

CANADA / JUDGMENT

Houston v. Houston

2011 BCSC 1333

COURT

Supreme Court of British Columbia

DECIDED

22 July 2011

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2011 BCSC 1333 Houston v. Houston IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Houston v. Houston, 2011 BCSC 1333 Date: 20110722 Docket: S094524 Registry: Victoria Between: James Gregg Houston, Dian Margaret Shirling, Anthony George William Houston and Shelagh Frances Russell Plaintiffs And: Angela Mary Comber Houston, Executrix of the Will of George Frederick Houston, Deceased, and Angela Mary Comber Houston Defendants Before: The Honourable Madam Justice Ross Oral Ruling Counsel for the Plaintiffs: S.L. Klinger Counsel for the Defendants: J. Adelaar Date and Place of Hearing: July 22, 2011 Victoria, B.C. Date and Place of Judgment: July 22, 2011 Victoria, B.C.

- [1] THE COURT: This is an application brought pursuant to Rule 10(1) of the Rules of Court for an order that half of the net proceeds plus \$80,000 of sale of the property located at 206-2277 Oak Bay Avenue be paid either into court or into a solicitor's trust account after the closing date of July 29, 2011, pending resolution of this action.
- [2] The action is a wills variation action, which was initiated in October 2009 and remains outstanding. The plaintiffs are the adult children of the deceased. The deceased, George Houston, died in May 2009, leaving a will dated July 2005.
- [3] The defendant Angela Comber Houston was the wife of the deceased and the stepmother of the plaintiffs and became the executrix of his estate.
- [4] At the first stage of the proceedings an action was commenced by the defendant against James Houston concerning an allegation of improper use of a power of attorney to sever the joint tenancy in the matrimonial home, thus creating, in effect, the estate. That action was dismissed April 21, 2011, and is currently before the Court of Appeal.
- [5] The defendant applied for probate of the estate, which was granted in August 2009. On October 8th, 2009, the plaintiffs filed and served a writ of summons, and in March filed and served a statement of claim.
- [6] The certificate of pending litigation was not filed against the property at the time the wills variation action was begun, and it was in particular not filed within ten days of starting the action, consistent with s. 4 of that Act.

- [7] However, it was subsequently filed in June 2011. At about the same time, the defendants discovered that the property, which had been registered in the name of Angela Houston as to one-half undivided interest as executrix of the will and one-half undivided interest in her own name, was transferred into her own name exclusively. It was then put up for sale, sold and a mortgage of \$160,000 registered against the property.
- [8] The parties have not been able to agree as to the disposition of the sale proceeds. The plaintiffs do not object to the sale of the property.
- [9] The tests to be applied by the court are as stated in the case of *Kashani v. Dhalla*, 2002 BCSC 1353, under the previous iteration of the rule: Is there a claim on the evidence and not just on the pleadings to a proprietary interest in property? Is there some evidence to render reasonable the belief of Ms. Kashani that the property is threatened with disposition or transfer outside the jurisdiction? Is there a substantial question to be decided as to the plaintiff's entitlement to the property? Does the balance of convenience favour the granting of the order?
- [10] The first objection by the defendants is that the CPL was not filed in a timely way. However, no cases have been put forward to suggest that the subsequent filing of a CPL is not effective as of the date of its filing, and the Wills Variation Act itself is silent as to the consequences of failure to file in a timely way. So I would not give effect to the preliminary objection.
- [11] With respect to the issue of is there a claim to a proprietary interest in the property, counsel argues based upon the decision in *Deutschmann (Guardian ad litem of) v. Fallis*, 2010 BCSC 952, that the essence of the claim is not such a claim, and accordingly the rule has no application.
- [12] However, I note that in the *Kashani* case, the claim that was being brought included a claim for unjust enrichment secured against matrimonial assets. The argument being that the unjust enrichment claim would be valueless unless the properties were preserved as security.
- [13] Counsel for the applicants submits that Ms. Houston acquired the half interest at issue as a trustee, and that is sufficient to satisfy the first branch of test. I agree with that submission.
- [14] With respect to then the question of whether the property has been threatened with disposition, the fact is that the half interest has been transferred into Ms. Houston's own name. That was done without any notice to the plaintiffs in circumstances in which there was an action commenced. The property was mortgaged, and now it has been sold. In my view, that satisfies the second branch of the test.

- [15] As to whether there is a substantial question to be decided, I think the parties are agreed that there is a question to be decided, and with respect to balance of convenience, I agree with the submission of the applicant that there is a danger in the circumstances that a portion of the sole proceeds found owing to the plaintiffs will no longer be available, prolonging this already lengthy litigation if an order securing the proceeds is not sought.
- [16] I am accordingly granting the application. I have heard no objection to the funds being held in the trust account of the solicitors, so I will make that order, with the stipulation that the funds will be held in an interest-bearing trust account so that the parties will benefit from whatever interest can be obtained.
- [17] I would add a provision that there is liberty to apply in the event that the financial circumstances of Ms. Houston become such that equity would require her to have access to those funds or the balance of convenience may be shifted or simply the litigation not be proceeded with in a diligent fashion. So there is liberty to apply to vary this order.
- [18] MR. ADELAAR: My Lady, what about the sum of money?
- [19] THE COURT: Well, I granted the sum in the amount that has been sought in the notice of motion.
- [20] MR. ADELAAR: You are also granting the \$80,000?
- [21] THE COURT: Yes.
- [22] MR. ADELAAR: May I ask why?
- [23] THE COURT: Well, I am not going to enter into a debate --
- [24] MR. ADELAAR: No, I am not -- I am asking why.
- [25] THE COURT: -- with respect to -- for the reasons given in the submissions of the claimant, the applicant.
- [26] MS. KLINGER: My Lady, I had prepared a draft order, but it does not have the interest bearing stipulation and liberty to apply. So I suppose I will have to redraft that. This matter is -- the sale is set to close on the 29th, which is next week, and I am actually out of town. And I am just trying to figure out how we can -- I do not really want to ask to dispense with the signature of my friend, but he is in Vancouver and so there is going to be some issues going back and forth. I do not know if Her Ladyship has any suggestions as to how we can.
- [27] THE COURT: Well, you could stand the matter down, handwrite in the additional changes while the two of you are here and if the two of you can be satisfied with respect to the form of order, then I will sign it.

- [28] MS. KLINGER: That is a very good idea, My Lady. With respect to my friend's application, you will see that I had consented to remove the CPL, subject to removal. I do not know if you want to make a second order, or if you are content to -- or my friend's content simply to accept my undertaking to remove that today.
- [29] THE COURT: I mean, I am happy to make an order that the CPL be removed.
- [30] MR. ADELAAR: I wrote -- I would appreciate if you would make the order.
- [31] THE COURT: Yes.
- [32] MR. ADELAAR: And I would appreciate it if my friend would file a letter --
- [33] THE COURT: All right. I make the order that the CPL be removed so that the sale can close.
- [34] MS. KLINGER: Okay. So, My Lady, if perhaps we can stand it down for five minutes and just --
- [35] THE COURT: Sure. I mean, poor Madam Registrar has not had any break at all today. Are you still okay, Madam Registrar? I know we should not be doing this to you.
- [36] THE REGISTRAR: I am fine, My Lady.
- [37] THE COURT: All right. I am trying to move things along because I have a different 2 o'clock matter.
- [38] MS. KLINGER: Ah, yes.
- [39] THE COURT: And so I need to be done with -- but we will stand this down so that you can see if you can finalize the order, and I need to call back the -- those other -- the sealed bid folks to see how they are doing in any event. So perhaps you can page them, Madam Registrar.
- [40] MS. KLINGER: Thank you, My Lady.
- [41] THE COURT: Thank you. "Ross J."

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