

CANADA / JUDGMENT

Pavlovich v. Danilovic

2020 BCCA 239

COURT

British Columbia Court of Appeal

DECIDED

25 August 2020

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2020 BCCA 239 Pavlovich v. Danilovic

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Pavlovich v. Danilovic,

2020 BCCA 239

Date: 20200825

Docket: CA45939

Between:

Ljuba Pavlovich

Respondent

(Plaintiff)

And

Alexander Gordon Danilovic

Appellant

(Defendant)

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

February 11, 2019 (Pavlovich v. Danilovic, 2019 BCSC 153,
Vancouver Docket S158302).

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(via video conference)

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Counsel for the Respondent:

(via video conference)

R.D. Bellamy

Place and Date of Hearing:

Vancouver, British Columbia

July 6, 2020

Place and Date of Judgment:

Vancouver, British Columbia

August 25, 2020

Written Reasons by:

The Honourable Chief Justice Bauman

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

In litigation arising out of their deceased father's estate, the daughter sought a declaration of trust against the son to whom the deceased had, during his lifetime, gratuitously transferred a one-half interest in joint tenancy in two properties.

The trial judge found that the evidence as to the deceased's intentions in so doing stood in "equipoise" and that the son had accordingly failed to rebut the presumption of a resulting trust in favour of the deceased's estate. Held: Appeal dismissed. The trial judge considered all of the relevant evidence, made findings as to its credibility and weight, and properly applied the law relating to the presumption of resulting trust.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I. OVERVIEW

- [1] This appeal concerns the application of the presumption of resulting trust in the context of the estate of the late Dragomir Danilovic.
- [2] Dragomir Danilovic had two children: Ljuba Pavlovich and Alexander Danilovic. Before his death, Dragomir had transferred two properties he owned into joint tenancy with Alexander. Like the trial judge, I will respectfully use first names of family members in these reasons.
- [3] In the court below, Ljuba sought a declaration that a half-interest in the properties actually were held in trust for her benefit, by Alexander. After finding the evidence in "equipoise" on the issue of Dragomir's intentions, the judge applied the presumption of resulting trust and declared that Alexander held the properties on resulting trust for Dragomir's estate.
- [4] On appeal, Alexander argues the judge committed multiple errors in her disposition of the case, including by ignoring relevant evidence showing the properties were meant to go to him, concluding that the property transfers were a financial strategy without evidence to support this, and in inappropriately applying the presumption of resulting trust.
- [5] I conclude that the judge committed no such errors. She provided reasons for her rejection of certain evidence, and came to conclusions that had a basis in the evidence. For the reasons that follow, I would dismiss the appeal.

II. BACKGROUND

- [6] Ljuba and Alexander's father passed away in 2011, and their mother in 1984.
- [7] Prior to their deaths, Dragomir and his wife owned two properties as joint tenants. These properties are the subject of the current litigation: a home on Whyte Avenue in Vancouver (the "Whyte House") and a vacation property in Harrison, British Columbia (the "Harrison House").
- [8] Before the wife passed away, she and Dragomir made wills in which each provided that the other spouse would inherit their respective estate, and that the estate of the survivor would be divided equally between their son and daughter. The son, Alexander, was named executor under each will. When his wife passed away, title to both properties passed to Dragomir by right of survivorship, not through his wife's estate.
- [9] Alexander has always lived in the Whyte House. When he married in 2008, his wife Tania moved into the Whyte House, and they are now raising their children there. After their father's death, Alexander and Ljuba agreed that Alexander would continue to live in the Whyte House and pay the expenses associated with it, and that they would split the expenses associated with the Harrison House.

- [10] Before Dragomir's death, the titles to both properties were transferred into joint tenancy in the names of Dragomir and Alexander: on 10 May 1988, Dragomir transferred the Whyte House for one dollar; and on 11 January 2011, Alexander, who had his father's power of attorney, transferred the Harrison House to himself for one dollar and "Natural Love and Affection".
- [11] On 24 January 2011, Dragomir passed away and the properties passed to Alexander by virtue of the ostensible right of survivorship.
- [12] In a notice of civil claim filed 7 October 2015 (amended 6 February 2018), Ljuba sought a variety of relief, including declarations that Alexander held a half interest in each of the properties in trust for her, or alternatively that he held the whole of the beneficial interest in the properties in trust for the estate of Dragomir.
- [13] A trial was held in Vancouver on 17-21 September and 2 November 2018.

III. TRIAL JUDGMENT

- [14] Following the trial, the judge issued a declaration that Alexander holds all the beneficial interest in the properties in trust for the estate of his father, Dragomir.
- [15] In reaching this conclusion, the judge first considered the admissibility of statements each party attributed to Dragomir before his death. Alexander testified that he had three to five discussions about his father's intentions (the judge termed these the "Altar Discussions") where Dragomir made it clear he did not want Ljuba to inherit (para. 16). Ljuba testified about a conversation between her, Alexander, and her father (termed the "Dinner Table Discussion") where her father stated the Whyte House had been transferred to Alexander for tax purposes and he nonetheless intended them to jointly inherit (para. 17).
- [16] The judge determined that even if this evidence was sufficiently trustworthy to be admitted, she would give it very little weight as it all came from parties with deep emotional investment in the case (at paras. 35-36).
- [17] The judge then considered whether Ljuba had a beneficial interest in the properties, either on an express trust or a resulting trust. The judge concluded that she was unable to place much weight on the Dinner Table Discussion--which was the only evidence that the properties were transferred for tax purposes and a joint inheritance was intended--and therefore, certainty of intention was not established to support the claim of an express trust.
- [18] The judge determined the presumption of resulting trust applied, consistent with *Pecore v. Pecore*, 2007 SCC 17, as she was unable to determine the father's intention on the evidence. Based on the documentary evidence, the trial judge found "[i]t is just as likely that the joint tenancies reflect a financial strategy aimed at saving the family money--both in taxes during his lifetime and in probate upon his death--as they do an intention for Alexander to hold the properties outright and to the exclusion of Ljuba upon Dragomir's death" (at para. 47).

[19] On the oral testimony, the judge stated that both parties had provided evidence to support their version of events, such that "the evidence stands in equipoise" (at para. 55). The judge was unable to determine Dragomir's intention on the balance of probabilities, and the presumption of resulting trust applied.

IV. ISSUES

[20] The appellant argues the trial judge made palpable and overriding errors in the conclusions she drew from the evidence, and in particular:

- a) she failed to consider
 - i. Tania Danilovic's evidence of the father's intention about the properties without giving adequate reasons; and
 - ii. documentary evidence that the father preferred his son over his daughter with respect to the properties, his bank account, his power of attorney, and his RRSP/RRIF without giving adequate reasons for doing so;
- b) she drew a conclusion unsupported by the evidence in stating the joint tenancies reflected a financial strategy; and
- c) after concluding that the father's intentions could not be determined, she erred in law by applying the presumption of resulting trust.

V. ANALYSIS

1. Did the Judge Err in Ignoring Relevant Evidence?

[21] Alexander makes three principal points under this heading.

[22] First, he says generally that the judge failed to "thoroughly engage with the evidence of Dragomir's intention in a way commensurate with the severity of the consequences".

[23] Second, Alexander specifically submits that the judge failed to consider the evidence of Alexander's wife, Tania, or alternatively, rejected it without sufficient or any reasons.

[24] Neither submission bears scrutiny. With respect to the general point, Alexander refers to this Court's decision in *J.G. v. Tyhurst*, 2003 BCCA 224, in support of the submission that there is a higher duty on the trier of fact to assess the evidence on probabilities "that is commensurate with the occasion", that is, reflective of the serious consequences of her decision on the interests of the parties.

[25] But we expect trial judges to exercise that diligence in all cases. The consequences of civil litigation are always important to the parties.

[26] As the Supreme Court of Canada said in *F.H. v. McDougall*, 2008 SCC 53:

- [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
- [27] "Once and for all", there is only one civil standard of proof at common law and that is proof on a balance of probabilities: F.H. at para. 40.
- [28] And as for the sufficiency of reasons in resolving the probabilities (if that is possible), R. v. R.E.M., 2008 SCC 51, tells us:
- [20] Similarly, the trial judge need not expound on evidence which is uncontroversial, or detail his or her finding on each piece of evidence or controverted fact, so long as the findings linking the evidence to the verdict can be logically discerned.
- [29] As to the second submission, Tania married Alexander in 2008 long after the events surrounding the Whyte House took place in 1988. Her evidence of several conversations with Dragomir in which she alleges he said that he did not "want Ljuba to get anything" covered some 17 pages of transcript in a six day trial. While the judge did not refer to her evidence specifically, the judge certainly expressed her conclusions in respect of all of the evidence from what she found to be interested parties invested in the outcome of this litigation.
- [30] At para. 36 of her reasons, the judge said:
- [36] Even assuming that the evidence I heard about Dragomir's statements of intentions (primarily the Altar Discussions and the Dinner Table Discussion) is admissible because it meets the low standard of trustworthiness or "threshold reliability," I give it very little weight. In so finding, I am not suggesting that any of the witnesses who testified about what Dragomir said to them intended to lie or deceive the court. I accept that each has genuinely come to believe in the truth of the evidence they gave. However, it is clear that both the plaintiff and defendant, as well as their families, have for years dwelled upon and shared the recollections that became their evidence. That evidence also reflects the deep emotional bonds implicated in testifying about their relationships with Dragomir and the animosity within the family, both of which were evident at the hearing.
- [31] And at paras. 51 and 54, the judge continued in this vein:
- [51] While I heard a great deal of evidence about Dragomir's character and his relationships with his children and their spouses and his grandchildren, I place very little weight on any conflicting evidence. Each party and their witnesses painted a picture of their relationship with Dragomir that supports the outcome they seek. That outcome may be as much a contest over their relationship with Dragomir and the love they believe that he had for them as it is about money, and that is what makes this case so difficult. Having heard the

testimony, including the cross-examination of each witness, I cannot agree with the submissions of counsel for either party that one side is more credible than the other.

- [54] Apart from the evidence of the parties, I am also unable to rely on the evidence of the other witnesses to determine Dragomir's intention. Some witnesses, such as Sasha, lacked direct knowledge of the facts. Both Peter and Mr. Dimitrijevic demonstrated an allegiance to one party and their credibility was undermined during cross-examination.
- [32] Finally, it is said that the judge failed to consider the documentary evidence suggesting Dragomir preferred his son over his daughter. Again, the reasons of the judge belie this assertion.
- [33] The judge dealt with the documentary evidence in paras. 47-49 of her reasons. She specifically referred to the property transfers and the power of attorney in favour of Alexander and concluded:
- [49] In summary, while reliable, the documentary evidence is of little assistance in determining Dragomir's intentions for the disposition of the properties after his death.
- [34] There is no merit in the submission that the judge failed to consider relevant evidence in the matter before her.
- [35] Alexander really complains of the conclusion drawn by the judge from her consideration of the documentary and oral evidence, to which I now turn.

2. Did the Judge Err in Drawing a Conclusion Unsupported by the Evidence?

- [36] The gravamen of the complaint here is the submission that the judge was simply speculating that the creation of the joint tenancies including Alexander reflected a financial strategy on the part of Dragomir. There was, however, evidence before the judge to this effect.
- [37] In particular, Ljuba, in testifying to the Dinner Table Discussion said:

A It was one of our regular family dinners and after the children had been excused and my dad and my brother and John and I were sitting chatting. And Alex said, I've put my name on the title of the Whyte Avenue property along with dad's, and dad is on the Harrison property on -- by himself. And he said, this way we can avoid capital gains tax, because if dad had both properties in his name, he would have to pay capital gains on one property or the other. So I'm on the title of one with dad and dad is on the other one and that -- that will be our principal residence, principal residence for Alex and principal residence for dad. And he said, you can't be on the title of any one because you already have a principal residence with John.

And then, you know, there was more talk about property purchase tax or transfer tax and all these other taxes. And I thought about dad's will and I asked how would that affect anything. And my brother said oh, nothing will change. We will share the properties when the time comes, when the time comes, he said. This is all about taxes.

And I looked over at my dad. He was quiet. He was listening. And I don't know which one of us, it could have been John or me who said, is this okay with you, dad? And dad just shrugged and -- you know, and he said "he's the lawyer." And then he went on to say, you know, nothing will change. [Serbian spoken] which is a phrase sort of "everything is for you all" and vama is a plural of "you," so he said [Serbian spoken]. And after awhile I -- after a minute or two he said, and besides, it will save us money.

[38] And these answers in Alexander's pre-trial discovery were read in at trial:

Q Did your father take steps to avoid paying property purchase tax?

A I believe it was just initiated at that time. I believe that in both transmissions exemptions applied, so it wasn't a point to be concerned with on his part.

Q Was your father concerned about the payment of probate fees on his death?

A He was. My father did not like to pay taxes of any kind.

Q Was he aware of probate fees independently of anything you said to him?

A Oh, absolutely.

Question 164:

Q And he didn't want to pay it; is that correct?

A He didn't think that it should be paid. He considered it another tax.

[39] These are two of the pieces of evidence before the judge, who, it is trite to say, is in a position to accept all, some or none of a witness' testimony at trial.

[40] Alexander's real complaint is that the judge should have drawn the inference that Dragomir could not have had a "financial strategy" top of mind in undertaking and encouraging the transfers to Alexander because with the trial judgment's result (the properties held in trust for Dragomir's estate), that strategy will have failed dramatically. That strategy could only be realized if Alexander indeed enjoyed the benefit of Dragomir's transfers to him.

[41] This submission by Alexander prompted Alexander's application to lead fresh or new evidence, in particular an expert opinion on tax and other consequences of Dragomir's allegedly failed "financial strategy".

[42] In my view, the proposed evidence, when taken with the other evidence adduced at trial, could not reasonably be expected to have affected the result. Alexander accordingly fails on this part of the test from *Palmer v. The Queen*, [1980] 1 S.C.R. 759. I would not admit the evidence on appeal.

[43] Alexander's submission on this point, respectfully, misses the point. Clearly the judge found that Dragomir had a general motivation to avoid at least probate fees. This prompted a layman's desire to keep the properties out of his estate. The fact that the strategy will not

now work in light of this litigation and indeed, to be colloquial, has backfired, is quite beside the mark and in no way affects Dragomir's motivation as found by the judge. One notes that if Alexander had accepted the transfers on the understanding that he would later gift a one-half interest to Ljuba, Dragomir's "financial strategy" would have worked at least to an extent.

3. Did the Judge Err in Applying the Presumption of Resulting Trust?

[44] There are two aspects to Alexander's submissions on error under this head.

[45] The first simply builds on his primary submission that the judge erred in ignoring relevant documentary and oral evidence, that if properly considered and weighed, would ineluctably lead to the conclusion that Alexander had, on a balance of probabilities, rebutted the presumption of resulting trust in respect of the Whyte House and Harrison House transfers.

[46] I have dealt with this alleged error above and I will not repeat the analysis that answers this submission. But generally, Alexander simply invites this Court, contrary to all of the jurisprudence on appropriate appellate review, to take on the trial judge's role, to re-weigh the evidence and second guess her findings of fact and the inferences she drew therefrom. I decline to do so.

[47] The second aspect of the argument here was the subject of Alexander's amended factum. He characterizes the error so:

The trial judge erred in law by limiting her findings to the intention to gift the beneficial interest while failing to address the separate right of survivorship. The finding the deceased appreciated the legal consequences of the right of survivorship from his wife to him and from he to Alex in fact confirms the gift of the right of survivorship whether or not beneficial interest was retained by intention or operation of law.

92. The trial judge erred in law by failing to consider whether Dragomir intended to transfer the right of survivorship in the properties.

93. There are 3 separate interests or rights a trial judge must consider on a transfer into joint tenancy: legal interest, beneficial interest and the right of survivorship. As explained in *Petrick (Trustee) v. Petrick*¹²⁷, not all joint property is subject to a true joint tenancy. Joint tenancy gives rise to three potential scenarios.

(a) A true joint tenancy in which the joint tenants are each owner of the whole. Each enjoys the full benefit of property ownership and the ultimate survivor will enjoy the whole title for him or herself.

(b) A resulting trust where only one joint tenant truly has any beneficial interest in the property and the other joint tenant (usually a gratuitous transferee) holds the title in trust for the other and has no beneficial interest in the property.

- (c) A gift of the right of survivorship, where a joint tenant is gratuitously placed on title and has no beneficial entitlement to the property during the donor's lifetime, but receives the entire property by the right of survivorship.
- [48] This submission finds its inspiration in this Court's decision in *Herbach v. Herbach Estate*, 2019 BCCA 370.
- [49] Alexander makes this submission in this regard:
94. A donor can transfer the legal interest in property while retaining the whole beneficial interest, but still immediately transfer the right of survivorship. The court in *Herbach v. Herbach Estate*, 2019 BCCA 370 confirmed the gift of the right of survivorship is a separate legal right.
95. The trial judge's analysis addresses the first two scenarios, but not the third. The trial judge's conclusion errs in law by failing to consider the right of survivorship apart from the legal and beneficial interest.
- [50] I say nothing to diminish the force of *Herbach Estate*. I say simply that on any fair reading of the trial judge's reasons here, she did indeed deal with the whole of the beneficial and legal interests in the real properties including, therein, the right of survivorship. The judge was throughout clearly dealing with the entirety of the property interests in the Whyte House and the Harrison House. Indeed as para. 2 of her reasons indicates, it was her assessment that Alexander's position was that his father intended to give him both of the properties as a gift to the exclusion of his sister--a "gift" in the context of the complete interest in the properties.
- [51] That the judge was considering the right of survivorship is made clear at para. 13 of her reasons:
- [13] On May 10, 1988, Dragomir transferred title to the Whyte House to himself and Alexander as joint tenants for consideration of one dollar. The effect was to give Alexander the right of survivorship, removing the property from Dragomir's estate.
- [52] I can only fairly read all of the judge's references later in her reasons to the "legal and beneficial interest" in the properties as including all of the interests therein, including the right of survivorship.
- [53] Again, this is made express in para. 41 of the judge's reasons, where she said in respect of the presumption of resulting trust:
- [41] When a property is purchased by one party but held in joint tenancy, there is a presumption that the transferor intended to retain the entire beneficial interest, including the right of survivorship, unless there is evidence to the contrary: see *McKendry* at para. 36; *Bergen v. Bergen*, 2013 BCCA 492 at para. 42; *Baryla v. Baryla*, 2019 BCCA 22 at para. 26-29.

[54] I note parenthetically that here the judge cites two of the decisions relied on by this Court in Herbach Estate.

[55] In my view, there is no merit in Alexander's amended submission on this point.

VI. DISPOSITION

[56] The judge concluded her reasons by observing:

[55] Ultimately, I am unable to rely on any of the oral evidence in the sense of preferring either the plaintiff or defendant's version of events over the other. The evidentiary difficulties in this case are such that I cannot determine Dragomir's intention on a balance of probabilities. The evidence stands in equipoise. Accordingly, this is one of those rare cases where the outcome must be decided based on the burden of proof.

[57] In *Rhesa Shipping Co. S.A. v. Edmunds*, [1985] 2 All E.R. 712 (H.L.), Lord Brandon recalled the well-known exchange between Sherlock Holmes and Dr. Watson on fact finding. Holmes said:

How often have I said to you that, when you have eliminated the impossible, whatever remains, however improbable must be the truth?

[58] Lord Brandon rejected this default position for three reasons. It is the first reason that applies here:

namely that the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.

[at p. 718]

[59] I would dismiss the appeal.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"

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