

CANADA / JUDGMENT

Germscheid v. Germscheid

2023 BCSC 1431

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1431 Germscheid v. Germscheid

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Germscheid v. Germscheid,

2023 BCSC 1431

Date: 20230817

Docket: S31246

Registry: Cranbrook

Between:

Travis Germscheid and Brandon Germscheid

Petitioners

And

Rhonda Germscheid and Robert Reisig

Respondents

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for the Petitioners:

J.A. Bird

Counsel for the Respondent, Rhonda Germscheid:

R. Henning

No one appearing for the Respondent, Robert Reisig

Place and Date of Hearing:

Cranbrook, B.C.

April 13, 2023

Place and Date of Judgment:

Cranbrook, B.C.

August 17, 2023

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Introduction

- [1] Rhonda Germscheid was named as the executor of the will of her deceased husband, Keith Gerald Germscheid. She applies to pass the accounts for the administration of the estate for the period of May 14, 2021 to February 22, 2023. Rhonda also applies to fix the remuneration resulting from her administration of the estate in that period. Under Rhonda's statement of account, she proposes that there be no distribution of the estate to Keith's sons, Travis and Brandon Germscheid, to whom Keith left specific bequests in his will, nor to herself, as the beneficiary of the residue of the estate.
- [2] Travis and Brandon, who are Keith's adult sons from a previous marriage, oppose the application. In this decision, I refer to the deceased and his family by their first names.
- [3] This application is made within proceedings in which Travis and Keith are the petitioners. Travis and Keith applied to have Rhonda passed over and removed as the personal representative and trustee of the estate. On October 24, 2022, Justice Wilkinson heard the petition. In an order made that same date, Wilkinson J. ordered that Rhonda be passed over and removed (the "Wilkinson Order"). She appointed Robert Reisig as the personal representative and trustee of the estate. She ordered that all assets, real and personal, of the estate shall vest in the new trustee. Rhonda was ordered to provide her accounts, including the remuneration sought, within 90 days, and in the absence of Travis and Brandon's

approval, she was ordered to forthwith apply to court to pass her accounts and fix her remuneration. Costs of that application were ordered in favour of Travis and Brandon.

- [4] In accordance with the Wilkinson Order, Rhonda sought Travis and Brandon's approval of her accounts and remuneration. They did not approve, and Rhonda made the present application.
- [5] Mr. Reisig was given notice of this application, but chose not to appear.

Issues

- [6] Underlying the present application are disputes between the parties with respect to a number of assets and liabilities. The parties disagree about whether those assets and liabilities form part of the estate. All parties accept that the court has jurisdiction to determine if the disputed assets and liabilities form part of the estate as part of this application, and I find I am able to do so on the evidence before me.
- [7] The items in dispute are as follows:
- a) A number of motor vehicles which were registered in Keith's name at the date of his death. Rhonda says that the motor vehicles passed to her outside of the estate as items held in joint tenancy with a right of survivorship. Travis and Brandon say that the motor vehicles form part of the estate.
 - b) A property in Phoenix, Arizona (the "Arizona Property"). The Arizona Property was registered in the names of Keith, Rhonda, Travis and Brandon as joint tenants. Rhonda says Travis and Brandon held their interests in trust for the estate. Travis and Brandon say they were joint tenants with a right of survivorship.
 - c) A Scotiabank Mortgage (the "Mortgage") registered against 4716 Mercury Street, Windermere, B.C. (the "Windermere Property"). On Keith's death, the Windermere Property passed to Rhonda as it was held by her and Keith as joint tenants with a right of survivorship. Rhonda says the Mortgage is a liability of the estate. Travis and Brandon say that Rhonda should be responsible for the Mortgage.

Factual Background

- [8] Travis and Brandon are the two sons, and only children, of Keith and his third wife. Travis is 32 years old and Brandon is 31. They both live in Alberta.
- [9] Keith and his third wife were divorced in 1996.
- [10] Keith and Rhonda married in 1997. In 1999 they, together with Rhonda's two daughters from a previous marriage, moved into the Windermere Property. Keith was a successful insurance senior loss adjuster in Alberta. He continued to work in Alberta and commuted back and forth to the Windermere Property.

- [11] Keith executed his will on December 20, 2013. He named Rhonda as his executor; Mr. Reisig, a friend and business associate, and Travis, together, as his alternate executors; and Brandon as the alternate executor to them.
- [12] Under the will, Travis and Brandon were to receive legacies of \$100,000 each. The residue of the estate was to go to Rhonda. The majority of Keith's assets passed to Rhonda outside of the estate.
- [13] Keith died on May 14, 2021 at age 74. Rhonda is 14 years younger than Keith.
- [14] On November 30, 2021, Rhonda's then solicitor wrote Travis and Brandon's then solicitor. She advised that Rhonda would not be making an application for a grant of probate. She advised that the Windermere Property had passed to Rhonda, and that it had a mortgage on it in the amount of \$543,000. She further advised that Keith and Rhonda had a joint bank account that had passed to Rhonda.
- [15] Rhonda's solicitor stated that the only assets owned by Keith in his own name were a number of motor vehicles, which were listed in an inventory. One vehicle was stated to be Rhonda's. Another was stated to have been a gift to Keith and Rhonda from a friend. All other vehicles were stated to have been purchased by Keith and Rhonda over the course of their marriage with funds held in their joint bank account. It was Rhonda's position that equitable title in the motor vehicles was shared between her and Keith.
- [16] The upshot of Rhonda's position as set out in her solicitor's letter was that the value of Keith's estate was nil, or less, having regard to his debts. As a result, there were no assets in the estate to fulfil the bequests to Travis and Brandon. Rhonda's solicitor referred to the Arizona Property, but stated that she was not assisting her with it.
- [17] The attached inventory provides a total value of estate assets of \$185,500, including and largely comprised of the motor vehicles. Debts had not yet been fully determined. The Mortgage was not listed as an estate liability.
- [18] I will set out the additional facts relevant to each of the items in dispute in the course of addressing whether they form part of the estate.

Motor Vehicles

- [19] There is no dispute that the motor vehicles were all registered solely in Keith's name in Alberta. Brandon says that he helped his father with the registration of vehicles when his father was out of the country, and that they were all registered in Keith's name. Rhonda says that the motor vehicles were registered in Alberta in Keith's name for convenience.

- [20] Rhonda submits that the motor vehicles were jointly insured, also in Alberta. The insurance documents in evidence were addressed to Keith and Rhonda jointly. They list the motor vehicles, as well as tenant insurance for the apartment Keith used in Calgary. Rhonda is listed as the principal driver of some vehicles, and Keith of some others. Rhonda says that at all times both of them had access to and use of all motor vehicles.
- [21] Rhonda says, and I do not understand Travis and Brandon to dispute, that the motor vehicles were, with the exception of one which was gifted to Rhonda and Keith, purchased with funds from Rhonda and Keith's joint accounts. She says that neither of them had any separate bank accounts, save for a very small account she has kept from when she was a teenager.
- [22] Rhonda has sold the motor vehicles, so the question before the court is actually over the ownership of the proceeds of sale.
- [23] Rhonda puts forward several arguments in favour of her position that the motor vehicles passed to her outside of the estate. The first of these is based upon s. 84 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. She argues that the vehicles are family property by operation of the FLA and therefore she is entitled to them by right of survivorship. She argues that the FLA establishes that spouses own family property as joint tenants, that divorce severs the joint tenancy, and the spouses become tenants in common. She also submits, as set out in her written submission, that "[Family property] is treated as being subject to joint ownership with each spouse having held a half interest in the property for the benefit of the other through a resulting trust." In effect, she argues that the FLA defines rights to family property between spouses before separation occurs.
- [24] With respect, the reading of the FLA put forward by Rhonda confuses several forms of ownership and is only tenable by selectively citing portions of sections of the FLA out of context.
- [25] Sections 81 and 84 of the FLA read:
- 81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],
- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
 - (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.
- []
- 84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:
- (a) on the date the spouses separate,

- (i) property that is owned by at least one spouse, or
- (ii) a beneficial interest of at least one spouse in property
- (b) after separation,

[Emphasis added]

[26] The definition of family property in s. 84 clearly relates to property as of the time of separation and does not determine property rights when the spouses have not separated. Similarly, s. 81 clearly states that it is only on separation that each spouse has a right to an undivided half interest in all family property as a tenant in common, not a joint tenant. There is no mention of joint tenancies or resulting trusts. This point is made in *C.K.M. v H.R.M.*, 2021 BCSC 1297 at para. 114:

[114] In British Columbia, upon the triggering event of separation, subject to an agreement or order that provides otherwise, each spouse has a right to an undivided one-half interest in all family property, except pension benefits, as a tenant in common and is equally responsible for family debt: FLA, s. 81. Family property includes all real and personal property a spouse owns or has a beneficial interest in at the date of separation, as well as property derived from family property: FLA, s. 84(1)(b).

[27] Accepting Rhonda's interpretation of the FLA would, in effect, treat the death of a spouse as a separation under the FLA. The estate would only ever be entitled to half of the deceased's assets. This would place the FLA and the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], in direct conflict.

[28] Rhonda's reliance upon the FLA to support her position that the motor vehicles passed to her as the surviving joint tenant is misplaced.

[29] Rhonda's second argument is that chattels purchased by spouses from a joint account are held in joint tenancy, with a right of survivorship. In support of this position, she relies firstly on the decision of the Supreme Court of Canada in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 [Rathwell].

[30] For their part, Travis and Brandon say that Rathwell does not go as far as Rhonda submits, and does not establish that the motor vehicles were held in joint tenancy.

[31] In support of her position, Rhonda relies on the following passage from the judgment of Justice Dickson, as he then was, in Rathwell at p. 459:

Where a husband and wife have a joint bank account, the beneficial ownership of money in it, and of assets acquired from it, will depend upon the intention of the parties. *Jones v. Maynard* [[1951] 1 All E.R. 802] is authority for the proposition that when the intention is that the account is to be a pool of their resources, or in the words of the trial judge in the present proceedings, "a common purse", the money in it will be treated as belonging to them jointly and if investments are purchased out of the account in the name of the husband, he holds a one-half interest in

them as trustee for the wife. It is true that in *Re Bishop, National Provincial Bank Ltd. v. Bishop* [[1965] Ch. 450], Stamp J. said that so far as the decision in *Jones v. Maynard* related to investments, it was based on its own particular facts and, in general, where spouses open a joint account on terms that cheques may be drawn by either, then (unless the account is kept for some specific or limited purpose) each spouse can draw on it for his or her own benefit, and any investment purchased out of the account belongs to the spouse in whose name the purchase was made. I have difficulty in understanding the basis upon which it can be said that the joint owner who reaches the bank first can divert jointly-owned funds to the purchase of investments upon which the other joint owner will have no claim. In a decision of this Court *Re Daly; Daly v. Brown* [(1907), 39 S.C.R. 122], at p. 148, a joint bank account case, McLellan J. said: "In a case of joint tenancy neither party is exclusive owner of the whole. Neither can appropriate the whole to himself."

[32] Rhonda argues that this is equivalent to joint tenancy and that she is entitled to the vehicles via the right of survivorship.

[33] For their part, Travis and Brandon emphasize a number of other passages from Dickson J.'s judgment which show that the parties in *Rathwell* both contributed equal amounts to their joint account, out of which the down payment for the farm land solely registered in Mr. Rathwell's name came, and Mrs. Rathwell's various in-kind contributions to the farming business. They point to the following passage at pp. 448-49 as an indication that a spouse's interest will be proportionate to their contribution:

A third limit: Although equity is said to favour equality, it is not every contribution which will entitle a spouse to a one-half interest in the matrimonial property. The extent of the interest will be proportionate to the contribution, direct or indirect, of the spouse. Where the contributions are unequal, the shares will be unequal. A spouse who fails to make a contribution has no claim in justice to assets acquired wholly by the efforts of the other spouse.

[34] They also refer to the following passage at p. 460:

In the absence of agreement to the contrary, a one-half interest in any investment purchased by a husband from a common pool of funds, in the circumstances of the case at bar, will be considered to be held by him for the benefit of his wife. Legal title will be held in trust for both parties jointly. As to the first land purchase, Mrs. Rathwell's direct financial contribution is clear. As to the second and third purchases, Mrs. Rathwell's claim to a beneficial interest can rest on her continuing one-half interest in the joint bank account and the use of funds therefrom to effect the purchase. Moneys deposited to the account represented the proceeds from the sale of the produce from land of which she was a one-half owner. The proceeds were impressed with a trust in her favour.

[35] Mrs. Rathwell succeeded in establishing her claim both on a resulting trust and a constructive trust. Travis and Brandon submit that Rhonda cannot, because of the lack of evidence of any contribution by Rhonda to the joint accounts.

- [36] There is relatively little evidence about Rhonda and Keith's respective contributions to their joint accounts, but I do not agree with Travis and Brandon that there is no evidence. Rhonda states that she is "retired" in her affidavits, which suggests that she was formerly employed. The 2005 transfer from Keith to Keith and Rhonda as joint tenants of the Windermere Property lists Keith's occupation as "businessman" and Rhonda's as "reservation agent". From this I infer that Rhonda was formerly employed during her and Keith's marriage as a reservation agent, and given that they only had joint accounts, she deposited her earnings into those joint accounts. Rhonda says that Keith's paycheques were auto-deposited into one of their two joint accounts. On the whole of the evidence, it is clear that Keith was the major income earner for the couple, but I find that Rhonda also contributed financially.
- [37] Taken on its own, Rathwell would mean that Rhonda has a beneficial one-half interest in the motor vehicles. Rathwell does not however indicate that such chattels, purchased during a marriage out of a joint account, are held in joint tenancy with a right of survivorship. In support of the proposition that the vehicles were held in joint tenancy with a right of survivorship, Rhonda relies on several decisions of this court.
- [38] First, Rhonda refers to *Weaver v. Weaver Estate*, 2019 BCSC 132 at para. 65 for the following:
- [65] A right of survivorship is inherent in the creation of a joint tenancy. Where a joint tenancy continues until the death of a joint tenant the interest of the deceased joint tenant is extinguished and passes to the surviving tenant: Fuller at para. 51. The fact that the beneficial interest of the transferee who is gifted the right of survivorship may arise only on the death of the transferor does not mean that the gift is testamentary in nature. The right of survivorship vests at the time of the creation of the joint tenancy and therefore is a "complete and perfect inter vivos gift": Fuller at para. 53, citing *Pecore*.
- [39] I do not understand Madam Justice Horsman's statement of the law in that passage to be controversial. The question is whether Rhonda and Keith held the motor vehicles as joint tenants, thus giving rise to a right of survivorship.
- [40] Rhonda cites *McMillan v. Nordahl*, 2010 BCSC 1929 [McMillan] at para. 39, in support of her joint tenancy argument. In *McMillan* at para. 39, Justice Voith stated the following three propositions of law:
- [39] A chattel owned by two people is presumed to be held by them as joint tenants unless they have expressed to each other the intention that they should have separate shares in the chattel: *DaimlerChrysler Financial Services (debi) Canada Inc. v. Mega Pets Ltd.*, 2002 BCCA 242, 1 B.C.L.R. (4th) 237, at paragraph 27. Where two people have a beneficial interest in property as joint tenants, upon the death of one of the tenants, the tenant who remains alive takes beneficial ownership of the entire property automatically by right of survivorship: *Parrott-Ericson v. Stockwell*, 2006 BCSC 1409, 61 B.C.L.R. (4th) 190, at paragraphs 9 and 10 quoting *Anger & Honsburger: Law of Real Property*, 3rd ed., at 14-7. If both spouses have contributed to the acquisition of an asset there is a presumption of joint tenancy ownership and a presumption that the deceased spouse intended to gift to the surviving spouse the

beneficial interest in his share in the asset. Even if both spouses did not contribute, a joint tenancy between spouses is presumed to be an advancement and the burden is on the claimant to rebut the presumption: *Kogler v. Schabernig*, 2004 BCSC 522, 7 E.T.R. (3d) 31, at paragraphs 41 to 57.

- [41] The facts in *McMillan* are instructive. As explained at para. 40, the deceased and his widow owned a home on a reserve. They did not own the land, so the house was a chattel. The evidence was that the deceased intended they own the home jointly, and that his widow would have the benefit of it upon his death. There was no evidence to rebut the presumption that the home was a gift to the widow. As a result, the court held that the widow was entitled to the entirety of the proceeds of sale of the home, and dismissed the estate's claim that the widow had wrongfully converted the proceeds to her own use.
- [42] In order to determine whether the motor vehicles were held by Rhonda and Keith in joint tenancy, the court must determine if the four unities were present, and if it was intended that they would hold the vehicles in joint tenancy. This analysis was described by the Court of Appeal in *Zeligs v. Janes*, 2016 BCCA 280 at para. 39 as follows:
- [39] Unity of title means the title of each joint tenant arose from the same act or instrument. Unity of interest means their holdings are perfectly equal in nature, extent and duration. Unity of time means all the interests vested simultaneously. Unity of possession means each joint tenant has a right to present possession and enjoyment of the whole property, but no right to exclusive possession of any individual part of the whole. Assuming all four unities are present, the question of whether a joint tenancy or a tenancy in common has been created is determined by the intention of the grantor: B. Ziff, *Principles of Property Law*, 6th ed. (Toronto: Carswell, 2014) at 336; *Felske Estate* at para. 31.
- [43] The motor vehicles were registered in Keith's sole name. The registration of a motor vehicle in Alberta is not determinative of ownership. This issue was addressed by the Alberta Court of Appeal in *Allegro v. TD Auto Finance (Canada) Inc.*, 2020 ABCA 175 at para. 44, where the Court stated:
- [44] There is nothing in the Traffic Safety Act, RSA 2000, c T-6 or the regulations thereunder dealing with vehicle registration (Part 2, Division 2 of the Operator Licensing and Vehicle Control Regulation, Alta Reg 320/2000) which provides that registration of a motor vehicle is evidence of title. The motor vehicle registry system merely determines who the owner is for the purposes of the enforcement of laws relating to the operation of motor vehicles and for the purpose of determining vicarious liability for their operation. A vehicle owner may sell his or her vehicle to another without the vehicle being registered in his or her name. Registration of a person as the owner of a vehicle may be refused for reasons unrelated to ownership, such as no proof of insurance. Registration of a vehicle in the name of a person who is not the lawful owner may take place for a variety of reasons, including fraud. In short, the certificate of registration is not necessarily proof of the fact indicated therein, namely that the person in whose name the certificate is issued is the owner.

- [44] Considering the evidence as a whole, I am satisfied both that the four unities are present, and that Keith and Rhonda intended that the motor vehicles were to be held in joint tenancy. They were purchased with funds taken from their joint accounts, which they held as joint tenants, and to which they both contributed. The vehicles were registered in Keith's sole name as a matter of convenience. The vehicles were used by both of them. I conclude that Keith and Rhonda held the motor vehicles as joint tenants. On his death, Rhonda became the beneficial owner of the motor vehicles by right of survivorship. She is entitled to the proceeds of their sale.
- [45] I declare that the motor vehicles, and thus the proceeds from their sale, do not form part of the estate.

The Mortgage

- [46] In 1994, Keith acquired the Windermere Property from his ex-wife, mortgage-free. Rhonda and Keith moved into the Windermere Property together in 1999. In 2005, Rhonda was added to title as a joint tenant.
- [47] In 2007, Keith and Rhonda granted the Mortgage to the Bank of Nova Scotia. Rhonda says that in 2007 she and Keith purchased the Arizona Property, and that the purchase of the Arizona Property was fully financed by the Mortgage. She says that, as of Keith's death, the Mortgage had a balance of approximately \$550,000. She says that the current Mortgage is a combination of several previous mortgages, including the original one to finance the purchase of the Arizona Property. She does not provide any details about the purposes of the subsequent consolidated debts, although that information would surely be within Rhonda's knowledge or control. She submits that information is irrelevant. The current balance of the Mortgage is not disclosed.
- [48] Brandon and Travis say that the purchase price of the Arizona Property was 206,816 USD paid by a 10,000 USD deposit and 197,536 USD from the Mortgage. By January 1, 2015, the Mortgage balance had been reduced to \$106,218. By December 31, 2015, Rhonda and Keith had taken out two additional mortgages and the total debt amounted to \$648,665.
- [49] Rhonda's position is that, while the entirety of the Windermere Property passed to her by virtue of the right of survivorship, the estate is entirely liable for the Mortgage debt. Travis and Brandon say in response that Rhonda is not entitled in equity for any contribution towards the Mortgage from the estate.
- [50] It is common ground that the bank could claim the debt secured by the Mortgage from either Rhonda or the estate, as they are jointly liable to the bank for the Mortgage. The question is whether either of them could seek contribution from the other.

[51] Rhonda relies on *Re Patry (Estate of)*, 2003 ABQB 707 [*Re Patry*], and other cases cited therein, to support the argument that the estate should pay to discharge the Mortgage such that she can receive her interest free of the charge. The rule in *Re Patry*, as stated at para. 13, is that: "a legatee of a specific legacy is entitled to have any charge on that specific legacy paid off". Clearly, this rule does not apply as Rhonda did not receive Keith's interest in the Windermere Property as a legacy.

[52] Travis and Brandon rely upon the Canadian Encyclopedic Digest, Executors and Administrators (Western), 2 - Powers, (h) - Powers in Respect of Mortgages for the following proposition:

275 If a testator owns property in joint tenancy with a joint loan secured by a mortgage on the property, then upon the testator's dying, the other joint tenant owns the property by right of survivorship subject to the mortgage and the estate is not responsible for one half the debt.

[53] They also rely on the decision of Justice Sigurdson in *Parrott-Ericson v. Stockwell*, 2006 BCSC 1409 [*Parrott-Ericson*]. In that case, property was held by the deceased and his widow as joint tenants. The property secured a mortgage which had been used to finance the purchase of the property. The widow sought contribution from the estate to pay one-half of the mortgage principal and interest. At para. 14, Sigurdson J. referred to G.H.L. Fridman, *Restitution*, 2nd ed. (Scarborough, Ont.: Carswell, 1992) at p. 229 for the following:

Prima facie, since no one is primarily or ultimately liable for the discharge of the common demand, all contributing parties must bear the loss equally. This prima facie rule will be displaced whenever the liability of the co-obligors is not equal in quantum. Given that the right to contribution is based in unjust enrichment, the liability of the co-obligors can be varied inter se by contract since the contractual rights may affect the equities between the parties. [footnotes omitted]

[54] At paras. 15-16, Sigurdson J. referred to *Cunningham-Reid v. Public Trustee*, [1944] 1 K.B. 602 (Eng. K.B.), a case in which the deceased and the plaintiff had jointly and severally covenanted for payment of their rent. On the death of the deceased, the plaintiff, as surviving joint tenant, took the whole benefit of the lease. The court dismissed the plaintiff's claim that the estate of the deceased pay half the rent. The estate had no beneficial interest in the lease, and so the plaintiff's claim to contribution failed.

[55] At para. 18 of *Parrott-Ericson*, Sigurdson J. stated that:

[18] Here the petitioner has, by operation of survivorship, received the entire interest that secured the joint and several obligations. Similarly, it strikes me that in these particular circumstances, in the absence of an agreement to the contrary by the parties, or some suggestion that the land was worth less than the debt, or some other relevant circumstance, the petitioner could not equitably be entitled to call on the executor of the estate to pay half of the debt.

- [56] The petitioner widow's claim was dismissed. At para. 27, Sigurdson J. concluded that the mortgage debt and the land were clearly connected, with the loan being the basis upon which the property was acquired. It remained a substantial burden on the property at the time of the deceased's death. On the facts before him, Sigurdson J. held that the petitioner would be unjustly enriched if the estate had to pay one-half of the mortgage.
- [57] There is a potentially distinguishing factor in Parrot-Ericson. In that case, unlike the present case, the mortgage was used to finance the purchase of the property. In this case, some of the indebtedness secured by the Mortgage was used to purchase the Arizona Property. The purposes for which the rest of the indebtedness was used have not been revealed by Rhonda. I do not agree with Rhonda that the purposes for which the rest of the indebtedness were used are irrelevant. The degree to which Rhonda and the estate benefitted from the debt incurred is highly relevant.
- [58] On the facts before me, I conclude that Rhonda has no basis in equity to seek contribution for the payment of the Mortgage, in whole or in part, from the estate. She has received the entire value of the Windermere Property, which has an assessed value of \$1,121,000. Rhonda has received the benefit, in substantial part, of the funds secured by the Mortgage. In this regard, I find the fact that she has failed to disclose the purposes for which the funds were used, save for the purchase of the Arizona Property, significant, as that information would have been available to Rhonda to disclose. To the extent the funds were used for the benefit of Keith, that means he did not need to spend other assets, and his other assets passed to Rhonda via either joint tenancy or as his designated beneficiary. The estate is not unjustly enriched by not bearing liability for the Mortgage. To the contrary, I conclude that Rhonda would be unjustly enriched by receiving the Windermere Property free and clear, unencumbered by the Mortgage.
- [59] I declare that Rhonda is not entitled to any contribution from the estate toward the Mortgage.

The Arizona Property

- [60] In 2007, Rhonda and Keith purchased the Arizona Property. They used it as a vacation home.
- [61] On February 18, 2013, Rhonda and Keith added Brandon and Travis to the title of the Arizona Property. According to the warranty deed, Keith conveyed the Arizona Property to himself and Rhonda and Brandon and Travis as joint tenants with right of survivorship. It is not clear on the evidence why or how it was that Keith was the sole conveyor of the Arizona Property, given that Keith and Rhonda had, on Rhonda's evidence, been the original purchasers.
- [62] On December 20, 2013, Keith executed his will, leaving Brandon and Travis legacies of \$100,000 each.

- [63] After Keith's death, in January 2022, the Arizona Property was sold for 450,000 USD, with the net sale proceeds being split equally three ways between Rhonda, Travis and Brandon. Each of them received approximately 130,000 USD.
- [64] Rhonda's position is that Travis and Brandon held their interests in the Arizona Property on a resulting trust for Keith and now the estate, on the basis that they gave no value for the interests they were gifted. She submits that the funds they received from the sale of the Arizona Property should be taken as satisfying the \$100,000 bequests they were entitled to under the will, and that they should pay back the excess funds they received to the estate. To do otherwise, she submits, would be to permit Travis and Brandon to "double-dip".
- [65] Travis and Brandon submit that the transfer of the interests in the Arizona Property were gifts and that they had a right of survivorship.
- [66] *Pecore v. Pecore*, 2007 SCC 17, establishes that there is a presumption of a resulting trust for a gratuitous transfer from a parent to an adult child. I find that the February 2013 transfer to Travis and Brandon raises a presumption of a resulting trust.
- [67] However, with respect, Rhonda's position in relation to the Arizona Property is incoherent. She asserts that each of Brandon and Travis held a one-third interest in the Arizona Property in trust for the estate. But according to Rhonda, she and Keith were owners in joint tenancy of the Arizona Property before the February 2013 transfer. Brandon and Travis each received a one-quarter interest. If they held those interests in trust, then they would each hold a 12.5 percent interest in trust for Keith, and now the estate, and a 12.5 percent interest in trust for Rhonda. If Rhonda's position were accepted, the estate would be entitled to two-thirds of the proceeds from the Arizona Property. But Keith never had a two-thirds interest to gift to his sons. At most, he could have gifted them his one-half interest.
- [68] I find on the facts that Travis and Brandon have rebutted the presumption of resulting trust, and that Keith and Rhonda intended a gift.
- [69] In support of this conclusion, I rely on the express terms of the warranty deed, which indicates that each of Keith, Rhonda, Travis and Brandon held their one-quarter interest as joint tenants with right of survivorship.
- [70] I further rely on the fact that Keith made his will after transferring the interests in the Arizona Property. In her affidavit, Rhonda says that she understood Keith's intention was to provide some legacy for Travis and Brandon through their share of the Arizona Property, with the balance of his estate to go to her. She also says that she believes Keith made arrangements so all of his assets would pass outside of the estate to avoid the need for probate and estate taxes. The basis for this understanding and belief is not stated. However, if Keith intended to provide Travis and Brandon with a legacy through their share of the Arizona Property, without passing through the estate, he could only do so by way of a right of survivorship. That is inconsistent with the position Rhonda takes in this application.

- [71] There is no evidence that Keith intended the interests in the Arizona Property to satisfy the specific bequests made in his will. For example, Rhonda has not produced the notes of the solicitor who drafted Keith's will, which could have shed some light on Keith's intentions. I note that Rhonda's counsel advised the court that they had requested the solicitor's file, but the solicitor had not responded.
- [72] I further rely on Rhonda's representations and conduct with respect to the Arizona Property since Keith's death. On October 13, 2021, Rhonda's counsel wrote counsel for Brandon and Travis, providing a copy of the will. Her counsel noted the \$100,000 bequests, and stated that it was unlikely the estate would be able to pay the gifts. There was no mention of the Arizona Property, or any suggestion that it was an estate asset out of which the bequests could be paid. On November 30, 2021, Rhonda's counsel wrote another letter to counsel for Brandon and Travis. The letter addresses a number of assets. The only reference to the Arizona Property is for counsel to say that she was not assisting with it. An inventory of property and debts was provided with the November 30, 2021 letter. The Arizona Property is not listed as an estate asset.
- [73] Most telling is that in January 2022 the three surviving joint tenants acted on the basis that each of them was a joint tenant who had both legal and beneficial ownership of their interests in the Arizona Property. That is why they split the proceeds of sale equally between the three of them. If Rhonda had actually believed that Brandon and Travis held their shares on a resulting trust, she would not have agreed to distribute the proceeds of sale as she did. The position she now takes in this proceeding, that Travis and Brandon held their shares in trust, is not consistent with her own previous conduct dealing with the proceeds of sale of the Arizona Property.
- [74] Each of Rhonda, Travis and Brandon are entitled to one-third of the net proceeds of sale of the Arizona Property as a result of their holdings in joint tenancy. I declare that the distribution of the net sale proceeds does not satisfy the legacies to Travis and Brandon.

Other Issues and Orders

- [75] It follows from my conclusions with respect to the Mortgage and the Arizona Property that Rhonda's application to pass the accounts cannot be granted. It is dismissed.
- [76] Rhonda is hereby ordered to provide accounts, amended in accordance with this decision, to Travis and Brandon within 45 days of the date of this decision.
- [77] Rhonda sought remuneration of \$7,227.88. That claim is based on 2.5 percent of estate assets, most of which were made up of the motor vehicles, despite the fact that it was Rhonda's position, which I have accepted, that she was the beneficial owner of the motor vehicles. That is an illogical position, and I do not accept it.

- [78] I agree with Travis and Brandon that Rhonda is not entitled to any remuneration for her administration of the estate. While Rhonda was successful in her position with respect to the motor vehicles, she wrongly, and without any reasonable justification, asserted that the Arizona Property was held in trust for the estate. She was passed over as personal representative and trustee of the estate by the Wilkinson Order due to her conduct. She did not apply for probate. I dismiss her application for remuneration.
- [79] The Wilkinson Order provided that "[a]ll assets, real and personal, of the Estate shall vest in the New Trustee". Rhonda has taken no steps to transfer the estate's assets to Mr. Reisig, the new trustee. I direct, pursuant to Rule 25-13(c), Rhonda to forthwith transfer the estate's assets to Mr. Reisig. It will be Mr. Reisig's responsibility to pay any extant estate liabilities.
- [80] In their application response, Travis and Brandon sought production of documents from Rhonda, specifically Keith's statements of account from the Bank of Nova Scotia and Wells Fargo, including balances as of the date of his death, co-account holders or beneficiaries, and for joint account holders, any account opening documents or agreements showing whether the joint account holder had rights of survivorship. They also sought bank account statements from the bank account(s) in which estate transactions were made, from the date of death onward.
- [81] The court's jurisdiction to order documents in these circumstances is broad. As stated by Master Robertson in *Antonias Estate (Re)*, 2021 BCSC 2388 at para. 12, "in order to finalize the estate the beneficiaries are entitled to an accounting. They are entitled to ask for documents and backup sources to monitor and approve the accounts before they do so, and that is what they want to do." Here, Travis and Brandon are at risk of not receiving their legacies, and they are entitled to documents to satisfy themselves whether there are other estate assets out of which their legacies could be satisfied.
- [82] In her third affidavit, sworn April 11, 2023, Rhonda provided some bank account information. It is not fully responsive to the requests made by Travis and Brandon. I order Rhonda to produce the documents sought by Travis and Brandon within 30 days of the date of this decision, and if any of the documents sought do not exist or cannot be obtained by her, she is to swear an affidavit that sets out the facts supporting those assertions.
- [83] Should there be any issues arising from this decision, the parties are at liberty to seek to appear before me by contacting Scheduling to request a hearing to address them.

"L.M. Lyster J."

LYSTER J.

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