

CANADA / JUDGMENT

Gerberg v. Gerberg

2025 BCSC 1359

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Supreme Court of British Columbia

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2025 BCSC 1359 Gerberg v. Gerberg

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gerberg v. Gerberg,

2025 BCSC 1359

Date: 20250716

Docket: S96765

Registry: Nanaimo

Between:

Jon Allen Gerberg

Plaintiff

And

Jason Zachary Gerberg

Defendant

And

Jason Maynard and Nicole Saunders

Defendants by way of Counterclaim

Before: The Honourable Justice Hoffman

Reasons for Judgment

Counsel for the Plaintiff and the Defendants by way of Counterclaim:

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Place and Date of Trial:

Nanaimo, B.C.

December 10-13, 16-20, 2024

March 31, 2025

April 1, 2025

Place and Date of Judgment:

Nanaimo, B.C.

July 16, 2025

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Overview

- [1] This case arises out of a transaction within the Gerberg family whereby Jon Gerberg transferred a property in Coombs, British Columbia (the "Property"), into the name of his son, Jason Gerberg, for nominal consideration. Jon Gerberg's intention regarding the nature of this transaction is the key issue in this proceeding.
- [2] For clarity and readability, I will refer to the parties and many of the central individuals in this matter by their first names. No disrespect is intended in doing so.
- [3] Jason was registered on title to the Property on September 13, 2005, shortly after Jon's second wife, Sharon Twarry, served him with a divorce petition. Jon says that Jason, who has made no financial contributions to the Property and paid no consideration in respect of its transfer, holds the Property in a resulting trust for his benefit. Jon now seeks to have the legal title transferred back to him.
- [4] Alternatively, Jon says that he gratuitously transferred the Property to Jason because he was experiencing life threatening medical issues and believed that it was a real possibility that he would die. Jon submits that by operation of the doctrine of donatio mortis causa, he is now entitled to revoke the gift.

- [5] Jason says his father intended to gift him the Property, that this gift was fully perfected in 2005, and, as a result, he is the legal and equitable owner of the Property. Jason says that the gift was the result of a long-standing verbal agreement that Jon made with his mother, Jon's first wife, Barbara Flynn, during their divorce. It is alleged that Jon and Ms. Flynn agreed that: (1) she would relinquish any claim to the Property so long as she was able to see her sons; and (2) Jon would give the Property to their two sons, Jason and Daniel, when they became adults. I will refer to this as the alleged verbal agreement.
- [6] A written separation agreement signed by Ms. Flynn and Jon in May 1986 (the "1986 Separation Agreement") does not contain any reference to the alleged verbal agreement. Instead, the 1986 Separation Agreement transferred Ms. Flynn's interest in the Property to Jon.
- [7] Jason alleges that Jon verbally, mentally, and physically intimidated Ms. Flynn into signing the 1986 Separation Agreement and that she only did so because of the alleged verbal agreement. Jason relies on the clean hands doctrine and submits that this wrongful conduct disentitles Jon from claiming a resulting trust in the Property.
- [8] Jason denies that the gift was intended to take place upon his father's death. Even if Jon could establish that was his intention, Jason says that Jon significantly delayed bringing forward his claim and that, as a result, his claim is barred by the doctrine of laches.
- [9] Jason also seeks a writ of possession to require his father and his father's guests, Jason Maynard and Nicole Saunders, who live in a trailer on the Property, to leave the Property. He also seeks compensation on the basis that Jon has interfered with his ability to claim rent from Jason Maynard and Nicole Saunders.
- [10] As my reasons below explain, there is insufficient evidence to establish that Jon's intention was to gift the Property to Jason. Much of the evidence that Jason relies upon to demonstrate that Jon intended to gift him the Property is not determinative. Rather, it is equally consistent with an intention to transfer the Property into Jason's name while retaining the beneficial interest until Jon's death. Due to the presumption of resulting trust, in the absence of evidence which demonstrates, on a balance of probabilities, an intention to gift the Property, the law presumes that Jason holds only the legal title to the Property and that Jon has retained the beneficial interest.
- [11] Given that I have found in favour of Jon, Jason's counterclaim for damages is dismissed.

Issues

- [12] The main issues to be resolved in this matter are as follows:
- In transferring the Property, did Jon intend to retain beneficial ownership through a resulting trust or did he intend to gift the Property to Jason outright?

- b) If Jon intended to retain the beneficial ownership, did he engage in wrongful conduct in respect of either the 1986 Separation Agreement or his divorce from Ms. Twarry, such that the equitable doctrine of clean hands would disentitle him from recovering ownership of the Property?
- c) If the Property was gifted, did Jon do so in circumstances that would establish that it was a donatio mortis causa such that he is entitled to revoke the gift?
- d) Does the doctrine of laches defeat Jon's claim?

Background Facts

- [13] I begin by making findings of fact on the basis of evidence that was largely not contested. I will address and make additional findings in respect of disputed facts in my analysis of each of the above listed issues.

First Marriage and the Acquisition of the Property

- [14] Jon Gerberg married Barbara Gerberg (now Barbara Flynn) in California in 1971. Following their marriage, they decided to relocate to Alaska. On their way to Alaska, they travelled through British Columbia and decided to settle on Vancouver Island instead.
- [15] The Property is a 16.5 acre wooded, rural lot with a house, a large wood shop, and a smaller wood shop, all of which were constructed with lumber from trees felled and milled on the Property. When it was purchased in 1972, the Property was mostly undeveloped.
- [16] There is some dispute in the evidence as to how the Property was acquired and how the mortgage was paid. Jon initially denied that Ms. Flynn was ever on title, but documents relating to their separation make it clear that Jon and Ms. Flynn were registered as joint tenants. Ms. Flynn testified that she worked during their marriage and that she was largely responsible for making the mortgage payments. Jon denies that Ms. Flynn made any contributions to the mortgage.
- [17] Jon and Ms. Flynn had two sons: Jason, who was born in 1973, and Daniel, born in 1978.
- [18] In 1974, when Jason was still a baby, Jon and Ms. Flynn moved into a trailer on the Property. They lived what could be described as a homesteading lifestyle without running water and, at least until 1982, no hydro-electric power.

First Divorce and Resulting Settlement Agreement

- [19] In October 1985, Ms. Flynn filed a petition for divorce alleging that Jon had both verbally and physically abused her. She sought custody of Jason and Daniel and division of the family assets, including the Property.

- [20] In December of that year, Jon took Jason and Daniel to Baltimore, Maryland, to live with his parents. At this time, Jason was 12 and Daniel was seven. The boys remained in Maryland until June 1986 when they returned to British Columbia with Jon's new girlfriend, Tamara Judd.
- [21] Under the 1986 Separation Agreement, Jon retained custody of the children, although he and Ms. Flynn were to share joint guardianship and Ms. Flynn was to have reasonable access. Jon assumed sole responsibility for the family debt associated with the Property and a family business, and Ms. Flynn agreed to convey her interest in the Property to Jon.
- [22] The 1986 Separation Agreement contains a whereas clause, which states that the "parties are desirous of effecting a complete and final settlement of all outstanding matters in existence between them, including issues of guardianship, custody, maintenance and property." In paragraph 5.3, each party acknowledged that the agreement was "intended to be a full and final settlement of all issues of property and maintenance currently outstanding".
- [23] As the parties seriously contest the existence of the alleged verbal agreement, I will deal with the evidence in this regard below.
- [24] On February 2, 1987, at a hearing attended only by Jon's lawyer, the court granted a decree nisi to Jon and Ms. Flynn effecting their divorce.
- [25] In May 1987, a year after she signed the 1986 Separation Agreement, Ms. Flynn filed a notice of motion to vary the decree nisi to get an order allowing her access to the children and preventing Jon from taking the children out of British Columbia. In support of this motion, Ms. Flynn swore an affidavit that she:
- did ultimately agree to release claim to the family assets on the understanding that [Jon] would ensure the return of the children to the jurisdiction following the completion of the school year in Maryland and that he would agree that I would be guardian of the children and have reasonable access to the children.
- The affidavit details her evidence that Jon was preventing her access to the children and was taking the position that the children did not wish to have contact with her.
- [26] Ms. Flynn further sets out in the affidavit that she allowed the divorce proceeding to proceed on the basis of Jon's counter-petition for adultery at Jon's insistence. She described Jon's repeated attempts prior to the 1986 Separation Agreement to persuade her to release her claim to the family assets, as well as interactions after the 1986 Separation Agreement, both of which involved acts of intimidation. However, there is no mention of the alleged verbal agreement in her affidavit.
- [27] Ms. Flynn did not go ahead with her motion to vary the decree nisi, and Jon continued to have custody of the boys. Her allegations of abuse and cruelty against Jon were never adjudicated.

- [28] It is not disputed that, following the divorce, Jason and Daniel only saw their mother on a few occasions during their childhood because they spent much of their time in the United States. It was not until they were both adults that they began to have a relationship with their mother.

Second Marriage and the Transfer of the Property

- [29] On January 4, 1995, Jon married Sharon Twarry. They owned and resided in a house in Boulder, Colorado, but also spent time together on the Property. After 10 years of marriage, on August 29, 2005, Ms. Twarry filed a petition for dissolution of marriage in Boulder (the "Colorado Action").
- [30] Jon was served with the petition in the Colorado Action on September 1, 2005, while at the Property.
- [31] On September 13, 2005, Jon executed a Form A which transferred the Property to Jason for "\$1.00 and other good and valuable consideration". Since the transfer of the Property, Jon has continued to reside, and currently resides, on the Property.
- [32] Ms. Twarry did not pursue the Colorado Action. On October 14, 2005, the court in Colorado granted her motion to dismiss the petition.

Second Divorce

- [33] Divorce proceedings between Jon and Ms. Sharon Twarry were renewed in September 2009, when Ms. Twarry filed a proceeding in British Columbia seeking a divorce and division of family assets, including the Property. Both Jon and Jason were named as defendants (the "2009 British Columbia Action").
- [34] In the 2009 British Columbia Action, Ms. Twarry alleged that Jon transferred the Property to Jason with the intent to defeat her claimed interest in a family asset.
- [35] Jon filed a statement of defence on October 18, 2009, denying this claim and taking the position that Colorado was the appropriate jurisdiction for the adjudication of the divorce.
- [36] On January 27, 2010, Jon's lawyer, Charles Beckingham, filed a Statement of Defence on behalf of Jason alleging that "the defendant Jon Gerberg transferred the said property to the defendant Jason as culmination and perfection of agreements and intentions which were established long before the plaintiff ever met the defendants."
- [37] On August 15, 2011, Jon filed a petition for dissolution of marriage in Colorado (the "2011 Colorado Action").
- [38] In April 2012, Jon and Ms. Twarry entered into a separation agreement whereby she relinquished any claim to the Property and Jon gave up any claim to the house he and Sharon had in Boulder. This agreement resolved the allegation that Jon fraudulently conveyed the Property on the following terms:

In 1972, Jon purchased 16 acres of land located at 2338 Swayne Road, Coombs, Canada, which is currently valued at \$392,100. Jon purchased this property in 1972 with the intent to provide the same to his children. When the parties married in 1993, Sharon was made aware of this plan, understood, and agreed to same. This property was transferred to Jon's son during the marriage, for nominal consideration. Again, this transfer was previously contemplated and agreed upon by the parties. Sharon shall waive all her right to title and interest in and to this property. Regardless of whether Jon or his son is the legal owner of the property, Sharon waives all interest in this property.

[39] As will be discussed below, the terms of this agreement are relevant to Jon's intention in transferring the Property to Jason in September 2005.

Current and Prior Occupants of the Property

[40] Jason moved back to Canada in 2000 and spent summers on the Property living in a tent with his now wife, Amanda Allman. At the time Jason's name was put on title, he was not living on the Property. He and Amanda came back to the Property in 2006 and lived in the unfinished house. They later moved into a trailer on the Property. When that trailer was destroyed by a downed tree in a windstorm in December 2018, he and Amanda moved to Nanoose Bay, where they still live.

[41] Jason Maynard and Nicole Saunders moved on to the property in 2020. The circumstances by which they claim to live on the Property are in dispute, but they have remained on the Property since that time and currently live in a fifth wheel trailer.

[42] On September 15, 2022, Mr. Maynard and Ms. Saunders were hosting Jon at their trailer for a barbecue to celebrate Jon's birthday. Jason came to the gathering and a verbal altercation between Jon and Jason ensued. Each party gave different evidence as to what led to the argument.

[43] After this altercation, Jason began taking steps to evict Jason Maynard and Nicole Saunders from the Property on the grounds that, as owner of the Property, he had the right to do so.

[44] Jon filed the notice of civil claim in this proceeding on November 10, 2022.

Credibility & Reliability

Legal Principles

[45] This is a case in which the credibility of the witnesses plays a central role in the adjudication of this dispute, as the parties disagree on many of the relevant facts. In addition, many of the disputed events took place almost four decades ago, which raises issues relating to reliability.

- [46] Credibility and reliability are not the same. Credibility is an assessment of the truthfulness of a witness whereas reliability assesses the ability of the witness to accurately observe, recall, and recount the events in question: *R. v. Plehanov*, 2019 BCCA 462 at para. 51, leave to appeal to SCC ref'd, [2020] S.C.C.A. No. 489.
- [47] In assessing the evidence of each party and the witnesses called on their behalf, I have taken into account the various considerations that comprise the assessment of the trustworthiness of a witness' testimony identified in the oft-cited decision of *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, at para. 186. These factors include:
- a) the ability of a witness to observe events;
 - b) the firmness of a witness' memory;
 - c) the ability of a witness to put aside their interests in the outcome of the litigation to modify their recollection;
 - d) whether the evidence of a witness is consistent with other independent evidence;
 - e) whether the witness changes their evidence during direct and cross-examination;
 - f) whether the evidence of a witness seems unlikely, unreasonable, or implausible; and
 - g) whether the witness has a motive to lie.
- [48] Consistent with *Farnya v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A), my consideration of the above factors is subject to an overall assessment as to the extent to which the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.

Findings on Credibility

- [49] I note that counsel for Jon requested, and I granted at the outset of the trial, an order excluding non-party witnesses who had yet to testify.

Jon

- [50] The two primary witnesses in this matter were Jon and Jason. In many respects, Jon was not a careful witness. On several occasions, he resorted to denying any recall of certain matters, either because it would not serve him to have a recollection or because he did not exercise care to exhaust his memory. At times, he would express certainty regarding his evidence only to be later contradicted by documents or his examination for discovery evidence. When confronted with contradictions, rather than readily accepting them, he often attempted to explain them away.
- [51] While some lack of care in exhausting his memory may be explained by the emotional toll of this trial and the underlying conflict with his family, most appeared to be motivated by a desire to alter his evidence in his interest. He became, at times, combative during cross-

examination, although some of this understandably arose from the accusatory nature of many of the questions counsel put to him. Given these issues, I have approached Jon's evidence with caution. I place little weight on his evidence regarding his subjective intentions.

Jason

- [52] Jason's evidence also raises credibility concerns. There were times when he exaggerated his evidence and resorted to hyperbolic descriptions to paint his father in a bad light. For example, at one point he referred to his father as a "psychopath and dangerous man unable to tell the truth" and so controlling that he "liked to control when my dog barked and how the chickens would walk".
- [53] A video was entered into evidence of a conversation that Jason had with David Bull, who was hired by Jon to do work on the Property and who also testified in this matter. Mr. Bull surreptitiously recorded this video because Jason began to discuss the dispute with his father over the Property. All participants in the video were consuming alcohol and smoking marijuana. In the video, Jason confidently told Mr. Bull that Jon had a written agreement with Jason's mother, Ms. Flynn, whereby Jon agreed to hand over the Property to his sons. Based on the evidence tendered in this proceeding, this was plainly not true. Jason admitted at trial that he was mistaken but offered the excuse that he was both misinformed as to the facts and inebriated. Nevertheless, the confidence with which he expressed these matters as truth in the video, as well as his overall tendency to exaggerate, cause me to also exercise caution in respect of his evidence.
- [54] Jason's evidence that Jon understood that Jason was in control of the Property and asked for Jason's permission before undertaking anything on the Property was not credible. Jason himself contradicted this by confirming on cross-examination his belief, initially expressed to David Bull in the video, that Jon would bulldoze the house on the Property out of spite. He also testified that Jon was very controlling in every other respect except that, conveniently, Jon accepted that Jason was in control of the Property.
- [55] Accordingly, I am unable to place significant weight on Jason's testimony regarding his understanding of the transfer.

Other Witnesses

- [56] In light of my concerns about the credibility of both parties' evidence, it is especially important to consider the inherent plausibility of their evidence and weigh it against more objective and independent evidence.
- [57] Each party called a number of witnesses. Jason Maynard and Nicole Saunders testified regarding Jon's use of the Property and how they assisted Jon with daily tasks and maintenance of the Property. Jon called Robin Ware, Matthew MacFarlane, Jorinn von Conruhds, and David Bull to testify to the work that Jon paid them to do on the Property and

their observations of Jason's contributions to the Property. Jon also called his friend Ms. Kilbride, with whom Jon shared some of the details of his medical issues and his plans for the Property.

- [58] The witnesses called for Jon included Denis Stofer and Charles Beckingham, legal counsel in the divorce proceedings against Barbara Flynn and Sharon Twarry, respectively. They both testified in a straightforward and objective manner, although their memory as to events was dim due to the passage of time. Mr. Stofer had the benefit of his file to refresh his memory. I had no concerns about the credibility of their evidence.
- [59] In Jason's defence, the court heard evidence from his wife, Amanda Allman; his brother, Daniel Gerberg; his mother, Barbara Flynn; and Tamara Judd, Jon's ex-girlfriend.
- [60] With the exception of Jon's two former counsel, who gave their evidence in a straightforward and objective manner, and Ms. Flynn (who I will discuss separately), most of the witnesses called by Jon and Jason appeared to be very much aligned with the interests of the party for whom they were called. For example, the witnesses called for Jon all said that they saw Jason do nothing on the Property. When David Bull was pushed on this point in cross-examination, he was forced to admit that Jason did some work in connection with the shop suite.
- [61] Ms. Flynn testified in a straightforward manner and, for the most part, I find her evidence to be credible. However, as I will discuss in greater detail below, I do not accept that all of her evidence regarding the terms of the alleged verbal agreement with Jon is reliable.
- [62] As the trial judge, even where the evidence of a witness presents serious credibility concerns, I am entitled to accept some, all, or none of their evidence: *Padgham v. Ram*, 2025 BCCA 100 at para. 41. In assessing which aspects of a witness' testimony I can accept, I have considered the degree to which that evidence is consistent with the testimony of the other witnesses and the documentary evidence before me, as well as the extent to which it is consistent with the preponderance of probabilities.

Issue #1 - What was Jon's intent in transferring the Property?

- [63] Before reviewing the evidence relevant to Jon's intent in transferring the Property, I set out the legal principles that must be applied to resolve this issue.

Legal Principles Relating to Gifts and Resulting Trusts

- [64] When a person gratuitously transfers property for no consideration, the law presumes that the person receiving the property holds the beneficial interest in it on a resulting trust for the person who transferred it. As explained in *Pecore v. Pecore*, 2007 SCC 17 at para. 24, "equity presumes bargains not gifts."

- [65] This presumption is rebuttable. When a transfer is challenged, the onus is placed on the person receiving the property to demonstrate on a balance of probabilities that a gift of both the legal and beneficial interests in the property was intended: *Pecore* paras. 24-25; Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds, *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters, 2021) at 10.I.A.
- [66] The Court of Appeal in *Fuller v. Harper*, 2010 BCCA 421 at paras. 42-47, held that resorting to the presumption is only appropriate where there is insufficient evidence to establish the actual intent of the person transferring the property at the time the transfer was made. All of the evidence, both direct and circumstantial, must be weighed. However, caution must be exercised with respect to post transfer conduct or statements. Little weight is given to plainly self-serving statements or conduct of the transferor. However, post-transfer evidence relevant to the intention of the transferor can be considered so long as it is sufficiently reliable and care is taken to guard against evidence that is self-serving or tends to reflect a change in intention: *Pecore* at paras. 56-59, adopting *Lavelle v. Lavelle*, [2004] EWCA Civ 223 (BAILII) at para. 19.
- [67] While gifts are not presumed, the evidence may establish that a gratuitous transfer made without consideration was intended to be an inter vivos gift. As set out in *McKendry v. McKendry*, 2017 BCCA 48 at para. 31, for such a gift to be legally binding, the evidence must establish two requirements. First, the donor must have intended to make a gift and must have delivered the subject matter to the donee. Second, the donor must have done everything necessary, according to the nature of the property, to transfer it to the donee and render the settlement legally binding on him or her. In respect of the first requirement, the intention of the donor at the time of the transfer is the governing consideration.
- [68] If the requirements of a valid gift are made out, the gift is legally binding and cannot be retracted: *McKendry* at para. 32. However, an incomplete gift can be revoked at any time, and the court will not compel the intending donor to perfect the gift: *Kooner v. Kooner*, 100 D.L.R. (3d) 76 at 78-79, 1979 CanLII 448 (B.C.S.C.).
- [69] The exception to the inability to revoke such gifts is the legal doctrine of *donatio mortis causa*. The legal principles relating to this doctrine are set out below in my analysis of the second issue.

Assessment of Jon's Intention in Transferring the Property

- [70] My task in assessing the evidence before me is to ascertain Jon's actual intentions in transferring the Property to Jason. I will first examine the evidence regarding the transfer itself to determine if there is sufficient evidence to ascertain Jon's intention in making the transfer.

- [71] Jon's position at trial is that he transferred the Property to Jason because of the diagnosis he received in 2004 and his concern about his children having to pay probate when he died. However, there is no dispute that Jon did not share with Jason that these fears formed the basis for his decision to put the Property in Jason's name. There is also no dispute that Jason did not ask to go on title.

Events Leading up to the Transfer

- [72] Jon testified that he had a conversation with his friend Robin Ware in the early 2000s about the death of Mr. Ware's mother and the handling of her estate. Mr. Ware told him that his family had to pay the tax department \$80,000 to keep his mother's property in the family. This evidence was not tendered for the truth of its contents, but rather to ground Jon's evidence regarding his understanding of Mr. Ware's situation. According to Jon, as a result of this information, he became concerned that Jason would not have the necessary funds to pay probate should Jon pass away.
- [73] Mr. Ware testified that he has known Jon since the 1970s and considers Jon a friend. Mr. Ware confirmed that his parents passed away in 2000 or 2001 and left their land to him and his siblings. On direct, Mr. Ware said that he could no longer recall the amounts involved but that they had to pay money to the executrix of the estate, in addition to covering other bills. Mr. Ware testified that he and his siblings had to mortgage the property they inherited to cover these expenses.
- [74] On cross-examination, Mr. Ware agreed with counsel's suggestion that the amount paid to the executrix was approximately \$12,000. On re-direct, he again stated that his memory of the amount was not clear but that the total amount they were required to cover may have been in the range of \$30,000. Mr. Ware did not recall a specific conversation with Jon about having to mortgage the properties to cover these expenses, but he was confident that he would have discussed it with Jon because the death of his parents and the handling of their estate were important events in his life.
- [75] According to Jon, his health played a role in his decision to transfer the Property to Jason. Jon testified that, while in Colorado in 2004, he was diagnosed with a heart condition which he understood to be an enlarged aorta. Because he was having chest pains, his brother recommended that he see a particular doctor. Jon did not have health insurance so paid the doctor in cash. According to Jon, the doctor did an ultrasound and, upon reviewing the results, told him that he had a heart problem and that if his aorta burst, he could die within three minutes. The doctor suggested that he follow up with him and that if the issue worsened, he could be a candidate for bypass surgery. He did not return for any follow-ups with the doctor. No medical records relating to this consultation were placed into evidence before me.
- [76] Jon testified that his older brother died of a heart attack in 1993.

- [77] Jon only told a few people about this heart issue: his younger brother, Glen, who has since passed away; his friend Carlos, who is also deceased; and his friend Eileen Kilbride, who gave evidence at trial.
- [78] Ms. Kilbride lives in Colorado and has known Jon for 38 years. She testified that sometime before the middle of 2005, Jon shared with her that he had a heart issue and that it had the potential to kill him instantly. Ms. Kilbride testified that Jon expressed the concern to her that if he died, Jason would be unable to financially manage the Property on his own. She did not ask him any details about his condition. Jon also spoke to her about needing back surgery in 2004 or 2005. Ms. Kilbride's evidence in this regard was not significantly challenged in cross-examination.

Timing of Transfer and Service of Divorce Papers by Sharon Twarry

- [79] Jon testified that he decided to take steps to transfer the Property into Jason's name in 2005. His first step was to make an appointment with a lawyer to complete the transfer. After making that appointment, he called Sharon and told her about the plan to transfer the Property to Jason. Jon says that while this particular conversation took place two weeks before the transfer, throughout their relationship, he had told Sharon that he intended to put the Property into the names of his sons and that they would get the Property when he died.
- [80] According to Jon, Sharon served him with divorce papers on the following Friday. Sharon was not called as a witness to corroborate this timeline. As set out above, the parties agree that the divorce papers were served on September 1, 2005, and the transfer took place on September 13, 2005.

Meeting to Transfer Title

- [81] Jon described the meeting in which the Property was transferred as brief. Jon told the lawyer that he "wanted to put the Property in my kid's name". He recalled that the lawyer asked if money would be changing hands and the lawyer's advice that there would need to be a fee of at least one dollar. Jon agreed that he did not raise any concerns regarding his health or probate fees at this meeting. Jon also says that he had no understanding of the concept of holding a property in trust or the right of survivorship at the time of the transfer.
- [82] Jon tendered into evidence an affidavit from Douglas Marshall, the lawyer involved in the transfer. In this affidavit, Mr. Marshall deposes that he has no recollection of the meeting.
- [83] Jon testified that his intended outcome for this transfer was that he and Jason could both live on the Property. He hoped that Jason would work with him on the Property and that Jason would eventually build a house there.
- [84] Jon did not anticipate that Jason could mortgage, sell, or make major changes to the Property while he was alive. It was his intent that Jason would take over control of the Property after he had passed away.

- [85] Jason's evidence on the transfer is that his father called him and said that he had made an appointment to transfer the Property. At this time, Jason and Amanda were not living on the Property. Jason said that there was no discussion with his father at the time of the transfer as to what it meant in terms of legal title. Jason suggested in his evidence that the only thing Jon told him at the time was that "once I owned [the Property], it would be mine alone".
- [86] Jason did not provide any evidence as to any discussions that took place at the meeting with the lawyer. His evidence was that they signed the documents, he handed his father \$10 dollars, and then "[the Property] became mine."
- [87] The freehold transfer document states that the consideration was "\$1.00 and other good and valuable consideration".
- [88] According to Jason, Jon did not say anything about the transfer being in satisfaction of any agreement or as part of his estate planning. Jason says that the only reason Jon gave him for the timing of the transfer was that "I was ready". Jason described the Property as his "birth right" because, from the age of five or six, his father frequently told him and his brother that we were going to get the Property.
- [89] Based on all the evidence surrounding the actual transfer, I find that there was no discussion between Jon and Jason as to Jon's intention in transferring the Property into Jason's name either before or after the transfer took place. In so finding, I do not accept Jason's evidence that Jon told him after the transfer that the Property was to be his alone. It is not plausible that Jon would have made such a statement as it is inconsistent with the fact that Jon continued to live on the Property, exercise considerable control over it, and make substantial improvements, the evidence of which will be discussed further below.
- [90] The evidence of Jon and Jason regarding the transfer itself is insufficient to make a finding as to Jon's intent behind the transfer. I must resort to other evidence to ascertain the intention behind the transaction.

The Alleged Verbal Agreement

- [91] This case is unusual in the sense that Jason takes the position that events alleged to have occurred some 40 years prior to the transfer of the Property are relevant to ascertaining Jon's intent in transferring the Property to him in 2005. Jason says that Jon gifted the Property to him in fulfillment of the alleged verbal agreement. Jon denies the existence of any verbal agreement.
- [92] At the outset, it is important to note that the only potential relevance of the alleged verbal agreement, aside from Jason's unclean hands argument addressed below, is whether it assists the court to ascertain Jon's actual intention in transferring the Property into Jason's name in 2005. Jason was not a party to the alleged verbal agreement, and accordingly, it would not be for this Court to enforce the terms of any agreement found to exist. Nor does Jason have any standing to set aside the 1986 Separation Agreement in which Jon obtained

the Property. Similar to the finding of Justice Horsman (as she then was) in *Weaver v. Weaver Estate*, 2019 BCSC 132, these issues are not before me.

- [93] In *Weaver*, the issue before the court was whether inter vivos gifts made by the deceased to his cousins were subject to a resulting trust in favour of the deceased's children, who were the plaintiffs in the action. The plaintiffs took the position that, in light of their father's mistreatment of them as children and his failure to financially support them throughout their childhood, it would be inequitable to allow their father to disinherit them through the inter vivos gifts. Justice Horsman rejected those arguments and held as follows:
- [71] These arguments appear to me to be directed at issues that are not before me. I understand the law of resulting trust to require me to ascertain [the deceased father's] actual intentions in making the inter vivos transfers to [his cousin] and to ensure [the deceased] took all necessary steps to perfect the transfers. The plaintiffs did not draw my attention to any cases in which courts have applied the presumption of resulting trust on the basis of general equitable concerns in the face of clear evidence of intention that would otherwise rebut the presumption. The Supreme Court of Canada's decision in *Kerr v. Baranow*, 2011 SCC 10 provides support for the contrary proposition; that is, that general equitable considerations are more appropriately addressed through principles of unjust enrichment.
- [94] Similar to *Weaver*, this case is not about whether Jon was abusive to Jason's mother or was a bad father to his sons. The relevance of the evidence regarding the alleged verbal agreement is limited to the extent that it informs Jon's actual intention in making the transfer.
- [95] Ms. Flynn testified that Jon was abusive towards her, both physically and emotionally, during their marriage. She decided to leave him in 1985. Following their separation, in December 1985, Jon called and told her that he was going to take the boys to Baltimore to stay with his parents. By the time Ms. Flynn got to the Property, they were already gone. She testified that Jon only permitted her to speak once with the boys while they were in Baltimore.
- [96] According to Ms. Flynn, Jon returned in March 1986 without the boys and began to harass her about the divorce proceeding. He threatened to kill her and her mother if he did not get all of the Property. She testified that she called the police about these threats but they just told her to give Jon what he wanted, and he would go away. This alleged harassment took place two months prior to Ms. Flynn signing the 1986 Separation Agreement.
- [97] Ms. Flynn testified that she and Jon then made a verbal agreement that she would sign over her share of the Property. In return, he would bring the boys back to BC and allow her to share custody, although she wanted to have them all to herself. At this point, counsel conducting her direct examination asked, "is that the only agreement?" Ms. Flynn responded "yes, he would bring the boys back and leave me alone." Counsel then asked if she and Jon discussed anything else about the Property. Ms. Flynn responded that "there wasn't anything else, he wanted the Property and I wanted the boys and for me the Property was nothing more than a bargaining chip at that point as it was for him as well. I just wanted the boys back." Then counsel prompted Ms. Flynn with a further question, to which no objection was

raised, namely, whether Jon was supposed to get the Property forever. Ms. Flynn responded, "no we had made an agreement as well that he would bring the boys back, I would sign the Property over and when the boys became of age, which would have been 19 for Daniel, that he would sign the property over to them at that point."

- [98] Ms. Flynn testified that Jon instructed her not to mention this arrangement to anyone. On the stand, Ms. Flynn initially denied that she told her counsel in the divorce proceedings, Peter Avis, about the alleged verbal agreement. However, later in her testimony, she recanted that evidence, and she believes she did tell him, although she could not be 100% certain.
- [99] In evidence is a May 9, 1986, letter from Peter Avis to Denis Stofer, Jon's counsel in the divorce proceeding, enclosing a copy of the 1986 Separation Agreement signed by Ms. Flynn. In the letter, Mr. Avis opined that the agreement had been signed "in circumstances of extreme duress" and that, notwithstanding his advice to Ms. Flynn, "the agreement was totally inappropriate." Mr. Avis was not called to give evidence as to what prompted him to make this statement.
- [100] Mr. Flynn testified that Jon left the boys in Baltimore after the 1986 Separation Agreement was signed. When the boys returned in the summer of 1986, she was only permitted to see them at Christmas.
- [101] In the affidavit Ms. Flynn swore in support of her motion in May 1997 for an order providing her access to the boys and preventing Jon from removing them from BC, she alleged that Jon threatened and harassed her. Those allegations are consistent with the testimony she gave in his proceeding. However, in the affidavit, she described the arrangement that she reached with Jon as follows:
- I did ultimately agree to release the claim to the family assets on the understanding that the Respondent would ensure the return of the children to the jurisdiction following the completion of the school year in Maryland and that he would agree that I would be guardian of the children and have reasonable access to the children.
- [102] When questioned on cross-examination about her omission of the verbal agreement in the affidavit, she testified that she feared that her life would be in danger if she did so because Jon had instructed her not to tell anyone.
- [103] Jason turned 19 in 1992, and Daniel turned 19 in 1997. Ms. Flynn acknowledged that she made no inquiries as to why the Property had not been transferred to her sons and took no steps to enforce the verbal agreement in either 1992 or 1997 because she had no desire to speak to Jon.

[104] Jon not only denies the existence of the alleged verbal agreement, he denies coercing Ms. Flynn into signing the 1986 Separation Agreement (which granted him a 100% interest in the Property). When asked how he got the Property, Jon testified that she never made a claim for it. This is contrary to documentary evidence that Mr. Avis advised Jon's counsel, Mr. Stofer, on April 28, 1986, that Ms. Flynn was:

not prepared to transfer her interest in the former matrimonial residence to Mr. Gerberg. However, Mrs. Gerberg is quite prepared to allow Mr. Gerberg to stay in possession of the former matrimonial presence for so long as the children of the marriage may reside there until they have completed high school or until both have attained the age of 20 years. Ultimately upon sale of the lands and premises the proceeds would be divided equally between Mr. and Mrs. Gerberg

[105] The fact that this offer was ultimately rejected by Jon can be inferred from the fact that Ms. Flynn agreed to sign over the Property in the 1986 Separation Agreement.

[106] In cross-examination, Jon admitted that he had told Tamara Judd, his girlfriend in 1986, that the Property was to go to his sons. However, he maintained that the transfer was to occur after he died and not while he was alive.

[107] When Mr. Stofer was initially contacted about this matter by counsel shortly before the trial, he had no recollection of handling Jon's divorce. However, his memory was refreshed by reviewing Jon's file.

[108] With respect to the 1986 Separation Agreement, Mr. Stofer recalled the terms came together quickly and that, at the time, he had the impression that the parties were speaking directly. He recalls that Jon told him that the boys did not want to see their mother and that he advised Jon to re-consider this issue and allow the boys to see their mom. This is consistent with a letter in his file in which he urged Jon to reconsider his position on access in response to Ms. Flynn's motion in 1987 to get access to the boys.

[109] Mr. Stofer was taken to a note in his file dated March 16, 1986, documenting a discussion with Jon. The note reads, "back in town for 4 days, wife apparently prepared to sign over everything." Another note dated four days later reads, "met with wife. She wouldn't discuss anything. But please go ahead and prepare separation agreement anyway." Mr. Stofer denied that he had any concerns at the time that Jon was threatening Ms. Flynn or coercing her into signing the agreement.

[110] With respect to Mr. Avis' letter returning the signed 1986 Separation Agreement, Mr. Stofer recalls being puzzled at the time as to why Mr. Avis would allow his client to sign the 1986 Separation Agreement if he believed that his client had been coerced.

[111] Mr. Stofer testified that although Ms. Flynn initially filed for divorce on the grounds of cruelty, Jon filed a counter-petition on the grounds of adultery. Mr. Stofer confirmed that the allegations of cruelty were never adjudicated. There is no dispute that Jon's counter-petition was granted in November of 1987.

Proceedings involving Ms. Twarry

[112] Jason takes the position that Jon's divorce proceedings involving Sharon Twarry also demonstrate that Jon gifted the Property to him in fulfilment of the alleged verbal agreement with Ms. Flynn.

[113] In particular, Jason relies on the statement of defence in the 2009 British Columbia Action filed by Jon's lawyer, Charles Beckingham, on his behalf. The defence alleges that "the defendant Jon Gerberg transferred the said property to the defendant Jason as culmination and perfection of agreements and intentions which were established long before the plaintiff ever met the defendants".

[114] In addition, Jason relies on a letter from one of Jon's neighbours, Wayne Halvorson, that Jon asked him to write to assist him in his divorce proceeding with Ms. Twarry. That letter, dated December 1, 2009, describes Ms. Twarry's limited connection with and contribution to the Property and contains the following statement:

Jason told me that Sharon is trying to take the land away from him! I have known the Gerberg family for more than 30 years and that land was always Jason and Daniel's land. Everybody knows the Gerbergs knows that land on Swayne Road was his sons land. My understanding is that Jon held their land in trust for them.

[115] Mr. Halvorson was not called as a witness as he is now deceased.

[116] Also in evidence is a letter written by Susan Phillips and apparently prepared for the same purpose as Mr. Halvorson's letter. I do not rely on this letter for the truth of its contents because Ms. Phillips was not called to speak to it. Rather, it is relevant only to show that she appears to have had a different understanding than Mr. Halvorson as to the basis upon which Jon's sons were to receive the property:

As long as I have known Mr. Gerberg he has always indicated to my husband and I that the land at 2338 Swayne Road, where he currently resides, would one day be given to his sons, Jason Zachery Gerberg and Daniel Victor Gerberg, and that the land would be their "inheritance" rather than cash upon his death Mr. Gerberg was very adamant during that conversation that the land was going to be put in the names of his two sons as this and the real estate in Colorado would be their inheritance one day and would ensure a financially secure future for them.

[117] Jason also points to Financial Statements sworn and filed by Jon in the 2011 Colorado Action on April 30, 2012, in which he failed to list the Property as an asset. Although Jon maintained on cross-examination that he was telling the truth when he swore that the contents of the form were true, he also conceded that he did not list either the Property, or any beneficial interest in it, as an asset. He went on to explain that he did not fill out the contents of the form and pointed to other inaccuracies in it. Counsel suggested on cross-examination that Jon had failed to list the Property because he wanted to create the impression that he no longer had anything to do with it since it had been fully gifted to Jason. Jon demonstrated his lack of care as a witness in his response, "yes sir, and it wasn't

gifted."

[118] In a previous Financial Statement filed in the 2009 British Columbia Action less than two years previously, Jon disclosed the Property as one of his assets, with the caveat that the title was registered in the name of Jason Gerberg. In light of this previous disclosure, I am unable to conclude that Jon was deliberately trying to conceal his interest in the Property in his 2012 Financial Statement.

[119] Jason also relies on a letter dated September 21, 2009, prepared by Jon's lawyer in the 2009 British Columbia Action, Charles Beckingham, to establish that the Property was gifted to him. The letter sets out a without prejudice proposal whereby Ms. Twarry would receive the family home in Boulder in exchange for forsaking any interest to the Property. In that letter, Mr. Beckingham included the following statement:

With this in mind, Mr. Gerberg points out that he acquired the 16 acres of land at 2338 Swayne Road in 1971 and developed it to the point where he gave it to his son in 2003. Your client made no contribution to the acquisition or maintenance of this property.

[120] Mr. Beckingham was unable to give any further evidence regarding the September 21, 2009, letter, other than to confirm that it would have been written on Jon's instructions. He also recalled advising Jon about the concept of excluded property in family law proceedings and receiving instructions to take the position that the Property was excluded in response to Ms. Twarry's claim.

[121] Mr. Beckingham also gave evidence regarding a document from his file that he says was prepared to assist him to respond to the statement of claim Ms. Twarry filed in the 2009 British Columbia Action. Mr. Beckingham testified that all of the information contained in the document would have come from Jon, including the following:

The plaintiff was well aware that the properties were to be transferred into my son's name. She was well aware that was going to happen long before we were even married. And she was aware that I was going to transfer the property to Jason in the spring of 2005. She was well aware that I was going to transfer ownership to my sons when they reached a point of financial stability and employment. My son and I had been discussing the transfer for the year of 2005, because he had just entered into application to join the RCMP. I figured he had reached a level of stability to have the land transferred to him.

[122] Following a negotiation between Jon and Ms. Twarry after which they entered into a separation agreement, Ms. Twarry ultimately accepted that she did not have an interest in the Property and further agreed that:

Jon purchased this property in 1972 with the intent to provide the same to his children. When the parties married in 1993, Sharon was made aware of this plan, understood, and agreed to same. This property was transferred to Jon's son during the marriage, for nominal consideration. Again, this transfer was previously contemplated and agreed upon by the parties.

- [123] The evidence regarding the Twarry divorce proceedings does not, on its own, satisfy me on a balance of probabilities that Jon was fulfilling the verbal agreement to Ms. Flynn by transferring the Property into Jason's name. The expressions of Jon's intent as set out in his separation agreement with Ms. Twarry and in Mr. Beckingham's letter do not rule out the possibility that in transferring the Property into Jason's name, Jon intended to retain the beneficial interest while also recognizing Jason's future interest in it.
- [124] The Halvorson and Phillips letters are out of court statements by non-witnesses and are, accordingly, of limited assistance in ascertaining Jon's intent. In any event, similar to the Beckingham letter, they can also be read as consistent with an intention to retain a beneficial ownership in the Property.

Post-Transfer Conduct

- [125] After the transfer, Jon continued to live on the Property. Several witnesses testified that even after 2005, they understood that Jon owned the Property and that they had never heard Jon say that he intended to live anywhere else.
- [126] I heard a considerable amount of evidence regarding the house and shop that Jon built on the Property. Jon began construction on the house in 2000 and it took an extended period of time to complete. He did not move into the house until 2017. It was undisputed the wood from the house came from trees felled and milled on the Property. Jon did much of the construction work himself.
- [127] David Bull, Matt MacFarlane, and Jorinn Von Conruhds testified that, after 2005, they performed work on the Property such as tree felling, milling, construction, land clearing, and ditching. They all testified that Jon paid them for this work. Some of the documents in respect of these payments were entered into evidence. Jon's cheque books were entered into evidence. In a summary prepared by counsel, it was submitted that Jon spent over \$280,000 on the Property between 2014 and 2022. All of these witnesses testified that they did not observe Jason do much, if any work, on the Property.
- [128] In 2006, Jason and Amanda moved back to the Property and lived for a time in the unfinished house. Later, they moved into a trailer on the Property. Sometime thereafter, there was an agreement between Jon and Jason that a suite would be constructed over the shop for Jason and Amanda to live in. The parties gave differing evidence regarding the extent of contributions that Jason and Amanda made to the work and materials required for the shop suite, but it was relatively undisputed that Jon made arrangements and paid for the bulk of its construction, which was primarily done by David Bull.
- [129] There was no dispute in the evidence that after the transfer, Jon remained responsible for, and paid, all of the utilities. Jason admitted that he took no steps to have the utilities transferred into his name or contribute to the utility payments.

- [130] Jason gave evidence that he and Jon reached an agreement sometime after the transfer that Jon would continue to pay the property taxes as a form of rent to Jason. Jason testified that Jon seemed reluctant to do so but that he eventually agreed. Jon denies that he entered into any such agreement or that they even had a discussion along these lines. Jon testified that the only time Jason mentioned rent was in a conversation in 2017 when he came home to find Jason measuring the converted bus Jon lived in on the Property and Jason said that he was going to charge Jon rent.
- [131] In cross-examination, it was suggested to Jon that in some years he had to borrow money from Jason to pay the taxes. Jon responded that he "never borrowed a dime from that kid". This, however, is contradicted by the Financial Statement Jon swore in the Colorado Action in which he stated that he had been borrowing money from Jason on a regular basis to cover living expenses.
- [132] In any event, the financial records in evidence from January 2014 to March 2019, and from April 2021 to December 2022, demonstrate that Jon paid the taxes at least in those years.
- [133] Given my concerns regarding the credibility of both Jason and Jon, and keeping in mind that Jason bears the burden of proof in establishing the existence of agreement that Jon was to pay the taxes as a form of rent, I am unable to conclude on a balance of probabilities that Jon agreed to do so.
- [134] When asked on discovery what his understanding was of how long Jon would reside on the property, Jason responded "until he died". He acknowledged that there were no discussions about this, rather it was just understood. His evidence at trial was different. When asked if Jon had the right to live on the Property, he testified that Jon "did not have the right but I would not have kicked him off, I felt he knew that he made it very clear that it was my property".
- [135] In reliance on his evidence that Jon always asked for his permission before embarking on a project, Jason submits that he exercised control over the Property. Jon denied that he needed to ask for Jason's permission for anything done on the Property. For example, he says he allowed David Bull to store his mill on the Property and did not discuss this with Jason. Given the totality of the evidence regarding Jon's significant financial and personal investments made to improve the Property, I find it implausible that Jon sought out Jason's approval for these improvements.
- [136] At the same time, I do not accept as reliable the evidence of Jon and many other witnesses called on his behalf that Jason did no work to improve the Property. However, in contrast to the work that Jon put into the Property, more objective evidence, such as financial records, establishes that Jason contributed comparatively much less to the maintenance and improvements of the Property.

Findings with Respect to the Alleged Verbal Agreement

- [137] Jason argues that the alleged verbal agreement between Ms. Flynn and Jon is proven by Jon's conduct in transferring the Property to Jason in 2005. He argues that the transfer is evidence both that there was an agreement and that Jon intended to fulfill the agreement in transferring the Property.
- [138] The onus is on the party seeking to rely on a verbal contract to establish a meeting of the minds that is sufficient to give rise to a legally binding agreement: *Solaris Custom Home Inc. v. Trovao*, 2024 BCSC 1831 at para. 76.
- [139] The Court of Appeal decision in *Voitchovsky v. Gibson*, 2022 BCCA 428 at paras. 32-34, summarizes the principles applicable to determine the existence and terms of an alleged oral agreement:
- [32] The following principles regarding oral agreements emerge from the jurisprudence. When the court is faced with an alleged oral agreement, it is necessary to look not only at the words used, but also at whether the parties' conduct is consistent with the oral agreement. The test for a binding and enforceable agreement is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract" (*Rudyak v. Bekturova*, 2018 BCCA 414, at para. 23 [*Rudyak*], citing *G.H.L. Fridman, The Law of Contract in Canada* (6th ed., 2011) at 15; see also *Berthin v. Berthin*, 2016 BCCA 104, at para. 46). In other words, courts must examine how the parties' conduct would appear to a reasonable person in the position of the other party (*Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22, at para. 35 [*Ethiopian Orthodox*]).
- [33] The determination of the outward manifestation of the parties' intentions is contextual and takes into account the parties' communications as well as their conduct before and after the agreement is made (*Oswald v. Start Up SRL*, 2021 BCCA 352, at para. 34). The parties must have reached consensus on the essential terms of their agreement and failure to reach this "meeting of the minds" means the agreement will fail for lack of certainty (*Rudyak*, at para. 24). This inquiry is an objective one, such that the actual state of mind and personal knowledge of the parties is not relevant (*Hammerton v. MGM Ford-Lincoln Sales Ltd.*, 2007 BCCA 188, at para. 23, citing *S.M. Waddams, The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at 103).
- [34] The question is "not what the parties subjectively had in mind but whether their conduct was such that a reasonable person would conclude that they intended to be bound" and in analyzing this conduct, courts can consider the surrounding circumstances (*Ethiopian Orthodox*, at para. 37). Every case poses the question of "what intention is objectively manifest in the parties' conduct" (*Ethiopian Orthodox*, at para. 38).

[Emphasis added.]

- [140] In applying these principles, I am unable to conclude that an objective reasonable bystander could conclude from the transfer itself that Jon's intent was to fulfill a meeting of the minds between Jon and Ms. Flynn whereby Jon agreed to transfer the Property to their sons once they had both attained the age of 19, leaving him with no remaining interest.
- [141] It is reasonable to infer that, during their separation, Jon and Ms. Flynn discussed that the Property should one day be passed on to Jason and Daniel. I also accept Ms. Flynn's evidence that her primary goal in those discussions was to get Jon to bring the boys back to BC so that she could see them. However, there is no other direct evidence besides that of Ms. Flynn to establish a specific term of the alleged verbal agreement that Jon would gift the Property to the boys when they turned 19. While I find Ms. Flynn's evidence, for the most part, to be credible, the way in which her evidence on this key issue had to be elicited by counsel leads me to believe that she was modifying her recollection of her discussions with Jon to favor her sons' interests. As a result, there is insufficient reliable evidence for me to conclude that there was a meeting of the minds between Jon and Ms. Flynn as alleged.
- [142] This is particularly so when such an agreement runs contrary to the 1986 Separation Agreement, which Jon and Ms. Flynn agreed would be a full and final settlement of the property issues between them. I find it implausible that Mr. Avis would have returned the executed 1986 Separation Agreement to Mr. Stofer without seeking to document this alleged verbal agreement if Ms. Flynn had told Mr. Avis about their agreement as she believes she did. Mr. Avis was not called as a witness to corroborate Ms. Flynn's evidence on this point.
- [143] The conduct of the parties before and after the alleged agreement would not cause a reasonable person to conclude that there had been the meeting of the minds between Jon and Ms. Flynn as alleged by Jason. The conduct of both Jon and Ms. Flynn following the alleged agreement was contrary to the alleged verbal agreement. Both agreed to and signed the written 1986 Separation Agreement, which includes no term requiring Jon to gift the Property to his sons.
- [144] Further, Ms. Flynn failed to raise any concerns when Jon failed to fulfill the terms of the alleged verbal agreement by transferring the Property to his sons by their 19th birthdays. Moreover, when the Property was finally transferred in 2005, it was transferred solely into Jason's name. Again, Ms. Flynn did not raise this as an issue until this litigation was commenced.

Findings with Respect to Jon's Intentions in the 2005 Transfer

- [145] Having considered and weighed all of the evidence, I am unable to conclude that Jason has proven on a balance of probabilities that Jon intended to gift him the Property in 2005. There is little direct and objective evidence from which to discern Jon's intention at the time of transfer. However, the preponderance of the evidence as a whole is more consistent with an intention to transfer the Property into Jason's name to preserve his son's interest and reduce complications that could arise if the Property was still in Jon's name at the time

of his death. I am unable to conclude that Jon intended to gift to Jason both legal and beneficial ownership of the Property.

- [146] In so finding, I give greater weight to objective and unchallenged evidence that, despite the transfer, Jon continued to spend considerable sums to improve the Property, including to finish a house in which Jon intended to live out his days. There is considerable unchallenged evidence before the Court that Jon paid others for their labour and paid for the vast majority of the materials required to build the house and the suite above the shop that was intended for Jason and Amanda. This conduct is more consistent with an intent on the part of Jon to retain beneficial ownership of the Property.

Issue #2 - Does Jon Have Unclean Hands?

- [147] Jason says that because Jon verbally, mentally, and physically intimidated Ms. Flynn into signing the 1986 Separation Agreement, the clean hands doctrine that "he who seeks equity must do equity" precludes Jon from claiming a resulting trust in the Property: *DeJesus v. Sharif*, 2010 BCCA 121 at para. 84, citing Mark Ellis, *Fiduciary Duties in Canada* (Toronto: Carswell, 2009) (looseleaf) at 20-38.
- [148] The bounds of this doctrine are narrowly circumscribed. It does not require Jon to have led a blameless life. The doctrine "does not entitle a court to canvass all aspects of the party's behaviour known to the court": *Wang v. Wang*, 2020 BCCA 15 at paras. 45-47. General dishonesty or fraudulent conduct unconnected to the transaction at issue is not sufficient to bar relief: *DeJesus* at para. 86.
- [149] It is insufficient for Jason to demonstrate that the alleged misconduct merely relates to the same subject matter as the equitable claim being advanced. The doctrine will only bar Jon's equitable relief if he is required to rely upon the misconduct to make out his equitable claim. In other words, the misconduct must form a necessary part of the foundation of the equitable claim: *Mayer v. Mayer*, 2012 BCCA 77 at para. 89; *De Angelis v. Siermy*, 2022 BCCA 401 at para. 39, leave to appeal to SCC ref'd, [2023] S.C.C.A. No. 61. Jason must establish that there is "such an immediate and necessary relation" between the equitable relief sought and the misconduct in question such that it would be unjust to grant that particular relief: *DeJesus* at para. 86, citing I.C.F. Spry, *The Principles of Equitable Remedies*, 6th ed. (UK: Sweet & Maxwell, 2001) at 169-179.
- [150] Jason submits that the required connection is satisfied by Ms. Flynn's evidence that Jon harassed and physically intimidated her into relinquishing her interest in the Property. Jason submits that but for this conduct, Jon would not own the Property outright and would not, therefore, be able to make the claim for resulting trust because the law requires that Jon be an owner of the Property before the gratuitous transfer.
- [151] In my view, this does not satisfy the requirement of an immediate and necessary connection between the misconduct and the equitable relief sought. The alleged intimidation occurred almost 40 years ago and involves Ms. Flynn, who is not a party to this

litigation. Even if there were sufficient reliable evidence to find on a balance of probabilities that the intimidation occurred, I am unable to conclude on a balance of probabilities that in the absence of this intimidation, Ms. Flynn would have insisted on selling the Property. Any number of other outcomes could have ensued. The terms of Jon and Ms. Flynn's divorce were the subject of a dynamic negotiation. Both parties were represented by counsel and, presumably, were receiving advice about the merits and risks of taking the matter to trial. Ms. Flynn did not walk away from the 1986 Separation Agreement with nothing. While she gave up her interest in the Property, she was relieved from assuming any part of the family debt. Accordingly, it is not possible, on the basis of the evidence before me, to draw a straight line between the alleged intimidation and Jon's retention of his interest in the Property. This aspect of Jason's unclean hands argument is, in reality, a challenge to the validity of the 1986 Separation Agreement. That issue is not before me. Jason is not a party to that agreement and has no standing to seek to set it aside.

[152] In the alternative, Jason submits that Jon should be precluded from an equitable remedy because he fraudulently conveyed the Property to Jason to defeat Ms. Twarry's family law claims and was dishonest in the Financial Statements as to his true interest in the Property.

[153] I am unable to accept this argument. As set out above, while Jon was inconsistent in how his interest was described in the various Financial Statements filed in 2009 British Columbia Action and the 2012 Colorado Action, I am unable to conclude that Jon was deliberately trying to conceal the nature of his interest in the Property. Even if there was any element of dishonesty in the Financial Statements, this is a matter of general dishonesty or character unconnected to the fact that Jon retained the beneficial interest in the property. Any concern that Ms. Twarry had that the Property had been fraudulently conveyed was put to rest by the separation agreement which states that parties contemplated and agreed to Jon transferring the Property into Jason's name before the transfer took place.

Issue #3 - Does Donatio Mortis Causa Apply?

[154] In light of my findings regarding the first issue, it is unnecessary for Jon to resort to this alternative ground for relief. Had it been necessary to do so, it is doubtful that the test for a donatio mortis causa could be satisfied. There is insufficient reliable evidence before me to conclude that Jon made the transfer to Jason because he thought that he could die at any time due to a heart condition. I am unable to make any findings about the state of Jon's health in or prior to 2005. All of the medical records in evidence post-date 2009, and there is no objective documentary evidence to corroborate Jon's evidence that he was diagnosed with an acute heart condition prior to 2005. In addition, I do not find it plausible that Jon would fail to follow up with the doctor or seek any additional treatment if he had been given such a grave diagnosis.

[155] As set out in *Cain v. Moon*, [1896] 2 Q.B. 283 (Eng. Q.B.) at 286, and applied in *Costiniuk v. Official Administrator*, 2000 BCSC 1372 at para. 15, aff'd 2002 BCCA 125, three conditions must be satisfied to establish a *donatio mortis causa*:

- a) the gift or donation must have been made in contemplation, though not necessarily in expectation, of death;
- b) the gift must be made under such circumstances as show that the property is to revert to the donor in the case that the death does not occur; and
- c) there must have been delivery to the donee of the subject matter of the gift.

[156] As to the first condition, there is some debate in the case law as to how close to death the donor must be for the requirement to be satisfied. This Court has rejected the view that the donor must be "in extremis", or at the point of death, when the gift is made: see *Slagboom v. Kirby*, 1993 CanLII 449 (B.C.S.C.), following *Saulnier v. Anderson*, 43 D.L.R. (4th) 19 at 24, 1987 CanLII 5283 (N.B.K.B.).

[157] However, it has also been held that the requirement "will not be satisfied by a vague and general impression that death may occur from one of those ordinary risks that attend all human affairs": *Saulnier* at 27. While the focus is on the donor's state of mind, there must be clear and unequivocal evidence that he or she was in contemplation of death when the gift was made: *Public Trustee v. Skoretz* (No. 2), [1974] 2 W.W.R. 77 at 83, 1973 CanLII 1700 (B.C.S.C.). Such clear and unequivocal evidence is lacking in this case. Further, as Jon did not discuss with Jason the reasons for the transfer in 2005, there is no evidence that the gift was made under circumstances that establish that the Property was to revert to Jon should his death not occur.

Issue #4 - Is Jon's Claim Barred by Laches?

[158] Laches is an equitable doctrine that will bar recovery by a plaintiff who has unduly delayed in prosecuting his or her claim: *Pacific Wagondepot Ltd. v. Hudson West Development Ltd.*, 2017 BCSC 1593 at para. 156.

[159] As the beneficial owner, Jon has always been entitled to assert his interest in the Property. It is apparent from the evidence that Jon did not feel the need to take legal action to assert this interest until after the altercation between himself and Jason at Jon's birthday celebration on September 15, 2022. After this altercation, Jason began taking steps to evict Jason Maynard and Nicole Saunders from the Property on the grounds that he had the right to do so as owner of the Property. Less than two months later, Jon filed the notice of civil claim on November 10, 2022. As such, there has been prompt action, rather than delay, to advance his claim.

[160] The determination of whether the delay amounts to laches involves two main considerations: (1) acquiescence on the plaintiff's part; and (2) a change in position on the defendant's part that arose from reasonable reliance on the plaintiff's acceptance of the status quo: *Pacific Wagondepot Ltd.* at para. 156.

[161] Jason argues that he fundamentally changed the course of his life and his prospects as a result of his reliance on the transfer having been a completed gift in 2005. He and Amanda both gave evidence that they may have tried to purchase their own property if the Property had not been transferred to Jason. However, in my view, in light of all of the evidence supporting the lack of an intention on the part of Jon to gift the Property, it was not reasonable for Jason to presume that the Property had been gifted to him.

[162] As such, the doctrine of laches does not apply to bar Jon's claim.

Disposition

[163] In conclusion, I declare that Jason Gerberg holds title to the Property having a civic address of 2338 Swayne Road, Coombs, BC, and a legal description of PID: 004-539-231, Block 41, District Lot 140, Nanoose District, Plan 1918, in trust for Jon Gerberg.

[164] I order that:

- a) Upon presentation for registration in the Land Title Office for the Land Title District of Nanoose of a certified copy of this order, the British Columbia Registrar of Land Titles is hereby directed to enter the plaintiff Jon Gerberg as the owner of the Property, together with all buildings and other structures, facilities, and improvements located thereon and fixtures, systems, interests, licenses, rights, covenants, restrictive covenants, commons, ways, profits, privileges, rights, easements, and appurtenances to the said hereditaments belonging, or with the same or any part thereof, held or enjoyed or appurtenant thereto, in fee simple in respect of the Property;
- b) The BC Registrar shall register indefeasible title in favour of the plaintiff as aforesaid.
- c) The counterclaim of the defendant, Jason Gerberg, as against Jon Gerberg, Nicole Saunders, and Jason Maynard is dismissed.

[165] With respect to costs, as Jon is the successful party, he is entitled to recover his costs on Scale B.

"Hoffman J."

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