IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jesson v. Tanaka,*
2023 BCSC 1313

Date: 20230728
Docket: S220570
Registry: New Westminster

Between:

Naomi Bernice Elizabeth Jesson and Christopher William Jesson

Plaintiffs

And

Janice Elizabeth Tanaka

Defendant

Before: The Honourable Justice Warren

Reasons for Judgment

Counsel for the Plaintiffs:	T. D. Affoo Y.Q. Zhao
Counsel for the Defendant:	J. Dreyer
Place and Dates of Trial:	Port Coquitlam, B.C. May 3-7, 2021; April 11-12, October 3-7, December 5 and 9, 2022
Place and Date of Judgment:	New Westminster, B.C. July 28, 2023

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Overview

[1] This is a dispute about the beneficial ownership of an undivided half interest in a house located in Surrey, British Columbia (the "Surrey House"). Title to the Surrey House is registered in the names of the plaintiff, Christopher Jesson, and the defendant, Janice Tanaka, as equal tenants in common.

[2] The other plaintiff, Naomi Jesson, is Chris Jesson's wife and Janice Tanaka's daughter. Naomi and Chris have two children, J, now aged 18, and E, now aged 16. Toshitsugu Tanaka ("Tosh") was Naomi's father and Janice's husband. Tosh died in July 2009. Richard Tanaka is Janice's son and Naomi's brother. Susan Tanaka is Richard's wife. Nicole Toth is Richard's adult daughter.

[3] I will refer to Chris and Naomi's children by their initials. I will refer to the parties and some of the witnesses by their first names to avoid confusion. I mean no disrespect in doing so.

[4] The Surrey House was purchased in 2003. Title was registered in the names of Chris as to an undivided ½ interest and Tosh and Janice, as joint tenants, as to an undivided ½ interest. Chris contributed $40,000 to the down payment and he paid the closing costs. Janice and Tosh contributed a little more than $60,000 to the down payment. The balance of the purchase price was financed by a mortgage loan to which Chris, Janice, and Tosh were all parties.

[5] When the Surrey House was purchased, the basement was unfinished. Initially, Chris, Naomi, Janice, and Tosh resided together in the upper two floors. It is not disputed that the plan was for a basement suite to be built for Janice and Tosh, where they would live for the rest of their lives.

[6] The basement suite was eventually built and Janice and Tosh then resided in it. There is some dispute about when the construction commenced and finished. Nothing turns on that. It is clear that construction was delayed beyond what was initially contemplated by the parties because Chris and Naomi could not initially afford to proceed. It is also clear that the suite was finished and Janice and Tosh

were living in it by no later than August 2006. There is a dispute about the extent to which each couple contributed to the cost of building the basement suite.

[7] There is no dispute that Chris and Naomi made all the mortgage payments and paid all other expenses associated with maintaining the Surrey House, such as property taxes, insurance premiums, and the cost of routine repairs.

[8] During the first couple of years after moving into the Surrey House, Janice and Tosh made cash payments to Chris of $700 per month. Aside from those payments and the amounts they contributed to the cost of building the suite, Janice and Tosh made no other financial contributions to housing-related expenses.

[9] While living in the basement suite, Janice assisted Chris and Naomi with child care, and she occasionally purchased groceries and assisted with cooking for the children. However, the extent to which she did those things is in dispute.

[10] In 2008, Tosh and Janice made mirror wills. Those wills provided that on the death of the survivor, the first $60,000 of the residue of the survivor's estate would go to Richard with the balance of the residue divided equally between Richard and Naomi, as described in what is known as a "hotchpot" clause.

[11] On Tosh's death in July 2009, his interest in the Surrey House passed to Janice pursuant to the right of survivorship, but at that time no change was made to the title.

[12] After Tosh's death, Janice continued to live in the basement suite of the Surrey House. Over the years, the relationship between her and Naomi deteriorated, at least from Janice's perspective.

[13] In 2017, Janice arranged for Tosh's name to be removed from the title. She also made a new will and declaration, and granted a power of attorney to Nicole and Richard. Richard, Susan, and Nicole were aware, at the time, that Janice was taking these steps. Chris and Naomi were not aware that she was taking these steps.

[14] Janice's 2017 will also provided that the first $60,000 of the residue of her estate would go to Richard with the balance of the residue divided equally between Richard and Naomi. Her 2017 will did not contain a "hotchpot" clause, but the accompanying declaration set out the reasons for the unequal division of her estate in terms that were significantly more detailed and somewhat different from the rationale contained in the 2008 wills.

[15] In August 2019, with the assistance of Richard and Susan, Janice moved out of the basement suite and into Richard and Susan's home in Alberta, where she continues to reside. The move was made without prior notice to Chris and Naomi. At the same time, Janice demanded to be bought out of what she says is her 50 percent beneficial interest in the Surrey House. This proceeding was commenced soon after that.

[16] Naomi and Chris allege that Janice holds her interest in the Surrey House in trust for them or for Naomi. They seek a declaration to that effect and an order, pursuant to s. 37 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, vesting Janice's interest in them and removing Janice from the title.

[17] Janice denies that she holds her interest in the Surrey House in trust for anyone. She alleges that she is the beneficial owner of a half interest in the Surrey House. She advances a counterclaim in which she alleges, among other things, that in addition to contributing to the down payment on the Surrey House and assuming liability under the mortgage, she and Tosh made other contributions including paying for most of the cost of building the basement suite, and providing child care and other domestic services that assisted the plaintiffs in meeting the financial obligations associated with home ownership. In the counterclaim, Janice also sought an order for the return of monies and items she alleges were wrongly taken from her by Naomi and/or Chris, or a monetary judgment in lieu. In final argument, she abandoned that claim. She seeks:

- dismissal of the plaintiffs' claim;

- an order providing the plaintiffs with 45 days to buy out her half interest in the Surrey House, failing which the Surrey House be sold pursuant to s. 6 of the *Partition of Property Act*, R.S.B.C. 1996, c. 347, with the proceeds divided equally, and associated orders concerning the conduct of such sale; and

- alternatively, a determination of her interest in the Surrey House and an order providing the plaintiffs with 45 days to buy out that interest, failing which the Surrey House be sold pursuant to s. 6 of the *Partition of Property Act*, with the proceeds divided in accordance with the parties' respective interests, and associated orders concerning the conduct of such sale.

Positions of the Parties

Chris and Naomi

[18] Chris and Naomi say that Janice and Tosh's approximately $60,000 contribution to the down payment on the Surrey House was intended by them to be a gift to Naomi, and that Janice and Tosh gave no value for their registered interest such that Janice holds her registered interest pursuant to a resulting trust in favour of Naomi.

[19] Alternatively, but to the same end, Chris and Naomi say the evidence can also be viewed as establishing an oral agreement between the parties that is contrary to the registered title and must be enforced to prevent an unjust enrichment. Specifically, they say that when the Surrey House was purchased, it was agreed that Janice and Tosh's contribution to the down payment would be viewed as a pre-inheritance payment for Naomi; that Janice and Tosh would go on title in place of Naomi because of a concern that going on title might jeopardize Naomi's scholarship, but they would hold their registered interest in trust for Naomi; that Janice and Tosh would make relatively small monthly payments to Chris for a limited period of time while Chris and Naomi became financially established; that Chris and Naomi would finance the construction of the basement suite, with the standard of the

finishings equal to the rest of the house; and that Janice and Tosh would reside in the basement suite for the rest of their lives without any obligation to pay rent or otherwise contribute to housing-related expenses.

[20] Chris and Naomi say that Janice has not established any claim for unjust enrichment. They acknowledge that Janice and Tosh covered some minor expenses associated with constructing the basement suite. However, they say they did that because they decided to finish the suite to a higher standard than the rest of the house was finished. They acknowledge that Janice assisted to a minor extent with child care, but say her role in this regard was limited to what would normally be expected of a grandparent who is sharing a house with their grandchildren.

Janice

[21] Janice says that Chris and Naomi have not established that she and Tosh gave no value for the half interest in the Surrey House that was registered in their names. She says they have not established that the $60,000 contribution she and Tosh made to the down payment was a gift to Naomi.

[22] Janice says that Chris and Naomi have not established any agreement that is contrary to the registered title. She acknowledges that the parties made an oral agreement but her version is that each couple was to have an equal beneficial interest in the Surrey House and, in consideration for her and Tosh's greater financial contribution to the down payment, she and Tosh would live in the Surrey House until they died without any corresponding obligation to contribute to the mortgage payments, property taxes, insurance, and other housing-related expenses.

[23] Janice's position is that Chris and Naomi have failed to rebut the statutory presumption created by s. 23(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250, that Janice, as the person named in the title as the registered owner of an undivided ½ interest in the Surrey House, beneficially owns that undivided ½ interest. She seeks partition and sale of the Surrey House.

[24] Alternatively, she says Chris and Naomi have been unjustly enriched by their breach of the oral agreement in depriving her of accommodation in the basement suite for the rest of her life, by her and Tosh's direct contributions to the acquisition and maintenance of the Surrey House, and by her child care and other domestic services.

Issues

[25] The following issues arise:

> 1. Have Chris and Naomi rebutted the statutory presumption created by s. 23(2) of the *Land Title Act*, that Janice, as the person named in the title as registered owner of an undivided ½ interest in the Surrey House, beneficially owns that undivided ½ interest?
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> 2. If not, should the Surrey House be ordered sold, and if so on what terms?
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> 3. If so, what legal consequences flow from the financial and other contributions made by Janice and Tosh?

Credibility, Reliability, and Hearsay

[26] There is no dispute that an agreement was made between Chris, Naomi, Janice, and Tosh at the time the Surrey House was purchased in 2003, but some of the terms are in dispute. The enforceability of the agreement has not been put in issue, but determining the disputed terms is fundamental to resolving the matters that are in issue.

[27] The agreement (which I will refer to as the "Agreement") was an oral one formed through discussions amongst Chris, Naomi, Janice, and Tosh. Unfortunately, Tosh has since passed away. In the circumstances, Chris and Naomi's case depends heavily on the credibility and reliability of their testimony, and Janice's case depends heavily on the credibility and reliability of her testimony. For reasons expressed below, I found Chris and Naomi to be credible witnesses and their evidence to be largely reliable, but Janice's testimony was wholly unreliable.

[28] The proper approach to assessing an interested witness's testimony was articulated in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.):

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be 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.

[29] The factors identified by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, play a role in assessing whether the evidence of a witness is truthful and accurate. These factors include the ability of the witness to resist being influenced by their interest in recalling those events; the internal and external consistency of the witness's evidence; whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence; whether their evidence seems unreasonable, improbable, or unlikely, bearing in mind the probabilities affecting the case; and the witness's demeanour, meaning the way they present while testifying.

[30] Janice’s counsel suggested that Chris understated his and Naomi’s financial difficulties and that this is a factor that affected his credibility. I disagree. Chris said that on a couple of occasions the mortgage payment was reversed because of insufficient funds in his bank account, but he said this was due to the timing of the processing of the mortgage payment and the typical hold the bank put on his paycheck. This was a reasonable explanation. More importantly, he admitted that his and Naomi’s finances were strained at the time the Surrey House was purchased. He conceded that, initially, he and Naomi could not afford to proceed with the suite construction, and this eventually angered Tosh. He testified that the $700 per month cash payments made by Janice and Tosh were intended to keep them afloat until Naomi finished school, settled into employment, and their financial position stabilized.

[31] Janice's counsel pointed to some differences in the testimony of Naomi and Chris about how much money Janice and Tosh were to pay monthly during the initial period, and for how long they were to make the payments, as a factor that undermined their credibility. There was some vagueness and imprecision in their testimony about these matters but I am satisfied that this stemmed from the fact that these aspects of the Agreement were not precisely settled at the time the Surrey House was purchased.

[32] Janice's counsel suggested that Chris and Naomi understated the extent to which Janice provided child care. She argued that the receipts they produced, at least for some years, demonstrated that their external daycare costs were lower than what one would expect which suggested they relied heavily on Janice's unpaid child care. I disagree.

[33] Naomi testified that Janice never provided daycare in the sense of looking after the children all day while Naomi and Chris were at work. Naomi's testimony, in summary, was that she and Chris paid for child care of various forms until about 2015, when J was ten years old and E was eight years old. She said that from 2015, the children walked to and from school together and they attended day camps during the summer months. The daycare receipts produced by Naomi and Chris were not, in the circumstances, inordinately low. On the contrary, given that Janice took a year-long maternity leave after the birth of each child; worked part-time until 2014; worked Saturdays during the earlier years so Chris could look after the children; and swapped child care with a friend during one period, the receipts appeared entirely reasonable.

[34] Contrary to the submissions of Janice's counsel, Chris's and Naomi's testimony was reasonable and generally internally consistent. With one exception, their testimony was not shown to be materially inconsistent with objective evidence. The exception concerned the timing of the completion of the basement suite. They testified that it was finished by the summer of 2005 but, as discussed later, the objective evidence satisfied me that it is more likely that the basement was not

finished until the summer of 2006. I attribute the inconsistency in Chris and Naomi's evidence on this point to a failure of memory rather than a lack of veracity because the timing has no bearing on the strength of their case. Most importantly, as discussed later, their testimony about the Agreement is consistent with the probabilities which an informed person would recognize as reasonable in the circumstances that existed at the time the Agreement was formed.

[35] In contrast, Janice's testimony was entirely unreliable. She was diagnosed with dementia in January 2021, and it was obvious that her condition has caused significant memory loss. She frequently acknowledged she could not remember the answers to questions one would expect someone to remember. It was apparent that she was often confused when testifying. It is not necessary to set out an exhaustive list of the specific deficiencies in her testimony. A few examples will suffice to explain why I have determined that I can give her testimony no weight:

- Janice's evidence about the Agreement and the nature of her and Tosh's contribution to the down payment on the Surrey House was inconsistent. At some points, she testified that they contributed because they were buying the house with Chris and Naomi. At other times she indicated they made the contribution so Chris and Naomi would have a home. During her examination for discovery, she agreed that Naomi "got the house" as a means of equalizing a previous financial contribution made by Janice and Tosh to Richard's first wedding, but then she said "[i]t's both of our houses" and she wants her "percentage" from the house, although she did not know what that percentage was. At one point she said the contribution she and Tosh made was a loan to Chris and Naomi. At another point, she said she and Tosh bought the Surrey House alone and charged Chris and Naomi rent to live there.

- Janice expressed confusion about whose names were on title to the Surrey House.

- Janice did not explain the differences between her 2008 will and her 2017 will and declaration concerning the rationale for giving the first $60,000 from her estate to Richard, or why she considered it necessary to make a new will in 2017, given that the effect of both versions was the same – Richard was to receive the first $60,000.

- Janice gave inconsistent evidence about whether she discussed updating her will and making the declaration in 2017 with Richard. During her examination for discovery she said she went with Richard to a lawyer's office and they discussed it together, but at other times she appeared to deny that Richard was involved.

- Janice recalled little if anything about key details expressed in the 2017 declaration as part of the rationale for giving Richard the first $60,000 from her estate. The declaration states that she and Tosh contributed approximately $44,700 towards the renovation expenses for the basement suite, but she was unable to explain how she came up with that amount. On at least one occasion, she said that she and Tosh paid the entire cost of the construction of the basement suite. The declaration states that Chris and Naomi contributed approximately $10,000 to the renovation expenses, but at one point she said that Chris and Naomi did not contribute to the renovation expenses at all, and at another point she said she did not know what they had contributed.

- At one point, when asked about updating her will in 2017, Janice claimed she had not updated her will at all and she "better get hopping".

- On the day Janice moved out of the basement suite, Richard drafted a text that was sent to Chris from Janice's phone and with Janice's knowledge. The text asserts a right to a 50 percent beneficial interest in the Surrey House. However, Janice testified that the text was intended to tell Chris that she "wanted her deposit back".

- Janice initially denied paying for Richard's first wedding but when reminded of her evidence on the point in examination for discovery, she acknowledged that she and Tosh did contribute financially to that wedding. Richard confirmed in his testimony that his parents contributed financially to his first wedding.

- On several occasions Janice was unable to identify routine documents with clear and unambiguous titles when they were placed in front of her.

[36] I was also troubled by Janice's evidence about the $700 monthly payments she and Tosh made during the first couple of years following the purchase of the Surrey House. Chris and Naomi characterized these as rent payments. At times Janice characterized them as contributions to the mortgage. As discussed later, I have concluded that Janice added the notation "mtge" to the receipts for those payments after Chris signed them. The only reason I can discern for her doing that is to bolster her position in this case. I am unable to conclude that she came up with the idea to add the notation to the receipts on her own. It is possible that someone influenced her to do it. Nevertheless, this was yet another factor that undermined my confidence in the reliability of her evidence.

[37] Tosh's death and Janice's memory loss are significant impediments to Janice's ability to contest the case advanced by Naomi and Chris. In the circumstances, Janice sought to rely on testimony from others (Richard and Susan, and to a lesser extent Nicole) about things they said they were told at various times by Janice and Tosh about the Agreement, and about the extent to which Janice was assisting Naomi and Chris with child care and homemaking tasks. Counsel for Chris and Naomi objected to the admissibility of this hearsay evidence. Ultimately, I allowed the evidence to be led, provisionally, and gave the parties leave to make submissions in final argument about both its admissibility and, if admissible, the weight it should be given.

[38] Hearsay is an out-of-court statement tendered for the truth of its contents. It is presumptively inadmissible because it is often difficult to assess its truth in the

absence of the opportunity to cross-examine the declarant at the time the statement is made. Thus, hearsay can threaten the integrity of the trial's truth-seeking process and trial fairness. However, hearsay may be admitted into evidence under the principled exception when it meets the criteria of both necessity and threshold reliability: *R v. Bradshaw*, 2017 SCC 35 at para. 1 [*Bradshaw*].

[39] Necessity in this context has a flexible meaning. The necessity requirement is satisfied where it is “reasonably necessary” to present the hearsay evidence in order to prove the fact in issue: *R v. Khan*, [1990] 2 SCR 531 at 546, 1990 CanLII 77 (SCC). I am satisfied that necessity has been established as a result of Tosh’s death and Janice’s dementia.

[40] Threshold reliability of an out-of-court statement may be established in two ways. The first is the presence of adequate substitutes for testing truth or accuracy, in other words, procedural reliability: *Bradshaw* at para. 27. Some examples include the taking of the statement under oath, video- or audio-taping the statement, and warnings about the importance of truth-telling when the statement is given: see for example, *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, 1993 CanLII 116 (SCC). No such substitutes for testing truth exist in relation to the hearsay statements of Janice and Tosh. Procedural reliability has not been established.

[41] The second is where the circumstances in which the statement was made demonstrate that the statement was inherently trustworthy, in other words, substantive reliability. An examination of substantive reliability allows consideration of corroborating evidence, but the statement must be so reliable that contemporaneous cross-examination of the declarant would add little to the process: *Bradshaw* at paras. 30–31.

[42] Factors that may be considered in assessing substantive reliability include: the context in which the statement was made; the person to whom it was made; when the statement was made in relation to the events to which it relates; whether there is any reason to doubt the truthfulness of the statement; whether there is a motive for the declarant to lie; whether there would be any difficulties with respect to

the declarant's capacity to perceive or remember the events; the condition of the declarant at the time the statement was made; the spontaneity in the statement; the demeanour of the declarant at the time the statement was made; the amount of detail in the statement; and the extent to which there is other extrinsic evidence tending to confirm the reliability of the statement: *Bradshaw*; *R. v. Khelawon*, 2006 SCC 57.

[43] The submissions advanced by counsel for Chris and Naomi on the hearsay issue focussed on the credibility of Richard's evidence. I will return to that. For now, I note that with limited exceptions that do not apply in this case, the credibility and reliability of the narrator in conveying the hearsay statement are not relevant to the assessment of the threshold reliability of the hearsay statement for the purpose of determining its admissibility: *Davis v. Jeyaratnam*, 2022 BCCA 273 at para. 38.

[44] The inquiry into the threshold reliability of the hearsay statement looks for circumstantial guarantees of trustworthiness arising out the circumstances in which the statement was made. Where these circumstantial guarantees of trustworthiness are sufficiently supportive of reliability, the threshold reliability hurdle is cleared and the statement is admissible. The credibility and reliability of the narrator, in this case Richard, Susan, and to some extent Nicole, are not circumstances surrounding the making of the statements, and therefore their credibility and reliability is not a precondition to the admissibility of the statements. However, their credibility and reliability are central to the assessment of the ultimate reliability of the hearsay statements, and therefore the weight to be given to the hearsay: *Davis* at para. 38.

[45] I am unable to conclude that the circumstances in which the hearsay statements made by Janice and Tosh to Richard, Susan, and Nicole demonstrate that they were inherently trustworthy. There are insufficient circumstantial guarantees of trustworthiness to conclude that contemporaneous cross-examination would add little to the process.

[46] I accept that, in some circumstances, a statement made by a parent to their adult child about an agreement to purchase a house with another one of their

children could be viewed as inherently trustworthy. For example, if there was some written evidence of the agreement, the parent was calm when the statement was made and clear that the information was being relayed to ensure transparency among the siblings, and there was evidence that the co-purchasing child was informed of what the parent said.

[47] Here, there is no extrinsic evidence tending to confirm the reliability of the statements in question. Additionally, some of the hearsay statements that Richard and Susan said were made by Tosh were described to have been made when Tosh was angry at Naomi and Chris, in circumstances where it might be inferred that Tosh regretted the Agreement. Some of the hearsay statements said to be made by Janice about the child care she was providing were, according to Naomi, exaggerated to provide Janice with an excuse not to visit Richard in Alberta. More importantly, there is reason to doubt the truthfulness of the hearsay statements relayed by Richard and Susan about the Agreement. This is because the version of the Agreement they say Janice and Tosh relayed to them is inconsistent with the probabilities which an informed person would recognize as reasonable in the circumstances that existed at the time the Agreement was formed. As mentioned (and discussed later), Chris and Naomi's version of the Agreement is consistent with such probabilities.

[48] For these reasons, the out-of-court statements made by Janice and Tosh to Richard, Susan, and Nicole are inadmissible. If threshold reliability had been established such that those out-of-court statements were admissible, I would nevertheless have given them very little weight because of my concerns about the credibility and reliability of the testimony of Richard, Susan, and Nicole.

[49] Richard displayed considerable animosity towards Naomi, testifying in detail about what he perceived to be her many shortcomings even though much of this was irrelevant. Although Naomi and Richard are clearly estranged, she did not disparage him in her testimony.

[50] I was troubled by the absence of a rational explanation for the making of the 2017 will and declaration and the unexplained differences between the 2008 wills and the 2017 will and declaration, which appear intended to bolster Janice's case. I am satisfied that Richard was involved in arranging for Janice to make the 2017 will and declaration, and the fact that neither he nor Janice told Naomi what they were doing in this regard is suspicious.

[51] The declaration in Janice's 2017 will is also demonstrably inaccurate in some respects. For example, it states that Chris and Naomi contributed approximately $30,000 towards the down payment of the Surrey House, when it is clear that Chris contributed $40,000. It contains assertions that are unsupported by documentary evidence and that Janice is unable to explain. As mentioned, it states that Janice and Tosh contributed $44,700 to renovation expenses for the basement but the evidence does not explain how Janice came up with that amount. It speculates about the reason Naomi's name was not on title to the Surrey House (that she wished to preserve her first-time homebuyer property tax exemption) in a manner that is inconsistent with all the evidence on the point. No one testified that the first-time homebuyer property tax exemption was a consideration. Naomi and Chris both testified that Naomi was concerned that going on title would jeopardize her eligibility for a scholarship, and Janice testified to the same effect.

[52] In his testimony, Richard attempted to understate his role in arranging for Janice to make the 2017 will and declaration. Initially, he said Janice told him she was concerned about Tosh's name being still on title, and so he made an appointment for Janice to see a lawyer, Ms. Dreyer, and Nicole took her to the appointment. Only later did he acknowledge that he took Janice to an initial appointment with Ms. Dreyer and he went back a second time to sign a power of attorney granted by Janice. From the whole of the evidence, it is clear that by 2017 the relationship between Naomi and Richard was very strained and, as mentioned, no one told Naomi what was being done about Janice's affairs. All of this causes me to conclude that Richard played a greater role in the creation of the 2017 will,

declaration, and power of attorney than he was prepared to admit, and causes me to question his objectivity.

[53] Susan testified that her and Richard's attendance at the basement suite, to move Janice's belongings to Alberta, was intentionally timed for the morning when it was expected that Naomi and Chris would be at work. She said they did that to avoid a confrontation. However, that is inconsistent with Richard's admission that upon arriving at the suite that morning, he used Janice's phone to send a text message to Chris advising that Janice was moving out and demanding that her 50 percent interest in the Surrey House be bought out. The sending of this text message gave Naomi plenty of time to get home and nearly guaranteed a confrontation.

[54] Susan testified that in the first years after the Surrey House was purchased, Tosh was upset because he and Janice had to take over the mortgage payments and also buy all the groceries, and Chris and Naomi "had not put anything into the house". The assertion that Tosh and Janice bought all the groceries and Chris and Naomi put nothing into the house is demonstrably untrue. Susan's apparent willingness to blindly accept such statements causes me to question her objectivity.

[55] Similarly, Richard and Susan testified that Tosh and Janice were angry that title to the Surrey House had been registered with Chris holding a 50 percent interest and Janice and Tosh jointly holding a 50 percent interest. They claimed that Tosh and Janice told them that title was supposed to have been registered with Chris having a 40 percent interest and Janice and Tosh having a 60 percent interest, to reflect their proportionate contributions to the down payment. Richard and Susan also maintained that Janice and Tosh told them that they were not supposed to have to contribute anything to the Surrey House aside from their portion of the down payment, which actually totalled $60,858.39, and they were entitled to live in the basement suite for the rest of their lives without paying rent or financially contributing to household expenses. Janice's and Tosh's contribution of $60,858.39 to the down payment represents 16.5 percent of the purchase price of the Surrey House, which

was $368,200 in 2003. The notion that Janice and Tosh would receive a 60 percent beneficial interest and the right to live in the house for life in exchange for a 16.5 percent contribution to the purchase price is highly improbable, if not absurd. Richard's and Susan's willingness to blindly accept it demonstrated a lack of objectivity.

[56] For these reasons, I conclude that it is unsafe to rely on the evidence of Richard and Susan where it aligned with Janice's case.

[57] Two aspects of Richard's and Susan's evidence actually aligned more closely with Chris and Naomi's version of the Agreement. First, both Richard and Susan testified that Tosh was angry or upset because Chris did not qualify for the mortgage financing for the Surrey House on his own, which meant that Tosh and Janice had to formally assume liability for the mortgage. There is no dispute that the Agreement contemplated that Janice and Tosh would live in the basement suite for the rest of their lives without contributing to the mortgage payments or other housing-related expenses. Despite Janice and Tosh's greater contribution to the down payment, their overall financial contribution was far less than half. Viewed objectively, it would be unreasonable for Tosh to be upset about having to formally assume liability under the mortgage (with no expectation that he and Janice would make any mortgage payments) if he and Janice were going to acquire a 50 percent beneficial interest in exchange for a much smaller than 50 percent share of the cost. On the other hand, Tosh's angry reaction to having to formally assume liability under the mortgage would be objectively reasonable if it was intended that he and Janice would not have a beneficial interest, but would have the right to live out the remainder of their lives in the basement suite without any financial exposure other than their contribution to the down payment.

[58] Second, Richard and Susan testified that Tosh was angry or upset about the delay in starting the construction of the basement suite. Chris and Naomi gave the same testimony. Chris and Naomi also testified that pursuant to the Agreement, they were supposed to fund the construction of the suite to the same standard of finishing

as the rest of the Surrey House. Janice's position is that the couples were to share the cost of constructing the suite. Chris and Naomi both testified that the delay in commencing construction was the result of their strained financial circumstances during the first couple of years. Tosh's reaction to the delay is more consistent with Chris and Naomi's version of the Agreement than with Janice's version because if the couples were to share the cost of building the suite, Janice and Tosh could have commenced construction immediately.

[59] I turn now to Nicole's evidence.

[60] Nicole's evidence was largely unhelpful because it was lacking in specificity and in some respects it was clearly incorrect. For example, she testified that Janice and Tosh were still living upstairs in the Surrey House when E was born in the summer of 2007. However, it is agreed that Janice and Tosh had moved into the suite by the summer of 2006 at the latest. Nicole said she took Janice to all the appointments with Ms. Dreyer during which the 2017 will, declaration, and power of attorney were created, and that Richard never came to those appointments; however, Richard admitted he went to two appointments.

[61] Additionally, some of Nicole's evidence did not make sense. For example, she said Janice complained that having to take J and E to after school activities interfered with Janice's ability to go to the gym, but she did not explain why Janice could not go to the gym when J and E were at school. Another example concerned her evidence about the reason for the 2017 declaration. She testified that the 2017 declaration was drafted because Janice wanted the Surrey House split equally between Naomi and Richard, and to achieve an equal division it was necessary to give Richard the first $60,000 to offset money Janice and Tosh put into the Surrey House. First, the 2008 will already provided for Richard to receive the first $60,000. Second, this would make sense only if Janice and Tosh put $60,000 into the house without having a beneficial interest in it or if they had a 50 percent beneficial interest but contributed $60,000 more to the house than did Naomi and Chris. As already

emphasized, Naomi and Chris's financial contribution to the Surrey House vastly exceeded Janice and Tosh's financial contribution.

[62] I will now address the evidence of the collateral witnesses.

[63] Shirley Whitters is a real estate agent. She was involved in the purchase of the Surrey House. She confirmed that she initially dealt with Chris and Naomi on the purchase, that Chris and Naomi made the design choices, and that the plan was for Janice and Tosh to live in the basement. She also said that, initially, the purchase was in Chris's name and later she helped Janice and Tosh sell their Delta home to generate proceeds to assist in the purchase of the Surrey House. She said that at some point Chris told her that Janice and Tosh would be buying the Surrey House with him and she assumed Chris did not qualify for financing on his own. None of that is inconsistent with Chris or Naomi's testimony. However, it was apparent that Ms. Whitters was not party to any discussions between Chris, Naomi, Janice and Tosh about the specific terms of the Agreement among them concerning the nature of Janice and Tosh's financial contribution to or the beneficial ownership of the Surrey House. Accordingly, her evidence was of limited, if any, assistance.

[64] That leaves the testimony of James Cooper, an electrician who worked on the basement suite and was paid by Chris, and the testimony of Donald Watson, a friend of Tosh's who did the framing and much of the finishing of the suite without charge.

[65] I have no reason to doubt the credibility of Mr. Cooper's evidence. In addition, his testimony covered very narrow and specific ground, and I have no reason to question the reliability of his recollection.

[66] I also have no reason to doubt the credibility of Mr. Watson's evidence. However, some of his testimony was obviously inaccurate, which calls into question his memory of the material events and suggests that some of his testimony was founded upon assumptions rather than specific recollections. I will give a few examples. Mr. Watson appeared to overstate his role in the construction of the suite. At one point he said "I built it", but later he acknowledged that he did not do any of

the drywall, insulation, painting, plumbing, electrical, vapour barrier, or communications cable installation. He said the Surrey House had three bedrooms, when it in fact had four (not including the two that were eventually built in the basement). He said the plan was for Janice and Tosh to live "in a bedroom" until the suite was built, but in fact they each had a bedroom. He said "all four of them were on title", when Naomi was not on title. He said Janice and Tosh "didn't sign on the mortgage", when in fact they did. In the circumstances, I am left with a concern about the reliability of Mr. Watson's evidence.

Findings of Fact

Background

[67] Much of the background is not controversial. I have indicated those areas that are in dispute and explained my findings.

[68] Janice is 81 years old. Richard is 56 years old. Naomi is 51 years old. Chris is 56 years old.

[69] Chris and Naomi began living together in about 2000. They were married on February 5, 2005. Their first child, J, was born in July 2005, and their second child, E, was born in June 2007.

[70] Chris has an ownership interest in Spectrum Networks Inc. ("Spectrum"), through which he provides communication infrastructure services such as the installation of fiberoptic network cabling. Naomi is employed as a Residential Care Licensing Supervisor.

[71] In May 2003, Chris entered into a contract of purchase and sale with Mark IV Developments Ltd. ("Mark IV") pursuant to which he agreed to purchase the Surrey House for $368,200, plus net GST (the "Purchase Contract"). Chris was represented in the negotiation of the Purchase Contract by Ms. Whitters and Scott Romey, another real estate agent. Ms. Whitters and Mr. Romey acted as dual agents for Chris and Mark IV on the transaction.

[72] At the time the Purchase Contract was entered into, the Surrey House had not yet been built. The purchaser was given the opportunity to make some design and finishing choices, and to choose exterior colours. Chris and Naomi testified that all these choices were made by them. There is no contrary reliable evidence. I find they did make the design choices, with little if any input from Janice and Tosh.

[73] In May 2003, when Chris entered into the Purchase Contract, he and Naomi were 36 and 31 years old respectively. They were not yet married although they were living together. Chris was operating a business (a predecessor of Spectrum) that was in its infancy and drawing a relatively low salary. In 2002, he reported income for tax purposes of $29,399. Naomi was attending Douglas College, in the first year of a two-year program in therapeutic recreation. In 2002, she reported income for tax purposes of $9,695.

[74] In May 2003, when Chris entered into the Purchase Contract, Janice and Tosh were living in a home they owned in Delta, BC (the “Delta House”). The Delta House was encumbered with a mortgage in favour of the Bank of Nova Scotia. Tosh was working as an iceman for the City of Surrey, but was approaching retirement. Janice was retired from her last job as a receptionist and was receiving Canada Pension Plan and Old Age Security benefits.

[75] In the period leading up to the formation of the Purchase Contract, Chris, Naomi, Janice, and Tosh had several conceptual conversations about Janice and Tosh selling the Delta House, contributing to the down payment on the Surrey House, and then moving in to the Surrey House with Chris and Naomi. As already noted, there is no dispute that the parties reached an oral agreement in this regard (which I have been referring to as the “Agreement”). However, the parties do not agree on all the terms of the Agreement. That is addressed in detail later. For now, I note that there is no dispute about the following terms:

1. Janice and Tosh would sell the Delta House;

2. Chris, Janice, and Tosh would contribute to the down payment on the Surrey House;

3. the balance of the purchase price would be financed with a mortgage;

4. Chris and Naomi would make all the mortgage payments and all other housing-related expenses;

5. Chris, Janice, and Tosh would all become registered owners of the Surrey House;

6. Naomi would not go on title because of a concern that owning real property might jeopardize her eligibility for a scholarship she was receiving;

7. the purchase of the Surrey House would complete with the basement unfinished, but the basement suite would then be built in a timely manner;

8. the parties would live together on the main and upper floors of the house until the basement suite was finished; and

9. once the basement suite was finished, Janice and Tosh would reside in it for the rest of their lives without any obligation to pay rent or contribute to the mortgage or any other housing-related expense.

[76] The Purchase Contract required the purchaser to make three progress payments ($20,000 on final subject removal, $20,000 on completion of framing, and $20,000 on completion of drywall), with the balance of the purchase price payable on closing. Chris and Naomi testified that Chris made the first two progress payments on the Surrey House in the total amount of $40,000, which ultimately became part of the down payment. There is no contrary reliable evidence. I find that Chris made those payments. There is no dispute that Janice and Tosh made the third progress payment of $20,000, which ultimately became part of the down payment, and that they borrowed $20,000 from the Royal Bank to do so.

[77] There is no dispute that initially Chris intended to obtain the mortgage on his own. He received a commitment letter from the Royal Bank indicating he had qualified for a mortgage of $268,200 with an interest rate of 5 percent. The letter states it is subject to a list of “enclosed” conditions, but no enclosure was tendered in evidence so the nature of those conditions is unknown. Ultimately, a mortgage was obtained by Chris, Tosh, and Janice from the Royal Bank for $268,200 at an interest rate of 3.15 percent. Chris testified that when the bank found out that Tosh and Janice were going to be on title, it required them to also assume liability for the mortgage. As discussed, according to Richard and Susan, Tosh was upset because Chris did not qualify for the mortgage financing on his own which meant that he and Janice had to formally assume liability for the mortgage. In any event, there is no dispute that, pursuant to the Agreement, Chris and Naomi were to make all the mortgage payments.

[78] The Purchase Contract initially specified a completion date of October 30, 2003. In August 2003, that was extended by agreement to November 27, 2003.

[79] On September 16, 2003, Janice and Tosh entered into a contract of purchase and sale pursuant to which they agreed to sell the Delta House for $264,300, with a completion date of November 27, 2003, the same as the Surrey House completion date.

[80] The purchase of the Surrey House completed on November 27, 2003. Title was registered in the names of Chris as to an undivided ½ interest and Tosh and Janice, as joint tenants, as to an undivided ½ interest.

[81] The sale of the Delta House also completed on November 27, 2003. The amount due to Janice and Tosh on the sale was $252,588.85, which was disbursed as follows:

- legal fees in the amount of $428.23;
- pay out of the Bank of Nova Scotia mortgage in the amount of $129,284.72;

- payout of a Visa account with the Bank of Nova Scotia in the amount of $7,948.16;

- payout of the Royal Bank loan in the amount of $20,000 the proceeds of which had been used by Janice and Tosh to make the third progress payment on the Surrey House;

- the balance required to complete the purchase of the Surrey House in the amount of $40,858.39; and

- the balance of $54,069.35 to Janice and Tosh.

[82] On November 27, 2003, Chris, Tosh, and Janice entered into a first mortgage with the Royal Bank that was registered against title to the Surrey House. The amount advanced by the Royal Bank for that mortgage was $268,200. According to the purchasers' statement of adjustments for the Surrey House, the three progress payments, a GST rebate of $8,564.79, and the $40,858.39 contributed by Janice and Tosh from the proceeds of the sale of the Delta House made up the balance owing by the purchasers. In addition, the purchasers were required to pay property transfer tax of $5,042.33 and legal fees of $751.24. Chris and Naomi maintain that Chris contributed the funds required to pay those amounts. There is no contrary evidence. I find that Chris did so.

[83] On or about November 30, 2003, Chris, Naomi, Tosh, and Janice all moved into the Surrey House.

[84] The Surrey House is a three-level house. At the time the parties moved in, the main floor and upper floor were finished. The upper floor (1,047 square feet) comprised four bedrooms, including a master bedroom with *en suite*, and an additional bathroom. Chris and Naomi used the master bedroom. Tosh and Janice used the other upstairs bedrooms, with Tosh sleeping in one, Janice sleeping in one, and one being used by them as a TV room. The parties shared the main floor (1,274 square feet) which comprised a kitchen, living room, dining room, family room, and half bathroom. The basement (1,265 square feet) was unfinished.

[85] Janice and Tosh purchased blinds for the entire Surrey House and they paid for upgrades to the kitchen appliances for the main floor kitchen. Naomi testified that Janice told her these were housewarming gifts. I accept that evidence. In addition, Janice and Tosh brought their furniture from the Delta House with them when they moved into the Surrey House, and that furniture was used on the main and upper floors.

[86] Initially, the monthly mortgage payment on the Surrey House was $1,289.98. It has been renewed from time to time on different terms as to interest rate and duration. For example, the mortgage was renewed on October 29, 2004 for a 12-month term at 4.9% with a monthly payment of $1,535.59; on December 18, 2004 the interest rate was converted to a variable rate for a two-year term with monthly payments of $1,380.78.

[87] Again, there is no dispute that all the mortgage payments on the Surrey House have been made by Chris and Naomi. Chris and Naomi also paid the property taxes and the insurance premiums on the Surrey House each year. Janice and Tosh claimed the homeowner grant to maximize the size of the grant when they were over the age of 65. All utility accounts for services to the Surrey House, such as electricity and gas, were in either Chris's name or Naomi's name. Chris and Naomi paid the utility bills. Chris and Naomi have paid for all housing-related repairs and maintenance.

[88] There is no dispute that for a period after moving into the Surrey House, Janice and Tosh made monthly payments to Chris in the amount of $700. There is documentary evidence that I accept that indicates these payments were made each month from December 2003 to April 2005 (17 payments totalling $11,900). Chris acknowledged signing receipts for these. There is also a receipt dated January 6, 2006. Chris testified that the signature on that receipt did not look like his signature. Janice provided no reliable explanation for the gap in the payment receipts between May 2005 and December 2005, but in their final argument Chris and Naomi admitted, or at least did not contest, that the payments were made for 26 months

(December 2003 to January 2006). I find that Janice and Tosh made the payments for 26 months, for a total of $18,200.

[89] Chris and Naomi characterized the $700 payments as rent. Chris testified that he referred to them as such at the time they were made. Chris and Naomi say that before the Surrey House was purchased, it was agreed that Janice and Tosh would live there for the rest of their lives without having to contribute to the mortgage payments or any other house-related expenses, and that Chris and Naomi would fund the construction of the basement suite. However, when the purchase completed, their finances were strained and while they could meet their basic expenses they could not afford to proceed with construction of the suite. Accordingly, it was agreed that Janice and Tosh would make $700 monthly rent payments during an initial period, until Naomi finished school, got a job, and her and Chris's finances stabilized.

[90] Janice's evidence about the $700 monthly payments was confusing. At one point she said the receipts evidenced payments Chris made to her and Tosh. More often however she characterized them as contributions by her and Tosh to the mortgage.

[91] As mentioned, the receipts Chris signed for the $700 payments have the notation "mtge" handwritten on them, except the first one which has the notation "Mor". All the handwriting on the receipts is Janice's. Chris testified that those notations were not on the receipts at the time he signed them, and had they been there he would have objected because Janice and Tosh were not contributing to the mortgage payments. Most of the handwritten information on the receipts is in black ink, including the month to which the payment relates which is written on the memo line. The "mtge" notation is written in blue ink on most, if not all, of the receipts. Janice did not provide any reasonable explanation for the difference in the ink colour. The first receipt is in a different format than the others. It is typed and refers to "cash" having been received. There is a handwritten notation, "Mor", close to the

top of the page. Janice did not explain why that particular notation is handwritten while the rest of the document is typed.

[92] I accept Chris and Naomi's evidence on this point and find that, at the time, all the parties viewed the $700 monthly payments as akin to rent. This is because in general, I found Chris's and Naomi's testimony to be credible and reliable, in contrast to Janice's, which was not at all reliable. I am also satisfied that Janice added the notation "mtge" to the receipts (except the first one, to which she added the notation "Mor") after Chris signed them, which suggests that she knew Chris would have objected to that characterization of the payments. The only reason I can discern for her doing this is to bolster her position in this case.

[93] I have not overlooked the submission made by Janice's counsel to the effect that Janice's version of the $700 payments as contributions to the mortgage should be preferred because Chris did not claim all these payments as rental income on his tax returns for the relevant years, and because he was not truthful about his ability to pay the mortgage at the material time. With respect to the former point, Chris testified that he gave all the information to his accountant who prepared his tax returns and he does not know why all the rent payments were not claimed. It may well be that he under-reported the rental payments to reduce his tax liability in those years, but the fact he reported some rental income aligns more closely with his version than Janice's version on this point. The second point misstates Chris's evidence. He said that he was able to make the mortgage payments himself but he also readily acknowledged that the $700 monthly payments were intended to help him and Naomi meet all their financial obligations during this period when his business was in its infancy, she was still in school, their finances were tight, and they were supposed to be getting on with the construction of the basement suite.

[94] Chris and Naomi testified that construction of the basement suite began in late 2004 or early 2005. Janice testified construction did not start until about two years after they moved in (which would have been late 2005). The objective evidence corroborates Janice's testimony on this point. Mr. Watson placed the

commencement of construction after J's birth in July 2005, because he has a clear recollection of seeing J as a baby at the house when he was working on the suite. A receipt for tile is dated March 29, 2006 and a receipt for a mirror is dated June 24, 2006. I am satisfied by Mr. Watson's evidence and those receipts that it is more likely than not that the construction began in the late summer or fall of 2005 and finished by the summer of 2006.

[95] Chris and Naomi maintain that pursuant to the Agreement, they were to pay for the construction of the suite. They testified that they paid for the vast majority of the costs of constructing the suite. They say the total cost to them was about $65,000. They say they spent about $44,000 on cabinets and granite counters alone. Chris testified that he also paid for the electrical work, plumbing, and mudding and taping, and purchased lumber and framing supplies. He testified that he personally installed communications cable, insulation, and drywall. Mr. Cooper testified that, at Chris's request, he did the electrical work and Chris paid him in the range of between $6,000 and $7,000.

[96] Chris and Naomi acknowledge that Mr. Watson performed some of the labour, including framing, installing flooring, and much of the finishing, without charge. Chris and Naomi also concede that Janice and Tosh made some relatively minor payments for finishing items, such as some light fixtures and some tile, and that Janice and Tosh paid for the appliances for the basement. As noted, they said that initially the parties agreed that the basement would be finished to the same standard as the rest of the house, but Janice and Tosh chose finishings and appliances that were better than those upstairs, which is why Janice and Tosh ended up contributing in a minor way to the cost.

[97] Janice's counsel instead submits that Janice and Tosh paid most of the cost of constructing the suite, in addition to paying for the appliances and a custom mirror and sliding door for the shower. However, Janice gave no reliable testimony to that effect. There is no documentation to support the assertion that Janice and Tosh contributed substantially. The documentary evidence (a few receipts) indicated they

paid about $770 for some tile and sundries and $120 for a mirror. There was also some evidence, not disputed by Chris and Naomi, that they paid for a custom shower door.

[98] I accept Chris and Naomi's evidence to the effect that the Agreement contemplated Chris and Naomi funding the construction of the suite. As mentioned, the fact that Tosh became angry about the delay is more consistent with that version. I find that they paid about $65,000 to have the suite built and that Janice and Tosh paid for the appliances, some lighting and some relatively minor finishing upgrades. Although Chris and Naomi did not produce documentary evidence corroborating their claim to have spent about $65,000 on the construction, they did produce documentary evidence of Chris having financed about $10,000 of the cost on a Home Depot credit card and Mr. Cooper testified that Chris paid him for the electrical work. For the reasons already expressed, I found their testimony to be credible.

[99] Janice's counsel submitted that Chris and Naomi did not earn enough income at the material time to contribute $65,000 to the construction of the suite. I was not persuaded by that submission. They financed $10,000 on the Home Depot credit card, leaving $55,00 for them to cover immediately. Their combined income in 2005 was about $92,000 and in 2006 it was about $99,000. In addition, they received the $700 monthly payments from Janice and Tosh, for a total of $8,400 in each of 2005 and 2006. I do not have evidence of all their expenses, but their mortgage payments were only about $1,200 a month or $14,400 a year and there was no suggestion that they had any other significant debt to service. In all the circumstances, I am satisfied that it was feasible for Chris and Naomi to have contributed about $65,000 to the cost of constructing the suite.

[100] I have not overlooked the testimony of Mr. Watson. Chris testified that he went to Home Depot with Mr. Watson and Mr. Watson told him what lumber, nails, and other materials to buy. Mr. Watson said Tosh was the only person he ever went with to get material. However, he also said he was told by Janice and Tosh that

Chris was going to supply the structural material – “the two-by-fours, two-by-twos, and all the rest of it”. He testified about going with Janice and Tosh to pick up some materials, but he did not say he knew who paid for them. Accordingly, his evidence corroborates Chris’s to the extent that he agreed that Chris paid for the lumber and other structural material. Chris’s evidence and Mr. Watson’s evidence differed with respect to whether they went together to get the material, but I prefer Chris’s evidence on that point because of my concerns about Mr. Watson’s memory.

[101] After Janice and Tosh moved into the basement suite in about August of 2006, Chris and Naomi continued to pay for the gas and electricity for the entire Surrey House and they continued to make all mortgage payments and cover all other housing-related costs.

[102] Not too long after the basement suite was finished, Tosh disclosed that he had been diagnosed with cancer. According to Mr. Watson, Tosh spent about a year in palliative care and about six months in and out of hospital before that. On that evidence, I find that by late 2007 his condition was known and his health was deteriorating.

[103] On July 15, 2008, Janice and Tosh executed mirror wills. As already noted, those wills provided that on the death of the survivor, the first $60,000 of the residue of the survivor’s estate would go to Richard with the balance of the residue divided equally between Richard and Naomi. The material “hotchpot” clause in Janice’s 2008 will reads as follows:

> *Advance on Inheritance*
>
> (d) My husband and I have assisted our daughter, Naomi Bernice Elizabeth Jesson and her husband, Christopher William Jesson with the purchase of a house in their name and ours, and with additional monies that we have provided since the purchase of that house. My husband and I estimate that Naomi has benefited by at least $60,000 as a result. I therefore direct my Trustee to take the amount of $60,000 into account by way of hotchpot, so as to treat this amount as an advance on our daughter Naomi’s inheritance under my Will in determining the division of the residue of my estate between my children…

[104] Tosh’s 2008 will contained the same hotchpot clause.

[105] On Tosh's death on July 1, 2009, his and Janice's 50 percent joint interest in the Surrey House passed to Janice pursuant to the right of survivorship. No change was made to the title until 2017. On September 8, 2017, Janice caused documents to be filed in the Land Title Office to remove Tosh from title to the Surrey House. Chris and Naomi did not know that Janice had taken this step until after this action was commenced.

[106] On September 21, 2017, Janice executed a new will giving the first $60,000 of her estate to Richard, with the remainder divided equally between Richard and Naomi. She also signed a declaration on September 21, 2017, explaining why Richard was to receive the first $60,000. Chris and Naomi did not know that Janice had done this until after this action was commenced.

[107] In the 2008 wills, the stated rationale for giving Richard the first $60,000 of the residue of the estate, is the assistance provided to Naomi and Chris "with the purchase of a house in their name and ours, and with additional monies that we have provided since the purchase of that house". The 2017 declaration expressly characterizes Janice's estate as including her "interest" in the Surrey House (i.e., clearly asserts that she has a beneficial interest) and the rationale for giving Richard the first $60,000 of the residue of the estate is stated in the 2017 declaration to be "to recognize the benefits that [Naomi and Chris] have received during my lifetime". Those benefits are identified in the 2017 declaration as including:

- unequal contributions to the down payment on the Surrey House, with Janice and Tosh contributing $60,000 and Chris and Naomi contributing only $30,000;

- unequal contributions to the cost of constructing the basement suite, with Janice and Tosh contributing $44,700 and Naomi and Chris contributing only $10,000;

- the purchase of a new fridge, stove, and blinds for Chris and Naomi, and the purchase of appliances and finishings for the suite;

- the $700 monthly payments made between 2003 and 2006, which were stated to total $14,700;
- the purchase of the vast amount of groceries for the household from the time they moved in until about 2007;
- assistance with monthly bill payments;
- the gift of a newer model Volkswagen automobile;
- payments on Naomi's car loan years earlier, well before the Surrey House was purchased;
- free child care and the provision of food for J and E; and
- the unauthorised use by Naomi of Janice's debit card, totalling approximately $1,100.

The declaration goes on to provide that "[b]y contrast I have not provided any financial help to my son …".

[108] In the summer of 2019, Janice travelled to Alberta to visit Richard. On August 19, 2019, she returned to the Surrey House with Richard and Susan to remove her belongings from the Surrey House and take them back to Alberta. Janice has resided in Alberta with Richard and Susan since then.

[109] Chris and Naomi testified that Janice's decision to move out of the Surrey House in August 2019 came as a surprise to them. Naomi testified that Janice seemed to become distant while she was visiting Richard earlier in the summer of 2019. Naomi said that she had not spoken to Janice for some weeks and she was getting concerned, but she and Chris were unaware that Janice intend to move out until Chris received the text from Janice on the morning of August 19, 2019, advising that she was moving out that day and demanding that she be bought out of the Surrey House. Richard acknowledged that he actually wrote that text. The text indicates it was sent at 9:26 am on August 19, 2019. It reads:

> Hi Chris, just wanted I [sic] let you know I'm moving out today. You need to buy me out, or sell the house, so I can have my 50%. I would like to do this amicably. I have been to a lawyer and I have been explained my steps and rights.

[110] Chris testified he was shocked when he received the text. He was at work at the time. He sent a copy to Naomi and he phoned her. He also phoned Janice but she did not want to talk and she handed the phone to Richard. He did not recall much about his conversation with Richard.

[111] Naomi was at work when she learned about the text. She phoned Janice but got no answer. Naomi sent Janice a text message saying they needed to talk but got no response. Naomi then left work and drove home. When she got there, there was a U-Haul truck in the rear alley, and Janice, Richard, and Susan were in the basement suite packing up Janice's things. She said she was upset and questioned Janice about the text that had been sent to Chris, but Richard interrupted and told her to speak to a lawyer.

[112] On September 23, 2019, Janice's lawyer sent a letter to Chris and Naomi proposing a buyout of Janice's interest in the Surrey House and seeking to have the Surrey House appraised for buyout purposes. Chris and Naomi then commenced this proceeding on October 30, 2019.

[113] The Surrey House was appraised at $1,725,000 as at April 9, 2022. The appraiser expressed the view that the basement suite had a contributory value of approximately $85,000. From the documentary evidence, it is possible to determine that as of the end of December 2020, the mortgage balance was $110,261.33. Assuming Chris and Naomi have continued to make mortgage payments in about the same amount as they were paying up to December 2020, and using the April 2022 appraisal, between $1.6 and $1.7 million is a fair estimate of the current equity in the Surrey House.

The parties' respective contributions to the acquisition and maintenance of the Surrey House to August 19, 2019

[114] I have already made findings in the preceding background section of these reasons about the parties' respective contributions to the acquisition and maintenance of the Surrey House up to August 19, 2019, when Janice moved out. To summarize, up to August 19, 2019, Chris and Naomi contributed:

- $40,000 to the down payment;
- formal liability on Chris's part for the mortgage;
- closing costs of $5,793.57 (property purchase tax of $5,042.33 and legal fees of $751.24);
- $65,000 towards the construction of the basement suite; and
- all mortgage payments (a total of approximately $213,000 in principal plus interest), property taxes (about $3,200 a year, for a total of about $48,000), insurance premiums; utility payments, and the cost of all routine repairs from 2003.

[115] Up to August 19, 2019, Janice and Tosh contributed:

- $60,858.39 to the down payment;
- formal liability for the mortgage;
- blinds for the entire house;
- the cost of upgraded appliances for the main floor;
- $700 per month rent payments for the first 26 months for a total of $18,200;
- appliances, some lighting, and some relatively minor finishings (worth about $1,000) for the suite; and

- use of their homeowner's grant (initially $470 per year, which later increased to $570 per year).

Janice's contributions of child care, groceries, and home-making services

[116] As mentioned, while living in the basement suite, Janice assisted Chris and Naomi with child care, and she purchased groceries and assisted with cooking for the children. The extent to which she did those things is in dispute.

[117] Chris and Naomi denied that Janice ever provided regular, extensive child care. They said that Janice did occasionally babysit and, from about 2015, she sometimes drove the children to their after-school activities. Naomi testified that she seemed to enjoy doing that. As discussed, the daycare receipts Chris and Naomi produced were consistent with that evidence. Chris acknowledged that J and E were relatively young when they started walking home from school on their own in 2015. He acknowledged that Janice's presence in the home was a factor that contributed to the decision to allow the children to do that. They acknowledged that at times the family consumed groceries bought by Janice and she did sometimes cook meals, but that this was mutual, as one would expect given their living arrangements.

[118] Janice's testimony on these matters was vague. As explained, her testimony is not reliable. Nicole testified that she was present on occasions when Janice picked up J and E from school and drove them to activities and she saw Janice feed the children from time to time, but her testimony about what she observed did not materially depart from Chris and Naomi's evidence on this point. Nicole also testified that on one occasion she overheard Naomi on the phone with Janice, and Naomi was upset because Janice said she could not pick the children up from an activity that day. I accept that evidence, but without context it is meaningless. If, for example, this was a last-minute cancellation of a previous commitment that left Naomi without child care coverage, it might be reasonable for her to have reacted negatively.

[119] For the reasons already discussed, I generally accept Naomi's and Chris's testimony as credible and reliable. I find that Janice did not provide regular, extensive child care for J and E. I find that she did occasionally babysit and, from about 2015, she sometimes drove the children to their after-school activities. I also find that from 2015, her presence in the home made it possible for Chris and Naomi to allow J and E to walk home after school, but after about 2017, when J and E were 12 and 10 respectively, Janice's presence would likely not have been necessary.

[120] I also find that while Janice did purchase groceries for the household and cook for the children from time to time, these contributions were to some extent mutual, and in any event did not exceed what would normally and reasonably be expected from the family relationship and the living situation. As Janice was not working and had more free time, it is likely Janice did this more often than the reverse, but I am not persuaded that any inequality in this regard was material.

The agreement concerning the acquisition of Surrey House

[121] I accept Naomi and Chris's evidence about the events that ultimately led to the Agreement. There is no reliable contrary evidence.

[122] Naomi and Chris's evidence, which I accept, was that in early 2003, Naomi and Chris were casually looking at housing developments. They were not serious about buying a house at the time – this was a pastime for them. They came across the development in which the Surrey House was ultimately built and they liked it. Naomi told Janice about the development, they went to look at it, and Janice also liked it. Later Naomi, Chris, Janice, and Tosh all went to look at the development. Tosh said something to the effect of "if you buy one of the bigger homes, we will rent off you". This led to further discussions over the next couple of weeks, during which Janice and Tosh said they were considering selling the Delta Home to extract the equity and pay off their debts in anticipation of Tosh retiring.

[123] It is not disputed that eventually, Naomi, Chris, Janice and Tosh selected a corner lot and plan, and as described above, they agreed that the Surrey House would be purchased on terms that included:

- Janice and Tosh would sell the Delta House;
- Chris, Janice, and Tosh would contribute to the down payment on the Surrey House;
- the balance of the purchase price would be financed with a mortgage;
- Chris and Naomi would make all the mortgage payments and all other housing-related expenses;
- Chris, Janice, and Tosh would all become registered owners of the Surrey House;
- Naomi would not go on title because of a concern that owning real property might jeopardize her eligibility for a scholarship she was receiving;
- the purchase of the Surrey House would complete with the basement unfinished, but the suite would then be built in a timely manner;
- the parties would live together on the main and upper floors of the house until the basement suite was finished; and
- once the basement suite was finished, Janice and Tosh would reside in it for the rest of their lives without any obligation to pay rent or contribute to the mortgage or any other housing related expense.

[124] The following terms of the Agreement, as it was initially contemplated, are in dispute to some extent:

- the amount that each couple was to contribute to the down payment;
- whether Janice and Tosh were to assume liability under the mortgage;
- who would be responsible for funding the construction of the basement suite;

- whether Janice and Tosh would pay rent for an initial period; and
- whether Janice and Tosh would have a beneficial interest or, instead, whether they would hold their interest in trust for Naomi.

I will address each in turn.

[125] I have already found that Naomi and Chris contributed $40,000 to the down payment (plus the closing costs) and Janice and Tosh contributed $60,858.39 to the down payment. Janice, Richard, and Susan all gave evidence to the effect that Tosh was unhappy about the fact that the title did not reflect his and Janice's greater contribution to the down payment. I have concluded that the notion that Janice and Tosh would receive a 60 percent beneficial interest and the right to live in the house for life in exchange for a 16.5 percent contribution to the purchase price is highly improbable, if not absurd. However, I accept that at times Tosh expressed displeasure about the inequality in the parties' respective contributions to the down payment. Naomi testified that she and Chris knew they would have about $40,000 to contribute to the down payment and it was agreed that Janice and Tosh would meet that or contribute more, depending on how much money they realized from the sale of the Delta House. Chris testified that he had about $50,000 available, but some of that would have to be used for closing costs. The initial mortgage commitment letter indicates that Chris applied for a mortgage of $268,200, which means that a down payment of about $100,000 was contemplated from the outset.

[126] On all that evidence, I find on a balance of probabilities that it was initially agreed that each couple would contribute $50,000 to the down payment, but as the closing date approached Chris realized that he would not have enough funds to contribute that amount and also cover the closing costs. Janice and Tosh had access to more than $50,000 from the proceeds of the sale of the Delta House. I find that at some point prior to completion of the purchase of the Surrey House, Janice and Tosh, somewhat reluctantly, agreed to make up the difference.

[127] There is no dispute that Chris initially sought mortgage financing on his own and there is no dispute that eventually Chris, Janice, and Tosh all assumed liability for the mortgage. Whether the reason for that change was Chris's ultimate inability to qualify (as suggested by Janice's counsel) or a bank requirement flowing from Janice and Tosh being on title is, in my view, immaterial. I find on a balance of probabilities that it was initially agreed that Chris, alone, would assume liability for the mortgage loan but that as events unfolded it was necessary, for one reason or the other, for Janice and Tosh to also assume liability.

[128] I have already found that Chris and Naomi contributed $65,000 to the costs associated with constructing the basement suite, and that Janice's contribution, while not quantified in the record, was substantially less. Chris and Naomi testified that pursuant to the Agreement as initially framed, they were to cover all the costs of constructing the suite, but they said that it was contemplated that the suite would be finished to the same standard as the rest of the house. They said that Janice and Tosh later agreed to pay for some items because they selected superior finishings.

[129] I accept Chris and Naomi's evidence on this point. Again, I found their testimony to be generally credible and reliable, and their version is consistent with the undisputed evidence that Tosh became angry about the delay in commencing construction. If Janice and Tosh were responsible for paying for half the construction costs, they could have commenced construction soon after the purchase of the Surrey House completed.

[130] As I have explained, there is no doubt that Janice and Tosh made monthly payments, akin to rent, for the first 26 months. Janice's position about whether the initial Agreement contemplated those payments being made was not entirely clear. I accept that in the initial discussion Tosh said something to the effect of "if you buy one of the bigger homes, we will rent off you". As already discussed, Chris and Naomi say that before the Surrey House was purchased, it was agreed that Janice and Tosh would live in the basement suit for the rest of their lives without having to contribute to the mortgage or any other house-related expenses, but that when the

purchase completed, Chris and Naomi could not afford to cover all their expenses and also proceed with construction of the suite. Accordingly, it was agreed that Janice and Tosh would make monthly rent payments of $700 during an initial period.

[131] I accept Chris and Naomi's evidence on this point as well. While there was some imprecision in their evidence about exactly how the rent discussions evolved, I attribute this to the fact that the evolution occurred over time and several conversations, and their memories about the details have faded. I find that the initial concept, raised by Tosh, was that Chris and Naomi would buy a bigger house to accommodate both couples and he and Janice would simply rent part of the house. This would allow Janice and Tosh to extract the equity they had in the Delta House and pay off their debts in anticipation of Tosh retiring. As it became apparent that Chris and Naomi did not have sufficient funds for a down payment on a bigger house, the discussions evolved and the plan changed to Janice and Tosh contributing to the down payment, but then not having to pay ongoing rent. As it then became apparent that Chris and Naomi's finances would not permit them to cover all their living expenses and also fund the construction of the basement suite, the agreement changed again, and it was then agreed that Janice and Tosh would make monthly rent payments during an initial period until Chris and Naomi's finances stabilized.

[132] This brings me to the fundamental question of whether the Agreement contemplated Janice and Tosh having a 50 percent beneficial interest in the Surrey House or, instead, whether it was agreed that they would hold their interest in trust for Naomi.

[133] As already discussed, I cannot rely on Janice's inconsistent evidence about the nature of her and Tosh's contribution to the down payment on the Surrey House. Chris and Naomi's evidence was that Janice and Tosh's contribution to the down payment was characterised by them as an advance on her inheritance. Naomi testified that it was agreed that Janice's and Tosh's names would go on title to protect her interest in the property while not jeopardising her scholarship, and that

placing legal title in Chris's name alone was problematic because she and Chris were not married. Chris's evidence on this point was consistent. Naomi testified that each of her parents told her that the Surrey House was her house, even though they were on title.

[134] I accept Chris and Naomi's evidence on this point as well, for the following reasons:

- I found their testimony to be credible and reliable.
- There is no contrary reliable evidence.
- Although Janice's evidence was inconsistent and confused, she did agree that the fact that Naomi and Chris were not married was a concern that was relevant to the manner in which title was held. Richard agreed that he too had a concern about Naomi and Chris not being married. These concerns provide an explanation for Naomi, Tosh, and Janice not wanting Chris to be alone on title.
- Chris and Naomi's version is consistent with the probabilities which an informed person would recognize as reasonable in the circumstances that existed at the time the Agreement was formed, while the version propounded by Janice's counsel is not. I have made findings about each couple's ultimate contribution to the acquisition and maintenance of the Surrey House, and the contributions that were contemplated when the Agreement was made. Chris and Naomi's contribution vastly exceeded Janice and Tosh's contribution, and the disparity would have been greater had the Agreement unfolded as initially contemplated. The notion that Chris and Naomi would have agreed to Janice and Tosh receiving a 50 percent beneficial interest and the right to live in the Surrey House for life in exchange for a vastly unequal contribution to the cost of its acquisition and maintenance is highly improbable. In contrast, the notion that Janice and Tosh would agree to make an upfront payment of $50,000 in exchange for the right to occupy a newly constructed, spacious suite for

> the rest of their lives but without acquiring any beneficial interest, is objectively reasonable and, given Tosh's impending retirement, probable. Even if the arrangement as it ultimately unfolded had been agreed to from the outset (Janice and Tosh contributing $60,858 upfront, assuming formal liability for the mortgage, paying $700 a month for the first 26 months, and covering a relatively small portion of the costs of building the basement suite) it would have been objectively reasonable for Janice and Tosh to proceed without acquiring a beneficial interest given their right to occupy the suite for the rest of their lives without further financial contribution or ongoing housing expenses.

[135] I have carefully considered what, if any, inferences I could draw about the parties' intentions at the time the Agreement was formed from the 2008 wills, and Janice's 2017 will and declaration. Having done so, I have concluded that it would not be safe to draw any inferences from these documents except, as discussed, the inference that the changes were made in 2017 for the primary purpose of bolstering Janice's case. In addition to the fact that these documents were created long after the Agreement was formed and by interested parties, below is a non-exhaustive discussion of the difficulties that emerge from these documents.

[136] On all the evidence, it appears that Tosh initiated the making of the 2008 wills. It is impossible to discern what he meant when he arranged for those wills to state that he and Janice had "assisted" Naomi and Chris "with the purchase of a house in their name and ours, and with additional monies that we have provided since the purchase of that house", and that he estimated that "Naomi has benefited by at least $60,000 as a result". Janice provided no useful evidence about this.

[137] If Tosh and Janice had a 50 percent interest in the Surrey House, why would Tosh characterize his and Janice's contributions as "assistance" to Naomi and Chris? The reference to the house being in "their name and ours" is ambiguous. If Tosh and Janice had a 50 percent beneficial interest, it is more likely that the 2008 will would contain something more definitive about the nature of this interest. What

monies, in particular, was he referring to when he quantified the benefit to Naomi as "at least $60,000"? If he was including the $60,000 contribution to the down payment, that would only be a "benefit" to Naomi if he and Janice did not acquire a beneficial interest in exchange and, even then, it is hard to view the $60,000 as a benefit considering the right he and Janice acquired to live in the suite for the rest of their days. If Tosh was not including the contribution to the down payment, it is difficult if not impossible to come up with some alternate explanation for the claim that Naomi received a total of $60,000 in benefits since the purchase of the Surrey House.

[138] Although the 2017 declaration seems to more precisely account for the alleged $60,000 in benefits to Naomi, it too leaves many questions unanswered. On what basis has the $60,000 benefit changed from having been provided to Naomi in relation to the purchase of the Surrey House and "since the purchase of that house", as stated in the 2008 wills, to having been provided during Janice's lifetime, including before the house was purchased? The $60,000 presumably does not include the $15,000 excess contribution to the down payment on the facts set out in para. 2 of the 2017 declaration; the $17,350 excess contribution to the renovation costs on the facts set out in para. 4; or the appliances and blinds referred to in para. 5, because in para. 6, it states that Chris and Naomi covered the mortgage payments and other housing expenses in exchange for those contributions. That leaves the $700 monthly payments (said to total $14,700 in para. 7 of the declaration); some groceries; some unquantified bill payments; a used automobile; some car payments; and the minor charges referred to in para. 13 of the declaration. It is difficult to accept that those items would add up to $60,000.

[139] For these reasons, my findings about the disputed terms of the Agreement as set out above do not reflect any consideration of the 2008 wills or the 2017 will and declaration.

Legal Analysis

Have Chris and Naomi rebutted the statutory presumption created by s. 23(2) of the *Land Title Act?*

[140] Section 23(2) of the *Land Title Act* creates a statutory presumption that persons registered on title to property hold the legal and beneficial interest. It provides that an indefeasible title is "conclusive evidence at law and in equity … that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title …". The burden is on the party seeking to challenge the state of title, in this case Naomi and Chris, to prove otherwise.

[141] In *Suen v. Suen*, 2013 BCCA 313 at para. 34, the Court of Appeal reiterated that there are three considerations for determining whether the s. 23(2) presumption has been rebutted:

> (i) the operation of a resulting trust which may be inferred where no value is given for a legal interest;
>
> (ii) the operation of an agreement between the parties that is contrary to the registered title; or
>
> (iii) taking into account the underlying equitable interests between the parties (e.g. considerations that arise in claims for unjust enrichment).

[142] The first question is whether Naomi and Chris have established the conditions for inferring the existence of a resulting trust. In my view, they have not.

[143] The presumption of resulting trust is engaged "when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it …": *Pecore v. Pecore*, 2007 SCC at para. 20.

[144] It cannot be said that Tosh and Janice gave no value for their legal interest in the Surrey House for two reasons. First, I am not persuaded that the $60,858 that Tosh and Janice contributed to the down payment is properly characterized as a "gift" to Naomi. A gift is "a gratuitous transfer of property in which the donor retained no interest and expected no remuneration": *V.J.F. v. S.K.W.*, 2016 BCCA 186 at

para. 49. As I have explained, although I accept that the contribution was referred to by Tosh and/or Janice as an advance on Naomi's inheritance, Janice and Tosh did expect remuneration; specifically, in exchange for providing Naomi with an advance on her inheritance in the form of a contribution to the down payment, Janice and Tosh expected to acquire the right to reside in the Surrey House for life without further consideration. Notably, in 2003, Janice was 61 years old and Tosh was 64. The right to live in the Surrey House for life without further financial contribution had significant value.

[145] Second, even if the $60,858 contribution to the down payment was a gift, Tosh and Janice made another contribution of value. By assuming liability for the mortgage, they pledged their credit and took on substantial debt. It makes no difference whether they did this because Chris did not qualify for the mortgage on his own or because the parties decided that Tosh and Janice should be on title to protect Naomi's interest, which caused the bank to require Tosh and Janice to assume liability for the mortgage. In either case, by assuming liability for the mortgage Janice and Tosh made it possible for Chris and Naomi to buy the property and in doing so they exposed themselves to the risk of having to make the mortgage payments or reimburse a shortfall if there was a default. Even without having made any of the mortgage payments, this is a contribution sufficient to preclude a finding of resulting trust: *Bajwa v. Pannu*, 2007 BCCA 260 at paras. 13–16; *Aujla v. Kaila*, 2010 BCSC 1739 at paras. 37–41, aff'd 2013 BCCA 158; *Jafar-Gholizadeh v. Larijani*, 2018 BCSC 279 at para. 133.

[146] Despite Naomi and Chris's failure to establish a resulting trust, it remains open to them to rebut the s. 23(2) presumption by establishing that it was the parties' agreement or intention at the time the Surrey House was purchased that Janice and Tosh would not acquire a beneficial interest: *Jafar-Gholizadeh* at paras. 134–141. In *Kang v. Brar*, 2009 BCSC 672 at para. 38, Justice Bernard explained that "if the evidence establishes that there was an agreement between the parties which is contrary to the interest shown on the title, then the court may enforce the agreement through the law of trusts".

[147] For the reasons I have already expressed in the section headed “The agreement concerning the acquisition of Surrey House”, I conclude that it was the intention of all the parties (Chris, Naomi, Janice, and Tosh) that Janice and Tosh would not have a beneficial interest in the Surrey House and, instead, they would hold their interest in trust for Naomi. It follows that I find that Janice holds her undivided ½ interest in the Surrey House in trust for Naomi. Chris and Naomi have rebutted the s. 23(2) presumption.

Unjust enrichment

[148] Having found that Chris and Naomi rebutted the s. 23(2) presumption, the question remains as to the legal consequences that flow from the contributions I have found that Janice and Tosh did make.

[149] The requirements to establish unjust enrichment are well-known: an enrichment of one party; a corresponding deprivation of the other party; and an absence of juristic reason for the enrichment: *Garland v. Consumers’ Gas Co*., 2004 SCC 25 at para. 30.

[150] The first two elements of the framework contemplate a “straightforward economic approach”, thus requiring a value neutral determination based on evidence of the services or benefits conferred by the one party upon the other: *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 990, 1993 CanLII 126 (SCC).

[151] 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 v. Baranow*, 2011 SCC 10 at para. 40. This element is considered under two stages, and calls for a measure of judgment in which the various interests at stake must be considered: *Peter* at 990–91. Under the first stage, the party claiming unjust enrichment has the burden of showing that no juristic reason from an established category exists to deny recovery. The established categories are a contract; a disposition of law; a donative intent; and other valid common law, equitable, or statutory obligations: *Kerr* at para. 43.

[152] In *Garland,* the Court applied the established categories at the first stage and then proceeded to the second stage, where the onus shifts to the other party to rebut any *prima facie* case of unjust enrichment by showing another reason to deny recovery and showing why the enrichment should be retained, having regard for the reasonable expectation of the parties and other public policy considerations.

[153] However, in *Kerr*, Cromwell J. writing for the Court stated that:

> [44] … if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties… and moral and policy-based arguments about whether particular enrichments are unjust (*Peter*, at p. 990). For example, in *Peter*, it was at this stage that the Court considered and rejected the argument that the provision of domestic and childcare services should not give rise to equitable claims against the other spouse in a marital or quasi-marital relationship (pp. 993-95). Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (*Peter*, at p. 990).

[154] Accordingly, the reasonable expectations of the parties may be considered as supporting an unjust enrichment claim or rebutting a *prima facie* unjust enrichment claim.

[155] If the right to claim relief for unjust enrichment is made out, it is necessary to determine the appropriate remedy. The first remedy to be considered is a monetary award, but where monetary damages are inadequate and where there is a link between the contribution that founds the action and particular property, the remedy of constructive trust in relation to that property arise: *Peter* at 987–988; *Harraway v. Harraway*, 2009 BCCA 561 at para. 52.

[156] Before addressing Janice's direct contributions to the Surrey House, I will deal with the child care and other domestic services she provided. Again, I found that she occasionally babysat J and E; from about 2015, she sometimes drove them to their after-school activities; and from 2015, her presence in the home made it possible for Chris and Naomi to allow the children to walk home after school, but after about 2017, Janice's presence would likely not have been necessary. I also found that while Janice occasionally purchased groceries for the household and cooked for the children, these contributions were to some extent mutual, and did not

exceed what would normally and reasonably be expected from the family relationship and the living situation. I accept Naomi's evidence to the effect that Janice never expressed any expectation of compensation for these services and she appeared to enjoy providing them.

[157] I have no difficulty concluding that the first two elements of the unjust enrichment analysis are met in relation to Janice's babysitting and other domestic services. Applying the value neutral approach, those services represent an enrichment to Chris and Naomi and a detriment to Janice. The nature of these services and the fact that they were bestowed voluntarily, without expectation of compensation, and as a result of natural love and affection are relevant considerations when assessing whether there is an absence of juristic reason: *Peter* at 989–990.

[158] While it is clear that domestic services can give rise to equitable claims, I am not satisfied that in this case the absence of juristic reason component has been satisfied in relation to the babysitting and domestic services. In all the circumstances, which include the familial relationship, the fact that the services were provided on an occasional as opposed to regular basis, the fact that to some (albeit limited) extent the services were mutual, and the absence of any expectation of compensation on Janice's part, I am satisfied that Janice provided the child care and domestic services with a donative intent. Even if that was not strictly speaking the case, I find that the reasonable expectations of the parties, given all the circumstances mentioned, were that there would be no compensation or obligation arising from these services and this provides a juristic reason for the enrichment.

[159] I turn now to Janice's direct contributions to the Surrey House, which I have found consisted of:

- the $60,858 contribution to the down payment;
- formal liability for the mortgage;
- blinds for the entire house;

- the cost of upgraded appliances for the main floor;
- $700 per month rent payments for the first 26 months, for a total of $18,200;
- appliances, some lighting, and some relatively minor finishing (worth about $1,000) for the suite;
- and use of her homeowner's grant (initially $470 per year, which later increased to $570 per year).

[160] I have found that the blinds and the appliance upgrades for the main floor of the house were housewarming gifts. Assuming the first two elements of the test were met, any claim for unjust enrichment in relation to these enrichments fails because Janice's donative intent provides a juristic reason for these enrichments: *Kerr* at para. 43.

[161] The first two elements of the test are met in relation to the other direct contributions made by Janice to the Surrey House:

- the contribution to the down payment;
- formal liability for the mortgage;
- the $700 per month rent payments for the first 26 months;
- relatively minor contributions to the cost of building the basement suite;
- and use of her homeowner's grant.

[162] Applying the value neutral approach, these contributions represent an enrichment to Chris and Naomi and a detriment to Janice. As is typical, the difficulty arises at the third stage.

[163] In my view, the Agreement, as initially conceived and later expanded, falls within an established category of juristic reason for these enrichments. Alternatively, if the Agreement, the enforceability of which remains open to question, does not fall

strictly within the “contract” category, any *prima facie* case of unjust enrichment would still be rebutted given that the parties reasonably expected that Janice would live out her days in the basement suite without further financial obligation in exchange for these enrichments. However, this is the nub of the problem because Janice moved out of the basement suite in 2019.

[164] The evidentiary record does not establish that Chris and Naomi made life intolerable for Janice such that she had no choice but to move out. However, the juristic reason stage of the analysis is “flexible” and the relevant factors to consider will depend on the situation before the court. Given the unusual nature of the Agreement, I am satisfied that the parties reasonably expected that some adjustment or compensation would be due to Janice and Tosh if, for whatever reason, they decided to move out of the basement suite leaving it available to Chris and Naomi. For this reason, I am satisfied that there is no juristic reason for Chris and Naomi’s ongoing enrichment that has arisen since Janice moved out.

[165] The final step is to determine the appropriate remedy.

[166] The ongoing enrichment of Chris and Naomi consists of the availability of the basement suite, which they can now use themselves or rent to a tenant, for the rest of Janice’s life. In my view, that benefit is most accurately quantified by determining the rent the suite would be expected to generate during the period from August 19, 2019 to the expected end of Janie’s life, determined by the average life expectancy of British Columbia females. However, I am not able to make those determinations on the evidentiary record. If the parties cannot agree on the expected market rent, or Janice’s life expectancy, further process as described below will be required.

[167] Given the equity in the Surrey House, Chris and Naomi’s current incomes, and Janice’s advanced age, I am satisfied that no matter what the evidence turns out to be on the expected market rent of the suite and on Janice’s life expectancy, a monetary judgment is adequate.

Conclusion

[168] I declare that Janice holds her undivided ½ interest in the Surrey House in trust for Naomi. I order that Janice's interest vest in Naomi. If further technical orders are required by the Land Title Office to give effect to this order, the plaintiffs may apply.

[169] Chris and Naomi shall pay Janice the sum of money that is equal to the present value of market rent for the suite for the period from August 19, 2019 to the expected end of Janice's life, determined by the average life expectancy of British Columbia females. If the parties are unable to agree on what that sum is, they may contact Supreme Court Scheduling to arrange a case management conference before me to settle the process for tendering the evidence required for me to make the determination.

[170] The parties have leave to make submissions on costs, provided that, by September 29, 2023, they contact the registry to arrange a date for those submissions to be made. If they do not do so by that date then each party shall bear their own costs, as success has been divided.

"The Honourable Justice Warren"