

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Townsend v. Donohue*,
2023 BCSC 684

Date: 20230427
Docket: S222496
Registry: New Westminster

Between:

Nicole Townsend

Petitioner

And

**Bernard David Donohue
aka Bernie Donohue and Kelly Lynn Donohue**

Respondents

Before: The Honourable Justice Lamb

Reasons for Judgment

Counsel for the Petitioner:

S. Sohi

Counsel for the Respondent Kelly Lynn
Donohue:

B. Duong
A. B. Richards

The Respondent Bernard David Donohue
aka Bernie Donohue, Appearing in Person:

B.D. Donohue

Place and Dates of Trial:

New Westminster, B.C.
January 17-19, 2023

Place and Date of Judgment:

New Westminster, B.C.
April 27, 2023

Introduction

[1] Nicole Townsend and Bernard Donohue are the registered owners of the property at 32369 Grebe Crescent, Mission BC (the “Property”) as joint tenants. Ms. Townsend seeks a declaration that she owns a 100% beneficial interest in the Property and that Mr. Donohue holds his interest in the Property in trust for her.

[2] Mr. Donohue agrees that Ms. Townsend is the only beneficial owner of the Property and that he only went on title to help her qualify for a mortgage. In most cases, Mr. Donohue’s concession would end the matter. However, Kelly Lynn Donohue, Mr. Donohue’s former spouse, opposes the relief sought by Ms. Townsend.

[3] Ms. Donohue argues that Mr. Donohue owns a beneficial interest in the Property and that the Family Maintenance Enforcement Program (“FMEP”) charge registered against the Property (the “FMEP Charge”) should remain in place. The FMEP Charge was registered against the Property in 2011 after Mr. Donohue failed to pay court-ordered child support and spousal support to Ms. Donohue. If Mr. Donohue is found not to have a beneficial interest in the Property, then Ms. Townsend wants an order discharging the FMEP Charge.

[4] There is little issue between the parties regarding the legal principles that apply. Land title registration provides “conclusive evidence at law and in equity” that Mr. Donohue owns the Property as a joint tenant: s. 23(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250; *Virk v. Pannu*, 2006 BCSC 921 at paras. 11-12, aff’d 2007 BCCA 260. However, the presumption of indefeasible title can be rebutted by operation of a resulting trust or an express trust: *Suen v. Suen*, 2013 BCCA 313 at paras. 34, 45. Ms. Townsend raised unjust enrichment as a consideration at the outset of the hearing; however, the doctrine was not pleaded, and the petitioner abandoned any claim based on unjust enrichment in her final submissions.

[5] The real issue in this case is to determine what Ms. Townsend and Mr. Donohue intended or agreed to when Mr. Donohue was added on title to the Property. Deciding this issue is complicated by the credibility of these parties.

Mr. Donohue in particular has filed inconsistent pleadings, affirmed contradictory affidavits, and was impeached a number of times during his oral testimony. Despite these credibility challenges, I accept that Mr. Donohue intended and expected that the Property would continue to belong to Ms. Townsend when he helped her out by co-signing the mortgage, which led to his being added as a joint tenant owner of the Property. In short, I am satisfied that Mr. Donohue holds interest in the Property in trust for Ms. Townsend.

[6] Given my finding that there is an express trust, I will not address Ms. Townsend's argument that Mr. Donohue holds his interest in the Property on a resulting trust.

[7] I will start by outlining the factual context for these proceedings. I will then comment in more detail on the issues of credibility and reliability of the key witnesses. I will then turn to the following issues:

- a) Does Mr. Donohue hold his interest in the Property pursuant to an express trust in favour of Ms. Townsend?
- b) If Mr. Donohue holds his interest in trust for Ms. Townsend, should the FMEP Charge be discharged?

[8] For the reasons that follow, I am satisfied that Mr. Donohue holds his interest in the Property in trust for Ms. Townsend. I am prepared

- a) to grant the declaration sought by Ms. Townsend (as outlined at the conclusion of these reasons for judgment);
- b) to make a vesting order that title to the Property be transferred into Ms. Townsend's name;
- c) to order the discharge of the FMEP Charge; and
- d) to order costs in favour of Ms. Townsend as against Ms. Donohue.

Procedural overview

[9] These proceedings were initiated by way of petition filed by Ms. Townsend on December 31, 2019, with an affidavit in support made the same day.

[10] Ms. Donohue filed a response to petition and supporting affidavit on January 31, 2020. She amended her response with assistance from her current counsel on January 9, 2023.

[11] Mr. Donohue filed his original response opposing the relief sought together with a supporting affidavit on February 5, 2020. Mr. Donohue resiled from his original affidavit and amended his response, in effect withdrawing his opposition to the relief sought by Ms. Townsend. I will have more to say about Mr. Donohue’s change of position and change of testimony.

[12] The petition was set for hearing in April 2021. However, given the conflicts in the evidence and issues of credibility, the matter was referred to the trial list pursuant to Rule 22-1(7)(d) of the *Supreme Court Civil Rules*.

Background

[13] On February 12, 2000, Ms. Townsend married her former husband, Steven Townsend. They had two children together. On June 28, 2006, Ms. Townsend and Mr. Townsend purchased the Property for \$162,500 by paying a deposit of approximately \$8200 and securing a mortgage against the Property for the balance.

[14] In or about May 2009, Ms. Townsend and Mr. Townsend separated. Ms. Townsend continued to live at the Property with their two children. Mr. Townsend moved out, but he continued to pay half the mortgage payment for approximately 10 months after separation. Mr. Townsend also paid support to Ms. Townsend.

[15] Mr. Donohue and Ms. Donohue were married in 2001 and separated in or around the end of June 2009. They had three children together, the eldest born in June 2000 and the youngest born December 2007.

[16] Mr. Donohue started dating Ms. Townsend in the summer of 2009 after Ms. Donohue threw him out. Mr. Donohue formally moved in with Ms. Townsend when he needed a place to stay in October 2009.

[17] In early 2010, Mr. Townsend told Ms. Townsend that he wanted to sell the Property or have Ms. Townsend buy out his interest, because he wanted to stop making mortgage payments. Ms. Townsend sought advice from Steve Pipkey, the family's mortgage broker. Mr. Pipkey told Ms. Townsend that, because there was little to no equity in the Property, she and Mr. Townsend would receive nothing after paying conveyancing costs if they sold the Property.

[18] Ms. Townsend decided to try to remortgage the Property in order to buy out Mr. Townsend's interest. Mr. Pipkey told her she would not qualify for a mortgage on her own because she did not have "enough income on paper", as the financing company would not consider as income for mortgage approval purposes the child support payments or child tax credit she received. Mr. Pipkey told Ms. Townsend that her mother (Deena Fischer) could not co-sign a new mortgage on the Property, as Ms. Fischer's debt ratio was too high as a result of the mortgage she had on her own home.

[19] I found Ms. Townsend's evidence regarding her conversation with Mr. Pipkey admissible not for the truth of what he said but rather as evidence admissible to explain her subsequent conduct, i.e., for a non-hearsay purpose.

[20] After some discussion between Mr. Donohue and Ms. Townsend (which I will review in more detail below), Mr. Donohue agreed to assist Ms. Townsend by co-signing a new mortgage on the Property in the amount of \$202,752 (which included a CMHC mortgage insurance premium of \$4752). Effective January 28, 2010, Mr. Townsend was removed from title to the Property, and Mr. Donohue was added as an owner in joint tenancy, which was consistent with the conditions set out in the mortgage commitment letter. It is likely that there was no equity in the Property after this refinancing.

[21] The following amounts were paid from the proceeds of the new mortgage registered against the Property on January 28, 2010:

- a) \$6000.00 to buy out Mr. Townsend's interest in the Property;
- b) \$186,482.35 to retire the balance of the existing mortgage;
- c) \$1095.50 to pay various conveyancing costs; and
- d) \$3879.15 to Ms. Townsend.

[22] Mr. Donohue did not contribute any funds as part of the refinancing and transfer of title. Mr. Donohue did not participate in the negotiations with Mr. Townsend for the amount of his buy-out. Although the order to pay suggests otherwise, Mr. Donohue did not receive any of the residual amount of \$3879.15 available through the refinancing: this remaining balance went to Ms. Townsend.

[23] As of January 2010, the monthly mortgage payment on the Property, including the requisite life insurance, was \$724.67.

[24] At some point after their separation, Ms. Donohue filed a Provincial Court family proceeding against Mr. Donohue to address the issues of custody and guardianship of the parties' three children and support. On May 21, 2010, after a four-day trial, Judge Skilnick made a final order in the Provincial Court family proceeding that included the following terms:

- a) sole custody and guardianship of the parties' two children was granted to Ms. Donohue;
- b) supervised access to the children was granted to Mr. Donohue;
- c) Mr. Donohue was required to pay child support of \$1139 per month, retroactive to November 1, 2009, with a requirement that he pay \$500 per month until arrears were paid off; and

- d) Mr. Donohue was required to pay spousal support in the amount of \$250 per month to Ms. Donohue.

[25] Both Mr. Donohue and Ms. Donohue were represented by counsel at the Provincial Court trial. Ms. Townsend and Ms. Fischer gave evidence on behalf of Mr. Donohue at that trial. In a financial statement filed in the Provincial Court family action, Mr. Donohue listed rent/mortgage, property taxes, insurance, and utilities on his list of monthly expenses. He listed the Property as an asset with negative equity.

[26] Shortly after Judge Skilnick made his order, Mr. Donohue applied to set aside the retroactive support order on the basis of hardship. He alleged he was paying substantial debts accumulated during his relationship with Ms. Donohue. Mr. Donohue's application to vary the support order was dismissed.

[27] In breach of Judge Skilnick's order, Mr. Donohue failed to pay any child support or spousal support to Ms. Donohue for the balance of 2010. On February 3, 2011, the Director of Maintenance Enforcement registered the FMEP Charge against the Property.

[28] In 2011, Mr. Donohue declared bankruptcy. At some point, FMEP started garnishing some of Mr. Donohue's wages to pay support to Ms. Donohue.

[29] In October 2013, Ms. Townsend ended her relationship with Mr. Donohue by kicking him out of the Property. From January 2010 to October 2013, Mr. Donohue had deposited his paycheque into a joint account from which the mortgage payment on the Property and other household expenses were withdrawn. After he moved out of the Property in October 2013, Mr. Donohue advanced \$330 to Ms. Townsend every second week between November 1, 2013 and December 13, 2013, i.e., he made four payments to Ms. Townsend after their relationship ended.

[30] Ms. Townsend took steps to try to remove Mr. Donohue from title to the Property in 2013. As of that time, the value of the Property according to BC Assessment was less than the outstanding mortgage principal.

[31] In 2013, Ms. Townsend tried unsuccessfully to retrieve the notary’s file related to Mr. Donohue’s becoming an owner on title to the Property. The notary told Ms. Townsend that her file had been lost in a flood. Ms. Townsend’s evidence regarding what she was told about the notary’s file was admissible not for the truth of what was said but rather as evidence admissible to explain why Ms. Townsend did not tender the notary’s file at trial. There is no evidence that Ms. Donohue took any steps to try to secure the notary’s file.

[32] Mr. Donohue continued to be employed by a mill between 2009 and March 2017, though he was off work on long term disability in 2014 after a car accident. He was then incarcerated for a year in Saskatchewan between 2017 and 2018.

[33] While Mr. Donohue was incarcerated, Ms. Townsend reached out to his then-girlfriend to ask that he write a letter about the Property. Sometime between March and June 2017, Mr. Donohue handwrote and signed a letter that he sent to Ms. Townsend, which reads as follows:

TO WHOM IT MAY CONCERN

I BERNARD DONOHUE AM WRITING this letter on my own free will to let anyone & everyone know that I went to the office of [the notary] with Nicole Townsend to get on a morgage of one percent to myself & ninety nine percent to Nicole Townsend but the morgage lender insisted we be fivety fivety. I only went on the morgage to help Nicole Townsend she was my girlfriend & she did Not qualify for a morgage on her own so I wanted to help her out as her husband Rusty Townsend wanted to be off of her morgage. I Bernard Donohue did Not have any money to help Nicole out nor did I invest a single dollar into her property. Nicole Townsend allowed me to live with her & her Two children. I paid her rent because living costs money. Again I Bernard Donohue have no intrest what so ever in Nicole Townsends property located at 32359 GREBE CRST. MISSION, BRITISH COLUMBIA, V2V 4Z2.

THANK YOU.

[spelling, capitalization and underlining as per the original]

[34] Mr. Donohue testified at trial that, in writing the letter, he was hoping his name could be removed from title to the Property. He testified that he had “no trouble” writing the letter because the Property was not his place, that he had enjoyed living there for four years, but he had never had a beneficial interest in the Property.

[35] In 2018, after returning to British Columbia, Mr. Donohue was involved in a serious single-vehicle car accident that has been described as a suicide attempt. After he was discharged from hospital in October 2018, Mr. Donohue moved back in with Ms. Donohue for the next year and a half. Mr. Donohue was living with Ms. Donohue when his original response to Ms. Townsend's petition was drafted.

[36] As of July 1, 2022, the value of the Property according to BC Assessment is \$552,400. There was no evidence as to the outstanding amount, if any, of the mortgage on the Property.

[37] Mr. Donohue has signed mortgage renewal applications as required since January 2010.

Credibility and Reliability

[38] The key evidence in this matter regarding the remortgaging of the Property and adding Mr. Donohue as owner in joint tenancy in January 2010 was provided by Ms. Townsend and Mr. Donohue. Both faced challenges to their credibility.

[39] Ms. Townsend believes that the Property is hers and has always been hers. She is strongly motivated to shade her evidence to support her belief, and I find that she did so to some extent at this trial. For example, in her direct examination, she said that she paid the mortgage, property taxes and household expenses when Mr. Donohue lived with her. She testified in direct that Mr. Donohue did not pay any expenses during the four years they lived together, aside from rent in the range of \$300 to \$500 per month. However, it became clear through cross-examination on their joint bank account statements that Mr. Donohue routinely deposited his bi-weekly paycheque (ranging from as much as \$1569.80 in 2010 before FMEP started garnishing his wages to \$821.41 in 2011 when FMEP was garnishing) into their joint account from which the mortgage was automatically withdrawn bi-weekly. The bank account statements suggest that Ms. Townsend and Mr. Donohue co-mingled their money during their relationship and that Mr. Donohue regularly contributed more than \$300 to \$500 per month to their joint finances.

[40] By way of another example of her failure to provide reliable evidence, Ms. Townsend testified that Mr. Donohue stopped contributing to the household finances when he moved out of the Property in October 2013. However, under cross-examination, she was forced to concede that he made four payments of \$330 in November and December 2013. I accept that some of these funds were on account of expenses that were automatically withdrawn from their joint account, such as his cellphone bill and car insurance. However, I cannot conclude that Mr. Donohue's personal expenses accounted for the entire \$1320 he paid after moving out.

[41] On the other hand, I accept Ms. Townsend's evidence regarding the circumstances that led up to Mr. Donohue co-signing the mortgage. Her evidence regarding her mother's inability to assist was corroborated by her mother and makes sense. Further, I accept her evidence that Mr. Donohue agreed to co-sign the mortgage as a favour to Ms. Townsend and told her that he recognized the Property was hers. This is consistent with statements he made close in time to the remortgaging.

[42] Ms. Townsend was cross-examined on evidence she gave at the Provincial Court family trial between Ms. Donohue and Mr. Donohue, where the issues were custody of the three Donohue children, child support and spousal support. At the Provincial Court trial, when asked at the outset of her testimony about whether she owned or rented the home where she lived, Ms. Townsend responded that she owned it with Mr. Donohue. I accept her explanation that ownership of the Property was not an issue at the Provincial Court trial, and it was accurate that he was a registered owner on title. Mr. Donohue's ownership interest in the Property was not an issue in the Provincial Court matter.

[43] I accept that Ms. Townsend has tried to take steps to remove Mr. Donohue from title a number of times since he moved out, including at a time when there was little to no equity in the Property. Ms. Donohue testified that Ms. Townsend approached her between 2013 and 2014, asking to remove Mr. Donohue from title. Ms. Townsend asked Ms. Donohue to sign a document to remove the FMEP charge

in 2017, but Ms. Donohue was not prepared to do so after she received advice from FMEP. Contrary to Ms. Donohue's closing submissions at trial, Ms. Townsend's efforts to remove Mr. Donohue from title and to discharge the FMEP Charge are not a recent development.

[44] It is clear that Mr. Donohue has a limited affinity for the truth. An oath or affirmation to tell the truth does little to bind his conscience. He admitted to lying on his financial statement filed in the Provincial Court family action between him and Ms. Donohue. He swore an affidavit on August 10, 2020 in which he deposed that the "entire contents of the [affidavit he swore on February 4, 2020] is incorrect". On cross-examination, Mr. Donohue confirmed that he meant "false" when he said "incorrect", though he also acknowledged in cross-examination that some paragraphs in the February 4, 2020 affidavit were accurate despite his resiling from the entire affidavit.

[45] Mr. Donohue attributed the inconsistencies in his evidence to concussions and medication use; Ms. Donohue confirmed his serious injuries in the 2018 accident included injuries to his head, but the extent and timing of his medication use was not corroborated. Mr. Donohue also attributed some of the inconsistencies in the affidavits he swore in this proceeding to Ms. Donohue's influence.

Mr. Donohue was living under Ms. Donohue's roof when this proceeding was filed, and Ms. Donohue acknowledged that they had arguments arising from her being named as a party. Ms. Donohue did not know why she was involved and why costs were being sought against her. In his second affidavit (sworn August 10, 2020) and his third affidavit (sworn April 1, 2021), Mr. Donohue deposed that Ms. Donohue compelled him to swear the February 2020 affidavit in an attempt to "fraudulently" obtain a "wrongful" interest in the Property. When asked under cross-examination whether the allegation of Ms. Donohue's influence on his February 2020 affidavit was true, Mr. Donohue responded, without irony, "Obviously: I swore to it."

[46] After considering Mr. Donohue's evidence as a whole, I am satisfied that Mr. Donohue is prepared to lie, including under oath or affirmation, when lying benefits his interests. I accept that it is reasonably likely that Mr. Donohue thought it

was in his interest to make an affidavit in February 2020 that favoured Ms. Donohue’s position, as they were living together at the time.

[47] Mr. Donohue has taken inconsistent positions over the years as to whether he had a beneficial interest in the Property:

- a) In the handwritten letter composed in 2017 while he was incarcerated, Mr. Donohue denied having an interest in the Property;
- b) In his original response to petition filed February 5, 2020, he claimed that “[a]t all material times, Mr. Donohue asserted his interest in the Property and fully intended to have an interest in the Property”;
- c) In his first affidavit in this proceeding made in February 2020, Mr. Donohue deposed that he did have an interest in the Property;
- d) Mr. Donohue filed a notice of family claim on February 5, 2020, naming Ms. Townsend as respondent, claiming an interest in the Property;
- e) In his second affidavit in this proceeding made in August 2020, Mr. Donohue deposed that he did not want an interest in the Property when he allowed Ms. Townsend to use his credit to qualify for a mortgage and he did not “now want an interest in the Property or have an interest in the property”;
- f) In an amended response to petition filed September 1, 2021, Mr. Donohue asserted as the factual basis for consenting to all the relief sought in the petition,
 - i. that he did not have a beneficial interest in the property,
 - ii. that he did not contribute to the acquisition, maintenance or preservation of the Property;

- iii. that he was registered as a legal owner as a “bare trustee only to assist the Petitioner with qualifying for a mortgage for the Property”; and
- iv. that it was agreed between him and Ms. Townsend that he would not acquire any beneficial interest in the Property; and
- g) at trial, Mr. Donohue returned to the position that he signed on to the mortgage so he could help Ms. Townsend keep her house because she had two children, and he acknowledged that the Property was Ms. Townsend’s.

[48] Mr. Donohue’s flip-flopping evidence on the issue at the heart of this litigation complicates the fact-finding exercise. His evidence also changed on the issue of whether he made mortgage payments or paid rent to Ms. Townsend, depending on whether he was asserting a beneficial ownership interest or not at that particular moment.

[49] In the end, after weighing all of the evidence, I accept Mr. Donohue’s testimony at trial that he co-signed the mortgage in January 2010 as a favour to Ms. Townsend, that he owns the Property as a joint tenant because the original financing company insisted on it, and that he understood the Property was and would remain Ms. Townsend’s property. I accept this evidence for the following reasons:

- a) prior to filing a notice of family claim in February 2020, Mr. Donohue had never formally claimed an ownership interest in the Property despite his own financial need at various times after he and Ms. Townsend separated and despite having experience with family law proceedings;
- b) Mr. Donohue has not pursued the family law claim against Ms. Townsend;
- c) Mr. Donohue’s handwritten letter from 2017, which he sent from prison, is consistent with Ms. Townsend’s account of their dealings with the notary,

and there is no evidence that Ms. Townsend told Mr. Donohue what to write;

- d) Mr. Donohue's evidence at trial is consistent with his handwritten letter;
- e) I accept the corroborative evidence of Deena Fischer, Shannon Fischer, Cindy Pye, and Norma-Lee Primrose that Mr. Donohue told them that he had co-signed the mortgage to help out Ms. Townsend;
- f) I accept the corroborative evidence of Deena Fischer that Mr. Donohue told her he wanted nothing to do with the Property because he just wanted to help;
- g) I accept the corroborative evidence of Shannon Fischer that Mr. Donohue told her he had no financial claim to the Property, but he was helping Ms. Townsend save the place for herself so she didn't lose it; and
- h) it is against Mr. Donohue's financial interest to renounce his claim to a beneficial interest in the Property.

[50] The final factor is significant. The Property is currently worth more than \$550,000 according to the BC Assessment Authority, and Mr. Donohue would presumptively have a 50% interest as a joint tenant: *Ryser v. Rawlings*, 2008 BCSC 1050 at para. 22. If the FMEP Claim is enforced against the Property, Mr. Donohue would likely be relieved of the outstanding balance he owes to Ms. Donohue for child support and spousal support, a debt which is currently more than \$100,000. In short, by disclaiming a beneficial interest in the Property, Mr. Donohue is walking away from a large sum of money at a time when he has limited financial means.

[51] Instead of claiming a beneficial interest in the Property, Mr. Donohue acknowledged at trial that his original intention was simply to help his then-girlfriend keep her home for her and her children. The fact that his position is contrary to his own self-interest helps to convince me that he is actually telling the truth this time. I do not accept Ms. Donohue's submission that Mr. Donohue is willing to compromise

his own self-interest because he is so strongly motivated to deprive Ms. Donohue. I accept that his strong animosity toward Ms. Donohue, which was evident at the Provincial Court family trial, reflected the recency of their separation and his despair over the hurdles he perceived that Ms. Donohue created to his parenting time with their children. That strong animosity was not obvious at this trial.

[52] In accepting the corroborative testimony of the non-party witnesses, I recognize that Ms. Townsend's mother and sister have a motive to provide supportive testimony. However, Ms. Pye and Ms. Primrose have no obvious incentive to be untruthful other than friendship with Ms. Townsend. Collectively, these witnesses presented their evidence in a simple, straight-forward manner. Deena Fischer's evidence was not shaken on cross-examination, and the testimony of the other witnesses was not subjected to cross-examination. The consistency and simplicity of their evidence was persuasive.

[53] Ms. Donohue challenges the credibility of both Ms. Townsend and Mr. Donohue on the basis that there was no written agreement from January 2010 or other contemporaneous documents to support their agreement that he was co-signing the mortgage but acquired no beneficial interest in the Property. This argument presupposes a level of sophistication that these individuals did not have.

a) Does Mr. Donohue hold his interest in the Property pursuant to express trust in favour of Ms. Townsend?

[54] I find that Mr. Donohue agreed to hold his interest in the Property in trust for Ms. Townsend.

[55] The Court of Appeal at para. 34 in *Suen* recognized that the statutory presumption of indefeasible title can be rebutted by "the operation of an agreement between the parties that is contrary to the registered legal title". At para. 45 of *Suen*, the Court explained an express trust as follows:

An express trust is created when the requirements of certainty of intention, subject, and objects of the transfer have been established and the trust property has been vested in the trustee: *Waters* at 132 and 167. ...

[56] In this case, the subject of the transfer is the Property.

[57] The object or beneficiary of the transfer is Ms. Townsend.

[58] As for certainty of intention, as noted by Justice Dillon at para. 201 in *Bradshaw v. Stenner*, 2010 BCSC 1398 [*Bradshaw BCSC*]; aff'd 2012 BCCA 296, “[c]ertainty of intention refers to the clear communication that the settlor intends that the recipient hold the subject matter in trust”. It is not necessary to use technical words when the trust is created: *Bradshaw BCSC* at para. 202. There must be an intention that the property is not to become the trustee’s property (in this case, Mr. Donohue’s) but rather that the property is to remain the property of the beneficiary (in this case, Ms. Townsend).

[59] I am satisfied on the evidence of Mr. Donohue and Ms. Townsend that there was the requisite certainty of intention. Mr. Donohue and Ms. Townsend agreed that the Property would continue to belong to Ms. Townsend even though Mr. Donohue became a registered owner of the Property (at the financing company’s insistence) when he agreed to co-sign the mortgage on the Property in January 2010. There was a clear understanding between Mr. Donohue and Ms. Townsend. This understanding was shared with their friends and Ms. Townsend’s family at the time. The first suggestion that Mr. Donohue might have a different understanding was when he filed his initial response to petition and affidavit. For the reasons outlined above, I prefer his evidence at trial that he accepted and agreed that the Property would belong to Ms. Townsend and not to him.

[60] Mr. Donohue’s intention is similar to that in *Bradshaw BCSC*, where the plaintiffs executed a sale “on paper” of property to the defendant, and the defendant secured a mortgage on the property, all in order to allow the plaintiffs to retain the property and avoid foreclosure. In this case, Mr. Donohue wanted Ms. Townsend to keep her home.

[61] Ms. Donohue argues that Mr. Donohue could have been added as a guarantor on the mortgage had he and Ms. Townsend not intended for him to

acquire a beneficial interest. However, this argument ignores the mortgage commitment letter which made mortgage approval conditional on joint tenancy.

[62] Ms. Donohue relies on *Naiker v. Naiker*, 2010 BCSC 224 as an analogous case, which she says the Court should follow. However, *Naiker* is distinguishable because one of the owners on title alleged that the other two registered owners held their interests in trust for him, and the trial judge could not find an agreement between the registered owners because the other two owners denied they had agreed to hold their interests in trust. In this case, Mr. Donohue acknowledges that he agreed to hold his interest in trust for Ms. Townsend, though they did not use those specific words.

b) If Mr. Donohue holds his interest in trust for Ms. Townsend, should the FMEP Charge be removed?

[63] I am satisfied that the FMEP Charge should be removed from the Property on the basis that Mr. Donohue does not have a beneficial interest in the Property.

[64] The FMEP charge is registered on title of the Property pursuant to s. 26 of the *Family Maintenance Enforcement Act*, R.S.B.C. 1996, c. 127.

[65] Section 26(10) of the *Family Maintenance Enforcement Act* reads as follows:

(10) On application by

(a) the person against whose land a notice of maintenance order is registered, or

(b) the creditor, if the director refuses to sign a discharge or postponement of a registered notice,

the court may make an order discharging or partially discharging the registered notice or an order postponing the registered notice to allow the registration of a charge.

[66] Section 26(10) of the *Family Maintenance Enforcement Act* authorizes the court to make an order discharging the FMEP Charge from title to the Property. Although s. 26(10) does not identify the grounds upon which the Court may order the discharge, I am satisfied that a finding that Mr. Donohue does not have a beneficial

interest in the Property is an appropriate basis on which to discharge the FMEP Charge.

Conclusion

[67] As outlined above, I am satisfied that Mr. Donohue holds his interest in the Property in trust for Ms. Townsend and that the FMEP Charge should be discharged from title. The petitioner has been successful on her petition, and she is entitled to costs: *Supreme Court Civil Rules*, Rule 14-1(9). Mr. Donohue did not oppose the relief sought, thus costs are payable only by the respondent, Kelly Lynn Donohue.

[68] As a result, I make the following orders:

- a) I declare that the respondent Bernard David Donohue holds the following lands and premises in trust for the petitioner, Nicole Townsend:

Civic Address: 32369 Glebe Crescent, Mission, BC V2V 4Z2

PID: 026-616-360

Legal Description: Strata Lot 2 Section 20 Township 17
New Westminster District Strata Plan BCS1727

(hereinafter referred to as the “Lands and Premises”)

- b) The title to the Lands and Premises shall be transferred into the sole name of the petitioner, Nicole Townsend, pursuant to s. 37 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.
- c) Pursuant to s. 26(10) of the *Family Maintenance Enforcement Act*, the Registrar of Land Titles at the New Westminster Land Title Office shall discharge charge BB1742249 registered against the Lands and Premises upon production of a court-certified copy of this order.
- d) The respondent Kelly Lynn Donohue shall pay costs to the petitioner.

“Lamb J.”