
CANADA / JUDGMENT

Lennox v. Lennox

2019 BCSC 938

COURT

Supreme Court of British Columbia

DECIDED

11 June 2019

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lennox v. Lennox,

2019 BCSC 938

Date: 20190611

Docket: S172911

Registry: Vancouver

Between:

Sam Lennox

Petitioner

And

Hazel Lennox

Respondent

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Counsel for the Petitioner:

J. Richter

Counsel for the Respondent:

J. Orrego

Place and Date of Hearing:

Vancouver, B.C.

May 17, 2019

Place and Date of Judgment:

Vancouver, B.C.

June 11, 2019

INTRODUCTION

- [1] The essential issue in this proceeding is what, if any, interest the petitioner has in the parties' former family home in Courtenay, British Columbia which they jointly purchased in 1990 (the "Property"). The parties separated in 1996 and entered into a separation agreement in 2004 that anticipated the sale of the Property and a division of the proceeds of sale (the "Property Agreement"). The Property was not sold, and in 2006 the petitioner transferred his interest in the Property to the respondent for no consideration. The respondent is presently the only registered owner.
- [2] The petitioner filed this petition on March 29, 2017 seeking the partition and sale of the Property under the Partition of Property Act, R.S.B.C. 1996, c. 347 [PPA]. The petition was initially dismissed by the Supreme Court of British Columbia on March 12, 2018. The petitioner's appeal from the dismissal was allowed in part, and the Court of Appeal remitted the matter back to this Court.
- [3] The issues before me include whether the Property Agreement continues to be effective, and if not whether the petitioner has a beneficial interest in the Property on the basis of a resulting trust. Depending on the resolution of those issues, the petition seeks the further remedies of termination of the trust and an order for sale of the Property under the PPA.

BACKGROUND FACTS

The marriage and separation

- [4] The parties married in England in 1981. They have two daughters who were born in England in 1981 and 1983. The family immigrated to Canada in 1990 and settled in the Comox Valley on Vancouver Island. The parties purchased the Property in Courtenay in 1990 as joint tenants.
- [5] The respondent's evidence is that the purchase price of the Property was \$74,000, and that the purchase was financed by a \$31,750 down payment (which the parties equally contributed to) and a mortgage in the amount of \$42,250. The respondent says that the mortgage payment was \$300 per month. I do not take this evidence to be in dispute although I note that the respondent's affidavit does not annex any supporting financial documentation.

- [6] The petitioner's evidence is that the parties qualified for a mortgage on the basis of his employment at a bakery between 1990 and 1993. The petitioner says that he also worked at various other jobs between 1990 and 1996, including as a music teacher, all of which paid minimum wage. Over the same period of time, the respondent home-schooled the children and worked as a part-time storyteller.
- [7] The parties continued to live together between 1990 and 1996, over which time they jointly contributed to the costs of the Property including mortgage payments. In 1996, the parties separated. It is not necessary for me to address the reasons for the separation for the purpose of deciding the issues that arise on this petition.
- [8] At the time of their separation, the parties' children were aged 14 and 15. The respondent remained living in the Property with the children while the petitioner moved out. There was no express agreement or court order addressing child support, spousal support, or property division. The respondent deposes that this was because "neither of us initiated it or were concerned about it". The petitioner did apparently pay the respondent \$100 per month in child support pursuant to an informal agreement.

The Property Agreement

- [9] The parties were divorced in March 2004. On January 22, 2004, in anticipation of the divorce order, the parties executed the Property Agreement. The Agreement included the following recitals:

AND WHEREAS the parties are separated and have been separated since July 15, 1996. The property was the matrimonial home of the parties prior to separation.

AND WHEREAS the parties have agreed that the property shall be sold. The parties have agreed that the property is to be listed privately by the Wife in January 2004.

- [10] The terms of the Property Agreement provided as follows for the disposition of the sale proceeds:
1. The parties shall divide the proceeds of sale from the property according to the following terms:
 - a. The sale proceeds shall be used to pay the mortgage on the property held by the Comox Valley Credit Union;
 - b. The Husband shall receive \$30,000 (Thirty Thousand Dollars) from the sale of the property;
 - c. The balance of the proceeds obtained from the sale of the property shall be retained by the Wife.
 2. The parties agree that the above described terms for the division of the property shall be incorporated into the terms of a divorce order in proceedings that have commenced in the Supreme Court of British Columbia (Courtenay Registry).

- [11] The respondent deposes that the Property had an assessed value of \$131,600 in 1996, although her affidavit does not append any supporting documentation. In any event, the Property was not listed for sale in January 2004 as anticipated by the Property Agreement, nor were the terms of the Property Agreement incorporated into the final divorce order which was signed by both parties and entered on March 19, 2004.
- [12] The respondent continued to live with the children in the Property after 2004. It is not in dispute that all costs associated with the financing and maintenance of the home since the parties' separation in 1996 were borne by the respondent. There is dispute as to the amount of the respondent's financial contributions and also as to the amounts that she received in rental income from the Property over time.

The transfer of the petitioner's interest

- [13] The petitioner says that in 2006, while he was temporarily residing in England, the respondent contacted him to request that he transfer title to the Property into the respondent's name. The stated purpose for the transfer was to facilitate a mortgage on the Property as security for a loan to the parties' eldest daughter, Jessie, and her then-husband for the purchase of property on Cortes Island. The respondent says she was advised by a notary that the mortgage could more readily be obtained if the respondent was the only registered owner.
- [14] The purpose for the transfer of the petitioner's interest in the Property to the respondent is undisputed. The respondent agrees in her evidence that the parties had an "oral agreement to use the Property as collateral for a mortgage" for their daughter. The respondent also agrees that there was no other agreement or accounting at the time of the transfer. The Form A transfer filed in the Land Title Office indicated that the petitioner's fee simple interest in the Property was transferred for consideration of \$1.
- [15] The petitioner deposes that Jessie and her husband separated in 2009. He says that in the fall of 2016 Jessie advised the petitioner that she and her husband had settled their financial affairs and that the mortgage on the Property had been paid off. This is consistent with the evidence of the respondent who deposes that there is currently no outstanding mortgage on the Property.
- [16] The petitioner says that he has attempted to engage the respondent in discussion over the sale of the Property and the distribution of proceeds but that the respondent has to date declined to commit to a sale. He says the discussion has also included the option of the respondent buying out the petitioner's interest but again this has not led to any final resolution. Given the lack of resolution, the petitioner considered it necessary to file the present petition.

The parties' current financial circumstances

- [17] The petitioner is 70 years old. His evidence is that he worked minimum wage jobs since 1996, primarily as a taxi driver, up until his retirement in 2015. The petitioner says that he has a monthly income of \$1,396, no savings and substantial debt. He says that he suffers from heart issues and high blood pressure that requires expensive medication. As a result, he cannot pay for hearing aids, car repairs, dental work or eye glasses.
- [18] The respondent is 75 years old. She says that she has a monthly income of \$1,900, which consists of her pension and rental income she receives from tenants living in a suite on the Property. The respondent says that she has made substantial financial contributions to the maintenance of the Property over time without assistance from the petitioner.
- [19] Suffice to say it is evident that both parties face difficult financial circumstances in their retirement years. The Property is their only substantial asset.

THE PETITION PROCEEDING

- [20] The petitioner filed this petition in March 2017 seeking partition and sale of the Property under the PPA. The petition alleged that the respondent held the petitioner's interest in the Property in trust. In her response to petition, the respondent pleaded that the petitioner had no interest in the Property and that his monetary claim was limited to \$30,000 under the Property Agreement. Alternatively, the respondent pleads unjust enrichment, and says that the court ought to exercise its discretion under s. 6 of the PPA to decline to order a sale in any event. The respondent has also raised a limitation defence.
- [21] On March 12, 2018, the petition was dismissed by a chambers judge of this Court: *Lennox v. Lennox*, 2018 BCSC 374. The chambers judge held that the petitioner was entitled under the Property Agreement to a fixed sum from the proceeds of the sale of the house. Even if this could be characterized as a possessory interest, the chambers judge found that the interest under the Property Agreement was less than a one-half interest. As such, the chambers judge held that the petitioner had no standing to apply for partition and sale under s. 6 of the PPA as that provision grants standing only to a party holding at least a one-half interest in the subject property.
- [22] On November 7, 2018, the Court of Appeal allowed the petitioner's appeal, in part: *Lennox v. Lennox*, 2018 BCCA 412 [*Lennox BCCA*]. The Court of Appeal held that the issues of whether the Property Agreement was abandoned or repudiated, and the effect of any such abandonment or repudiation, arose from the evidence on the petition but was not addressed in the chambers judgment. The Court of Appeal therefore remitted two issues back to this Court for determination:
- i. Whether the Property Agreement has been abandoned or repudiated, and
 - ii. Whether the petitioner has an interest in the Property and the nature of that interest.

- [23] The Court of Appeal held that the chambers judge was correct to dismiss that part of the petition seeking remedies under the PPA. This was because even if the petitioner had a broader right to the Property than the right to a certain sum, for example a right under a resulting trust, it would still be a beneficial interest. In the absence of a right to immediate possession, or a co-ownership interest in a legal estate, the petitioner would not have standing to seek partition and sale: *Lennox BCCA* at para. 12.
- [24] The petitioner subsequently filed an amended petition to expand the relief he seeks to include orders terminating the alleged trust and restoring his legal title. On that basis, the petitioner now renews his request for orders under the PPA. On the petitioner's theory, the path to standing under the PPA is as follows:
- a) the Property Agreement is no longer effective, having been abandoned or repudiated;
 - b) following the petitioner's gratuitous transfer of his interest in the Property to the respondent in 2006, the respondent held the petitioner's interest on a resulting trust;
 - c) the trust may be terminated because either: (i) it is bare trust and the petitioner can require the respondent to transfer his property interest back without invoking the rule in *Saunders v. Vautier* (1841), 49 E.R. 282, or (ii) the rule in *Saunders v. Vautier* applies;
 - d) once the trust terminates, the petitioner is entitled to a legal and equitable one-half interest in the Property and a vesting order should issue to give effect to that interest;
 - e) the petitioner therefore has standing under s. 6 of the PPA to seek an order for partition and sale, and the court has only a narrow discretion to decline to grant the order;
 - f) there should be a post-sale reference to the Registrar to assess the parties' relative financial contributions and claims (including the claim for occupational rent) in relation to the Property;
 - g) the disposition of the sale proceeds may be paid into court and be the subject of further court direction following the assessment before the Registrar.

ISSUES

[25] The following issues arise:

I. Is the Property Agreement still effective to define the petitioner's entitlement to the Property, and if so what is that entitlement?

II. If the Property Agreement is not effective, does the respondent hold the petitioner's interest in the Property on a resulting trust? There is a sub-issue as to whether the claim for breach of trust is barred by the Limitation Act.

III. If there is a resulting trust, can the petitioner terminate the trust?

IV. Should the court issue a vesting order to restore the petitioner's legal estate?

V. Should an order for sale be granted under s. 6 of the PPA?

ANALYSIS

Evidentiary issues

[26] Before turning to the issues raised on this petition, I will briefly address the deficiencies in the evidentiary record in this case. They are relevant, in particular, to the petitioner's request for a vesting order and an order for sale of the Property under the PPA.

[27] The respondent provided affidavit evidence in relation to the initial and ongoing financing of the Property, and income she has derived through rent over time. Some of the matters that the respondent testifies to do not appear to be in dispute. For example, I do not take the petitioner to dispute that the original purchase price of the Property was \$74,000 and that the parties contributed equally to the down payment.

[28] However, much of the respondent's evidence is disputed by the petitioner. The petitioner's evidence on the issues of dispute is unsupported by particulars and/or financial records. For example:

- the respondent estimates that she has paid \$125,000 towards mortgage costs, taxes and insurance since separation but provides no supporting financial documentation;
- the respondent estimates that she has paid \$30,000 towards the upkeep and maintenance of the Property since separation, again without particulars or supporting documentation;
- the respondent estimates that she has put "over 50,000 hours of labour" into the Property since separation, an estimate that the petitioner challenges as implausible;
- the respondent deposes that she continues to pay \$1,000 per month towards the house expenses despite the fact that the mortgage has been paid off, again without particulars or supporting documentation;
- the respondent provides her estimates of the revenue she currently receives from renting out the suite on the Property, and the rent she has received over time, without particulars or supporting documentation;
- the respondent estimates the market value of the Property in 1996 and 2017 based on BC Assessment data that is not appended to her affidavit.

[29] The petitioner's evidence is also unsatisfactory. The petitioner's claim for occupational rent is based on the bare assertion that he has paid "substantial rent" since 1996, combined with his estimate, based on personal experience, of the market rent in Courtenay for a 3-bedroom house. The petitioner takes issue with the respondent's estimate of the value of the home by providing his own estimate, based on personal research, of the current market value.

- [30] While I appreciate the difficulty in providing supporting financial records covering a period that dates back to 1996, something more than the parties' bare assertions is required to determine their relative equitable claims, particularly when the bare assertions are disputed. The respondent says that the petitioner has a limited entitlement to the present value of the Property because of her disproportionate contributions over time. The petitioner says that the respondent overestimates her contributions to the Property and underestimates its value and the rental revenue that could be derived from it. It is simply impossible on the current evidentiary record to resolve their competing claims.
- [31] I will return to this issue in addressing the petitioner's request for a vesting order and an order for sale of the Property under the PPA.

Issue I: The Property Agreement

Legal framework

- [32] The petitioner raises two alternative arguments as to why the Property Agreement is no longer in effect. First, the petitioner says that the parties abandoned the Property Agreement by jointly acquiescing in the non-performance of its essential terms. Second, and alternatively, the petitioner argues that the respondent repudiated the Property Agreement by failing to list and sell the Property as required by the Property Agreement, and the petitioner accepted the repudiation.
- [33] Repudiation occurs where by words or conduct one party evidences an intention not to be bound by the contract. The consequences of a repudiation depends on the election of the non-repudiating party. If the non-repudiating party accepts the repudiation, the contract is terminated and the parties are discharged from their prospective obligations: *Guarantee Company of North America v. Gordon Capital Corporation*, [1999] 3 S.C.R. 423 at paras. 40-41.
- [34] The abandonment of a contract may be established where the parties, expressly or impliedly, reach a new agreement to abandon the old one. In *Jedfro Investments (U.S.A.) Limited v. Jacyk*, 2007 SCC 55, the Supreme Court of Canada explained:
- [17] It is suggested that if both parties are found to have abandoned a contract, that will terminate it. However, abandonment discharges a contract only if it amounts to a new contract in which the parties agree to abandon the old one. As Lord Diplock stated in *Paal Wilson & Co. A/S v. Partenreederei Hannah Blumenthal*, [1983] 1 All E.R. 34 (H.L.), at pp. 48-49:

To the formation of the contract of abandonment, the ordinary principles of the English law of contract apply. To create a contract by exchange of promises between two parties where the promise of each party constitutes the consideration for the promise of the other what is necessary is that the intention of each as it has been communicated to and understood by the other (even though that which has been communicated does not represent the actual state of

mind of the communicator) should coincide. That is what English lawyers mean when they resort to the latin phrase *consensus ad idem* and the words that I have italicised are essential to the concept of *consensus ad idem*, the lack of which prevents the formation of a binding contract in English law.

[35] The evidence supporting the existence of an agreement to abandon a contract can be express, but it may also be inferred from the parties' conduct and the surrounding circumstances. In order for abandonment to be inferred, it must be established that the parties implicitly agreed with each other to abandon the old agreement: *Quinlan Brothers Ltd. v. Coady*, 2013 NLCA 31 at para. 27.

Application

[36] In my view, the evidence in this case supports the conclusion that the parties mutually agreed to abandon the Property Agreement. Although the Agreement was not replaced or amended by a further agreement in writing, I infer from the parties' conduct that there was a mutual release of obligations arising under the Agreement. An agreement to abandon is evidenced by the following circumstances:

- a) The respondent did not list the Property for sale in January 2004 as anticipated by the Property Agreement.
- b) The petitioner did not object to the respondent's failure to list the Property. Both parties signed the divorce order in March 2004, despite the fact that the terms of the Property Agreement were not reflected in the order.
- c) Neither party subsequently took steps to sell the Property, or compel its sale, for 13 years until the filing of the present petition. The parties' intervening conduct, including the use of the Property as security for their daughter's debt, is consistent with an intention to retain the Property.
- d) The respondent did not pay the petitioner \$30,000, or any sum beyond \$1, when the petitioner transferred the Property to the respondent in 2006;
- e) The respondent has no present intention to sell the Property. Indeed, she resists the petitioner's request for an order for sale under the PPA in part on the ground of the serious hardship she would face if the Property is sold.

[37] The respondent argues that the surrounding circumstances do not clearly evidence a mutual intention to abandon the Property Agreement because its terms are still capable of fulfillment. That is, on the respondent's theory, the petitioner will remain entitled to receive \$30,000 from the proceeds of sale of the Property when (and if) the sale eventually occurs.

[38] I do not find the respondent's argument on this point to be persuasive. The Property Agreement clearly anticipated the imminent sale of the Property. Indeed, it was anticipated that the Property would be listed in January 2004 before the parties' final divorce order was

granted. The petitioner's agreement, in 2004, to a division of the proceeds of the sale of the Property was grounded in its imminent sale. The terms of the Property Agreement do not reflect a mutual intention to grant to the respondent a unilateral discretion of indefinite duration to decide when the Property would be sold, even if the sale might not occur during the petitioner's lifetime.

- [39] Although the respondent now resists the proposition that the Property Agreement was mutually abandoned, she also resists any sale of the Property. In my view, the apparent inconsistency in these positions is a further reason why the respondent should not be permitted to rely on the Property Agreement to define the parties' entitlements.
- [40] It is exceedingly unfortunate that the parties have taken this long to seek a determination of their respective interests in, and entitlement to, the Property. It may be that the respondent has a legitimate equitable claim to a greater interest in the Property based on her contributions over time. However, such equitable considerations can be addressed in any relief granted by the court on this petition without the need to resort to an agreement which was entered into 15 years ago and then ignored.
- [41] I conclude on this issue that the Property Agreement was mutually abandoned by the parties and therefore has terminated.

Issue II: Resulting trust

Limitation defence

- [42] The respondent's argument that the petition is barred by a limitation period may be briefly disposed of.
- [43] The respondent says that the petitioner's "claim" arose at the time of the parties' separation in 1996, or alternatively on the date of their divorce in 2004. The respondent says that the claim is subject to the basic two-year limitation period in s. 6 of the Limitation Act, S.B.C. 2012, c. 13, subject to the rule of discoverability in s. 8 of the Act.
- [44] In considering the application of the Limitation Act, it is important to be clear about the nature of the petitioner's claim. His fundamental claim is that the respondent holds his interest in the Property in trust and has declined to return the Property to him on demand as the terms of the trust required. This is a "trust claim" within the meaning of s. 12 of the Limitation Act.
- [45] Section 12(2) of the Limitation Act sets out the discoverability rules relating to a trust claim. In relevant terms, s. 12(2) provides that a trust claim is discovered when the beneficiary becomes fully aware that the injury, loss or damage had occurred, that it was caused by an act or omission of the person against whom the claim is brought, and that having regard to the nature of the injury, loss or damage, a court proceeding was appropriate.

- [46] In the present case, the triggering event for the operation of the limitation period was the point in time that the petitioner became fully aware that the respondent denied existence of the trust and would refuse to transfer his interest in the Property back to him: *Bacic v. Bacic Estate*, 2010 BCSC 728 at paras. 57-58.
- [47] The petitioner's evidence is that until February 2017 the parties were engaged in discussion of a potential buy-out of his interest. It was only once the petitioner realized that the respondent did not recognize the trust and refused to effect a transfer that he filed this petition in March 2017. This was well within the applicable limitation period. The respondent has not adduced evidence to suggest that the petitioner was fully aware of the respondent's denial of the existence of the trust at an earlier date.
- [48] Accordingly, I reject the respondent's limitation defence.

The doctrine of resulting trust

- [49] There is a rebuttable presumption of law that a gratuitous transfer of property is not intended to be a gift, rather that the transferee holds the property on resulting trust for the transferor. As summarized by the Supreme Court of Canada in *Pecore v. Pecore*, 2007 SCC 17 [Pecore]:
- [24] The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and *E. E. Gillese and M. Milczynski, The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.
- [25] The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.
- [50] The operation of the presumption therefore shifts the onus to the transferee to lead evidence of the transferor's contrary intent on a balance of probabilities in order to rebut the presumption: *Pecore* at para. 43.
- [51] The present case is somewhat unusual in that the respondent's evidence confirmed rather than rebutted the petitioner's evidence as to the purpose of the gratuitous transfer of the petitioner's interest in the Property to the respondent in 2006. Both parties agree that the transfer of the petitioner's fee simple ownership was not intended as a gift to the respondent but rather to facilitate a mortgage for the purpose of assisting their daughter. The evidence is therefore uncontradicted that the petitioner did not intend to gift his interest in the Property to the respondent.

- [52] Counsel for the respondent argued at the hearing before me that the transfer was not gratuitous because the respondent agreed to undertake future financial obligations associated with the maintenance of the Property as a condition of the transfer. Even if such an undertaking was given, and there is no evidence on the point, such future payments would not constitute consideration for the transfer. There is no benefit to the petitioner in the respondent assuming the future financial obligation for property he has gifted over to her.
- [53] In the circumstances, I find that the evidence does not rebut the presumption that the Property was transferred to the respondent on a resulting trust. The petitioner therefore retains his beneficial interest in the Property. For reasons I will shortly articulate, the extent of the petitioner's present beneficial interest is a matter of dispute between the parties.

Issue III: Termination of the trust

- [54] The petitioner says that the respondent held the Property on a bare trust for him following the transfer of his interest, and that he is now entitled to terminate the trust without the need to invoke the rule in *Saunders v. Vautier*. Alternatively, the petitioner says that the rule in *Saunders v. Vautier* would permit him to terminate the trust since he is the only beneficiary and he is of full age and not under a disability: see *Pallot v. Douglas*, 2017 BCCA 254 at paras. 36-44.
- [55] The concept of a bare trust is explained in *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at pp. 33-34:

The usually accepted meaning of the term "bare", "naked", or "simple" trust is a trust where the trustee or trustees hold property without any duty to perform except to convey it to the beneficiary or beneficiaries upon demand. It is true, of course, that so long as a trustee holds property on trust he has the duty to account for the property, keeping it secure and unharmed. The trustee cannot divest himself of this duty, and, if that is his sole duty, he must transfer that property to the beneficiary on demand. For example, a corporation may move assets such as accounts receivable off its books into a trust for itself, the trustee's sole obligation being to hold those assets secure. This is the situation where there never were active duties. Alternatively, a settlor may have required that a beneficiary be maintained until he reaches the age of majority. Upon the occurrence of that event, the beneficiary is entitled to call for capital and income. This is the situation where once there were active duties but they exist no more. The trustee is then care, or naked, of active duties decreed by the settlor.

....

The definition of the care, naked or simple trust assumes two things: (1) that the beneficiary or beneficiaries are able to call for the property on demand; and (2) either that no active duties were ever required by the settlor or that the active duties have been performed. But, of course, if all the beneficiaries are ascertained, adult and capacitated, they can call for the trust property whether or not the settlor's charge to his trustees has been carried out.

- [56] In the case of a bare trust, the general rule is that one of several beneficiaries, provided they are sui juris and absolutely and indefeasibly entitled to a share in the trust property, can require a transfer of that share to him or her: *Bronson v. Hewitt*, 2010 BCSC 169 at para. 680.
- [57] In the case at bar, the resulting trust is presently a bare trust. The respondent's duty under the trust was to hold the petitioner's interest until such time as the purpose for the trust - facilitation of the mortgage on the Property to assist their daughter - had been fulfilled. There are no remaining active duties on the respondent other than to return the trust property on demand.
- [58] Even if the trust is not a bare trust the petitioner is, in any event, entitled to terminate the trust in accordance with the rule in *Saunders v. Vautier*.

Issue IV: Vesting order

- [59] It is at the next step of the petitioner's path to a sale of the Property under the PPA that the evidentiary deficiencies in the record become critical.
- [60] The petitioner argues that once the trust is wound up, the court can and should declare that the petitioner is the legal and beneficial owner of an undivided half interest in the Property, and order the Registrar of Land Titles to vest the undivided legal half interest in the Property in the petitioner as a tenant in common. The petitioner relies on the presumption that, as joint tenant, he had equal ownership in the Property at the time he transferred it to the respondent. The petitioner also assumes that this interest has remained constant over time. The petitioner says that it would be open to him to sever the joint tenancy by transferring his interest in the Property to himself, which would create a tenancy in common.
- [61] However, I understand the respondent to resist the notion that the petitioner's equitable interest in the Property, assuming the petitioner has an interest, is one of equal ownership. The respondent says that principles of unjust enrichment apply given what the respondent says is her disproportionate contributions to the financing and maintenance of the Property over time. The remedies for unjust enrichment may include the proprietary remedy of a constructive trust: *Kerr v. Baranow*, 2011 SCC 10 at paras. 50-53; *Suen v. Suen*, 2016 BCCA 107 at para. 54.

- [62] It may be that the respondent's evidence, once adequately marshalled, will persuade a court that her equitable interest in the Property exceeds 50%. I make no determination one way or the other on this point because the evidentiary deficiencies I have noted prevent a final determination of the issue of the parties' respective entitlements. My point is simply that the relief sought by the petitioner on this application - a declaration that the petitioner is the legal and beneficial owner of an undivided half interest - presumes equal ownership.
- [63] In my view, the reference to the Registrar that both parties appear to acknowledge must eventually occur in this case should occur before any vesting order is made. I do consider it appropriate to issue declarations that the petitioner is entitled to terminate the trust, and that he is entitled to a vesting order once the nature of his current possessory entitlement is determined. However, it is premature to grant further remedies that will finally and conclusively decide the extent of the petitioner's interest in the Property, and amend registered title, before a reference to the Registrar occurs.

Issue V: Relief under the PPA

- [64] It follows that I also consider it premature to deal with the petitioner's application for sale of the Property under the PPA. I will simply add that even if the petitioner had a vested legal one-half interest in the Property, I would nevertheless decline to grant an order for sale prior to a reference to the Registrar. The assessment that will occur before the Registrar could, hypothetically, establish that the respondent is entitled to 90% of the sale proceeds. This would obviously be a circumstance relevant to the exercise of the court's discretion to decline to order a sale under s. 6 of the PPA. Yet on the petitioner's timeline, that evidence would not be available until after a sale had already been ordered and carried out.

CONCLUSION/ORDERS

- [65] In summary, I issue the following declarations:

- a) the Property Agreement was mutually abandoned by the parties and has therefore terminated;
- b) the respondent holds the petitioner's interest in the Property on a resulting trust;
- c) the petitioner is entitled to terminate the trust by demanding the return of his possessory interest in the Property;
- d) the petitioner is entitled to a vesting order in relation to his interest in the Property once the extent of that interest has been determined.

- [66] I direct that there shall be an assessment held before the Registrar to determine the following matters:

- a) the market value of the Property as of the date of the hearing before the Registrar and its market value as of the date of the parties' separation in 1996;

- b) the equity in the Property as of the date of the hearing before the Registrar and the equity as of the date of the parties' separation in 1996;
 - c) the amount of the parties' respective monetary contributions to mortgage payments, property tax and insurance on the Property since the date of the parties' separation in 1996;
 - d) the amount of the parties' respective monetary contributions to the maintenance and upkeep of the Property since the date of the parties' separation in 1996;
 - e) the net revenue received by the respondent since the parties' separation in 1996 for the rental of the suite in the Property;
 - f) the amount paid by the petitioner for rent on an annual basis since the date of the parties' separation in 1996; and
 - g) the fair market rent for the entire Property, inclusive of the suite, on an annual basis since the date of the parties' separation in 1996.
- [67] I further direct that the result of the assessment be certified by the Registrar and filed pursuant to Rule 18-1(2) of the Supreme Court Civil Rules.
- [68] The parties shall schedule a pre-hearing conference before the Registrar to determine the process to be followed at the assessment before setting the assessment down for hearing.
- [69] The parties are at liberty to reach agreement on one or more of the matters listed at para. 66(a) through (g), in which case the assessment before the Registrar need not address that matter.
- [70] The balance of the relief sought by the petitioner is adjourned generally pending either an agreement between the parties on all of the matters listed at para. 66(a) through (g), or receipt of the Registrar's certificate.
- [71] The costs of the appearance before me shall be in the discretion of the judge who decides the remaining issues on the petition.

"Horsman J."

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Prepared on 28 October 2026 · Esheria