

CANADA / JUDGMENT

Lee v. Chau

2021 BCSC 70

COURT

Supreme Court of British Columbia

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2021 BCSC 70 Lee v. Chau

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lee v. Chau,

2021 BCSC 70

Date: 20210115

Docket: S158972

Registry: Vancouver

Between:

Nu Lee

Plaintiff

And

My Linh Chau aka Helen My Linh Chau and Li Hau Chau aka Jack Li Hau Chau, the Joint Administrators of the Last Will and Testament of Tan Chau, deceased and the said My Linh Chau aka Helen My Linh Chau and Li Hau Chau aka Jack Li Hau Chau

Defendants

Before: The Honourable Madam Justice Douglas

Reasons for Judgment

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(by telephone)

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(by telephone)

Counsel for Jack Chau:

J. McStravick

(by telephone)

Place and Date of Trial:

Vancouver, B.C.

October 8 and 9, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 15, 2021

Table of Contents

INTRODUCTION. 3

THE ISSUES. 3

BACKGROUND. 4

Procedural history. 4

Chronology of events. 4

LAW AND ANALYSIS. 6

Is this action suitable for summary trial?. 6

Positions of the parties. 6

Legal framework. 7

Analysis and conclusion. 8

i. The cost of a conventional trial relative to the amount at stake. 8

ii. The complexity of the matter 9

iii. Urgency and prejudice arising from delay. 9

iv. Whether credibility is a critical factor 9

v. Whether a summary trial might create unnecessary complexity. 10

vi. Whether a summary trial would result in litigation in slices. 10

vii. Summary. 10

Is Hearsay evidence admissible to establish the Deceased's intent?. 11

Are the hearsay statements in the defendants' affidavits admissible?. 11

Can the plaintiff rely on her Affidavit #3?. 12

Can the plaintiff rely on her own examination for discovery evidence?. 14

Have the defendants and/or the Deceased been unjustly enriched?. 14

Did the Deceased intend the Transfer as a gift to the defendants?. 18

Positions of the parties. 18

Legal framework. 18

The evidence. 19

Analysis and conclusion. 23

Were the plaintiff and the Deceased spouses at the time of his death?. 25

Positions of the parties. 25

Legal framework. 25

The evidence. 26

Analysis and conclusion. 27

SUMMARY. 29

INTRODUCTION

- [1] The defendants, Helen Chau (aka Lira Lee) and Jack Chau, are the only adult children of their now deceased father, Tan Chau (the "Deceased"). They bring this summary trial application pursuant to Rule 9-7 for an order dismissing all claims against them and a declaration that the plaintiff, Nu Lee, had no legal or beneficial interest in the lands and premises at 412 Aubrey Place in Vancouver (the "Property") or in the proceeds of sale for the Property.
- [2] The Deceased acquired the Property in June 1988. The Deceased and his first wife, Thu Van Chau (the defendants' mother), owned the Property as joint tenants. She died in 1994. Thereafter, by right of survivorship, the Deceased became the sole owner of the Property. The parties agree that he owned it, free and clear of any mortgages, before he married the plaintiff, his second wife, on May 30, 1995 in Vancouver.

- [3] The parties' dispute arises from the Deceased's gratuitous transfer of joint tenancy interests in the Property, his former home, to the defendants on February 14, 2014 (the "Transfer"). The defendants say that he intended the Transfer to be a gift, that his relationship with the plaintiff had ended many years before his death, and that their marriage was a sham. The plaintiff says she was the Deceased's wife for 19 years, that he made inadequate provision for her in his will, and that the Transfer gives rise to the presumption of a resulting trust in her favour. She advances an unjust enrichment claim and seeks to vary the Deceased's will pursuant to the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 ("WESA").
- [4] The plaintiff abandoned her constructive trust and fraudulent conveyance claims on the second day of this summary trial.

THE ISSUES

- [5] The following issues arise on this application:
- a) Is this action suitable for summary trial?
 - b) Is hearsay evidence admissible to establish the Deceased's intent?
 - c) Were the defendants and/or the Deceased unjustly enriched?
 - d) On a balance of probabilities, does the admissible evidence:
 - i. Establish that the Deceased intended the Transfer to be a gift?
 - ii. Rebut the presumption of a resulting trust?
 - e) Were the plaintiff and the Deceased spouses at the time of his death?

BACKGROUND

Procedural history

- [6] This action was commenced by notice of civil claim filed October 30, 2015. Pleadings were closed on January 28, 2016. All parties have been examined for discovery: Ms. Chau examined the plaintiff on September 22, 2016; the plaintiff examined Mr. Chau on July 28, 2016 and Ms. Chau on September 23, 2016.
- [7] The defendants filed this application on October 24, 2018. On December 14, 2018, the plaintiff cross-examined Ms. Chau on her affidavit evidence. No conventional trial date has been set.

Chronology of events

- [8] The following chronology of events is supported by the undisputed evidence:

- a) The Deceased was born on August 4, 1929. The plaintiff was born in 1951. She and the Deceased met in 1994 in Toronto. She was then living in Taiwan; he resided at the Property in Vancouver. She flew from Toronto to Vancouver to stay with him for a few days in 1994 and made a return trip in May 1995.
- b) On May 30, 1995, they married. The Deceased was then 65 years old and retired; the plaintiff was 44. They had no children together. For unknown reasons, the defendants were not invited to the wedding.
- c) The plaintiff made no financial contribution to the purchase, maintenance, or ongoing costs of the Property.
- d) In June 1995, she applied for landed immigrant status.
- e) On July 17, 1995, the Deceased made a will, dividing his estate into three equal parts to be given to the plaintiff and to each of the two defendants for "[their] use absolutely".
- f) On August 26, 1996, he made a second will, revoking all former wills, appointing the defendants as the joint executors and trustees of his estate, and leaving his entire estate to them and nothing to the plaintiff (the "Will").
- g) On August 27, 1996, the Deceased filed a petition for divorce alleging a breakdown of his marriage to the plaintiff (the "Divorce Proceedings"). On April 3, 1997, he filed a notice of discontinuance in the Divorce Proceedings and a praecipe, citing a "reconciliation of the spouses".
- h) In 1998, Ms. Chau moved out of the Property.
- i) On February 13, 2002, the plaintiff became a Canadian citizen. On January 17, 2004, her mother died.
- j) In or about 2007, Mr. Chau moved out of the Property.
- k) In or about 2010, the Deceased was diagnosed with pancreatic cancer; thereafter, Ms. Chau became his primary caregiver.
- l) On February 14, 2014, the Deceased made the Transfer, adding the defendants as joint tenants on title to the Property. He died on July 21, 2014, at the age of 84. The plaintiff was then living in Taiwan. She was unaware that the Deceased had been terminally ill, was not involved in his palliative care, and did not know that he had died.
- m) On or about April 18, 2015, Mr. Chau transferred his one-half interest in the Property to Ms. Chau for \$500,000. On or about April 20, 2015, Ms. Chau took out a \$500,000 mortgage on the Property (the "Mortgage"). She used the Mortgage proceeds to purchase Mr. Chau's one-half interest in the Property.

- n) On or about June 11, 2015, Ms. Chau took out a second mortgage on the Property for \$150,000 (the "Second Mortgage"). She used the Second Mortgage funds, together with personal RRSPs, to finance renovations at the Property.
- o) On October 30, 2015, the plaintiff filed a notice of civil claim initiating this action and a certificate of pending litigation on the Property.
- p) On November 29, 2015, the plaintiff's father died.
- q) On April 30, 2018, Ms. Chau sold the Property to a third party (the "Sale"). Net proceeds of about \$1.1 million from the Sale were paid into the trust account of Cawkell Brodie LLP. All registered charge holders agreed to a discharge of their charges provided the Sale proceeds were held in trust and not dispersed pending an agreement or court order.
- r) On November 8, 2018, the parties attempted unsuccessfully to mediate a settlement of this claim.
- s) By consent order filed December 13, 2018, the remaining proceeds of the Sale (approximately \$906,517) were distributed as follows:
 - (1) \$265,000 to remain in trust at Burrard Law LLP pending court order or agreement of the parties;
 - (2) \$35,000 paid to the plaintiff, without prejudice to the defendants to assert at trial that she is entitled to no relief or less than \$300,000 in relief; and
 - (3) the balance paid to Ms. Chau, without prejudice to the plaintiff's right to assert at trial that she is entitled to more than \$300,000 in relief.

LAW AND ANALYSIS

Is this action suitable for summary trial?

Positions of the parties

- [9] The defendants argue that a summary trial favours the efficient, proportionate, and cost-effective resolution of this claim. They say this action is ideally suited for summary trial because it gives rise to discrete legal issues and all parties have been examined for discovery, filed affidavit evidence, and had an opportunity to conduct cross-examinations. They say the evidence will not improve at a conventional trial, as the Deceased cannot testify. They submit that it is open to a court to weigh the evidence and to resolve any evidentiary conflicts on a summary trial; they maintain there are no material conflicts in the evidence. The defendants note that the plaintiff has taken no steps to set this action down for trial since concluding examinations for discovery in September 2016. Finally, they say that Ms. Chau has a medical disability, works only part-time, and is in need of the \$265,000 currently being held in trust.

- [10] The plaintiff argues that this action raises numerous complex claims (two of which she formally abandoned during this summary trial) and that the multiple evidentiary conflicts demand further cross-examination and an assessment of the parties' credibility at a conventional trial.

Legal framework

- [11] Rule 9-7 permits a party to an action, to which a response to civil claim has been filed, to apply to the court for judgment, either on an issue or generally. A party may tender evidence by affidavit, answers to interrogatories, evidence given on an examination for discovery, admissions, and expert reports.
- [12] If it is possible to find the facts, a chambers judge must give judgment unless it would be unjust to do so for any proper juridical reason: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, [1989] B.C.J. No. 1003 at para. 53 (C.A.) [*Inspiration Management*]. A judge must consider whether the evidence is sufficient for adjudication and is not obliged to remit a case to the trial list just because there are conflicting affidavits: *Inspiration Management*, at paras. 55-56.
- [13] In deciding whether it is just to proceed by summary trial, a judge may consider the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of proceeding with a conventional trial relative to the amount at stake, the course of the proceedings, and any other matters which arise: *Inspiration Management*, at para. 49. Other relevant factors include the cost of the litigation and the time required for the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create unnecessary complexity in the resolution of the dispute, and whether the application would result in litigation in slices: *Gichuru v. Pallai*, 2013 BCCA 60 at para. 31 [*Gichuru*]; *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241 at paras. 64-66.
- [14] A conventional trial is not required if summary disposition can achieve a fair and just adjudication, provide a process that allows the judge to make the necessary findings of fact and apply the law to those facts, and is a more proportionate, expeditious, and less expensive means of achieving a just result: *Hyrniak v. Mauldin*, 2014 SCC 7 at paras. 2-5, 23-33.

Analysis and conclusion

- [15] It is with those principles in mind that I consider the suitability of this action for summary trial.
- i. The cost of a conventional trial relative to the amount at stake

- [16] The parties appear to agree that a conventional trial of this action would likely consume about two weeks of trial time. The defendants say that the plaintiff has not advanced this claim with reasonable due diligence and is now "approaching want of prosecution territory".
- [17] The value of the Sale proceeds currently being held in trust is \$265,000. The assets in the Deceased's estate total about \$20,000. In *White v. Glossop*, 2019 BCSC 1044 [White], the parties' claim involved property worth approximately \$420,000 and other claims totalling \$110,000. Justice Voith (as he then was) noted at para. 110, that such a low global amount would not normally warrant a two-week trial. As in *White*, it is likely that all parties would be separately represented at trial as they were on this summary trial.
- [18] Plaintiff's counsel conceded that any conventional trial of this action would be a "three person trial" involving the named parties, all of whom have given evidence on this application. While he suggested that the notary public who prepared the Will might be a witness, the plaintiff apparently took no steps to secure his evidence before this summary trial. All parties have an obligation to "put their best foot forward" and to adduce all evidence necessary to make out their claim or defence at a summary trial. As noted by the Court of Appeal in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275 at para. 34 [Everest], "[i]t is trite law that where an application for summary determination under Rule 18A [the predecessor to Rule 9-7] is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible". A party cannot, by failing to take such steps, frustrate the benefits of the summary trial process: *Everest*, at para. 34.

ii. The complexity of the matter

- [19] As in *White*, the resulting trust issues raised on this summary trial are relatively straightforward. The case law in this area is well-developed: *White*, at para. 111. I conclude that the same is also true of the law relating to unjust enrichment and wills variation claims pursuant to WESA.

iii. Urgency and prejudice arising from delay

- [20] The Deceased died in July 2014. This action was commenced in October 2015. The plaintiff has taken no steps to advance these proceedings since September 2016. To date, the parties have not secured a conventional trial date.
- [21] Ms. Chau is currently on medical leave and says that she requires the use of the Sale funds currently being held in trust.

iv. Whether credibility is a critical factor

- [22] While there are conflicts in the evidence, they primarily relate to:
- a) The amount of time the plaintiff spent at the Property before the Deceased died;
 - b) The nature of her contributions to the Property; and

c) The nature of her relationship with the Deceased.

[23] In my view, none of those evidentiary conflicts precludes finding the facts necessary to grant judgment or requires oral testimony at a conventional trial. Other admissible evidence may make it possible to find the facts necessary to grant judgment: Inspiration Management, at para. 56. There is documentary evidence (adding the defendants as joint tenants on title to the Property and the Will) supporting the Transfer. I conclude that I am able to make findings of fact based on the parties' undisputed evidence.

v. Whether a summary trial might create unnecessary complexity

[24] I am not persuaded that a summary trial will create unnecessary complexity in this case. All parties have completed examinations for discovery and had an opportunity to conduct cross-examinations on affidavits. Proportionality and its influence on Rule 1-3 are relevant considerations: White, at para. 115.

vi. Whether a summary trial would result in litigation in slices

[25] Apart from those that the plaintiff formally abandoned, I have addressed all claims on this summary trial. Accordingly, any concern about this action being litigated in slices is unwarranted.

vii. Summary

[26] As in White, the central issue in this case is what the Deceased intended when he transferred the Property to the defendants. No party has adduced any direct evidence addressing this issue. I have the evidence of all parties, together with the title search document (confirming the entered application to add the defendants as joint tenants on title to the Property) and the Will. I am not satisfied that this evidence is likely to change significantly at a conventional trial. I am not persuaded that I must resolve all the evidentiary conflicts between the parties.

[27] Having regard to the above-noted factors, I conclude that the evidence is sufficient to permit me to find the facts necessary to decide all properly pleaded issues on this summary trial and that it would not be unjust to do so.

Is hearsay evidence admissible to establish the Deceased's intent?

[28] Rule 22-2(13) provides that affidavits may contain statements based on the deponent's information and belief if: (i) the source of the information and belief is given; and (ii) the affidavit is made in respect of an application that does not seek a final order or by leave of the court. This summary trial seeks a final determination of all issues in this action. Thus, absent leave of the court, hearsay cannot be adduced on this summary trial.

[29] Hearsay is presumptively inadmissible. Nevertheless, it can be admitted through one of the traditional exceptions to hearsay or the principled approach set out in *R. v. Khelawon*, 2006 SCC 57 at para. 47. The principled approach requires that the hearsay statements be both necessary and reliable.

Are the hearsay statements in the defendants' affidavits admissible?

[30] The defendants seek to establish the Deceased's intentions in making the Transfer by adducing hearsay evidence based on the principled approach. Their affidavits contain hearsay regarding the Deceased's intentions. Ms. Chau deposes that, before the Transfer, the Deceased told her he intended to leave the Property to her and Mr. Chau equally. Mr. Chau similarly deposes that, "in the years preceding his death", the Deceased told him the defendants "would each inherit a 50% share of the Property". According to Mr. Chau, the Deceased knew he was terminally ill when he made the Transfer and did so in order to avoid probate fees and to facilitate the Property passing to his children on his death. At the plaintiff's cross-examination of Ms. Chau on her affidavit evidence, Ms. Chau testified that it was the Deceased's idea to add his children as joint tenants on title to the Property.

[31] The Deceased obviously cannot give evidence. Accordingly, I am satisfied that the defendants' hearsay evidence regarding his intention in making the Transfer is necessary.

[32] However, the defendants' evidence is *prima facie* substantively unreliable because it is self-serving; both have an inherent interest in showing that the Deceased intended an outright gift to rebut the presumption of a resulting trust. The defendants contend that any reliability issues can be overcome by evidence that corroborates the veracity of the impugned hearsay. Specifically, they point to the Transfer and the Will.

[33] I am not persuaded that the alleged corroborating evidence overcomes the inherent reliability concerns with the hearsay the defendants seek to adduce. As the Supreme Court of Canada held in *R. v. Bradshaw*, 2017 SCC 35 at para. 4 [Bradshaw], corroborative evidence may be used to assess threshold reliability only if it shows, when considered as a whole and in the context of the case, that the only explanation for the impugned hearsay statement is the truthfulness or accuracy of the material aspects of the statement. This stringent standard requires the trial judge to consider alternative, and even speculative, explanations for the statement and then to rule out those alternatives based on the corroborative evidence adduced: *Bradshaw*, at para. 57.

[34] When the evidence is considered as a whole and in all the circumstances, I am not persuaded that the Deceased's alleged intention to gift the Property to the defendants is the only likely explanation for the Transfer or the Will. It is possible that the Deceased could have made the Transfer for other reasons. The fact that the Transfer occurred does not explain why it was made. Although the defendants were the sole beneficiaries under the Will, the Will is not the only explanation for the Transfer. As noted in *Bradshaw*, at para. 32, the threshold reliability standard always remains high and the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents.

[35] I conclude that the corroborating evidence here does not mitigate those dangers when considered under the Bradshaw framework. Accordingly, I have not admitted the impugned statements for the truth of their contents. I rely on the parties' undisputed evidence to decide the issues on this application.

Can the plaintiff rely on her Affidavit #3?

[36] The plaintiff seeks to rely on her Affidavit #3, sworn October 7, 2020, and filed on October 8, 2020, the first day of this two-day summary trial. The plaintiff's Affidavit #3 was sworn in response to Ms. Chau's Affidavit #2, sworn September 30, 2020, appending the Deceased's April 2011 to August 2014 Telus records (indicating no telephone calls were made from his number to Taiwan in this period). In her Affidavit #3, the plaintiff claims to "now recall" that the Deceased contacted her by telephone at least twice in 2012 and 2013 and that she "believes" he did so using a calling card. This statement is not corroborated by any credible documentary evidence. I find it lacks sufficient threshold reliability to be admitted on a principled basis, and I rule this evidence inadmissible.

[37] Also appended to the plaintiff's Affidavit #3 is a generic poem, the meaning of which is open to interpretation. It was purportedly mailed by "Chau" from the Property on March 28, 2012, received by the plaintiff, apparently without a cover letter, and unofficially translated into English, purportedly by someone competent to do so.

[38] The defendants filed this summary trial application on October 24, 2018. It is unclear why this poem was not included in the plaintiff's list of documents. It does not clarify the Deceased's intentions in making the Transfer. It was filed on the first day of this summary trial and the defendants had no opportunity to cross-examine the plaintiff on it. Ultimately, I conclude that this evidence is ambiguous, uncorroborated, unreliable, and of limited assistance.

[39] The plaintiff's Affidavit #3 also appends a letter dated January 3, 1995, similarly translated into English and purportedly received by her from the Deceased. It is unclear why this document was not produced earlier. It is addressed to "Shi Hua", the name the plaintiff says she used when in Taiwan. It states that the Deceased missed the plaintiff (whom he indicated had "been away for [a] few days") and that "[w]e welcome you to live in Canada after our family discussion". This letter predates the Deceased's marriage to the plaintiff. It does not assist in clarifying his intentions in making the Transfer. I conclude that it is of limited assistance and I give it minimal weight.

Can the plaintiff rely on her own examination for discovery evidence?

- [40] The plaintiff appended extracts from her own examination for discovery transcript to a legal assistant's affidavit for her use on this summary trial. The defendants object on the basis evidence given on discovery is only admissible against the adverse party being examined, citing Rules 9-7(5)(c) and *Shiels v. Shiels*, [1997] B.C.J. No. 105 at para. 7. I agree. The law is clear that a party cannot rely on his or her own discovery evidence; it may only be tendered in evidence by a party adverse in interest.

Have the defendants and/or the Deceased been unjustly enriched?

- [41] The test to establish an equitable claim in unjust enrichment is threefold. The plaintiff must prove: 1) that the defendant received a benefit; 2) the plaintiff suffered a corresponding deprivation; and 3) there is an absence of juristic reason for the defendant to retain the benefit: *Moore v. Sweet*, 2018 SCC 52 at para. 37.
- [42] The defendants argue that the plaintiff has provided no facts (in her pleading, application response, or affidavit evidence) to explain how the Deceased or the defendants were unjustly enriched by her actions. In response, the plaintiff submits that the defendants have been enriched because the Property was transferred to them for no consideration. She argues that her contribution of domestic services when she lived at the Property, regardless of how small, are appropriately considered in assessing her claim for unjust enrichment. She suggests that Ms. Chau resided rent-free at the Property with her children for an extended period of time after the breakdown of her marriage in 2002; this assertion is unsupported by the evidence and, accordingly, I have not considered it.
- [43] The plaintiff's pleading is deficient. Rule 3-1(2)(a) requires a party to set out in their notice of civil claim "a concise statement of the material facts giving rise to the claim". A plaintiff must plead the material facts to establish each legal element in the cause of action: *Kindylides v. Does*, 2020 BCCA 330 at paras. 31-33. The plaintiff does not plead the material facts necessary to establish the three required elements of her unjust enrichment claim. Paragraph 18 of the notice of civil claim is the only paragraph that could be construed as an attempt to identify a benefit and corresponding deprivation. That paragraph makes reference to the plaintiff contributing "to the improvement, upkeep, and preservation of the Property, all of which she was not compensated for". There is no reference to an absence of juristic reason for the defendants to retain the alleged benefit.
- [44] In paragraph 19 of her notice of civil claim, the plaintiff alleges that the Deceased held "all or a portion of her one-half interest in the Property in trust [for her] as a resulting trustee. In the alternative, she alleged a constructive trust, one of two claims that she formally abandoned at this summary trial. In the further alternative, she alleged unjust enrichment "against the Deceased, and the Deceased's estate on the basis that the Deceased had been unjustly enriched and [she] had suffered a corresponding deprivation". The factual basis necessary to support all the elements of that claim is neither pleaded nor in evidence on this summary trial.

- [45] The notice of civil claim is silent regarding the absence of a juristic reason. The evidence does not address that matter. The plaintiff has not pleaded, or otherwise demonstrated, that the established categories of juristic reasons in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 44 (including a contract, disposition of law, donative intent, or other valid common law, equitable or statutory obligations) do not apply. In my view, those omissions are fatal to the plaintiff's unjust enrichment claim. The plaintiff has failed to meet the burden of proof she bears on that issue. Even if the evidence that she provided some domestic services when she lived at the Property could be construed as supporting her conferral of a modest benefit on the Deceased and the defendants, which caused her to suffer a corresponding deprivation, the plaintiff fails to address the absence of a juristic reason, both in her pleadings and in her evidence.
- [46] I find it significant that the plaintiff's claim was initiated in October 2015, more than five years ago, and that the plaintiff has taken no steps to advance it since September 2016. The defendants served their summary trial application in October 2018, more than two years ago. It is clear from their notice of application that the defendants sought a summary dismissal of all the plaintiff's claims in their entirety.
- [47] At no time, either in response to the defendant's October 24, 2018 notice of application, or the submissions of defence counsel that her notice of civil claim was deficient, did the plaintiff seek an adjournment of this summary trial or an opportunity to amend her pleading. A summary trial, although heard on affidavits in chambers, remains a trial of the action and the plaintiff retains the onus of proof in establishing her claim: *Gichuru*, at para. 35. For all these reasons, I conclude that the plaintiff's unjust enrichment claim is not properly pleaded, not supported by the evidence, and cannot succeed. Accordingly, I dismiss it.
- [48] Even if the plaintiff could establish a *prima facie* claim for unjust enrichment, I would not be inclined to grant her the relief she seeks. She formally abandoned her constructive trust claim and therefore seeks only a monetary restitutionary award. This is not a case where the plaintiff and the Deceased had embarked upon a joint family venture, pursuant to which the plaintiff might be entitled to the value survived: *Kerr v. Baranow*, 2011 SCC 10 at paras. 87-89. There is no evidence of any economic integration between the plaintiff and the Deceased. Nor is there any indicia that they intended to engage in a joint family venture or had prioritized their family when making decisions. In the absence of a joint family venture, the plaintiff would, at best, be entitled to compensation for her household services on a fee-for-service basis.
- [49] Any benefit the plaintiff conferred on the defendants or the Deceased's estate would be equitably set-off by the conferral of mutual benefits: *Delorme v. Normand*, 2014 BCSC 2655, *aff'd* 2016 BCCA 28. In *Kerr*, at paras. 104, 109, and 116, Justice Cromwell adopted Huddart J.A.'s reasoning in *Wilson v. Fotsch*, 2010 BCCA 226, in holding that mutual enrichments are to be considered principally at the defence and remedy stage of the unjust enrichment analysis. The assessment of mutual benefits can, and should, occur whether or not the

defendants have made a formal counterclaim or pleaded an equitable set-off: *Ibbotson v. Fung*, 2013 BCCA 171 at para. 75.

- [50] On the undisputed evidence, the Deceased purchased the Property and owned it mortgage-free when he married the plaintiff. The plaintiff admitted on discovery that he paid all the costs of maintaining the Property. In her affidavit evidence, she concedes that she made no financial contribution to the Property and paid no property taxes, maintenance, or other costs associated with it.
- [51] The plaintiff testified on discovery that, after her arrival in Canada in 1995, she worked briefly as an on-call grocery store clerk in 2001 or 2002. She paid no rent when she lived at the Property. According to Ms. Chau, the Deceased gave the plaintiff the monthly income earned from the rental of a basement suite at the Property, except when she was not in Canada. The plaintiff does not dispute that evidence. On discovery, the plaintiff testified that, when she lived at the Property, she contributed domestic services in the form of cleaning, cooking, laundry, and grocery shopping. She also said that, when something broke, she would "get someone to fix it". In her Affidavit #1, she deposes that she was the person primarily responsible for cooking, cleaning, and grocery shopping. She admits that she received about \$600/month from the Deceased for groceries until about December 1999 and that, thereafter, he bought the groceries himself.
- [52] According to the defendants, they shared cooking, cleaning, and grocery shopping duties with the Deceased, both before and after he married the plaintiff. On their evidence, both typically contributed one-half of their monthly incomes towards household expenses when they worked part-time and lived at the Property. They say the plaintiff occasionally helped with household tasks after she married the Deceased. Mr. Chau deposes that the Deceased did most of his own laundry; Ms. Chau testified on cross-examination that the plaintiff did her personal laundry only. On the evidence of Mr. Chau, he and the Deceased often gardened at the Property together; he says he never saw the plaintiff do any gardening. Ms. Chau deposes that the Deceased completed a variety of maintenance tasks at the Property including fence painting, power-washing, and small repairs. The plaintiff does not dispute that evidence.
- [53] On the undisputed evidence, the Deceased gardened, painted, performed small repairs, cooked, cleaned, did some laundry, and shopped for groceries. He paid all costs associated with maintaining the Property and running the household. The defendants shared domestic duties and contributed to household expenses while living at the Property. I conclude that the contributions of the Deceased and the defendants at least equalled the modest provision of domestic services by the plaintiff. Accordingly, even if her unjust enrichment claim could succeed, any monetary award owed to the plaintiff for her domestic services would be equitably set-off by the mutual benefits conferred by the defendants and the Deceased.

Did the Deceased intend the Transfer as a gift to the defendants?

Positions of the parties

- [54] The defendants argue that the plaintiff has not pleaded the facts necessary to establish how or why either one or both of them held the Property for her pursuant to a resulting trust. They deny there is any evidence to suggest the Deceased intended the Transfer to create a resulting trust in her favour. That is not the issue before me. The onus is on the defendants to rebut the presumption of a resulting trust by adducing evidence that the Deceased intended the Transfer to be an outright gift: *Pecore v. Pecore*, 2007 SCC 17 [*Pecore*] at paras. 24-26. If they fail to rebut the presumption, the Property would be held on resulting trust for the transferor (i.e., the Deceased's estate). If the presumption of resulting trust is displaced, the defendants lawfully became the full owners in a joint tenancy of the Property by right of survivorship on his death. Accordingly, they say the Property never formed part of his estate and that the plaintiff has no claim to it under WESA or by any other operation of law.
- [55] The plaintiff maintains that, as the Deceased's wife, he had a legal and moral obligation to provide for her in his will. She argues that they had reconciled, were spouses at the time of his death, and the Transfer gives rise to the presumption of a resulting trust.

Legal framework

- [56] In order for a transfer of property to be a legal and binding gift, there must be:
- A legal transfer of the property from the owner to the beneficiaries; and
 - An intention by the owner to transfer the property as an outright gift to the beneficiaries: *Stade Estate (Re)*, 2017 BCSC 2354 [*Stade*].
- [57] The key inquiry is to determine the transferor's intent at the time of the actual transfer; only the transferor's intention is relevant: *Pecore* at paras. 56-59; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33 at paras. 37, 41 [*Nishi*]. Placing a party on title to real property as a joint tenant constitutes a legal transfer of property at law. In this kind of transfer, the legal and equitable title (the right of survivorship) of a joint tenancy vest at the time the joint tenancy is created: *Pecore*, at para. 49. An inter vivos gift of a joint tenancy is a gift that cannot be retracted by the donor and is therefore a "complete and perfect inter vivos gift": *Pecore*, at para. 49.
- [58] A deed of gift or a statutory declaration setting out the reasons for the transfer need not accompany a gift of real property: *Stade*, at paras. 77-79. A rebuttable presumption of a resulting trust arises when property is transferred for no consideration: *Pecore*, at para. 24. The presumption of a resulting trust will determine the result only when there is insufficient evidence to rebut it on a balance of probabilities: *Pecore*, at paras. 43-44; *Fuller v. Harper*, 2010 BCCA 421 at para. 47 [*Fuller*]. Evidence of the quality of the relationship between the transferor and transferee is relevant in deciding whether the presumption of a resulting trust applies or has been rebutted: *Pecore*, at para. 37.

The evidence

[59] It is Ms. Chau's evidence that, in the six or so years before his death, she "rarely" heard the Deceased mention the plaintiff. I have not relied on this hearsay evidence. I accept it was Ms. Chau's "sense" that the Deceased believed the plaintiff was "gone from his life".

[60] There are no allegations of undue influence or issues regarding the Deceased's testamentary capacity. In the Will, the Deceased appointed the defendants as his joint executors and trustees and bequeathed his entire estate to them, stating as follows:

"I am giving nothing to NU LEE whom I married on May 30, 1995, as although we were married, she refused to consummate our marriage or live with me as husband and wife and on March 1, 1996, she left me and returned to Taiwan, China and has not returned. I believe that she married me for the sole purpose of facilitating her entry into Canada as a landed immigrant. She has never and refused to consummate our marriage and we have at no time lived together as husband and wife relationship".

[61] The Will was never revoked and probate was granted on September 16, 2015. According to Ms. Chau, the Deceased's estate consisted of personal effects and about \$20,000 in a TD bank account at the date of his death. The plaintiff denies she knew about the Will.

[62] The parties agree that the Deceased's marriage to the plaintiff was never consummated.

[63] In his divorce petition filed August 27, 1996, the Deceased alleged a breakdown of his marriage to the plaintiff, stating as follows:

The Petitioner and the Respondent have been living separate and apart since March 1, 1998 and are living separate and apart at the commencement of the proceeding and will have lived separate and apart for at least one year immediately proceeding the determination of the divorce proceeding.

The Respondent has treated the Petitioner with mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

The Petitioner married the Respondent and sponsored her to Canada. He was a widower then. The respondent arrived in Vancouver on May 12, 1995 and married the Petitioner on May 30, 1995. Though they were married the Respondent continued to reside at her fourth uncle's house for four and a half months after her arrival in Vancouver and she did not live with the Petitioner as spouses married to each other. She moved to the Petitioner's house after she had quarrelled with her uncle, but insisted on sleeping on the sofa in the living room. She refused to sleep with the Petitioner saying that she had not acquired the legal landing status and she had to protect her virginity.

The Respondent went back to Taiwan on January 6, 1996 and returned to Vancouver on January 19, 1996 because a visa was issued to her and she wanted to be landed. After that she went to the States and visited her brother and returned to Vancouver on February 16, 1996. The Respondent repeatedly denied the Petitioner his conjugal rights giving all sorts of reasons which are not credible.

The Respondent left for Taiwan with lots of presents all at the Petitioner's expense. She has not returned since March 1, 1996. The Petitioner has phoned the Respondent many times but her parents did not allow the Petitioner to talk to her.

The Petitioner has suffered extreme emotional distress and financial loss because the Respondent has deceived him and married him only so that she could come to Canada as a permanent resident. The Petitioner is suffering from depression and insomnia because of the fraudulent conduct of the Respondent. The Respondent's behaviour has caused such mental cruelty as to make co-habitation intolerable.

[64] In the divorce petition, under the heading "Reconciliation", the Deceased stated that the "Petitioner is very distressed at being used by the Respondent and does not wish a reconciliation". Under the heading "Efforts to Reconcile", he indicated:

Given the circumstances and history of this relationship the Petitioner does not wish a reconciliation and will not make any efforts to reconcile. The Petitioner believes that even if the Respondent should return to Canada she will not reside with him.

[65] The parties disagree about whether efforts were made to serve the plaintiff with the petition for divorce in Taiwan and, if so, whether they succeeded. The plaintiff denies that she evaded service; Ms. Chau says the Deceased told her that, despite his efforts, a process server by the name of Mr. Huang was unable to effect service. These statements are inadmissible hearsay. Ultimately, I conclude that this conflict is neither material to the central issues on this summary trial nor one that it is necessary for me to resolve.

[66] Plaintiff's counsel described the notice of discontinuance and praecipe filed April 3, 1997 by the Deceased in the Divorce Proceedings as the proverbial "smoking gun". The praecipe indicates that the Divorce Proceedings were being discontinued because the spouses had reconciled. The defendants do not know why the Divorce Proceedings were discontinued; the plaintiff claims she was unaware they had been commenced.

[67] There are conflicts in the parties' evidence about when the plaintiff resided at the Property between May 1995 and July 2014. I am not persuaded that I must resolve them in order to find the facts necessary to decide this summary trial.

- [68] Mr. Chau lived at the Property continuously from 1995 until 2007. It is his evidence that the plaintiff was often in Taiwan between 1995 and 2002, and that he rarely saw her at the Property during that period. He last recalled seeing her there in January 2002, following a domestic dispute that involved the police. Ms. Chau lived at the Property from 1995 until 1998, returning to live there full-time in 2008 to care for the Deceased.
- [69] On her evidence, the plaintiff was rarely at the Property between 1995 and 1999, and never lived there from 2008 to 2014. In his submissions, plaintiffs counsel made statements that are not rooted in the admissible evidence including, for example, that the plaintiff and the Deceased had a "verbal agreement" regarding the amount of time she would spend in Taiwan after they were married. I have not considered those unsupported assertions.
- [70] While the plaintiffs own evidence contains some internal inconsistencies, it supports the following findings of fact:
- a) She returned to Taiwan within one to two months of obtaining her Canadian citizenship in February 2002;
 - b) Thereafter, she remained in Taiwan for about six months, returning to Canada in or about October 2002;
 - c) She returned to Taiwan in about March 2003, staying there until after her mother died in January 2004, and returning to Vancouver in about March 2004, approximately one year later;
 - d) From 2005 to 2011 inclusive, she returned to Taiwan annually, remaining for about six months at a time, "mostly" staying with her unidentified cousin with whom she "sought refuge" when she returned to Canada as the Property "did not feel like [her] home";
 - e) She was "mostly not" at the Property between 2005 and 2011;
 - f) In 2011, she returned to Taiwan, remaining there until her father died on November 29, 2013; and
 - g) She never lived at the Property between November 2013 and July 2014.
- [71] Notably, the plaintiff did not produce her complete passport to establish definitively when she entered and left Canada between 1995 and 2014, despite her evidence on discovery that she "almost always" made photocopies of her expired passports. Accordingly, her evidence about when she says she was in Canada and at the Property is not corroborated by any credible documentary or other evidence. There was no evidence from the unidentified cousin with whom the plaintiff "sought refuge" when not residing at the Property.

Analysis and conclusion

- [72] On the plaintiff's own undisputed evidence, she mostly lived with her cousin when in Canada between 2005 and 2011 and resided in Taiwan full-time from 2011 until 2014. In other words, accepting that evidence, she and the Deceased were mostly not living together for more than eight years before he died, and were living completely separate and apart for more than three years before he died.
- [73] Plaintiff's counsel attempted to explain those extended absences by suggesting that hostility between the plaintiff and Ms. Chau "forced" the plaintiff from the Property. However, that assertion is inconsistent with the plaintiffs own evidence on discovery that the Deceased "put all his focus on his children", "did not give [her] any right", and "didn't care about [her]". In her Affidavit #1, sworn November 7, 2018, she deposed that the Deceased "always blamed me and berated me whenever there [was] tension in the relationship between [Ms. Chau] and me".
- [74] The cumulative effect of the Will, the Transfer, the plaintiff's extended absence from the Property for many years before the Deceased's death, her full-time residence outside Canada for more than three years before his death, her ignorance of his terminal illness, their lack of contact immediately before his death, and the fact that he died without her knowledge, persuade me on a balance of probabilities that he and the plaintiff were estranged. I conclude that is a relevant factor in assessing the Deceased's intentions at the time of the Transfer: Fuller, at para. 56.
- [75] The Deceased and his first wife had owned the Property as joint tenants; he became sole owner of the Property by right of survivorship on her death. In the circumstances, I infer that the Deceased would have been aware of the implications of adding the defendants on title to the Property as joint tenants.
- [76] I conclude on a balance of probabilities that the Deceased intended, at the time of the Transfer, to gift the Property to his children. He had been diagnosed with cancer before the Transfer. He had personal knowledge of the right of survivorship and the legal implications of creating a joint tenancy. Based on his own experience (which resulted in him becoming sole owner of the Property by right of survivorship on the death of his first wife), I conclude that is what he intended in this case (i.e., for his children to become full owners of the Property as joint tenants by right of survivorship on his death). The defendants were the only beneficiaries in the Will at the time of the Transfer. Ms. Chau was then his primary caregiver. All the admissible evidence suggests that he and the plaintiff were estranged at the time of the Transfer. The admissible evidence supports the conclusion that the Deceased intended to gift the Property to the defendants when he created the joint tenancy and that his remaining share in the Property would pass to them by right of survivorship on his death.

- [77] This conclusion is also supported by the Deceased's actions after the Transfer. While I acknowledge that subsequent actions by a transferor must be viewed with both caution and skepticism, they are not automatically excluded if relevant to the transferor's intention at the time of the transfer: Pecore, at para. 59; Nishi, at para. 41. This is not a case involving either self-serving evidence by a transferor or post-transfer conduct that belies a different intention. Rather, the post-transfer evidence supports the conclusion that the Deceased intended to make an outright gift to his children. Although he died within a few months of the Transfer, he did not alter or revoke the Will, nor sever the joint tenancy.
- [78] For these reasons, I find that the Deceased intended to gift the Property (by way of joint tenancy and right of survivorship) to the defendants at the time of the Transfer. While it is not necessary for me to rely on it, I also conclude that the Deceased's post-Transfer conduct supports his intention to make an outright gift. I find that the defendants have rebutted the presumption of resulting trust.

Were the plaintiff and the Deceased spouses at the time of his death?

Positions of the parties

- [79] The plaintiff seeks an order pursuant to s. 60 of WESA that the Deceased failed to satisfy his legal and moral obligations to provide for her as his married spouse in the Will. The defendants deny that the plaintiff meets the statutory definition of a spouse. Accordingly, they say she lacks standing to vary the Will, as contemplated by WESA, s. 60.

Legal framework

- [80] The plaintiff's WESA claim depends on her status as the Deceased's married wife at the time of his death. Section 2 of WESA specifies when a person is a spouse under that statute as follows:

When a person is a spouse under this Act

- (1) Unless subsection (2) applies, 2 persons are spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time and
 - (a) they were married to each other, or
 - (b) they had lived with each other in a marriage-like relationship for at least 2 years.
- (2) Two persons cease being spouses of each other for the purposes of this Act if,
 - (a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 [Property Division] of the Family Law Act, to arise, or
 - (b) in the case of a marriage-like relationship, one or both persons terminate the relationship.

(2.1) For the purposes of this Act, spouses are not considered to have separated if, within one year after separation,

- (a) they begin to live together again and the primary purpose for doing so is to reconcile, and
- (b) they continue to live together for one or more periods, totalling at least 90 days.
- (3) A relevant time for the purposes of subsection (1) is the date of death of one of the persons unless this Act specifies another time as the relevant time.

[Emphasis added]

[81] Under WESA, a separated spouse no longer qualifies as a "spouse" and has no variation rights: *Gibbons v. Livingston*, 2018 BCCA 443 at para. 17. Separation is not defined in either WESA or the Family Law Act, S.B.C. 2011, c. 25 (the "FLA").

[82] Section 2.1 of WESA provides as follows:

For the purposes of this Act, spouses are not considered to have separated if, within one year after separation,

- (a) they begin to live together again and the primary purpose for doing so is to reconcile, and
- (b) they continue to live together for one or more periods, totalling at least 90 days. Section 83 of the FLA contains identical language.

[83] In *Sachdeva v. Sachdeva*, 2013 BCSC 313 at paras. 87-93 [Sachdeva], Justice Armstrong discussed the hallmarks of separation and how to ascertain the date of separation when a specific date cannot be readily identified. His analysis involved the weighing of multiple social, economic, and domestic factors including whether or not the parties:

- a) Intended to remain married;
- b) Contributed to a joint home;
- c) Engaged in sexual relations;
- d) Carried on activities in public;
- e) Shared financial resources; and
- f) Participated in significant family events together.

The evidence

[84] In essence, the plaintiff relies on her status as the Deceased's legally married wife at the time of his death to advance her WESA claim to vary the Will.

[85] There is a notable lack of evidence from any source, including the plaintiff, to suggest that she and the Deceased intended to remain married spouses up to the time of his death. The plaintiff's evidence is silent regarding the commingling of finances, the mutual provision of

care, an ongoing emotional commitment to each other, attendance as spouses at public or private events, or participation in shared social activities: Sachdeva, at para. 91. It is common ground that she and the Deceased did not engage in sexual relations during their marriage.

Analysis and conclusion

- [86] The plaintiff attempted to excuse the absence of evidence regarding a shared intention to remain married spouses until the Deceased died on the basis it reflects a middle-class lifestyle. Her counsel argued that the plaintiff and the Deceased were both of modest means and did not socialise or go out often. Because they were legally married, the plaintiff maintains that the cases identifying the indicia of a marriage-like relationship have no application. I disagree.
- [87] Despite being urged to do so by plaintiff's counsel, I do not accept the notice of discontinuance and praecipe filed in the Divorce Proceedings as definitive evidence of a lasting reconciliation between the plaintiff and the Deceased. I have weighed the Deceased's discontinuance of the Divorce Proceedings in the context of all other admissible evidence, including the events that transpired in the following 17 years before his death.
- [88] The defendants say that the plaintiff and the Deceased ceased being spouses several years before his death. They admit that it is difficult to identify a date of separation with precision. The plaintiff argues that she and the Deceased were spouses at the time of his death. In her Affidavit #2, sworn October 5, 2020, she deposes that, as far as she was aware, she was "always happily married to [the Deceased] until his death and [he] never told me otherwise". That evidence is inconsistent with much of her other evidence regarding contentious issues in their relationship and I do not find it to be persuasive.
- [89] I conclude that the plaintiff and the Deceased were living separate lives when he died, and had been for many years before his death. There is no credible admissible evidence to the contrary. There is no evidence to suggest that they ever lived together for a period of 90 days after 2011, at the latest, so as to trigger s. 2.1 of WESA.
- [90] On all the admissible evidence, I conclude that the plaintiff played no meaningful role in the Deceased's life for many years before he died. She argues that physical separation alone does not mean parties are living separate and apart: *Dorchester v. Dorchester* (1971), 19 D.L.R. (3d) 126 (B.C.S.C.). She suggests that her acrimonious relationship with Ms. Chau prevented her and the Deceased from "functioning as a normal married couple". On all the evidence, I do not accept that as a credible explanation for the plaintiff's permanent residence in Taiwan for more than three years before the Deceased's death. Apart from the plaintiff's uncorroborated and inadmissible hearsay that they exchanged a few telephone calls in 2012 and 2013, they had essentially no contact in that interval.
- [91] The admissible evidence supports the following conclusions:

- a) Commencing in 2002, the plaintiff spent at least six months a year living in Taiwan and lived there full-time from at least 2011;
- b) She did not know the Deceased was terminally ill, was not involved in his palliative care, and was unaware of his death;
- c) The Deceased made no attempt to contact her shortly before he died; and
- d) The Deceased took no steps to reverse the Transfer or to revoke the Will before his death.

[92] The plaintiff highlights the defendants' inability to identify a specific date of separation. In my view, the critical question is whether the plaintiff and the Deceased were spouses at the date of his death. I am satisfied the evidence is sufficient to permit me to find that, on a balance of probabilities, they were not.

[93] I find that the plaintiff and the Deceased were separated at the time of his death and that the plaintiff does not meet the definition of a spouse, as contemplated by WESA. Accordingly, she has no status to vary the Will.

SUMMARY

[94] My conclusions are summarised as follows:

- a) The plaintiff's unjust enrichment claim is neither properly pleaded nor supported by the evidence and therefore fails;
- b) Even if the plaintiff could establish a prima facie unjust enrichment claim, any benefit conferred by her on either the defendants or the Deceased's estate would be equitably set-off by the mutual conferral of benefits;
- c) The defendants' hearsay evidence regarding the Deceased's intentions in making the Transfer is inadmissible;
- d) The admissible evidence is sufficient to rebut the presumption of a resulting trust on a balance of probabilities; and
- e) The plaintiff and the Deceased were not spouses as contemplated by WESA at the time of his death.

[95] I grant judgment in favour of the defendants, dismissing all claims against them, with costs on Scale B. If there are any matters arising from these reasons, the parties are at liberty to apply to speak to them.

"Douglas J."

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