

CANADA / JUDGMENT

Cooke v. Gacina

2020 BCSC 694

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Supreme Court of British Columbia

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2020 BCSC 694 Cooke v. Gacina

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cooke v. Gacina,

2020 BCSC 694

Date: 20200505

Docket: E046000

Registry: New Westminster

Between:

Gary Cooke, Litigation Representative for the

Estate of John William Cooke, Deceased

Claimant

And

Theresa Gacina, Litigation Representative for the

Estate of Elizabeth Rose Savage, Deceased

Respondent

- and -

Docket: S191814

Registry: New Westminster

Between:

Theresa Gacina

Plaintiff

And

Gary Cooke, personally and as Litigation Representative

for the Estate of John William Cooke, Deceased, and Lorne Cooke

Defendants

- and -

Docket: S190857

Registry: New Westminster

Between:

Gary Cooke, Litigation Representative

for the Estate of John William Cooke, Deceased

Plaintiff

And

Theresa Gacina and Theresa Gacina, Litigation Representative for

the Estate of Elizabeth Rose Savage, Deceased

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for Gary Cooke:

K. Johnson

Counsel for Theresa Gacina:

D. Manson

Place and Date of Trial:

New Westminster, B.C.

December 9-12, 2019

December 16, 2019

Vancouver, B.C.

January 29-30, 2020

Place and Date of Judgment:

New Westminster, B.C.

May 5, 2020

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I. INTRODUCTION

- [1] The issues in this case concern the disposition of a home in which an elderly couple, now both deceased, lived for many years. The trial consisted of three actions. At issue in all three actions was the ownership of that home (located on Patricia Avenue, Coquitlam, which I will refer to as the "PA House"), and whether any portion of it has passed into the estate of either deceased spouse. The primary parties are the litigation representatives, who are both children of the deceased. The issues raised at trial included questions about family law, trust law and property law.

II. FACTS

A. The Parties and Their Families

- [2] The elderly couple who lived in the PA House were John Cooke and Elizabeth Savage, both now deceased. They were common law spouses.
- [3] John Cooke had three sons with his first wife (Agnes Cooke), only two of whom are still living: Gary Cooke and Lorne Cooke. Agnes Cooke died in 1969. Her and John Cooke's son, Murray Cooke, died in 2013.

- [4] John Cooke married a second time, to Mary Cooke (nee Kilby). Mary Cooke divorced her first husband (John Kilby) when their five children were very young. John Cooke became step-father to Mary Cooke's five children, one of whom testified at trial (Cheryl Beaton). Mary Cooke passed away in March 1990.
- [5] Mary Cooke and Elizabeth Savage were sisters. Around 1992, Elizabeth Savage and John Cooke became common law spouses. There are no children as a result of that relationship.
- [6] Elizabeth Savage had three children with her first husband, William Savage: Theresa Gacina, Scott Savage and Michael Savage (all of whom testified). Elizabeth and William Savage separated in 1986 and later divorced.
- [7] To avoid confusion, I will refer to John Cooke, his first wife Mary Cooke, John's children, Mary Cooke's children, and Elizabeth Savage and her children by their first names. I intend no disrespect by doing so.
- [8] Elizabeth died on August 7, 2014; she was 81 years old. John died on January 31, 2016; he was 93 years old.
- [9] Gary is the litigation representative of John's estate, and Theresa is the litigation representative of Elizabeth's estate.

B. Agreed Statement of Facts

- [10] The Court is grateful to the parties for coming to an agreement about a substantial number of facts, some of which are summarized below.
1. Background

[11] John was born April 9, 1922, and Elizabeth was born July 3, 1933.

[12] John and Mary lived together in a house on 59th Avenue in Vancouver (the "59A House"). They owned that house together as joint tenants. After Mary's death, John became the sole owner of the 59A House.

[13] In 1992, Elizabeth moved into the 59A House to live with John. She and John lived together in a marriage-like relationship.

[14] In late 1995, Elizabeth purchased the PA House. The closing date for the purchase was in November 1995, and she moved into the PA House shortly thereafter. She was the sole registered owner. At that time, John was still living in the 59A House.

[15] In March 1996, John sold the 59A House and moved into the PA House, to live with Elizabeth.

[16] In late February 2014, Elizabeth was hospitalized because of complications with her cancer. About four days later, John moved into an assisted living facility (Hawthorne House). They did not cohabitate after that.
 2. John's Financial Affairs

- [17] John had one bank account with Vancouver City Savings Credit Union from 1992 onwards (the "Vancity Account"). He earned benefits from five different pensions. His pension income and savings were deposited into the Vancity Account. However, most of his money was invested in term deposits. He used money from the Vancity Account to pay for his living expenses.
- [18] In the summer of 1992, John purchased a bare lot in Nanaimo. He cashed a term deposit to do so. He sold that property in September 1994 for \$102,500 and deposited the net sale proceeds into the Vancity Account.
- [19] In March 1996, John sold the 59A House for \$310,000. The sale proceeds were deposited into the Vancity Account. He moved in with Elizabeth to live with her in the PA House.
- [20] Over the period from 2000 to 2012, John made a number of cash withdrawals from the Vancity Account totalling approximately \$147,750.
- [21] John made a number of cash gifts to his children and step-children between 1991 and 2001, including the following: Gary received \$13,100, Lorne received \$12,800, and Murray received \$12,500. John's step-children collectively received \$136,500, of which Cheryl received \$26,000.
- [22] In addition, in 2001 John's term deposits had grown to \$260,000 and he distributed \$60,000 to each of Lorne, Gary and Murray, retaining the balance of \$80,000.
- [23] From May 1997 until February 2014, John paid \$800 per month to Elizabeth. The total amount paid over those years was \$156,400.
- [24] Over the course of their relationship, John also paid just over \$49,000 for vacations he took with Elizabeth.
- [25] On July 14, 2014, Gary (by that time, a joint account holder of the Vancity Account), transferred \$234,000 from that account to an account only in his name. Later, Gary named Lorne as a joint account holder of his account, and on February 19, 2016 (after John's death), they each withdrew \$100,000 from the joint account.

3. Elizabeth's Financial Affairs

- [26] Elizabeth paid \$249,900 for the PA House. She paid a deposit of \$15,000 and took out a mortgage of \$130,000. The balance of the purchase price came from the proceeds of sale of the house in which she previously lived with her first husband (the agreed facts state this figure was \$109,658.39). The PA House was registered in her name only. Over the years, Elizabeth paid the property taxes, insurance costs, mortgage payments and utility expenses.
- [27] John loaned \$22,000 to Elizabeth to facilitate her purchase of the PA House. On October 26, 1995, John wrote and signed a handwritten document confirming the terms of that loan (the "Loan Document"). Although Elizabeth did not sign the Loan Document, the parties agree the loan was made and repaid according to the terms in the Loan Document.

[28] On January 27, 2014, Elizabeth transferred title to the PA House into joint tenancy with Theresa. At that time, Theresa also became liable for the remaining CIBC mortgage secured against title, which at the time had an outstanding balance of about \$33,000.

[29] The PA House was assessed in 2014 as having a value of \$522,000, but the parties agreed this does not reflect its value at trial.

4. Estate Planning

[30] In 1999, John and Elizabeth made wills drafted by the same lawyer. Elizabeth's will was dated September 22, 1999. John witnessed Elizabeth's execution of her will. Her will directed that her estate would be shared equally between her three children. No provision was made for John in her will.

[31] On January 7, 2013, John made a new will. It provided that Elizabeth would receive household items in the PA House, while the rest of his estate was to be divided equally amongst John's three children (but not his step-children).

[32] The evidence was undisputed that the household items bequeathed to Elizabeth in John's will were items she had brought with her into the relationship from her home with her first husband.

C. The Proceedings

[33] I will briefly describe the three actions tried before me. Prior to the trial, the court ordered all three actions to be tried together.

1. New Westminster Registry Action E046000

[34] This is a family law claim started by John in March 2014 (the "Family Proceeding"). John alleged that he and Elizabeth separated in late February 2014 and that they had no agreement regarding division of property. He sought an order for equal division of the PA House. John placed a certificate of pending litigation ("CPL") on the PA House, which remains in place.

[35] Elizabeth filed her response in April 2014, specifically disagreeing with John's seeking an equal division of family property. She filed a counterclaim in early May 2014, in which she sought an unequal division of family property, and spousal support. John's response denied everything claimed in the counterclaim.

[36] The trial was originally set to proceed in June 2016, but was adjourned. It appears another trial was set for March 2017, but that too did not proceed.

2. New Westminster Registry Action S190857

[37] This is a civil claim filed in May 2017 by Gary, in his capacity as litigation representative of John's estate, against Theresa, both personally and in her capacity as litigation representative of Elizabeth's estate ("Gary's Civil Action"). Gary asserted Theresa only has a

one-half interest in the PA House because she took title to the PA House subject to a resulting trust in favour of Elizabeth. John alleged he is entitled to one half of Elizabeth's interest because of the Family Proceeding. In the alternative, he pleaded the transfer of the PA House into joint tenancy was a fraudulent conveyance. He seeks damages.

[38] Theresa filed a response in July 2017, and in it she asserted John and Elizabeth did not separate. She alleged Elizabeth made a complete and binding inter vivos gift of the PA House to her in January 2014. Her position is that upon Elizabeth's death, Theresa retained 100% ownership and nothing passed into Elizabeth's estate.

3. New Westminster Registry Action S191814

[39] This is a civil claim filed in June 2017 by Theresa, in her personal capacity ("Theresa's Civil Action"). Gary is a respondent both in his personal capacity and as litigation representative for his father's estate. Lorne is also a respondent.

[40] Theresa seeks a declaration that Elizabeth and John never separated. She also pleaded that no portion of the value of the PA House is family property and John has never been entitled to any interest in it. Alternatively, she pleaded the PA House is excluded property. She also seeks a declaratory order that she holds title to the PA House in trust for herself and her two brothers in equal shares.

[41] Gary's response was filed in July 2017, and it mirrors the facts and legal basis in the civil action he commenced (Gary's Civil Action), mainly that: John and Elizabeth had no agreement regarding the division of property upon separation; Elizabeth placed titled to the PA House into joint tenancy with Theresa to circumvent remedies available to John via the Family Proceeding, or alternatively, the transfer was a fraudulent conveyance.

III. ISSUES

[42] Counsel identified eight issues they contend arose across the three actions, but they did not necessarily agree on how and in what order those issues should be addressed. However, upon reviewing the evidence and submissions, I prefer to address the issues in a different manner. First, I will summarize the parties' collective legal positions from all three actions.

[43] Gary's position is that the transfer of the PA House into joint tenancy was subject to a resulting trust in favour of Elizabeth. He says upon John's filing of the notice of family claim associated with the Family Proceeding, John was presumptively entitled to one half of the current value of the PA House (less certain specified amounts). His position is that Elizabeth's interest in the PA House, and John's claim attached to that interest, survived Elizabeth's death. Therefore, he submits Theresa is not entitled to 100% of the PA House.

- [44] Theresa's position is that John and Elizabeth did not separate, defeating John's family claim. However, even if they did, she submits that John never had any interest in the PA House. She submits the transfer of the PA House to her into joint tenancy was a full and complete inter vivos gift, which included the right of survivorship. Therefore, she says no resulting trust was created. In the alternative, if there is a presumption of a resulting trust, she says the evidence is sufficient to rebut it.
- [45] In any event, she says upon Elizabeth's death, Elizabeth's interest (whether legal or beneficial or both) was extinguished. Therefore, even if John had a potential claim on Elizabeth's interest, Theresa submits that was also extinguished upon Elizabeth's death. Accordingly, she submits she holds 100% of the title to the PA House in trust in equal shares with her two brothers.
- [46] Gary's alternative position is that the transfer into joint tenancy was, at the very least, intended to circumvent the relief John sought in the Family Proceeding. He specifically pleaded, in the alternative, that the transfer was a fraudulent conveyance contrary to the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163.
- [47] The parties have taken various competing positions, including some in the alternative, with respect to what portion of the value, if any, of the PA House is at issue. For instance, Gary seeks an order to sell the PA House and to equally divide the proceeds, less two amounts: Elizabeth's down payment, which came from proceeds of sale of her former matrimonial home, and the outstanding mortgage balance that was paid by Theresa. Theresa's primary position is that the PA House is not family property. In the alternative, she takes different positions with respect to both the value of the PA House at the time of purchase, and its increased value, but submits both are excluded property. As will become evident, it is not necessary to resolve these particular issues. For that reason, and for simplicity, I will refer to either the PA House or the value of the PA House as what is at issue.
- [48] Notwithstanding the identification of eight issues and three separate actions, the crux of the dispute is the following: was John entitled at any time to any portion of the value of the PA House?
- [49] Part 5 of the Family Law Act, S.B.C 2011, c. 25 [FLA], addresses division of family property, whose definition includes any property held by either spouse. The only asset pursued in this litigation was the PA House. If I were to find that the parties separated, Part 5 would be triggered.
- [50] However, concluding that John and Elizabeth separated would not resolve all issues. Elizabeth relied on s. 95 of the FLA. Her position is that it would be significantly unfair to equally divide the value of the PA House.
- [51] In my view, answering two questions resolves the central dispute between the parties and will resolve all three actions:

- a) What was the effect of Elizabeth's transfer of the PA House into joint tenancy with Theresa in January 2014?
- b) If I were to find that Elizabeth and John separated in late February 2014, would it be significantly unfair to equally divide the PA House (FLA, s. 95(1)(a))?

[52] As I explain in this judgment, I conclude the transfer into joint tenancy was a full and complete inter vivos gift that did not create a resulting trust in favour of Elizabeth, or her estate. Consequently, upon Elizabeth's death, her interest in the PA House was extinguished, along with John's claim asserted against her interest. I also conclude that if John and Elizabeth separated in February 2014, it would be significantly unfair to divide the PA House equally.

A. Legal Principles

1. Legislation

- [53] Part 5 of the FLA addresses property division. Section 81 provides that on separation, each spouse is entitled to an undivided half interest in all family property, regardless of contribution, and each is equally responsible for family debt. Family property is defined in s. 84(1)(a) as all real and personal property owned or beneficially owned by at least one spouse on the date of separation, unless the property is excluded. However, any increase in value of excluded property over the course of the relationship is considered family property (s. 84(2)(g)). This regime has been described as a "communal pot" of property from which only excluded property is removed: *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 8, leave to appeal ref'd [2016] S.C.C.A. No. 295.
- [54] Section 87 stipulates that the value of family property must be based on its fair market value as of the date the issue is resolved in court (or by agreement, which does not apply in this case).
- [55] Section 92 explicitly permits the parties to come to an agreement regarding the division of property and debt. If that agreement is in writing, and the spouses' signatures on it were witnessed by another person, s. 93(3) sets out the factors to consider if one spouse applies to set aside the agreement.
- [56] Section 95 permits the court in certain circumstances to order an unequal division of family property:
- (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to
 - (a) equally divide family property or family debt, or both, or
 - (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

- (a) the duration of the relationship between the spouses;
- (b) the terms of any agreement between the spouses, other than an agreement described in section 93(1) [setting aside agreements respecting property division];
- (c) a spouse's contribution to the career or career potential of the other spouse;
- (d) whether family debt was incurred in the normal course of the relationship between the spouses;
- (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
- (g) the fact that a spouse, other than a spouse acting in good faith,
- (i) substantially reduced the value of family property, or
- (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
- (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
- (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

[57] In light of the facts in this case, only three of the listed factors in s. 95(2) are potentially relevant to the issue of property division: (a) the duration of the relationship; (b) the terms of any agreement John and Elizabeth had; and, (i) any other factor that may lead to significant unfairness.

[58] Gary's pleadings assert in the alternative that Elizabeth's transfer of title of the PA House in January 2014 was a fraudulent conveyance. The Fraudulent Conveyance Act comprises two sections which state:

Fraudulent conveyance to avoid debt or duty of others

1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies

- (a) a disposition of property, by writing or otherwise,
- (b) a bond,
- (c) a proceeding, or
- (d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

Application of Act

2 This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

2. Common Law Principles Regarding Gifts and Resulting Trust

- [59] In V.J.F. at para. 74, the Court of Appeal held that the property regime in the FLA was not intended to be a complete code and common law and equitable concepts, including gifts, trusts and evidentiary presumptions, continue to operate; the statutory scheme merely builds on those principles.
- [60] Gary's position is that the determinative event was John and Elizabeth's separation. He argues, on the date of separation, John was entitled to one half of the value of the PA House because it was family property. Theresa disagrees. She submits the key event was Elizabeth transferring title to the PA House into joint tenancy for valid estate planning purposes before the alleged separation. She submits based on John and Elizabeth's agreement, the PA House was excluded family property. Gary submits the transfer into joint tenancy was a gratuitous inter vivos gift to Theresa, which created a resulting trust in favour of Elizabeth. He submits John's interest attached to that beneficial interest and survived Elizabeth's death.
- [61] Most of the principles underlying both positions were addressed in *Pecore v. Pecore*, 2007 SCC 17. In that case, the Court held that a gratuitous transfer of property, even between a parent and an adult child, resulted in the presumption of a resulting trust. Its reasoning was that equity presumes bargains and not gifts. Therefore, one assumes a transferor intends to convey only legal title to a transferee who pays no consideration. In those circumstances, the transferee holds the beneficial interest in the property on a "resulting trust" in favour of the transferor. However, that presumption can be rebutted if the transferee can establish on a balance of probabilities that the transferor intended to provide a gift at the time of the transfer.
- [62] *Pecore* also addressed the nature of the right of survivorship in situations of joint tenancy. A fundamental feature of joint tenancy is the right of survivorship: when one joint tenant dies, his or her interest in the property is extinguished and passes to the surviving joint tenant. Justice Rothstein commented on transfers of the right of survivorship along with a resulting trust in the joint asset during the lifetime of the transferor:

46 In certain cases, however, courts have found that the transferor gratuitously placed his or her assets into a joint account with the transferee with the intention of retaining exclusive control of the account until his or her death, at which time the transferee alone would take the balance through survivorship: .

47 There may be a number of reasons why an individual would gratuitously transfer assets into a joint account having this intention. the transferor may wish to avoid probate fees and/or make after-death disposition to the transferee less cumbersome and time consuming.

48 Courts have understandably struggled with whether they are permitted to give effect to the transferor's intention in this situation. One of the difficulties in these circumstances is that the beneficial interest of the transferee appears to arise only on the death of the transferor. This has led some judges to conclude that the gift of survivorship is testamentary in nature and must fail as a result of not being in proper testamentary form: For the reasons that follow, however, I am of the view that the rights of survivorship, both legal and equitable, vest when the joint account is opened and the gift of those rights is therefore inter vivos in nature. This has also been the conclusion of the weight of judicial opinion in recent times: .

53 Of course, the presumption of resulting trust means that it will fall to the surviving joint account holder to prove that the transferor intended to gift the right of survivorship to whatever assets are left in the account to the survivor. Otherwise, the assets will be treated as part of the transferor's estate to be distributed according to the transferor's will.

[Emphasis added]

[63] These principles are also addressed in *McKendry v. McKendry*, 2017 BCCA 48 at paras. 27-36. In addition, the Court of Appeal confirmed that once given, a gift cannot be retracted (*McKendry* at para. 32),

[64] The critical consideration is the transferor's actual intention at the time the alleged gift was made: *McKendry* at para. 31; *Pecore* at para. 5.

[65] Issues similar to those before me arose in *J.D.G. v. J.J.V.*, 2016 BCSC 2389. At paras.144-157, the court reviews many of the same principles discussed in the preceding three paragraphs, noting too that the key factor is to weigh all the evidence to discern the transferor's actual intent. The court continued by noting "[t]he traditional rule required evidence of the transferor's intention at the time of the transfer" that must "'be contemporaneous, or nearly so', to the transaction" (at para. 157, citing *Pecore* at para. 56). However, courts should guard against "self-serving evidence or placing undue weight on evidence that may reflect a change of intention (*Pecore* at para. 59)".

3. Assessing Hearsay Evidence

[66] Unsurprisingly, both parties rely on hearsay evidence in support of their positions.

- [67] In relation to the existence of John and Elizabeth's oral agreement, Gary submitted that the only evidence of its existence was hearsay from individuals standing to benefit from Theresa's position in the litigation, and on that basis, the court needs to approach that evidence with caution. I accept that caution is appropriate, but it applies equally to testimony from Gary and Lorne. However, I agree with Gary that testimony about John or Elizabeth's statements from witnesses that are either not connected to or do not stand to gain anything from the litigation is probably more reliable.
- [68] However, hearsay in the circumstances of this case is not necessarily inadmissible per se. The modern approach allows the admission into evidence of out of court statements for the truth of their contents if the criteria of necessity and reliability are satisfied: *R. v. Khelawon*, 2006 SCC 57. Necessity and reliability are not separate compartments, but should be viewed as part of a continuum: *Roussin v. Bouzenad*, 2005 BCSC 1719 at para. 14. The condition of necessity is easily met with respect to statements made by John or Elizabeth since they are both deceased.
- [69] However, even before *Khelawon*, an exception existed to allow the admissions of hearsay evidence if the statement was adduced to show the state of mind or intention of the person who made the statement: *R. v. Starr*, 2000 SCC 40 at para. 168 (cited in *Volovsek v. Donaldson*, 2019 BCSC 1820 at paras. 103-104).
- [70] The court in *Johnston Estate v. Johnston*, 2019 BCSC 2149, was presented with a similar admissibility issue in the context of a transferor's intention. After citing *Volovsek* at paras. 104-105, the court concluded that hearsay statements of the deceased transferor made to his lawyer and pastor concerning making his son a joint tenant in the family home were admissible as an exception to the rule (at paras. 62-63).
- [71] Thus, provided I am otherwise satisfied with a witness's reliability and credibility, his or her repetition of a statement made by John or Elizabeth may be admissible for its truth.

B. What Was the Consequence of Elizabeth's Transfer of the PA House into Joint Tenancy?

- [72] As noted above (para. 28) about a month before the alleged separation, Elizabeth transferred title of the PA House into joint tenancy with Theresa. The key factor in determining whether a resulting trust was created is to discern Elizabeth's actual intent at the time the transfer was done.

1. Elizabeth's Intent

- [73] A resulting trust is presumed where a parent makes a gratuitous transfer to an adult child, who is not a dependent, placing the onus on the transferee to demonstrate a gift was intended. I note that Theresa became responsible for the mortgage once the PA House was put into joint tenancy. It is possible the assumption of that liability could draw into question whether Elizabeth's transfer was gratuitous, precluding the creation of a resulting trust. However, the parties did not raise that issue.

- [74] In any event, the determinative factor is the transferor's actual intention. Of note, the "presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities" (Pecore at para. 44). In other words, courts only rely on the presumption of resulting trust if the evidence led at trial is insufficient to determine the actual intent of the transferor: *White v. Glossop*, 2019 BCSC 1044 at para. 23, citing *Fuller v. Harper*, 2010 BCCA 421 at paras. 47, 69.
- [75] In *Fuller*, the Court of Appeal held the trial judge erred by failing to consider direct evidence of the transferor's actual intent at the time of the transfer (at para. 68). This led to an error in law because "the presumption could only be made if, after a consideration of all the evidence, the trial judge found there to be insufficient evidence to determine the transferor's actual intent at the time of the transfer" (at para. 69).
- [76] I find the evidence was clear that Elizabeth's motivation for the transfer into joint tenancy was her terminal diagnosis, and the desire to make it easier for her testamentary wishes to be carried out.
- [77] The lawyer who took instructions from Elizabeth for that transfer, Don Drysdale, testified. He relied on his file and standard practice in giving his testimony. However, he had a specific recollection of Elizabeth telling him she was terminally ill. I am satisfied he was a reliable and credible witness.
- [78] He recalls Elizabeth was referred to him by the banker at CIBC who Elizabeth dealt with for her mortgage; he had an ongoing relationship with that branch of CIBC. He testified he met first with Elizabeth alone to find out why she wanted to transfer title to her daughter. His invariable practice was to enquire into the reasons a client wanted to transfer property into joint tenancy. He also said he would have inquired into Elizabeth's family circumstances. Elizabeth confirmed her will left everything to her three children. His evidence is that once he confirmed Elizabeth's instructions, Theresa joined the meeting.
- [79] He said the transfer into joint tenancy was sensible because Elizabeth believed her death was imminent. That made it unlikely Theresa would face any significant tax implications from the transfer into joint tenancy. He also confirmed it would save significant amount of probate and other fees upon Elizabeth's death.
- [80] Mr. Drysdale was asked during direct examination if he would have explained to Elizabeth and Theresa the legal concept of a "gift". He responded that was the whole point of the exercise. He confirmed Elizabeth wanted to structure her affairs so the PA House would transfer without the cost, expense and lengthy delay involved in probating a will. He also confirmed he would have told them that a gift is not retractable.

- [81] Theresa, Michael and Scott all testified that Elizabeth explicitly explained the reason why the transfer was only to Theresa. Theresa was the only one who could qualify to take over the mortgage. Michael and Scott also testified Elizabeth explained the transfer was to carry out her testamentary wishes without incurring the fees and taxes of probating the will. None of this testimony was successfully challenged during cross-examination.
- [82] I find the preceding evidence is persuasive. Mr. Drysdale's testimony is independent, direct evidence that Elizabeth intended to provide an inter vivos gift of the PA House to Theresa, including the right of survivorship. I also find the statements Elizabeth made to her three children buttress Mr. Drysdale's testimony.
- [83] For those reasons, I do not find a presumption of resulting trust arises in this case. In the alternative, if the presumption did arise, I find the evidence was sufficient to rebut it.

2. Effect of the Family Proceeding

- [84] Gary accepts that the evidence established that Elizabeth transferred the PA House into joint tenancy for estate planning purposes. While he acknowledges the right of survivorship was also transferred to Theresa at that time, he disputes the "extent of that right".
- [85] He put it this way in his written submissions: upon filing the notice of family claim, John's claim to an equal share of family property "was perfected and any subsequent transfer - such as the transfer to Theresa following Elizabeth's death - was subject to his prior legal and equitable claim". He submitted that the filing of the notice of family claim had the effect of "reversing" the legal effect of the transfer into joint tenancy.
- [86] In support of his position, he relies on a statement in Pecore that the balance of a joint account fluctuates over time and "[t]he gift in these circumstances is the transferee's survivorship interest in the account balance - whatever it may be - at the time of the transferor's death, not to any particular amount" (at para. 50). Based on that, Gary submits that Elizabeth's gift to Theresa was only to the "extent of [Elizabeth's] interest in the property at the time of her death, not any particular percentage of the ownership in the property".
- [87] That quote from Pecore does not support Gary's position. That case concerned a joint account, not real property. In that context, Justice Rothstein, writing for the majority, commented that "[s]ome judges have found that a gift of survivorship cannot be a complete and perfect inter vivos gift because of the ability of the transferor to drain a joint account prior to his or her death" (at para. 50). However, Rothstein J. specifically rejected that view. He then went on to comment that a balance in a joint account will fluctuate over time, but that does not modify the transferee's entitlement to the whole of the property. In any event, I do not agree that John's unproven claim to the PA House is somehow analogous to a withdrawal from a joint account.
- [88] In my view, there is no reason why the principles from Pecore would have any different application when the asset in question is real property: Schouten Estate v. Swagerman-Schouten, 2014 BCSC 2320, at para. 4; see also Fuller at para. 43 (although the parties

assumed the presumption could apply to real property, the Court of Appeal noted there was case law consistent with that assumption) and McKendry at paras. 27-36 (the only property at issue in that case was real property). Furthermore, generally speaking, the concern about transferors depleting an asset would not easily arise when the asset in question is real property, which does not have the same fluidity as an account (Fuller at para. 67).

- [89] In any event, I find the potential concern raised and rejected by Justice Rothstein does not arise in this case. Elizabeth did nothing that would "drain" or deplete the value of the PA House. In some respects the opposite occurred because Theresa became responsible for the mortgage at the same time she became a joint tenant, and subsequently paid it off.
- [90] Further, Gary's position is premised on the proposition that the "transfer" of title to Theresa upon Elizabeth's death was encumbered with John's interest in Elizabeth's share of the PA House. His position is the value of the PA House (less the money used to purchase it that is excluded property and money Theresa paid towards the mortgage) passed to the estate because of the filing of the Family Proceeding, and John is entitled to one half of that balance.
- [91] However, there was no transfer of title. By operation of law, Theresa already owned the whole of the PA House, jointly with Elizabeth. When her mother died, Elizabeth's interest in it was extinguished, leaving Theresa as the sole owner: McKendry at paras. 28-29; see also Fuller at para. 53.
- [92] The transfer took place on January 27, 2014. The evidence was consistent from all witnesses that no one considered the possibility of John and Elizabeth separating until mid to late February 2014. I agree with Theresa's submission that at the time of the transfer, the PA House was Elizabeth's property to do with as she pleased even though John was her spouse: Volovsek at para. 166. No rights or obligations arose with respect to the PA House under the FLA until the date of the alleged separation (V.J.F. at para. 69), which happened after the transfer into joint tenancy.
- [93] In his written submissions, Gary also urged the court to accept his position based on "a significant policy reason to be concerned about any precedence that would allow a gift to a child in joint tenancy to obviate a family law claim" because that would "encourage those intending to separate to transfer property solely in their names in [an effort] to remove it from family property and thus avoid sharing it with their spouse". Although I am not sure that is a valid concern since s. 84(1)(a)(i) includes as family property assets which are "owned by at least one spouse", it does not arise on the facts of this case. Further, this is essentially another way of describing the concerns raised with respect to the Fraudulent Conveyance Act, which I address in the following section.

- [94] As I understood it, Gary also relies on Elizabeth's failure to contest the separation in her pleadings as "perfecting" John's interest in the PA House. I disagree. Even if that failure could "prove" the parties separated, it would not resolve the central dispute. Elizabeth's pleadings specifically allege the PA House ought not to be equally divided.
- [95] Moreover, even if Elizabeth did not contest the separation, that does not equate to a finding that she intended or even agreed to separate from John on the date of separation. Although, as Gary points out, there need not be "a meeting of the minds with respect to the intention to separate" (*H.S.S. v. S.H.D.*, 2016 BCSC 1300 at para. 40), that does not render Elizabeth's intention at the time of the alleged separation irrelevant in these circumstances. Nor does it have any bearing on her intention when the PA House was transferred into joint tenancy.
- [96] Elizabeth's intention at the time of the transfer cannot be altered by subsequent events. Further, there was no evidence that her intention with regard to the PA House ever changed. It follows that even if there were a judicial finding that John and Elizabeth separated, that alone could not retroactively change her intention to transfer the PA House into joint tenancy with Theresa for estate planning purposes. I was given no authority to suggest that the basic principles of joint tenancy operate differently in this family law context.
- [97] For the preceding reasons, I find nothing about the Family Proceeding affects the validity of Elizabeth's full and complete inter vivos gift of the PA House to Theresa. Since Elizabeth's interest was extinguished by virtue of Theresa's right of survivorship, Elizabeth's estate has never had any interest in the PA House. As a result, the Family Proceeding, which was continued against Elizabeth's estate, must be dismissed.

3. Fraudulent Conveyance

- [98] In the two civil actions, Gary alleged in the alternative that the transfer into joint tenancy was a fraudulent conveyance. Section 1 of the Fraudulent Conveyance Act renders a disposition of property void "against a person whose rights are or might be disturbed, hindered, delayed or defrauded" if the disposition was done to "delay, hinder or defraud creditors and others of their just and lawful remedies".
- [99] Even if John qualified as a "creditor" or "others" under s. 1 of the legislation (an issue that was not clearly addressed by Gary), I am not satisfied a fraudulent conveyance was proven on the evidence. In *Abakhan & Associates Inc. v. Braydon Investments Ltd.*, 2009 BCCA 521 at para. 73, the Court held that the intent that must be found to qualify as a fraudulent conveyance, is the intent to put an asset out of reach of creditors. Intent is a state of mind, and a question of fact: *Abakhan* at para. 74.
- [100] Elizabeth transferred the PA House into joint tenancy with Theresa on January 27, 2014. The alleged separation occurred in late February 2014. There is no evidence that Elizabeth had any intention to separate from John at the time of the transfer into joint tenancy, let alone an intention to defeat the claim that John had not yet filed.

[101] I have already found that what motivated the transfer of the PA House into joint tenancy was Elizabeth's desire to implement her estate plans. Even if the transfer itself could give rise to an inference Elizabeth had the requisite intent (see Abakhan at para. 80), the evidence clearly proves otherwise. Based on that finding, and my review of the whole of the evidence, I do not find Elizabeth had the requisite intent to establish a fraudulent conveyance. The claim is therefore dismissed.

4. Conclusion

[102] For all those reasons, I find Elizabeth's transfer of the PA House into joint tenancy was a full and complete inter vivos gift to Theresa that included the right of survivorship. The evidence was clear that Elizabeth's intent was to gift the PA House to Theresa to facilitate an easier and less costly implementation of her testamentary wishes. Given the weight of the evidence of Elizabeth's intent, the presumption of resulting trust does not arise. However, even if it did, I am satisfied on the whole of the evidence that the presumption would be rebutted. Upon Elizabeth's death, her interest in the PA House was extinguished. For all those reasons, the family claim and counterclaim are dismissed.

[103] I also find there was no evidence to support the transfer into joint tenancy was a fraudulent conveyance.

C. Assuming John and Elizabeth Separated, Would Equal Division of the PA House be Significantly Unfair?

[104] In my view, the reasoning and conclusions regarding the impact of the transfer of the PA House into joint tenancy renders this issue moot (see above paras. 72-97). In the event I am mistaken, however, I also conclude that if John and Elizabeth separated, it would be significantly unfair to divide, equally or otherwise, the value of the PA House.

[105] Theresa submits the evidence is insufficient to establish that John and Elizabeth separated and therefore the property division regime under the FLA has not been triggered. Gary submits they did separate in late February 2014 and at that point, John was presumptively entitled to an equal division of family property. Gary submits the value of the PA House, minus the amount Elizabeth paid as a down payment and the amount Theresa paid on the mortgage, is family property.

[106] However, he submits the assets held only in John's name at the time of the alleged separation were excluded property. Those assets were significant as John had \$225,000 in term deposits and received benefits from a number of pensions. Theresa did not seek, in the alternative, equal division of those assets, but Elizabeth's counterclaim in the Family Proceeding did seek spousal support. However, spousal support was not pursued at trial.

[107] While Elizabeth's pleadings in the Family Proceeding do not contest the separation, Theresa's pleadings in both civil actions do. It is not entirely clear who would bear the burden of persuasion on the issue of the separation in this trial of all three actions.

- [108] The evidence about what happened around the time of the alleged separation, and in the months following, was relatively consistent amongst the witnesses, but the parties dispute the legal implications of those events. However, there is no doubt that those events were emotionally difficult and stressful for all concerned.
- [109] As I explain below, having reviewed the whole of the evidence and submissions of the parties, I conclude that even if I were to find that there was a separation, it would be significantly unfair to equally divide the value of the PA House. Therefore, it is unnecessary for me to make a finding whether John and Elizabeth separated.
- [110] Given the property division regime in the FLA, Theresa bears the burden to demonstrate that it would be significantly unfair to equally divide the value of the PA House notwithstanding I have made no finding about the separation.
1. Length of the Relationship
- [111] Neither party made submissions on whether or how the length of John and Elizabeth's relationship, which is a factor listed in s. 95(2)(a), should impact this particular contested division of property. John and Elizabeth lived together for approximately 22 years in a marriage-like relationship.
- [112] I find the evidence demonstrates that John and Elizabeth's living and financial arrangements remained unchanged up until six months before Elizabeth died. As I explain below, I am persuaded on a balance of probabilities that they had agreed to keep their estates and finances separate (see below paras. 132-135, 182) and that John never viewed the PA House as belonging to him until he filed his notice of family claim (see below para. 182).
- [113] Thus, I find that the circumstances of the alleged separation were the only indications that either John or Elizabeth challenged or questioned the financial arrangements they had throughout their long relationship, including their understanding of who owned the PA House.
- [114] In my view, this is a relevant factor to consider. In relation to the length of their relationship, John's assertion of a claim on the PA House was very recent. It also came less than six months before Elizabeth's death. In my view, both factors make it important to consider John's and Elizabeth's state of mind and personal circumstances at the time of the alleged separation. Those factors cannot be determinative, but in the circumstances of this case, I find they provide important information that speaks to the fairness of an equal property division.
- [115] Gary submits John's and Elizabeth's age and health should not be considered relevant factors to the issue of property division. That position is premised on his assertion that taking into account Elizabeth's terminal diagnosis would inappropriately weave into the analysis the impact of her impending death on her heirs. I note that accepting that position is to Gary's advantage since it would also preclude consideration of how an equal property division would impact what he and Lorne would inherit from John. John's lawyer (Pat

Bisiglia) testified that it was clear John would not financially benefit from his success in the Family Proceeding given his circumstances, but both Gary and Lorne would.

- [116] In any event, I do not agree with Gary's position. Understanding how John and Elizabeth viewed their relationship and their financial arrangements, up until they allegedly separated does provide insight into the property division issue. Undertaking that assessment while ignoring their age and significant health difficulties would not reflect reality.
- [117] Elizabeth had been diagnosed with terminal cancer, and suffered a significant set back in October 2013, requiring surgery. She was told at that time to arrange her affairs. The alleged separation happened just as Elizabeth was to be hospitalized due to another complication with her cancer. She knew that even if she was able to leave the hospital, she would not return to the PA House because she would need to live with Theresa who could take care of her.
- [118] John's health had also deteriorated in the last few years of his life. By the time of Elizabeth's diagnosis, he had chronic obstructive pulmonary disease ("COPD") and required an oxygen tank at all times. He also had cancer, although it was "slow moving", not terminal and one for which the doctors did not recommend any treatment. He was also incontinent. I find on a balance of probabilities that he was incapable of looking after himself well before the alleged separation.
- [119] Based on an assessment of all witnesses' testimony, I find that John and Elizabeth maintained fairly traditional roles with regard to household duties. Specifically, it was clear that even while she was undergoing chemotherapy, Elizabeth was still providing personal care to John. This included her having to exclusively deal with his incontinence. Elizabeth hoped to hire home care for him and had his needs professionally assessed. For some reason, John refused to hire any home care. Elizabeth's children were gravely concerned about the toll looking after John was having on Elizabeth's already fragile health.
- [120] In addition, Gary testified that John's adjustment to living at Hawthorne House was difficult, layered over his existing difficulties with COPD and deteriorating health. Gary said John could be absolutely lucid one moment, but perhaps not so the next moment.
- [121] In light of this context, I find the separation and John's assertion of a claim on the PA House represented a dramatic and unexpected change to what had been the couple's status quo throughout their relationship. By contrast, Elizabeth's transfer of the PA House into joint tenancy was consistent with what I have found to be the couple's financial arrangements. In my view, these factors are relevant and support a conclusion that equally dividing the PA House would be significantly unfair.

2. Oral Agreement

- [122] John and Elizabeth did not have an agreement regarding what would happen if their relationship ended because they believed, as did their families, that they would be together for the rest of their lives. However, Theresa submits John and Elizabeth had what she phrased a "separate estates agreement", which supports allotting the PA House completely to Elizabeth.
- [123] Gary submits Theresa should be barred from asserting the existence of an oral agreement to refute an equal division of family property. John's notice of family claim asserts no agreement existed, and Gary's position is that Elizabeth's response did not contest that position.
- [124] While it is true that Elizabeth's response to the notice of family claim does not specifically disagree with John's assertion that there was no agreement, the filed response appears to be missing a section (the first paragraph in Form F-4 is absent). I am not prepared on that basis to find that Theresa, on behalf of Elizabeth's estate, is barred from raising and relying on all of s. 95(2), including the possible existence of an agreement to contest John's claims in the notice of family claim.
- [125] Furthermore, Theresa pleaded the existence of an agreement in both her notice of civil claim and response to Gary's Civil Action. Therefore, at trial, there was no surprise in her position.
- [126] Gary also asserts the evidence failed to establish the existence of an oral agreement. To the extent Gary submits the evidence was insufficient to prove there had been a cohabitation agreement, which was determinative on the issue of division of property, I agree. However, Theresa does not assert there was a cohabitation agreement, or that the oral agreement was determinative. Instead, her position is that John and Elizabeth had an oral agreement regarding their estates and that agreement is a relevant factor that can be taken into account pursuant to s. 95(2)(b) of the FLA.
- [127] Theresa submits the reference to "agreement" in s. 95(2)(b) is not restricted to an agreement that addresses division of family property and debt in the event a relationship ends. In *P.N.K. v. C.L.*, 2013 BCSC 1856 at para. 86, Justice Punnnett points out that s. 92 of the FLA allows for the existence of binding oral agreements between the parties. Those may include agreements that "exclude as family property or family debt items of property or debt that would otherwise be included": FLA, s. 92(c).
- [128] Although addressed in the judgment as an alternative basis for relief, Justice Punnnett analyzes whether the parties had an agreement that would be relevant to property and debt division. He states that he would have found that the parties had an agreement either to unequally divide family property or debt, or to exclude certain assets from family property (at para. 89). His reasoning as to the existence of the agreement was as follows (at para. 87):

In this instance the agreement is oral, but was supported in evidence by the documents produced relating to the purchase of assets, the accounting for expenses, the registered ownership of the condo and the loans received by the claimant. I find that this couple agreed to keep their financial affairs separate and apart and that they did so throughout the relationship.

[129] In the alternative to his position that Theresa should not be able to argue the existence of an agreement, Gary submitted the evidence was insufficient to establish that John and Elizabeth had reached an agreement. He relies on *M.F.W. v. M.A.H.*, 2019 BCSC 588, as quoted in *Muller v. O'Flynn*, 2019 BCSC 1674 at paras. 35-38. Both cases state that to qualify as an agreement under s. 92 of the FLA, an objective test is applied requiring the court to be satisfied the parties expressed themselves outwardly with an intention to be mutually bound by clearly expressed terms.

[130] I am satisfied that John and Elizabeth had an agreement that is relevant under s. 95(2)(b). Rather than the separate estate agreement urged by Theresa, I find the evidence supports a conclusion that John and Elizabeth agreed the PA House was not a joint asset (see below para. 182). In my view, that is an agreement as described in s. 92(c) that the PA House be excluded from family property. The evidence discussed below regarding their estate arrangements, and financial arrangements generally, including regarding the purchase of PA House, and my analysis of that evidence, support this conclusion.

[131] In the event I am mistaken that Theresa has demonstrated the existence of an agreement relevant under s. 95(2)(b), the evidence and reasoning supporting that conclusion are relevant factors that should be considered pursuant to s. 95(2)(i). I now turn to that analysis.

3. Estate Arrangements

[132] The evidence was clear that John and Elizabeth at all times agreed they would not make a claim on either's estate, and would leave their assets to their own children. Not only was this reflected in their wills, testimony from Theresa, Michael, Scott and Cheryl was consistent in that they all had knowledge of that arrangement.

[133] In addition, Mr. Bisiglia confirmed that he understood John and Elizabeth intended to have their estates completely separate. He only ever dealt with Gary and John, so one of them must have given him that information. The lawyer who did the transfer of the PA House (Mr. Drysdale) had the same understanding. Neither Gary nor Lorne had any discussion with John about his will. Thus, I find the evidence was clear that John and Elizabeth agreed they would not make any claim on each other's estates.

[134] Gary's position is that even if they had a separate estates agreement (which he denies), that should have no impact on the issue of property division. However, I find it has some relevance. Elizabeth's transfer into joint tenancy was consistent with what I have found was her and John's agreement regarding their estates. This supports a conclusion that equally dividing the value of the PA House would be significantly unfair.

[135] Further, I have found that Elizabeth's motivation for the transfer into joint tenancy was her desire to make it easier for her testamentary wishes to be carried out (see above, paras. 76, 102). This provides further support for the conclusion the equal division would be significantly unfair because it would be contrary to Elizabeth's wishes that the PA House be divided among her three children only. The evidence supports that John was aware of, and agreed with, Elizabeth's wishes in that regard, at least until the alleged separation. In the circumstances, I am mindful that the result sought by Gary would distribute some of the value of the PA House to John's children contrary to Elizabeth's wishes and John's understanding. These circumstances support Theresa's position in this litigation.

4. Financial Arrangements

[136] In addition, I find John and Elizabeth agreed from the start of their relationship that they would keep their finances separate. Among other things, that arrangement made sense given certain characteristics of their relationship.

[137] Both John and Elizabeth had been married before. In John's case this was his third spousal relationship. John was retired and about 70 years old when he and Elizabeth began living together. She was about 11 years younger than him and still working at the time.

[138] As indicated above, John and Elizabeth's relationship began not too long after Mary's death. Theresa admitted that at first, she was uncomfortable with their relationship, and she spoke with her mother about that. According to Theresa, Elizabeth explained her relationship with John was complicated, but driven primarily by a desire for companionship.

[139] John and Elizabeth were already friends because of their family connection, but Elizabeth explained they spent a lot of time together during Mary's illness. Elizabeth was living in Tsawwassen at the time. She took public transit to work, and also after work to visit Mary at Vancouver General Hospital, before heading home late at night. John began assisting Elizabeth by driving her home, and assisting with errands.

[140] After Mary's death, Elizabeth told Theresa that she and John carefully discussed their future together. Elizabeth said John loved being a part of Mary and Elizabeth's family and wanted to remain a part of their "clan". Elizabeth regarded John as a friend, and a safe and dependable person. According to Theresa, Elizabeth said that she and John agreed at the beginning of their relationship that they would keep their finances separate and neither would have a claim on each other's estate.

[141] Cheryl's testimony was consistent with Theresa's. She recalled learning not too long after her mother passed away that John and Elizabeth would be living together as a couple. She had come to believe it was the best outcome she could wish for. She loved John, describing him as a wonderful father. She had always been close to her aunt and became more so after her mother's death.

- [142] Cheryl recounted a conversation she had with John at the time he was planning on selling the 59A House. She specifically asked him what would happen with the sale proceeds because she viewed those as her, her siblings' and her step-siblings' inheritance. John explained at that time that he and Elizabeth had already agreed their estates would be left to their own children (in John's case his and Mary's children) and neither made provision in their will for the other. He also told her they ensured the PA House (which Elizabeth had already bought and he was about to move into) was in Elizabeth's name only because she had no pension and that was the only asset she had for her future and to leave to her children. Cheryl testified John explained that the PA House "had nothing to do with us".
- [143] Cheryl was challenged about that evidence during cross-examination, but her testimony was firm and I find that her recollection of the conversation to be credible and reliable. I place considerable weight on Cheryl's testimony because she had no financial stake in this litigation. I accept that John made those statements to her. I also find Theresa's recollection to be credible and reliable, and accept Elizabeth did make the statements Theresa attributed to her.
- [144] Having found the evidence reliable, and given the necessity of that evidence because John and Elizabeth are both deceased, I find it more probable than not that John's statements to Cheryl, and Elizabeth's statements to Theresa, were true.
- a. John's Payments During the Relationship
- [145] Gary submits that John's payments to Elizabeth and third parties during the course of their relationship support an equal division of the value of the PA House. Theresa disagrees with that position as well as how Gary characterized John's payments.
- [146] I start by reiterating that an equal division of family property is presumed regardless of each parties' financial contribution (FLA, s. 81(a)). The burden remains on Theresa to establish an equal division would be significantly unfair. Therefore, Gary's position that the value of the PA House should be equally divided is not completely dependant upon his success on this issue. However, his position is that if he succeeds on this point, it would significantly weaken Theresa's position.
- i. Monthly Payments to Elizabeth
- [147] Gary submitted the regular cheques John made to Elizabeth (see above para. 23) were contributions to the mortgage. Theresa submits those payments were in the nature of rent and only meant to cover normal living expenses. She contends this was consistent with John and Elizabeth's arrangement to keep their finances separate.

[148] Gary relies on the Loan Document, submitting it is evidence that John contributed to the mortgage. Gary submits the Loan Document is persuasive evidence of John's understanding of the purpose of his payments. He agreed that because Elizabeth did not sign the document, it was not evidence of an agreement. Indeed, there was no evidence Elizabeth was aware of the Loan Document.

[149] He also agreed the loan referred to in that document was completely paid off. However, he points to the underlined portions (underlining not in original) of the following passages:

Repayment of the above loan shall be made in the following manner: each month the amount of the loan shall be reduced by the sum of 1. Mortgage Payment 2. Telephone Bill 3. Hydro Bill 4. Cable TV 5. Security Charge 6. 1/12 of the Annual of property taxes, sewer & water 7. [illegible] Insurance. This total will be in the neighborhood of \$1400.00 per mo., and represents my monthly cost of living in the premises.

When the loan has been fully paid off, I agree to continue to pay the monthly mortgage pay't, but only half of the aforementioned monthly charges.

[150] While Gary emphasizes the two references to mortgage payments, Theresa focussed on the statement that the monthly payments represented John's cost of living in the PA House.

[151] After the loan was paid off, John paid only \$800 each month to Elizabeth. There was no evidence indicating how that sum was arrived at and whether it was intended to be correlated in either timing or amount with Elizabeth's mortgage payments.

[152] However, there was evidence that the \$800 was akin to rent. Theresa, Michael and Cheryl all testified that John referred to the cheques he wrote to Elizabeth as rent, and Scott testified his mother said John paid rent. Because Scott lived with John and Elizabeth for about 18 years, he had the best opportunity to observe payments being made and any conversation surrounding them. This is a factor that increases the credibility of his testimony on that point.

[153] Cheryl also testified about John's payments. She estimated she visited John and Elizabeth probably weekly at the PA House in addition to attending family events. Cheryl understood John paid "rent" to Elizabeth regularly by cheque, but she was unaware of the amount. She stated at different times both John and Elizabeth mentioned that John paid rent.

[154] Gary and Lorne both testified that their father was very private and rarely spoke to them about his financial affairs or his relationship with Elizabeth. Specifically, they both confirmed John did not discuss any financial arrangements he had with Elizabeth. It is not surprising therefore that Gary was unaware of the Loan Document or John's regular payments to Elizabeth until after John moved into Hawthorne House. Gary received John's papers and that is when he first saw the Loan Document.

[155] On the whole of the evidence, I am not satisfied on a balance of probabilities that John's regular cheques to Elizabeth were intended by him to be anything other than him paying his living expenses consistent with their financial arrangement generally. Specifically, I do not find the evidence sufficient to prove that those payments were for the mortgage.

ii. Payments to Third Parties

[156] The parties agreed John made two individual payments regarding the PA House totalling just under \$750: one to a furnace company in 1997 and one for a water heater in 2004. The parties also agreed John and Elizabeth equally shared the cost of a new roof on the PA House, each paying \$6,500.

[157] I find these three payments were related to maintenance of the PA House. However, with regard to the first two, I have no evidence as to whether or not Elizabeth paid any amount back to John, or what percentage of those expenses those payments represented. Nevertheless, I accept that John paid a total of about \$7,250 to third parties for home maintenance during the 18 years he lived in the PA House.

[158] The parties also agreed that John wrote cheques to Costco totalling just over \$12,000 between 1993 and 2014. However, there is no reliable evidence what the payments were for. Given the variety of items those cheques may have purchased, I am not persuaded on a balance of probabilities that any of those payments were related directly to household maintenance rather than living or personal expenses.

[159] The parties also agreed John made payments for travel in relation to trips he took with Elizabeth totalling just over \$49,000 over the course of their relationship. There was no evidence as to what percentage of their total travel costs that represented. In any event, I find those payments were personal and therefore of minimal if any relevance to the issue of property division.

[160] John and Elizabeth lived together in the PA House for about 18 years. As indicated above, John and Elizabeth maintained fairly traditional roles with regard to household duties (see para. 119). In my view, neither of their non-monetary contributions to the upkeep of the PA House are significant factors in this analysis.

[161] Viewing all of the evidence, I am not persuaded on a balance of probabilities that John's payments to third parties should weigh in the balance one way or another about division of the PA House.

b. Purchase of PA House

[162] In my view, it is significant that the PA House was registered only in Elizabeth's name until January 2014. I also find it significant that she purchased the PA House with her own funds and a mortgage in her name only. Given the family law property regime in place at the time, these factors weigh in favour of Theresa's position.

- [163] The Family Relations Act, R.S.B.C. 1996, c. 128, was in force when Elizabeth bought the house. Under s. 56 of that legislation, spouses were each entitled to an undivided half interest in each family asset upon the occurrence of a "triggering event". However, for the purpose of property division, the definition of "spouse" did not include common law spouses. Thus, common law spouses could claim maintenance, but only people who had been married were presumptively entitled upon a triggering event to half interest in family property.
- [164] When John moved into the 59A House upon marrying Mary, he became a joint tenant. I find it reasonable to infer that he was aware that avenue was open to him upon moving into the PA House, but he did not pursue that. I find it more probable than not he did not do so because he and Elizabeth had already agreed the house would always belong to her.
- [165] The FLA came into force in March 2013, and granted to unmarried spouses the same presumptive entitlement married couples had to an equal division of family property under the previous statutory regime. Theresa points out there is no evidence that Elizabeth or John were aware of that change in the law. I do not find that to be a relevant factor because ignorance of the law cannot affect its application.
- [166] However, the timing of the changes to the law is relevant to my assessment of other evidence.
- [167] Gary was a realtor and acted in that capacity when Elizabeth purchased the PA House. He testified during his direct examination that until he wrote up her contract for purchase, he assumed she and John were purchasing the house together. He testified that both he and John were surprised when the purchase agreement was only in Elizabeth's name, implying John believed the PA House would belong to both of them.
- [168] Gary testified that despite the surprise, he did not "push the issue" with his father. His explanation for not doing so causes me to question the veracity of two of his statements: (i) that he believed John and Elizabeth were looking to buy a house together, and (ii) that John was surprised the house would be registered only in Elizabeth's name.
- [169] Gary testified he was reluctant to challenge his father about Elizabeth being the sole title holder for the PA House because of a minor falling out he had with his father for a few days when John was getting involved with Mary. Gary said they got into a heated discussion and did not speak for a few days. He did not want to repeat that experience. However, the content of that discussion had nothing to do with the purchase of property. Instead, Gary expressed concern to his father about marrying someone who had five young children (the youngest was apparently only two years old) at a time when John's own children were only a few years from moving out of the house.

- [170] I accept that discussion may have left a mark on Gary. I agree it may have contributed to Gary's hesitation to enquire into the nature of John and Elizabeth's relationship. However, if he truly believed he was acting as a realtor for both his father and Elizabeth, Gary's professionalism would compel him to at least ask for more information as to why the property would only be in Elizabeth's name.
- [171] As confirmed during cross-examination, at his examination for discovery, Gary admitted at the time he did not question Elizabeth being the sole person on title to the PA House. Although Gary later prevaricated a bit about his discovery answer, I find his discovery evidence to be more reliable.
- [172] In any event, his prevarication was not compelling evidence. He testified he would have told John and Elizabeth that after two years living together, they would essentially become co-owners. He claims this was his way of questioning title being registered only in Elizabeth's name. This echoed his testimony in direct examination that he believed it was common knowledge in the real estate industry at the time that if a home was purchased by two people who would live together but only one person's name was on title, after two years they would essentially become "co-owners". He claimed his practice was to inform clients of that understanding and advise them to get legal advice. He said he did so with John and Elizabeth, but he confirmed John did not get legal advice.
- [173] I cannot accept Gary's recollection of what was common knowledge in the industry because that amounts to an opinion about standard practice that only an expert could give. Moreover, Gary could not identify the source of his knowledge about the significance of "two years" of cohabitation.
- [174] However, I do not find Gary intended to mislead the Court. I find his recollection was inaccurate most likely based on some confusion. I find it probable that when he learned about the 2013 changes to the family law, he incorrectly remembered or believed they had been applicable when the PA House was purchased. In my view, this erodes the reliability of Gary's recollection that John was surprised that Elizabeth would be the only one on title to the PA House.
- [175] I also find other evidence has the same effect. The parties' agreed statement of facts confirms that John became a joint tenant with Mary on the 59A House even though it was the house Mary had lived in before their marriage. Although Elizabeth moved in to live with John after Mary's death, Elizabeth was never put on title of the 59A House.
- [176] John was a certified general accountant and many witnesses described him as being careful with his money and keeping careful records. That characterization is buttressed by his preparation of the Loan Document.

- [177] In that context, and based on my finding that John and Elizabeth did agree to keep their finances separate, I find it difficult to accept John would be surprised the PA House would only go into Elizabeth's name. Furthermore, John's surprise would conflict with Cheryl's evidence about the conversation she had with John (see above paras. 142-143).
- [178] In addition, Gary also confirmed during cross-examination that while John and Elizabeth were looking at houses, Gary did not know who would own the house because neither said anything to him about; it was never discussed. Therefore, I also find Gary's testimony that he believed John and Elizabeth were looking to buy a house that they would both own to have low reliability.
- [179] In all these circumstances, I am not persuaded that John would have gone into the process of looking for a house believing he would own it, only to say and do nothing upon learning at the time Gary wrote the offer that Elizabeth would be the sole registered owner.
- [180] Accordingly, I find John was not surprised Elizabeth registered the PA House only in her name. Nor do I find the evidence establishes that either of them, at any time, believed or intended that John would own any portion of the PA House.
- [181] Gary's testimony about John's surprise was the only evidence he or Lorne could offer as to John's state of mind at the time the PA House was purchased. In light of all the evidence, I find on a balance of probabilities that both John and Elizabeth understood and accepted that the PA House belonged only to Elizabeth and it was not intended to be a joint asset. This supports Theresa's position in the litigation.

c. Conclusion about Financial Arrangements

- [182] Based on the foregoing, I find that John and Elizabeth had always agreed to keep their finances separate. I find this agreement also applied to the PA House in that they both agreed it was not a joint asset; it was Elizabeth's. These conclusions support Theresa's position on property division.

5. Conclusion on Significant Unfairness

- [183] Based on the preceding analysis, I find that Theresa has established on a balance of probabilities that if John and Elizabeth had separated, it would be significantly unfair to divide, equally or otherwise, the value of the PA House. Therefore, I conclude neither John nor his estate have ever had any interest, legal or beneficial, in the PA House. Accordingly, the CPL must be removed.

IV. CONCLUSIONS

- [184] I repeat the two issues analyzed in this judgment.
- [185] First, what was the effect of Elizabeth's transfer of the PA House into joint tenancy with Theresa in January 2014? I find Elizabeth's transfer of the PA House into joint tenancy was a full and complete inter vivos gift to Theresa that included the right of survivorship. Because

the evidence about Elizabeth's intent was clear, the presumption of resulting trust does not arise. In the alternative, even if it did, I am satisfied that the evidence was sufficient to rebut it. I also find there was no support for a claim that the transfer into joint tenancy was a fraudulent conveyance. These findings result in Gary's Civil Action being dismissed.

[186] Because Elizabeth's interest in the PA House extinguished upon her death, no portion of the PA House passed into her estate. Therefore, the notice of family claim is dismissed, as is the counterclaim.

[187] The second issue asks if I were to find that Elizabeth and John separated in late February 2014, would it be significantly unfair to equally divide the PA House (FLA, s. 95(1)(a))? Given my conclusions, it is not necessary to answer this question, but I have addressed it in the alternative. I conclude the answer is yes. Therefore, had Elizabeth and John separated I would have allocated the entire value of the PA House to Elizabeth.

[188] For all those reasons, I find neither John nor his estate has ever had any legal or beneficial interest in the PA House.

[189] Accordingly, with regard to the three actions:

Family Proceeding (NW Registry Action E046000)

- a) The notice of family claim is dismissed in its entirety, and the CPL must be removed.
- b) With regard to the counterclaim, the claim for spousal support is dismissed.
- c) The claim for an order for unequal division of family property is also dismissed because Elizabeth's estate has never had an interest in the PA House. That is because the transfer into joint tenancy of the PA House was a full and complete inter vivos gift to Theresa that did not create a resulting trust. Therefore, upon her death, Elizabeth's interest (and consequently any claim that purported to attach to that interest) was extinguished.
- d) In the alternative, had I made a finding that the parties separated, I would have concluded it would be significantly unfair to equally divide the value of the PA House, and I would have allocated it to Elizabeth (who owned it jointly with Theresa)..

Gary's Civil Action (NW Registry Action S190857)

- e) The action for damages is dismissed.

Theresa's Civil Action (NW Registry Action S191814)

- f) I grant the order declaring that Theresa holds the PA House in trust in equal shares for herself and her two brothers (para. 5 of Part 2).
- g) It is unnecessary to address any of the other orders sought.

V. COSTS

[190] As representative of Elizabeth's estate, Theresa is entitled to costs with regard to the notice of family claim. Even though I dismissed the counterclaim, Theresa, as litigation representative for Elizabeth's estate, is also entitled to those costs because as an alternative to my main conclusion, I would have granted relief sought in the counterclaim for an unequal division of the PA House.

[191] Theresa is also entitled to costs of both civil actions.

If there are circumstances relevant to the award of costs of which I am unaware or have failed to address, the parties may seek to either provide brief written submissions or convene a brief hearing before me. However, that request must be within 30 days of the date of this judgment.

"Sharma J."

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