SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Hughes v Sangster**
Citation:	**[2019] ACTSC 178**
Hearing Dates:	13-16 May 2019 and 12 June 2019
Decision Date:	26 July 2019
Before:	Mossop J
Decision:	See [109]
Catchwords:	**EQUITY –** JOINT TENANCY – Severance – property purchased as joint tenants by mother and daughter – Agreement or understanding that each would contribute $190,000 – daughter contributes $20,000 – whether agreement or understanding varied so that amount of $125,000 is be deducted from required contribution or so that contributions to household reduced required contributions – constructive trust imposed on daughter's interest in property.
Legislation Cited:	*Civil Law (Property) Act 2006* (ACT), s 244 *Guardianship and Management of Property Act 1991* (ACT), s 14 *Evidence Act 2011* (ACT), dictionary cl 4(1)(c)
Cases Cited:	*Baumgartner v Baumgartner* (1987) 164 CLR 137 *Bennett v Horgan* (unreported, New South Wales Supreme Court, Bryson J, 3 June 1994) *Green v Green* (1989) 17 NSWLR 343 *Hill v Hill* [2005] NSWSC 863 *Kriezis v Kriezis* [2004] NSWSC 167 *Muschinksi v Dodds* (1985) 160 CLR 583 *Public Trustee of the Australian Capital Territory v Hall* [2003] ACTCA 27 *Watson v Foxman* (1995) 49 NSWLR 315 *Webb v Ryan* [2012] VSC 377
Parties:	Christina Ella Hughes by her Guardian and Manager Warwick Samuel Hughes (Plaintiff) Martell Justine Sangster (Defendant)
Representation:	**Counsel** JA Rose (Plaintiff) DA Hassall (Defendant) **Solicitors** Bradley Allen Love Lawyers (Plaintiff) Legal on London (Defendant)
File Number:	SC 478 of 2017

MOSSOP J:

Introduction

1. These are proceedings between a mother and her daughter. Christine Hughes, the plaintiff, sues by her guardian and manager, Warwick Hughes. She was 79 years old at the time of the hearing. She suffers from Alzheimer's dementia. The defendant is Martell Sangster, the daughter of the plaintiff. She was 50 years old at the time of the hearing. The case relates to the respective interests of the plaintiff and the defendant in a property in Nicholls, a suburb of Canberra (the Nicholls property). That land was acquired by the plaintiff and the defendant as joint tenants in 1999. A house was constructed on the land and mother and daughter lived together along with the daughter's family from the end of 2000. Subsequently, in 2007, the defendant moved out of the property. At about the time of the commencement of the proceedings in 2017, the plaintiff took steps to sever the joint tenancy with the effect that the parties are now tenants in common in equal shares.

2. The substantial contest in these proceedings relates to:

    (a) the nature of the agreement or understanding between the plaintiff and the defendant as to their joint ownership of the property;

    (b) whether, and in what way, the agreement or understanding was varied; and

    (c) the extent of contributions made to the acquisition and maintenance of the property pursuant to that agreement or understanding.

3. The plaintiff's case is that the agreement or understanding between the plaintiff and the defendant was one which required the defendant to pay to the plaintiff an amount of $190,000, being half the combined cost of land and the home that was constructed on it. The defendant on the other hand, while accepting this aspect of the agreement or understanding, asserted that it was also part of the agreement or understanding that:

    (a) an amount of $125,000 would be deducted from the amount required to be contributed by the defendant; and

    (b) the joint tenancy would be maintained until either the plaintiff or the defendant died.

4. That latter claim is buttressed by a claim that the plaintiff is estopped from denying it.

5. The defendant also contended that the agreement or understanding was subsequently varied as a result of discussions between the parties so that the contribution by the defendant to the plaintiff in relation to the Nicholls property would be regarded by them as having been fully met due to various contributions made to household expenses at the Nicholls property and at a property in Ngunnawal where the plaintiff and defendant lived for two years prior to residing at the Nicholls property. The defendant's pleadings identify these contributions as amounting to $148,330. In the affidavit of the defendant this amount had increased to $345,930. By the time the defendant's final submissions

were made it had shrunk to $123,841. The defendant did not allege that the presumption of advancement applied in relation to her interest in the property. That was understandable given that it was accepted by both parties that there was an agreement or understanding requiring equal contributions to the purchase, and the issues in contention related to whether that contribution had been made or the agreement or understanding varied so that no further monetary contributions were required from the defendant.

6. The plaintiff claims a declaration that the defendant holds the defendant's interest in the property on trust in proportion to the financial contribution of each of the parties. As the case was run, the plaintiff's contention was that the defendant's interest was subject to a constructive trust. The plaintiff claims that the only contributions made by the defendant were payments totalling $20,000 made between May 2005 and September 2006. If the $20,000 figure is adopted as the defendant's contribution and the total cost of acquisition is accepted to be $380,000, then this would result in the defendant's interest in the Nicholls property being subject to a trust requiring approximately 89.47% to be beneficially held by the plaintiff and 10.53% by the defendant. The plaintiff seeks sale of the property pursuant to s 244 of the *Civil Law (Property) Act 2006* (ACT) and distribution of the proceeds in accordance with the parties' beneficial interests. As an alternative claim, the plaintiff seeks payment of $170,000 as a debt acknowledged in writing by the defendant and interest upon that amount.

7. In her counterclaim, the defendant claims a declaration that she is entitled to a 50% beneficial interest in the Nicholls property. She also claims that the severance of the joint tenancy was contrary to the agreement or understanding between the parties and also contrary to s 14 of the *Guardianship and Management of Property Act 1991* (ACT). She seeks relief requiring the restoration of the joint tenancy so as to re-establish her right to survivorship. She also seeks an order for the sale of the property and distribution of the proceeds.

Chronology of events

8. In order to provide a framework for the discussion of the issues that arise in the case it is useful to set out a basic chronology of events.

9. The plaintiff and Warwick Hughes married in 1977. In about 1984 they separated. The plaintiff's divorce from Mr Hughes was finalised in March 1986.

10. In about 1985 the plaintiff entered a de facto relationship with Dr Larry Sternstein.

11. In 1994 the defendant acquired a property in Carina Street, Ngunnawal (the Ngunnawal property), where she lived with her sons Michael and Adam.

12. In 1997 Dr Tony Sangster moved in with the defendant at the Ngunnawal property.

13. In May 1997 Dr Sternstein died unexpectedly at the Canberra Hospital. His death was the subject of a coronial inquest. Following the death of Dr Sternstein the plaintiff moved into the Ngunnawal property, returning daily to the property where she lived in Turner to maintain it and look after her dogs. The plaintiff had lived at the Turner property with Dr Sternstein prior to his death and he was the registered proprietor of the property.

14. On 28 June 1997 the plaintiff wrote a letter to the defendant dealing with the possibility of her giving to the defendant an amount of $125,000. The terms of that letter (the 1997 letter) and its significance will be discussed in greater detail later in these reasons (see [64] below).

15. The Turner property was transferred from Dr Sternstein's estate to the plaintiff in May 1999 at about the same time as the coronial inquest into his death occurred. In 1999 there were discussions between the plaintiff and the defendant about purchasing a property in Nicholls where both of them could live.

16. The transactions related to the purchase of the Nicholls property involved, in effect, the exchange of the plaintiff's Turner property for a new house and land package in Nicholls. A contract for sale of the Turner property for $371,850 was entered into in with a building company. In September 1999 a vacant block in Nicholls was transferred into the plaintiff's and the defendant's names as joint tenants, but subject to a mortgage for the purchase price to the building company. The building company then constructed a house on the Nicholls block under a construction contract. The plaintiff transferred the Turner property to the Nicholls building company. This was completed in early December 2000 and the plaintiff moved into the property. The defendant and her family moved into the property about two weeks later. At that point the defendant's family included Dr Sangster and her son, Adam Daniel. Her other son, Michael, had moved to Queensland to live either with his father or his paternal grandparents.

17. The Ngunnawal property had been sold in July 2000 but the defendant remained in possession until moving into the Nicholls property as a result of a leaseback arrangement. None of the proceeds of the sale were paid to the plaintiff or otherwise contributed to the acquisition or improvement of the Nicholls property.

18. In December 2001 the defendant gave birth to twins, the father of whom was Dr Sangster. One of the children had Down syndrome. Between 2004 and 2007 the defendant and Dr Sangster undertook a progressive separation whilst both remained living at the Nicholls property.

19. In 2005 and 2006 the defendant acquired two investment properties and rented them out.

20. In 2005 the plaintiff pursued the defendant to pay her contributions for the property. At this stage the defendant had established herself in a new career as a real estate agent and was earning around $200,000 per year.

21. Between May 2005 and September 2006 the defendant paid the plaintiff a total of $20,000. Those amounts were paid in instalments as follows:

    1. 18 May 2005: $1000
    2. 17 July 2005: $1000
    3. 20 July 2005: $1000
    4. 27 August 2005: $1500
    5. 10 October 2005: $500
    6. 1 November 2005: $1000

7. 3 December 2005: $1000

8. 5 May 2006: $1000

9. 14 August 2006: $4500

10. May 2006 to September 2006: $7500

22. Receipts for these amounts, prepared by the plaintiff, were in evidence. From October 2005 the receipts prepared by the plaintiff recorded an entitlement to interest which affected the calculation of the amount owing. In contrast, a note signed by the defendant in December 2005 calculated the amount owing without regard to the accumulation of any interest. That note provided: "$1000 paid 3/12/05 $183,000 owing". I will return to the significance of this note later in these reasons (see [46] below).

23. In October 2005 the defendant met Mr McIntyre whom she ultimately married in 2010.

24. In 2007 the plaintiff and her former husband, Warwick Hughes, reconciled.

25. In October or November 2007 the defendant and Dr Sangster separately moved out of the Nicholls property. There is some dispute on the evidence as to whether this was at the plaintiff's request, however on the defendant's own evidence she was "happy to move out" at that point. Since moving out the defendant has not contributed to the rates for or maintenance of the Nicholls property.

26. In December 2007 the defendant purchased a property at McClelland Avenue in Nicholls in which she and her two daughters then lived. The defendant alleges that the plaintiff promised her a $150,000 contribution to assist with the purchase of this property and then reneged on that promise. Mr McIntyre moved in with the defendant at this property in June 2008.

27. Mr Hughes moved into the Nicholls property with the plaintiff in March 2008. They remarried in December 2008. Sometime in 2008 or 2009 the defendant and Dr Sangster were formally divorced.

28. In October or November 2010 a solicitor acting for the plaintiff, Mr Nathan, communicated an offer to the defendant that her contributions to the property be refunded and that the property be transferred into the sole name of the plaintiff. This offer was rejected by the solicitors for the defendant, Hill and Rummery, in November 2010 and the defendant indicated that she claimed 50% of the value of the property. By letter dated 6 December 2010 her solicitors outlined the basis for that claim.

29. For the purposes of instructing solicitors, the plaintiff had, between 2009 and 2011, prepared a series of typewritten notes describing the history of the dealings between herself and the defendant in relation to the Nicholls property. Further correspondence from the plaintiff to her solicitor, which disclosed her instructions at that time, was put into evidence.

30. In April 2012 the plaintiff wrote to the defendant again, seeking consent to have the title transferred into her name as soon as possible. The letter made reference to the plaintiff having offered the defendant $60,000 and to the defendant requesting a sum of $100,000.

31. In 2012 the defendant lodged a caveat over the Nicholls property. The interest claimed was that of registered proprietor. That caveat lapsed at the request of the plaintiff in December 2013.

32. In July 2016 the plaintiff's diminished mental capacity was first discovered and in December 2016 she was diagnosed with moderate to severe Alzheimer's dementia. Mr Hughes was appointed guardian and manager for the plaintiff by an order of the Australian Capital Territory Civil and Administrative Tribunal on 10 January 2017. The terms of the appointment as manager required that all dealings with the real property of the plaintiff have prior endorsement of the Public Trustee and Guardian.

33. In August 2017 BAL Lawyers, acting for the plaintiff on the instructions of Mr Hughes, wrote to the defendant giving notice of the plaintiff's intention to sever the joint tenancy. At about the same time they sought consent from the Public Trustee and Guardian to sever the joint tenancy and commence proceedings against the defendant to determine the respective legal and equitable interests of the plaintiff and the defendant in the Nicholls property and to have the property sold.

34. On 19 September 2017 the solicitors for the defendant communicated to the solicitors for the plaintiff that the defendant did not want the joint tenancy severed.

35. Further information was provided to the Public Trustee and Guardian in a letter of 6 October 2017. In October 2017 the Public Trustee and Guardian wrote giving consent to the application for severance although, due to an error on the part of the Public Trustee and Guardian, this was only received by the solicitors for the plaintiff in December 2017.

36. These proceedings were commenced in December 2017.

37. The severance of the joint tenancy was registered by the Registrar General on 1 March 2018.

Assessment of witnesses

38. The following witnesses gave evidence at the hearing:

    (a) Dr Sasikala Selvadurai, a consultant geriatrician at the Canberra Hospital;

    (b) Warwick Hughes, the plaintiff's husband and guardian and manager;

    (c) Dr Tony Sangster, the defendant's former husband;

    (d) Adam Daniel, the defendant's son;

    (e) John McIntyre, the defendant's husband; and

    (f) the defendant.

39. Dr Selvadurai gave evidence explaining the history and current status of the plaintiff's Alzheimer's disease. Her evidence was to the effect that the plaintiff was now unable to give truthful evidence because of her condition. That had the effect that while she could understand a question she could not remember the context in order to answer the question truthfully and could not repeat the question. As a result of this evidence, on 13 May 2018, I ruled that the plaintiff was unavailable for the purposes of cl 4(1)(c)

of the Dictionary to the *Evidence Act 2011* (ACT). That permitted a number of previous representations made by the plaintiff to be admitted into evidence.

40. Warwick Hughes is the plaintiff's current husband and a retired mineral exploration geologist. In the witness box he demonstrated some frustration at the questions asked in cross-examination. This led to some of his answers being somewhat testy or offhand but not in a way that cast doubt upon the reliability of his evidence. The most significant aspect of his evidence was that it permitted the admission of documentary records relevant to the issues in the case. As I will explain later in these reasons, those documentary records are of particular significance in resolving the matters in contention. He also gave evidence of the circumstances surrounding the severance of the joint tenancy, which was an issue raised by the defendant's counterclaim which sought its reversal. I did not consider that any significant doubt was cast upon the honesty or reliability of Mr Hughes' evidence.

41. Tony Sangster's evidence related to his dealings between the plaintiff and the defendant between 1996 and 2008. In particular he gave evidence about the financial contributions of himself, the plaintiff and the defendant during the period in which he was living with the defendant. An attack was made on his credit by reference to a period of hospitalisation in 2004 and documents relating to the circumstances in which he was removed from the register of medical practitioners in South Australia. Neither of those two areas of cross-examination caused me to doubt the reliability of the evidence that he gave.

42. Adam Daniel gave evidence by telephone. He gave evidence of conversations had with his mother before they moved into the Nicholls property. The evidence was to the effect that prior to moving into the house (when he was no more than 14 years old), he had a conversation in which his mother said that "Grandma and me will be joint owners". He also gave evidence that after moving into the Nicholls property, in conversations with the plaintiff, the plaintiff said that if anything happened to her, "your Mum will get full ownership of this house" and that "the house is joint between me and your Mum". I accept his evidence as being, within its limited scope, reliable.

43. John McIntyre, the plaintiff's current husband, gave evidence as to what he was told by the defendant about her joint ownership of the Nicholls property and the subsequent purchase of the McClelland Avenue property. He gave evidence of having discovered the 1997 letter at some time between 2008 and 2013. He also gave evidence of a conversation at the McClelland Avenue property about the Nicholls property in which Mr Hughes said that to the defendant "At the end of the day if your mum dies, you get all of the house". His evidence also covered events from 2016 onwards. I considered his evidence to have been carefully given and reliable.

44. The defendant swore two affidavits. Unfortunately, having regard to the manner in which her first affidavit was drafted, it was largely inadmissible. Her evidence traversed the history of her dealings with her mother in relation to the Ngunnawal property, the Nicholls property and the McClelland Avenue property. The evidence in her second affidavit was suffused with a tone of anger, resentment and hostility towards her mother and Mr Hughes. It sought to paint a picture of an idle and insecure mother who was a burden upon her daughter and made little contribution to the joint household in which she lived for nine and a half years. It suggested that the defendant was trapped in that joint household until forced out by her mother when her mother's need for emotional

support was at an end. This feature of her evidence was somewhat less prominent in the oral evidence that she gave.

45. On critical issues for the defendant's case the evidence given by the defendant was vague, incomplete or uncorroborated. Those issues were whether the arrangement or understanding between the parties included, or was varied to include:

    (a) taking account of contributions to living expenses made by the defendant during the period when the plaintiff resided at the Ngunnawal property;

    (b) a requirement that the property remain as a joint tenancy until one of the joint tenants died even though the parties no longer lived together at the property;

    (c) an agreement or understanding that the payment by the defendant of living expenses at the Nicholls property would be treated by the parties as deductions from the defendant's contribution towards the acquisition of the property.

46. I considered that the defendant's evidence concerning her signing the note referred to at [22] above to be significantly damaging to her credibility. That note was strong evidence that as at 2005 she considered (consistent with the plaintiff's case) that she owed the plaintiff $183,000 pursuant to the agreement or understanding with the plaintiff. The evidence that she gave (at transcript 347, 350) was, to the extent that it was understandable, that rather than her owing her mother $183,000, her mother owed her that amount. I do not accept that evidence. It is clear that the note recorded, and was intended to record, the amount then considered by her to be owing to her mother pursuant to the agreement or understanding between them. It was produced by her to counter the claims made by her mother that the amount owing was greater by reason of the addition of CPI amounts upon the unpaid amounts after October 2005. Her unsuccessful attempt to avoid the significant probative value of this note for the plaintiff's case significantly damaged her credibility.

47. The defendant's credibility was also damaged by her reliance upon some extravagant or inaccurate claims of contributions to the household at the Ngunnawal property and the Nicholls property which were said to be contributions relevant to the reduction in her obligation to pay her $190,000 contribution to the cost of the Nicholls property. These are addressed later in these reasons (see [83-92]).

48. In my view, the defendant's evidence on central issues is likely to have involved forensically targeted reconstruction designed to support her claims to a 50% interest in the property. I treated her evidence with considerable caution and generally preferred the evidence of Mr Hughes, Dr Sangster and Mr McIntyre to those of the defendant. I also considered that the documentary records created by the plaintiff in 2009 and 2010 to be more reliable than the evidence of the defendant, notwithstanding that the plaintiff was not able to attest to the accuracy of those documents on oath or affirmation.

Is this a case in which a constructive trust is available?

49. The plaintiff's claim that a constructive trust arose in relation to the defendant's interest in the property was, in final submissions, put on two alternative bases. The principal submission was that there was what was described as a "joint endeavour constructive trust" based upon the principles articulated in *Baumgartner v Baumgartner* (1987) 164 CLR 137 (*Baumgartner*). Alternatively, the plaintiff submitted that there was a common

intention constructive trust preventing the unconscientious denial by a legal owner of another party's rights, an example of which is *Green v Green* (1989) 17 NSWLR 343 (*Green*).

50. While the ultimate basis for the imposition of a constructive trust is that it would be unconscionable for the holder of the legal title to the property to assert that it is held free of any beneficial interest of the claimant, unconscionability is not itself a sufficient description of the basis upon which such a trust is imposed: *Muschinski v Dodds* (1985) 160 CLR 583 (*Muschinski*) at 615-616.

51. A common intention constructive trust may be imposed where parties have a common intention that property shall be held by them in a particular manner and the claimant acts to his or her detriment on the basis of that intention. In such a case what must be established is an actual intention that the property be held in the relevant manner. Further, the claimant's conduct must be such that they would not have conducted themselves in that way unless they would have an interest in the property: *Green* at 354-355.

52. Another class of case in which a constructive trust may be imposed is that where, although no subjective intention could be established as would be necessary for a common intention constructive trust, such a trust is imposed so as to prevent an unconscionable windfall gain to one of the parties to a joint endeavour. That arises from the decision in *Muschinski*. *Baumgartner* was significant because it recognised that, in the context of a de facto couple, non-material contributions to the joint endeavour may be taken into account.

53. In contrast to the present case, the context in which the issue arose in *Muschinski* and *Baumgartner* was of de facto couples jointly acquiring real property. However, the principles are applicable to other domestic relationships: *Hill v Hill* [2005] NSWSC 863 (*Hill*) at [34].

54. The present case is most appropriately analysed as one where a constructive trust may be imposed in order to prevent a windfall gain. It would be somewhat artificial to analyse it as a common intention constructive trust because the circumstances which have arisen are ones in which the constructive trust would need to be imposed in order to accommodate a situation which was never intended, namely, that the defendant failed to make her required contributions to the purchase price. The case does however permit analysis within the framework of a constructive trust imposed to prevent a windfall gain.

55. In *Muschinski* at 620, Deane J concluded that a constructive trust should be imposed on the following basis:

> [I]n a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that the other party should so enjoy it … equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do. .

56. For the purposes of this exercise it is necessary to establish the scope of any joint endeavour and, having done so, determine the scope of relevant contributions. It is

also necessary to determine whether the joint endeavour has ended "without attributable blame" for the purposes of Deane J's formulation.

57. In the present case the scope of the joint endeavour was the subject of only limited disagreement. Both parties accepted that there was an agreement or understanding that the parties would contribute equally to the acquisition and construction of the residence on the Nicholls property. The agreement or understanding included:

    (a) that the contribution would be $190,000 each out of a total cost of $380,000;

    (b) that the plaintiff would fund the initial acquisition and construction of the residence on the Nicholls property by mortgaging and selling the Turner property to the construction company;

    (c) that the plaintiff and the defendant would become joint tenants so that the plaintiff could not "kick out" the defendant; and

    (d) that the parties would live together at the Nicholls property.

58. The defendant contended that the agreement or understanding included:

    (a) that the defendant's $190,000 share of the total cost of acquiring the Nicholls property would be reduced by the sum of $125,000, in fulfilment of the intention expressed in the 1997 letter; and

    (b) that the property would remain a joint tenancy until the death of one of the parties to the agreement or understanding.

59. The defendant also contended that the agreement or understanding was subsequently varied so that the plaintiff would "take into account" the defendant having borne the living expenses of the plaintiff in the Ngunnawal and Nicholls households as deductions from, or as satisfying the remaining $65,000 of the defendant's intended contribution after the deduction of the $125,000.

60. It is necessary to determine whether the joint endeavour came to an end without attributable blame and to consider the issues raised by the defendant in relation to the agreement or understanding before returning to the question of whether a constructive trust should be imposed.

Did the joint endeavour end "without attributable blame"?

61. In a family context such as this, when deciding whether to impose a constructive trust so as to prevent an unconscionable windfall, the *Muschinski* and *Baumgartner* decisions do not require a judgment attributing blame among family members for the breakdown of their continuing relationship, other than in extreme cases: *Bennett v Horgan* (unreported, New South Wales Supreme Court, Bryson J, 3 June 1994); *Kriezis v Kriezis* [2004] NSWSC 167 at [23]; *Hill* at [35] and *Raulfs v Fishy Bite Pty Ltd* [2012] NSWCA 135 at [73]. Where personal relationships deteriorate and the sharing of a dwelling becomes intolerable to some or all of those concerned then, except in an extreme case, there is no attributable blame and the case is one in which equitable adjustment may be made.

62. In the present case it was uncontroversial that the defendant and Dr Sangster had been separated under the one roof for a significant period. When they left the

Ngunnawal property they then lived separately. The defendant's evidence was that she was asked to leave the premises because the plaintiff wished to live with Mr Hughes with whom she had re-established her relationship. The defendant's evidence was that she was happy to move out.

63. There is no evidence of any decisive breakdown in the relationship between the plaintiff and the defendant. However, I am satisfied that the joint endeavour, insofar as it involved the plaintiff and the defendant living together, came to an end without attributable blame. That involved a combination of factors, including both the breakdown of the relationship between the defendant and Dr Sangster and the re-establishment of the relationship between the plaintiff and Mr Hughes. Those changed circumstances involving the dissolution or establishment of intimate relations by the plaintiff and defendant were matters which were not contemplated by the parties at the time the arrangement or understanding was entered into. It is not unreasonable that either the plaintiff or defendant considered it appropriate to move on to different living arrangements.

Was the $125,000 to be deducted from the defendant's contribution?

64. The defendant contended that it was part of the arrangement or understanding that an amount of $125,000 would be deducted from the $190,000 contribution to the acquisition of the property that was to be made by the defendant. This was said to arise from the terms of the 1997 letter which, one way or another, was incorporated into the arrangement or understanding reached in mid-1999. The letter provided:

> Dear Martell,
>
> Should I be able to settle your mortgage, or part thereof, I want you to be aware of why this action occurs; I am neither foolhardy nor wanting a dutiful kindness from you or any special consideration.
>
> When I was a younger woman parent, I did not have sufficient language to present the best case for your future needs in this world, in a way your father could readily comprehend and accept and be agreeable with - participate with: Hence your grammar school and university education necessary for practical and personal stability - self - esteem - did not occur. Now, only money can give you some respite and shelter.
>
> I calculated long ago that 50% of what should have been expended for your benefit to be in the order of $75,000-today this would be about $125,000 value. My personal parental failure in this practical matter sits ill within me, hence a disbursement - belated for your well-being. This is not love, this is caring. For me too, I pray this intention comes to fruition. Sincerely, your mother I speak for Larry also, who knew; and loved me. 28-6-97

65. The 1997 letter was brought into existence at a time when the parties did not contemplate the arrangement ultimately entered into. Rather, it was brought into existence shortly after the death of Dr Sternstein. At that point the plaintiff had recently moved in with the defendant. She may have been contemplating the future availability of some money from Dr Sternstein's estate. It was not in contemplation that a new joint residence would be acquired. The critical issue is whether at the time that the arrangement or understanding relating to the Nicholls property was reached it was part of that arrangement or understanding that the $125,000 referred to in the 1997 letter would be treated as a contribution by the defendant to her half interest in the property. The evidence does not establish that it was. There are a number of reasons for that conclusion.

66. First, the letter in its terms does not relate to or contemplate the subsequent agreement or understanding in relation to the Nicholls property. It can only be relevant to that agreement or understanding to the extent that the idea of a $125,000 payment subsequently became part of it.

67. Second, I accept Dr Sangster's evidence that he was aware of the letter at the time that it was given to the defendant, but that it was not mentioned in any conversations for which he was present in relation to the Nicholls property. That makes it less likely that it was an operative consideration in mid-1999 when the arrangement or understanding between the parties relating to the Nicholls property was being formulated.

68. Third, so far as the evidence of the plaintiff is concerned, her instructions to her lawyer in 2010 made no reference to the letter or to the $125,000 contribution. As indicated above, I consider those records to be more reliable than the evidence of the defendant.

69. Fourth, when the defendant through her solicitors responded to the plaintiff's solicitor, Mr Nathan, and outlined the defendant's understanding of the arrangement between the parties, the letter dated 6 December 2010 made no reference to any agreement or understanding relating to the $125,000. Instead, the position articulated in that letter was that the entitlement of the defendant to 50% of the value of the property was based upon the fact that she had lived with the defendant's family for two years prior to completion of the house and that during the seven years in the Nicholls house the defendant paid for all the bills, rates and insurance, purchased groceries, installed curtains and improved the property. That was notwithstanding the fact that the defendant accepted that at the time of this letter she was conscious of the 1997 letter. The failure to make any reference to what would have been a very significant consideration for the defendant, had it been in play, is consistent with the defendant's reliance upon this letter being a forensically targeted reconstruction post 2010.

70. Fifth, the affidavit evidence of the defendant concerning the conversation or conversations said to give rise to the $125,000 deduction was imprecise. It referred to discussions "in the period 1997 to 2000" and simply provided purported statements made at unspecified times during that period without providing any of the context in which they were made (see affidavit of the defendant dated 27 March 2019 at [50]). Having regard to the length of time that has passed since the events, the subject of this evidence and fact that the evidence is otherwise uncorroborated, the evidence in this form must be treated with particular caution: cf *Watson v Foxman* (1995) 49 NSWLR 315 at 318-319; *Webb v Ryan* [2012] VSC 377 at [22]. I consider it inappropriate to place weight on such evidence on an issue of critical significance in the case.

71. As a consequence, I do not accept the defendant's submission that the arrangement or understanding between the plaintiff and the defendant involved a reduction by $125,000 of the $190,000 that she was otherwise required to contribute to the acquisition of the Nicholls property.

Did the agreement or understanding require that the property remain a joint tenancy until death?

72. The property was put in joint names. While there is evidence of discussions that the property would be held jointly, there is no evidence of discussions at the time that the agreement or understanding was reached specifically targeting either an understanding of the meaning of joint tenancy or the significance of the right of survivorship.

73. The references in the evidence to an entitlement to the whole property if the plaintiff predeceased the defendant only appear well after the purchase and are more in the nature of a statement of fact about the legal consequences of joint tenancy rather than reflecting some part of the original understanding. They are not sufficient to establish that it was part of the original understanding that the joint tenancy must remain until the death of one party.

74. Rather, the position was that both parties entered into the arrangement on the assumption that it would continue for the indefinite future. Neither gave consideration to the possibility that the arrangement would come to an end as a result of one or other of them moving out of the house to live elsewhere. That is made clear by the evidence given by the defendant.

75. In examination in chief (transcript 285):

> Now, I want to ask you in your - if you could just think back, in your discussions with your mother about the two of you acquiring the joint - the property - the Nicholls property jointly did your mother say anything to you about how long the joint tenancy of you two was to remain in place?---Yes.
>
> What did she say?---She said that whilst we we're living there that it would always remain and whoever died first would get the remainder of it. It was intended when we first moved there that would be a happy family living there forever.
>
> In those discussions you had with your mother after you arrived at the Nicholls property did your mother ever put any time limit on how long - I know you've given some evidence that your mother asked you to leave in---?---Correct.
>
> ---Late 2007. But going back to the earlier years, 2000 to 2007, did your mother ever put any time limit on how long you could remain living there?---No.

76. In cross-examination (transcript 353):

> There was nothing in the discussion about what would happen with the property if either of you wished to move out?---No. We assumed we would live there forever.
>
> … There was nothing in the discussions you had with your mother---?---Yes.
>
> ---Before you moved into Nicholls---?---Right.
>
> ---about what would happen to the property if one of you or both of you wanted to move out?---We had never discussed that possibility.
>
> The arrangement was that you were going to live together. The expectation - correct---Yes. At the time we thought we were all living together.
>
> The expectation was that you would be continuing to live there when one or other of you died?---Correct.
>
> You had not considered the possibility of moving out?---No. I'd recently just got married. I was happy. I had babies.

77. Later in cross-examination (at transcript 380):

> Because you had said earlier in your evidence that your discussions with her had not extended beyond the time that either of you moved out?---We never discussed that possibility.
>
> Never discussed it?---No.
>
> Never discussed the idea that the property had to stay---?---We never had a backup plan should it all fall apart as to what we were to do.

> The arrangement came to an end at that point?---My obligation to my mother had already ended.

78. This evidence is inconsistent with the proposition advanced by the defendant that it was part of the arrangement or understanding that if the parties ceased to live in the jointly acquired property the ownership of the property would nevertheless be retained as a joint tenancy with the right of survivorship. Rather, the position was that the parties had not considered what the position would be in the event that their joint endeavour came to an end. The evidence is therefore insufficient to support the defendant's claim that the plaintiff by her words and conduct had promised, arranged or agreed with the defendant that "the Nicholls property would remain in their Joint Names as Joint Tenants during the joint lives of the Plaintiff and the Defendant" and insufficient to support the pleaded estoppel. It therefore provides no impediment to the lawful severance of the joint tenancy and no basis upon which the plaintiff could be compelled to restore the joint tenancy.

Was the agreement or understanding varied so as to require living expenses to be "taken into account" and extinguish any obligation on the defendant to pay an additional amount for her interest in the property?

79. The defendant's contention was that following the acquisition of the Nicholls property, the agreement or understanding between the parties was varied so that the remaining $65,000 of the defendant's contribution (after the deduction of the $125,000 dealt with above) was to be regarded by the plaintiff and the defendant as having been fully met because of:

    (a) the plaintiff having lived in the Ngunnawal property from May 1997 until the end of 2000 rent free and without having contributed to household expenses and utilities whilst living there;

    (b) the plaintiff not contributing to household expenses and utilities at the Nicholls property from 2000 until 2007;

    (c) the defendant having paid for $25,000 worth of carpets and curtains for the Nicholls property and paid for landscaping done there; and

    (d) the defendant making $20,000 in cash payments to the plaintiff between May 2005 and September 2006.

80. There were two aspects of the defendant's evidence which support this claim. The first related to what was said at the time of moving into the Nicholls property, the second related to what was said close to the time at which the defendant moved out of the property.

Claim relating to Ngunnawal expenses

81. The defendant's evidence in relation to what occurred at the point of moving into the property was that in December 2000, just before the parties moved into the Nicholls property, there was a conversation:

> … I recall saying to my mother words to the effect of "Mum, I have already spent about $30,000 and more on you living here".
>
> In response, my mother said to me words to the effect of "I will take that into account".

82. The defendant's evidence goes on to explain her understanding that the $30,000 would amount to a deduction from her contribution to the cost of the Nicholls property. However, that is merely a self-serving statement of her understanding. The evidence given of the conversation, even if it was accepted, would be insufficient to justify a conclusion that it formed part of the arrangement or understanding between the parties.

Claim relating to Nicholls expenses

83. The defendant's affidavit as to what was said in 2007 was as follows:

> In about 2007, my mother and I had discussions in the lounge room in the Nicholls property. We said words to the effect of:
>
> I said: "Mum, my contributions have been more than paid off by what I have paid for you while you've lived with me since 1997."
>
> My mother said: "Yes. I no longer need you to live with me anymore as I have a new man in my life - he will look after me and he will probably move in and he is very well off and wants to buy out you[r] share of the house. Your contributions are done and paid."

84. In further oral evidence in chief, this conversation appears to have been placed "[c]oming up to 2002" or "after you moved into the Nicholls property" rather than in 2007.

85. I do not accept this evidence of the defendant.

86. First, the evidence is consistent with the characterisation of the plaintiff as self-interested and exploitative, casting aside the defendant when she no longer needed her support. Having regard to the circumstances that existed at the time that appears to me to be less than a complete picture of the circumstances at the time and I have indicated earlier in these reasons my reservations about the characterisations in the defendant's affidavit.

87. Second, I do not accept that the factual premise for such a discussion existed at the time. I am not satisfied that the relationship between the parties was one-sided to the benefit of the plaintiff as the defendant's evidence suggests. During the relevant period the defendant had infant children, one of whom was disabled, a teenage son and was working (apparently full-time) whilst undergoing a separation under the one roof from her husband. In such circumstances it is likely that the presence of her mother in the house was of mutual benefit to the parties even if coming with some downsides.

88. Third, further undermining the premise upon which the occurrence of the conversation is based, namely the existence of substantially disproportionate financial contributions, I prefer the evidence of Dr Sangster to that of the defendant. I do not accept that the contributions made by Dr Sangster to the running of the household can be considered to be contributions made by the defendant. The characterisation in the defendant's second affidavit of amounts paid by Dr Sangster as being paid from "joint matrimonial money" is a linguistic device designed to obscure the source of the contribution. I accept Dr Sangster's evidence which was to the following effect:

    (a) He and the defendant never held joint bank accounts.

    (b) While living at the Ngunnawal property the plaintiff contributed proportionally to the household duties during the time she spent there. She lent him her car, undertook household work including cleaning, washing, drying, ironing clothes

and giving cooking instruction. She also cared for and provided tuition to her grandsons.

(c) While at the Ngunnawal property she contributed to household groceries proportionally.

(d) The plaintiff did not contribute towards bills or the mortgage for the property.

(e) The defendant paid the rates, for completion of a retaining wall area and mortgage payments on the Ngunnawal property.

(f) At the Nicholls property the defendant paid proportionally for the utility bills as well as her own food, household needs, the needs of her dogs and any household repairs.

(g) He paid the rates and the balance of the utility bills as his contribution for residing in the property.

(h) There were no discussions in his presence that the manner in which the expenses were divided would be tied to the ownership of the house.

(i) He took out a personal loan in order to acquire carpets and curtains for the Nicholls property.

(j) He paid for landscaping works which needed to be completed after he and the defendant moved into the property in 2001.

(k) The plaintiff paid for a low retaining wall on the north side of the property and the defendant paid for concreting on the south side of the house and for soil and plantings for the north-side garden bed.

(l) He paid for all the food, medication and living needs of the defendant and her children while they were at the Nicholls property, except for some specific items (including childcare for the twins and the defendant's son, Adam).

89. The documentary material tendered by the plaintiff supports the contention that the plaintiff made contributions to the living expenses incurred during the period from 1999. The amounts paid by way of cheque are summarised in Mr Hughes's affidavit. Whilst those records are likely to be an incomplete record of the payments made by the plaintiff, they do disclose substantial contributions identified as being to "food", particularly in the years 2000 to 2005. I do not accept the speculative contention raised by the evidence of the defendant that the cheques identified as being for "food" were in fact paid for cigarettes. Similarly, the descriptions of the purpose of the cheques drawn from the plaintiff's cheque account are consistent with her having borne significant costs associated with gardening, furniture, maintenance and some utilities at the Nicholls house.

90. Finally, as to the extent of contributions, there were a number of specific points upon which the defendant's claim to contribution was unreliable or unpersuasive:

(a) The defendant made a claim of $95,000 as part of her contribution to the household, being an estimate calculated over a nine and a half year period at the rate of $10,000 per year. In light of my acceptance of Dr Sangster's evidence, the documentary evidence concerning expenditure by the plaintiff

and the absence of detail or corroboration of the defendant's claim, I consider that claim to be unreliable.

(b) The defendant claimed that she had made a $197,600 contribution which was said to have been relevant to the reduction of her obligation to contribute $190,000 being discharged. This was calculated on the basis of her having performed internal maintenance and housework for 20 hours per week for nine and a half years at the rate of $20 per hour. It became apparent in cross-examination that this was an estimate of the value of housework done by the defendant for the whole of her family as well as the plaintiff and herself. Notwithstanding that, she had sworn an affidavit which sought to characterise it as a contribution which could be deducted from, or taken into account in lessening, her contribution to the acquisition of the Nicholls property. The inclusion of such a claim reinforced the likely unreliability of all of the claims of contribution made by the defendant in circumstances where they were not supported by contemporaneous documents and made more than 10 years after the events in question.

(c) The defendant also claimed as part of this contribution white goods and furniture, which it emerged in cross-examination that she took with her when she moved to the McClelland Avenue house.

(d) She also included as part of her contribution artwork bought for the Nicholls property which remained in the plaintiff's possession. However, the evidence disclosed that Mr Hughes and the plaintiff had purchased it from her for an amount approaching its original purchase price.

(e) She included as part of her contribution the cost of a fountain which she had in fact swapped with a fountain purchased by her mother and then taken the swapped fountain to McClelland Avenue.

91. The evidence before the court demonstrating a pattern of contribution to the household inconsistent with the evidence of the defendant, and the unreliability of the defendant's evidence makes it less likely that there was such a disproportion between contributions that would result in the plaintiff altering the arrangement or understanding in the manner alleged.

92. In the absence of any express variation of the arrangement or understanding between the parties, I do not consider that any difference in the contributions to the running of the household were such as to affect the equitable interests in the property. Rather, in my view, any difference in the respective contributions to living costs was a matter which arose incidentally as part of the costs and benefits of living together as part of the anticipated arrangement and was not the subject of any arrangement or understanding that it would be reflected in the beneficial interest in the property: see, eg, *Hill* at [43]. In so far as there was some improvement of the property at the defendant's expense (concreting the south side of the house), this appears to have been a modest investment (the defendant's evidence puts it at $2000). There is no evidence about the effect of this improvement on the value of the property. It is not such as to require it to be a factor which results in any variation of the extent of a constructive trust.

Conclusion as to constructive trust

93. The constructive trust is certainly a flexible remedy in the context of protecting against unconscionable windfalls. However, that flexibility is not an invitation to engage in complicated factual inquiries which will result in relatively insignificant differences in contributions and consequential beneficial interest: *Baumgartner* at 150. In this case, having regard to the original agreement or understanding, and my findings that it was not altered in the manner contended for by the defendant, it is not a case in which any disparity between the contributions of the parties to the functioning of the household or maintenance or improvement of the property would render it inequitable that the beneficial interests of the party in the property reflect their direct financial contributions under the agreement or understanding. In other words, in my view an equitable outcome will be reached by giving effect to the express contributions of the parties, namely, $370,000 by the plaintiff and $20,000 by the defendant. The failure to impose a constructive trust to achieve this outcome would result in an unconscionable windfall for the defendant.

Unpaid loan claim

94. Because of my conclusion in relation to the plaintiff's constructive trust claim, it is not necessary to address the alternative claim that a loan to the defendant of the purchase price remains substantially unpaid.

Counter claim in relation to severance

95. The defendant made a counter-claim challenging the severance of the joint tenancy by the plaintiff. The defendant put forward two matters in support of the claim that the court should order the restoration of the joint tenancy prior to the sale of the property. The first was that the severance of the joint tenancy was "an unconscionable device and abuse of legal rights to defeat the pre-existing equity in the Defendant … to have and to retain the usual right of survivorship to the whole of the estate on the death of the Plaintiff". The second was that upon the death of the plaintiff, to the extent that Mr Hughes stood to gain as a beneficiary of the plaintiff's intestate estate, the transaction was entered into by Mr Hughes for his ultimate benefit and not solely for the benefit of the plaintiff. The defendant contends that it was prohibited and an unlawful transaction under s 14 of the *Guardianship and Management of Property Act* and that this was "a further imperative reason why the joint tenancy must, in due justice, be restored now".

96. The starting point is that the relationship of joint ownership is, of itself, not a fiduciary one and there is therefore no impediment to a joint owner severing the joint tenancy: *Public Trustee of the Australian Capital Territory v Hall* [2003] ACTCA 27 (*Hall*). In my view, contrary to the submissions of the defendant, it makes no difference to the principle in *Hall* that the severing party had notice of the other party's opposition to severance.

97. Here the defendant's first argument is, therefore, based upon the proposition that it was part of the arrangement or understanding between the plaintiff and the defendant, and hence part of their joint endeavour, that the joint tenancy would be maintained until the death of one of the joint tenants. For the reasons given at [72]-[78] above, I have rejected the defendant's submission that this was an element of the parties' joint endeavour. Rather, the joint endeavour extended only to the period during which the

parties were living in the house together. There was never any contemplation that the joint tenancy would remain forever, notwithstanding that the parties no longer lived together. It was not part of the agreement or understanding between the parties that one of the parties would inevitably become the sole owner of the property upon the death of the other. As a consequence, there was no equitable restraint upon the plaintiff taking steps to sever the joint tenancy at the time that she did.

98. The defendant's second argument was based upon s 14 of the *Guardianship and Management of Property Act* which provides:

> **14 Restrictions on manager about property**
>
> (1) Unless the ACAT, on application, orders otherwise—
>
> (a) a manager of a person's property must not enter into a transaction in relation to the property if the interests of the manager are in conflict, or may conflict, with the interests of the person; and
>
> (b) a manager of a person's property must keep the manager's property separate from the person's property.
>
> (2) Subsection (1)(b) does not apply to property owned jointly by the manager and person.

99. On this issue it is significant that the burden of proof lies upon the defendant.

100. The evidence of Mr Hughes was that allowing half of the Nicholls property to remain vested in the defendant's name was not in the plaintiff's financial interests as she had long wanted to get the property into her name. So far as severance specifically was concerned, he had no professional knowledge of land titles law and he acted upon the legal advice that he was given in his capacity as her guardian and manager.

101. It is clear that for many years prior to the plaintiff losing her mental capacity she was seeking to reach an accommodation with the defendant which would allow the plaintiff to buy out her interest in the property for less than 50% of the value of the property. It is also clear that she did not wish for the property to pass to the defendant as a result of her right of survivorship under the joint tenancy. She had been advised that severance of the joint tenancy was the appropriate course as early as 2010. The steps taken by Mr Hughes in 2017 to sever the joint tenancy and achieve an equitable adjustment of the parties' entitlements in relation to the property were a package of measures taken by Mr Hughes at the same time. They advance what were clearly the wishes of the plaintiff. The severance of the joint tenancy has the effect that rather than passing on survivorship to the defendant, the property would remain part of the plaintiff's estate and would be distributed in accordance with the rules of intestacy. It is correct that as the plaintiff's husband, Mr Hughes would be entitled to a distribution of up to $200,000 upon intestacy. Although there was [limited] evidence of the value of the plaintiff's estate, the case was argued on the assumption that the house was her principal asset and hence the entitlement of Mr Hughes in her intestate estate would be affected by whether or not the house was the subject of a right of survivorship.

102. In my view, the severance was not a transaction in relation to the Nicholls property in relation to which the interests of Mr Hughes were "in conflict … with the interests of" the plaintiff. Nor was it a transaction where his interests "may conflict" with the interests of the plaintiff. Rather he was acting consistently with the previously expressed wishes of the plaintiff to assert her entitlements in relation to the property. The transaction needs

to be seen as part of a package of measures taken by the plaintiff including the commencement of the proceedings. That he may have, in circumstances which have not arisen, received a benefit as the husband of the plaintiff as a result of the transaction is not sufficient to demonstrate that there was or may have been a conflict for the purposes of s 14.

103. I do not accept the submission of the defendant that a breach of s 14 was established if the transaction "was not solely for the benefit of the plaintiff" if by that the defendant submitted that demonstrating that some other person will also benefit from a transaction demonstrated a breach of s 14.

104. The defendant pleaded various other matters in relation to the manner in which the Public Trustee and Guardian dealt with its consent to the severance, however those were issues which were not pursued in final submissions and it is not necessary to address them further.

105. For these reasons, this aspect of the counterclaim will be dismissed. Having regard to my conclusion that there was no breach of s 14 it is unnecessary to consider what, if any, consequences would flow from such a breach in proceedings such as these, in circumstances where those consequences are not specified in the statute.

Summary

106. I have found that the arrangement or understanding between the parties relating to the acquisition of the Nicholls property was as contended for by the plaintiff. I have rejected the defendant's contention that an amount of $125,000 was to be deducted from the defendant's contribution required in accordance with the arrangement or understanding. Further, I have rejected the defendant's contention that there was a variation of the arrangement or understanding on account of disproportionate contributions to household expenses for domestic work undertaken at the Ngunnawal or Nicholls properties. In those circumstances, having regard to the limited financial contribution made by the defendant to the acquisition of the Nicholls property, it is unconscionable for the defendant to assert that her beneficial interest in the property reflects her legal interest in the property. It is therefore appropriate that a constructive trust should be imposed over the defendant's interest so that the plaintiff's interest in the property reflects the full extent of her contribution to its acquisition. That involves the imposition of a trust over 89.47% of the defendant's tenancy in common.

107. I have also rejected the defendant's contention that it was part of any arrangement or understanding between the parties that the joint tenancy would remain until the death of one or other of the parties notwithstanding that the joint endeavour, insofar as it involved the parties living together, came to an end. As a consequence, there is no unconscionability that would provide an equitable restraint upon the capacity of the plaintiff to sever the joint tenancy. Further, I have found that the severance of the joint tenancy at the instigation of Mr Hughes, acting as the plaintiff's guardian and manager, did not involve any contravention of s 14 of the *Guardianship and Management of Property Act* and hence that there was no statutory impediment to the severance of the joint tenancy.

Orders

108. In those circumstances, it is appropriate that the property be sold and the net proceeds distributed in accordance with the beneficial interests of the parties. I will make orders requiring the sale of the property and the distribution of the proceeds consistently with the proportions that I have identified above. I will dismiss the defendant's counterclaim. The orders sought by the plaintiff seek that her costs be paid out of the proceeds of sale prior to any payment to the defendant on account of her interest in the property. The orders necessary to give effect to the conclusions that I have reached will need to be finalised at the same time as the issue of costs is addressed. It is appropriate that the parties have the opportunity to make submissions on that issue so long as that does not delay the making of final orders.

109. The orders of the Court are:

    1. The plaintiff is to provide orders to give effect to these reasons by email to my associate (copied to the defendant) by Tuesday 30 July 2019.

    2. The proceedings are listed at 9.30am on Thursday 1 August 2019 for any argument in relation to costs and the making of final orders.

I certify that the preceding one hundred and nine [109] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Mossop.

Associate:

Date: 12 August 2019

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Amendments

12 August 2019	Replace "plaintiff's" with "defendant's"	Paragraph: [97]
12 August 2019	Replace "defendant" with "plaintiff"	Paragraph: [102]