

CANADA / JUDGMENT

Innes v. Innes

2025 BCSC 465

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 465 Innes v. Innes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Innes v. Innes,

2025 BCSC 465

Date: 20250211

Docket: E232826

Registry: Victoria

Between:

Susan Diane Innes, by her litigation guardians and representatives Robert Stephen Wells, Richard Craig Wells and David Edward Settle

Claimant

And:

Stuart Falconer Innes

Respondent

Before: The Honourable Justice Morley

Oral Reasons for Judgment

(Summary Trial)

Counsel for the Claimant:

C. Ziegler (by videoconference)

Counsel for the Respondent:

T. R. Fraser (by videoconference)

D. Gill (A/S) (by videoconference)

Place and Dates of Hearing:

Victoria, B.C.

January 30 - 31, 2025

Place and Date of Judgment:

Victoria, B.C.

February 11, 2025

[1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit any written version for errors, omissions, redundancy, and to add references to the evidence and to legal authority. I have made such edits. The substance of the reasons remains the same, as does the result.

Introduction and Overview

[2] Before me is an application for summary trial in a family law proceeding involving a married couple. In itself, that is not unusual. What makes this particular proceeding atypical, at least in the family law context, is that the claimant, Susan Innes, is not bringing the proceeding herself. Her interests are being represented by her brothers Robert and Richard Wells and her son David Settle as her litigation guardians and attorneys. This is because Ms. Innes is unable to represent herself as a result of suffering Alzheimer's-type dementia.

[3] On her behalf, the litigation guardians (the "Claimant") are asking for a number of remedies, including:

1. A declaration that Ms. Innes has legally "separated" from her husband, Stuart Innes, the respondent. The Claimant concedes that Ms. Innes does not have the mental capacity to instruct counsel or seek a divorce, but argues that she meets the much lower standard for deciding to be separated.
2. Confirmation of a 2000 Marriage Agreement in which Ms. Innes and Mr. Innes agreed that they would each retain their own property through the marriage and in the event of its breakdown, including, at the time that they entered into the agreement at least, the home in which they lived at 3400 Metchosin Road. Ms. Innes brought that home into the marriage.
3. An order that the entirety of the parties' home at 3400 Metchosin Road, Victoria, BC, belongs to Ms. Innes, notwithstanding a 2011 transfer of a half interest to Mr. Innes.

4. Orders providing for tracing inheritances Ms. Innes received and that were paid into a joint account she held with Mr. Innes and over which Mr. Innes had control during the relevant period of time.
- [4] The respondent Mr. Innes opposes these orders. First of all, he rejects the characterization that he and Ms. Innes have "separated" in the sense of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The event precipitating the physical separation of Mr. and Ms. Innes (which may or may not have been or preceded a legal "separation") was her involuntary hospitalization on July 26, 2022, as a result of delusional psychosis associated with dementia. While there is no dispute that, subsequent to this hospitalization, Ms. Innes has expressed an unwillingness to see Mr. Innes, let alone live with him, Mr. Innes argues that she does not have the cognitive capacity necessary to have the intent to separate.
- [5] Since Mr. Innes denies that he has ever had the intention to separate, he says that no remedies under the FLA or its predecessor, the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] are available. He opposes the other relief on that basis, among others.
- [6] For reasons I will elaborate, I find that Ms. Innes has not had the requisite capacity to separate since her hospitalization and that Mr. Innes has not, in fact, manifested such an intention. Therefore, they are not "separated" in the sense meant by the FLA. However, in my view, this is not the end of the matter because I conclude I can address the other issues, even if the parties remain married and are not legally "separated".
- [7] The Marriage Agreement respecting property division that is the subject of this application was made in 2000, before the FLA came into force. As a result of s. 252 of the FLA, applications relating to the enforcement of such marriage agreements are determined under the predecessor statute, the FRA. Under s. 61 of the FRA, a marriage agreement could provide for ownership in or division of, family assets or other property during marriage, as well as on the making of an order for dissolution of marriage, judicial separation, or a declaration of nullity of the marriage. For reasons I will elaborate, I conclude that the FRA, as preserved by s. 252 of the FLA, gives the court jurisdiction to consider the validity of a marriage agreement regardless of whether Mr. Innes and Ms. Innes are "separated" within the meaning of the current FLA.
- [8] If this is right, then I still must determine whether their Marriage Agreement is enforceable since it determines division of property during the marriage, which includes both legal and, more in dispute here, beneficial or equitable title to the home at 3400 Metchosin Road. This involves two steps. First, I have to interpret the Marriage Agreement in light of what has happened since then to determine how it allocates property between the parties, and then I have to consider whether it is enforceable.
- [9] My findings, which I will explain further, are as follows:

- a) Properly interpreted, the Marriage Agreement supports the conclusion that the transfer of joint title of the matrimonial home in 2011 by Ms. Innes to Mr. Innes was an enforceable gift. Therefore, under the Marriage Agreement, Mr. Innes owns half of 3400 Metchosin Road, both legally and beneficially.
- b) However, the Marriage Agreement also is quite clear that property that is brought into the marriage or acquired by one spouse after the marriage is not to be shared unless there is evidence of a gift. Therefore, the inheritances were and, to the extent they can be traced, remain, Ms. Innes's property.
- c) In light of my interpretation, I find the Marriage Agreement to be enforceable.

Appropriateness for Summary Trial

- [10] Before I address the substantive issues here, I have to address the question of whether this application is properly brought by way of summary trial. In his application response, Mr. Innes objected to proceeding in that fashion.
- [11] Summary trials are available pursuant to Rule 11-3 of the Supreme Court Family Rules [SCFR] to promote the just and efficient resolution of disputes. It is the same procedure as available under Rule 9-7 of the Supreme Court Civil Rules [SCCR]. A summary trial may proceed where the court is able, on the basis of the limited record, to answer the relevant questions of fact and law: *Hudema v. Moore*, 2021 BCCA 482 at para. 19.
- [12] One obvious benefit of summary trials is that they allow the parties to get answers to legal questions that divide them more quickly and without the strain of testifying in court. I find this is particularly important here. In this case, both parties are elderly. If this proceeding went to trial, Ms. Innes would not be able to testify. A trial would put considerable stress on Mr. Innes's ability to testify as well in light of his health problems. Because of their advanced age, it is very important for both parties to have a timely answer about the property each of them has so that they can provide for their remaining years.
- [13] The main downside, to summary trials, of course, is that if there are major issues of credibility, the judge is forced to try to resolve these on the basis of a written record, without the benefit of cross-examination. If this is impossible in relation to a fact that is necessary to decide the issues between the parties, then the summary trial application must be dismissed. On the other hand, if it is possible, even if it is difficult, it will usually be just to try to find those facts, however imperfectly, so that the parties can proceed with their lives.
- [14] In this case, each party challenges some aspects of the credibility or reliability of the main deponent of the opposing party. Ms. Ziegler submits, on behalf of the Claimant, that Mr. Innes's denial that he has ever had an intention to separate is not consistent with some of his actions, including severing the joint tenancy, disinheriting Ms. Innes from his will and making large transfers out of their joint chequing account and stating his tax status was "separated".

- [15] Richard Wells is the main deponent for the Claimant. Mr. Fraser submits, on behalf of the respondent, that Mr. Wells' observations of Ms. Innes's capacity are inherently unreliable. He has some basis for this, contained in observations recorded by the medical professionals. However, these are not witnesses before me, and since there has been no cross-examination, these points have not been put to Mr. Wells, as they would be at a trial.
- [16] I have the additional disadvantage of not having any medical evidence in the form of expert evidence of Ms. Innes's current or past cognitive states, but I explored that with the parties. Both parties were of the view that it would be disproportionate for them to try to seek that expert evidence.
- [17] All of this does raise concerns about my ability to find the necessary facts. However, I have concluded that I am able to find the facts even on this limited record to decide the legal and factual issues that arise between the parties, and I will explore that specifically as I get to those issues. In light of that, I find that it would not be unjust for me to do so, and I will proceed on the basis of a summary trial application.
- [18] The one exception, which I address at the end, is that while I find that the Claimant is entitled to trace inheritances, I find that it is beyond my capacity on this record to determine all the issues that arise out of that tracing. There are specific accounts, a trust account and a Scotiabank account, that I find can be traced to those inheritances, and I will make orders with respect to those. However, a full accounting would have to involve a further proceeding.

Factual Background

- [19] Mr. Innes and Ms. Innes began cohabiting in May 1998. They married on August 28, 1999. At the time they were both employees of the Greater Victoria School Board. Mr. Innes has four daughters from a previous relationship: Cassandra, Rachel, Meaghan and Sarah. Ms. Innes had one son from her previous marriage, who was already an adult at the time, David Settle, now one of the litigation guardians and attorneys.
- [20] Ms. Innes brought the home at 3400 Metchosin Road into the relationship with Mr. Innes. Her title to that home had been the result of settlement of her divorce from her previous husband, Alan Settle. Mr. Innes did not bring significant assets into the relationship, as he had recently been bankrupt.
- [21] The parties executed the Marriage Agreement sometime in 1999 or 2000 and dated it January 2000. Since its validity and interpretation is a major issue, I will defer discussing its terms. At the time of the Marriage Agreement, Ms. Innes indicated her intention that her son get an undivided interest in the property on her death.

[22] According to Mr. Innes's evidence - which is uncontradicted on this point - he and Ms. Innes had a joint savings account into which they each contributed \$1,000 per month. This money was used to pay expenses including mortgage payments and house insurance. Mr. Innes testifies he did work on the home.

[23] At some point in 2011, Ms. Innes came home from work and told Mr. Innes that she wanted to do the paperwork to add Mr. Innes to title to the Metchosin Road property. Mr. Innes said he was surprised and felt loved and appreciated. He told her it was "generous".

[24] The conveyance work was done by Robert Pearson, a local solicitor. His closing letter, dated January 12, 2012, stated:

We understood that you wished to become registered owners as Joint Tenants, so that upon the death of one of you, the survivor becomes the sole owner of the property.

[25] I note that this is often a statement that conveyancing orders will include when there a joint tenancy is created. It does not necessarily indicate that that was the only purpose of the creation of the joint tenancy.

[26] In the summer of 2018, Ms. Innes received two substantial inheritances, one from her mother, Joyce Irene Wells, and one from a close family friend, Wilford Johnson. From her mother's estate, she received \$326,837.14 on July 6, 2018. From Mr. Johnson's estate, she received \$145,656.72 on August 21, 2018, and a further \$11,244.10 on February 3, 2020.

[27] Mr. Innes says he noticed symptoms of cognitive decline in Ms. Innes as early as 2017. She had difficulty doing her job and retired that year. She gave up her driver's licence in 2019. Mr. Innes was her primary caregiver, but that became increasingly difficult as he got sick himself. The extent and timing of Ms. Innes's cognitive decline is in dispute, and I will address it after setting out the legal test for capacity to form the intention to separate.

[28] What is not in dispute is that on July 26, 2022, she was hospitalized under the Mental Health Act, R.S.B.C. 1996, c. 288 after engaging in violent behaviour against Mr. Innes motivated by paranoid beliefs. After a one to two weeks' stay at Acute Care in the Victoria General Hospital, she was moved to Acute Memory Care at the Royal Jubilee Hospital. She was then admitted to a permanent living facility, AgeCare James Bay, in December 2022 where she has lived ever since. Mr. Innes continues to live at the Metchosin Road property.

[29] It is not disputed that Ms. Innes enjoys the company of her brothers and son, has consistently expressed a desire not to see Mr. Innes, including when she is calm. I will review the evidence of how much she understands about the situation later.

[30] It is disputed what happened to Ms. Innes's inheritances after they were deposited into the joint account. For reasons I will discuss later, it is premature for me to make thorough findings on this at a summary trial.

Did the Parties Separate?

- [31] The Claimant asks for a "declaration that the parties are separated as defined by the Family Law Act".
- [32] If the parties are physically separated, then legal separation under the FLA occurs when at least one spouse has the settled intention to separate permanently: *Gupta v. Kumar*, 2023 BCCA 106 at para. 13 [Gupta]. A court may consider either communication or action pursuant to this intention as evidence of that intention: see FLA, s. 3(4).
- [33] The statutory test under the FRA was stated differently. The issue under the FLA was whether there would be a declaration that married spouses had "no reasonable prospect of reconciliation with each other." However, this involved essentially the same inquiry: see *Gupta* at para. 13, adopting the test under the FRA as stated in *Dhillon v. Dhillon*, 1998 CanLII 4192 (BC CA), [1998] B.C.J. No 823 (C.A.). The ultimate issue was the demonstrated existence of an intention, whether joint or on the part of one spouse, to live separate and apart: see *A.B. v. C.D.*, 2009 BCCA 200 at para. 26 [*A.B. v. C.D.*].

Mr. Innes' Intention

- [34] In this case, Mr. Innes deposes that he has never had such an intention. While that is not necessarily determinative, and the Claimant alleges his actions demonstrate such an intention, in my view, there is not sufficient evidence before me to displace the presumption that Mr. Innes is telling the truth.
- [35] Mr. Innes says that he as not had the settled intention to separate, but rather the physical separation is the result of factors beyond his control. The fact that he is not permitted to visit Ms. Innes is a result of the decision of her attorneys, which Mr. Innes does not challenge here and which I therefore accept - that it is not in her best interest to see him. That is of course informed by her statements that she does not want to see him. But it says nothing about his intentions.
- [36] It is true that Mr. Innes has taken various financial and legal steps that could be interpreted as evincing a desire to separate. He has severed the joint tenancy and removed Ms. Innes from his will, an action he took before he was aware that Ms. Innes has also removed him from hers. He has put his status as "separated" on his tax returns. However, Mr. Innes explains these as measures he has taken in response to Ms. Innes's biological family and to the fact that Ms. Innes's tax returns have been filed with the status "separated", and he wished to avoid problems with the tax authorities.
- [37] It is understandable that Mr. Innes severed the joint tenancy and changed his will to avoid reducing what he can pass on to his daughters in the scenario in which he predeceases Ms. Innes. It is less understandable, on the assumption that he has no intention to separate, why he has provided nothing for her in the event he predeceases her. It is also less understandable why he has made transfers from the joint account to his own account if he truly regards them to continue to be in a spousal relationship.

- [38] However, on the basis of the written record, I must make findings, if I can, and I find that on the balance of probabilities, that Mr. Innes does not have and has not had a settled intention to separate from Ms. Innes.

Ms. Innes' Capacity to Have the Intention to Separate

- [39] With respect to Ms. Innes, the real issue is whether she has the capacity to form the intention to separate. This involves the ability to appreciate the nature and consequences of ending the marital relationship: see Gerald B. Robertson, *Mental Disability and the Law in Canada*, 2nd ed., (Toronto: Carswell, 1994) at p. 272, adopted by the BC Court of Appeal in *A.B. v. C.D.* at para. 28.
- [40] The capacity to appreciate the nature of abandoning a marital relationship requires less cognitive ability than the general capacity to conduct one's own affairs, make financial decisions, or instruct legal counsel: see *A.B. v. C.D.* at para. 27. Capacity to separate therefore may exist despite incapacity in other matters. A person may be capable of marrying or divorcing even if they require a property guardian or guardian of the person, and the capacity required to separate is arguably even lower: see *Wolfman-Stotland v. Stotland*, 2011 BCCA 175 at paras. 26-28.
- [41] If a person is capable of instructing counsel and managing their financial affairs, then they have the capacity to separate, but the converse does not hold. Someone can be incapable of instructing counsel and managing financial affairs yet also have capacity to separate.
- [42] It is not necessary that the spouse have the present capacity to form the intention to separate so long as they had that capacity at some point in the past and exercised it by forming a settled intention to live separate and apart: see *M.K.O. (by his Litigation Guardian) v. M.E.C.*, 2005 BCSC 1051 at para. 40 [*M.K.O.*].
- [43] But even though the cognitive capacity necessary is lower than for other tasks, the spouse must still have the necessary minimum level of understanding of the nature of the act of separation. In *M.K.O.*, Mr. Justice Ehrcke found that a man who had Alzheimer's did not have the capacity to divorce or separate. The husband in that case expressed a desire not to live with his wife, but also had limited understanding of who she was or why he wanted to divorce her when called to testify.
- [44] Mr. Innes deposes that Ms. Innes's cognitive decline became worse between 2020 and 2022. He deposes to an incident in April 2021 when she went outside to look for her cat and wandered around until she was found by one of Mr. Innes's daughters. According to him, on the Thanksgiving weekend of 2021, she tried to pour wine from a coffee machine. In March 2022, she threw their silverware in the garbage. During this time, she would forget which burner she had on, and would accuse Mr. Innes of trying to poison her.

- [45] Dr. David Woodley, her family physician, first met with Ms. Innes about cognitive decline in April 2017 before she retired. She reported at that time that she was having difficulty with tasks at work. Dr. Woodley observed a "transient benefit" from decreasing workplace pressures, but by April 2019, her cognitive decline had returned. Dr. Woodley conducted a cognitive test. Her score was low, and the cognitive test was discontinued because it was causing her distress.
- [46] On April 7, 2022, Ms. Innes met again with Dr. Woodley, who found her to have "obvious cognitive deficits" and made a "working diagnosis" of Alzheimer's-type dementia. I note that it is an admitted fact that she suffers from Alzheimer's.
- [47] Both Mr. Wells and Mr. Innes have deposed to the fact that Ms. Innes was not eating and losing weight during the spring of 2022.
- [48] On May 5, 2022, when appointing her current attorneys, Ms. Innes also executed a will under the direction of a lawyer. Whether she really had testamentary capacity or not is not an issue that is before me, and I do not comment on it. However, the lawyer's willingness to take instructions in relation to a will is some evidence that she had at least had the lower level of capacity needed to separate as of the beginning of May 2022.
- [49] In a further meeting with Dr. Woodley on May 12, 2022, he recommended sending Ms. Innes to a geriatric clinic for a mental health review. On July 13 and July 15, a registered nurse and a social worker met with her at the Metchosin Road property, and then in Mr. Wells' home. She was unable to recognize them between the two meetings. Their report shows that, at this point, she was not aware of where she lived. The registered nurse concluded that Ms. Innes had "advance dementia with psychosis, no insight or judgment." She also expressed concerns that Mr. Wells, her brother, validated her in her delusions.
- [50] Mr. Innes's uncontradicted evidence is that Ms. Innes did not express a desire to separate from him during the period when she was physically with him. I do find that there is no question that in the months prior, that she had some hostility to him, and that from his affidavit I also find that he was at this point very frustrated with his role as caregiver, and they were under quite a bit of stress in terms of their relationship. Nonetheless, there is no evidence that Ms. Innes took this to the point of expressing a desire to separate prior to her hospitalization on July 26, 2022.
- [51] I have records from her admission to the Victoria General Hospital. Dr. Wall took notes on her initial admission. He reported his impression of a combination of dementia and psychosis. Ms. Innes was placed on Seroquel to address the psychotic symptoms. It appears at this point she believed that both Mr. Innes and the doctor were conspiring to kill her cat.

- [52] On July 28, a geriatric psychiatry consult was performed by Dr. Jennifer Oates, who recorded her observation that Ms. Innes appeared to be suffering from major neurocognitive disorder, with agitation and aggression, paranoia, and possible hallucinations. Dr. Oates found that she was confused about whether her parents were alive, her marital status, and whether she had a son. Dr. Oates noted in her observation that Mr. Richard Wells "also had no insight into the significance of her cognitive impairment."
- [53] I have records of a subsequent meeting in October 2022 when she was in long term care. She believed she was living at home at this point. She did not know where her residence was. She demonstrated no orientation as to place or time and was unable to name the country she was living in or the year. The record indicates that she had lived in Canada for most, if not all, of her life.
- [54] Mr. Wells deposes that Ms. Innes has improved at AgeCare James Bay, at least after her original doctor was replaced and she was taken off what he describes as a "floor for the dying". He confirms she continues to have what he characterized as short-term memory and cognitive issues.
- [55] Mr. Innes and Ms. Innes have spoken once since she was hospitalized. According to Mr. Innes, she called the house. He answered and was surprised to hear her voice. She said, "can you come and get me?" He said he was not allowed to come get her, and she said she was "at the dockyard waiting for David," which appears to be a reference to her son, "but he has not come to get me." She then hung up. It is certain that she was not at the Dockyard, but was calling either from the hospital or the long-term care facility, depending on when this happened.
- [56] I note that Ms. Innes, from the record, appears to be usually happy, especially when she has and is in the company of her biological family. She has consistently expressed that she does not want to see Mr. Innes, and I accept that that represents her perspective.
- [57] Unfortunately, I do not have the benefit of an opinion by an appropriate expert. As I have mentioned, both parties considered that obtaining such an opinion would be disproportionate. However, an expert opinion is not always necessary if I can reach a conclusion on lay evidence. I believe I can. On a balance of probabilities, I am persuaded that Ms. Innes does not now have the cognitive capacity to understand the implications of separation and has not had it since the time she was hospitalized. Her hostility to Mr. Innes may have rational roots, but it is clearly based at least in part in paranoia and possibly the influence of her brothers and son. This would not, in itself, mean she does not have the capacity to make her own decisions about whether to separate. But all the objective evidence is that she is confused about her family and marital status, and even where she is. I cannot see any basis to distinguish this case from that of M.K.O.
- [58] I therefore decline to make a declaration that the parties are separated.

2000 Marriage Agreement

- [59] As I have already noted, however, this is not the end of my analysis. The Claimant has sought an order under s. 214 of the FLA confirming the 2000 Marriage Agreement. It is common ground that because the Marriage Agreement was executed before the FLA came into force, as a result of s. 252(2) of the FLA, this application must be determined under the FRA.
- [60] The respondent argues that if I find that there is no separation, this application cannot proceed. However, s. 61(2)(b) of the FRA includes, within the definition of "marriage agreement", an "agreement entered into by a man and a woman before or during their marriage to each other" in relation to "ownership in, or division of, family assets or other property during marriage."
- [61] The fact that the phrase "or on the making of an order for dissolution of marriage, judicial separation, or a declaration of marriage" appears immediately afterwards gives rise to the inference that the Legislature must have intended a marriage agreement to include agreements that would apply during the marriage as well as on dissolution, separation or annulment. There is no other way to read the text of s. 61(2)(b). The text is clear and there is no basis either in context or purpose to conclude that the provisions of the FRA about the validity of "marriage agreements" would not also apply to ones that were meant to have force during the marriage.
- [62] While Mr. Innes and Ms. Innes are not divorced or separated, they are still separate legal persons with the separate ability to own property and contract. They had legal capacity to provide for an agreement that would govern their proprietary rights inter se, both at law and at equity, and it would be enforceable, at common law and equity, unless void (for example, if entered into under duress) or voidable (for example, if unconscionable) and one or other of them sought to void it. Section 61(4) of the FRA altered the common law/equitable position in the following ways: it made such agreements enforceable, whether or not there is consideration, but it also subjected them to modification as provided by Part 5 of the FRA.
- [63] This was a statutory modification of the common law and equity. At common law, "consideration" is a formal requirement of a contract, while at equity the slightly different concept of whether a transfer is "for value" has enormous significance because transfers without value lead to a presumption of resulting trust and a party obtaining property for value and without notice is free of equitable obligations of the transferor. Section 61(4) means that a marriage agreement is not subject to either of these limitations on enforceability. The flip side of the modification of pre-statutory law was that marriage agreements could be more easily challenged than common law contracts.
- [64] Since there is no dispute that the formalities of s. 61 were observed, the Marriage Agreement is presumptively binding, subject either to s. 65 (if that is applicable) or the common law/equitable doctrines of duress, unconscionability, frustration and so on (if, contrary to my analysis, s. 65 is not applicable).

- [65] Before I get to the question of whether the Marriage Agreement would be enforceable under s. 65 of the FRA, I must first interpret it, especially on the basic question of what effect it has on the ownership of the 3400 Metchosin Road Property, since that is obviously relevant to whether it would meet the test of s. 65 (or, if necessary to consider, the doctrine of unconscionability).
- [66] The Claimant argues that the Marriage Agreement means Ms. Innes has sole beneficial ownership of 3400 Metchosin Road, notwithstanding her subsequent transfer of half the legal title. As the Claimant points out, the recitals acknowledge that it was the parties' intention that the property listed in Schedule A remain Ms. Innes's sole property. The home at 3400 Metchosin Road and one-half of all furniture and furnishings were listed in Schedule A. Clause 6 of the Agreement sets out that all property acquired by either party, either before or during the marriage, will be that party's sole property during the marriage and would continue to be should the parties separate or divorce.
- [67] Clause 6 is said to be "subject to" the rest of the agreement. Clause 7 provides an exception for property intended to be owned as tenants in common. Such property is supposed to be listed in Schedule B. The 3400 Metchosin Road Property was never listed in Schedule B, and therefore the inference that is being sought by the Claimant is that 3400 Metchosin Road, or at least the beneficial ownership thereof, is assigned to Ms. Innes by the agreement.
- [68] On the other hand, Clause 6 would also be "subject to" Clause 5, which states as follows:
- Susan and Stuart separately acknowledge that:
- (a) in the course of the relationship each of them has and will confer benefits on the other;
 - (b) benefits conferred by one on the other are gifts, and the making of these gifts does not result in an unjust enrichment of the recipient to the detriment of the donor;
 - (c) neither party intends to share legal or beneficial ownership of his or her separate property, owned before or acquired after the making of this Agreement, subject to the terms of this Agreement; and
 - (d) neither party will rely on the oral expressions, or conduct that may suggest the expression, of an intention by one party to hold property or a portion of property in trust for the other party.
- [69] Taking the Marriage Agreement in the context of family law and related areas of equity and common law at the time, I find that the overall purpose of the Marriage Agreement was to try to ensure greater certainty between the parties about how property would be allocated, including by contracting out so far as possible from doctrines that split equitable ownership with the more easily ascertained and controlled legal ownership.

- [70] The mutual benefit of such an agreement would be greater certainty and hopefully less room for expensive litigation. Clause 5 explicitly tries to contract out a constructive trust doctrine as exhibited by *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 1980 CanLII 22, with para. (a), and from implied trust doctrine with para. (d). In this sense, Clause 5 has the same overall goal as Clause 7. Both try to provide certainty by ensuring that it is easily ascertainable which property belongs to which party.
- [71] In my view, one of the doctrines that Clause 5 was likely trying to get away from was the presumption of resulting trust. Because equity presumes bargains, not gifts, there is a presumption that when one person transfers property without valuable consideration to another, the transferee holds it in a "resulting trust for the transferor": *Pecore v. Pecore*, 2007 SCC 17 at para. 24 [*Pecore*]. This presumption can be displaced by evidence of an intention to make a "full and perfect gift." The presumption of resulting trust has always applied to gratuitous transfers from wives to husbands; however, historically, it did not apply to transfers from husbands to wives, where the opposite "presumption of advancement" prevailed: *Pecore* at para. 28 citing *Hyman v. Hyman*, [1934] 4 D.L.R. 532 at p. 538, 1934 CanLII 324 (S.C.C.). The presumption of advancement was legislatively abolished for such transfers in many provinces, but not in British Columbia at the time of the FRA: see *Pecore* at para. 87.
- [72] In light of this context, part of the point of Clause 5(b) saying "benefits conferred by one on the other are gifts" was to avoid the presumption of resulting trust, along with the asymmetric application of its opposite, the presumption of advancement. While the equitable doctrines of constructive and remedial trust are helpful in doing justice in complex situations, the price for this has always been complexity, uncertainty and the potential for litigation. Marriage agreements and the policy behind enforcing them is that they allow the parties to lessen this uncertainty, albeit always with the potential price that this would be unfair when implemented in different circumstances than those in which they were negotiated, which was the purpose of s. 65 of the FRA to address.
- [73] What are the implications for the effect of the 2011 transfer of half the interest in the Metchosin Property to Mr. Innes? Clause 8 says, "Nothing in this Agreement prevents either Susan or Stuart from making gifts to each other during their respective lifetimes ..." and that is clearly made paramount over Clauses 6 and 7. Thus, Clause 5(b) supports the proposition that benefits that look like gifts are to be treated as gifts.
- [74] I find, therefore, that under the Marriage Agreement, the apparent intention to create a gift by transferring a half interest in Metchosin Property to Mr. Innes was effective in transferring not only the legal but also the equitable half interest. That was precisely the kind of certainty the parties were looking for in the Marriage Agreement and what it allowed them to accomplish without having to worry about the subsequent applications of equitable presumptions.

- [75] In the alternative, I find that even if the presumption of resulting trust applied to the 2011 joint tenancy transfer, it is rebutted on the evidence here. It is true that it is possible for a party to register an interest in land by way of joint tenancy simply as an estate planning tool to avoid probate without intending a full and perfect gift of the beneficial interest: *Bergen v. Bergen*, 2013 BCCA 492 [Bergen]. However, as *Bergen* makes clear, this is just one possibility, and everything turns on the facts. So, the presumption gives way to the evidence of whether or not there was a present gift.
- [76] In this case, of course, we have no direct evidence from Ms. Innes as to what she intended in 2011. We have the necessarily interested evidence of Mr. Innes, which indicates that it was a gift. In addition to that we have the conveyance itself which says that the transfer was for "love and affection". This suggests a gift. We have the evidence of the Marriage Agreement, which indicates that the parties sought to avoid trust doctrines that got in the way of the gifts. Finally, we do not really have any other explanation for why Ms. Innes made the transfer title to Mr. Innes other than that she felt that after a decade, the situation had changed from the time of the Marriage Agreement and it was no longer, from her perspective, right, fair, or otherwise appropriate for her to retain 100 percent ownership in the matrimonial home.
- [77] There is little evidence of an intention not to make a gift, and little explanation for why she would go to the trouble of making the transfer otherwise. Mr. Wells concedes that he does not know why Ms. Innes made the transfer. He deposes that she consistently said she wanted the property to go in its entirety to her son, Mr. Settle, but there is clear evidence that this was not a completely consistent intention on her part since the June 2017 will makes it clear that at that point, she intended to leave all her property to Mr. Innes unless he predeceased her.
- [78] Therefore, in my view, in the alternative, even if the law of resulting trust applied, the presumption has been rebutted in this case because the bulk of the evidence supports the inference that there was a gift. However, this is an alternative finding. In my view, the Marriage Agreement makes it unnecessary to consider the presumption of resulting trust at all because it says that when one of the parties appears to make a gift, it is a gift.

The Inheritances

- [79] While the Marriage Agreement is compatible with gifts, it does not suggest that the mere fact an inheritance is paid into a joint account would make it a gift. Rather the inheritances are "property ... acquired by ... Susan ... after the marriage" within the meaning of Clause 6, and therefore under Clause 6, they remain her sole property during the marriage, which means they are her property now.
- [80] This does not mean the inheritances could not be used for ordinary joint expenses, if Mr. Innes was acting on Ms. Innes's behalf. However, to the extent that they were not used for that purpose, they remain Ms. Innes's property, and any property that the principles of

equitable tracing lead back to these inheritances are hers as well. I cannot make findings about what those amounts or property would be in this summary trial. First, I cannot make the necessary findings without an expert report and it would be unjust in the circumstances because much of the evidence was given late. Moreover, because this has not been brought in the consolidated civil action, Mr. Innes's daughters do not have standing, but this may be necessary if there is a claim of equitable tracing into any assets in their hands.

- [81] However, I do have sufficient evidence from the accounts that at minimum, the \$100,000 currently being held by in trust by McConnan Bion O'Connor & Peterson can be traced to these inheritances, as can the balance of the respondent's Scotiabank account, so, assuming the Marriage Agreement is enforceable, I will make orders in relation to those, and then provide for an accounting to determine if there is anything in addition that has to be worked out to provide fairness between the parties.

Is The Marriage Agreement Enforceable?

- [82] In light of how I have interpreted the Marriage Agreement, it is not difficult to conclude that it would not be departed from under s. 65(1) of the FRA, and would certainly not be unconscionable if that is the relevant doctrine. Under *Hartshorne v. Hartshorne*, 2004 SCC 22 [Hartshorne], the court should be reluctant to second guess private parties' initiative and arrangement, particularly when independent legal advice has been obtained: Hartshorne at para. 67. Fairness is determined by considering what was in the contemplation of the parties at the time that they entered into the marriage agreement. Only if the discrepancy between these expectations and what has happened subsequently would render the result unfair should the parties' agreement be departed from.
- [83] In this case, what has happened is more or less what the parties might have expected in 2000. They knew they would get older. The result might have been unfair if Ms. Innes had not transferred a half interest in the Metchosin Property. But she did, and I need not make such a hypothetical finding.

Conclusion and Order

- [84] Therefore, while the parties cannot be said to be "separated" under the FLA, the provisions relating to marriage agreements under the FRA continue to apply and govern their proprietary rights inter se, even though the marriage continues. The Marriage Agreement as interpreted should be enforced, which means both that Mr. Innes should get a half interest in the Metchosin Road Property, but that any traceable proceeds or inheritances belong to Ms. Innes.
- [85] I therefore order as follows:
1. The Affidavit of Richard Wells #1 is admitted for the purposes of this summary trial, subject to the excisions set out in blue pen in Exhibit 1.

2. The Affidavit of Richard Wells #2 is admitted for the purposes of this summary trial, subject to the excisions set out in blue pen in Exhibit 2.
3. The Affidavit of Frances Crowhurst #1 is admitted for the purposes of this summary trial, subject to the excisions set out in blue pen in Exhibit 3.
4. Leave is granted to file the Affidavit of David Settle #1.
5. The application for a declaration that the parties are separated as defined by the Family Law Act is dismissed.
6. The application to confirm the Marriage Agreement entered into by the parties in January 2000 is allowed and the Marriage Agreement is declared to be valid and enforceable.
7. A declaration is made that each of the parties have a half legal and equitable title in the property with a civic address of 3400 Metchosin Road, Victoria, BC.
8. An order is granted confirming that the Claimant had equitable title to her inheritances from the estate of her mother, Joyce Irene Wells, and from the estate of Wilford Robert Edwin Johnson, and she is entitled to trace that money under the principles of equitable tracing.
9. An order is granted that \$100,000 being held in trust by McConnan Bion O'Connor & Peterson be paid to Brown Henderson Melbye in trust for the Claimant, with those monies to be credited to the respondent in an accounting of the inheritances.
10. An order is granted that the balance of the respondent's Scotiabank GIC account ending with 1311 be paid to Brown Henderson Melbye in trust for the Claimant, with those monies to be credited to the respondent in an accounting of the inheritances.
11. Either party may seek an accounting. The parties may apply to me regarding the terms of the accounting.

(SUBMISSIONS ON COSTS)

[86] THE COURT: I am of the view that success was divided today and that the appropriate order is that each party bear its own costs of this application.

"J. G. Morley, J."

The Honourable Justice Morley

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