
CANADA / JUDGMENT

Petrick (Trustee) v. Petrick

2019 BCSC 1319

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1319 Petrick (Trustee) v. Petrick

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Petrick (Trustee) v. Petrick,

2019 BCSC 1319

Date: 20190808

Docket: S152029

Registry: Vancouver

Between:

Trustee of the Estate of Rock Petrick, a bankrupt

Plaintiff

And

Rock Petrick and Dena Chilton

Defendants

Before: The Honourable Madam Justice Francis

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S. Andersen

Counsel for the Defendants:

A. Bayley

Place and Dates of Hearing:

Vancouver, B.C.

April 17, May 21 and 28, 2019

Place and Date of Judgment:

Vancouver, B.C.

August 8, 2019

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I. Introduction

- [1] This is a summary trial application brought by the plaintiff, the trustee in bankruptcy of the estate of Rock Petrick. The applicant seeks a declaration that the 2014 transfer of an interest in title to real property from Mr. Petrick to his mother, Dena Chilton, is void pursuant to the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 [FCA], as well as other relief.
- [2] This action was originally commenced by one of Mr. Petrick's creditors, Home Hardware Stores Limited ("HHSL"), but since Mr. Petrick is now bankrupt, his bankruptcy trustee has been substituted as plaintiff.
- [3] The real property in question is a residential strata condominium at 511 - 10 Renaissance Square in New Westminster (the "Property"), at which Ms. Chilton resides. The Property was purchased in 2006, and at that time, Ms. Chilton and Mr. Petrick were registered on title as joint tenants. Ms. Chilton paid the deposit and down payment for the purchase of the Property. Both Ms. Chilton and Mr. Petrick are borrowers on the mortgage. There is evidence that some mortgage payments were made by Mr. Petrick, although that is a matter of some contention in the evidence, and the bulk of the mortgage payment and other costs associated with the Property have been paid by Ms. Chilton. Ms. Chilton has lived in the Property since it was purchased. Mr. Petrick has never lived there.
- [4] On July 17, 2014, in the midst of foreclosure proceedings brought by HHSL with respect to other properties owned by Mr. Petrick, Mr. Petrick transferred his interest in the Property to Ms. Chilton (the "2014 Transfer"). It is this transaction that is attacked in this proceeding, and which the applicant seeks to have set aside as a fraudulent conveyance.
- [5] Ms. Chilton responded to this application and her counsel appeared at the application. Mr. Petrick filed a response and responding affidavit material but no one appeared on his behalf at the application. I was informed by counsel for Ms. Chilton that Mr. Petrick no longer has a lawyer acting on his behalf in this matter.
- [6] At the outset of the hearing, counsel for Ms. Chilton raised a number of objections to the evidence submitted by the plaintiff in support of this summary trial application. I advised counsel at the hearing that I would hear the summary trial and would rule on the evidentiary matters in my written reasons.

II. Issues to be determined

- [7] The issues that must be determined in this application are:

- a) Is this case suitable for summary determination?
- b) Has the applicant sought to introduce inadmissible evidence and, if so, should some or all of that evidence be excluded?
- c) Did Mr. Petrick have a beneficial interest in the Property immediately prior to the 2014 Transfer?
- d) Was the 2014 Transfer a fraudulent conveyance?
- e) What is the appropriate remedy if a fraudulent conveyance is found?
- f) If the 2014 Transfer was a fraudulent conveyance, does the applicant have standing to seek the relief sought under the Partition of Property Act, R.S.B.C. 1996, c. 347 [PPA]?

III. suitability for summary determination

- [8] The parties who appeared before me do not dispute that the matter is suitable for summary disposition. Mr. Petrick's counsel filed a response in which he argued that this matter should not be determined summarily, but no party appeared for Mr. Petrick at the hearing to make these submissions.
- [9] Mr. Petrick's opposition to the summary trial process appears from his application response to be primarily grounded in concerns that some of the evidence advanced by the applicant is inadmissible and that the Court will not be able to make the necessary findings of fact on the record before it. The concerns about admissibility of evidence raised by Mr. Petrick (which are the same concerns as those raised by counsel for Ms. Chilton at the hearing) are dealt with below. In terms of finding the necessary facts, I am not persuaded that this case is as factually contentious as Mr. Petrick's application response would suggest. In terms of factual determinations, this is primarily a case about ascertaining the intentions of two people at two points in time, namely Ms. Chilton when she made Mr. Petrick a joint tenant on the Property in 2006 and Mr. Petrick when he transferred his interest in title to Ms. Chilton in 2014. On those two issues, the necessary findings of fact can be made on the basis of the record before me.
- [10] I am satisfied that I am able to make the findings of fact necessary to decide the issues on this application, and that it is just to do so under the principles laid down in *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.).

IV. Evidentiary issues

- [11] The respondents object to the admissibility of a number of documents in the application record.

A. Admissibility of Real Estate Listing document

- [12] Ms. Chilton's counsel objects to the admissibility of an undated form completed by Mr. Petrick entitled "Real Estate Listing" which is attached as Exhibit "A" to the Affidavit of David Horne sworn August 8, 2017, and which appears to be a net worth statement (the "Net Worth Statement"). Mr. Horne is a director of HHSL and in his affidavit, he testifies that Mr. Petrick sent him the Net Worth Statement via fax on October 11, 2012. In the Net Worth Statement, Mr. Petrick makes representations about assets he owns, including the Property. Ms. Chilton's counsel argues that this document should not go into evidence on the basis that it was never put to Ms. Chilton in cross-examination. He argues that to allow the plaintiff to rely on this document would be to offend the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.) [Browne].
- [13] I find that Mr. Petrick's representations that he owned the Property are not something that needed to be put to Ms. Chilton on cross-examination in order for the plaintiff to rely on them. *Browne* simply requires that if a party wishes to impeach the credibility of a witness by means of extrinsic evidence, the witness must be given a chance to address that evidence. No one is challenging Ms. Chilton's credibility in this case and therefore *Browne* has no application. I find that the Net Worth Statement is admissible for the purposes of proving that in 2012, Mr. Petrick told one of his creditors that he owned the Property.

B. Admissibility of Personal Statement of Affairs

- [14] A similar analysis applies to a July 29, 2013 document entitled "Personal Statement of Affairs", which was exhibited to the Affidavit #3 of Blake Elyea. This document appears to have been completed by Mr. Petrick, and it was found amongst the books and records of Mr. Petrick during the searches of his property authorized by court order in the bankruptcy proceedings. In this document, Mr. Petrick represented that he had assets net of liabilities of \$5,610,000. He hand wrote on the statement:

I have included #511 Renaissance Square in my Assets at \$530m. There is a mortgage with TD Bank that I help my mother with. Please tell me the exact amount and add it to my mortgage. The amount is under \$113m.

- [15] I find that this document, the authenticity of which has been acknowledged by Mr. Petrick in his Affidavit #4, is admissible for the purposes of demonstrating that Mr. Petrick made representations to third parties that he owned the Property and assisted in paying the mortgage on it.

C. Admissibility of documents that relate to disposition of other property

- [16] There were numerous documents in evidence, mostly attached to the affidavits of Blake Elyea, which concern the manner in which Mr. Petrick had dealt with other assets, including what appears to be a pattern of conveying other property owned by Mr. Petrick to third parties in and around the time of the foreclosure proceedings. Ms. Chilton's counsel argues

that this evidence is not relevant to the matters before me and is only included in the application record as evidence of Mr. Petrick's bad character. He argues that evidence of bad character is, as a rule, inadmissible. He says that this evidence is more prejudicial than probative and should not be admitted. Counsel for the plaintiff argues that he is not seeking to introduce evidence of Mr. Petrick's character but merely seeking to establish his intent in 2014, which is relevant to determining the application of the FCA. I find that the relevance of any evidence about how Mr. Petrick dealt with property other than the Property in issue is marginal at best. I therefore have not considered any of this evidence in making my determination in this case.

D. Admissibility of Transcript

- [17] The plaintiff seeks to rely on a portion of the transcript of Mr. Petrick's examination under s. 163 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA] which took place on April 7, 2017 (the "Transcript").
- [18] Counsel for Ms. Chilton argues that the Transcript is not admissible in this proceeding. Specifically, he argues that s. 163(3) of the BIA requires that a party can only rely on transcript evidence in an action under the BIA, and this proceeding is not an action under the BIA.
- [19] Section 163(3) states that:
- (3) The evidence of any person examined under this section shall, if transcribed, be filed in the court and may be read in any proceedings before the court under this Act to which the person examined is a party.
- [20] In making submissions about the admissibility of the Transcript in this proceeding, both counsel referred to the decision of Savage J. (as he then was) in *Re Bowell Estate v. Gill*, 2008 BCSC 1270 [Bowell]. In that case, in considering the circumstances in which a s. 163 transcript may be used, the court held:
- [17] With respect to whether these actions are "proceedings before the court" under the Bankruptcy and Insolvency Act, I agree with the Trustee that proceedings taken by a trustee in bankruptcy to realize on assets of a bankrupt, including, pursuant to that end, lodging a caveat against title to property pursuant to section 74 of the Act, are proceedings before the court under the Act.
- [21] Counsel for Ms. Chilton says that the proceeding herein is not a proceeding before the court under the BIA. He argues that this action is not based on any section of the BIA and only if the plaintiff is successful in establishing a fraudulent conveyance would a collection proceeding ensue that would fall under the BIA. At that point, Ms. Chilton's counsel argues, the plaintiff would be entitled to rely on the Transcript, but not before.

- [22] Counsel for the plaintiff argues that the very status of the bankruptcy trustee and its right to bring this application flows from the BIA. The bankruptcy trustee would not have standing to be a plaintiff in this claim were it not for the BIA. I agree with the plaintiff on this point. A trustee in bankruptcy will often need to rely on provincial legislation like the FCA to recover property in the context of a bankruptcy. This is part of discharging its duties under the BIA.
- [23] I agree with counsel for the plaintiff that because s. 163(3) uses permissive rather than restrictive language, it should be read broadly. Section 163(3) requires transcripts to be filed and gives permission for them to be used in another proceeding, unlike an examination for discovery transcript, which would be subject to an implied undertaking: *Bowell* at para. 34.
- [24] Therefore, I find that this action is a proceeding before the Court under the Act and I am satisfied that there is no basis to exclude the Transcript in this case.
- [25] The Transcript shows that Mr. Petrick was asked the following questions and gave the following answers under oath:

Q. Now the hearing in the Home Hardware foreclosure matter was scheduled to be heard on July 22nd, 2014. Do you recall that specific hearing date?

A. No, I do not, but I know where you're going with this, so we should just get right to it. I transferred my share in my mom's condo back to her, which she had given me for probate reasons. Simple as that.

Q. So she had given the property before her death or given you a half interest in the property before her death, and this is the document by which you transferred it back to her, is that correct?

A. Yes. Yes, it is.

V. Did Mr. Petrick have a beneficial interest in the Property?

- [26] The determination of whether Mr. Petrick held a beneficial interest in the Property, which is a threshold issue to determining whether he fraudulently conveyed that interest, requires a consideration of the conceptual nature of a joint tenancy and the various rights and interests that flow from joint ownership of property in the circumstances of this case.

A. Relevant facts

- [27] Ms. Chilton has sworn multiple affidavits in this proceeding. She has testified that she purchased the Property in 2006 for \$314,900, using the proceeds of sale of her prior home in Williams Lake, and a \$140,000 loan from TD Bank secured by a mortgage on the Property. Ms. Chilton and Mr. Petrick were co-borrowers on the mortgage loan and they were both registered on title as joint tenants. Ms. Chilton took sole occupancy of the Property on April 28, 2006, and has had sole possession of it since then. Ms. Chilton has given the following evidence about her intention at the time the Property was registered jointly in her and Mr. Petrick's names:

- She understood that if she died with the Property in her name alone, the Property could not be transferred to her beneficiaries without a grant of probate and the payment of probate fees.
- She understood that she could avoid the Property forming part of her estate, and therefore the payment of probate fees, if she were to register the Property in joint tenancy with her beneficiary, Mr. Petrick.
- It was then, and is now, her intention that upon her death Mr. Petrick will inherit the Property.

[28] Specifically, Mrs. Chilton deposed in her August 28, 2017 affidavit:

My purpose in [registering Mr. Petrick on title to the Property] was not to make a gift of a half interest in the condominium to Rock Petrick, but rather to arrange my affairs in such a way that in the event of my death, the beneficial interest in the property would pass to my son Rock Petrick, without the necessity of first obtaining a grant of letters probate and paying probate fees.

[29] Mr. Petrick's evidence is that the Property was registered in joint tenancy "for estate planning purposes". In his Affidavit #3, sworn August 23, 2017, Mr. Petrick deposed:

It was not my intention, nor to the best of my knowledge was it hers, that I should acquire any beneficial interest in the condominium. Rather, we understood that in the event of her death, the condominium would be transferred to me, without the necessity of any application for probate.

[30] As noted, Mr. Petrick represented on a credit application completed July 29, 2013, that he helped his mother with the mortgage on the Property. He also represented to creditors that he was an owner of the property.

[31] In his Affidavit #4 sworn October 10, 2017, Mr. Petrick explained his reasoning for the handwritten notation on his July 29, 2013 Personal Statement of Affairs as follows:

5. I gave those gifts of cash to my mother as she is my mother. I wanted my mother to have a peaceful and happy retirement. I did not want her to worry about money. I assumed she would use the money for her expenses of living including paying the mortgage on her home. Therefore I stated to the credit union in this application for credit that I help my mother with the mortgage. What I wanted was the money to pay out the mortgage to assist my mother.

[32] Ms. Chilton stated that, upon learning that Mr. Petrick was having serious financial difficulties in 2013, she requested that Mr. Petrick convey his registered interest in the Property to her and he ultimately did so.

[33] By way of a Form A transfer executed by Mr. Petrick on July 15, 2014, and registered in the Land Title Office on July 21, 2014, Mr. Petrick transferred his interest in the Property to Ms. Chilton.

[34] Ms. Chilton's position is that between 2006 and the 2014 Transfer, Mr. Petrick held his legal interest in the Property as a bare trustee for his mother and as such, the 2014 Transfer did not constitute a conveyance of any beneficial interest in the Property. In order to consider this argument, I must review the law of joint tenancy as it applies to property arrangements between parents and adult children.

B. Nature of joint tenancy

[35] A joint tenancy is defined by the confluence of the four unities: unity of title, interest, time and possession. The four unities were described by Dickson J.A. in *Zeligs v. Janes*, 2016 BCCA 280 [Zeligs], as follows:

[39] Unity of title means the title of each joint tenant arose from the same act or instrument. Unity of interest means their holdings are perfectly equal in nature, extent and duration. Unity of time means all the interests vested simultaneously. Unity of possession means each joint tenant has a right to present possession and enjoyment of the whole property, but no right to exclusive possession of any individual part of the whole. Assuming all four unities are present, the question of whether a joint tenancy or a tenancy in common has been created is determined by the intention of the grantor: B. Ziff, *Principles of Property Law*, 6th ed. (Toronto: Carswell, 2014) at 336; *Felske Estate* at para. 31.

[36] In *Zeligs*, Dickson J.A. noted that joint tenancy is a popular form of estate planning, because the "legal fiction of a unified singularity composed of more than one person may fit comfortably in a family context": at para. 40. Unfortunately, as this case demonstrates, joint tenancy as an estate planning device can often create unexpected problems, particularly when the interests of people or entities outside the family context are affected.

[37] The right of survivorship is the principal distinguishing characteristic of joint tenancy. In *Zeligs*, Dickson J.A. described it in the following way at para. 41:

The right of survivorship is, however, a revocable expectancy that manifests only upon success in the so-called "ultimate gamble" - survival - and then only if the joint estate has not been previously destroyed by an act of severance: *Estate of Propst*, 788 P.2d 628 at 631 (Cal. Sup. Ct. 1990). When given inter vivos, a gift of survivorship rights is to what is left, if anything, when the gamble is won: *Simcoff v. Simcoff*, 2009 MBCA 80 at para. 64.

[38] In *McKendry v. McKendry*, 2017 BCCA 48 [McKendry], Dickson J.A. once again considered the right of survivorship at para. 29:

So long as the requirements of a binding gift are met, the owner of property may, during his or her lifetime, make an immediate gift of a joint tenancy, including the right of survivorship. This is so regardless of whether the donee of the gift is to hold it for the benefit of the donor while he or she is alive. When gifted inter vivos, the right of survivorship is a form of expectancy regarding the future. It is a right to what is left of the jointly-held interest, if anything, when the donor dies: *Simcoff v. Simcoff*, 2009 MBCA 80 at para. 64; *Bergen v. Bergen*, 2013 BCCA 492 at para. 37; *Pecore*

at paras. 45-53.

[39] There can be no question that if there were a true joint tenancy in the Property, from the time the Property was purchased in 2006 until the 2014 Transfer, Mr. Petrick had a present legal and beneficial interest in the Property and a right of survivorship with respect to same. He would have been entitled to whatever was left of the jointly held interest in the Property if he was successful in the "ultimate gamble" and survived his mother.

C. Beneficial ownership between joint title holders

[40] Not all jointly owned property is subject to a true joint tenancy. Pursuant to the Supreme Court of Canada's decision in *Pecore v. Pecore*, 2007 SCC 17 [Pecore], property that is held in joint tenancy can give rise to three potential scenarios in terms of the beneficial interests of the title holders:

- a) A true joint tenancy, in which the joint tenants are each owner of the whole. Each enjoys the full benefit of property ownership and the ultimate survivor will enjoy the whole title for him or herself.
- b) A resulting trust, wherein only one joint tenant has any beneficial interest in the property and the other joint tenant, usually a gratuitous transferee, holds title in trust for the other and has no beneficial interest in the property.
- c) A scenario which is sometimes referred to as a "gift of the right of survivorship," wherein a joint tenant is gratuitously placed on title and has no beneficial entitlement to the property during the lifetime of the donor, but if the donee survives the donor, the donee will receive the entire property by right of survivorship. In *Bergen v. Bergen*, 2013 BCCA 492 at para. 37 [Bergen], Newbury J.A. described a gift of the right of survivorship in a joint account as "an immediate gift of a joint interest consisting of whatever balance exists in the account on the transferor's death, assuming he or she dies first."

There has been some debate as to whether the inter vivos gift of a right of survivorship as described in *Pecore* is a new kind of gift, or whether Rothstein J. was simply describing an implied trust when discussing the beneficial entitlement that arose on the facts in *Pecore*: Michael Welters and Emma McArthur, "Pecore's Troubles" (2010) 29 Est. Tr. & Pensions J. 139 at 156-157; Donovan Waters, "Sawdon Estate v. Sawdon: The Ontario Court of Appeal Rejects the Existence of Any Pecore Confusion" (2015) 34 Est. Tr. & Pensions J. 113 at 117-118. Either way, post-*Pecore*, it is possible for a donor to make a gratuitous transfer into joint tenancy which will be an immediate inter vivos gift but will allow the donor to retain the whole beneficial interest during the donor's lifetime, and have the property pass to the surviving joint tenant on the donor's death.

D. What presumption applies?

- [41] There are a number of legal presumptions available to assist in determining the beneficial interests of joint title holders. In *Pecore*, the Supreme Court of Canada confirmed that the presumptions of advancement and resulting trust still have a role in our common law. With respect to a gratuitous transfer of property from a parent to an adult child, the presumption of resulting trust will apply: *Pecore* at paras. 34-37
- [42] A number of cases have noted an apparent clash between the presumption of indefeasible title under s. 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], and the presumption of resulting trust at common law.
- [43] S. 23(2) of the LTA states:
- 23 (2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following
- [44] S. 23(2) sets up a presumption, consistent with our Torrens system of land holding, that title reflects the underlying beneficial interests in real property. That presumption may be rebutted in circumstances in which the beneficial ownership is not consistent with registered title: *Aujla v. Kaila*, 2010 BCSC 1739 at para. 32 [Aujla].
- [45] For example, it has been well established by appellate authorities in this province that, notwithstanding s. 23(2) of the LTA, when a transfer of land is gratuitous, the presumption of resulting trust may displace the presumption of indefeasible title: *Bajwa v. Pannu*, 2007 BCCA 260 paras. 9-16 [Bajwa], *Fuller v. Harper*, 2010 BCCA 421 at para. 43 [Fuller], *Suen v. Suen*, 2013 BCCA 313 at para. 34, *Bergen* at para. 42, *McKendry* at para. 37.
- [46] Therefore, in a case involving a gratuitous transfer of property between a parent and an adult child, the presumption of resulting trust will displace the presumption of indefeasible title under the LTA.
- [47] It is important not to overstate the importance of either the presumption of resulting trust or the presumption of indefeasible title. Neither is engaged in circumstances where the actual intention of the transferor at the time of transfer is clear on the evidence. As noted by Smith D. J.A. in *Fuller*, in discussing the presumption of resulting trust at para. 47:

Only if the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of transfer, will the presumption be applied to tip the scales in favour of the transferor or his estate.

E. The interests of creditors when property is held in trust

- [48] While the bulk of resulting trust cases deal with disputes amongst family members about beneficial ownership of property, the legal and beneficial interests that arise as a result of those family arrangements can impact the rights of third parties, including creditors. In *Re*

Heffner (1986), 10 B.C.L.R. (2d) 50, 32 D.L.R. (4th) 760 (C.A.) [Heffner], a bankrupt owned property in joint tenancy with his parents. The purchase price and all expenses for the property had been paid for by the parents. The court below held that the presumption of indefeasible title under the LTA meant that the bankrupt's registered interest must be deemed to be his property and available to creditors. The Court of Appeal overturned this decision and held that, notwithstanding the presumption of indefeasible title, the bankrupt was a bare trustee of the property for his parents and had no present interest in the property that could be realized by his trustee in bankruptcy.

- [49] Two cases from this Court were raised at the hearing of this matter that may suggest that the principle of indefeasible title under the LTA will always prevail where the interests of creditors are invoked: *Gully v. Gully*, 2018 BCSC 1590 [Gully] and *MCAP Service Corporation v. Chichak*, 2018 BCSC 1892 [MCAP]. It was suggested by counsel that Gully and MCAP stand for the proposition that the presumption of resulting trust will only displace the presumption of indefeasible title in disputes amongst family members, but where a third party creditor is relying on title, the indefeasibility of title will prevail. I cannot agree with this submission.
- [50] In *Gully*, Ms. Gully transferred a half interest in her home to an adult son for estate planning purposes. She registered the transfer on title but never told her son. The son later consented to judgment against him in favour of a creditor, *Ledcor*. *Ledcor* registered its judgment against title. Ms. Gully argued at trial that her son held his interest as a joint tenant on a resulting trust for her estate.
- [51] The Court in *Gully* found that *Ledcor* was entitled to rely on the registration of the son's interest on title as conclusive evidence of his interest. While the Court commented on the distinction between cases like *Pecore* that deal with disputes amongst family members and cases involving third party creditors, it is important to note that *Gully* turned on the factual finding of intention, namely that Ms. Gully intended to make a true gift of joint tenancy in the property in question to her son. In any case, to the extent that *Gully* suggests that the presumptions of indefeasibility and resulting trust apply differently depending on whether a claim is brought by a family member or a creditor, it appears that the Court of Appeal's decision in *Heffner* was not brought to the attention of the Court in *Gully*.
- [52] In the *MCAP* case, the spouse of the title holder sought to claim an interest in the proceeds of sale of a foreclosed property on the basis that she had a one-half interest in the property, pursuant to a resulting trust. The Court held that the creditors in that case had relied on the state of title, which was solely in the name of the other spouse, when registering judgment on title. As such, the Court held that the third party judgment creditor's claim, which was properly registered under the LTA, could not be defeated after foreclosure and sale of the property by a claim of a previously undisclosed obligation to the title holder's spouse.

- [53] It is clear that MCAP was the result of a particular set of facts, involving a trust claim that was raised laterally on the eve of distribution of foreclosure proceeds. It does not stand for the proposition that the presumptions apply differently depending on whether one of the parties attacking or defending the beneficial ownership of a title holder is a creditor or a family member. Nor could it stand for the proposition that a property could be held on a resulting trust for the purposes of family members but not for the purposes of creditors, a proposition that would undermine the very essence of a trust and is inconsistent with the Court of Appeal's decision in *Heffner*.
- [54] If a person holds an interest in property that is subject to a resulting trust, that person does not have a beneficial interest in the property; rather, the title holder is a trustee. The trustee cannot take the property for his or her own benefit and it flows as a matter of logic that he or she also cannot give the property to his or her creditors. The legal maxim of *nemo dat quod non habet*, roughly meaning "one cannot validly give away what one doesn't have" is applicable here. If the Property were held on a resulting trust, neither Mr. Petrick's creditors nor his trustee in bankruptcy would have any claim to it.

F. Is the beneficial ownership impacted by whether the transfer was gratuitous?

- [55] Most of the cases dealing with legal and beneficial ownership in joint tenancies, particularly those involving family members, are cases like *Pecore* and its companion case *Madsen Estate v. Saylor*, 2007 SCC 18, where the transfers were gratuitous.
- [56] In *Pecore*, the Supreme Court of Canada held that a resulting trust arises "when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner": at para. 20.
- [57] In this case, Mr. Petrick is a co-borrower under the mortgage. As such, unlike *Pecore*, this case does not involve a completely gratuitous transfer.
- [58] In *Bajwa* at para. 16, our Court of Appeal stated that where a person whose equitable interest is being challenged gave value for his or her interest in the property, there can be no resulting trust. Multiple cases from this court have held that in order for a resulting trust to apply, a transferee must have given no value for his or her legal interest: *Pavlovich v. Danilovic*, 2019 BCSC 153 at para. 43, *Mac v Mak*, 2016 BCSC 1140 at paras. 119-120, *Luo v. Vesterinen*, 2017 BCSC 1566 at para. 76.
- [59] Counsel for Ms. Chilton argues that a resulting trust could occur in circumstances where the alleged trustee provided value for his or her legal interest in the property, so long as he or she made a lesser contribution than the other joint tenant. This proposition is inconsistent with the decision of the Court of Appeal in *Bajwa* at paras. 13-16, which I am bound to follow.

- [60] Whether value was given is a question of fact to be determined on the evidence in each case: *Bajwa* at para. 16.
- [61] In two recent cases of this court, it has been held that the pledging of credit by a donee constitutes consideration such that the presumption of resulting trust will not arise on an otherwise gratuitous transfer: *Jafar-Gholizadeh v. Larijani*, 2018 BCSC 279 at para. 133 [*Jafar-Gholizadeh*], and *Aujla* at para. 59. In *Jafar-Gholizadeh*, Fitzpatrick J. held that the presumption of resulting trust did not arise where the donee joint title holder was liable under the mortgage but, on the specific facts of that case, a resulting trust was proven on the evidence.
- [62] With respect to the applicability of the presumption and the provision of value by pledging credit, counsel for Ms. Chilton seeks to distinguish cases like *Aujla* on the basis that in those cases, the original purchasers would not have been able to purchase the property without the pledging of credit by the joint tenant. In this case, I am urged to infer that Ms. Chilton did not require Mr. Petrick to be a co-borrower because her financial circumstances were secure, and to follow the approach taken by Master Scarth in *Re Eng*, 2012 BCSC 1096 [*Eng*], where the presumption of resulting trust was found to apply.
- [63] In *Eng*, Ms. Ng held two parcels of real property in joint tenancy with her adult son, Davie. On both properties, Davie was both a joint title holder and a co-borrower on the mortgage loan. Davie, like Mr. Petrick, went through a bankruptcy and did not disclose to his creditors that he had an interest in the properties he owned jointly with his mother. He advised his bankruptcy trustee that his name had been placed on title due to the language difficulties of Ms. Ng and for "estate planning purposes." In the context of the bankruptcy, Ms. Ng applied for a declaration that the properties were held on a resulting trust for her. Master Scarth found that this case was distinguishable from *Bajwa* because Davie was a 21-year-old with no financial security at the time he went on title and on the mortgage and as such, there was no value to his covenant under the mortgage.
- [64] *Re Eng* is distinguishable from the case before me on the matter of whether value was given by the donee for the joint title interest. In that case, Davie made no contributions towards the mortgage. It was clear on the evidence that one of the primary purposes of putting Davie on title was to enable him to assist Ms. Ng, who did not speak or read English, to deal with financial and municipal authorities on her behalf. Ms. Ng did not give consistent evidence that she intended to gift the property to Davie and in her oral evidence, she said she wanted the property to be distributed to her four children on her death. I do not find that *Re Eng* can be taken to stand for the broad proposition suggested by Ms. Chilton's counsel: that an adult child who goes on title as a joint tenant, and pledges his credit under a mortgage, will have given no value for his interest if the parent owner had the means to purchase the property without the child's assistance.

- [65] Ms. Chilton deposed that Mr. Petrick was not required to pledge his credit in order for her to obtain mortgage financing on the Property and that "he was added on the mortgage simply because he was going to be registered on title."
- [66] I am not persuaded that simply because Ms. Chilton may have been able to purchase the property without Mr. Petrick pledging his credit, Mr. Petrick did not give up something of value when he became a co-borrower. The pledging of credit exposed Mr. Petrick to risk. Irrespective of Ms. Chilton's means, Mr. Petrick remained jointly and severally liable on the mortgage debt. Further, it appears that from 2006 to 2011, Mr. Petrick may have been in better financial circumstances than his mother. In his affidavit evidence, he deposed that during that period he made cash gifts in the range of \$2,000 to \$5,000 to his mother, not exceeding \$10,000 a year. Therefore, while it may not have been necessary for Mr. Petrick to have been named on the mortgage, he certainly had the means to service the mortgage and indeed, I find it more likely than not that he did make some payments on the mortgage over the years.
- [67] Therefore, I find that Mr. Petrick gave value for his interest in the Property and Ms. Chilton did not gratuitously make Mr. Petrick a joint tenant. As this was not a gratuitous transfer, the presumption of resulting trust does not apply.
- [68] Irrespective of the applicable presumptions, I find that on the evidence it is clear that Mr. Petrick did acquire a beneficial interest in the Property in 2006. Mr. Petrick gave valuable consideration for his interest in the property and as such he was a co-purchaser of the Property; he was never a trustee.

G. What was Ms. Chilton's intention?

- [69] Even if Mr. Petrick had not provided value for his interest in the Property, I would find on the evidence that Ms. Chilton's intention was not consistent with the Property being held on a resulting trust.
- [70] The single determinative factor in the doctrine of resulting trust is the actual intention of the transferor or, in the case of a joint purchase, the provider of value: *Pecore* at para. 55, *Bergen* at paras. 38-41.
- [71] Ms. Chilton deposed that, in 2006 and now, her intention was for the Property to pass outside her estate on her death. This can only mean that she intended for Mr. Petrick to have a right of survivorship in the Property. Her evidence simply does not support the characterization that her counsel has sought to place on it in submissions, namely that Ms. Chilton intended Mr. Petrick to hold the Property on a resulting trust for her estate. If Mr. Petrick were holding the Property on a resulting trust for Ms. Chilton's estate, the Property would fall into her estate on her death and be subject to probate. This is precisely the result that Ms. Chilton deposed that she was seeking to avoid when she put Mr. Petrick on title as a joint tenant.

[72] Counsel for Ms. Chilton has urged me to find a resulting trust on the basis that there was an agreement between Ms. Chilton and Mr. Petrick that she could ask for the property back at any time. The problem with this argument is that Ms. Chilton's own evidence does not support this alleged agreement. Ms. Chilton is unequivocal in her affidavits that she intended for the Property to pass outside her estate, which would not happen if the property were returned to her.

H. Conclusion re: Mr. Petrick's interest

[73] I find that in all the circumstances, Mr. Petrick acquired a beneficial interest in the Property in 2006. At the time of the 2014 Transfer, Mr. Petrick was a true joint tenant with a present beneficial interest and a right of survivorship in the Property.

I. Relevance of severance

[74] A joint tenant may sever a joint tenancy at any time and when a joint tenancy is severed, the joint tenancy is converted into a tenancy in common and the right of survivorship is extinguished. As a result of this, each co-owner becomes entitled to a distinct share rather than an undivided interest in the whole property. In *Bergen, Newbury J.A.* stated:

[40] Where a joint tenancy in land is concerned, on the other hand, either of the joint tenants is at liberty to sever the joint tenancy at any time – a fact that clearly undermines the notion that as a matter of law, a joint tenant receives a "full and perfect" inter vivos gift of the "survivorship" (and counsel for Robert contends, of the property itself). Severance, which occurs automatically upon the destruction of the four unities, ends the *jus accrescendi*, with the result that each co-owner becomes entitled to a distinct share in the land rather than an undivided interest in the whole. (Under s. 18(3) of the Property Law Act, R.S.B.C. 1996, c. 377, a joint tenant may sever the joint tenancy--and thus the "survivorship" - by transferring the property to himself and need not even notify the co-owner. See generally Law Reform Cm'n., *supra*, at 5-9 and 33-44; and A.J. McClean, "Severance of Joint Tenancies" (1979) 57 Can. B. Rev. 1.)

[75] Severance is effected by any action that destroys the four unities (title, interest, time and possession) or any course of action that reasonably suggests that the interests of all were mutually treated as constituting a tenancy in common. Bankruptcy and partition are both circumstances that will cause the joint tenancy to be severed: *Zeligs* at para 47.

[76] If Mr. Petrick had not engaged in the 2014 Transfer, his bankruptcy would have served to sever the joint tenancy, making him an owner of one half of the Property as a tenant in common.

VI. Was the 2014 Transfer a Fraudulent Conveyance?

- [77] As I have concluded that Mr. Petrick had a beneficial interest in the Property, the question that I must next determine is whether his transfer of his interest in the Property to Ms. Chilton constituted a fraudulent conveyance.
- [78] The timing of the transfer of Mr. Petrick's interest in the Property to Ms. Chilton is significant. Mr. Petrick, through his company R Home Supply Centre Ltd. ("R Home"), had owned and operated a Home Hardware store in Dawson Creek. In July 2013, R Home's primary lender, the Bank of Nova Scotia, appointed a receiver of R Home. Mr. Petrick's financial troubles continued. In February 2014, HHSL commenced foreclosure proceedings in the B.C. Supreme Court with respect other properties owned by Mr. Petrick regarding amounts owing to HHSL by R Home, the payment of which were guaranteed by Mr. Petrick personally.
- [79] On May 13, 2014, the order nisi application in the foreclosure proceeding was filed. It was scheduled to be heard on July 22, 2014. Judgment was sought against Mr. Petrick for \$2,369,902. The 2014 Transfer of the Property was filed on July 21, 2014.
- [80] Pursuant to s. 1 of the FCA, a disposition of property, if made to delay, hinder or defraud creditors or others of their just and lawful remedies, will be void and of no effect against those persons. The legislation is to be given a fair, large and liberal interpretation: *Vancouver Coastal Health Authority v. Moscipan*, 2019 BCCA 17 [Moscipan] at para. 98.
- [81] In order to meet the intent requirement under the FCA, it must be shown that Mr. Petrick intended to put his assets out of the reach of his creditors. No further dishonest or morally blameworthy intent is required: *Botham Holdings Ltd. v. Braydon Investments Ltd.* 2009 BCCA 521 at para. 73, leave to appeal ref'd, [2010] S.C.C.A. No. 26.
- [82] The intent to defeat creditors and others must be proven as a matter of fact. This often involves drawing an inference from the surrounding circumstances: *Mawdsley v. Meshen*, 2012 BCCA 91 at para. 7.
- [83] Mr. Petrick admitted in his affidavit that the reason his interest in the Property was transferred was because he was in serious financial difficulties. He stated in his Affidavit #3 sworn August 23, 2017:
8. In 2014, when it became apparent that my company R. Home Supply Ltd. was in serious financial trouble, and I was as well, my mother requested that I transfer the legal title to a one-half interest in the condominium to her. At her request I did so.
 9. In doing so, neither my mother nor I had any fraudulent intent.

- [84] I find that the circumstances of the 2014 Transfer can lead to no conclusion other than that the transfer was done with the intent of putting the Property out of reach of Mr. Petrick's creditors. No consideration was paid for the 2014 Transfer and the 2014 Transfer was registered the day before an application for judgment against Mr. Petrick for over \$2.3 million. The requisite intent can be inferred from Mr. Petrick's own evidence where he attributes his "financial trouble" as the reason for the 2014 Transfer.
- [85] Since the purpose of the 2014 Transfer was to defeat the legitimate claims of Mr. Petrick's creditors, the transfer of the Property is void and of no effect as against the creditors of Mr. Petrick.

VII. Appropriate Remedy under FCA

- [86] The plaintiff seeks an order that a one-half interest in the Property be conveyed to the plaintiff, on the basis that the 2014 Transfer is void. The plaintiff argues that s. 6 of the PPA gives the Court the authority to order a deferred sale that would allow Ms. Chilton to live out her days in the Property, and on her death for the Property to be sold and 50% of the proceeds of sale distributed to the plaintiff as trustee in bankruptcy. It was argued that such an order would balance the interests of the trustee, who has a statutory duty to realize value from the assets of Mr. Petrick, and Ms. Chilton, an 82 year old retiree.
- [87] Counsel for Ms. Chilton questions whether the order sought by the plaintiff flows from the finding of a fraudulent conveyance. Counsel argues that pursuant to the authority of *Moscipan and Guthrie v. Abakhan & Associates Inc.*, 2017 BCCA 102 [Guthrie], if I find a fraudulent conveyance, the proper order that follows is not that the conveyance itself is set aside, but that it is ineffective as against all creditors of the grantor who may be hindered or delayed. In *Moscipan*, the result of a finding of a fraudulent conveyance was that the conveyance remained valid, but the grantor's creditors could execute against the subject property notwithstanding the conveyance. In other words, the property stayed in the name of the transferee, but the creditors could attach their interests to the property as if the conveyance had not taken place.
- [88] In *Guthrie*, the Court of Appeal discussed the appropriate order that should follow from a finding of a fraudulent conveyance. Madam Justice Newbury discussed the case authorities and academic commentary at length and concluded:
- [24] I agree that the better view is that the Act does not operate so as to "re-vest" the conveyed property in the grantor, nor to allow the grantor to set up his or her fraudulent act as a basis on which to re-claim it from the grantee. Rather, as stated by Anglin J. in *McGuire v. Ottawa Wine Vaults Co.* (1913) 48 S.C.R. 44, "the relief granted is properly confined to setting aside the impeached conveyance, thus removing it as an obstacle to the creditor's recovery under executions against their [sic] debtor." (At 56.) It is then open to the creditor to pursue such additional remedies as may be necessary, including (as we have seen) the registration of a judgment against land, a declaration of trust, etc.

- [89] Counsel for Ms. Chilton says that if the transfer to Ms. Chilton is a fraudulent conveyance, I must not order that Mr. Petrick's one-half interest in the Property be re-conveyed to him because this would be contrary to the holding in Guthrie.
- [90] I find that Ms. Chilton's position fails to account for the practical realities of this litigation, which is taking place in the context of a bankruptcy. Unlike in Guthrie, the creditors are not seeking to enforce their rights in this action; their rights are stayed as a result of the bankruptcy. Rather, all the assets of the bankrupt have vested in the trustee and the trustee has a statutory obligation to realize on those assets. Had the fraudulent conveyance not taken place, as a matter of law, title to Mr. Petrick's one-half interest in the Property would have vested in the Trustee. In Guthrie, the Court of Appeal held that a fraudulent conveyance does not void a transfer but the Court also held that the relief must be such as to remove the impeached conveyance as an obstacle to the creditors' recovery. In this case, given the intervening bankruptcy, the only way to remove the impeached conveyance as an obstacle to the creditors' recovery is to put the trustee in bankruptcy on title to the Property.
- [91] As such, I find that the appropriate remedy in this case is to order that a one-half interest in the Property be conveyed to the plaintiff as trustee in bankruptcy.

VIII. Does the applicant have standing to bring An Application under the PPA in the context of his FCA claim?

- [92] Ms. Chilton argues that the applicant lacks standing to bring this application. This is on the basis of the decision in Pallot v. Douglas, 2017 BCCA 254 [Pallot], wherein the Court of Appeal held that anyone seeking partition and sale under the PPA must have an immediate right to possession in the land. The respondent argues that Mr. Petrick's bankruptcy trustee has no such right.
- [93] In order to have standing under the PPA, a petitioner must have a possessory interest in land, which means an immediate right to possession of the land: Pallot at para 22.
- [94] As the plaintiff has been successful in establishing a fraudulent conveyance, for reasons discussed above, the order that follows is that Mr. Petrick's one-half interest as a tenant in common in the Property must be conveyed to the plaintiff in its capacity as trustee in bankruptcy. Once an interest in the Property is conveyed to the plaintiff, the plaintiff will have a possessory interest in the land and will have standing to pursue relief under the PPA.
- [95] I do not agree with Ms. Chilton's position that the plaintiff is required to bring two proceedings because the trustee in bankruptcy has no standing under the PPA until the fraudulent conveyance is established. As pointed out by counsel for the plaintiff, if the plaintiff had simply brought an action seeking conveyance of the Property, without giving notice to Ms. Chilton as defendant of the second part of the relief that they were seeking, namely the sale of the Property under the PPA, it would expose them to arguments of unfairness and potentially cause of action estoppel. Counsel cited the decision of the Supreme Court of Canada in Grandview v. Doering, [1976] 2 S.C.R. 621, in which the

Supreme Court of Canada emphasized the requirement that parties to litigation bring forward their whole case.

[96] I agree with counsel for the plaintiff on this point. If Ms. Chilton had been faced with the action seeking relief under the FCA without also being given notice that the trustee in bankruptcy intended to seek an order for sale of the Property under the PPA, it would have given rise to considerable unfairness. Moreover, having two separate proceedings on the same issues and facts is not in the interests of judicial economy. Therefore, I find it entirely appropriate that the plaintiff sought relief under both the FCA and the PPA in this proceeding. Further, I find that the order sought by the plaintiff under the PPA, which will defer the sale of the Property until such time as Ms. Chilton ceases to occupy the Property, is one that fairly balances the interests of the creditors of Mr. Petrick and Ms. Chilton's interest in living out her remaining years in her home.

IX. disposition

- [97] The 2014 Transfer constitutes a fraudulent conveyance and as such is of no force or effect as against the Trustee of the Estate of Rock Allan Petrick, a Bankrupt (the "Trustee"). The Trustee is entitled to a one-half interest as a tenant in common in the Property.
- [98] Ms. Chilton shall be entitled to reside in the Property for as long as she wishes. When she ceases to occupy the Property, or on her death if she occupies the Property for the remainder of her life, the Property shall be sold and the net proceeds of sale of the Property shall be divided equally between the Trustee and Ms. Chilton (or the personal representative of her estate as the case may be).
- [99] Counsel for the plaintiff provided a draft order with a number of specific terms pertaining to the respective responsibilities of Ms. Chilton and the Trustee as tenants in common of the Property. I did not hear submissions from either counsel with respect to those terms. If the parties are unable to agree on the terms that shall govern the tenancy in common they are at liberty to appear before me to speak to same.

X. Costs

- [100] As the plaintiff was the successful party, the defendants should be jointly and severally liable to pay the plaintiff's costs on Scale B. However, if there are facts relating to costs about which I am unaware, the parties may make arrangements to appear before me no later than 60 days from the date of this judgment to speak to costs.

"Francis J."

The Honourable Madam Justice Francis

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