

CANADA / JUDGMENT

## Feinstein v. Ashford

2005 BCSC 1379

### COURT

Supreme Court of British Columbia

### DECIDED

30 September 2005

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2005 BCSC 1379 Feinstein v. Ashford

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Feinstein v. Ashford,

2005 BCSC 1379

Date: 20050930

Docket: S90029

Registry: New Westminster

Between:

Linda Helen Feinstein

Petitioner

And:

Wade William Ashford

Respondent

Before: The Honourable Madam Justice Dorgan

Reasons for Judgment

(in Chambers)

Counsel for the Petitioner:

H. P. Gill

No one appearing for the Respondent

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Date and Place of Trial/Hearing:

August 9, 2005

New Westminster, B.C.

- [1] The application of the petitioner Ms. Feinstein raises the issue of severance of a joint tenancy in respect of real property. No one appeared on behalf of the estate of the respondent, the late Mr. Ashford. At the court's request, Mr. Gill swore his affidavit of service. The office of a Port Coquitlam solicitor who acted for Mr. Ashford in November 2004 and who acted for Mr. Ashford's estate in the spring 2005, and who corresponded with Mr. Gill as the estate solicitor about the property in issue, was served on July 8, 2005 with notice of this application. Mr. Gill received no response.
- [2] Ms. Feinstein's evidence is that she and Mr. Ashford met in July 2004. In her affidavit, she deposes as follows:
3. We were not ever married, nor had we ever been in a common-law relationship. We were in a conjugal relationship between July 17, 2001 and August 2002.
- [3] In November 2001, Ms. Feinstein and Mr. Ashford purchased a residential property in Pitt Meadows. The possession date was March 2002. According to Ms. Feinstein's evidence, they purchased the property with the intention of using it as their residence. However, the parties resided there together for only a short time over the summer of 2002. Mr. Ashford removed his belongings from the property and thereafter, they went their separate ways. In July 2004, Ms. Feinstein moved from the property and it has remained vacant since. Apparently, Mr. Ashford married sometime in 2004 or early 2005.
- [4] It appears that in February 2004, the parties agreed to list the property for sale and correspondence between Ms. Feinstein and Mr. Ashford's solicitor suggests that some negotiations took place regarding the disposition of the property or at least Mr. Ashford's interest in it. Unknown to Ms. Feinstein, on February 10, 2005, Mr. Ashford, in his solicitor's office, executed an application to re-register the title to the property as one of ownership in tenancy in common. Evidently, no steps were then taken to present the application at the Land Title Office for registration.
- [5] Mr. Ashford unexpectedly died and was declared deceased as at 10:04 a.m. on February 28, 2005. At 3:23 p.m. on February 28, 2005, the application to re-register the property was filed with the Land Title Office. On March 2, 2005, Ms. Feinstein received notice of the re-registration.
- [6] Ms. Feinstein seeks a declaration that she was a co-owner of the property in joint tenancy with Mr. Ashford prior to his death and that arising from the joint tenancy she became the sole owner of the property upon his death.
- [7] The question therefore is, was the joint tenancy severed prior to the death of Mr. Ashford?

- [8] A joint tenancy is created and maintained according to an elaborate set of rules. To create a joint tenancy, four unities must exist. The four unities are:
1. Unity of interest - the interest of each co-owner is the same in extent, nature and duration as the other;
  2. Unity of title - each co-owner must claim his or her title under the same act or instrument;
  3. Unity of possession - each co-owner is as much entitled to possession as the other; and
  4. Unity of time - the interests of each co-owner must arise at the same time.
- [9] A determination of whether a joint tenancy has been severed begins with the judgment of Sir W. Page Wood V.C. in *Williams v. Hensman* (1861), 1 John & H. 546 at 557, 70 E.R. 862 at 867. This often cited case (see for example *Walker v. Dubord*, [1992] B.C.J. No. 1192 (B.C.C.A.)), provides that a joint tenancy may be severed in three ways: (i) by one person acting on his or her own share; (ii) by mutual agreement; or (iii) by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.
- [10] The first rule is based on the fact that a joint tenant, without the consent of or even notice to the other tenants, is free to deal with his interest as any other owner and may deal with it in such a way as to destroy one of the unities (A.J. McClean, *Severance of Joint Tenancies*, (1979) 57 Can. Bar Rev. 1 at 2). Ms. Feinstein does not disagree with this proposition; rather she argues that the act of executing an application to re-register without actual filing with the Land Title Office prior to Mr. Ashford's death is insufficient to sever the joint tenancy.
- [11] The leading case on this point is *Stonehouse v. Attorney-General for British Columbia*, [1962] S.C.R. 103 ("Stonehouse"). In *Stonehouse* a husband and wife were registered as joint tenants in fee simple. The wife transferred her interest to her daughter. The conveyance was not presented for registration until the day after the wife's death. This was three years after the delivery of the conveyance. The daughter's interest was duly registered. The husband claimed against the Land Registry Assurance Fund, alleging he had suffered a loss solely because of the mistake of the registrar. The Supreme Court of Canada held that the joint tenancy was severed on delivery of the conveyance, not on the registration.
- [12] The decision turned on the wording of s. 35 of the Land Registry Act, R.S.B.C. 1948, c. 171. That section provided:
35. Except as against the person making the same, no instrument ... executed and taking effect after the thirtieth day of June, 1905, purporting to transfer, charge, deal with, or affect land or any estate or interest therein, shall become operative to pass any estate or interest, either at law or in equity, in the land ... until the instrument is registered in compliance with the provisions of this Act; ...

- [13] The court found that under the exception, a transfer is effective against the party making it, even before registration. The unregistered conveyance therefore transferred title from the wife to her daughter, severing the joint tenancy. The court held that while the general prohibition in s. 35 prevents an unregistered transfer from passing any estate or interest, it does not prohibit the transfer from having other effects, such as changing the joint tenancy to one of tenants in common, due to the exception noted in the section.
- [14] The Land Registry Act has been replaced with the Land Title Act, R.S.B.C. 1996, c. 250. Section 20 of the Land Title Act provides:
20. (1) Except as against the person making it, an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land unless the instrument is registered in compliance with this Act.
- [15] On this wording, I am satisfied that the Land Title Act does not change the law as it was set out in Stonehouse.
- [16] The transfer in Stonehouse involved a third party, the daughter. The transfer in the case at bar was to Mr. Ashford alone. However, the Property Law Act, R.S.B.C. 1996, c. 377 provides:
- 18 (3) A transfer by a joint tenant to himself or herself of his or her interest in land, whether in fee simple or by a charge, has and is deemed always to have had the same effect of severing the joint tenancy as a transfer to a stranger.
- [17] There is one further consideration; the Land Title Act provides that an instrument is operative as of the date of registration:
- 37 (1) An instrument or application so registered is deemed to have been registered and to have become operative for all purposes in respect of the title, charge or cancellation claimed by the application for registration, and according to the intent of the instrument or application, as of the date and time when the application was received by the registrar.
- [18] That same provision was in the Land Registry Act at the time that Stonehouse was decided. It read:
37. Every instrument purporting to transfer, charge, deal with, or affect land, or any estate or interest therein, shall pass the estate or interest at the time of its registration, irrespective of the date of execution thereof.
- [19] The result in Stonehouse clearly shows this provision did not affect the exception contained in the s. 35 of the Land Registry Act. It follows that s. 37(1) of the Land Title Act does not affect the current s. 20.
- [20] It is argued on Ms. Feinstein's behalf that the instrument that purported to transfer Mr. Ashford's interest was not binding on him as it failed to meet the common law requirement of delivery. Mr. Gill argues that Mr. Ashford's actions -- executing and leaving the application

to re-register with his solicitor -- are not enough to prove the document was "delivered". He relies on *Re Sammon* (1979), 94 D.L.R. (3d) 594 (Ont. C.A.), *Freed v. Taffel*, [1984] 2 NSWLR 322, *Corin v. Patton* (1990), 169 CLR 540 (H.C. Aus.), and *Milroy v. Lord* (1862), 45 E.R. 1185, in support of this proposition.

[21] In *Re Sammon* a husband and wife purchased a property in Toronto as joint tenants. Some time later they separated. The husband continued to reside at the property until his death. Eight months prior to his death, the husband signed and sealed a deed purporting to transfer his interest in the property to himself, thereby severing the joint tenancy. His signature was witnessed by his solicitor and all the requisite affidavits were sworn. On the same date the husband made a will in which he left nothing to his wife. His wife knew nothing of these actions. The deed was left in the possession of husband's solicitor until it was registered some four days after the husband died. The solicitor deposed that the husband, who had been suffering from a serious health condition, did not want the deed registered until after his death, because he wished to avoid a serious dispute with his estranged wife.

[22] The question before the court was whether there was an effective conveyance, severing the joint tenancy. That question turned on whether there was, in law, a delivery of the deed. The court found the applicable law to be as follows:

There can be no doubt as to the generally applicable substantive requirements of delivery.

In order that a deed shall be effective it must be "delivered", that is to say, the party whose deed the document is expressed to be, having first sealed it, must by words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the expressions contained therein

[23] The court was not satisfied that the evidence showed the deceased husband immediately and unconditionally considered himself bound by the instrument. The court stated at 601:

There is nothing in the affidavit as to what was said by or to Mr. Sammon relating to his intention to be immediately and unconditionally bound by the deed, in the sense that I have mentioned, or at all, when it was left with his solicitor -- and only if such intention were manifested would the joint tenancy be severed. If the grantor had instructed his solicitor register the deed immediately this would have been virtually conclusive evidence of delivery: *Anning v. Anning* (1916), 38 O.L.R. 277 at p. 286

[24] The court distinguished the facts in *Stonehouse*, as in that case, there was evidence that the wife delivered the conveyance to her daughter. The court in *Sammon* dismissed the claim, finding the joint tenancy had not been severed. In my view, the result was largely based on the fact that the deceased husband asked his solicitor to hold onto the documents until his death, at which point it would be too late to sever the joint tenancy as the property would already have devolved to his estranged wife. Further, in *Sammon*, the evidence suggested the deceased husband did not consider himself immediately and unconditionally bound by

the deed. In the case at bar, there is no such evidence, and arguments made in this vein appear to be pure conjecture.

- [25] The decisions in *Freed* and *Corin* are decisions of the Australian High Court and are not binding on this court. Although the common law of joint tenancy and delivery of documents may have unfolded in a similar manner in both countries, the legislation and case law governing the registration of land titles has undoubtedly developed nuances that suit each jurisdiction. No argument was made on the similarities and differences between our two systems. While counsel was not able to provide the court with a copy of either of these decisions, I have since obtained a copy of *Corin* and find that it is factually distinguishable in any event.
- [26] In *Corin* a husband and wife owned land in New South Wales as joint tenants. The wife was terminally ill. Several days before her death she signed a transfer and declaration of trust. That document declared the wife's brother trustee of her share in the property as tenant in common. Relying on the English decision of *Milroy v. Lord*, the Australian High Court held that the joint tenancy had not been severed, as the wife had not done everything in her power to effect the transfer. Although the wife had signed all the relevant documents, she did not obtain the certificate of title from the mortgagee, or make any attempts to authorize the mortgage bank to give the certificate of title to the brother or her solicitor. The court held that a gift of land cannot be regarded as complete in equity while the donor retains possession or control of the certificate of title. The transfer was therefore incomplete and failed to sever the joint tenancy. In the case at bar, neither the certificate of title, nor possession or control of it, impacts the issue before the court.
- [27] The result is that the application for re-registration that was executed by the respondent was effective as against himself on the date that it was signed. In other words, the application did indeed sever the joint tenancy on the date that it was signed, even though it was not registered until after the respondent's death.
- [28] The application is dismissed.

"J.L. Dorgan, J."

The Honourable Madam Justice J.L. Dorgan

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