

CANADA / JUDGMENT

Newhouse v. Garland

2022 BCCA 276

COURT

British Columbia Court of Appeal

DECIDED

9 August 2022

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2022 BCCA 276 Newhouse v. Garland

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Newhouse v. Garland,

2022 BCCA 276

Date: 20220809

Docket: CA47619

Between:

Patricia May Newhouse

Appellant

(Defendant)

And

Glenn Douglas Garland in his capacity as

Executor of the Estate of Robert Edward Garland, Deceased

Respondent

(Plaintiff)

Before:

The Honourable Mr. Justice Goepel

The Honourable Justice Dickson

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated July 2, 2021 (Garland v. Newhouse, 2021 BCSC 1291, Vancouver Docket S205367).

Counsel for the Appellant

(via videoconference):

T. Hewitt

Counsel for the Respondent

(via videoconference):

P.W. Lightbody

Place and Date of Hearing:

Vancouver, British Columbia

February 9, 2022

Place and Date of Judgment:

Vancouver, British Columbia

August 9, 2022

Dissenting Reasons by:

The Honourable Mr. Justice Goepel

Written Reasons by:

The Honourable Justice Dickson (page 37; para. 112)

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

Majority (per Justice Dickson and Justice DeWitt-Van Oosten) This is an appeal from a summary trial where the chambers judge found there was no right of survivorship in the beneficial interest in partnership property held by the appellant and the deceased in joint tenancy. The chambers judge concluded the appellant had not rebutted the presumption that the beneficial interest in partnership property is held as tenants in common with no right of survivorship. The appellant alleges the chambers judge erred in finding that the presumption applied, and by failing to consider evidence properly. Held: Appeal dismissed, Justice Goepel dissenting. There was no reason to interfere with the decision of the chambers judge. She applied the correct standard of proof in determining that the appellant had not proven the alleged oral agreement that the partnership property was subject to the right of survivorship. She made no palpable and

overriding errors in her factual findings, all of which were reasonable and supported by the evidence. Nor did she err in exercising her discretion to decide the case at a summary trial.

Dissent (per Justice Goepel) Appeal allowed. The chambers judge erred in law in imposing a higher standard of proof to rebut the presumption when all the law requires is a party to rebut the presumption with proof on a balance of probabilities. The chambers judge further erred in not finding evidence on the record as to the parties' intention when agreeing to purchase the property and opening the bank account. There was ample evidence for her to conclude that the parties intended the right of survivorship to apply. Finally, she erred in proceeding by summary trial when there were credibility issues that would have benefited from a full trial.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

- [1] There is a legal presumption that partners hold partnership property as tenants in common and accordingly there is no right of survivorship as between partners. Partners, however, can agree otherwise: *Bathurst v. Scarborough*, [2004], EWCA Civ. 411 [Bathurst]; Partnership Act, R.S.B.C. 1996 c. 348 s. 21. If the evidence, on a balance of probabilities, leads to a finding that the parties intended to hold the property as joint tenants with a right of survivorship, the presumption will be rebutted.
- [2] Weighing the evidence in such a case raises significant challenges. The dispute will inevitably arise after the death of one of the partners and will be between the surviving partner and the estate of the deceased partner. Because of the surviving partner's self-interest, their evidence must be viewed with some care. Statements made by the deceased partner, although hearsay, may be admissible if they meet the criteria of necessity and reliability. The difficulty with the hearsay evidence is of course, it is not subject to cross examination and there may be more than one inference that can be drawn from it. Some of these challenges may be magnified if the matter proceeds by way of summary trial.
- [3] This appeal raises many of these challenges. It involves a dispute over the status of partnership property that was jointly owned by the deceased Robert Garland ("Bob") and the appellant Patricia Newhouse. On Bob's death, Ms. Newhouse says that legal and beneficial ownership of the property passed to her, as the surviving joint tenant, through the right of survivorship. This is contested by Bob's son, Glenn Douglas Garland ("Glenn") acting in his capacity as the executor of Bob's estate (the "Estate"). The present value of the property is approximately one million dollars.

- [4] The chambers judge, following a summary trial, concluded that Ms. Newhouse had not rebutted what she described as the strong presumption against the right of survivorship in relation to the partnership property. She found that Ms. Newhouse held legal title to the property and a related bank account in trust for herself and the Estate. In her reasons she found Ms. Newhouse's evidence regarding the intention behind the joint tenancy not credible. The judge's reasons are indexed at 2021 BCSC 1291.
- [5] Ms. Newhouse now appeals. The issue on the appeal is whether the evidence before the court rebutted the presumption. This requires consideration of the standard of proof upon which the presumption can be rebutted, what evidence the court could consider in determining the issue and whether the evidence did in fact rebut the presumption. The appeal also requires consideration of whether given the credibility issues it was unjust to decide the case summarily.
- [6] For the reasons that follow I would set aside the judgment and order a full trial.

BACKGROUND

- [7] On the summary trial the main affidavits were sworn by Ms. Newhouse, Bob's three children (Glenn, Jonathan Garland (Jonathan) and Karen Lamare (Karen)) and Bob's long-time friend Allan Argue. In addition, there was in evidence excerpts from the examinations of discovery of Ms. Newhouse and Glenn. As did the chambers judge, I will for convenience refer to all of the Garlands by their first names.
- [8] Bob was born in 1941. He became a chartered accountant in approximately 1960. He was for some years the controller for Block Brothers/N.R.S. Real Estate, a real estate firm that operated in Saskatchewan, Alberta, and British Columbia. During his career, he was the co-owner of a real estate marketing company and owned or had an interest in numerous real estate properties.
- [9] Bob was a close friend of Barry Smith ("Barry"), Ms. Newhouse's common-law husband. Ms. Newhouse and Barry had lived together since 1980. Barry was chronically unemployed and had personal debt problems. For the most part, Barry and Ms. Newhouse kept their finances separate. Ms. Newhouse had substantially more assets than Barry.
- [10] In 2003, Bob and Barry discussed buying a real estate property together. Their plan was to buy a house in need of repairs and work on it together as an investment that would earn rental income. Bob was interested in it because it would give him a project to work on with Barry.

- [11] Barry did not have sufficient funds for such an investment, and he asked Ms. Newhouse if she was interested in investing with Bob. Ms. Newhouse was initially reluctant to purchase a property. She deposed that she was a risk averse person and was reluctant to enter into any partnership as she had never been in one before. While she understood Bob was experienced as an investor and she trusted him, she was concerned about what would transpire if something should happen to him.
- [12] In particular, she had the impression from her discussions with both Bob and Barry that there were a number of issues with Bob's family, to the point that she suspected they were a dysfunctional bunch. She did not have a favourable view of his family and did not want to be partners with anyone that she did not know or trust should something happen to Bob. She deposed that when she discussed this concern with Bob in the summer of 2003, Bob told her that he could guarantee her that she would not become partners with his family and that he would be agreeable to arranging the purchase such that if he died before they sold the property then she would receive the entire property, but that if she died first that he would get the property. Ms. Newhouse deposed that she felt that this was a reasonable solution to her concerns, and she would be agreeable to buying a property with him on those terms.
- [13] On her examination for discovery, Ms. Newhouse was pressed for details concerning her concerns with having to deal with Bob's family in a partnership. She testified as follows:

124 Q: All right. I want you to tell me what you remember about what Bob told you about his family that caused you to not want to have to deal with his family in a partnership arrangement?

A: It seemed like they were always fighting with each other.

125 Q: Okay. Tell me -- I want you to tell me details as you can remember them.

A: It would take me some time to scour my memory to give you details. It wasn't stuff I liked to hear. Even though he made the stories very funny, I find family issues very disturbing.

So I just know that John had issues back east, I don't know, divorce issues, and maybe John and Glenn didn't agree on stuff and were always fighting about stuff. And when John came to town usually there was lots of family tension, things were fraught.

But I can't -- I can't tell you anything in a lot more detail than that because I really didn't want to know. I wasn't plying him with questions and wanting more details about his family. So, yeah, I'm sorry, I can't -- I can't give you details. I can just give you the general tenor, which was dysfunction from my point of view.

126 Q: Was it your understanding that Bob's daughter was a part of a dysfunctional relationships in this family?

A: No, she was probably the stablest of the three. So, no, I wouldn't say especially.

127 Q: Well, how about at all? Was the dysfunction in this family that was related to you by Bob, did it involve the daughter at all?

A: I don't know about the daughter. Like I say, details were something I really didn't want. So I don't know about the daughter. It was probably more her husband. Bob was always bumping heads with Steve. Bob adored his daughter so I don't think he bumped heads with his daughter much but I would say he bumped heads a lot with her husband. Yeah, that's about as much as I can remember.

If I were to talk to Barry he might give me more details but I don't --

128 Q: Well, what I would like to do right now is ask you to tell me if there is anything more, even a single detail that you can relate to me today from your memory that is the dysfunction in the Garland family that caused you to not want to be in an arrangement with Bob where you would have to potentially deal with them if something happened to him. I want every detail that you have now.

A: Hmm. Well, let's see. I can't give you details. I can just give you the feeling that they were arguing a lot. I don't know that Karen was specifically involved. It was probably John and Glenn. I think Bob used to say they didn't see eye to eye and if John came to town John and Glenn were always fighting.

Sorry, that's about all I can remember.

129 Q: Well, that is in fact all you can remember?

A: Right now, yes.

[14] Jonathan confirmed Ms. Newhouse's evidence that in 2003 there were problems between himself and his brother. In his affidavit sworn on the 15th of April 2021, which was after the examination for discovery of Ms. Newhouse, Jonathan deposed:

[11] My brother Glenn and I had a period of estrangement [I] approximately 2000 to 2005. Although we did not talk for a number of years, there was nothing particularly hostile going on. Glenn and I have since re-established a good relationship and have been on good terms now for a number of years.

[15] Glenn, whose affidavit was also sworn on April 15, 2021, was far less candid about the family dynamic. He professed to be unable to comment on Ms. Newhouse's evidence of family dysfunction. He deposed:

[38] I was surprised to learn that Patricia Newhouse was prepared to turn down an investment opportunity with my Dad based on the "disturbing" stories my father told her about our family dysfunction. I don't know specifically what she is talking about and therefore cannot address it at this time.

[16] What he did not do was challenge, contradict or explain Jonathan's evidence that in 2003 he and his brother had not spoken for three years.

- [17] In July 2003, Bob and Ms. Newhouse entered into an agreement to purchase a rental property on Hospital Street in New Westminster for \$185,000 (the "Rental Property"). They each put up \$25,000 by way of deposit and financed the balance of the purchase price with a mortgage in the principal amount of \$138,750.
- [18] Ms. Newhouse deposed that Bob chose a notary, Ian MacFadyn to do the conveyancing. She did not receive any independent legal advice. The notary prepared a Form A Transfer indicating the Rental Property would be owned by Bob and Ms. Newhouse as joint tenants. She deposed that when she and Bob met the notary at the end of August to sign the documents, Mr. MacFadyn explained the right of survivorship to confirm that it was their intention to register the property as a joint tenancy. She says Bob and herself both confirmed to Mr. MacFadyn that was their intention. Mr. MacFadyn has subsequently passed away, and the parties were not able to locate his client files.
- [19] By way of deed dated July 31, 2003, the property was transferred into the names of Bob and Ms. Newhouse as joint tenants. On August 29, 2003, Bob and Ms. Newhouse as joint tenants entered into a mortgage with the Bank of Montreal.
- [20] Also on August 29, 2003, Bob and Ms. Newhouse attended at the Bank of Montreal to open a bank account (the "BMO Account"). The application form under account details set out under the heading the form of co-ownership "JOINT WITH RIGHT OF SURVIVORSHIP". Above the signature line the application form included the following:

PLEASE READ THE FOLLOWING IMPORTANT AGREEMENT AND SIGN WHERE INDICATED.

In the following agreement, "you" means each person who signs below.

§ You acknowledge receipt of and agree to (a) the terms and conditions contained in the Agreements for Everyday Banking.

- [21] Ms. Newhouse and Bob both signed the application.
- [22] The parties continued to own the Rental Property until Bob's death on May 11, 2020 at age 79. In the years following the purchase, Bob kept detailed accounts of rental income, expenses and mortgage payments. Income and expenses were shared equally.
- [23] In 2008, Bob paid off his share of the mortgage. Ms. Newhouse subsequently did so. I should note that in the court below, the Estate argued that if a joint tenancy had been entered into, it was severed when Bob paid out his share of the mortgage in advance of Ms. Newhouse. The chambers judge held she did not need to determine that question. On the appeal, the parties agreed that if we reversed the chambers judge's decision, the question as to whether the joint tenancy was severed would need to be returned to the trial court for determination.

- [24] Bob's beneficiaries are his three children, Glenn, Jonathan and Karen. Prior to his passing, none of them were aware that the Rental Property was held in joint tenancy with Ms. Newhouse. Based on their discussions with their father, they in fact believed that Barry, not Ms. Newhouse was Bob's partner in the business.
- [25] Glenn, Jonathan and Karen each deposed that, in the weeks prior to their father's death, he discussed with them the Rental Property and said it should either be listed for sale or, if Barry wanted to buy his share from the Estate, he asked that they be fair with the price and give him a good deal if he wanted to purchase it. Similar evidence was given by Mr. Argue.
- [26] Glenn's affidavit also attached, as an exhibit, an undated Wills Checklist that Bob completed sometime after 2017 which lists his half interest in the Rental Property within his list of assets.
- [27] A few days after Bob's death Glenn was told by the Estate's lawyer that the Rental Property was held by Bob and Ms. Newhouse in joint tenancy. This led to an exchange of emails with Barry. On May 11, 2020, Glenn emailed Barry, in which he said in part:

The lawyer said the title of the New West house is joint tenancy with both his name and Pat Newhouse. Do you recall why it was set up that way?

My dad wanted me to ask you if you wanted to buy his share or if we should list and sell whatever you want to do. I need to list the value of the New West house on the probate application, any idea what it might be worth?

- [28] On May 12, 2020 at 10:07 a.m., Barry responded. The email included the following:

Yes, the [Rental Street house] is in my Wife's name, not mine. Is that what you mean?

...

The value of the house (both assessed value and local market value) did peak at just over a million--has possibly dropped to 850 right now but should drift back up when the panic is over.

- [29] On May 14, 2020 at 11:44 a.m., Barry again wrote to Glenn:

Back 17 years ago in August 2003 when we were planning to buy a property with Bob as our partner, Pat was nervous as it meant, for us investing every penny we had. There was some discussion as to how to set up the partnership/title to protect the other should one partner die. Bob of course was very knowledgeable about real estate and property transactions so we left it up to him to set the deal up. He was then in the best of health and likely to live another 30 years and Pat at least that long. Over the years the whole thing has receded into the background and for me was totally forgotten but for Pat only partially forgotten until recently resurfacing and she was able to locate the joint tenancy agreement from 2003.

This is unhappily a shock to the Garland family especially since we think Bob in recent years had also forgotten the terms of the deal.

[30] On May 14, 2020 at 2:13 p.m., Glenn wrote Barry as follows:

The lawyer was wondering if there was a reason for registering the title of the property as joint tenancy. This is normal for a husband/wife so he was a little confused when I said Pat was not his life partner. Can you forward a copy of the joint tenancy agreement? I have been unable to locate Bob's copy with his documents.

[31] On May 14, 2020 at 3:19 p.m., Barry responded and sent Glenn a copy of the title agreement.

[32] At 4:04 p.m. on May 14, Glenn responded:

Thanks Barry, I guess Pat doesn't have an agreement describing the terms of joint tenancy? I thought there might be something describing their interest--I believe it's 50/50. Do you know if there's still a mortgage; I haven't gone through his accounting for that yet as I'm still trying to track down documents, etc.

[33] On May 15, 2020 at 9:11 a.m., Barry responded:

Pat and I have, since your first email, looked up the terms of joint tenancy, and here is what we understand:

Joint Tenancy is an equal share of a property amongst both partners, and upon the death of one partner, the other partner receives the deceased's share.

Bob and Pat owned Rental Street 50/50 and upon his passing, Pat now owns 100%. The transfer of ownership to the survivor is automatic and occurs at the moment of death. Bob set this up at that time in 2003 to protect both parties.

I get the feeling that your lawyer may not yet have informed you the full implications of joint tenancy.

Here is a link that is a pretty good explanation if you haven't researched it for yourself yet.

[34] On her examination for discovery, Ms. Newhouse was asked about the exchange of emails and testified as follows:

122 Q: There was an email exchange between Barry and Glenn after Bob passed away. Are you familiar with that?

A: I am.

123 Q: So I'm showing you an email here from Barry Smith dated May 14, 2020 to Glenn sent at 11:44 A.M. and on the second page it says -- let me just go back.

The first page describes a little bit about what happened 17 years ago before the property was purchased and then Barry says:

"Over the years the whole thing has receded into the background and for me was totally forgotten. He then goes on to say:

"But for Pat only partially forgotten until its recent resurfacing, and she was able to locate the Joint Tenancy agreement from 2003."

So is he correct that you had partially forgotten what had happened back then?

A No. His description of "partially forgotten" is a little bit inaccurate. When he asked me - when he came to see me he said, Pat, what kind of agreement do you have with Bob? And I said rights of survivorship. I don't know what you call it. And he said, well, is it called joint tenancy? And I said maybe. You know, I don't know the term joint tenancy. It was 17 years ago.

So I said I don't remember the term joint tenancy. I just remember the terms of our agreement so let me find the document. And it took me some time, but I finally found the document that I had filed 17 years ago and, yes, then I was able to confirm for him it was a joint tenancy agreement. I just called it rights of survivorship, but I realize that joint tenancy is the correct term.

145 Q: According to this email exchange, after Bob passed away either you or Barry or both did some research, is that correct, about the issue of joint tenancy?

A: After Barry came to me and said what's your agreement with Bob, is it a joint tenancy, I said I think that's what it's called but I don't remember.

So, yes, I went and found the document and I think Barry went online to look up what a joint tenancy meant. I kept telling him as far as I was concerned it meant rights of survivorship but he went and looked.

[35] On May 21, 2020, the Estate commenced this proceeding. In the initial Notice of Civil Claim, the Estate alleged that neither Bob nor Ms. Newhouse at the time of the purchase of the property, or at any time thereafter, intended either of them should enjoy a right of survivorship over their respective interests in the property. It alleged that the registration in joint tenancy was done in error, as their respective interests should have been registered as tenants in common, to reflect their true intentions. In the alternative, the Estate alleged that because neither the deceased nor Ms. Newhouse had an intention to gift their interest to the other whether by way of survivorship or otherwise, the registration in joint tenancy did not create a right of survivorship in favour of either Ms. Newhouse or the deceased as surviving joint tenant.

[36] In its amended pleading, which was filed on January 12, 2021, the Estate expanded the legal basis of their claim to allege:

- 1) Where co-owners of a property are business partners, in the absence of an expressed agreement that their respective beneficial interest of the owners of the property are held in joint tenancy, the partners will be presumed tenants in common of the beneficial interests;
- 2) When, in 2008, the deceased paid out the balance of his share of the liability under the BMO mortgage, title of the property was no longer subject to "four unities" essential for a joint tenancy, and the joint tenancy was therefore severed.

THE JUDGE'S REASONS

- [37] In her introduction, the judge noted that the matter had come on for judgment on a summary trial. She noted that while there were conflicts in the evidence that required credibility findings to resolve, the parties were in agreement that the necessary credibility findings could be made on the current record, and that the case was suitable for resolution on summary trial. The judge noted the existence of disputed facts was not a basis for the court to decline to grant summary judgment, and cited the seminal authority *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, 1989, 36 B.C.L.R. (2d) 202; 1989 CanLII 229 (BC CA) [*Inspiration Management*] for the proposition that the court may be able to make necessary factual findings on the basis of the evidentiary record as a whole, despite conflicts in the affidavits. The judge concluded that she was able to make the necessary findings to decide the issues of fact and law that arose, and that in her view, it would not be unjust to decide the issues summarily.
- [38] The judge noted the party's submission gave rise to the following issues:
- a) Did a partnership exist between Bob and Ms. Newhouse?
 - b) If so, has Ms. Newhouse rebutted the presumption that the partnership property is not subject to the right of survivorship?
 - c) If the parties intended a true joint tenancy at the time of purchase, was the joint tenancy later severed by the destruction of one or more of the four unities?
- [39] As noted above, the judge determined she did not have to decide whether the joint tenancy had been severed. She found that a partnership did exist between Bob and Ms. Newhouse. That issue is not challenged on the appeal. That left for consideration the question of whether Ms. Newhouse had rebutted the presumption that the partnership property was not subject to the right of survivorship.
- [40] In regards to that issue, she commenced her analysis by noting that in its ordinary operation, the principle characteristic of joint tenancy is the right of survivorship. When a tenant dies, their interest is extinguished and the surviving joint tenant takes full ownership of the property: *McKendry v. McKendry*, 2017 BCCA 48 at para. 28.
- [41] She then went on to note that when the property in issue is partnership property, there is a presumption that there is no right of survivorship as between partners. In that regard, she said:
- [59] . . . Absent compelling evidence of a contrary agreement, a surviving partner holds legal title to property held in joint tenancy on trust for the surviving partner and the estate of the deceased partner: *Agro Estate v. CIBC Trust Corp.* (1999), 26 E.T.R. (2d) 314 at para. 44 [*Agro*].
- [42] She acknowledged that the right of survivorship that ordinarily flows from a joint tenancy could apply to partnership property. To do so however, she said:

[64] . . . there must be evidence of a contrary agreement between the parties that is sufficiently clear and compelling to overcome the presumption that beneficial interest in partnership property does not transfer through the right of survivorship.

Later in her reasons at para. 81, she indicated that there was a "strong presumption" against the operation of the right of survivorship in the partnership context.

[43] Turning to the evidence, the judge found that Ms. Newhouse's evidence regarding the intention behind the joint tenancy was not credible. She said it was implausible, vague, and inconsistent with other evidence tendered on the summary trial that she accepted. She specifically rejected Ms. Newhouse's explanation as to how the right of survivorship came to be. In this regard, she said:

[72] Ms. Newhouse says that Bob agreed to a joint tenancy, with a right of survivorship, to address her concern that she did not wish to continue in a partnership with Bob's children after his death. It is difficult to perceive the logic in this explanation. There was no prospect that Ms. Newhouse would be forced into a partnership with Bob's children after his death; rather, the partnership would dissolve on Bob's death by automatic operation of the law. Ms. Newhouse's explanation requires one to assume that she and Bob were unaware of the effect of a death of a partner on the partnership, and made no inquiries even when Ms. Newhouse raised the concern. Even if this were so, it defies belief that Bob would agree that the appropriate solution to the problem was to ensure that ownership of all partnership assets would transfer to Ms. Newhouse on Bob's death.

[73] Ms. Newhouse's evidence as to the nature of her concerns about Bob's children is, in any event, vague and lacking in particulars. Ms. Newhouse was pressed for the details in her examination for discovery of what she had heard about Bob's children that caused her such concern. Ms. Newhouse testified that she could not provide details, but could only give the "general tenor". She thought it had to do with fighting between Glenn and Jon, or maybe "divorce issues". I find it implausible that Ms. Newhouse could not, without "scouring [her] memory", detail the issues with Bob's children that were of sufficient significance that she was unwilling to enter a partnership with Bob without further assurances.

[74] Ms. Newhouse testified on discovery that her conversation with Bob about the right of survivorship occurred at her house with Mr. Smith present. She is certain that Mr. Smith heard the conversation. However, she also agreed in her discovery evidence that Mr. Smith had "totally forgotten" what the arrangement was by the time he exchanged emails with Glenn on May 11-12, 2020. I find it unlikely that Mr. Smith, given his consistent involvement with the Rental Property over time, would have totally forgotten the details of an agreement that could, if Ms. Newhouse predeceased Bob, deprive Ms. Newhouse's heirs of any interest in the Property. It is more likely that there was no such agreement.

- [75] I infer that Mr. Smith and Ms. Garland only came to fully appreciate the significance of the joint tenancy when, prompted by Glenn's emails, Mr. Smith researched the nature of joint tenancy after Bob's death. Ms. Newhouse agreed in her discovery evidence that Mr. Smith had conducted such research after receiving Glenn's first email.
- [44] The chambers judge held that Ms. Newhouse's evidence was inconsistent with other independent evidence that she accepted. She did not mention Jonathan's evidence that confirmed Ms. Newhouse's evidence of dysfunction in the family.
- [45] In this regard, she said:
- [76] Ms. Newhouse's evidence about Bob's intention is inconsistent with other independent evidence on the summary trial that I accept as credible. First, there is the Wills Checklist that Bob completed, listing his 50% interest in the Rental Property as an investment asset. Second, there is the evidence of Bob's friend and neighbour, Mr. Argue. Mr. Argue's evidence is that Bob told him that he anticipated that the Rental Property would be sold after Bob's death if Mr. Smith could not buy out the interest of the estate. This is inconsistent with the existence of a right of survivorship.
- [77] The defendant says that the videotaped cross-examination of Mr. Argue establishes that he is "on the side of the Garland family", and "stubbornly resolute in holding his side's ground". I do not agree with the defendant's assessment. Mr. Argue is not a witness with any direct interest in the outcome of this action. In his cross-examination, Mr. Argue did resist agreeing with propositions put to him that he did not agree with. However, this does not make him a biased witness. The fact that Mr. Argue's evidence on cross-examination did not change from his affidavit evidence enhances rather than undermines his credibility. I found Mr. Argue to be an honest and credible witness. He remained respectful and responsive throughout a cross-examination that was, at times, quite challenging.
- [78] Mr. Argue's evidence is, furthermore, plausible and consistent with the probabilities affecting the case as a whole. Bob's statements to the effect that he anticipated the Rental Property being sold after his death is consistent with the ordinary rules that govern partnership property on the dissolution of a partnership. Those rules explain why Bob may not have considered it necessary to take steps to sell the Rental Property before his death, which is a point emphasized by the defendant. His death would dissolve the partnership, and trigger the liquidation of the partnership property in any event. There was no need to force a dissolution at an earlier date. Allowing the partnership to continue permitted the parties to maximize profit derived from the rental income. This benefitted Ms. Newhouse and Mr. Smith, but it also benefitted Bob's heirs.
- [79] Furthermore, it is clear on the evidence that Bob, who was a careful person, was concerned to simplify Glenn's tasks in administering Bob's estate. I find it unlikely that Bob would have taken no steps to alert Glenn, and other family members, that the Rental Property would transfer to Ms. Newhouse through the right of survivorship. The result would be that the Rental Property did not form part of Bob's estate, which is surely a matter that Bob would

want Glenn to be aware of. Instead, the instructions Bob gave to Glenn presumed that the Rental Property would be sold, and that the estate would have an interest in the proceeds of sale. This is consistent with the usual process on dissolution of a partnership.

- [46] The chambers judge then went on to hold that it was unnecessary for her to reach a finding as to whether Ms. Newhouse had deliberately fabricated evidence. In that regard, she said:
- [80] It is unnecessary for me to reach a finding as to whether Ms. Newhouse has deliberately fabricated evidence about her discussions with Bob at the time of the purchase of the Rental Property in 2003, or whether her recollection is influenced and shaped by the benefit she stands to gain if the right of survivorship applies. In either case, her evidence is not credible and I reject it. I accept the evidence of Mr. Argue, Glenn, Karen, and Jon, that Bob repeatedly advised them that he anticipated the Rental Property would be sold on his death. Their evidence is logical, consistent with the history of dealings between Bob and Ms. Newhouse, and consistent with the ordinary rules that govern partnership property.
- [47] The judge held that the fact the parties held the property as joint tenants was not sufficient to rebut the presumption. In that regard, she said:
- [81] In my view, the fact that Bob and Ms. Newhouse held legal title to the Rental Property as joint tenants is not, in itself, sufficient in the circumstances of the present case to rebut the presumption that partnership property is not subject to the right of survivorship. The same is true of the BMO Account. The decision of the English Court of Appeal in Bathurst provides a useful example of the type of evidence that may rebut the strong presumption against the operation of the right of survivorship in the partnership context. In that case, the presumption was found to be rebutted by evidence of the partners' solicitor, a disinterested witness, that she had advised her clients in writing of the consequences of buying property as joint tenants, and was instructed to proceed. In the present case, there is nothing in the evidence, other than the testimony of Ms. Newhouse which I have rejected, to suggest that the parties intended the right of survivorship to apply.
- [82] On the present record, it is impossible to reach firm conclusions as to the reasons why Bob and Ms. Newhouse chose to register the Rental Property in joint tenancy. There is no credible evidence on this summary trial to indicate that Bob and Ms. Newhouse turned their minds to the significance of registering title as joint tenants as oppose to tenants in common. If they had turned their minds to the question, they may have simply concluded that the form of legal ownership was immaterial given the rules that applied to partnership property. Whatever their motivation, the evidence does not persuade me that Bob and Ms. Newhouse intended and agreed that on the death of one partner, legal and beneficial ownership of the partnership property would transfer to the surviving partner for his or her personal benefit.

[Emphasis added.]

- [48] In the result, the chambers judge concluded that Ms. Newhouse had not rebutted the presumption against the right of survivorship in relation to partnership property, and that she held legal title to the rental property and the BMO account in trust for herself and Bob's estate.

ON APPEAL

- [49] The appeal requires consideration of the standard of proof upon which a presumption can be rebutted, what evidence can be considered in determining whether the presumption has been rebutted, and whether the evidence did in fact rebut the presumption. It also requires consideration of when a case is suitable for summary determination where the heart of the case is the credibility.
- [50] Ms. Newhouse submits that the chambers judge disregarded substantial supporting and corroborating evidence that the parties intended that the Rental Property would pass by way of the right of survivorship. She submits the chambers judge misstated and misapprehended certain evidence. The respondent submits that the chambers judge made no such errors.

DISCUSSION

Proof Required to Rebut a Legal Presumption

- [51] The task before the chambers judge was to determine whether the Rental Property and the BMO account passed to Ms. Newhouse by right of survivorship. In answering this question, she noted the presumption that there is no right of survivorship as between partners. To overcome that presumption, the chambers judge indicated there needed to be "compelling evidence" of a contrary agreement and that there was a "strong presumption" against the operation of the right of survivorship in the partnership context.
- [52] The first question for determination is on what standard will a presumption be rebutted. Prior to the decision in *F.H. v. McDougall*, 2008 SCC 53 [F.H.], the standard of proof in civil cases had long been a matter of controversy: see paras. 26-49. While there was general agreement that the standard in civil cases is proof on a balance of probabilities, many cases reflected the view of Lord Denning that "there may be degrees of probability within that standard" that "require a degree of probability which is commensurate with the occasion": *Bater v. Bater*, (1950) 2 All E.R. 458 (C.A.) at 459.
- [53] F.H. rejected that approach. It held in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred: F.H. at para. 49. The failure by a judge to apply the correct standard of proof in assessing evidence is an error of law: F.H. at para. 54.

- [54] A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption. The presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities: *Pecore v. Pecore*, 2007 SCC 17 at paras. 22, 44 [*Pecore*].
- [55] A presumption is not a legal standard. A presumption is not strong or weak. It is a guide post that designates the legal burden. In this case the presumption placed the burden of proof on Ms. Newhouse to prove on a balance of probabilities the Rental Property and the BMO account passed to her by right of survivorship.
- [56] In this case the chambers judge did not set out the correct legal test. In finding that Ms. Newhouse had to overcome a strong presumption against the operation of the right of survivorship, she fell into the error highlighted in *F.H.* There was no strong presumption against the operation of the right of survivorship. To overcome the presumption against partnership property being held in joint tenancy, Ms. Newhouse need only establish on a balance of probabilities that she and Bob had agreed to hold the Rental Property and BMO account as joint tenants. In the circumstances of this case, the chambers judge imposed a higher standard. In doing so she erred in law and accordingly, her decision cannot stand.

Evidence Rebutting the Presumption

- [57] The chambers judge was tasked with determining the intention of the parties at the time that they entered into their agreement in July 2003. In particular she had to determine whether they had agreed to hold the Rental Property and the BMO account as joint tenants with a right of survivorship. She had to weigh all the evidence to ascertain, on a balance of probabilities, the parties' actual intention.
- [58] In addition to the evidence of Ms. Newhouse, there was the evidence of the conveyance, the mortgage, and the BMO application form all of which supported a finding that the parties intended a joint tenancy. The evidence against the joint tenancy comes from the affidavits of Bob's children and Mr. Argue. From that evidence, the court could properly conclude that in the weeks prior to his death, Bob did not understand that the Rental Property would pass by way of survivorship.
- [59] That evidence however does not explain or go to the critical issue of Bob's intention in 2003 when the Rental Property was acquired. In *Pecore*, at para. 58, in the context of a gratuitous transfer, the Court cautioned that evidence of intention that arises subsequent to a transfer must be relevant to the intention of the transferor at the time of the transfer.
- [60] In this case there is no direct evidence of Bob's intention in 2003. While from the Estate's evidence an inference could arguably be drawn that Bob did not intend in 2003 to hold the property in joint tenancy, that is not the only inference that arises from that evidence. A perhaps stronger inference is that Bob, at 79 years old, did not remember in 2020 the terms of the agreement he had made in 2003 with Ms. Newhouse. The fact that he never told his

children that the property was held in joint tenancy, lends some credence to the possibility that Bob had forgotten the terms of the agreement he had made seventeen years previously. Given the implications of a joint tenancy, if he did recall the Rental Property was held in joint tenancy one would have expected that he would have forewarned his children and explained to them why the Rental Property was so held.

- [61] At para. 81 of her reasons, the chambers judge held that there was nothing in the evidence, other than the testimony of Ms. Newhouse which she had rejected, to suggest that the parties intended the right of survivorship to apply. She also held the fact that Bob and Ms. Newhouse held legal title to the Rental Property and the BMO Account as joint tenants was not sufficient in the circumstances of the present case to rebut the presumption that partnership property is not subject to the right of survivorship.
- [62] With respect, those findings are in error. The documents the parties entered into in 2003 were critical evidence of the parties' intent.
- [63] The starting point is s. 11 of the Property Law Act, R.S.B.C. 1996 c. 37, which reads as follows:

Tenancy in common

11 (1) In this section, "transferred" includes a vesting by declaration of trust or order of court.

- (2) If, by an instrument executed after April 20, 1891, land is transferred or devised in fee simple, charged, or contracted to be sold by a valid agreement for sale in which the vendor agrees to transfer the land to 2 or more persons, other than personal representatives or trustees, they are tenants in common unless a contrary intention appears in the instrument.
- (3) If the interests of the tenants in common are not stated in the instrument, they are presumed to be equal.

[64] As set out in this section, when land is transferred to two or more persons, they are tenants in common unless contrary intention appears in the instrument. In this case, a contrary intention does appear in the instrument. In the deed, the mortgage, and the BMO application, the parties signified that they were to hold the property as joint tenants. The documents are clear and unambiguous. Bob was a chartered accountant who had made many real estate investments. He retained the notary who prepared the documentation. It is inconceivable that the notary would have drawn the documents in the way that he did absent instructions.

[65] In *Randall v. McLaughlin*, [1950] S.C.R. 291; 1950 CanLII 4 (SCC), Mr. Hill and Mr. McLaughlin made a joint purchase of property in 1919, with each contributing, as in this case, one half of the purchase price. The deed was drawn by a solicitor acting on Hill's instructions. During his lifetime, Hill collected the revenues and paid over one half of the net proceeds to McLaughlin. After Hill died in 1928, the agents continued to collect rent with half going to McLaughlin and the other half to Hill's successors. In 1946, McLaughlin

decided to sell his share in the property, and upon searching the title he learned for the first time that under the original deed, to Hill and himself, they held the property as joint tenants and not as tenants-in-common. He successfully sued for a declaration that he was the sole owner, a decision ultimately upheld in the Supreme Court of Canada. The Court held that the conveyance of December 1, 1919 was clear and unambiguous, and there was nothing in the evidence to substantiate that it did not carry out the intention of Hill, who had given instructions to the solicitor. Thus the deed alone was sufficient evidence to determine the parties' intent.

- [66] A similar conclusion was reached in *Bathurst*, a case cited by the chambers judge in her reasons. In *Bathurst*, Mr. Bathurst and Mr. Scarborough were friends and business partners. They purchased a house which the court found to be partnership property. The deed indicated they were to hold the property in trust for themselves as joint tenants. Following Mr. Bathurst's death, the issue arose as to whether the property passed to Mr. Scarborough by right of survivorship.
- [67] In *Bathurst*, as in this case, the court had to consider the presumption that partnership property is held as tenants in common. At trial, the solicitor who had prepared the documentation testified that her instructions were to put the property in a joint tenancy. Notwithstanding that evidence, and of the documents themselves, the trial judge concluded that it was unlikely that the parties intended to put the property in joint tenancy.
- [68] The Court of Appeal reversed the decision. In doing so, they first examined the effect of the partnership and the primary rule that partners have full autonomy to make any such agreement as they wish. They found that the general rule of partnerships in favour of a tenancy in common as against joint tenancy is nevertheless subject to contrary agreement. The court then went on to find that the trial judgment was flawed. In that regard, they said:
- [45] It seems to me that Master Baumann's judgment is flawed inasmuch as he saw the issue solely in terms of whether the property was an asset of the partnership; and also because, perhaps for that very reason he paid scant or no attention to the terms of the transfer and of Mrs. Koder's letter or her evidence to the effect that the parties wanted to be beneficial joint tenants. It is true he nevertheless asked himself, in the concluding paragraphs of his judgment, whether the parties had agreed to a rule of survivorship: but he did so purely in the terms of the probabilities of their having done so. What he did not do was put the terms of the transfer and of Mrs. Koder's letter and evidence into the scales. In such circumstances, in my judgment, this court is entitled to look at the matter again for itself. Even on the assumption that Mr. Scarborough's evidence adds nothing, Mrs. Koder's evidence was accepted as that of an independent witness and an experienced lawyer, and the transfer and letter speak for themselves.

[Emphasis added.]

- [69] The court then went on to consider the documentation. It found the documents amounted to an express agreement to take a beneficial joint interest and in face of the documentation the parties could not be treated as holding the property as tenants in common. The court reasoned:
- [48] If the transfers executed by the two partners, and it is clear that it was prepared for them to execute, then that amounts to an express agreement to take a beneficial joint tenancy, as well as a formally completed declaration of trust to that effect. Subject to all the difficulties of pursuing a rectification of the transfer and the register, which is not in issue in this proceeding, I do not see how on that hypothesis the partners could be treated as holding the property as tenants in common. It is true that it would remain the case that they intended to hold the property as partnership property, but subject to an express agreement and declaration of trust to the effect that the property would accrue to the survivor: see *Blackett-Ord.* at para. 8.37. That would not mean that the property would cease to be partnership property: it would still be available, even after the death of one of the partners, to the creditors of the partnership on dissolution. But as between the partners there would be an agreement, ousting the ordinary understanding of a partnership will, that the property would accrue to the survivor. That was consistent with the arrangement that the debt to the bank would be paid off by the life insurance policy.

[Emphasis added.]

- [70] In that passage the court not only found the presumption against partnership property being held as tenants in common could be overcome by the documents alone, but also explained that the property remained partnership property which would be available to the creditors of the partnership on dissolution. As between the partners themselves, the property would pass to the survivor.
- [71] In *Bathurst*, the court then went on to consider the evidence of the solicitor who had prepared the documents. In her reasons the chambers judge at para. 81 refers to this portion of the *Bathurst* reasons. In that regard she says:
- [81] ... The decision of the English Court of Appeal in *Bathurst* provides a useful example of the type of evidence that may rebut the strong presumption against the operation of the right of survivorship in the partnership context. In that case, the presumption was found to be rebutted by evidence of the partners' solicitor, a disinterested witness, that she had advised her clients in writing of the consequences of buying property as joint tenants, and was instructed to proceed.
- [72] On a full reading of *Bathurst*, however, it appears that the evidence of the solicitor was not critical to the outcome and the documents alone would have led the court to the same conclusion. While evidence of the conveyancer, if available, will always be important, the law does not require such evidence. The documents can speak for themselves.

- [73] In this case the three contemporaneous written documents, the conveyance, the mortgage and the BMO application form, all indicate the parties' intention to hold the property as joint tenants with the right of survivorship. Those documents are unchallenged. There is no evidence or explanation from the Estate as to how those documents came into existence or that Bob did not intend in 2003 for the right of survivorship to govern the relationship between himself and Ms. Newhouse.
- [74] The Estate submits that the chambers judge did not err in ignoring the documents. In support of that proposition it cites *Calmusky v. Calmusky*, 2020 ONSC 1506 at para. 45, *Stade Estate (Re)*, 2017 BCSC 2354 at paras. 88-90, and *Madsen Estate v. Saylor*, 2007 SCC 18 at paras. 25-28. Each of those cases concerned banking documents similar to the BMO documents in this case. In each case the court found a lack of clarity in the bank documents as to the meaning of survivorship language and accorded them little weight.
- [75] Those cases all concerned circumstances where the parties had made unequal contributions to the bank account in question. In those cases, the court had to determine whether the presumption of advancement or resulting trust applied and whether the transferor intended to gift the right of survivorship to whatever assets were left in the account to the survivor. In those situations, the terms of the banking agreement were not of assistance in resolving the dispute.
- [76] This is a case of a different kind. In this case Bob and Ms. Newhouse made equal contributions to the purchase and the BMO account. In this situation there is nothing to ground the presumption of a resulting trust, for persons making equal advances might very well take an estate in joint tenancy, fully understanding that the property will ultimately pass to the survivor.
- [77] In *Pecore*, the Court recognized that bank documents may provide evidence of the parties' intention regarding the how the balance in the account should be treated on his or her death. In that regard Justice Rothstein, who wrote for the majority, said:
- [61] While I agree that bank documents do not necessarily set out equitable interests in joint accounts, banking documents in modern times may be detailed enough that they provide strong evidence of the intentions of the transferor regarding how the balance in the account should be treated on his or her death: see B. Ziff, *Principles of Property Law* (4th ed. 2006), at p. 332. Therefore, if there is anything in the bank documents that specifically suggests the transferor's intent regarding the beneficial interest in the account, I do not think that courts should be barred from considering it. Indeed, the clearer the evidence in the bank documents in question, the more weight that evidence should carry.
- [78] In her concurring reasons Justice Abella put it even more forcefully:
- [104] It seems to me that bank account documents which specifically confirm a survivorship interest, should be deemed to reflect an intention that what has been signed, is sincerely meant. I appreciate that in *Re Mailman Estate*, [1941] S.C.R. 368, *Niles v. Lake*, [1947] S.C.R.

291, and *Edwards v. Bradley*, [1957] S.C.R. 599, this Court said that the wording of bank documents was irrelevant in determining the intention behind joint bank accounts with respect to beneficial title. Fifty years later, however, I have difficulty seeing any continuing justification for ignoring the presumptive, albeit rebuttable, relevance of unambiguous language in banking documents in determining intention. I think it would come as a surprise to most Canadian parents to learn that in the creation of joint bank accounts with rights of survivorship, there is little evidentiary value in the clear language of what they have voluntarily signed.

[Emphasis added.]

- [79] In finding at para. 81 that there was nothing in the evidence, other than the testimony of Ms. Newhouse which she had rejected, to suggest that the parties intended the right of survivorship to apply, the chambers judge clearly erred. The documents are clear and unambiguous. Unfortunately, the solicitor who drew the documents died before the trial, and while his evidence would be helpful it is not necessary. There is nothing in the evidence to support the claim of the Estate that the documents did not represent the intention of Bob in 2003 when he entered into the partnership with Ms. Newhouse.
- [80] In the circumstances of this case, the documents signed by the parties were evidence of their intent that the Rental Property and the BMO account were to be held in joint tenancy with the right of survivorship. If that had been the only evidence on the application it would have been open to the chambers judge to conclude on a balance of probabilities that Ms. Newhouse had proven that the parties intended to hold the property as joint tenants with a right of survivorship. Such a result would have been consistent with the decisions in *Randall* and *Bathurst*.
- [81] That was of course not the only evidence before the chambers judge. In this case there was also the evidence of Ms. Newhouse. Her evidence was of critical importance. She was the only witness who gave direct evidence as to the parties' intentions in 2003 when they purchased the Rental Property. Her evidence was that she and Bob discussed and agreed that the Rental Property would be held as joint tenants with the right of survivorship. If her evidence was accepted, it was a complete answer to the Estate's claim.
- [82] The chambers judge did not however accept her evidence. She found Ms. Newhouse's evidence regarding the intention behind the joint tenancy was not credible. She held it was implausible, vague, and inconsistent with other evidence that she accepted: at para. 71. Given the credibility issues the chambers judge found with the affidavit evidence, it was unjust to decide the case summarily.

Suitability for Summary Trial

- [83] This case was decided on a summary trial. On a summary trial pursuant to Supreme Court Civil Rules, B.C. Reg. 168/2009 Rule 9-7(15) the court may grant judgment unless:

- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
- [84] Pursuant to the Rule it is the judge, not the parties, who determine whether a matter is suitable for summary judgment. A judge's determination of suitability is reviewable by this Court regardless of whether the issue is raised by the parties. In *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249 [Main Acquisitions] this Court reiterated the gatekeeper roles of the summary trial judge and this Court:
- [89] The Rule makes the judge a gatekeeper. It is a crucial role. Notwithstanding the wishes or indeed often the vociferous submissions of counsel, judgment should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so. As noted by Justice Southin in her typically forthright language in *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138 [Bacchus]:
- [28] . . . the judge before whom a proceeding of this kind comes must not think of himself or herself as a puppet in the hands of the litigants.
- [90] If the trial court does grant judgment in a summary trial this Court can review whether it was appropriate to do so: *Bacchus; Prevost v. Vetter*, 2002 BCCA 202; *Parsons v. Finch*, 2003 BCCA 409; *Castellan v. Muncey Estate*, 2004 BCCA 128.
- [85] In *Gichuru v. Pallai*, 2013 BCCA 60 the Court set out the standard of review of a decision concerning the suitability of proceeding by way of summary trial:
- [34] In summary, the jurisprudence is clear that, subject to certain guidelines, the decision as to the suitability of proceeding by way of summary trial to determine an action (or issue), is a discretionary one. Appellate deference is given to the exercise of discretionary powers in the absence of a clear conclusion that the discretion has been wrongly exercised, in that no weight or insufficient weight has been given to relevant considerations (see *Creasey v. Sweny* (1942), 57 B.C.R. 457 at 459 (C.A.); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at para. 104; *Stone v. Ellerman*, 2009 BCCA 294, 92 B.C.L.R. (4th) 203 at para. 94, leave to appeal ref'd [2009] S.C.C.A. No. 364; and *Bell v. Levy*, 2011 BCCA 417 at para. 75), or it appears that the decision is clearly wrong and may result in an injustice (see *Taylor v. Vancouver General Hospital* (1945), 62 B.C.R. 42 at 50, [1945] 3 W.W.R. 510 (C.A.)).
- [86] In this case, the parties agreed that the necessary credibility findings could be made on the current record and the case was suitable for resolution on a summary trial. The chambers judge properly recognized that she was not bound by the parties' views and had to independently determine the suitability of proceeding by way of summary trial. She concluded that it was. In doing so she referenced *Inspiration Management* for the proposition that a chambers judge could decide a case on the basis of the evidentiary record as a whole despite conflicting affidavit evidence. She did not however consider the

circumstances in which that could be done.

- [87] When summary trials were first introduced in the Rules in 1983, there was considerable uncertainty as to the circumstances in which a chambers judge could decide a case if there was conflicting affidavit evidence. In *Inspiration Management*, this Court rejected the proposition that a judge was obliged to remit a case to the trial list just because there were conflicting affidavits if there was other admissible evidence that made it possible to find the facts necessary for judgment to be given. In reaching that conclusion it emphasized however that a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if he prefers one version to the other. There needed to be some other admissible evidence that made it possible to find the necessary facts. The Court explained at pages 215-216:

Lastly, I do not agree, as suggested in *Royal Bank v. Stonehocker* supra, that a chambers judge is obliged to remit a case to the trial list just because there are conflicting affidavits. In this connection I prefer the view expressed by Taggart J.A. in *Placer*, quoted supra, at p. 15 of these Reasons. Subject to what I am about to say, a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if he prefers one version to the other. It may be however, notwithstanding sworn affidavit evidence to the contrary, that other admissible evidence will make it possible to find the facts necessary for judgment to be given. For example in an action on a cheque, the alleged maker might by affidavit deny his signature while other believable evidence may satisfy the court that he did indeed sign it. Again, the variety of different kinds of cases which will arise is unlimited. In such cases, absent other circumstances or defences, judgment should be given.

- [88] In *Cory v. Cory*, 2016 BCCA 409 this Court reiterated that a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if he prefers one version to the other:

- [10] On this appeal, the respondents argue that the matter was suitable for determination under Rule 9-7 on the basis that the judge was able to make the necessary findings of fact. On my reading of his reasons, however, I do not believe that the judge made any findings on the disputed evidence. Indeed, I do not see how the judge could have properly resolved the conflicts on a summary trial application when there was no documentary evidence, evidence of independent witnesses or undisputed evidence that undermined the affidavit evidence of one of the parties on critical issues, or some other basis for preferring one affidavit over another. As stated in the seminal decision of *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 219, 36 C.P.C. (2d) 199 at 216 (C.A.), a summary trial judge should not simply choose between one affidavit and another.

[Emphasis added.]

- [89] The main factual issue in this case was whether the parties intended when they entered their partnership agreement that the right of survivorship would apply to the partnership property. On the evidence before the court the resolution of that issue required the judge to

determine Ms. Newhouse's credibility. To resolve her credibility the judge had to consider Ms. Newhouse's explanation that the parties had agreed to a right of survivorship because she did not want to have to deal with Bob's children after her death because she believed the family to be dysfunctional. Resolution of this issue required the judge to consider and determine whether the family was in fact dysfunctional.

- [90] The chambers judge did not believe Ms. Newhouse's evidence about the dysfunction in the Garland family. She found her evidence to be vague, lacking in particulars and implausible. In making those findings the chambers judge clearly overlooked Jonathan's evidence that the family was dysfunctional. Jonathan's evidence corroborated Ms. Newhouse's evidence there were difficulties in the Garland family in 2003. Jonathan's evidence was not denied by either Glenn or Karen. Given Jonathan's evidence, the fact that Ms. Newhouse could not better remember the details became of no import. There was no conflicting evidence on the issue of family dysfunction. Even if there had been such evidence, there was no documentary evidence, evidence of independent witnesses or undisputed evidence that undermined Ms. Newhouse's evidence on this critical issue.
- [91] Similarly, Ms. Newhouse's evidence as to why the parties entered into the joint tenancy was not contradicted by any other witness. While the evidence of the Garland children and Mr. Argue suggests that near the time of his death in 2020, Bob did not believe he held the property in joint tenancy, that does not challenge or provide a contrary explanation to that given by Ms. Newhouse.
- [92] The only challenge to Ms. Newhouse's evidence arose from an interpretation of certain answers read in from her examination for discovery. In that regard it is important to note that Ms. Newhouse on her discovery never resiled from her position that the parties had agreed that the Rental Property would pass by way of survivorship. Although discovery evidence is admissible on a summary trial application, and can be an important source of admissions, the selective and fragmented use of discovery testimony otherwise makes it of limited value: *Main Acquisitions* at para. 95; *Advanced Mobile Welding Co. v. Quartz Ventures Ltd. and Bright Developments Ltd.* (1991), 60 B.C.L.R. (2d) 235 at 236-237.
- [93] The chambers judge held that Ms. Newhouse's evidence about Bob's intention was inconsistent with other independent evidence that she accepted as credible. In that regard, she refers to a reference on a Wills Checklist listing his 50% interest in the Rental Property as an investment and the evidence of Mr. Argue that Bob anticipated that the Rental Property would be sold after his death. The Wills Checklist was prepared sometime in the last two years of Bob's life. It did not lead to Bob preparing a new will. The Wills Checklist is without context as to why it was prepared. It accurately sets out that Bob held a 50% interest in the Rental Property. It does not however shed any light on how the property is held nor Bob's intention in 2003 when he entered into the partnership and purchased the property. Mr. Argue's evidence is the same as and adds nothing to that of Bob's children.

- [94] The chambers judge at para. 78 reasons that Bob's statements to the effect that he anticipated the Rental Property being sold after his death are consistent with the ordinary rules that govern partnership property on the dissolution of a partnership and explain why Bob may not have considered it necessary to take steps to sell the Rental Property before his death. With respect that evidence does not explain or provide any assistance on the key question which is whether Ms. Newhouse and Bob in 2003 had agreed to hold the Rental Property and BMO account as joint tenants with a right of survivorship. The answer to that question turns entirely on Ms. Newhouse's credibility and reliability. She is the only witness before the court as to what took place in 2003. The inferences that might arise from the Estate's evidence cannot be determined until the court has first made findings on her credibility.
- [95] *Castellan v. Muncey Estate*, 2004 BCCA 128 [Castellan] is a case very similar to this one. Castellan concerned the estate of a deceased testator and the issue related to a transfer of funds that the deceased had made some years before her death to her daughter, Ms. Monaghan. The funds represented almost the entirety of the estate with the result that a second child received no inheritance notwithstanding that in the deceased's will she was to share the estate equally with Ms. Monaghan. The question was whether the funds were transferred to Ms. Monaghan by way of gift or to hold in trust for the deceased's estate.
- [96] Ms. Monaghan and her daughter Ms. Fraser, in their affidavits both set out conversations that they had had with the deceased in which the deceased explained the reasons she had gifted Ms. Monaghan the money. As in this case the crucial issue was the credibility of Ms. Monaghan and her daughter and the reliability of their evidence concerning statements they alleged had been made by the deceased.
- [97] The chambers judge who heard the summary trial concluded that the facts were mostly not in issue and that the case was well suited to resolution by summary trial: *Castellan v. Monaghan*, 2003 BCSC 594. He made a number of rulings about hearsay evidence, and he made a number of rulings about the credibility and reliability of the evidence of Ms. Monaghan and Ms. Fraser given their obvious interest in the outcome of the litigation. In the result, he found the evidence of Ms. Monaghan and her daughter inadmissible or, alternatively, of very little weight.
- [98] This Court allowed the appeal and ordered a new trial. In that regard they said:
- [9] In my opinion, the heart of this case lay in the credibility of the witnesses and of their evidence. With respect to the principled approach to the hearsay rule as discussed in *R. v. K.G.B.*, [1993] 1 S.C.R. 740, the test of necessity was found to have been met because Mrs. Muncey was deceased, but the test of reliability was not thought by the chambers judge to have been met. The reliability, of course, is all bound up with credibility and, with respect, it seems to me that to make adverse findings on reliability without seeing the witnesses on whom the whole assessment of credibility depends, is a poor foundation for a finding of reliability or unreliability.

[10] I know that *Orangeville Raceway Ltd. v. Wood Gundy Inc.* (1995), 6 B.C.L.R. (3d) 391 says that it is perfectly proper on a Rule [9-7] application in appropriate circumstances for findings to be made about credibility based on affidavits alone. However, that does not mean that it is always appropriate to make findings of credibility or reliability based solely on affidavits. That is particularly so when a trial date was only 30 days away and where, in fact, there were fundamental disputes about the nature of the evidence and about where the truth of the matter lay because those fundamental differences would settle the outcome of whether what was intended at the time the transaction was made in 1991 was an *intra vires* gift or given for safekeeping on a resulting trust. In my opinion, the questions of law about the admissibility of the evidence are affected by the findings of reliability that must precede the application of the law.

[11] In my opinion this was a case that was not suitable for a summary trial under Rule [9-7] but was a case where there should have been a hearing on oral evidence in circumstances which would have lent themselves to vigorous cross-examination and an opportunity to assess the demeanour of the witnesses.

[Emphasis added.]

[99] Those comments resonate in this case. Ms. Newhouse's credibility was the key to this case. To make adverse findings on her credibility and reliability without seeing her in the witness box was fundamentally unfair. I respectfully suggest the chambers judge could not, in a summary trial based on the record before her, find the facts necessary to disbelieve her evidence. She should have referred the matter to trial where Ms. Newhouse's evidence and the evidence of the Garland children could be tested by proper cross-examination, and the trial judge with all the well-known advantages that a trial judge has in observing the witness could then make the findings necessary to determine her credibility, and the facts and law necessary to decide the case. In the circumstances of this case, it was unjust to decide this case at a summary trial.

[100] In this case if there had been conflicting affidavit evidence on the question of family dysfunction, given there was no documentary evidence, evidence of independent witnesses or undisputed evidence that undermined the affidavit evidence of one of the parties on that critical issue, on the authority of *Inspiration Management and Cory* the case should have been referred to trial. Similarly, if the Estate had been able to lead evidence that Bob had told them the property was in joint tenancy for tax or other reasons and the right of survivorship was not to apply, there would have been a clear conflict in the evidence and no basis for preferring one affidavit over another.

- [101] In this case there is in fact no conflicting affidavit evidence on the parties intention when they entered into their agreement. The only evidence is that of Ms. Newhouse. That said, it would not be just to dismiss the Estate's claim because of lack of conflicting evidence. As in Castellan this was a case where there should have been a hearing on oral evidence in circumstances which would have lent themselves to vigorous cross-examination and an opportunity to assess the demeanour of the witnesses.
- [102] In the circumstances of this case, with respect, the judge's decision to proceed by way of summary trial was a wrongful exercise of her discretion. She failed to give sufficient weight to relevant considerations and her decision was clearly wrong and may result in an injustice.
- [103] Further, and in any event, assuming that the decision to proceed by summary trial was not a wrongful exercise of discretion, her reasons contain several reversible errors of law and fact. I have earlier in these reasons detailed some of those errors of law including applying the wrong standard of proof, holding there was no evidence other than the testimony of Ms. Newhouse to suggest that the parties intended the right of survivorship to apply and misapprehending the evidence of family dysfunction.
- [104] The judge also erred in her credibility assessment. She was particularly critical of Ms. Newhouse's explanation as to why Bob had agreed to a joint tenancy being her concern that she did not wish to be involved with Bob's children after his death. The chambers judge indicated that it was difficult to perceive the logic in this explanation, as there was no prospect she would be forced into a partnership with Bob's children after his death because the partnership would dissolve by automatic operation of law. This finding presumes that Ms. Newhouse, who had no previous experience with partnerships, would understand the legal consequences of a partner's death. Further, the fact that the partnership would have dissolved on Bob's death would not have alleviated Ms. Newhouse's concerns. After Bob's death, the co-owners of the Rental Property would be Bob's children and she would then have to deal with them concerning the Rental Property. This was precisely the result that she wanted to avoid.
- [105] The chambers judge conclusion that it defied belief that Bob would agree to a right of survivorship is with respect pure speculation, without any evidentiary foundation and completely disregards the fact that the parties did put the Rental Property and the BMO Account in joint tenancy. Bob was an experienced real estate investor. The Rental Property was a project for himself and Barry. His investment was but \$25,000. On Ms. Newhouse's evidence she would not put up her money absent the right of survivorship. In those circumstances Bob may well have concluded that he was prepared to go forward on Ms. Newhouse's terms.
- [106] The chambers judge found that Ms. Newhouse's evidence as to her concern about Bob's children was vague and lacking in particulars. I have set out above Ms. Newhouse's evidence on the cross-examination which forms the basis of the judge's comments. As

noted, Ms. Newhouse on her discovery indicated she could only give the general tenor of the problem and believed it had to do with fighting between Glenn and John. The trial judge's finding that it was implausible that Ms. Newhouse could not, without scouring her memory, detail the issues is problematic. It must be recalled that Ms. Newhouse was being asked on an examination for discovery to recall events that had taken place more than 17 years previously. Further, Bob's good friend was Barry, not Ms. Newhouse. That Ms. Newhouse 17 years later could not recall the specifics of the disputes in the Garland family is, I suggest, hardly surprising.

- [107] Further, however, and more importantly, as explained above, the judge in her credibility assessment overlooked critical evidence that confirmed Ms. Newhouse's evidence of dysfunction in the Garland family and thereby misapprehended the evidence of family dysfunction. Jonathan in his affidavit confirmed that in 2003 the two brothers were estranged and not talking to each other and apparently did not talk to each other from 2000 to 2005. Jonathan's evidence is uncontradicted.
- [108] In her answer to question 128 set out at para. 14 above, Ms. Newhouse, when pressed for details, says the problem was probably between John and Glenn, and that she thought Bob used to say they did not see eye to eye, and if John came to town, John and Glenn were always fighting. Jonathan's affidavit confirms that evidence. Clearly, in 2003, there was dysfunction in the Garland family. It is certainly understandable why Ms. Newhouse was not prepared to invest with Bob in circumstances in which she ultimately might have to deal with the two estranged brothers.
- [109] Further, the chambers judge inferred that Barry and Ms. Newhouse only came to fully appreciate the significance of the joint tenancy when, prompted by Glenn's emails, Mr. Smith researched the nature of joint tenancy after Bob's death. She says Ms. Newhouse agreed in her discovery evidence that Mr. Smith had conducted such research after receiving Glenn's email. What the trial judge overlooks, however, is Ms. Newhouse's evidence at question 123 of her examination for discovery when she denies that she had forgotten what happened in 2003. While she did not recall the term "joint tenancy" what she did recall as soon as the matter was brought to her attention was that her agreement with Bob contained a right of survivorship.
- [110] On the evidence that was before the chambers judge, it was open to her given the documents and Ms. Newhouse's explanation to find that that Ms. Newhouse had proven on a balance of probabilities that the parties had agreed to hold the Rental Property and the BMO Account as joint tenants with a right of survivorship. Indeed, absent the evidence of Ms. Newhouse, the deeds and the BMO Agreement in and of themselves may have provided a sufficient foundation to dismiss the Estate's claim. That said, to the extent the credibility of Ms. Newhouse is of critical importance, and clearly it is, the matter should have been referred to trial. As noted in *Inspiration Management*, in deciding whether a matter should be referred to trial, a judge is entitled to consider, among other things, the amount involved, the complexity of the matter, its urgency, and the cost of taking the case forward to a

conventional trial in relation to the amount involved. In this case all of these factors support the case going to trial. In this case, the amount involved is considerable. The rental property is valued at over one million dollars. The parties estimated a three-day trial. The cost of taking the case forward to a conventional trial in relation to the amount involved clearly favoured a trial. This is particularly so when credibility is a key issue.

DISPOSITION

[111] For all of the various reasons set out above, I am of the view that the judgment under appeal cannot stand. I would set aside the judgment and order a new trial. Ms. Newhouse is entitled to the cost of the appeal. The cost of the summary trial application should be left to the judge who hears the subsequent trial.

"The Honourable Mr. Justice Goepel"

Reasons for Judgment of the Honourable Justice Dickson:

[112] I have had the privilege of reading the draft reasons for judgment of my colleague, Justice Goepel. With respect, I have come to a different conclusion.

[113] In my view, it is apparent from her reasons read as a whole that the judge applied the correct standard in deciding Ms. Newhouse had not proven an oral agreement that beneficial ownership of the partnership property would pass on the death of one partner to the other through the right of survivorship, namely, on a balance of probabilities. Based on the evidence and the "probabilities affecting the case as a whole", she expressly found that it was "more likely that there was no such agreement": at paras. 74, 78. Nor did the judge commit any palpable and overriding error in making her factual findings, all of which were reasonable and supported by the evidence. Further, while the parties' request did not oblige her to do so, the judge did not err in exercising her discretion to decide the case at a summary trial.

[114] Justice Goepel has helpfully outlined much of the evidence, the applicable standard of proof and the governing principles concerning the suitability of proceeding by way of summary trial. He has also quoted extensively from the judge's reasons. That being so, in explaining why I have reached a different conclusion I will focus on the relevant standards of appellate review, which I see as determinative.

[115] For purposes of my analysis, I would state the issues on appeal differently than my colleague does in para. 5 of his draft reasons. As I see it, the issue is not whether the evidence rebutted the presumption that the right of survivorship was not intended to apply to the beneficial ownership of the partnership property or whether the credibility of the witnesses could justly be determined based on the record. Those were issues for the judge below. This Court is only entitled to interfere if she made a legal error, a palpable (clear) and overriding (material) factual error or an error in the exercise of her discretion: *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at paras. 53-56, 64; *Gichuru* at para. 34. Accordingly,

I would state the issues on appeal as whether the judge committed a legal error by applying an incorrect standard of proof, made erroneous factual findings that were unavailable or erred in exercising her discretion to decide the case by way of summary trial in light of the credibility issue.

Did the judge make a legal error?

- [116] My colleague states that the judge "did not set out the correct legal test" and "fell into the error highlighted in F.H." in finding that Ms. Newhouse had to overcome a strong presumption against the right of survivorship in the beneficial interest in the partnership property. He goes on to conclude that she made a legal error by imposing on Ms. Newhouse a higher standard than a balance of probabilities to prove the parties had agreed to hold the property as joint tenants. In support of this conclusion, he points to the judge's statement that "compelling evidence" of an agreement contrary to the "strong presumption" against the right of survivorship is required in the partnership context to overcome the presumption. He also emphasizes that a presumption is a guide post which designates a legal burden, not a legal standard of proof: at paras. 51-56.
- [117] In my view, the judge did not make the error perceived by my colleague. Read in context, her statement at para. 64 that "there must be evidence of a contrary agreement between the parties that is sufficiently clear and compelling to overcome the presumption that beneficial interest in partnership property does not transfer through the right of survivorship" is consistent with the guidance in F.H., namely, that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test": F.H. at para. 46. Nor do I read her reference at para. 81 to the "strong presumption" to reflect a failure to state or apply the correct legal test on the question of whether the alleged oral agreement was established to the requisite civil standard. Rather, as I read the impugned sentence, the judge was repeating the descriptor used in Bathurst, the English Court of Appeal decision from which she had earlier quoted and which she distinguished. Elsewhere in her reasons she referred simply and repeatedly to the "presumption", including in her concluding paragraph on whether the alleged oral agreement rebutted the presumption: at paras. 38, 40, 43, 56, 59, 60, 64, 67, 83.
- [118] A failure to apply the correct standard of proof in assessing evidence would, of course, amount to a legal error. However, the question in this case, as in many, is whether such an error is apparent in the judge's reasons. In F.H., the Court said this about identifying errors of this kind:
- [54] Rowles J.A. was correct that failure by a trial judge to apply the correct standard of proof in assessing evidence would constitute an error of law. The question is how such failure may be apparent in the reasons of a trial judge. Obviously in the remote example of a trial judge expressly stating an incorrect standard of proof, it will be presumed that the incorrect standard was applied. Where the trial judge expressly states the correct standard of proof, it will be presumed that it was applied. Where the trial judge does not express a particular

standard of proof, it will also be presumed that the correct standard was applied:

Trial judges are presumed to know the law with which they work day in and day out. [citation omitted.]

Whether the correct standard was expressly stated or not, the presumption of correct application will apply unless it can be demonstrated by the analysis conducted that the incorrect standard was applied. However, in determining whether the correct standard has indeed been applied, an appellate court must take care not to substitute its own view of the facts for that of the trial judge.

[119] The judge did not expressly state the standard of proof to be applied to the alleged oral agreement, which, if proven, rebutted the presumption that beneficial interest in partnership property does not transfer through the right of survivorship. However, she carefully scrutinized the evidence through the lens of probability, as F.H. directs, and found it was "more likely" that there was no such agreement: at para. 74. Bearing in mind this approach and the presumption that she knew the law, as outlined in F.H., in my view, considered in context the judge's references to the need for sufficiently "compelling evidence" of the alleged agreement and the "strong presumption" do not demonstrate that she applied an incorrect standard of proof. In other words, the judge's reasons, read as a whole, show that the evidence did not persuade her on a balance of probabilities that "Bob and Ms. Newhouse intended and agreed that on the death of one partner, legal and beneficial ownership of the partnership property would transfer to the surviving partner for his or her personal benefit": at para. 82.

Did the judge make a factual error?

[120] My colleague also perceives factual errors in the judge's analysis. In particular, he sees problems with her treatment of the contemporaneous documents that created the joint tenancy, the evidence of Bob's children and friend regarding his statements about the partnership property and Ms. Newhouse's evidence regarding the parties' intentions in 2003 about the right of survivorship in the beneficial interest in the property. For example, he states the contemporaneous documents were "critical evidence of the parties' intent" at the relevant time that was unchallenged, "clear and unambiguous" and signified they were to hold the property as joint tenants with the right of survivorship: at paras. 62, 64, 73, 79. He also states "[t]here is no evidence that Bob did not intend in 2003 for the right of survivorship to govern the relationship between himself and Ms. Newhouse": at para. 73. He states further that "[i]n finding at para. 81 that there was nothing in the evidence, other than the testimony of Ms. Newhouse which she had rejected, to suggest that the parties intended the right of survivorship to apply, the chambers judge clearly erred": at para. 79.

[121] After interpreting Bathurst differently than the judge did, my colleague concludes that, given the credibility issues, it was unjust for her to decide the case summarily: at paras. 66-72, 80-82. In support of this conclusion, he states that the resolution of Ms. Newhouse's credibility required the judge to consider whether the Garland family was dysfunctional, but that she "clearly overlooked" Jonathan's evidence of family dysfunction: at paras. 89-90.

He also characterizes the Wills Checklist and Mr. Argue's testimony as shedding no light on Bob's intention in 2003: at para. 93. He goes on to state that the judge erred in her credibility assessment. In particular, in his view, among other things, she unreasonably presumed that Ms. Newhouse would understand the legal consequences of a partner's death, overlooked the "critical evidence" of Garland family dysfunction and erroneously speculated that Bob would not have agreed to a right of survivorship: at paras. 104-107.

- [122] With great respect, in my view the issues and perceived problems identified by my colleague do not involve factual errors such as misapprehending evidence, ignoring material evidence or drawing inferences unsupported by primary facts.
- [123] First, there was no real dispute that the parties intended to enter into a joint tenancy with the right of survivorship in the legal interest in the partnership property. The live issue was whether, in doing so, they also intended to confer on one another the right of survivorship in the beneficial interest in the property. As is clear from Pecore and Madsen Estate, if there is anything in contemporaneous documents such as bank records that specifically suggests an intention regarding the beneficial interest in jointly-held property, those documents may constitute persuasive evidence for the consideration of the court: Pecore at para. 61; Madsen Estate at para. 25. However, in my view, as in Madsen Estate, the contemporaneous documents in this case did not answer that description.
- [124] In addition, and in any event, the judge expressly referred to the documents that created the joint tenancy, including the BMO bank record that stated the account was "joint with Right of Survivorship". She also expressly noted that the parties held legal title to the partnership property as joint tenants. However, on the whole of the evidence and in light of the rules governing partnership property on the death of a partner, she was not prepared to infer that the documents suggested an intention to confer the right of survivorship to the beneficial interest in the partnership property on the other joint owner: at paras. 11, 59-64, 81. In my view, she was not obliged by the content of the documents to draw such an inference and it was not an error for her to decline to do so.
- [125] Second, I do not accept that there was no evidence Bob did not intend in 2003 for the right of survivorship in the beneficial interest in the partnership property to govern the relationship between the parties. While not direct evidence, the Wills Checklist and his statements to his family and friend many years later were capable of supporting an inference that Bob believed his interest in the property formed part of his estate and would be sold on his death because that had been his intention all along. In other words, the Wills Checklist and Bob's statements were circumstantial evidence that in 2003 he did not intend to confer the right of survivorship in the beneficial interest in the property on Ms. Newhouse and that they never made the oral agreement she alleged in her evidence. While different inferences might also have been drawn, for example, an inference that when Bob created the Wills Checklist and made the statements he had forgotten about his original intention, as proposed by my colleague, that possibility does not mean the inference drawn by the judge was unreasonable or otherwise unavailable.

[126] Third, I do not agree that the judge overlooked "critical evidence" of Garland family dysfunction, or that resolution of Ms. Newhouse's credibility required her to consider whether the family was, in fact, dysfunctional. Quite apart from whether a period of estrangement between two siblings amounts to "family dysfunction", the judge's negative credibility finding regarding Ms. Newhouse's evidence was borne in part of the implausibility that she "could not, without 'scouring [her] memory', detail the issues with Bob's children that were of sufficient significance that she was unwilling to enter a partnership with Bob without further assurances": at para. 73, emphasis added. Whether there was, in fact, family dysfunction was neither here nor there. Her negative credibility finding also related to the inherent unlikelihood that, as Ms. Newhouse claimed, Mr. Smith would have "totally forgotten the details of an agreement that could, if Ms. Newhouse predeceased Bob, deprive Ms. Newhouse's heirs of any interest in the Property" and that Bob would have failed to advise his family that, contrary to the usual process on a partnership dissolution, the beneficial interest in the property did not form part of his estate: at paras. 74, 79-80. The judge's credibility findings in this regard were reasonable, available on the evidence and hers to make.

[127] As I see it, my colleague's concerns with the factual findings largely reflect a different view of the evidence, reweighed, and identify alternative available reasonable findings. While I accept that some judges may have made different findings, I see no palpable and overriding error in those made by the judge.

Did the judge err in the exercise of her discretion?

[128] Finally, my colleague concludes that the judge erred in proceeding by way of summary trial because it was unjust to decide the case in that manner given the key issue for determination, namely, Ms. Newhouse's credibility, on the evidence. While I agree that a judge must act as a gatekeeper and decline to give judgment where the necessary facts cannot be found or it would be unjust despite the request of the parties, in my view this was not such a case.

[129] As I understand it, my colleague's concern that it was unjust to proceed by way of summary trial arises primarily from the lack of opportunity to observe Ms. Newhouse's demeanour under in-person cross-examination. More specifically, in his view, the only challenge to Ms. Newhouse's evidence regarding the parties' intentions in 2003 arose from an interpretation of her answers on discovery, which, standing alone, was insufficient to justify disbelief of her account in the absence of "proper cross-examination". I cannot agree.

[130] As I have explained, the Wills Checklist and Bob's statements to his family and friend were circumstantial evidence from which a reasonable inference could be drawn that, contrary to Ms. Newhouse's account, the parties did not agree in 2003 that the right of survivorship in the beneficial interest in the partnership property would pass to the other partner. In addition, the inherent implausibility and vague quality of Ms. Newhouse's evidence were relevant factors from which a negative inference regarding her credibility could fairly be

drawn. Further, the discovery evidence presented was in the nature of cross-examination and, finally, the parties agreed that the necessary facts could be found on the record.

[131] In these circumstances, I do not see how the lack of an opportunity to observe Ms. Newhouse testify in person rendered the judge's discretionary decision to proceed as the parties requested unjust. In my view, that decision is entitled to appellate deference, particularly in the context of a case in which both parties wanted to have the matter resolved by way of summary trial, did so knowing credibility was a live issue, and had sufficient opportunity to put their best cases forward.

CONCLUSION

[132] For all of these reasons, I would dismiss the appeal.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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Prepared on 26 October 2026 · Esheria