

CANADA / JUDGMENT

Ali v. Narayan

2024 BCSC 698

COURT

Supreme Court of British Columbia

DECIDED

19 March 2024

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2024 BCSC 698 Ali v. Narayan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ali v. Narayan,

2024 BCSC 698

Date: 20240319

Docket: S225291

Registry: New Westminster

Between:

Zaid Ali and

Shabnam Narayan

Plaintiffs

And:

Shalendra Narayan as Litigation Representative of the Deceased,

Logeshwaran Narayan

Defendant

Before: Associate Judge Krentz

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

J.D. Fisher

Counsel for the Defendant:

J.S. Malik

Place and Date of Hearing:

New Westminster, B.C.

March 19, 2024

Place and Date of Judgment:

New Westminster, B.C.

March 19, 2024

- [1] THE COURT: I am providing my reasons for judgment orally at the end of the hearing, as there is urgency in having a decision today. In the event a transcript is requested, I reserve the right to make editorial changes. Such editing would not change the reasoning or outcome of my decision.
- [2] This is an application regarding the estate of Logeshwaran Narayan ("Logesh"). I am going to use first names, meaning no disrespect to the parties, as there are a number of parties with the same surname.
- [3] Logesh and the plaintiff, Shabnam Narayan ("Shabnam"), married in 2010. The plaintiff Zaid Ali ("Zaid"), is Shabnam's son from a prior marriage. Shabnam has another son and I will refer to him later. Logesh immigrated from Fiji to Canada in August 2011. Shabnam had already been a resident here. In October 2012, Logesh and Shabnam purchased a property on 156th Street in Surrey, B.C. It was described initially as the family home but, more recently, has been a rental property.
- [4] The position of Logesh is that as he was unable to obtain financing for the purchase, Shabnam and Zaid were on title at the time of the purchase. The intention was to tear down the home on the property to build a new home. In 2015, Zaid transferred his interest to Logesh. As a result, Logesh and Shabnam were on title as joint tenants. Steps were started to construct the new home, including getting estimates, building permits and a construction loan.
- [5] In February 2017, Shabnam and Logesh separated. In June 2018, the joint tenancy was severed so that each of them had an undivided one-half interest. In March 2020, this proceeding was commenced. In this action, Zaid and Shabnam seek an order that Logesh transfer his interest in the property back to Zaid. Logesh filed his response to the civil claim in May 2021. A notice of trial was filed for a five-day trial to commence in November 2022. Both Logesh and Shabnam were examined in July 2021.

- [6] On December 17, 2021, Logesh passed away. In his will, Logesh named his brother, Shalendra Narayan ("Shalendra"), as the executor and trustee of the estate. The beneficiaries pursuant to Logesh's will included Shalendra and his sister, Shobna Narayan.
- [7] Some further relevant background appears to be the following. The other child of Shabnam is Mustafa ("Mustafa"), and he is Zaid's younger brother. They are both in their 30s. Around 1996, using funds from the estate of the biological father of Zaid and Mustafa, Shabnam purchased a property on 144th Street in Surrey. She lived there with her two sons, her parents and a sister.
- [8] It is alleged that in 2009, Zaid and Mustafa used funds that they received from their father's estate, somewhere in the area of \$26,000 to \$35,000 each, to apply against the mortgage on the 144th Street property. It is also alleged that they made regular payments thereafter on the mortgage.
- [9] It is further alleged that prior to the marriage, Logesh agreed that any real property or investments that he and Shabnam had would remain their separate property. The 144th Street property was sold in 2012 and the 156th Street was purchased for approximately \$480,000. It is alleged that the downpayment for that property came from the proceeds of the sale of the 144th Street property.
- [10] As Zaid had a low income at the time he did not qualify for a mortgage, so Shabnam was required to go on title as co-owner and a covenantor on the mortgage. The position of Shabnam and her sons is that the beneficial owners of the property were Zaid and Mustafa.
- [11] With respect to the litigation history, prior to the death of Logesh he had instructed counsel to commence a family law proceeding and to seek a division of family property, which would include the 156th Street property. However, that proceeding was not commenced until after his death.
- [12] In this action, a trial was set for November 2022 but was adjourned at the request of counsel for Shalendra. That request was in October 2022, as counsel was not available for those trial dates. Shalendra's counsel also took the position that five days would not be enough time.
- [13] Furthermore, the notice of family claim was only filed on October 14, 2022, and it was anticipated that the two actions could be heard at the same time. Also, Zaid had not yet been examined. The plaintiffs consented to an adjournment and a notice of trial was filed for a 10-day trial to commence on April 8, 2024.
- [14] Also at that time, Shabnam retained a family lawyer to represent her in the family law proceeding. Her counsel wrote to Logesh's counsel advising that a grant of probate was to be issued to Shalendra, in order for him to pursue the family law proceeding. Counsel for Shabnam in the family law proceeding indicated that if probate was not granted, they would apply to have the family law proceeding struck.

[15] On December 16, 2022, Logesh's counsel filed an application in both the family and the civil action seeking to have Shalendra appointed as administrator of Logesh's estate; and that he be substituted as a defendant for Logesh in the civil action, and appointed to represent the estate in the family law proceeding. On February 8, 2023, counsel for Shabnam in the family action filed a response to the application and again took the position that probate must first be granted. As a result, the applications by Shalendra were abandoned and he began the process of seeking a grant of probate.

[16] In my view, the legal position taken by counsel for Shabnam in the family law proceeding (which is different counsel than in the civil action) may have been incorrect. *Weaver Estate v. Weaver*, 2022 BCCA 79 at para. 19, sets out the interplay between the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] and the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Specifically, s. 150 of WESA provides that:

- (1) Subject to this section, a cause of action or a proceeding is not annulled by reason only of the death of
 - (a) a person who had the cause of action, or
 - (b) a person who is or may be named as a party to the proceeding.
- (2) Subject to this section, the personal representative of a deceased person may commence or continue a proceeding the deceased person could have commenced or continued, with the same rights and remedies to which the deceased person would have been entitled, if living.

[Emphasis added in *Weaver*.]

[17] The Court confirmed in *Weaver* that if there has not been an agreement related to property division or an order in place between spouses at the time of the death of a spouse, the estate of the deceased spouse would be able to start a proceeding for property division under the FLA.

[18] Where I disagree with counsel for Shabnam is in this respect. I do not believe WESA requires that there be a grant of probate issued in order for there to be a personal representative of the estate in a family law proceeding. Rule 20-6(1) of the Supreme Court Family Rules defines a 'litigation representative' as follows:

in relation to the estate of a deceased, means a person referred to in subrule (3) who is starting, conducting or defending a family law case on behalf of the deceased's estate.

[19] Subsection (3) says that:

If there is no personal representative for the deceased's estate, the court may, on application brought in accordance with subrule (5), appoint a person as a litigation representative to start, conduct or defend a family law case ...

- [20] Shalendra was named as the executor in Logesh's will, so as a litigation representative he had standing to commence the family law proceeding on behalf of the estate. If there was an issue as to his standing, Shalendra would still be able to apply to the court under subrule (5) for appointment as a litigation representative, without a requirement to first obtain a grant of probate.
- [21] Nonetheless, the matter proceeded on the basis that the family law action would be stalled until such time that a grant of probate was obtained. To that end, in July 2023 Logesh's counsel served a notice of proposed application in relation to Logesh's estate. There was a lengthy delay, that Shalendra's counsel acknowledges was due to their inaction, before Shalendra swore the required affidavit of assets and liabilities in October 2023. The probate application was then filed in November 2023 on a rush basis, but it was initially rejected. In December 2023, there were further materials submitted in response to the rejection notice. There were a number of follow-ups, until finally Logesh's counsel obtained the grant of probate on February 26, 2024.
- [22] The estate is seeking an adjournment of the trial for a number of reasons, which includes that there will now be steps taken to have Shalendra formally appointed, in both the civil action and the family action, as a representative of the estate. Furthermore, he will apply to have both actions consolidated for trial. It is likely a certificate of pending litigation will also be filed in the family action against the subject property.
- [23] I have been provided with drafts of the applications that have been prepared for filing, if the trial is adjourned. There may be other ancillary relief sought, including seeking further document disclosure and, as I indicated earlier, Zaid has not yet been examined.
- [24] The seminal case on an application for the adjournment of a trial is *Navarro v. Doig River First Nation*, 2015 BCSC 2173. In addition, the following principle was stated by Justice Adair in *Atkinson v. Atkinson*, 2021 BCSC 2033 at para. 13:

There is no dispute that the adjournment of a trial is a discretionary matter. This discretion must be exercised in accordance with the interests of justice, which in turn requires a balancing of the interests of the parties. The paramount consideration is whether it is necessary to adjourn the trial in order to ensure a fair trial on its merits. Overall, the interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits.

- [25] Navarro sets out a number of factors to be considered. I have considered those factors and they are as follows:

- the expeditious and speedy resolution of matters on their merits (Rule 1-3(1)) ;
- the reasonableness of the request ;
- the grounds or explanation for the adjournment ;

- the timeliness of the request ;
- the potential prejudice to each party ;
- the right to a fair trial ;
- the proper administration of justice ;
- the history of the matter, including deliberate delay or misuse of the court process ; and
- the fact of a self-represented litigant .

[Citations omitted.]

[26] As the trial has already been adjourned, to have it adjourned again cannot be considered an expeditious and speedy resolution of the matter. As for the reasonableness of the request and the grounds or explanation for the adjournment, I am satisfied that there are sufficient grounds or explanation for the adjournment and that the request is reasonable.

[27] What I have to balance with respect to the interests of the parties, is that it was Shabnam who insisted that Shalendra first obtain a grant of probate in order for the family action to proceed. This requirement imposed by Shabnam resulted in a significant period of time elapsing without any significant steps being taken within the litigation, all while the parties were waiting for the trial date. I have already expressed my views that perhaps a grant of probate was not required, but in any event it was something that Shabnam, through her counsel, insisted upon. While some of the delay in getting the grant of probate may rest at the feet of the estate, the delay is also attributable to the position taken by Shabnam.

[28] As for potential prejudice to each party, I have nothing before me that suggests evidence may be lost if the trial is adjourned. The evidence of Logesh remains available through his discovery. The parties that are expected to testify will remain available if the trial is adjourned.

[29] There is nothing of substance in the affidavits of Zaid and Shabnam that indicate there is potential prejudice to them. While it is understandable that they want to get this matter resolved so they can get on with their lives, even if the trial proceeds next month on the civil action, this property will likely still be tied up for a considerable period of time while the family law proceeding is litigated, with a certificate of pending litigation filed against the subject property.

[30] Another important consideration is the proper administration of justice. Section 10 of the Law and Equity Act, R.S.B.C. 1996, c. 253 provides that the court should avoid a multiplicity of proceedings, so that:

as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

- [31] There is significant overlap as between the civil and the family action, as they both focus on the same property and should be tried at the same time by the same judge to avoid inconsistent results.
- [32] Although this is not an application before me today, Justice Satanove in *Robak Industries Ltd. v. Gardner*, 2006 BCSC 1628 at para. 2, said the test that would be applied to have the matters tried together, is:
1. Do the pleadings disclose common claims, disputes and relationships between the parties?
 2. Having regard to matters outside the pleadings, are the claims so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and economic expense?
- [33] In referring back to the Navarro factors, I find it would be contrary to the proper administration of justice to have separate trials of these actions. It would be a costly exercise for all of the parties involved and could result in there being inconsistent decisions of the court.
- [34] Lastly, as to the history of the matter, including deliberate delay or misuse of the court process, I do not find that applies in this case. There may have been delay in obtaining a grant of probate, but I do not take it as a delay that would be tantamount to misuse of the court process. Accordingly, the application is granted and the trial will be adjourned generally.
- [35] Are there any submissions with respect to costs?

(SUBMISSIONS ON COSTS)

[36] THE COURT: I am just going to leave it as costs in the cause.

"Associate Judge Krentz"

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Prepared on 26 October 2026 · Esheria