusting the defendant with respect to the transaction, but it is clear that he signed all of these documents. The defendant's position at trial was simple: the plaintiff signed the papers; he knew what was going on; and he became a partner in the two houses (the Glen Eagle and Long Lake Properties).

[66] As part of the transaction, the existing CIBC mortgage registered against title to the Long Lake Property was discharged. The amount owing was \$67,280.23, and the parties also paid a prepayment charge of \$796.91.

[67] The buyer's statement of adjustments indicated that the purchase of the Glen Eagle Property was funded by:

- a) A deposit of \$10,000 paid when the contract of purchase and sale was finalized;
- b) Net proceeds of \$376,246.46 from the Equitable Bank mortgage (after payment of various fees);
- c) A net amount of \$247,106.27 transferred from the refinancing of the Long Lake Property; and
- d) A bank draft in the sum of \$22,584.77.

[68] On May 1, 2018, the conveyancing solicitor provided a reporting letter with respect to the Long Lake Property, and enclosed with that letter a trust cheque for \$8,642.39, representing "net mortgage proceeds". That amount was deposited into the Coastal Community Credit Union account.

[69] The parties moved out of the Long Lake Property on about May 14, 2018.

[70] At the Glen Eagle Property, the parents had a suite on the ground floor, the plaintiff had a suite above the garage, and the defendant had a suite above the parents' suite. Various renovations were done to each of these suites.

The Relationship Disintegrates

[71] As the parties progressed into the summer of 2018, the relationship between the plaintiff and defendant began to deteriorate. As noted, the parties shared the upper floor at the Glen Eagle Property. A formerly open corridor connected their two areas. The defendant had cats, while the plaintiff was allergic to cats. He installed a door in the hallway to separate the suites. He complained when the door seemed to regularly be left open and the cats kept making their way into his area of the upper floor. In the fall of 2018, the plaintiff framed in and drywalled a temporary wall in the corridor. The wall was installed with minimal connections to the hallway, and without taping of the seams around the edges, so that it could be easily removed. The wall was installed without the defendant's knowledge and angered her.

[72] As well, the defendant began to ask the plaintiff for money every month. It appears that the parties sometimes referred to this money as rent. In reality, it reflected the shortfall experienced each month as each of the three properties was highly leveraged and only two of them were rented out. The plaintiff's evidence was that in the beginning he was asked to pay \$250 per month, but the amount was very quickly increased to \$450 and then to \$650. The plaintiff complained that this required him to keep working and put off his hip replacement.

[73] The parties disagreed as to how much the plaintiff actually contributed to these shortfalls. The plaintiff said that he paid the amount he was asked for during 2018, although on several occasions he did so by giving cash to his mother who then wrote a cheque to the defendant. The defendant, on the other hand, said that the plaintiff only gave her two \$400 cheques the entire time he lived at the Glen Eagle Property.

[74] The evidence included an undated, handwritten summary in the defendant's handwriting. This was produced late in the defendant's evidence, and was never put

to the plaintiff, although the defendant said that it came from the plaintiff's document production. This summary noted that the parties received no income for the Glen Eagle Property. It referenced an average monthly hydro charge of \$165, and a water charge of \$50. It divided each of these numbers by four (presumably indicating that four individuals were sharing in those costs), and then calculated that the plaintiff and defendant together were responsible for one half of the overall bill—i.e., \$82.50 for the hydro and \$25 for the water. It then calculated an amount of \$25 per person for internet/phone, including a total of \$50 for that item. The calculation then comes up with an amount of \$160.50—presumably, this is a miscalculation of the above three numbers (which by my calculation add up to \$157.50). To this is added a mortgage payment of \$2,090.11. The numbers \$2,090.11 and \$160.50 add up to \$2,250.51. The calculation then goes as follows:

Total payout Glen Eagle	\$2,250.61
- Total monthly profit	<u>\$1,225.91</u>
	1,024.70 owing divided by 2
	= 512.35 or round up to
	\$ 520.00 each/mth

[75] No explanation was given for the mortgage payment amount set out here of \$2,090.11—as noted above, the closing documents for the Glen Eagle Property indicated monthly payments of \$2,288.68. The calculation also includes no provision for property taxes or insurance.

[76] The defendant produced another draft unsigned cheque number 023 from one of the parents' accounts. It shows a date of August 29, 2018, is in the defendant's handwriting, includes the amount of \$555, and has the handwritten "re" line "Brian rent shortfall Sep 2018 paid by Margaret". This cheque does not appear in the bank statement for the parents' account. There was, however, a copy of cheque number 018 dated September 28, 2018, also in the defendant's handwriting, payable to her for \$555. The "re" line written in the defendant's handwriting says "shortfall Sep 2018 Brian". The parents' account statement shows that cheque number 018 for \$555 was processed through their account on October 1, 2018.

[77] In the summer and fall of 2018, the parties began to have more serious discussions about drafting some sort of agreement with respect to the various properties. The plaintiff's evidence was that he wanted to go to a lawyer, get some advice and develop something they could both sign. The defendant on the other hand believed there should be a "business plan" prepared and signed as between the parties that could be given to a lawyer to further document.

[78] They exchanged texts on September 16–17, 2018, as follows:

- a) On September 16, the defendant wrote: "I left all the paperwork in regards to the houses on your table in the garage. Please review and text me when you would like to see the lawyer".
- b) On September 17, the plaintiff wrote: "Ok thanks can we talk today sometime if you like".
- c) A few minutes later, the defendant responded:

No too premature to talk. You have to get your paperwork together and correct all the mistakes of my paperwork. Then we should get together to finalize the agreements and make an appointment with the lawyer.

[79] The evidence included two documents titled "Business Plan", drafted by the defendant and given to the plaintiff for comment. The plaintiff's evidence was that he objected, among other things, to the defendant's efforts to deduct all kinds of money that she said had been given to him. In his view, his mother had been generous with both of the parties and never said she expected to get the money she had given him back or have it deducted from anything.

[80] The first of the two draft plans was presumably the one referenced in the texts of September 16–17, 2018. I will refer to it as the "First Business Plan", and quote from it extensively because it provides one of the few contemporaneous written records of what at least one of the parties believed their relationship to be, and was recorded at a time before their relationship became completely dysfunctional. The introductory words read as follows:

This letter is a business outline/plan for Brian DeFrancesco and Cheryl Balla. The business outline/plan is for the properties: 1013 Beverly Dr.; 3734 Long Lake Terrace and 2902 Glen Eagle Cres., all here in Nanaimo. The business plan is in effect immediately and shall continue until all of the aforesaid properties are sold. Once all the properties are sold the final 2021 income tax is to be completed and the business outline/plan is to be concluded. Neither party Brian DeFrancesco or Cheryl Balla is forced to enter into this agreement and is doing so on their own volition.

[81] I note that on the fourth page of the First Business Plan, there are signature lines for each of the parties, and the words “This agreement is signed and dated: September , 2018”. I infer from the manner in which the document opens and closes that it was intended by the defendant to form an agreement between the parties—although it does appear to contemplate the eventual involvement of a lawyer as well.

[82] Section 1 of the First Business Plan deals with the parties’ initial investment as follows:

1. The original investments by Brian DeFrancesco and Cheryl Balla in the above mentioned properties shall be returned to them without interest as each property is sold.

Brian’s original investment is:	\$ _____	Long Lake Terrace
	\$ _____	Beverly Drive
	\$ _____	Glen Eagle Crescent
Cheryl’s original investment is:	\$ _____	Long Lake Terrace
	\$ _____	Beverly Drive
	\$ _____	Glen Eagle Crescent

This amount is to be determined by the accountant of Brian DeFrancesco and Cheryl Balla’s choice. Our decision is to go with Orion Accounting Services ... The blank amounts will be filled in by the lawyer and agreed upon by both parties.

[83] There is no indication that the parties ever actually retained Orion Accounting Services. The defendant’s 2018 income tax return, which appears to have been completed in May 2019, was prepared for her by a firm called Syryus Solutions Ltd. (“Syryus”).

[84] The next several sections (2, 4, 5 and 6—there was no section 3) deal with the parties' business relationship:

2. a) Brian DeFrancesco and Cheryl Balla shall both remain amicable business partners in regards to the three properties until all properties are sold roughly May 1, 2021. This is when the mortgages to Equitable Bank for Long Lake Terrace and Glen Eagle Crescent are due and shall be discharged. Prior sales of any/all properties can ensue but both Brian DeFrancesco and Cheryl Balla must agree. It is understood that 1013 Beverly Dr. is on a 5 year mortgage through the Costal [sic] Community Credit Union and upon selling the property in 2012 [sic] may mean that there will be additional fees and disbursements for early payout of this mortgage.

b) As business partners both Brian DeFrancesco and Cheryl Balla must communicate in regards to the three properties ... Brian DeFrancesco and Cheryl Balla also have to communicate in regards to the tenants. Communication can occur in the forms of: text message, phone call, face to face, written letter or via third party. The last one being not favourable by both parties but may sometimes be necessary.

c) Also as business partners Brian DeFrancesco and Cheryl Balla are both responsible for ½ of all the bills/renovations/legal and accounting fees for the three properties. There is also a shortfall of approx. \$1,110.00 per month. Both Brian DeFrancesco and Cheryl Balla shall put ½ of this amount, that being \$555.00 into the Costal [sic] Community Credit Union account. This account has been opened for the sole purpose as to be the only bank account used by Brian DeFrancesco and Cheryl Balla in regards to payments or deposits. Cheryl Balla has already given Brian DeFrancesco the access code for internet banking on the account and it is up to Brian DeFrancesco to keep himself informed of all of the transactions pertaining to this account and the properties attached to it.

d) Also as business partners, Brian DeFrancesco and Cheryl Balla will work in conjunction to make sure all matters in regards to the three properties are properly kept up and that no property shall be left in disrepair.

i) Cheryl Balla is usually in charge of paying bills, rent collection, bank runs, ads when and if needed, phone calls to trades people needed for various jobs that Brian DeFrancesco is unable to repair. Cheryl Balla shall also be in charge of all the paperwork created by the properties. Cheryl Balla shall log entries to save money when it is time to have the paperwork go to the accountant for the final figures and income tax preparation. If there is a problem with tenants or any other items in regards to the three properties, Cheryl Balla shall communicate with Brian DeFrancesco.

ii) Brian DeFrancesco shall be the maintenance person for the aforementioned properties. If Brian DeFrancesco is unable to repair the problem then he must communicate to Cheryl Balla and they shall both decide on a course of action in regards to the problem. If an outside contractor has to be called in for the repair work both Brian DeFrancesco and Cheryl Balla will have to agree on the outside contractor prior to work being done. Brian DeFrancesco and Cheryl Balla shall be responsible for

a 50/50 split of payment for the invoice of the outside contractor. The invoice amount is over and above the \$555.00 that has to be paid by both parties on a monthly basis for the mortgages.

4. Brian DeFrancesco or Cheryl Balla shall not withhold their signature in regards to the sale of any of the three aforementioned properties. Once Brian DeFrancesco and Cheryl Balla decide to sell the houses; the properties can be sold privately on Kijiji, Used Nainimo or Craig's List or through a real estate agent of agreed upon status by both Brian DeFrancesco and Cheryl Balla.
5. Both Brian DeFrancesco and Cheryl Balla are responsible to for their own Income Tax return preparations in regards to the investment properties and their own personal taxes. Neither party shall make the other claim more or less than their fair share unless it is agreed upon by both parties.
6. a) Brian DeFrancesco and Cheryl Balla shall share equally the net assets of the sales of the three properties. ...

[85] The plaintiff in his evidence at trial raised very few objections to these initial portions of the document. He agreed that he and the defendant had an initial plan to keep the properties for three years. With respect to what is set out in the above portions of the document, in his testimony he raised a number of questions such as: "if I am a partner, what kind of partner am I; what is my role in this; and how much money do I have in this?" These are the kinds of questions that are dealt with at least in part in the document, and that could have been further clarified through discussions with a lawyer and an accountant about the structure of the parties' enterprise. Unfortunately, that did not happen at any time in which it was realistic for the parties to work together.

[86] The more controversial parts of the First Business Plan were the final page and a half. In the balance of section 6(a) and again in section 7, the defendant references what she says are monies owing by each of the parties to their mother, as set out in Appendix A. Appendix A asserts that the parties collectively owe the mother \$1,575 each for "mtg" and \$100 each for "fridge for Glen Eagle". Appendix A also lists two amounts the plaintiff is said to owe his mother: \$480 for July shortfall and \$55 for August shortfall (I note that the defendant in her evidence at trial said that the mother had paid the full amount of the August shortfall, not just \$55).

[87] In section 6(b), the defendant states that the mother had “invested 1/3 of all renovation costs for Long Lake Terrace” spent up until March 2018, when it was decided that the Long Lake Property would become an investment. In evidence, the defendant identified several payments made by the mother in respect of the Long Lake Property, but testified that those payments were all aimed at making up for shortfalls from the plaintiff.

[88] Section 8, which is 15 lines long, sets out in great detail the defendant’s claim that the plaintiff owes her \$1,600 as reimbursement for cell phone costs. She also claimed 20% interest on all such amounts.

[89] Section 9 states that no romantic partner or spouse of either of the parties shall move in with them, and that if they do, they will have to pay rent at \$500 per month. Section 10 purports to exclude any claims arising from any spousal-type relationship and demands that a prenuptial agreement be signed before any such person moves in. Presumably, these sections reflect a concern on the part of the defendant that the plaintiff’s relationship with Ms. Rix might resume and progress – as well as ongoing resentment with respect to some of the plaintiff’s past partners (see my discussion below of the undated letter sent later in September 2018).

[90] These detailed monetary claims beginning in section 6(a) were objectionable to the plaintiff. He disputed the claim as to cell phone costs, saying the defendant had never actually provided him with bills he could review, asserting that his mother had never expressed a desire to be repaid any money she had advanced for any of these expenses, and also asserting that many of the cheques provided by the mother to the defendant were in place of cash he had given to the mother.

[91] It was common ground that the First Business Plan was never signed. The plaintiff said he told the defendant that, rather than her drafting things, they should be sitting down with a lawyer to figure out how best to structure the affairs, but that the defendant would not agree.

[92] At some point—most likely in late September 2018—the defendant wrote a lengthy (four-page, single-spaced) letter to the plaintiff. With respect to the current properties, the letter noted that the parties had been arguing about the defendant wanting the plaintiff to invest in the properties, including a “first fight” where the plaintiff “did not want to invest ½ into the house”. It suggested that the defendant had “4x more money” than the plaintiff. It continued:

... it was not fair of you to feel that I contribute so much and you throw in a few cents and in the end when the houses sell you will get ½ of the profit – this is what family does for family – who else would give you a deal like that.

[93] With respect to the reference to having four times as much money, the defendant said that she had about \$304,000 from the sale of her own house, plus about \$200,000 as her own pre-inheritance from the parents, as well as some RRSPs.

[94] Returning to the undated letter, the defendant referenced a “second fight” said to have occurred in May 2018, when the parties were living at the Long Lake Property, and the plaintiff was:

... mad that I put all of your money into the houses and now you had no money. Yet a month or so before this fight we worked out how much was put in by everyone for the house on Long Lake Terrace and it was divided equally in three parts.

[95] There was no document in evidence reflecting any such working out of contributions.

[96] The defendant went on to say:

Third fight is now and it has not even been a year that I have lived here on the Island and I don't want to fight. We have 3 houses together as business partners. I expect to keep a cordial business relationship with you until all houses are sold in roughly 2½ years. The money will be divided according to what we have worked out with the lawyer and accountant.

[97] The letter then contains a lengthy discussion of the parties' historical relationship with each other and with others. At the very end of the letter, the defendant produced a chart of what she had tracked as all of the various monies the

parents had provided to the plaintiff over the previous 20 years. It is apparent from the derogatory language used about some of the plaintiff's former partners that there were deep-seated resentments on the part of the defendant.

[98] With respect to the then-current issues between them, the defendant wrote:

We are too old to keep going on like this. We both don't need the stress. So from now on you are on your own side and I will never set foot in your apartment unless it is to remove all my clothes from your closet ASAP.

I will maintain the property here on Glen Eagle Cres. If trees have to be cut down we can both work amicably to deal with the situation if it should arise. We are both responsible for the monthly shortfalls on our properties that being \$555.00 per month payable on the 29th of each month. By the way you only gave me \$500.00 for August payment and Mom paid the missing \$55.00. ... I will continue to pick up the rent from the tenants, do bank runs, pay bills and do the bookwork to be given to the accountant. You are in charge of maintenance on the properties.

[99] On October 3, 2018, one of the tenants of the Long Lake Property sent an email to the defendant stating:

Hope all is well with you. I wanted to remind you that I sent the September 15 and October 1 rents by email transfer and they haven't been accepted as yet.

With the colder temperatures we are concerned with regard to the heat in the house ... or lack there of as it can become a breeding ground for mold to grow without proper heating.

Can you please look into options for this situation at your earliest convenience as the house is damp and very cold and we are quite concerned for our health and well being.

[100] The plaintiff's evidence was that the defendant promised this tenant a new furnace, then reneged, which led to them moving out a year later. The defendant disputed this, saying that he never promised anyone a furnace and that the new electric baseboard heaters on the lower floor provided adequate heat for the upstairs.

[101] On October 24, 2018, the parties' mother wrote cheque number 098 to the plaintiff for \$1,500. The "re" line says "bed". The plaintiff was not asked about it. The defendant said that she had found it in her parents' financial records, and was not

previously aware of it. She asserted that it should be considered “another dip out of his pre-inheritance”.

[102] On October 31, 2018, the defendant sent a lengthy text to the plaintiff. It began:

Do you have your rent money? I should not have to ask you for it, you know what you owe. If mom has to cover for you it is up to you to ask her, not my problem. The money has to go into the bank TODAY, this should not be a surprise to you.

[103] By “rent money”, I assume that the defendant was referring to the plaintiff’s contribution to the shortfall on the Glen Eagle Property mortgage costs.

[104] The text also requested that the plaintiff pay half of the cost of some siding that was installed on the Long Lake Property at an overall cost of \$784.

[105] The next part of the text presumably reflects the plaintiff having recently installed the wall between the two upper units of the Glen Eagle Property:

As for my clothes in your spare room ... the normal thing to do was text me to ask if you could go into my place to do the wall. I am 100% sure that you wouldn’t like it if I did that to you. Do you seriously think I would say no? If you or Bonnie would have texted me I would have said to take all the clothes out and put it on the bed in my spare bedroom, a whole 4 minutes of your time, but instead, now you have created a big problem and I have to walk around for my clothes. You didn’t think that through!

[106] The final paragraph deals with the parties’ relationship:

We are business partners that own 3 houses and you don’t want to communicate!? Give your head a shake. I am the only one doing anything for the rentals. You are maintenance, so every two weeks we have to get together to talk about what is going on with the houses and what has to be repaired / replaced or removed. Figure out a time for the bi-monthly meetings and pick a day next week to go to the lawyer.

[107] A cheque drawn on the parents’ account was processed on October 31, 2018. The cheque is dated October 29, 2018, is payable to the plaintiff in the amount of \$555, and the “re” line says “mortgage”.

[108] At about 8:00 or 8:30 am on November 27, 2018, the parties had a disagreement. The only common ground between them is that the initial part of their argument occurred on the main floor of the Glen Eagle Property, in the kitchen of the parents' unit.

[109] The plaintiff's evidence was that the dispute was whether to pay to have the driveway at the Beverly Property enlarged so that there would be more parking space for the tenants. The plaintiff did not agree that this expense should be incurred. He said that he spoke to the tenants and they said the space was sufficient. His evidence was that the defendant "flew off the handle" and they were both screaming at each other. He said the defendant then headed upstairs. At this point, he said he was downstairs in the kitchen with his mother, but then afterward started to head upstairs—however, this was before his knee surgery and he was slow going up the stairs. He denied that he assaulted the defendant in any way.

[110] The defendant's evidence was that she heard the plaintiff downstairs arguing with their mother and came down. She said that when the plaintiff saw her, he told her to shut up, and that he then headed upstairs after her, grabbed her by her housecoat and tossed her sideways and down the stairs. She said that her head hit the steel front door (which is located on the landing, halfway down the stairs), causing a concussion and a chipped tooth. She said that that when the plaintiff came after her again, she started kicking at him and yelled at her mother to call 911. When her mother "was freaking out", the defendant said she ran upstairs to her unit and called the police herself.

[111] The defendant obtained the RCMP file related to this incident by way of a request under the federal *Access to Information Act*, R.S.C. 1985, c. A-1 [*Access to Information Act*]. The request was submitted in May 2019, and the documents were provided in December 2019. The documents that were tendered in court had significant portions whited out. I am assuming that was because the documents were provided pursuant to the *Access to Information Act*, rather than by way of a court order. The defendant was insistent that this is how she received them.

Unusually, the documents did not contain explanations on each page as to the basis for the redactions, although the cover letter does reference that “some of the information has been exempted pursuant to subsection 19(1) of the Act”.

[112] The summary of the initial RCMP attendance at the Glen Eagle Property at 09:56 am on November 27, 2018, reads as follows:

BALLA fell down into a wall, hitting her shoulder.
BALLA called Police at 0857 hours and demanded
BALLA went on and on about her business issues.
BALLA was not willing to take steps to protect herself
. BALLA is not willing to remove her assets
from the business arrangement.
This is a childish argument
fail to grasp how to act during a professional business
arrangement. BALLA was advised to speak with a lawyer about forming an
end to the investment partnership.
Further follow-up done by Cst. POPE with BALLA
Mother Margaret DEFRANCESCO added as a witness, but she did not
witness any physical contact.
File concluded.

[113] The defendant gave evidence that she went to the emergency room at Nanaimo Regional General Hospital that evening, and was diagnosed with a concussion, a chipped tooth and a back problem. She tendered in evidence a document on hospital letterhead headed “Discharge Instructions (Clinical)”. That document identifies that the defendant was discharged at 6:15 pm, but under the heading “Discharge Diagnosis” the document is blank. There is no reference to a concussion, a chipped tooth or any other injury. The only information recorded on this document is that the defendant’s temperature was recorded as 37.6 degrees.

[114] The RCMP files record that the defendant attended the Nanaimo RCMP detachment at 9:15 pm on the following day, November 28, 2018, and asked to speak to a supervisor about the incident of the morning of November 27, 2018. The defendant is recorded as having advised the RCMP that she and the plaintiff were “initially involved in a verbal altercation about specific to finances owed specific to their join [*sic*] properties”. The defendant is reported to have told the supervisor that “when she became belligerent in return grabbed her by the collar

and flung her down the stairs and into a wall where she sustained an injury to her hip". The defendant was insistent that her mother had witnessed the assault and would testify.

[115] The supervisor immediately arranged for a different officer to attend the Glen Eagle Property, which occurred at 9:50 pm that evening. That officer took a recorded statement in which the mother said that she did not see any physical contact between the plaintiff and the defendant, but only saw the defendant fall back down the stairs.

[116] The RCMP also interviewed the plaintiff. What the RCMP's redacted notes appear to record is very similar to the evidence the plaintiff gave at trial.

[117] On November 30, 2018, the mother withdrew \$5,000 from her account. The defendant said that she understood this money was given to the plaintiff. This was never put to the plaintiff.

[118] The plaintiff's evidence was that, after the events of November 27, 2018, and the defendant reporting him to the RCMP, he began to stay primarily at the home of Ms. Rix in Parksville, who had an extra room he could use. At some point in 2020, he had knee surgery, and Ms. Rix was able to help with the lengthy recovery that ensued. He left some of his things at the Glen Eagle Property, until one day he arrived and found that both the hydro and the water in his unit had been cut off. All of the food in the fridge and freezer had spoiled, and he was "basically forced" to move his things out.

[119] The defendant's evidence was that, after the alleged assault, the plaintiff "ran away and wouldn't talk" to her. She said that she tried calling him, but he would not answer the phone. She said that he did not see their parents or her after November 2018.

[120] The defendant did not dispute that she had control of the breakers and the water main at the Glen Eagle Property. She agreed that she had shut off the water to the plaintiff's unit, explaining this was because she was afraid the plaintiff would

“run it to ridiculous amounts”. She denied that she had shut off the electricity, saying instead that BC Hydro had disconnected it for non-payment. Her evidence was that, after November 27, 2018, electricity usage at the Glen Eagle Property “skyrocketed”.

[121] The defendant tendered in evidence a series of invoices from Symphony Rehabilitation, the first of which is dated December 11, 2018. It states “concussion / vestibular / neuro (60 minutes)”. No clinical records or medical reports of any sort were tendered to further explain this treatment, although the defendant said that it was recommended by a nurse practitioner and was necessitated by the alleged assault.

[122] The defendant tendered in evidence a series of documents titled “Expense Reports”. The first of these was for July–December 2018. Her evidence was that she gave these to the plaintiff’s lawyer (the plaintiff retained counsel in April 2019). She said that she created these documents to show the plaintiff what was coming in from the properties and how it was being spent.

[123] The numbers are fairly consistent for the final few months of 2018. They indicate income of: \$3,000 per month from the Beverly Property (\$1,700 from the upstairs tenant, and \$1,300 from the downstairs tenant); \$2,700 per month from the Long Lake Property; and \$0 from the Glen Eagle Property. Expenses for all three properties total \$6,771.70, leaving a shortfall of \$1,071.70 to be covered by the parties.

Preliminary Efforts to Exit the Business Relationship

[124] In early 2019, the parties had discussions about selling the Long Lake Property. The documents include a multiple listing contract dated January 16, 2019, which appears to be signed by both parties (although this document was never put to the plaintiff). The defendant testified that the house was listed on February 4, 2019, and a subsequent cancellation notice referenced cancellation of a listing dated February 4, 2019. The list price on the January 16, 2019, document was \$540,000, and the listing agent was Frederick Pollock of Century 21 Harbour Realty Ltd. (“Century 21”), who had worked with the parties on the earlier property acquisitions.

A property disclosure statement was completed on February 5, 2019, and signed by both parties.

[125] The defendant testified that she saw a periodontist and dental implant specialist on January 31 and February 20, 2019, with respect to the tooth that she said was chipped on November 27, 2018. A “proposed plan of treatment” dated January 31, 2019, proposes various work including an implant at a total cost of \$2,846. That amount is invoiced on February 20, 2019.

[126] It appears that at some point in early 2019, the defendant had some consultation with a lawyer, Stuart Wood of Warsh Law in Nanaimo. Her evidence was that she drafted up an amended business plan and took it to Mr. Wood, who read it over and thought it looked okay, so she asked him to send it to the plaintiff. On March 7, 2019, Mr. Wood sent a letter to the plaintiff stating “Enclosed please find a business plan prepared by Ms. Cheryl Balla for your consideration.”

[127] The attachment, which I will refer to as the “Second Business Plan”, is primarily focused on the sale of the three properties. The only provisions dealing with ongoing operations in the interim are sections 11–12:

11. There will continue to be bills and payments in regards to these properties until they are sold. Cheryl Balla and Brian DeFrancesco shall continue to pay \$600 per month each to maintain all properties. The amount of \$600 shall be deposited in the Coastal Community Credit Union account #[redacted] at the end of each month to cover all shortfalls in regards to the three properties until all properties are sold.

12. a. As maintenance person for the above 3 properties, Brian DeFrancesco shall make sure all matters in regards to the rental properties are properly kept up and that no property shall be left in disrepair until it is sold.

12. b. As office administrator for the above 3 properties, Cheryl Balla shall make sure all matters in regards to the rental properties are properly kept and all bills are to be paid, rents to be collected and deposited, communications with tenants/renovation workers.

[128] With respect to sale of the properties, the Second Business Plan proposed as follows:

4. All three of the aforementioned properties are to be sold ASAP. Frederick Pollock of Century 21 ... will be the listing agent for all three of the properties.

5. Neither party is to withhold their signatures in the sale of the three properties.

6. Mr. S. Wood from Warsh Law ... will represent both parties in the sale and disbursements for the aforementioned three properties.

[129] The next section purports to confirm that on November 27, 2018, the plaintiff “assaulted” the defendant, and that this is the reason for the sale of the investment properties. Presumably, the defendant contemplated that the plaintiff, by signing the documents, would agree that this was accurate. Section 8 provided that the plaintiff would pay for all of the defendant’s physiotherapy costs. As well, section 10 provided that:

10. It is understood that all three properties are locked into fixed term mortgages, and upon selling this property early it will mean that there will be additional fees and disbursements for early payout of the mortgage. Any shortfalls will come out of initial investments by both Brian DeFrancesco and Cheryl Balla on a 60/40 split with Brian DeFrancesco taking 60% of any loss.

[130] Presumably, this reflected the defendant’s view that the early sale of the properties was the plaintiff’s fault. To similar effect is section 14, which states:

14.a. Since there has been violence in the past, Brian DeFrancesco is to hold the peace. Brian DeFrancesco is not to harass, annoy, speak to, text, phone, e-mail, threaten or assault Cheryl Balla under any circumstances. If Brian DeFrancesco insists on threatening, harassing, assaulting or bothering Cheryl Balla or any person residing at or visiting 2902 Glen Eagle Cres., and another police occurrence is filed, then Brian DeFrancesco will lose all of his inheritance given to him by his parents ... All the inheritance money (aka initial investment) is to be returned to both Margaret and Joseph DeFrancesco upon sale of the last house located at 1013 Beverly Drive.

14.b. If Brian DeFrancesco agrees to keep the peace, remove his possessions with no hostility or damage to house at 2902 Glen Eagle Cres., or Cheryl’s property, then, upon sale of 1013 Beverly Dr., Brian DeFrancesco will receive all of his remaining money to a final settling of debts in regards to this business plan.

[131] Section 19 sets out the defendant’s view that the plaintiff’s pre-inheritance had been reduced as a result of various “withdrawals” from \$160,000 to \$122,554.11. It provides that if the plaintiff disagrees with this number, he must disprove it to the defendant’s satisfaction by March 15, 2019, otherwise it shall be deemed accurate.

[132] Most of the remaining sections deal with accountings with respect to each of the three properties, and various adjustments that the defendant believed should be made in her favour. They set out further claims that would reduce any amount payable to the plaintiff upon sale. With respect to the Glen Eagle Property, the Second Business Plan provides that the plaintiff would move all his possessions out two weeks before completion of any sale, and at section 10(f) that:

10.f. Upon the removal of all Brian DeFrancesco's possessions, the RCMP are to be called and attend as witness to the removal of a wall that Brian DeFrancesco erected between units by unlawfully entering Cheryl's apartment while she was in Ontario for dental surgery October 2018. This wall shall be removed by Brian DeFrancesco and taken off of the property. ... Brian DeFrancesco shall then surrender any and all copies of keys to 2902 Glen Eagle Cres. ... to the attending RCMP officer.

[133] There was no direct written response from the plaintiff to the Second Business Plan. However, it appears to have caused some concern on his part as to what was going to happen if the Long Lake Property sold. He apparently had discussions with the real estate agent, Mr. Pollock. The defendant tendered in evidence three texts dated April 1, 2019, which she says she received from Mr. Pollock. Unfortunately, what was produced does not include any preceding text that might provide context. What the texts say is:

Option number one at day of closing of Long Lake Terrace deposit \$125,000 into Brian's account and he will vacate Glen Eagle in 2 weeks.

Option number two deposit \$125,000 into Brian's account before closing date of Long Lake Terrace and Brian will vacate in 2 weeks.

Option number three we continue with our original agreement of 3 years until the sale of said three properties and Brian will not consent or sign anything related to these three properties until 3 years.

If options one or two are acceptable Brian will sign off on all properties submit all bills to Diane and vacate property in 2 weeks.

[134] The defendant responded to Mr. Pollock about 18 minutes later as follows:

Here is option #4. See you in Court.

[135] In explaining this series of texts, the defendant complained that the plaintiff would not speak to her, and would go through other people to communicate with her.

She said that he ran away and figured he could hide and come back to a full pocket of money. It is difficult to reconcile the defendant's complaints that the plaintiff would not talk to her with her proposed Second Business Plan, sent three weeks earlier, which demanded the plaintiff not talk to her except through third parties, at the risk of losing his inheritance.

[136] The listing agreement for the Long Lake Property was cancelled on April 4, 2019. The defendant said this was because plaintiff had said he would not sign anything. On April 8, 2019, the defendant sent an email to the tenant, stating:

I am just letting you know that I had the real estate agent remove the sign from the house last week.

I also withdrew the listing because Brian appears to be difficult in the sale of the house. It is not fair to disrupt your family to make you have showings when in the end it will lead to nothing. I understand that Brian has signed the withdrawal also. So, house is no longer for sale.

I am so sorry for the inconvenience this has caused everyone.

[137] None of this was put to the plaintiff. It seems strange to me that the defendant would see anything unusual in the plaintiff's reluctance to continue with the sale process when his efforts to reach agreement as to what would happen to the sale proceeds were met with a response of "See you in court". It was shortly after this exchange that the plaintiff retained counsel, Chyna Lines (then of Heath Law in Nanaimo).

Litigation, Foreclosure and Sale of the Properties

[138] On April 8, 2019—just four days after the listing of the Long Lake Property was cancelled—the defendant listed the Beverly Property for sale with Mr. Pollock at a list price of \$529,900. Notwithstanding all of the documents in which she described the Beverly Property as part of the partnership, the defendant decided that she was entitled to unilaterally list the property for sale because title was in her name alone. Her evidence was that she just wanted to get rid of everything because she was "hemorrhaging money". It is not clear what was meant by this, as at this point both the Beverly Property and the Long Lake Property were leased and the monthly income they generated covered the bulk of the costs of the Glen Eagle Property.

[139] The plaintiff did not learn that the Beverly Property had been listed for sale until he was advised by one of the tenants. His counsel, Ms. Lines, objected on his behalf to the sale. This action was commenced on May 10, 2019, and a certificate of pending litigation (“CPL”) was filed against title to the Beverly Property.

[140] On April 26, 2019, the defendant changed course. She issued a two-month notice to end the tenancy of the tenants of the upstairs unit at the Beverly Property, on the basis that the rental unit would be occupied by the landlord or the landlord’s close family member. Notwithstanding that the plaintiff was listed as a landlord on the residential tenancy agreement, he was not referenced on the notice to end tenancy.

[141] The defendant gave evidence that she was unhappy with the tenants of the upper level of the Beverly Property because they had refused to provide access to their suite for showings when it was listed for sale. The tenants had, of course, been told by the plaintiff, the other landlord on their residential tenancy agreement, that he was not aware that the house had been listed for sale.

[142] As all of this was going on, the health of the parties’ father, Joseph, declined to the point that he moved into a care facility in April or May 2019.

[143] On May 15, 2019, BC Hydro issued a “Notice of Disconnection” with respect to the Glen Eagle Property. The amount referenced was \$202.80, which was the amount of the BC Hydro bill dated April 16, 2019. The BC Hydro bills indicate that \$252.80 was paid on June 10, 2019, and it does not appear that service was disconnected at the time.

[144] On May 25, 2019, the defendant issued a notice to end tenancy with respect to the lower unit at the Beverly Property. The notice asserted that the tenants had not paid the rent that was due on March 1, 2019. The defendant’s evidence was that the tenants were two months behind in their rent.

[145] The defendant’s 2018 income tax return is dated May 30, 2019. It was prepared for her by the accounting firm, Syryus. It contains two completed “Form

T776 – Statement of Real Estate Rentals” forms. One relates to the Beverly Property, the other relates to the Long Lake Property. In the form T776 for the Beverly Property, under the heading “Your % of the Partnership”, the form says 50%. Under “Details of other co-owners and partners”, it states “Brian DeFrancesco” and “50%”. It lists the gross rental income as \$22,450, and then sets out a list of expenses (insurance, \$2,224.82; interest, \$10,369.92; office expenses, \$350.03; legal, accounting and other professional fees, \$861; maintenance and repairs, \$1,046.10; property taxes, \$2,602.63; utilities, \$1,954.95; city user rates, \$162.34; and capital cost allowance (“CCA”) of the partnership, \$114.10), which total \$19,685.89. This leads to a net income of \$2,764.11, and then sets out that each of the two partners has net income of \$1,382.05 (being half of the total net income).

[146] The form T776 for the Long Lake Property also indicates that each of the defendant and the plaintiff are 50% partners. It says that gross rental income was \$18,900, then lists expenses (insurance, \$449.32; office expenses, \$20.16; professional fees, \$861; maintenance and repairs, \$529.61; property taxes, \$1,150.55; city user rates, \$240.35; and CCA of the partnership, \$562.47), which together total \$3,813.46. This leaves net income of the partnership of \$15,086.54, and income for each of the partners of \$7,543.27. There appears to be an error in this statement, as the mortgage interest is not included the property expenses. If the interest was approximately \$1,700 per month initially (based on principal of \$360,000 and an interest rate of 5.69%), then the mortgage interest for the year would have been just under \$12,000—meaning the net income would have been comparable to that earned on the Beverly Property.

[147] On the basis of these two forms, the defendant reports at line 126 of her income tax return gross rental income of \$41,350 and net rental income of \$8,925.32.

[148] The plaintiff’s evidence was that at some point the CRA contacted him and asked him why he had failed to report the same gross rental income of \$41,350 and net rental income of \$8,925.32. His evidence was that he was not aware that the

defendant had filed these statements in her income tax return, and he was perplexed at how he could be deemed to have received such significant amounts of income when all he had done is pay money and he had never received any income.

[149] This notion of partnership was canvassed in cross-examination of the defendant. When asked about her assertion in the tax returns that the parties' ownership of the properties was equal, she said that's because the plaintiff:

... didn't put in the same amount of money. But we're business partners – for tax, you're a business partner and you split everything in half. You split money, what you have to do, split everything. The costs, the work. It's a partnership.

[150] In late June 2019, the defendant and the mother moved into the Beverly Property.

[151] As noted above, the defendant's evidence was that electricity usage at the Glen Eagle Property skyrocketed after November 2018. That does appear to be borne out by the documents, although it is difficult to understand why given that the plaintiff was no longer residing regularly at the Glen Eagle Property. The parties were on an "equal payment" program with BC Hydro that provided for a set rate of electricity to be charged year-round, with an annual reconciliation based on actual usage. Each monthly bill indicated the actual usage that month. For the Glen Eagle Property, the supposed average amount was \$189 per month. However, the actual electricity cost shown each month after November 2018 was \$432.15 (Dec 14, 2018), \$457.37 (Jan 16, 2019), \$629.92 (Feb 14, 2019), \$749.82 (Mar 16, 2019), \$415.49 (Apr 16, 2019) and \$373.54 (May 16, 2019). The result was that, when the annual reconciliation occurred on May 16, 2019, the amount charged by way of "annual equal payment plan adjustment" was \$2,035.06.

[152] A BC Hydro bill dated July 5, 2019, states "This is your final bill. Your account was closed on July 3, 2019." It appears that the amount then outstanding (\$2,185.99) was transferred to the Beverly Property and a payment plan was arranged. I infer from this that the defendant—having moved to the Beverly Property in late June 2019—arranged with BC Hydro as of July 3, 2019, for the electricity at

the Glen Eagle Property to be cut off. Nothing in the BC Hydro documents indicates that the power had been previously cut off at the Glen Eagle Property.

[153] The defendant was asked on cross-examination why, having moved to the Beverly Property, she did nothing to attempt to rent out the Glen Eagle Property. Her evidence was that “we were business partners and I was not going to do anything without [the plaintiff’s] approval.” It is difficult to reconcile this with the fact that the only reason the Glen Eagle Property was vacant was that she had unilaterally evicted the tenants from the Beverly Property in order to move there with her mother. She also pointed to the fact that the plaintiff still had possessions at the Glen Eagle Property.

[154] The documents contain another “Expense Report” document prepared by the defendant for the first half of 2019, which the defendant says was sent by a lawyer who was helping her, Mr. Peters of Warsh Law, to the plaintiff’s lawyer, Ms. Lines. That document reflects a rent of \$0 for the Beverly Property in June 2019. It includes an entry for “speculation tax” in May 2019, for which no explanation was provided at trial. The statement shows shortfalls for May 2019 of \$4,750.75 (half of which was the speculation tax) and for June 2019 of \$3,759.20, showing the severe impact of the loss of the Beverly Property income.

[155] In about June and July 2019, the plaintiff gave the defendant two cheques for \$400 each as his contribution to the mortgage costs. As well, the defendant wrote two cheques on her mother’s account, both of which appear to be signed by the mother and state in the “re” line that they are for “Brian DeFrancesco’s shortfall”. One is dated June 30, 2019, in the amount of \$1,000; the other is dated July 31, 2019, in the amount of \$2,690.

[156] On August 29, 2019, the defendant filed a response to civil claim and counterclaim. She did not have a lawyer of record, but she had drafting help from Mr. Peters. However, the defendant filed amended pleadings several months later changing some of the facts asserted. Her evidence was that, because of her concussion, some of the information was not accurate on these initial documents.

[157] On October 1, 2019, a lawyer acting for Equitable Bank wrote to the parties, noting that the mortgage payments on the Glen Eagle Property were in arrears and making demand on the mortgage. The demand letter sets out that, as of that date, the amount due on the mortgage was \$381,645.86. I infer from the calculations that the mortgage arrears were at that point about \$4,740, which was presumably two months' worth of missed payments.

[158] It appears that there were some communications between Ms. Lines and the defendant in October 2019. An email of October 15, 2019 was put in evidence, which referenced a "proposed plan of sale" that it appears Ms. Lines had put forward in prior correspondence, and to which the defendant had responded. In that context, Ms. Lines in her email discussed who would hold sale proceeds in trust (including the question of whether Mr. Wood would be retained to represent the defendant), and asked what further clarification was required.

[159] At one point in her evidence, the defendant complained that none of the plaintiff's lawyers ever tried to talk to her or work anything out with her. Then, when explaining this correspondence, she said that there were discussions beginning in October 2019, but that it took a long time to reach agreement. Other than the email of October 15, 2019, none of the negotiations were put in evidence.

[160] On November 4, 2019, the tenants of the Long Lake Property wrote advising that they would be moving out on December 15, 2019, as they had purchased a home of their own. The parties disagreed as to whether this was motivated in part by issues of heating costs.

[161] On November 13, 2014, Equitable Bank commenced foreclosure proceedings in respect of the Glen Eagle Property.

[162] This appears to have pushed the parties toward agreement as to appropriate terms on which the properties could be sold. The plaintiff had concerns about their previous real estate agent, Mr. Pollock, after the dealings in the spring of 2018 with the Beverly Property. He also expressed concern that Mr. Pollock had tried, on

behalf of the defendant, to persuade him to sign the Second Business Plan, which the plaintiff thought was inappropriate. Ms. Lines recommended a new agent—Dan Morris. On December 3, 2019, Ms. Lines emailed the defendant as follows:

As per our earlier discussions, I advised you that I would contact Mr. Morris such that he could contact each of you. As discussed, I had not yet provided an interim agreement as I had not heard from Mr. Wood. I have now spoken to Mr. Wood and he is agreeable to providing the requested undertaking. As such I have provided an agreement for your review and signature.

Regarding the kitchen in Glen Eagle, I have just spoken to the Plaintiff and he advised that Mr. Morris told him it should be removed prior to sale. He also said that with respect to the items purchased, Bonnie purchased the cabinets, you purchased the countertops and your mother purchased the sink.

Regarding Hydro, your brother has advised that the breaker has been tripped with respect to his side of the property and he does not have access to the breaker.

If you could arrange for the water to be turned on for this week / weekend, that would be appreciated.

[163] The defendant responded on December 6, 2019:

I went to 2902 Glen Eagle this morning and turned on all the breakers and the water. I will keep everything on until Monday morning or longer if requested/needed. When I discuss the interim agreement with my legal representative I will ask about the “without prejudice” tag not being added and I will get back to you about that.

For the rest of the interim agreement ...

3. I agreed to list Beverly Dr. when I have found alternative living arrangements for myself and my 94 year old mother. So far I have not found any. The plaintiff does not hold any title or any investment in the property.

...

5. The properties listed in the interim agreement between the Parties shall be shall be: 3734 Long Lake Terrace and 2902 Glen Eagle Cres. Both of these properties the plaintiff has title to.

[164] It appears that the parties were also discussing at this time various smaller items that each claimed ownership of. Ms. Lines’ December 3, 2019, email included the following:

Regarding your requested items, please find your brother’s responses below:

- 2 ceiling fans new in boxes (these items are at Long Lake Terrace)
- Mastercraft ¾ hp. Garage door opener (at Glen Eagle)

- Makita jigsaw with blades and case (he does not believe the brand is Makita, but it is at Glen Eagle)
- 10 LED light string (he no longer has this as the lights were broken)
- Garden items:
 - 2 shovels (he believes there was only one shovel but he said you can have the other one he just bought. The other is at Long Lake Terrace)
 - Metal sheep ornament (he never had this but he recalls seeing it at Glen Eagle)
 - Lawn mower part (he never had a lawn mower part but it may be in the garage at Glen Eagle)
- All my clothes from the bedroom closet (at Glen Eagle)
- Stainless steel rotisserie oven (he said this broke a long time ago because it was old but you can have the one he purchased from Costco)
- Napoleon fireplace with remote (this is in storage and he will contact them today to find out when he is able to retrieve it)
- Acorn chair lift (at Glen Eagle)
- 6' marble shelf (in storage – as above will confirm date)
- Oak kitchen captain's chair (he does not know what this is referring to but he never had it)
- Margaret's outdoor round thermometer (is at Glen Eagle outside)

Your brother expects to be able to have confirmation regarding the storage this week. He advised he can leave a garage key at our office on Monday for you to pick up and you can go anytime next week to pick up your things. If you let us know when you plan to go, he will arrange to not be there so that you can pick up your items on your own.

Additionally, your brother has advised that there is a table saw he owns at Long Lake Terrace that he would like to retrieve.

[165] The defendant's evidence was that the plaintiff never returned these items. The plaintiff said that they were made available to her.

[166] On December 14, 2019, Coastal Community Credit Union issued a "Loan Delinquent Notice" with respect to the Beverly Property, advising that the payment due was seven days delinquent and that \$1,562.51 was outstanding. This was followed up by a "Loan Late Notice" on December 21, 2019.

[167] As noted above, the tenants of Long Lake moved out on December 15, 2019.

[168] On January 8, 2020, the parties entered into an agreement, which appears to reflect the results of the negotiations of which the October 15, 2019 email was a part. The agreement is titled “Interim Agreement Without Prejudice to Mitigate Damages from Foreclosure” (the “Interim Agreement”). It provides in the recitals that the parties intend the agreement to be “interim in nature and to allow for the sale” of the Long Lake Property and the Glen Eagle Property pending resolution of this action. In the Interim Agreement, the parties agree:

- a) To list the properties with Mr. Morris on or before January 17, 2020, with the list price to be determined by Mr. Morris;
- b) To accept any cash offer that is not less than 95% of the listed sale price;
- c) To pay from the proceeds of sale the costs of clearing title, commissions, legal fees of the conveyance and any outstanding utility bills or taxes; and
- d) To deposit the net sale proceeds with Mr. Wood of Warsh Law to be held in an interest-bearing trust account until the parties reach a written agreement or until a court order was obtained.

[169] There is also provision for each of the parties to recover any personal items from the properties before closing. As well, the parties agree that each is to pay the legal costs they incur in the negotiation, preparation and carrying out of the agreement.

[170] The Interim Agreement makes no reference to the Beverly Property. Presumably, the parties were unable to agree to terms with respect to it.

[171] The Long Lake Property was listed for sale on January 10, 2020, at a list price of \$549,900. The list price was reduced on January 31, 2020, to \$539,900. I assume that the Glen Eagle Property was also listed in January 2020, although the listing contract was not put in evidence.

[172] The defendant included texts with Mr. Morris on January 20, 2020, in which he recommended that the power be turned on at the Long Lake Property. The

defendant said she was unable to afford to do so, and suggested that Mr. Morris talk to the plaintiff. Then, on February 3, 2020, a paralegal from Equitable Bank asked about plans to restore heat. The defendant responded:

I would like to turn on the heat but my credit is destroyed because of my dealings with Brian. The hydro company will not allow me to put another hydro account in my name. I have emailed Brian's lawyer and told her to have him restore power but I don't think anything was done about it.

Also, there is no insurance on the house either starting on February 14, 2020. BCAA contacted Brian and he is flat out refusing to pay for insurance on 3734 Long Lake Terrace and at 2902 Glen Eagle Cres. I am financially ruined so I am unable to continue to pay the premiums.

Please let me know if you need me to let an appraiser into the house for an inspection. It is vacant and it has been put up for sale MLS.

[173] Perhaps not surprisingly given this email, on February 18, 2020, Equitable Bank commenced foreclosure proceedings with respect to the Long Lake Property. The foreclosure materials indicated that payments were in default and the amount due on the mortgage was \$358,756.39 plus interest at 5.69%.

[174] The evidence indicated that a contract of purchase and sale with respect to the Glen Eagle Property was made on February 8, 2020. Unfortunately, only pages one and seven of the contract were put in evidence. They indicate that the sale price was \$620,000.

[175] It appears that there was also an agreement to sell the Long Lake Property in early 2020. The contract of purchase and sale was not in evidence, although some of the closing documents were.

[176] The foreclosure petition with respect to the Glen Eagle Property was heard by Associate Judge Dick (at the time, Master Dick) on February 26, 2020. The defendant attended that hearing and made submissions. Associate Judge Dick granted an order nisi that was, for the most part, in usual form. The petitioner's costs were awarded at Scale A. That is generally the applicable scale when no party shows up to oppose an order nisi. However, Associate Judge Dick added an additional provision to the order giving Equitable Bank leave to "apply for an order that any of its costs after the date this order is made will be assessed on a different

basis". Associate Judge Dick also ordered that approval as to form of the order by the defendant be waived.

[177] On March 4, 2020, Coastal Community Credit Union filed a foreclosure petition in respect of the Beverly Property. The petition indicated that as of February 19, 2020, the amount due on the mortgage was \$331,370.72.

[178] On March 26, 2020, the sale of the Long Lake Property completed. Mr. Wood of Warsh Law dealt with the conveyance. However, it seems clear that his client was the defendant: his invoice was addressed solely to her and he took instructions from her, liaising with Ms. Lines where necessary. The closing documents indicated that the 2019 property taxes of \$1,060.77 were unpaid, and that the February 4, 2020 municipal utility bill of \$381.40 was outstanding. The vendor's statement of adjustments indicated that the sale price was \$530,000, of which a net of \$508,028.81 was paid by the purchaser's lawyer to Warsh Law. The various orders to pay and trust ledger indicate that these funds were paid in the amounts of \$368,880.78 to the Equitable Bank, \$1,460.68 to the City of Nanaimo, \$1,335.11 to Warsh Law in respect of its fees, and the balance of \$136,072.24 into the trust account in accordance with the Interim Agreement.

[179] The sale of the Glen Eagle Property appears to have completed on April 9, 2020. The vendor's statement of adjustments indicates a price of \$620,000, leading to net sales proceeds of \$594,882.33 payable to Warsh Law, in trust. The documents indicate that these monies were paid in the amounts of \$399,225.29 to the Equitable Bank, \$1,484.27 to the City of Nanaimo in respect of unpaid property taxes and utilities, \$280.00 for other utilities, \$1,488.55 to Warsh Law, \$2,555.85 to BC Hydro, and the balance of \$189,848.37 into the trust account.

[180] The defendant exchanged texts with Mr. Morris on April 9, 2020. In the first of the texts that was placed in evidence, he said:

Thank you. I talked to Brian and he said he is willing to remove the charge on Beverly. I think for the safety of you and your mom that we shouldn't look at selling a Beverly until this covid thing blows over. Brian agreed as well as he said he wanted to make sure both you and his/your mom stayed safe.

[181] The defendant responded:

I didn't know how to respond to the text you sent. Brian has no interest in this house, he never did. So, for him to say anything in regards to the sale of this house is delusional on his part. I find it immensely hilarious that Brian is concerned about my well-being.

[182] Mr. Morris responded:

Sorry – was just passing on what Brian said. I recalled that you had requested that he would remove the certificate of pending litigation from Beverley and he told me he would. When we originally talked about listing Beverly to be sold as well. When the time is right I'll be there to help you.

[183] I assume that the defendant subsequently asked Mr. Morris to ask to have the CPL removed unconditionally. A subsequent text (undated) from Mr. Morris stated:

Hi Cheryl. I sent a note to Mrs. Lines about the CPL on Beverly and this was her response:

The CPL will not be removed at this time but there is nothing preventing the Beverly property from being listed for sale. We are agreeable to removing the CPL concurrently with the conveyance of that property, providing that CB will agree to the conveyancing lawyer holding the proceeds in trust until this matter has been resolved.

I'm happy to help get the property on the market to be sold if that is what everyone is committed to

[184] On May 6, 2020, the defendant entered into a listing agreement with respect to the Beverly Property with Mr. Pollock of Century 21, with a list price of \$534,900. Her evidence was that she preferred to deal with Mr. Pollock, and that it was her view that nothing prevented her from choosing an agent unilaterally. A contract of purchase and sale was entered into on May 10, 2020 (of which only page one was in evidence), at a purchase price of \$541,000, but after a home inspection, the sale price was decreased to \$538,200 on May 25, 2020.

[185] On May 21, 2020, the defendant emailed Ms. Lines, asking that the CPL be removed. Ms. Lines responded that she would no longer be acting for the plaintiff going forward, and encouraged the defendant to contact the plaintiff directly.

[186] At some point in the first half of 2020, the defendant contacted the RCMP to report that the plaintiff had driven by the Beverly Property and turned around in the

driveway, which resulted in his headlights shining in. She interpreted this as threatening behaviour. At trial, she tendered in evidence the number of the police file related to her call to the RCMP.

[187] It is not clear whether anyone contacted the plaintiff about the CPL until the sale of the Beverly Property was scheduled to complete on June 30, 2020. At that time, the plaintiff asked that he be paid \$10,000 in respect of the work he had done on the Beverly Property. This was agreed to on a without prejudice basis, and Ms. Lines (who was still counsel of record) provided a letter authorizing cancellation of the CPL.

[188] The amended vendor's statement of adjustments indicated that net sale proceeds of \$518,219.15 were paid to Warsh Law, in trust. A first order to pay authorized Warsh Law to make various payments from this amount leaving a balance of \$165,556.13 to be held in the trust account. However, an updated order to pay indicated revised figures, including net sale proceeds of \$518,154.34, and additional payments and holdbacks. From those proceeds, \$339,271.54 was paid to Coastal Community Credit Union, \$11,099.54 was paid to the City of Nanaimo in respect of property taxes and utilities, \$969.95 was paid to FortisBC in respect of unpaid utility bills, \$2,014.95 was paid to Warsh Law in respect of its fees and disbursements, \$10,000 was paid to the plaintiff, and \$1,000 was held back for other utility bills. This left a balance of \$153,798.36 to be held in the trust account.

[189] On July 3, 2020, Mr. Wood sent a cover letter to the plaintiff enclosing a cheque for the \$10,000, and stating "This payment is without prejudice to your rights and responsibilities with respect to Cheryl Balla and/or 1013 Beverly Drive, Nanaimo, BC".

After Sale of the Properties

[190] At the end of June, 2020, the defendant and the mother moved out of the Beverly Property and to Nanoose Bay. She entered into a lease of a house there at a rent of \$3,250 per month (significantly more than the cost of living at the Beverly Property). She remained there until the beginning of April 2021, when she and the

mother moved to an apartment in Nanaimo, for which the rent was \$1,600 per month. The defendant's evidence was that, because she had extensive furniture and only a 900-square-foot apartment, she had to rent a storage locker. Initially, she paid \$219 per month for this, but the fee subsequently increased to \$251 per month.

[191] On July 8, 2020, the defendant closed the Coastal Community Credit Union bank account. While the account was still in existence to that date, it had not actually been used since December 2019.

[192] On July 24, 2020, the plaintiff filed a notice of intention to act in person.

[193] On August 12, 2020, Warsh Law sent an invoice to the defendant for \$250 "to administer and hold the sale proceeds from three properties in trust for the month of August 2020 pending order of the court". Warsh Law has continued to charge the defendant \$250 per month as its fee for this service since that time. A T5 issued by Warsh Law at the end of 2020 indicated that interest had been earned on the funds in the amount of \$161.32.

[194] On August 14, 2020, the defendant filed an application to strike out the plaintiff's claim. The plaintiff retained a new lawyer, Michael Schryver, to respond to the application. The application was heard by Justice Grist on October 5, 2020. In accordance with the Covid protocols in place at the time, the application was heard remotely by video. Justice Grist dismissed the application, with costs payable by the defendant to the plaintiff in the cause.

[195] In September 2020, the defendant hired Blackbird Security Inc. ("Blackbird Security") to provide a uniformed security guard to accompany her to the Nanaimo courthouse on October 5, 2020. A fee of \$346.50 was prepaid for three hours of services. She says this was because of her fear of being assaulted by the plaintiff. When she realized that the application would be heard by video, she instead met with the security guard in a coffee shop to obtain advice as to "how to stay safe". The fee paid to Blackbird Security is part of her damages claim for the alleged assault.

[196] The defendant's 2019 income tax return is dated November 30, 2020. It was prepared by the same firm as her 2018 return, Syryus, and again contains the two "Form T776 – Statement of Real Estate Rentals" forms. Once again, the plaintiff is identified as a 50% partner with respect to each property. For the Beverly Property, the form reports income of \$10,100 and expenses of \$14,772.22, leading to a total net loss of \$4,672.22. The form indicates that half of this net loss (\$2,336.11) is the defendant's and the other half is the plaintiff's. With respect to the Long Lake Property, the form indicates gross income of \$27,350, total expenses of \$23,047.66, and net income of \$4,302.34. The form indicates that half of this net income (\$2,151.17) is the defendant's and the other half is the plaintiff's. At line 126 of the defendant's tax return, she reports gross rental income of \$37,450 and a net loss of \$184.94.

[197] The evidence includes a letter dated April 29, 2021, in which Mr. Schryver followed up on his October 6, 2020 letter asking to schedule a deposition of each of the parents. When the defendant eventually responded, she advised that the father had died a year and a half earlier and that the mother was not capable of giving evidence.

[198] Each of the parties went on at length as to whether the defendant had kept the plaintiff from their parents after November 2018. The plaintiff asserted that she had, while the defendant asserted that the plaintiff had her phone number and could have contacted her to make arrangements at any time. It is not clear how to reconcile this with the evidence that the defendant called the RCMP on the one occasion the plaintiff was reported to have driven by the house in which the defendant and the mother were living. Ultimately, while these dealings likely have great personal significance to the parties, they do not impact the issues to be determined in this action.

[199] The defendant's evidence was that Mr. Schryver wanted to talk about settling the case, but that she was of the view that this could not be done until there had been a full accounting. She said that she and Mr. Schryver had discussions about

sharing fees on the accounting, but that the lawyer “wanted to do it their own way” so she decided to do the accounting on her own. In July 2021, she retained Syryus to review documents she had provided and put them into an accounting. Work progressed over several months. The November 2021 invoice indicates that there was a meeting with the defendant on October 29, 2021, after which the accountant prepared “adjustments as per” the defendant’s information.

[200] The defendant’s 2020 income tax return was dated October 29, 2021. Presumably, it was filed after and reflected the results of the accounting work that the defendant had commissioned. The rental property schedule shows \$0 income for the Long Lake Property. There is no rental property schedule for the Beverly Property. The capital gains schedule shows losses of \$2,900 on the Long Lake Property and \$37,448 on the Beverly Property. The return includes a designation of principal residence form designating the Glen Eagle Property as the defendant’s principal residence and identifying \$310,000 as the proceeds of disposition thereof.

[201] Warsh Law continues to hold in trust the net sale proceeds with respect to the three properties, being: \$136,072.24 from the Long Lake Property, \$189,848.37 from the Glen Eagle Property, and \$155,113.17 from the Beverly Property, for a total of \$481,033.78.

Reliability and Credibility

[202] Reliability and credibility are related but distinct concepts. The distinction between them was considered in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 526, 1995 CanLII 3498 (C.A.), cited in *United States v. Bennett*, 2014 BCCA 145 at para. 23:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness’s sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness’s testimony. The accuracy of a witness’s testimony involves considerations of the witness’s ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness’s veracity, one speaks of the witness’s credibility. When one is concerned with the accuracy of a witness’s testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible

cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[203] In considering these matters, the evidence of a witness must be assessed for “its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions”: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.).

[204] A frequently cited list of factors in assessing evidence as to both the veracity of a witness and the accuracy of that witness’ evidence is found in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff’d 2012 BCCA 296. It includes:

- a) The ability and opportunity of the witness to observe events;
- b) The firmness of their memory;
- c) Their ability to resist the influence of interest to modify their recollection;
- d) Whether their evidence harmonizes with independent evidence that has been accepted;
- e) Whether the witness changes their evidence during cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in their recollection;
- f) Whether their evidence seems generally unreasonable, impossible or unlikely;
- g) Whether the witness has a motive to lie; and
- h) The demeanour of the witness generally.

[205] A trier of fact may accept none, part or all of a witness’ evidence and may attach different weight to different parts of a witness’ evidence: *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para. 28.

[206] I have concerns with the evidence of both parties.

[207] First, it is my view that both exaggerated their own contributions and unduly minimized the other's contributions to the improvement of all three of the properties (as well as the Penticton Property).

[208] The plaintiff's evidence was relatively brief—his evidence in direct was just under four hours in length, and his cross-examination was only about 90 minutes. He painted a picture of someone whose inheritance was taken by his sister with little explanation, who contributed significantly to the improvement of the various properties that were acquired, who paid “rent” notwithstanding that he was also being told he was an owner, who was falsely accused of assault and then kept away from his parents, and who was subsequently told that his money was all gone. I have difficulty accepting that he gave so little thought to the nature of his business relationship with his sister, or that he had so little understanding of the documents he signed at the lawyer's office on April 28, 2018. I also believe that he had second thoughts after the properties had all been purchased and he was being called upon to contribute to the monthly shortfalls, while his own financial circumstances were continually worsening as a result of his AVN. In my view, while I accept that the plaintiff trusted his sister to take a lead role in all of the administrative details, he was not as ignorant as he portrayed himself.

[209] That said, I can accept that the defendant took an expansive view of her role in the business relationship, often acting unilaterally in business matters with little or no consultation with the plaintiff. This became more pronounced as her frustration increased.

[210] I have significant concerns with the evidence of the defendant. Her evidence was, in many cases, internally inconsistent as she tried to explain inconsistent positions taken at different times and recharacterize events in ways that made no sense. Having reviewed her evidence as a whole, I have concerns that she struggled “to resist the influence of interest” as she recounted events. Her evidence was far more extensive than the plaintiff's, and she had far more documentary

evidence available to her, but in my view many of the explanations she gave simply do not hold up.

[211] The defendant identified numerous transactions that she said should be considered debits or deductions from the plaintiff's pre-inheritance. For some of them, she clearly had little or no knowledge of the purpose of the transaction. Some of them predated the decision to provide the plaintiff with a pre-inheritance, while the bulk of them were subsequent to the completion of the purchase of the Long Lake Property on November 1, 2017. The evidence seems clear that, at that time, the entirety of the plaintiff's pre-inheritance had been used—for the purchase of that property and for the purchase of the truck and cap a few weeks earlier.

[212] The defendant denied having turned off the power to the plaintiff's unit at the Glen Eagle Property, suggesting instead that BC Hydro had cut off power to the entire building. Yet the BC Hydro bills reflect no cancellation or reinstatement of power prior to the defendant's decision to cancel the account on July 3, 2019. There are emails in which the defendant discusses whether and when she will turn the breakers back on to the plaintiff's unit. I have significant concerns about the veracity of the defendant's evidence on that point.

[213] The various statements and actions of the defendant with respect to the plaintiff's interest in the Beverly Property are also inconsistent. The defendant, having prepared the First Business Plan which included the Beverly Property as part of their partnership, later filed tax returns which attributed 50% of the income from the Beverly Property to the plaintiff. She then unilaterally terminated the tenants from the Beverly Property, yet claimed that she could not rent the property to new tenants without the plaintiff's consent. She unilaterally decided to list it for sale. The defendant appears to have advanced whatever position she thought was to her financial benefit with respect to the Beverly Property at any given time.

[214] The defendant wrote to Equitable Bank, claiming that she had been financially ruined, and recording her refusal to pay insurance or keep the Long Lake Property

heated, yet when the Beverly Property was sold, she moved to a rental home at a higher rent than the costs she was paying at the Beverly Property.

[215] I turn to the allegations of assault on November 27, 2018. I reviewed the evidence with respect to this above. The defendant's evidence at trial was that her brother grabbed her by her housecoat and tossed her sideways down the stairs, causing her to hit her head on the steel door. The notes of the first RCMP interview (on the morning of November 27, 2018) record the defendant as saying that that she fell down into a wall, hitting her shoulder. The notes of the second RCMP interview (on the evening of November 28, 2018) record the defendant as saying that the plaintiff had grabbed her by the collar and flung her down the stairs and into a wall where she sustained an injury to her hip.

[216] The inconsistencies between these different statements are of great concern. In light of the plaintiff's complete denial of any assault, and my above concerns about the credibility and reliability of the defendant's evidence, I conclude that no assault has been proven on the evidence.

[217] In this case, extensive documentary evidence (albeit sometimes incomplete) was put before the court. Given my concerns about the reliability of the evidence of both parties, I will be relying primarily on the documents and those parts of the parties' evidence as to which the parties were *ad idem*.

[218] The evidence of Ms. Rix was limited. In my view, she limited herself to speaking of matters as to which she had actual knowledge, and I generally found her to be credible.

[219] I note that both the plaintiff and Ms. Rix mentioned that, at a dinner at some undefined time, the mother stated that she understood the amount of the pre-inheritance to have been \$250,000 rather than \$160,000. In my view, it was not clear whether that statement, if it was made, reflected confusion on the part of the mother or a change to the intended gift. Included in the evidence was a copy of the parents' wills from 2009, which indicated that on the death of the survivor of the two parents,

their net estate would be divided 55% to the defendant and 45% to the plaintiff. Based on the relatively vague information I have, I have concerns that a gift of \$250,000 might well have been a change from this estate plan. The bulk of the evidence seemed to focus on the amount of the plaintiff's pre-inheritance being \$160,000, and in my view that is the appropriate basis on which to proceed.

Positions of the Parties

The Plaintiff

[220] The plaintiff says that his pre-inheritance was invested in the Long Lake Property and he is entitled to recover it from the sale proceeds that are held in trust.

[221] With respect to the question of whether the parties were engaged in a partnership, he says that the defendant called him a partner, but shut him out of decision-making. She saddled him with tax statements saying that he had made income, yet he never saw a penny and she kept demanding that he provide more money. She acted unilaterally—including with respect to putting the Beverly Property up for sale and then evicting the tenants.

[222] Whether there was a partnership or not, the plaintiff submits that the court should, in any accounting, consider that the defendant sabotaged the parties' business as a result of her own unilateral acts. She pushed tenants out without any intention to replace them. She let the houses sit empty and watched them go into foreclosure. She blamed the plaintiff for her own poor decisions and took no account of the fact that he was unable to work due to his AVN.

[223] The plaintiff claims that the defendant was unjustly enriched at his expense. With respect to this claim, the plaintiff submits that to the extent of the defendant's interest in the properties, she was unjustly enriched as he performed substantial work on the properties on the understanding they were in business together, while he was forced to pay what she called rent.

[224] The plaintiff flatly denies any assault.

The Defendant

[225] The defendant submits that the parties embarked on a partnership when they bought the Long Lake Property. That partnership later expanded to include other properties. The defendant says that the plaintiff knowingly agreed to invest in the partnership. All of the arrangements were initially made verbally, and when the defendant tried to get something definitive in writing, the plaintiff refused to sit down and sign a proper business plan.

[226] The defendant submits that the plaintiff “ran away” and abandoned the partnership business. As a result of the difficulties caused by the plaintiff, the defendant says the partnership business ended up losing over \$200,000. The defendant says that when their relationship started to disintegrate, the plaintiff failed to communicate with her, make decisions, pay his share of the business expenses, or work with her to finalize either the First or Second Business Plan. The defendant submits that given her greater contributions to the business, and given the plaintiff’s actions that made everything more difficult than it needed to be, the plaintiff should bear the bulk of this loss and the entirety of the funds in trust should be paid to the defendant.

[227] The defendant further submits that the plaintiff failed to respond—both before and after he was represented by counsel—to her efforts to mitigate their losses and that, even when he did agree to things, he would change his mind. The defendant says that, even after the plaintiff had a lawyer, the plaintiff and his lawyer “dragged their feet” before eventually agreeing to the Interim Agreement for the sale of the properties. By that time, it was too little too late, and massive financial losses had already been incurred. She says that if the plaintiff had worked with her when asked, they would have been able to significantly reduce the business losses.

[228] The defendant says that the plaintiff’s contribution to the partnership is based initially on the \$160,000 pre-inheritance from his parents; however, the plaintiff made numerous substantial “withdrawals” which the defendant says slowly diminished the plaintiff’s investment in the partnership. In addition to the \$10,000 paid on behalf of

the plaintiff towards the deposit on the Long Lake Property, and the funds paid on his behalf toward the costs of purchasing the Long Lake Property, the defendant identifies a number of payments which she says should be deducted from the pre-inheritance. Four of them were made prior to completion of the purchase of the Long Lake Property:

- a) Cheque number 035 on the parents' account for \$2,200, processed on May 24, 2017, which the defendant believes was paid to the plaintiff but as to which she had no knowledge other than that a draft cheque number 036 in the mother's records had the plaintiff's name and a note "Parksville-Penticton";
- b) A bank draft withdrawn from the defendant's account on August 1, 2017, to purchase a truck in the amount of \$22,032.30;
- c) A cash withdrawal from the defendant's account on August 1, 2017 in the amount of \$2,000; and
- d) A bank transfer from the mother to Ms. Rix on August 31, 2017 for \$5,000.

[229] The defendant also says that the following payments made after completion of the purchase of the Long Lake Property should be considered withdrawals from the plaintiff's pre-inheritance:

- a) A further bank transfer from the mother to Ms. Rix on November 10, 2017, also for \$5,000;
- b) A cheque drawn on the parents' account in favour of the plaintiff on October 24, 2018, in the amount of \$1,500 with a "re" line stating "bed";
- c) The payment on February 8, 2018, of \$15,258.07 from the parents' bank account to CRA in satisfaction of the plaintiff's CRA debt;
- d) A transfer memo on March 29, 2018, showing a transfer of \$4,742 out of the parents' CIBC account; and

- e) A transfer memo on November 30, 2018, showing a transfer of \$5,000 out of the parents' CIBC account.

The defendant also claims in respect of a November 28, 2018, withdrawal of \$5,000 from that same CIBC account; however, as I read the bank statement, that withdrawal was immediately reversed and then replaced by the November 30 withdrawal.

[230] The defendant also submits that the \$10,000 paid to the plaintiff out of the proceeds of sale of the Beverly Property was improperly taken and should be repaid.

[231] In response to the plaintiff's claim of unjust enrichment, the defendant submits that the plaintiff exaggerated the amount of work he did, that the bulk of the work was actually done by hired contractors, and that any work that either of the parties did on the properties should be considered sweat equity intended to create a future greater profit.

[232] The defendant says that before moving to British Columbia, she had a beautiful home that she owned and a small mortgage; however, through her dealings with plaintiff, she lost her independence, freedom, and ability to purchase a home for a reasonable price. She says that her credit rating was destroyed, and that it has taken her four years to pay off her credit card debt. She continues to incur unnecessary expenses every month, such as the cost of the storage unit and fees to her former lawyer. She is paying rent rather than a mortgage. She says that she had to wait four years for the plaintiff and his lawyers to move this action forward, and that the plaintiff should pay for these ongoing costs.

[233] The defendant pressed her claim with respect to the alleged physical assault, which she described as a catalyst to the end of the partnership. She says that the plaintiff's actions afterward led to a downward spiral. She says she sustained injuries in the assault, including a concussion, and had to undergo painful and costly dental work. She claims for the cost of treatment, other expenses (such as the amount of the Blackbird Security invoice) and general damages.

[234] The defendant also claims \$1,600 she says the plaintiff owes her for phone bills and advances a general claim for legal expenses of winding down the partnership.

Characterizing the Relationship

[235] In order to determine allocation of the funds in trust, I must first determine the nature of the parties' relationship—with each other and with the properties.

[236] In this case, there is no clear written agreement setting out the basis on which the parties purchased, improved, rented, maintained and eventually sold the three properties in issue.

[237] However, the various documents generated by the defendant are replete with references to partnership. As well, the pleadings advance claims of resulting and constructive trust, as well as unjust enrichment. As such, I will consider each of these areas of law in ascertaining the nature of the parties' relationship.

Legal Principles – Partnership and Co-Ownership

[238] Section 2 of the British Columbia *Partnership Act*, R.S.B.C. 1996, c. 348 [*Partnership Act*], defines a partnership as the “relation which subsists between persons carrying on business in common with a view of profit.” There are three essential ingredients of a partnership: (1) a business, (2) carried on in common, (3) with a view to profit: *Backman v. Canada*, 2001 SCC 10 at para. 18 [*Backman*].

[239] The first element of a “business” is defined broadly in s. 1 of the *Partnership Act* as “every trade, occupation or profession”. It will generally involve: (a) the occupation of time, attention and labour; (b) the incurring of liabilities to others; and (c) the purpose of profit: *Backman* at para. 19. As noted in *Backman*:

20 ... It is not necessary to show that the partners carried on a business for a long period of time. A partnership may be formed for a single transaction. ... A business may be established even in circumstances where the sole business activity is the passive receipt of rent ...

[240] With respect to the second element, that the business is “carried on in common”, the Court in *Backman* commented that:

21 ... the fact that the management of a partnership rests with a single partner does not mandate the conclusion that the business was not carried on in common. ... Other evidence consistent with an intention to carry on business in common includes: the contribution of skill, knowledge or assets to a common undertaking, a joint property interest in the subject-matter of the adventure, the sharing of profits and losses, the filing of income tax returns as a partnership, financial statements and joint bank accounts, as well as correspondence with third parties ...

[241] With respect to the third element of a “view to profit”, this inquiry involves examining the parties’ intentions. As set out in *Backman*:

24 ... In determining whether there is a view to profit courts should not adopt or employ a purely quantitative analysis. The amount of the expected profit is only one of several factors to consider. The law of partnership does not require a net gain over a determined period in order to establish that an activity is with a view to profit. For example, a partnership may incur initial losses during the start up phase of its enterprise. That does not mean that the relationship is not one of partnership, so long as the enterprise is carried on with a view to profit in the future. ...

[242] The contractual nature of a partnership was discussed in *Grewal v. Grewal*, 2016 BCCA 237:

[107] ... A partnership must have a contractual foundation, demonstrated by an offer and acceptance regarding all essential terms, certainty of terms, consideration, and an intention to create legal relations. The contract may, however, be oral or written, and may be established by express declaration or be implied through conduct ... Whether a partnership exists must be determined pragmatically and objectively, in the context of all of the surrounding circumstances ...

[243] With respect to those circumstances, as noted in *Backman*:

25 ... to ascertain the existence of a partnership the courts must inquire into whether the objective, documentary evidence and the surrounding facts, including what the parties actually did, are consistent with a subjective intention to carry on business in common with a view to profit.

[244] The inquiry is undertaken at the time the partnership agreement is said to be formed. The test is objective—it is determined by whether an objective reasonable bystander would have considered the parties to have agreed to establish a

partnership: *Gaukel v. Buksh*, 2021 BCSC 1751 at para. 178. When the alleged agreement is oral, the court objectively assesses what the parties did and said, in context, to determine whether their words and actions establish an intention to be bound: *Gaukel* at para. 182.

[245] A partnership can be distinguished from mere co-ownership of property. The *Partnership Act* provides a variety of default provisions that will apply to a partnership unless the parties agree otherwise, including with respect to the distribution of partnership assets, such as partnership property, on dissolution – partnership property being all property “brought into the partnership, property acquired on account of the firm, or property acquired for the purposes and in the course of the partnership business”: s. 1.1.

[246] In this case, the evidence indicates that registered title to the Long Lake Property and to the Glen Eagle Property were shared by the parties, while registered title to the Beverly Property was in the name of the defendant only. Originally, however, title to the Long Lake Property was entirely in the defendant’s name, notwithstanding the evidence that the plaintiff had contributed the entirety of his pre-inheritance to the purchase of that property. The plaintiff was only added to title as a tenant in common with a 1/100 interest when the equity in the Long Lake Property was subsequently used to acquire the Glen Eagle Property. The plaintiff has pleaded that a resulting trust was created in these circumstances.

[247] A resulting trust arises where there is a gratuitous transfer (in this case, the plaintiff’s contribution of his pre-inheritance) that is not proven to be a gift (in this case, there was no allegation that the defendant was given the plaintiff’s pre-inheritance as a gift): *Kerr v. Baranow*, 2011 SCC 10 at para. 19 [*Kerr*]. If a resulting trust is found, then the parties would be beneficial co-owners of at least the Long Lake Property and the Glen Eagle Property. Their respective rights and obligations as mere co-owners would, however, be significantly different than they would be as partners.

[248] It is thus important to determine whether a partnership exists in this case. The distinction between partnership and co-ownership was explained in *Garland v. Newhouse*, 2021 BCSC 1291, aff'd 2022 BCCA 276 [*Garland*]:

[53] A partnership may be distinguished from certain other relationships, including co-ownership of land when the parties have no intention of creating a partnership. Section 4(a) of the *Partnership Act* expressly provides that the co-ownership of land does not of itself create a partnership as to any property that is so held, whether or not the co-owners share profit from use of the property. Whether or not the position of co-owners becomes that of partners depends on their intention, as disclosed by all of the facts of the case. It is necessary to determine whether the parties had a common intention to carry on business in a partnership, or whether they intended to maintain their separate interests in the property as co-owners: *A.E. LePage Ltd. v. Kamex Developments Ltd. et al* (1977), 16 O.R. (2d) 193 (C.A.) at 195.

[249] In *Garland*, Justice Horsman (as she then was) concluded that two co-owners of an apartment building were in fact partners. *Garland* was a dispute over the status of the apartment building owned by the deceased and the defendant. As with the present case, there was no formal written partnership agreement. However, in that case (*Garland* at para. 55):

- a) The defendant and the deceased contributed equally to the purchase of the investment property, equally shared expenses associated with the property, and equally shared in profits derived from the rental revenue. Their objective was to earn profit over time.
- b) They opened a joint bank account to manage the financial aspects of the business, with both having signing authority.
- c) The defendant did not view her interest in the property as separate from the deceased's, and admitted on discovery that they had entered a verbal partnership agreement.
- d) Accounting records described the arrangement as a "partnership", and the defendant and the deceased as "partners".

Legal Principles – Unjust Enrichment

[250] In this case, the plaintiff has pleaded in the alternative that he is entitled to either a constructive trust or to damages based on the law of unjust enrichment. The law in this area is well settled. As summarized in *Moore v. Sweet*, 2018 SCC 52 at para. 37 [*Moore*], a plaintiff will succeed on the cause of action if they can show:

- a) that the defendant was enriched;
- b) that the plaintiff suffered a corresponding deprivation; and
- c) that the defendant’s enrichment and the plaintiff’s corresponding deprivation occurred in the absence of a juristic reason.

[251] The first two elements of the cause of action are closely related. To establish that the defendant was enriched and the plaintiff correspondingly deprived, it must be shown that something of value—a “tangible benefit”—passed from the latter to the former: *Moore* at para. 41. The Supreme Court of Canada has adopted a straightforward economic approach to the first two elements. Accordingly, other considerations such as moral and policy questions, are appropriately dealt with at the juristic reason stage of the analysis: *Kerr* at para. 37.

[252] The third element, the absence of a juristic reason, “means that there is no reason in law or justice for the defendant’s retention of the benefit conferred by the plaintiff, making its retention ‘unjust’ in the circumstances of the case”: *Kerr* at para. 40. In *Garland v. Consumers’ Gas Co.*, 2004 SCC 25, the Supreme Court of Canada adopted a two-step analysis for the absence of a juristic reason as follows:

44 ... First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. ... The established categories that can constitute juristic reasons include a contract (*Pettkus [v. Becker]*, [1980] 2 S.C.R. 834), a disposition of law (*Pettkus, supra*), a donative intent (*Peter [v. Beblow]*, [1993] 1 S.C.R. 980), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a prima facie case under the juristic reason component of the analysis.

45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de*

facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. ...

[253] As noted, the existence of a contract providing for the plaintiff's actions giving rise to an enrichment and corresponding deprivation will in many cases constitute a juristic reason that negatives the application of unjust enrichment. A partnership agreement is, as noted above, a contract.

Analysis

[254] In my view, the decision of the parties in January 2018 to purchase additional properties to be rented out in order to generate profits created a partnership. They were carrying on a business: that being to purchase residential properties, renovate and repair them to create suites, and then rent them out for a period of two and a half to three years with the intention of earning profit from the rental income, on the understanding that at that time they would re-evaluate whether to continue renting or to sell. There was a secondary hope that the properties would have increased in value over time, giving rise to a capital gain. The parties embarked on this business in common, in that they each contributed the funds they were able to contribute to the acquisition of the partnership assets. This was done with a view to profit. Their goal was to generate net income from ongoing rental operations and potential capital gains. Thus, the three key elements of a partnership exist.

[255] This conclusion is also based on the parties conduct in:

- a) Working together and sharing the expenses of renovations and repairs;
- b) The defendant reporting rental income to CRA on the basis of equal sharing between herself and the plaintiff as partners;

- c) Opening a bank account, which both parties had access to, dedicated to transactions related to the partnership's operations; and
- d) The parties' own description of their relationship—particularly prior to disputes arising—as a partnership.

[256] In my view, the initial decision made in August 2017 to purchase the Long Lake Property, and to live in it, did not itself create a partnership. Prior to 2018, the Long Lake Property was not part of a business and, while the parties may have realized the possibility that a gain might be made upon holding the property for a period of time, that was secondary to the immediate goal of having a home in which the four family members could live.

[257] That said, it is my view that the Long Lake Property became a partnership asset in 2018.

[258] I find that the Beverly Property is also an asset of the partnership. This was the first property purchased by the parties following their verbal agreement to go into business together. Although the defendant asserts that she purchased the property as a personal investment, this is inconsistent with her inclusion of the property in the First Business Plan.

[259] Finally, I see the Glen Eagle Property as being an asset of the partnership, as it was jointly held property that was to be used as a base for the overall rental business, even though the parties and their parents were residing in it, and there was anticipation that it would appreciate in value over time.

[260] In my view, there is sufficient certainty in the parties' arrangements for the court to conclude that a partnership exists. The *Partnership Act* provides a variety of default provisions that will apply to a partnership unless the parties agree otherwise. In my view, much of what is in sections 2 through 5, plus the first sentence of s. 6(a), of the First Business Plan, reflects the parties' verbal arrangement, which in my view comprise the following:

- a) There would be a division of responsibilities, with the plaintiff being responsible for maintenance and the defendant being responsible for administration;
- b) The parties would share profits and expenses equally;
- c) In May 2021, the parties would sell the properties absent agreement to continue; and
- d) Upon a sale of the properties, the parties would share equally the gains.

[261] These verbal terms, read in the context of the default provision of the *Partnership Act*, provide sufficient certainty for the court to conclude that a partnership existed.

[262] The existence of a partnership, in my view, precludes any claim for unjust enrichment. It provides a juristic reason for the work done by each of the parties to repair and improve the properties. The contributions made by each of them form “sweat equity” with respect to the partnership assets.

[263] With respect to the claims of resulting trust, it is perhaps arguable that a resulting trust existed in this case upon the initial acquisition of the Long Lake Property in the defendant’s name. Even after the creation of the partnership, it is clear that the title to the properties does not reflect the parties’ actual capital contributions. While I have found that all three properties are partnership assets, title to each property is different. However, it is my view that the existence of any resulting trust would have no impact on the resolution of this action. All of the partnership assets have been sold. All that remains to be dealt with is division of the proceeds of those sales. Because there was a partnership, it is my view that the division of those assets is appropriately based on the rules governing the partnership as set out by the *Partnership Act*.

Accounting

Legal Principles

[264] Given my conclusion that the parties were in a partnership, I turn to the *Partnership Act* for guidance as to the distribution of the sale proceeds from the parties.

[265] The *Partnership Act* provides a set of default rules that governs the relationship between partners unless agreed otherwise: s. 21. They include obligations on partners:

- a) To hold and apply partnership property exclusively for the purposes of the partnership and in accordance with the partnership agreement (s. 23(1));
and
- b) To act with the utmost fairness and good faith towards the other members of the firm in the business of the firm (s. 22(1)).

Those rules also include a set of standard rights and duties in the ongoing business of the partnership, subject to any express or implied agreement to the contrary: s. 27.

[266] Section 47 of the *Partnership Act* outlines the rules for distribution of assets and liabilities of a partnership upon dissolution:

- 47** Subject to any agreement, in settling accounts between the partners after a dissolution of partnership, the following rules must be observed:
- (a) losses, including losses and deficiencies of capital, must be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits;
 - (b) the assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, must be applied in the following manner and order:
 - (i) in paying the debts and liabilities of the firm to persons who are not partners;
 - (ii) in paying to each partner rateably what is due from the firm to that partner for advances as distinguished from capital;

- (iii) in paying to each partner rateably what is due from the firm to that partner in respect of capital;
- (iv) the ultimate residue, if any, must be divided among the partners in the proportion in which profits are divisible.

[267] Based on these provisions, it would appear that the funds in trust should be used:

- a) First, to repay the parties for any outstanding loans or advances made to the partnership;
- b) Second, to repay the parties rateably for the amount of capital they are entitled to; and
- c) Finally, any remaining funds would be divided equally between them.

Analysis

[268] I begin my analysis by determining the parties’ respective capital contributions to the partnership. This is made more complicated in the present case, as the plaintiff’s primary contribution took the form of a pre-inheritance, which funds were never actually in his possession. The pre-inheritance was to come from the parents’ assets, which in this case were invested in the Penticton Property in April 2017, and transferred to the Long Lake Property when the Penticton Property sold in November 2017. The plaintiff’s pre-inheritance flowed primarily through transactions managed by the defendant in relation to the two real property transactions and, in August 2017, through money advanced by the defendant at her parents’ request.

[269] In the absence of funds being received by the plaintiff and then invested, I must evaluate the amount of the plaintiff’s pre-inheritance through what evidence I have of transactions between the parents and the defendant, and through evaluation of what the defendant says are other “withdrawals” from that pre-inheritance.

[270] The evidence was inconsistent as to when the parents first advised the parties of their intent to provide their children with a pre-inheritance. In my view, this most likely happened in the latter part of July 2017. I say this because it would

almost certainly have happened after the parents sold their home in Kitchener. As well, I accept the defendant's evidence that she was the one who told the plaintiff about the pre-inheritances, and that shortly thereafter, he came to Penticton to purchase a truck. Records show the truck was purchased August 2, 2017.

[271] One of the payments the defendant says should be "deducted" from the pre-inheritance was made in May 2017. I reject that submission. The defendant herself admitted no knowledge of that payment and it was never put to the plaintiff. The note on the draft cheque she referred to in support of this payment ("Parksville-Penticton") gives no indication that it was intended as part of the plaintiff's pre-inheritance. It was written at a time when the plaintiff was admittedly travelling from Parksville to Penticton to work on the parents' home, and in any event, based on my conclusion in the previous paragraph, it predates the plaintiff being advised of the pre-inheritance.

[272] I would similarly reject the defendant's submission that payments made by the mother to the plaintiff after the purchase of the Long Lake Property are to be considered part of the plaintiff's pre-inheritance. The evidence was that the pre-inheritance was fully invested in the Long Lake Property by that time.

[273] It is noteworthy that these are all payments by the mother to or on behalf of the plaintiff. The defendant is a stranger to those transactions. Nothing in the documents indicated any intention on the part of the mother to claw back the gift she had already made to the plaintiff and perfected by its investment in the Long Lake Property. Any payments by the mother were either a gift or a loan to the plaintiff. The plaintiff's evidence is that they were gifts, and the making of occasional gifts to the plaintiff is not inconsistent with the historical parent-child relationship in this case. In any event, the limitation period to recover these funds even if they were loans has long since passed.

[274] That leaves three transactions – two of which were paid from the defendant's account: the bank draft to purchase the truck and the cash withdrawal of \$2,000 on August 1, 2017. The third is a bank transfer from the parents' account to Ms. Rix on

August 31, 2017. Ms. Rix gave evidence of being reimbursed for costs and for work done on properties.

[275] As I understand the evidence, it was common ground that the cost of the truck and of the cap (about \$22,000 and \$4,000 respectively) were initial distributions from the pre-inheritance. That is the only evidence that I accept as to such deductions. I do not need to decide whether the \$4,000 for the cap came from the August 1, 2017 cash withdrawal or the August 31, 2017 transfer to Ms. Rix (or some combination thereof).

[276] Thus, I conclude that the amount of the plaintiff's pre-inheritance invested in the Long Lake Property was \$134,000—that is, \$160,000 less \$26,000 (paid towards the truck and cap). The investment took place both through the payment of the deposit on the Long Lake Property and through the payment down of the bridge financing from the equity of the Penticton Property.

[277] I note that the accounting prepared under the defendant's instructions contains five transactions categorized as "Due to Margaret DeFrancesco". These appear to relate to the amounts the defendant says were paid by the mother on behalf of the plaintiff. One of them is cheque number 023, which as I noted above appears to have been written in August 2018 but never cashed. The others may well represent amounts paid by the mother on behalf of the plaintiff, but that does not make the mother a party to the partnership nor make those payments anything other than a matter between the mother and the plaintiff. Ultimately, in this case, the defendant is seeking to get the benefit for herself of monies she says were given by the mother to the plaintiff. In my view, she is a stranger to those transactions and she is not entitled to the benefit of them.

[278] I wish to comment briefly on the accounting that was tendered in evidence by the defendant. It was clearly a document prepared on the defendant's behalf—the accountant's invoices reflect receiving instructions from and later adjusting the accounting based on ongoing direction from the defendant. The accounting differed from the annual statements attached to the defendant's tax returns. It included

expenses such as real estate commission and mortgage broker fees—items I would have thought would be treated as capital expenses. The amount calculated as “mortgage interest” seemed high to me. For the Long Lake Property, it calculated mortgage interest of over \$50,000, yet by my calculation the mortgage interest that would have accrued over the 23 months this mortgage was outstanding should have been in the range of \$38,000. It included a substantial claim for legal fees on behalf of the defendant. To the extent those reflected the conveyancing costs for the properties, they were paid from the proceeds of sale and are thus already accounted for in my consideration of the capital amounts. To the extent they reflected legal fees related to the parties’ dispute, they are for the defendant’s own account, subject to any award that may be made as to costs. The accounting also contained numerous small expenses claimed by the defendant that I find difficult to consider as partnership expenses. It seemed to attribute almost every deposit to the Coastal Community Credit Union account as being from the defendant, which I do not accept to be the case. After detailed review of the accounting, it is my view that this document must be approached on the basis that it is an advocacy document to be read with great caution.

[279] I turn to the defendant’s contribution to the purchase of the Long Lake Property. The documents show that there was a deposit of \$10,000 plus closing costs of \$400,900 paid by way of bridge financing from CIBC. That bridge financing was subsequently paid out upon sale of the Penticton Property. If the plaintiff’s contribution was \$134,000, then the defendant’s contribution would be calculated as \$276,900. I assume that to be a combination of her own pre-inheritance and some part of her own assets.

[280] The evidence indicated that the capital contributed to the acquisition of the Beverly Property was a deposit of \$25,000 and closing funds of \$165,304, for a total of \$190,304, all of which came from the defendant.

[281] The capital contributed to the acquisition of the Glen Eagle Property was a deposit of \$10,000 plus closing funds of \$22,585, for a total of \$32,585, all of which came from the defendant.

[282] Thus, I calculate the respective initial capital contributions of the parties as \$134,000 by the plaintiff and \$500,000 by the defendant (rounded up from \$499,789).

[283] There were other capital contributions to the three properties made by way of renovations and the purchase of appliances. Some of those were made prior to the formation of the business partnership. The initial renovation work at the Long Lake Property was done prior to the formation of the partnership to create three units that met the specific needs of the parents, the plaintiff and the defendant. The documents indicate that the costs of this work were paid one-third each by the parents, the plaintiff and the defendant. The defendant's accounting calculates the amount spent on renovations at Long Lake Property prior to March 1, 2018, as \$20,800, plus just under \$4,000 in appliances. This number seems generally in accord with the evidence and documents I viewed, and I accept it notwithstanding my reservations about the accounting. Given that the amount paid by the parents was never required to be repaid, I will infer that each of the parties is entitled to credit of \$12,400 as a capital contribution for these costs.

[284] The accounting further indicates that additional renovation work was done at the Long Lake Property between March and September 2018, at a cost of \$8,400. That was at a time where all indications are that the parties were contributing equally. I would thus credit each of the parties with a further capital contribution of \$4,200.

[285] The accounting indicates that at the Beverly Property renovations were done and appliances purchased from February through August 2018 at a cost of \$23,600. However, as noted above, \$8,642 in excess mortgage proceeds was returned to the parties and deposited in the Coastal Community Credit Union account. I would infer that this money was used for the purposes of the Beverly Property renovations. I

would deduct that from the amount spent, and credit each of the parties with a further capital contribution of half of the remainder—being \$7,500 (rounded up from \$7,479).

[286] The accounting records the purchase of a shower enclosure at the Glen Eagle Property in October 2018 at a cost of \$1,322. There was evidence indicating that this was for the parents' unit and that it was never fully installed. I do not think it appropriate to use this evidence for purposes of calculating capital contributions.

[287] By my calculation, the parties' respective capital contributions are thus for the plaintiff: \$158,100 (\$134,000+\$12,400+\$4,200+\$7,500), and for the defendant \$524,100 (\$500,000+\$12,400+\$4,200+\$7,500). On a percentage basis, I find that the plaintiff contributed 23.2% of the equity and the defendant 76.8%.

[288] After the parties acquired the three properties and were renting the Beverly Property and the Long Lake Property, the rental income generated (\$3,000 per month on the Beverly Property and \$2,700 per month on the Long Lake Property) was sufficient to cover all of the regular expenses associated with those two properties, plus leave excess funds to cover a significant portion of the expenses related to the Glen Eagle Property (which the parties lived in at the time).

[289] With respect to the Beverly Property, the annual rental income should have been \$36,000. Based on the mortgage agreement and the expenses claimed in the 2019 income tax return, I would estimate the regular annual expenses would have included mortgage payments of \$19,000 (including principal and interest), utilities of about \$2,700, property taxes of about \$1,500, insurance of about \$1,200, user rates of about \$600, repairs and maintenance of about \$300 and accounting fees of about \$300. If the Beverly Property had been successfully rented for a full calendar year, it should have generated a total profit of over \$10,000.

[290] With respect to the Long Lake Property, the annual rental income should have been \$32,400. Based on the mortgage agreement and the expenses claimed in the 2019 income tax return, I would estimate the regular annual expenses would

have included mortgage payments of \$28,000 (including principal, interest and provision for property taxes), insurance of about \$1,200, user rates of about \$800, repairs and maintenance of about \$500 and accounting fees of about \$300. If the Long Lake Property had been successfully rented for a full calendar year, it should have generated a smaller profit of just under \$2,000.

[291] The income from the two properties together would have covered nearly half of the mortgage payments on the Glen Eagle Property (which by my calculation would have totalled just over \$27,000 per annum). The parties would also have had to cover property taxes, insurance and utilities for the Glen Eagle Property.

[292] The evidence indicates that there were shortfalls, and that the parties shared in those shortfalls, which they occasionally referred to as rent. I have reviewed the evidence in depth above. It seems that the plaintiff paid his contribution to the shortfall on many occasions. There were some occasions on which the mother was involved in that transaction. There is conflicting evidence on whether that reflected the mother using her own funds to make that payment on his behalf, or whether he gave her cash and she then provided a cheque. For the reasons I have set out above, any issues between the plaintiff and his mother are not part of the accounting I am doing here.

[293] In my view, the best view on the evidence is that for the bulk of the time, the plaintiff and the defendant shared equally in the monthly shortfalls to the extent necessary to cover the Glen Eagle Property mortgage and related expenses. I note that in both the First and Second Business Plan, the defendant identified very limited monthly contributions that the mother had made on behalf of the plaintiff. I have no doubt that if there were any other monthly contributions outstanding, the defendant would have identified them at the times those documents were prepared.

[294] The financial model underlying the parties' ownership of these three properties depended on income being generated from renting two of them. That ceased to be the case with respect to:

- a) the Beverly Property in June 2019, when the defendant unilaterally evicted the tenants so that she could move in and vacate the Glen Eagle Property; and
- b) the Long Lake Property in December 2019, when the tenants voluntarily moved out (the circumstances of which are in dispute).

[295] The parties moved expeditiously to mitigate the losses that arose when the Long Lake Property became vacant. The Interim Agreement was finalized, both the Long Lake Property and the Glen Eagle Property were listed for sale within four to six weeks, and the sale was completed in late March 2020.

[296] The Beverly Property was a different story. The defendant evicted both sets of tenants shortly after the CPL was registered against title to the Beverly Property. The upstairs tenants were evicted on what was presumably the only basis available to the defendant—that it was needed for use by the owner or a close family member. She then vacated the Glen Eagle Property, with no plans whatsoever to rent it out. She explained at trial that she could not rent it out because she could not act unilaterally, yet her actions with respect to the Beverly Property were very much unilateral.

[297] The plaintiff suggested that the defendant's actions were done in anger, in an attempt to strike back at him. There may be merit to that. Whatever the motive, they were financially disastrous. The parties lost up to \$36,000 in rent over the next year. I say up to, because the evidence was that the existing tenant of the lower floor was behind in rent, and I heard no evidence that anyone inquired as to that tenant's circumstances or whether the tenant was likely to remain behind in rental payments.

[298] As noted above, the defendant as a partner was obligated to use partnership property for purposes of the partnership and to act in good faith. Her unilateral actions in evicting the tenants of the Beverly Property were not in accordance with that duty. They deprived the partnership of up to \$36,000 in income. Generally speaking, income was shared 50/50. However, to the extent that the parties are

having capital returned to them on a prorated basis pursuant to s. 47 of the *Partnership Act*, it is to be returned on a 23.2/76.8 basis. In my view, the appropriate adjustment to reflect the loss of \$36,000 in the course of dividing the remaining capital in the partnership is to provide a credit in the plaintiff's favour of roughly one quarter of the \$36,000, or \$9,000.

[299] The defendant claimed against the plaintiff for his own failures to act in accordance with his obligations to act in good faith. These claims were primarily directed at his failure to communicate with her and his perceived delays in agreeing to the sale of the properties. I have reviewed the relevant events above under the headings "Preliminary Efforts to Exit the Business Relationship" and "Litigation, Foreclosure and Sale of the Properties". As described more fully there, the parties were able to agree to list the properties for sale in January 2019, but when the plaintiff began to make proposals as to how the proceeds of sale would be divided—a prudent thing to do given the relationship at that time, and particularly given what the defendant had proposed in the Second Business Plan—he was met with a flat "See you in Court". Within a short time thereafter, the plaintiff had retained counsel, commenced litigation, and filed a CPL. In my view, that was an entirely reasonable response to the defendant's position.

[300] Similarly, it appears that from at least October 2019 onward, the plaintiff's lawyer was attempting to negotiate an interim arrangement for the sale of the partnership property. I appreciate that the defendant may feel that the plaintiff's lawyer was the one causing difficulty in those discussions. I have only seen a part of the correspondence, but what I have seen seems to indicate that Ms. Lines was doing her best to come up with a reasonable arrangement commensurate with the hundreds of thousands of dollars that were in issue. It appears that the negotiations were complicated by the fact that the defendant was obtaining advice from Warsh Law, but did not want them to become lawyers of record or liaise directly with Ms. Lines, yet wanted them to be the ones holding the funds. I would infer as well that the defendant's refusal at several points to accept that the Beverly Property was part of the partnership was a complicating factor.

[301] I am unable to conclude that the plaintiff was to blame for any significant delay in the process leading to the sale of the partnership properties.

[302] As noted above, the plaintiff obtained \$10,000 from the sale proceeds of the Beverly Property in return for authorizing the release of the CPL. That might have been justified if the court had concluded that the plaintiff's only entitlement was as a result of unjust enrichment for work performed on that property. However, I have found that he was a partner. In my view, that \$10,000 needs to be added back in to the partnership assets and credited against the amount to which the plaintiff is found to be entitled.

[303] I return to s. 47 of the *Partnership Act*. Section 47(a) references dealing with losses of a partnership. Although I was presented with a calculation of "losses", for the reasons set out above I do not accept that calculation. To the extent there were any non-capital losses in this case, they arise from either the personal use of the properties by the parties or the defendant's unilateral decision to evict the tenants of the Beverly Property.

[304] This is a case in which the allocation of the remaining assets of the partnership—being the funds held in trust by Warsh Law—are properly distributed pursuant to s. 47(b). In my view, there are no debts of the partnership to persons who are not partners, and there are no advances as distinguished from capital. Thus, the funds held in trust are to be distributed by "paying to each partner rateably what is due from the firm to that partner in respect of capital".

[305] I understand that the amount held by Warsh Law is \$481,033.78 plus a small amount of interest. If I add back the \$10,000 previously paid to the plaintiff, the amount then becomes \$491,033.78 plus interest. Divided on the 23.2% and 76.8% apportionment identified above, I would on a preliminary basis allocate \$113,919.84 to the plaintiff, and \$377,113.94 to the defendant. I would adjust the plaintiff's portion upward by \$9,000 to reflect the \$36,000 in lost income from the Beverly Property (for which my reasoning is set out above). This gives rise to an allocation of \$122,919.84 to the plaintiff and \$368,113.94 to the defendant.

[306] There are two adjustments to be made to this calculation. The first is that the plaintiff has already received \$10,000 of the funds to which he is entitled.

[307] The second adjustment relates to the defendant's claim for cell phone bills she said she paid for the plaintiff. The plaintiff says that the defendant never gave him proper bills, and that he gave her some cash as well. The amount of cash was never specified, and the plaintiff seemed to accept that the defendant did pay for his cell phone for some period of time. I have reviewed what the defendant provided in terms of proof of this claim. They are screenshots taken on her cell phone from the cellular provider's website. The defendant's evidence was that the plan she was on provides online service only and does not create traditional bills. Having reviewed the evidence, and given the vagueness of the plaintiff's evidence, I will accept the defendant's claim of \$1,627.62.

[308] I would thus direct that the funds held in trust by Warsh Law be distributed \$111,292.22 to the plaintiff and \$369,741.56 to the defendant. Any accrued interest should be paid out on the same 23.2% and 76.8% basis.

Other Claims

[309] Each of the parties has asked for reimbursement of legal costs. I note that the conveyancing fees have already been paid out of the sales of the properties. Any fees for negotiating the Interim Agreement or advising the parties with respect to this litigation are properly considered litigation costs. In my view, the fees the defendant has paid to her lawyer to hold funds in trust would also ordinarily be considered litigation costs. There is no reason to award such costs other than in accordance with R. 14-1 of the *Supreme Court Civil Rules*. I will provide below for either party to make submissions as to whether they should be given an award of costs pursuant to R. 14-1. In my view, it would not be appropriate to make a separate award for those amounts.

[310] I heard significant evidence about whether the plaintiff has the ability to visit his mother. That was not an issue raised on the pleadings, and it is not something I

see as appropriate to make any orders in respect of given the nature of the proceeding.

[311] The plaintiff sought an order requiring that his father's estate be distributed in accordance with his will. The mutual 2009 wills of the parents were in evidence. Those wills provided that the assets of each of the parents would go to the survivor of the two parents, and thereafter be shared between their two children on the basis of 45% to the plaintiff and 55% to the defendant. The defendant advised during trial that the father had no assets requiring probate, and that everything of his went to the mother. That appears to be in accordance with the will. It is not known whether the mother made any changes to her will at a time when she was competent. Given that this issue was not pleaded, and given the nature of the pleadings, there is no basis for me to make any order in respect of it.

[312] The defendant submitted that certain personal property that she left at the Glen Eagle Property was not returned to her. The correspondence in evidence included a lengthy email from Ms. Lines identifying where certain of these items were located and proposing that the defendant stop by her office to pick up a key to facilitate access. The defendant was not clear as to whether she did so—she simply kept repeating that the items were never “returned” to her. In my view, the evidence is not sufficient for me to make a finding that any personal property was converted or to value that property.

[313] For the reasons set out in my discussion of reliability and credibility, I have dismissed the defendant's claims of assault. It flows that all of her claims for damages resulting from the alleged assault—including for general damages and expenses for physiotherapy, dental work and security services—are thus dismissed.

Conclusion

[314] I order that the remaining partnership asset—being the funds held in trust by Warsh Law—be distributed as follows:

a) \$111,292.22 plus 23.2% of any accrued interest be paid to the plaintiff;
and

b) \$369,741.56 plus 76.8% of any accrued interest be paid to the defendant.

[315] All other claims are dismissed.

[316] If either party seeks an order as to costs pursuant to R. 14-1, or in respect of a formal offer made pursuant to R. 9-1, of the *Supreme Court Civil Rules*, they may apply by way of a written submission to be made within six weeks of the date of this judgment. The other party may file a written response within three weeks after the submission to which they are replying. Any submission should be submitted through Supreme Court Scheduling – Nanaimo.

[317] My preliminary view is that the plaintiff has been substantially successful, given the positions advanced at trial. However, I am open to submissions as to that matter. If neither party files submissions in respect of costs by the above-noted deadline, the plaintiff will be entitled to his costs on Scale B.

“Veenstra J.”