

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Clarion Property Corporation v. Chichak*,
2025 BCSC 683

Date: 20250410
Docket: H150576
Registry: Vancouver

Between:

**Clarion Property Corporation
Serin Investments Ltd.**

Petitioner

And

**Derek William Chichak, Joanne Rae Nickel, Cardero Capital Corporation, First
West Credit Union, Beech Development Ltd., Carevest Capital Inc., Attorney
General of Canada as representing the interests in the Crown in Right of
Canada, and
The Tenants of the Property**

Respondents

- and -

Docket: S195291
Registry: New Westminster

**In the matter of lands and premises located at 8411 Laidmore Road,
Richmond, British Columbia more particularly known and described as P.I.D.:
003-630-935, Lot 1 Block 10 Section 22 Block 4 North Range 7 West New
Westminster District Plan 19395**

Between:

Jennifer Kay Chichak

Petitioner

And

**Derek William Chichak,
Cardero Capital Corporation and First West Credit Union**

Respondents

Before: The Honourable Justice Dion

Reasons for Judgment

Counsel for the Applicants and Petition Respondents, Cardero Capital Corporation and First West Credit Union:

S. R. Andersen

Counsel for the Petitioner and Application Respondent, Jennifer Kay Chichak and Derek Chichak:

K. E. Ducey

Place and Date of Hearing:

New Westminster, B.C.
January 21, 2025

Place and Date of Judgment:

Vancouver, B.C.
April 10, 2025

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Introduction

[1] Before the court are two cross applications asserting a claim to \$312,930.93 paid into court in these foreclosure proceedings in April 2016. The applicants, Cardero Capital Corporation and First West Credit Union (collectively “Cardero”), are judgment creditors of Derek Chichak. Cardero’s claim is based upon registration of their judgment in 2014 on title to lands located at 8411 Laidmore Road, Richmond, BC (the “Property”).

[2] The petition filed subsequently by Jennifer Chichak seeks a declaration that she had a fifty (50%) beneficial interest in the Property at the time it was sold, which beneficial interest ranks in priority to the interests of Cardero. If she is successful, she seeks the foreclosure funds plus interest and a dismissal of Cardero’s application with costs.

[3] Mr. Chichak and Ms. Chichak refer to each other in their affidavits by their first names. Accordingly, meaning no disrespect, I will do the same.

[4] The Property was the former matrimonial home of Jennifer and Derek.

[5] There is no dispute that the only parties or persons asserting a claim to the monies are Cardero and Jennifer.

Background

[6] The Chichaks were married in 1998. They have three children. The judgment in favour of Cardero arose from a guarantee provided by Derek in the context of a real estate development project. Derek was one of several guarantors of the mortgage to Cardero.

[7] The Chichaks purchased the Property on March 24, 1988 for \$122,500.00. At the time of purchase, title to the Property was registered in both the Chichaks’ names as joint tenants. The purchase was financed with a mortgage and some of their own funds. The Property was the family home from the date of purchase until 2016, when it was sold in foreclosure proceedings.

[8] Derek was the primary breadwinner in the family. Jennifer was a homemaker but was employed at times. According to her September 19, 2017 affidavit, Jennifer was working full-time outside the family home in 2006, and was not employed full-time in 2010. In 2006 and in 2010, Derek was self-employed and he needed to raise funds for his business.

[9] Between 1988 and 2006, the Chichaks jointly refinanced the Property with Richmond Savings, Canada Trustco Mortgage Company, Scotia Mortgage Corporation, The Bank of Nova Scotia, HSBC Bank of Canada and Conconi FT Holdings Ltd.

[10] On August 31, 2006, title to the Property was transferred solely into Jennifer's name for mortgage refinancing purposes with GMAC Residential Funding of Canada, Limited ("GMAC").

[11] On February 10, 2010, title to the Property was transferred solely into Derek's name for mortgage refinancing purposes with MCAP Service Corporation ("MCAP").

Procedural History

[12] In 2014, Derek was the sole registered owner of and resided at the Property.

[13] On May 12, 2014, Cardero obtained an order nisi and judgment against a number of debtors including Derek ("Cardero Judgment"). On August 21, 2014, the Cardero Judgment was registered against the Property.

[14] In June 2015, MCAP commenced foreclosure proceedings as the first mortgagee of the Property.

[15] The Chichaks, who were in a continuing relationship and who represented to their lender MCAP in 2010 that Derek was the sole beneficial owner of the Property, took the position at the foreclosure hearing on January 25, 2016 that, contrary to the representation they made to MCAP and the manner in which title was registered, Derek held half interest in the Property for Jennifer pursuant to a resulting trust.

[16] Jennifer says she transferred legal title to Derek in 2010 only because of the refinancing with MCAP. She says it was never her intention to give up her beneficial interest in the Property.

[17] On January 26, 2016, Justice Wilson approved the sale of the Property in MCAP's foreclosure proceedings by way of a vesting order that half of the net proceeds would be paid into court. On April 5, 2016, \$312,830.83 was paid into court (the "Jennifer Balance", as that term was defined in the Wilson Order). The monies would have been paid to Cardero based on registration of their judgment. However, the issue of entitlement to the Jennifer Balance was reserved to another date due to the timing at which the issue was raised and with a view of not losing the sale.

[18] The Jennifer Balance was to "stand in place and stead of the Lands, as of the date of completion of the sale, and all claims to the Jennifer Balance shall be determined on that basis". The Jennifer Balance remained in court pending claims thereto to be advanced by Jennifer and Cardero.

[19] Derek did not challenge the validity or the enforceability of the Cardero Judgement as against him. The sale of the Property closed on February 16, 2016. As a result, I am satisfied the date for determining any claims to the Jennifer Balance is February 16, 2016.

[20] Pursuant to a Notice of Application filed on September 13, 2017, Cardero applied for an order in the MCAP foreclosure proceeding that the Jennifer Balance be paid out to them. Derek and Jennifer opposed that application and, pursuant to her Petition filed October 11, 2017, Jennifer applied for an order that the Jennifer Balance be paid out to her on the basis of a resulting trust. I refer to Cardero and Jennifer's applications for payment of the Jennifer Balance collectively as the "Cross Applications".

[21] The Cross Applications before me were originally heard on September 28, 2018 by Madam Justice Iyer (as she then was). On November 1, 2018, Justice Iyer ordered the funds be paid to Cardero as the judgment creditors: *MCAP Service*

Corporation v. Chichak, 2018 BCSC 1892. Justice Iyer found that the manner in which title was registered was determinative such that she did not need to consider Jennifer's claim to a resulting trust.

[22] The funds were then paid to Cardero pursuant to Justice Iyer's Order.

[23] Jennifer appealed Justice Iyer's Order. On July 16, 2021, the appeals were granted and the Cross Applications were remitted back to this Court for determination: *Chichak v. Chichak*, 2021 BCCA 286.

[24] Instead of resetting this application for hearing as directed, Derek filed another application asserting that the judgment granted in this proceeding on May 12, 2014, had been extinguished as a result of Cardero's assignment of its mortgage over the Property. That application was brought in the original foreclosure proceeding initiated by Cardero.

[25] On September 26, 2022, Madam Justice Sharma dismissed Derek's application as *res judicata*: *Cardero Capital Corporation v. 0743323 BC Ltd*, 2022 BCSC 1828.

[26] Derek appealed Justice Sharma's decision. On October 12, 2023, the Court of Appeal dismissed that appeal on the basis that it was moot: *Chichak v. Cardero Capital Corporation*, 2023 BCCA 382. The Court of Appeal reasoned that the only live and remaining issue was:

[11] ... The issue of entitlement to the Jennifer Balance is joined between Ms. Chichak and Cardero. The judge was right to say that, pursuant to the Wilson Order, the only issue remained with respect to the Jennifer Balance was whether that money belonged to Ms. Chichak because of a resulting trust. There has yet to be a hearing to determine that issue, as directed by this Court...

[27] Cardero say they had not sought to set the hearing down again because the monies had already been paid to them.

GMAC Loan

[28] As noted above, between 1988 and 2006, the Chichaks jointly owned the Property and refinanced the mortgage of it with six different financial institutions.

[29] In 2004, Derek and Jennifer signed a written trust agreement documenting a trust agreement for a property that was registered in their names, but beneficially owned by Mr. Chichak's father. The trust agreement was prepared by Derek and it was available to both him and Jennifer in 2006 and 2010.

[30] In 2006, Jennifer became the sole registered owner of the Property and also the sole borrower of the mortgage granted by GMAC.

[31] In the GMAC mortgage, Jennifer represented that she owned the Property and had a right to mortgage it, that her title was subject only to charges permitted by GMAC (which were none) and to unregistered charges or encumbrances to which GMAC had agreed in writing (again which were none), and that she was not aware of any other claims against the Property. In cross-examination, Jennifer confirmed that the representations were true at the time the mortgage was signed in August 2006.

[32] In her affidavit sworn March 13, 2015, Jennifer attaches the Form A transfer of the Property to her by Derek in 2006, but she does not mention in her affidavit if a Spousal Waiver and Postponement was required of Derek by GMAC in 2006, nor is one appended as an exhibit, though all other transfer documents are appended.

[33] Cardero say that Jennifer's representations contradict the assertion in her Response and Petition. Her pleadings assert that at all times since it was acquired, she and Derek owned an undivided interest irrespective of legal ownership. Though in August 2006, she did not represent to GMAC that Derek had a beneficial interest in the Property, but that she was the sole legal and beneficial owner.

MCAP Loan and 2010 Transfer

[34] According to Jennifer, the mortgage broker who facilitated the MCAP loan in 2010 confirmed that while she and Derek each filled out credit applications, after initial discussions with MCAP, the indications were that because of their respective credit and job status (aside from not working full time, Jennifer's evidence was that Derek's credit rating was better than hers), it was most likely that the loan would be approved if Derek was the only applicant. According to the mortgage broker's evidence, the Chichaks agreed that Derek would be the applicant.

[35] Jefferson Froh, the lawyer who acted on the 2010 transfer, does not have any specific recollection of the reason the Property needed to be put in Derek's sole name, other than it was required to be for the purposes of the financing arrangements with MCAP. He said that at the time in 2010, he understood from Derek that the Property continued to be his and his wife's family home and that the transfer was simply to facilitate the new loan. Derek also confirmed the transfer was to facilitate the MCAP financing.

[36] Jennifer refers to MCAP's representative, Linda McCarten, who deposed that, according to notes on file, the application was presented in Derek's sole name. Jennifer says that these notes say that title was in their joint names and, while she says this was obviously incorrect, such was indicative of her and Derek's understanding as to ownership.

[37] Jennifer also deposed that because MCAP's policy was that all owners must be borrowers, they required that either she be added as a borrower or that she transfer title to Derek. Once it was determined that the application would proceed in Derek's name alone, MCAP then required Jennifer to sign a Spousal Waiver and Postponement ("Spousal Waiver") for the transfer. Jennifer says this would not have been necessary if she had no further interest in the Property once the transfer was complete.

[38] However, Ms. McCarten says the Chichaks' assertion that it was a lending requirement of MCAP that title to the Property be solely in Derek's name is not true. MCAP did not require that title to the Property be registered solely in Derek's name.

[39] Further, as to the assertions made by Derek that (i) the Property was beneficially owned by him and his wife in equal shares and that at no time did his wife ever agree to give up her half interest in the property, and (ii) he holds the Property for himself and his wife on a resulting trust such that they are equal owners, Ms. McCarten says these statements are inconsistent with representations made by the Chichaks to MCAP.

[40] Ms. McCarten refers to the mortgage loan application dated January 15, 2010, wherein Derek certified that on closing he would be the only beneficial owner of the Property. According to Jennifer, MCAP will not fund a mortgage where the owners on title differ from the applicants for the mortgage. It is MCAP's policy that all owners (legal and beneficial) must be borrowers under the mortgage and provide a covenant to repay the funds advanced and must grant his or her interest in the lands as security for the performance of the obligation to pay.

[41] Ms. McCarten confirmed that in order to proceed with the application, either Jennifer had to be added as an applicant/borrower or she had to transfer her interest in the Property to Derek. MCAP took no position on what approach was taken and thus it is not correct that MCAP required title to the Property to be registered solely in Derek's name. It was for the borrower to decide whether to add Jennifer as an applicant/borrower or to have her interest in the Property transferred to Derek. This, Ms. McCarten says, is why the MCAP underwriter at the time of the application contacted the broker to confirm in whose name the application should be processed.

[42] Ms. McCarten also deposed that upon deciding to proceed with the application solely in Derek's name, it then became a condition precedent to the loan from MCAP that a "spousal consent", which is the Spousal Waiver, be obtained from Jennifer. Completion of this document was a lending requirement of MCAP, which they relied on.

[43] Finally, Ms. McCarten confirmed that the standard mortgage terms applied to the mortgage of the Property signed by Derek, whereby he declared to MCAP, among other things, that he owned the lands, he had the right to mortgage them and that there were no other unregistered interests in the land. MCAP relied upon Derek's declarations, which are consistent with certification of the mortgage.

[44] In 2010, Jennifer was dependent on Derek and his business to support the family. All of Derek's income derived from his business. In 2010, Derek needed additional funding for his business and Jennifer agreed he could use the Property as collateral for those loans and transferred the Property to him.

[45] This, Cardero says, is the clearest evidence of Jennifer's real intention: she agreed to transfer the Property to Derek so that he could obtain additional borrowings required by his business, which income supported their family.

[46] In Derek's affidavit filed July 6, 2015 in the MCAP foreclosure proceedings, he said that this (and another) mortgage were taken out by him to raise funds for businesses in which he was involved. He deposed that those funds were not used for family purposes other than a small amount which was used to pay off some credit card debt.

[47] That said, in his affidavit filed September 24, 2018, Derek deposed that prior to and after 2010, he paid for all the mortgage payments. Throughout their marriage, Derek worked full time while Jennifer contributed to the maintenance and upkeep of the Property and was primarily at home raising their three children. As a result, I find the mortgage monies were used for family purposes.

[48] As above, it was a condition precedent to the MCAP loan that Jennifer obtain and deliver to MCAP a "spousal consent", i.e. the Spousal Waiver. In the Spousal Waiver, Jennifer swore and acknowledged that the MCAP loan was in part for her benefit.

[49] Ken Krag, the solicitor who gave the advice to Jennifer, confirmed in the Certificate of Legal Advice that he explained to her the nature and effect of the Form

A transfer document which was used to effect the 2010 transfer. That is, to transfer all of her rights, title and interest in and to the lands to Derek. The Form A Transfer contained no reservation of rights on her behalf. Cardero says the implication is that Ken Krag explained this to Jennifer and she acknowledged to him that she understood that she would be transferring all of her rights, title and interest in and to the lands to her husband unconditionally, i.e. without reservation.

[50] In Jennifer’s affidavit sworn March 13, 2015 she deposed that:

“Although I transferred legal title to the Property to Derek, it was only because of the lending requirement to obtain the MCAP mortgage. It was never my intention to give up my beneficial interest in the Property.”

[51] Similarly, in her affidavit sworn September 19, 2017, she deposed that:

“Although I transferred legal title to the Property to Derek, it was only to obtain the better terms and interest rate offered by MCAP to Derek if he were both the borrower and sole registered owner of the Property. It was never my intention to give up my beneficial interest in the Property to Derek or anyone else.”

[52] Cardero says that Jennifer did not understand the difference between legal and beneficial ownership. In cross-examination, she clarified that her understanding of “beneficial ownership” was “something about the *Family Law Act* and that [her] 50 percent beneficial interest in the property would not be put into question”.

[53] In Jennifer’s affidavit filed on September 19, 2017, she deposed that:

“... I was clearly and specifically advised at the time by Ken Krag, my lawyer, that signing the spousal waiver did not give up my spousal rights to my fifty (50%) percent of the Property; that the waiver was only a postponement and waiver of my spousal rights as it related to the MCAP’s mortgage...”

[54] Jennifer says that the Spousal Waiver was a postponement and subordination of her rights to the Property to the rights of MCAP. Therefore, she says, it does not support a finding that she intended to give up all her rights to the Property when it was transferred into Derek’s sole name.

[55] Cardero says this evidence in Jennifer's September 19, 2017 affidavit is directed at her understanding that the Spousal Waiver would not impact her ability to assert a claim under the *Family Law Act*, S.B.C. 2011, c. 25 (previously the *Family Relations Act*, R.S.B.C. 1996, c. 128) to a half interest in all family property, including the subject property, in the event that she separated from Derek.

[56] Given this, Cardero says Jennifer's evidence regarding her intent and the interest she understood she continued to have in the Property (though incorrectly referred to in the affidavits as a "beneficial" interest) is really an assertion of an interest in the land pursuant to the provisions of the *Family Law Act*. No such claim has crystalized, they say. She and Derek are not separated; they remain married. As such, any claim to a "beneficial interest" based on the *Family Law Act* must be dismissed.

[57] In the MCAP mortgage application signed by Derek on January 13, 2010, he certified on closing that he was the sole beneficial owner, declaring that he had good and valid title to the Property free from encumbrances or claims, that he owned the Property and had the right to mortgage them, that his title was subject only to charges and encumbrances permitted by MCAP (there were none) and unregistered charges and encumbrances to which MCAP agreed in writing (there were none), that he had not given any other charge or encumbrance of the Property and he had no knowledge of any other claim against the Property.

[58] In cross-examination, Jennifer confirmed that she knew Derek would submit a mortgage application and that her expectation was that he would be truthful and he would represent to MCAP that he was the sole owner of the Property. She was also asked in cross-examination whether Derek's representations to MCAP that he was the sole beneficial owner of the Property were true. She said she did not know. Cardero says Jennifer's statements in her affidavits that she remained a beneficial owner is not her evidence, but rather, it is what her counsel prepared and which Jennifer signed. The importance of this, Cardero says, is that Jennifer did not understand what a beneficial interest was.

[59] When Jennifer transferred the Property to Derek in February 2010, the evidence is that she did so in order to obtain funds he needed for his business. As part of that transfer, the mortgage amount of \$520,000.00 in favour of GMAC, in which Jennifer was the sole borrower, was repaid in full and the mortgage was discharged.

[60] In cross-examination, Jennifer acknowledged she received a benefit from the 2010 transfer of the Property to Derek because:

- a) the loan proceeds from MCAP repaid in full the monies owed to GMAC, thereby discharging her liability to GMAC;
- b) she went from being the sole borrower on the covenant to GMAC to having no personal covenant to MCAP; and
- c) the transfer facilitated the loan from MCAP needed by Derek's business, which business generated almost all the income to support the family.

[61] Cardero says this admission of Jennifer is proof she received consideration for transferring the Property to Derek. They say that the evidence of Jennifer and Derek is neither credible nor reliable and it has evolved over time as evidence they have asserted has been wholly refuted by evidence from a disinterested third party: Ms. McCarten on behalf of MCAP.

The Chichaks' Evidence

[62] With respect to the evolution of their evidence, Cardero refers to two of Jennifer's affidavits, the first made March 13, 2015 and the second made September 19, 2017.

Jennifer's First Affidavit - March 13, 2015

[63] In her first affidavit, Jennifer deposed that:

- a) in 2006, it was a "lending requirement" of GMAC that title be solely in her name;

- b) in 2010, it was a “lending requirement” of MCAP that title be solely in Derek’s name;
- c) she never intended to give up her “beneficial” interest in the Property.

[64] Campbell Froh May and Rice LLP acted for Derek with respect to the 2010 MCAP refinancing. Ms. Ducey on behalf of the firm confirmed in a letter dated November 2, 2015 that she has reviewed her file regarding the February 2010 refinancing with MCAP and “determined that there are no documents in our file referring to the mortgagee’s requirement that the property be placed in Derek Chichak’s name.”

Jennifer’s Second Affidavit – September 19, 2017

[65] Cardero says that on September 19, 2017, and after the delivery of Linda McCarten’s affidavit filed on September 13, 2017, Jennifer revised her evidence regarding the loan transactions involving GMAC and MCAP.

[66] In cross-examination, Jennifer said she was not aware that a representative of MCAP, namely Ms. McCarten, had sworn an affidavit nor had she ever read any such affidavit. Cardero says, accepting that to be true, Jennifer’s legal counsel appear then to have drafted Jennifer’s second affidavit for her to sign to advance her position in this proceeding.

[67] Cardero says further that Jennifer’s second affidavit waters down the unequivocal assertion in her first affidavit that putting title in Derek’s name was a “lending requirement of MCAP” and instead seeks to explain why that was done once MCAP had deposed that there was no such requirement. Cardero submits that Jennifer’s second affidavit is clearly responsive to Ms. McCarten’s affidavit, which makes Jennifer’s evidence she was not aware of it nor had read it, surprising.

[68] The original wording in Jennifer’s March 13, 2015 affidavit is that:

In 2010, Derek decided to refinance the Property again to raise funds for his business and he approached MCAP Service Corporation (“MCAP”) for the refinancing. One of the lending requirements was that title to the Property be

registered solely in Derek's name. As a result, title to the property was registered solely to Derek on February 10, 2010 ... Although I transferred legal title to the Property to Derek, it was only because of the lending requirements to obtain the MCAP mortgage.

[69] The wording of Jennifer's September 19, 2017 affidavit is that:

While it may not have been, in the strictest sense, MCAP's lending requirement for the Property to be registered solely in Derek's name, the reality was that in order for MCAP to lend on the favourable terms and interest rate, the Property had to be in Derek's name, and Derek had to be the borrower ... Although I transferred legal title to the Property to Derek, it was only to obtain the better terms and interest rate offered by MCAP if Derek was both the borrower and the sole registered owner of the Property.

[70] Cardero says the fact that Jennifer did not know that Ms. McCarten had sworn an affidavit refuting it was a lending requirement and thus did not know why the language in her second affidavit had been revised is troubling. This, they say, renders her affidavit inherently unreliable.

[71] Notwithstanding this change in Jennifer's affidavit evidence, her evidence in cross-examination was that she did not have any personal knowledge of those facts. It is not her evidence, Cardero says, and she confirmed that all of the facts asserted were told to her by Derek.

[72] More importantly, Cardero says, the second iteration of this evidence is also demonstrably incorrect. Ms. McCarten swore a subsequent affidavit confirming that the assertion that Derek's beacon score entitled him to a better rate was incorrect. In fact, his beacon score fell below MCAP's minimum requirements such that the underwriter had to request an exception.

[73] Thus, Cardero says the entire story given by the Chichaks about why they transferred the Property, first to her because she could get a better rate with GMAC and later to Derek because he could get a better rate, was entirely undermined.

[74] In her oral submissions, Jennifer said this does not make sense because in 2006 Derek realized it would be prudent to put title solely in Jennifer's name for business reasons. In 2010, title was transferred solely to him because his strategy

did not work; he needed more money. In her written submissions, Jennifer said the 2006 and 2010 transfers were solely for mortgage refinancing purpose, not to hide the Property from creditors or for some other nefarious purpose.

[75] Cardero says no documentation has been produced to corroborate or confirm the unsupported assertion that Jennifer had a better credit rating than Derek or that GMAC was prepared to lend money at a lower rate of interest only if Jennifer was the sole borrower and sole registered owner to the Property. Jennifer does not have any personal knowledge of these facts (someone had to make those statements to her) and the unattributed statements in her evidence are therefore inadmissible.

[76] The mortgage from GMAC was registered on August 31, 2006. In Jennifer's second affidavit filed September 19, 2017, she deposed in relation to GMAC that:

At the time [August 2006], I was fully employed whereas Derek was self employed, and I was told that I was able to qualify for a better interest rate and terms than Derek. In order for the financing to be provided by GMAC at the better interest rate and terms, title to the Property had to be in my name solely and I had to be the sole borrower.

[77] Although Jennifer says that in August 2006 she was “fully employed”, that did not mean she was working “full time”. Rather, she meant she was working and running the house. In 2006, Jennifer was not working “full time”, she was working part time and earned approximately \$22,000. So, by August 2006, she may have earned \$14,500. Jennifer confirmed that her gross income in 2004 and 2005 was less than \$5,000. During this period, Derek was earning about \$120,000 per year and supporting the family from income earned through his business.

Cardero says part of the narrative to explain why the Property was transferred to Jennifer was the unsupported allegation that Jennifer was “fully employed” in 2006 but not “fully employed” in 2010.

Issue

[78] The issue I must decide is whether Jennifer has established that Derek held an undivided half interest in the Property for her pursuant to a resulting trust when

the Property sold on February 16, 2016. If she is unable to establish a resulting trust, then the foreclosure funds were properly paid out to Cardero.

Position of the Parties

[79] In summary, Jennifer says she never intended to give up her beneficial interest in the Property when she transferred sole ownership to Derek when he re-financed the Property with MCAP in 2010. She argues that, because her transfer of her legal interest in the Property to Derek in 2010 was gratuitous, the presumption of resulting trust arose, that Cardero have failed to rebut that presumption, and therefore that Derek held an undivided half interest in the Property on trust for her when the Property was sold on February 16, 2016.

[80] Cardero says that if Jennifer cannot establish a resulting trust claim, then the proceeds were properly paid to them as the judgment creditor whose judgment was registered on title next in priority when the Property sold. Cardero says neither the evidence tendered nor the applicable law enables this Court to find a resulting trust in the circumstances of this matter.

[81] Cardero argues that the evidence of the Chichaks is not credible or reliable. It is, they say, inconsistent, evolving, self-serving and, if accepted, means that the Chichaks acted with intent to obtain loans (one in 2006 and one in 2010) under false pretences. They argue that there are no contemporaneous documents that support or corroborate their position. Much of their “evidence” is inadmissible and all of it is unreliable. Finally, Cardero says direct evidence from MCAP (i.e. Ms. McCarten) refutes that it was a lending requirement that Derek be the sole borrower and that title had to be in his name or that he was entitled to a better rate.

[82] With respect to the law, Cardero submits that the Chichaks cannot “have it both ways”; that is, they cannot say when they are securing financing that Derek is the sole legal and beneficial owner of the Property and then, when faced with foreclosure and enforcement proceedings, suggest that Derek was in fact holding half of his beneficial interest Property on trust for Jennifer. Further, Cardero argues that Jennifer cannot avail herself of the equitable remedy of a resulting trust in

circumstances where she has not come to the court with clean hands: *Holland v. Holland*, 2007 CanLII 47154 (ON SC). In any event, Cardero submits that no resulting trust arises in these circumstances as the transfer was not gratuitous; Derek gave value for the interest he acquired and Jennifer received consideration.

Credibility and Reliability

[83] Before turning to my analysis, I will address the issue of the credibility and reliability of the Chichaks' evidence.

[84] Credibility concerns the honesty or truthfulness of a witness; reliability relates to the accuracy of the testimony: *Ford v. Lin*, 2022 BCCA 179 at para. 104.

[85] Credibility involves an assessment of the trustworthiness of a witness' testimony based on the veracity or sincerity of a witness and the accuracy of the evidence they provide: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013). As the Court explained in *Bradshaw*, that assessment involves the assessment of various factors, such as:

- a) the ability and opportunity to observe events;
- b) the firmness of his or her memory;
- c) the ability to resist the influence of interest to modify his recollection;
- d) whether the witness' evidence harmonizes with independent evidence that has been accepted;
- e) whether the witness changes his or her testimony during direct and cross-examination;
- f) whether the witness' testimony seems unreasonable, impossible, or unlikely; and
- g) whether a witness has a motive to lie.

Bradshaw at para. 186; citing *Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (B.C.C.A.), [1952] 2 D.L.R. 354; *R. v. S.(R.D.)*, 1997 CanLII 324 (S.C.C.), [1997] 3 S.C.R. 484 at para.128.

[86] Ultimately, the focus is on whether the evidence of the witness is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time: *Bradshaw* at para. 186; citing *Faryna* at para. 356.

[87] A trier of fact may believe all, part or none of a witness's evidence, and may attach different weight to different parts of a witness's evidence: *R. v. R.(D.)*, [1996] 2 S.C.R. 291, 1996 CanLII 207 (S.C.C.) at para. 93.

[88] I do not find Jennifer to be a credible witness as to the lending requirements of MCAP and the manner in which those requirements affected the Chichaks' decision to effect the 2010 transfer. Her initial evidence, i.e. that one of MCAP's lending requirements was that title to the Property be registered solely in Derek's name, changed in response to Ms. McCarten's evidence, which I accept, that while it was MCAP's policy that all owners of the Property (legal and beneficial) be borrowers under the mortgage, MCAP took no position on whether the Chichaks' should both become borrowers or Jennifer transfer her interest to Derek.

[89] While I accept that Jennifer was not aware of nor read Ms. McCarten's September 13, 2017 affidavit, the fact remains that she swore an affidavit six days later attesting to the very same facts she would have been unaware of. More importantly, I find that the modified evidence she gave in that later affidavit, i.e. that in order for MCAP to lend on the favourable terms and interest rate they did the Property had to be in Derek's name because his credit rating was better than hers, was again incorrect.

[90] Jennifer's evidence that her income deteriorated from 2006 to 2010 is also not credible. According to her Notice of Assessments, in 2006, she earned roughly \$22,000. By 2009, her earnings had increased by almost 60% to \$35,125, with a dip to \$29,242 in 2010.

[91] As for Derek, I find that his evidence that the MCAP mortgage proceeds were not used for family purposes is not credible. It contradicts other of his evidence, which I accept, that he covered the family's home-related expenses and that income from his business was used to support the family.

[92] More generally, I find Chichaks' evidence about their respective interests in the Property over time is neither credible nor reliable. Jennifer's positions varied in her pleadings, affidavits and representations to the various financial institutions she and Derek used to finance the Property. For example, in her pleadings, she asserted at all times that she and Derek each held a 50% beneficial interest in the Property irrespective of legal ownership. Yet, in August 2006, she represented to GMAC that only she held the legal and beneficial interest, not that Derek retained a beneficial interest in the Property. Derek represented the same for Jennifer with respect to the MCAP mortgage in 2010, but has now provided evidence in support of Jennifer's claim of a beneficial interest in the Property.

[93] In sum, I find that the Chichaks' evidence was, at times, inconsistent, self-serving, and at odds with the probabilities affecting this case as a whole and which I find have been shown to exist at the relevant times. I have therefore approached the Chichaks' evidence with caution, in particular regarding the lending requirements for the GMAC and MCAP loans and the manner in which those requirements impacted their decision-making with respect to transfers of ownership of the Property.

Legal Principles

Judgment Creditor's Interest

[94] A judgment creditor cannot take more than the interest of the judgment debtor. In particular, a judgment creditor's interest in property owned by a judgment debtor is subject to the equities in favour of an unregistered interest given by the owner prior to obtaining the judgment: *Chichak v. Chichak*, 2021 BCCA 286 [Chichak] at paras. 9–10; citing *Jellett v. Wilkie* (1896), 1896 CanLII 49 (S.C.C.), 26 S.C.R. 282 at 288–89.

[95] The *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 is the statute regulating the enforcement of judgments obtained in court proceedings. In respect of enforcement of a judgment against a person having an interest in land, it allows for registration of the judgment against title. As the Court of Appeal explained at para. 12 of *Chichak*, s. 86(3) of the *Court Order Enforcement Act* codifies the common law rule of recovery against a judgment debtor's interest in these terms:

Registration of judgments after October 30, 1979

86 ... (3) From the time of its registration the judgment forms a lien and charge on the land of the judgment debtor specified in the application referred to in section 88 in the same manner as if charged in writing by the judgment debtor under his or her signature and seal,

- (a) to the extent of his or her beneficial interest in the land,
- (b) if an owner is registered as a personal representative or trustee, to the extent of the interest of a beneficiary who is a judgment debtor, and
- (c) subject to the rights of a purchaser who, before the registration of the judgment, has acquired an interest in the land in good faith and for valuable consideration under an instrument not registered at the time of the registration of the judgment.

...

[Emphasis added.]

[96] Therefore, while the *Court Order Enforcement Act* renders a registered judgment a lien or charge on real property, it creates an interest in land in favour of the judgment creditor that is subject to the equities, including a pre-existing resulting trust: *Chichak* at paras. 16–20.

Presumption of Indefeasible Title

[97] The land title system in British Columbia is a Torrens system providing for registration of title. Section 23(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250 provides for the indefeasibility of title as follows:

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...

[98] This section creates a presumption, consistent with our Torrens system, that title reflects the underlying beneficial interests in real property, subject to a number of exceptions not relevant here. That presumption may be rebutted in circumstances in which the beneficial ownership is not consistent with registered title: *Petrick (Trustee) v. Petrick*, 2019 BCSC 1319 at para. 44; citing *Aujla v. Kaila*, 2010 BCSC 1739 at para. 32, aff'd 2013 BCCA 158. The burden is on the party seeking to challenge the state of title to prove otherwise: *McInerney v. Laass*, 2015 BCSC 1708 at para. 45; citing *Bajwa v. Pannu*, 2006 BCSC 921, aff'd 2007 BCCA 260.

[99] As Madam Justice Smith explained in *Suen v. Suen*, 2013 BCCA 313 at para. 34, the courts in British Columbia have endorsed three considerations for determining whether the statutory presumption of indefeasible title has been rebutted:

- a) the operation of a resulting trust which may be inferred where no value is given for a legal interest;
- b) the operation of an agreement between the parties that is contrary to the registered legal title; or
- c) taking into account the underlying equitable interests between the parties (e.g., considerations that arise in claims for unjust enrichment).

[100] In this case, Jennifer relies primarily on the competing presumption to the statutory presumption, namely, the presumption of resulting trust: see *Jafar-Gholizadeh v. Larijani*, 2018 BCSC 279 at para. 32. Alternatively, she argues that the presumption of indefeasible title is rebutted by her and Derek's agreement or common intention that she would retain a beneficial interest in the property: see *Jafar-Gholizadeh* at paras. 134–136.

Presumption of Resulting Trust

[101] In *Pecore v. Pecore*, 2007 SCC 17, the leading case on resulting trusts, Rothstein J. described that a resulting trust arises when title to property is in one

party's name, but that party, because he or she gave no value for the property, is under an obligation to return it to the original title owner: at para. 20; see also *McKendry v. McKendry*, 2017 BCCA 48 at para. 35.

[102] The first question in determining whether a resulting trust arises is therefore whether the party holding legal title to the property gave value for it.

[103] Whether a party gave value for their legal interest in a property is a question of fact to be determined on the evidence in each case: *Freeland v. Farrell*, 2022 BCCA 99 at para. 59; citing *Bajwa* at para. 16. The question for the court is whether the recipient of title provided "tangible, meaning real or material, value" for the interest in the property they received: *Freeland* at para. 63. That said, as this Court recently explained in *Chohan v. Chohan*, 2024 BCSC 420:

[75] ... the value provided need not be a direct monetary contribution towards the purchase. For example, in *Virk/Bajwa*, the defendant provided value rebutting a resulting trust, by serving as a covenantor on a mortgage, assisting in searching for the property, and engaging a realtor...

[76] Other cases have applied the *Virk/Bajwa* principle that serving as a mortgagor or covenantor may provide sufficient consideration to defeat a resulting trust claim: *Aujla* at para. 106; *Petrick (Trustee) v. Petrick*, 2019 BCSC 1319 at paras. 65–68; *Lafavor v. Nelson*, 2019 BCSC 1903 at para. 65; *Banihashemi v. Behshad*, 2021 ONSC 1145 at para. 44.

[104] If the Court is satisfied that no value was given, i.e. that the transfer was gratuitous, then the presumption of resulting trust is engaged. At this stage, the onus is placed on the transferee (or in this case the judgment creditor of the transferee) to lead evidence of the transferor's contrary intention on the balance of probabilities, in order to rebut the presumption of resulting trust: see *Fuller v. Harper*, 2010 BCCA 421 at paras. 45–46. In other words, the onus is on the transferee or judgment creditor to demonstrate that a gift was intended.

[105] As Madam Justice Dickson summarised in *McKendry*:

[35] ...The judge commences the inquiry with the presumption, weighs all of the evidence, and attempts to ascertain the actual intention of the transferor. The governing consideration is the transferor's actual intention. The presumption of resulting trust determines the result only where there is

insufficient evidence to rebut the presumption on a balance of probabilities: *Pecore* at paras. 20, 22-25, 44; *Kerr v. Baranow*, 2011 SCC 10 at para. 18.

[106] The effect of the presumption thus only becomes evident after all the evidence, both direct and circumstantial, on the surrounding circumstances in which the transfer was made, has been weighed. Only if the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of the transfer will the presumption be applied to tip the scales in favour of the transferor: *Fuller* at para. 47; citing Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed. (Markham, ON: LexisNexis Canada, 2009) at page 159, § 4.60.

The Parties' Intentions

[107] It is important not to overstate the importance of either the presumption of resulting trust or the presumption of indefeasible title: see *Petrick* at para. 47. Neither presumption is in fact engaged in circumstances where the actual intention of the transferor at the time of transfer is clear on the evidence: see *Petrick* at para. 47; citing *Fuller* at para. 47.

[108] Even if engaged, the presumption of indefeasible title can be rebutted by the parties' actual intentions. In *Jafar-Gholizadeh*, for example, the Court held that the presumption of indefeasible title may be rebutted by evidence that it was the parties' intention at the time of the transfer that the transferor would retain a beneficial interest in the property: at paras. 134–135; citing *Dhaliwal v. Olleck*, 2010 BCSC 1524 at para. 186, var'd on other grounds, 2012 BCCA 86. In *Jafar-Gholizadeh*, Madam Justice Fitzpatrick explained that the question is whether, on consideration of the entirety of the circumstances, a common agreement or intention arose such that the parties were *ad idem* that the actual title would not and did not accurately reflect the true ownership of the property as between the parties: *Jafar-Gholizadeh* at para. 139; citing *Dhaliwal* at para. 186.

[109] Either way, if the actual intention of the transferor or the common intention of the parties at the time of transfer is clear on the evidence, that intention governs and

is determinative of the beneficial ownership of the property: see *Petrick* at paras. 69–72; *McKendry* at para. 35.

[110] The type of evidence that may be considered to determine the transferor's intention was admirably summarized by Madam Justice Dillon in *Schouten Estate v. Swagerman-Schouten*, 2014 BCSC 2320:

[5] What type of evidence may be considered to determine the transferor's intention? Once the court has determined the proper presumption to apply, all of the relevant evidence should be weighed, depending on the facts of the case (*Pecore* at para. 55). The type of evidence that may be considered was discussed in *Pecore* at paras. 56-70. The Supreme Court of Canada at para. 59 expanded the traditional rule that evidence of intention ought to be contemporaneous with the transaction and said that evidence of intention subsequent to a transfer that is relevant to intention at the time of transfer should be assessed for reliability and weighed. Generally, the types of evidence germane to ascertaining intention include declarations and conduct contemporaneous with the transfer, evidence subsequent to the transfer, the documentary record as it relates to the asset, subsequent control and use of the property, other legal instruments, and tax treatment (*Pecore* at paras. 56-70; *Doucette v. McInnes*, 2009 BCCA 393 at paras. 56-64; *Fuller* at paras. 48-50, 66-67; *Chung* at para. 49; *Anderson v. Anderson*, 2010 BCSC 911 at para. 161 [*Anderson*]). The grant of a power of attorney at the same time as a grant of joint ownership may indicate that the transferor intended to give more than management control of property (*Pecore* at para. 67). A Property Transfer Tax Return filed in relation to a transfer is a factor to consider in relation to intention and may suggest the intention of gift if the presumption of advancement was the applicable presumption at the time of transfer (*Chung* at paras. 52-54). Evidence of intention that arises subsequent to a transfer must be relevant to the intention of the transferor at the time of transfer (*Pecore* at para. 59; *Turner v. Turner*, 2010 BCSC 49 at para. 57). Continuing control and use of property after the transfer by the transferor may not be conclusive because it may not be inconsistent with a gift (*Pecore* at paras. 62-66; *Fuller* at paras. 66-67; *Zukanovic v. Malkoc Estate*, 2011 BCSC 625 at paras. 134-135).

[6] Care must be taken to guard against after the fact evidence that may be self-serving (*Pecore* at para. 59; *Fuller* at para. 49; *Chung* at para. 51; *Anderson* at para. 164). The credibility of a witness should be gauged by its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions (*Farnya v. Chorny*, 1951 CanLII 252 (BC CA), [1952], 2 D.L.R. 354 at 357 (B.C.C.A.), *Aujla* at para. 36). Care must also be taken not to treat any single type of evidence as determinative but to weigh all of the evidence (*Pecore* at paras. 55, 68-69). D. Smith J.A. for the court in *Fuller* at para. 49 put it in a nutshell: "In short, the court must consider if the transferor had any rational purpose for the transfer other than a gift".

[111] I note here that, while this summary was technically provided in the more specific context of determining the transferor's intentions so as to ascertain whether the presumption of resulting trust arises, given the authority cited above, I cite it here to guide consideration of the transferor's intentions more generally.

Discussion

[112] As above, I am satisfied the date for determining any claims to the Jennifer Balance is February 16, 2016; the date on which the Property was sold in the foreclosure proceedings.

Cardero's Interest in the Property

[113] Section 86(3) of the *Court Order Enforcement Act* dictates that, as of February 16, 2016, the interest in the Property held by Cardero, as judgment creditor, was subject to the equities in favour of any unregistered interest given by Derek, as judgment debtor, prior to Cardero's registration of the Judgment: *Chichak* at paras. 9–10.

[114] Cardero's interest in the Property and entitlement to proceeds of its sale are therefore subject to Jennifer's claim that she retained a one-half beneficial interest in the Property at the time it was sold by virtue of the 2010 transfer and is thereby entitled to the Jennifer Balance: *Chichak* at paras. 16–20. As above, the question I must answer is whether she retained such an interest.

Did Jennifer Retain a Beneficial Interest in the Property?

[115] On February 16, 2016, Derek was the sole registered owner of the Property. Pursuant to the presumption of indefeasible title, Derek's title as registered at that time is presumed to reflect the underlying beneficial interests in the Property: *Land Title Act*, s. 23(2). That is, Derek is presumed to have been the sole legal and beneficial owner of the Property on February 16, 2016.

[116] The onus is therefore on Jennifer to demonstrate that, notwithstanding the registered title, she retained a beneficial interest in the Property as of February 16, 2016, by virtue of her transfer of her legal interest to Derek in 2010: *McInerney* at

para. 45. The governing consideration is Jennifer's actual intention in effecting the 2010 transfer: *McKendry* at para. 35. If, on the totality of the evidence, Jennifer's actual intention is not clear, Jennifer may be entitled to rely on the presumption of resulting trust. The question then becomes whether the 2010 transfer was gratuitous. If no consideration was given for the transfer, Cardero would have to demonstrate on all of the admissible evidence that the transfer was intended by Jennifer to be a gift to Derek of her interest: *Fuller* at paras. 45–46.

Jennifer's Actual Intention

[117] I find that Jennifer's actual intention is clear on the evidence: she intended Derek to have all legal and beneficial interest in the Property in order to secure the MCAP mortgage.

[118] From the time the Chichaks purchased the Property in 1988 to 2006, they refinanced with six different mortgage lending institutions with title to the Property registered jointly in their names.

[119] On August 31, 2006, further re-financing was sought with GMAC and the Property was transferred solely into Jennifer's name. The result of the various representations she made to GMAC were such that Derek had no beneficial interest in the Property and she was the sole beneficial owner. Those representations were contradicted in her Response and Petition where she now says that, at all times, she and her husband owned an undivided half interest irrespective of legal ownership.

[120] On February 10, 2010, further financing was sought with MCAP and the Property was transferred solely to Derek's name without restriction and without reserving any interest therein in favour of Jennifer.

[121] I find the reason Jennifer agreed to permit this transfer to her husband was because he required additional funding for his business. As a result, the mortgage provided Derek with an additional \$130,000 as the sole borrower. In 2010, she was dependent on her husband's income as it supported the family. Jennifer agreed that Derek could use the Property as collateral for the loan.

[122] Jennifer’s initial evidence was that for various reasons it was a lending requirement of MCAP that Mr. Chichak be the only borrower. I accept Ms. McCarten’s evidence and find that was not true.

[123] In the mortgage agreement between Derek and MCAP, accepted and signed only by him on January 13, 2010, he certified the following:

“I/We certify that, I/We will on closing be the only beneficial owners of the property at the security address indicated above”.

Form A Transfer and Spousal Waiver

[124] Jennifer signed the Form A Transfer and the Spousal Waiver on February 9, 2010 upon the advice of her lawyer, Ken Krag, as to the legal effect of those documents.

[125] In his Certificate of Legal Advice at the time, Mr. Krag confirmed he explained the nature and effect of signing the Form A transfer: it would transfer all of Jennifer’s rights, title and interest in and to the Property to Derek. Jennifer acknowledged this understanding by signing the document. I am satisfied and find that in the Form A Transfer, Jennifer made no reservation of rights on her behalf.

[126] I also accept and find that Mr. Krag explained the Spousal Waiver to Ms. Chichak as a postponement and waiver of her spousal rights as it related to the MCAP mortgage. The Spousal Waiver was specifically in relation to the *Family Relations Act* (now *Family Law Act*) and the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) which is clear on the face of the document itself. These statutes are engaged upon marriage breakdown and/or divorce. The terms of the Spousal Waiver that Jennifer agreed to are:

- (1) My Husband, being Derek William Chichak, will be the registered owner of the property known as 8411 Laidmore Road, Richmond, BC (the “Property”) and intends to refinance the said property, MCAP SERVICE CORPORATION (the “Lender”) is providing a loan (the “Loan”) in the approximate sum of \$650,000 which loan is to be secured by a mortgage (the “Mortgage”) charging the Property.

- (2) I do hereby waive and postpones fully to the Lender and its interest in and to the Property by reason of the Loan and the Mortgage and all rights that I may have now or in the future with respect to any share or claim I might have in the Property, it being my declaration and agreement that the Loan is in part for my benefit as I shall reside at the Property and that his waiver and postponement of my interest in the Property is a full and complete, legally binding waiver and postponement in favour of the Lender of any right, interest or claim that I might have with respect to the Property, whether arising pursuant to the Divorce Act, 1985 (Canada) and the Family Relations Act (British Columbia) and amendments thereto or otherwise.
- (3) My sale, waiver and release of the Property as specified herein is expressly limited to the Property, the Lender, the Loan and the Mortgage and shall not be construed in any manner to be a waiver and release of any other asset, liability or matter involving myself and my Husband.
- (4) I am aware of my right to consult with a lawyer with respect to the matters contemplated by this Waiver, Release and Declaration and have either done so or have elected not to consult with a lawyer.
- (5) I make this Waiver, Release and Declaration with the intent that it be fully binding and with the knowledge that the Lender is providing the funding to my Husband for the refinancing of the Property and that the Lender is relying on this Waiver and Postponement as a condition precedent to providing the Loan and accepting the Mortgage and security therefor.

And I make this Waiver, Release and Declaration, conscientiously believing it to be true and knowing that it is of the same force and effect as if I made under oath by virtue of the Canada Evidence Act.

[Emphasis in original.]

[127] Jennifer asserted in her submissions that the language in paragraph 3, that the Spousal Waiver was not a "...waiver and release of any other asset, liability or matter involving myself and my Husband" provides an exception for the beneficial interest she claims in these proceedings. I do not accept that submission.

[128] In cross-examination, she confirmed that the context in which she received legal advice about the Spousal Waiver was in relation to the *Family Law Act*.

[129] This then, appears to be the genesis of Ms. Chichak's understanding of her claim to the retention of a 50% interest and title to the Property she so strenuously advances. I have already found that Jennifer's understanding of a beneficial interest in relation to the MCAP mortgage was told to her by Derek.

[130] My finding is supported by her argument in the alternative that she retains an interest in one-half of the Property over the judgment creditor by operation of the *Family Law Act*. The authorities relied on by Jennifer relate to constructive trusts arising upon marital breakdown: *Rathwell v. Rathwell*, 1978 CanLII 3 (S.C.C.), [1978] 2 S.C.R. 436; *Myers v. Myers*, 1979 CanLII 497 (B.C.C.A.), (1979) 12 B.C.L.R. 52.

[131] Under s. 81 of the *Family Law Act*, spouses may have an ongoing half interest in family property which only arises upon separation. For the purposes of these proceedings, the Chichaks have always been and remain in a continuing relationship. Neither the *Family Relations Act/Family Law Act* nor the *Divorce Act* have any application to these proceedings.

[132] I wish to address what Jennifer and Derek say they spoke about regarding the 2010 MCAP financing prior to the Cross Applications being filed. In her first affidavit, filed March 16, 2015, in relation to a court action filed by Jetmov Mortgage Investment Corporation against Derek and others, Jennifer said that “In 2010, Derek decided to refinance [the Property] to again raise funds for his business”. She also said she never gave up her beneficial interest in the Property.

[133] In her subsequent two affidavits filed on September 19, 2017 and October 11, 2017, after the Cross Applications were filed, Jennifer’s evidence remained consistent that “[i]n 2006, Derek needed to raise funds for his business. It was agreed between Derek and I that we would refinance to property to do so”.

[134] In Derek’s affidavit filed September 24, 2018, he says, “I certainly did not ask her nor did I expect her to give up her interest in the Property when she took her name off title”.

[135] While Jennifer says in all three of her affidavits that she never gave up her beneficial interest in the Property, she does not say she and Derek ever discussed the retention of a beneficial interest for her in 2010. In fact, I have found that the issue was never raised by Derek with Jennifer. Her evidence was that they agreed to

refinance in 2006 and 2010 because Derek needed money for his business, not that they discussed the retention of a beneficial interest for her.

[136] Moreover, there is no evidence that Jennifer and Derek ever actually discussed the implication of the Spousal Waiver she signed. Jennifer's evidence in cross examination was that she specifically spoke to Mr. Krag about her beneficial interest, which he explained fully to her, in the context of the *Family Law Act*.

[137] Again, the evidence as to a person's actual intentions will generally be contemporaneous with or around the time of the transfer. Evidence of intention that arises after a transfer must be relevant to the intention of the transferor "at the time of the transfer", and the weight to be afforded to that evidence must be considered, particularly where the evidence may be self-serving or reflect a change in intention: *Jafer-Gholizadeh* at para. 36; relying on *Pecore* at para. 59.

[138] In cross examination, Jennifer said Derek prepared the 2004 trust agreement between them and his father, which she signed. She agreed at this time, that it was her expectation that Derek generally would protect her interests.

Linda McCarten's Evidence

[139] Ms. McCarten provided two affidavits, one dated September 13, 2017 and the second dated July 3, 2018. She refutes that it was a lending requirement that Derek be the sole borrower and that title had to be in his name or that he was entitled to a better rate. I accept Ms. McCarten's evidence, particularly as she is an independent uninterested third party to these proceedings.

No Other Evidence

[140] There is no document or any evidence whatsoever that corroborates the Chichaks' assertion that they intended for Derek to hold an interest in the Property in trust for Jennifer at the time of the 2010 transfer. To the contrary, the entirety of the documentary evidence clearly shows it was the actual intention of Jennifer to transfer all of her rights, title and interest in and to the Property to Derek as collateral for the loan from which she received benefit.

[141] I note here that Derek deposed in his affidavit made on September 21, 2018, that he read Jennifer's March 2015 and September 2017 affidavits. He confirms the facts contained in those affidavits as they refer to him. He does not acknowledge or attempt to explain Ms. McCarten's two affidavits refuting Jennifer's evidence.

[142] I am persuaded that the Chichaks appreciated the legal effect of holding title legally and beneficially, because they had done so for 18 years previous to the GMAC mortgage. As well, in 2004, Derek and Jennifer signed a written trust agreement for a property that was registered in their names, but beneficially owned by Mr. Chichak's father. This landholding arrangement was not new to them. It does not matter why they documented that trust relationship in 2004, although Derek deposes that the trust relationship with his father was documented because his brother-in-law asked them to do so. What matters is their prior experience in, and understanding of, documenting beneficial land interests.

[143] I find Jennifer's actual intention was to transfer her entire legal and beneficial interest in the Property to Derek as collateral for the loan for his business, which monies Jennifer derived a benefit, and which monies supported their family. I therefore conclude that, consistent with that intention, Jennifer did not retain any beneficial interest in the Property at the time it was sold, nor any right to the Jennifer Balance.

[144] Given that conclusion, I need not go on to consider the presumption of resulting trust, as it is not engaged: see *Petrick* at para. 47; citing *Fuller* at para. 47. However, in the event I am wrong that Jennifer's actual intention is clear on the evidence, I will go on to consider the presumption of resulting trust and the alleged agreement or common intention of the Chichaks nonetheless.

Presumption of Resulting Trust

[145] As above, the first question in determining whether a resulting trust arises is whether the party holding legal title to the property gave value for it, i.e. whether the transfer was gratuitous.

[146] I am satisfied the evidence establishes that the 2010 transfer was not gratuitous because Jennifer acknowledged receiving what I find to be tangible value for her interest in the Property, namely:

- a) the MCAP loan proceeds repaid in full the monies owed to GMAC, thereby discharging Jennifer's liability to GMAC;
- b) Jennifer went from being the sole borrower on the covenant to GMAC to having no personal covenant to MCAP; and
- c) the transfer facilitated the loan from MCAP needed by Derek's business, which business generated almost all of the income to support the family.

[147] As the 2010 transfer was not gratuitous, the presumption of resulting trust does not arise to rebut the presumption of indefeasible title.

The Chichaks' Agreement or Common Intention

[148] Jennifer argues, in the alternative, that the presumption of indefeasible title is rebutted by her and Derek's agreement or common intention that she would retain a beneficial interest in the property: see *Jafar-Gholizadeh* at para. 134.

[149] The question is whether, on consideration of the entirety of the circumstances, a common agreement or intention arose such that the parties were *ad idem* that the actual title would not and did not accurately reflect the true ownership of the property as between them: *Jafar-Gholizadeh* at para. 139.

[150] As I have found, there is no corroborating evidence to support any intention that Derek would hold the Property in trust for Jennifer. Rather, the Chichaks' actual and common intention was that Jennifer transfer all of her legal and beneficial interest in the Property to Derek in order to secure the MCAP mortgage.

[151] I have found on Derek's own evidence, that he did not ask Jennifer about giving up her interest in the Property when she took her name off title. They did not have a discussion about that, much less come to any agreement.

[152] Based on consideration of the entirety of the circumstances, I am unable to find that a common agreement or intention arose between Jennifer and Derek such that they were *ad idem* that the actual title would not and did not accurately reflect the true ownership of the Property as between them: *Jafar-Gholizadeh* at para. 139.

[153] The presumption of indefeasible title has not been rebutted.

Summary

[154] In summary, I am satisfied that the evidence, and particularly the evidence contemporaneous with the 2010 transfer, is sufficient to clearly establish that the Chichaks' actual and common intention at the time of the 2010 transfer was that Ms. Chichak would not retain a beneficial interest in the Property. While certain (self-serving, particularly the change between Jennifer's 2015 and 2107 affidavits) post-transfer evidence may support the Chichaks' current narrative that it would have been illogical for Ms. Chichak to have intended to transfer her beneficial interest in the Property, such an intention was in fact necessary and declared by the Chichaks for the purpose of obtaining the relevant mortgage funding.

[155] Even if I had found that Jennifer's actual intention was not sufficiently clear on the evidence, which I have not, I would have found that Jennifer has failed to rebut the presumption of indefeasible title. The relevant authorities satisfy me that Jennifer's pledging of credit/assumption of the relevant mortgage (which was used to pay some of Jennifer's debts) is sufficient tangible value to displace the presumption of resulting trust. That is, because Derek assumed all liability under the relevant mortgage and the funds received benefitted Jennifer, the 2010 transfer was not gratuitous and the presumption of resulting trust does not apply (see e.g. *Bajwa*, *Aujla*, *Jafar-Gholizadeh*, *Petrick*). Further, the totality of the evidence clearly demonstrates that no common agreement or intention arose such that Jennifer and Derek were *ad idem* that the actual title would not and did not accurately reflect the true ownership of the Property. In those circumstances, the presumption of indefeasible title prevails, Ms. Chichak has failed to establish a one-half beneficial interest in the property, and Cardero were entitled to the Jennifer Balance.

Conclusion

[156] Jennifer’s petition is dismissed. The application of Cardero is granted, with costs payable by Jennifer Chichak. Cardero have leave to make submissions as to costs in the usual process.

[157] Accordingly, I order that funds paid into court to the credit of this proceeding on April 5, 2016, in the amount of \$312,830.83 be paid out to “Gowling WLG (Canada) LLP” in trust for the applicant creditor herein.

“Dion, J.”