

CANADA / JUDGMENT

Preskar Estate v. Wagner

2023 BCSC 80

COURT

Supreme Court of British Columbia

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2023 BCSC 80 Preskar Estate v. Wagner

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Preskar Estate v. Wagner,

2023 BCSC 80

Date: 20230119

Docket: S56532

Registry: Vernon

Between:

Kailar Braydan Alois Preskar, Executor of the Estate of

Peter Milan Preskar, Deceased

Plaintiff

And

Lynda Dawn Wagner also known as Lynda Wagner

Defendant

Before: The Honourable Madam Justice Hardwick

Reasons for Judgment

Counsel for the Plaintiff:

A.A.D. Powell

Counsel for the Defendant:

D.L. Schaefer

Place and Date of Trial/Hearing:

Vernon, B.C.

January 5, 2023

Place and Date of Judgment:

Vernon, B.C.

January 19, 2023

- [1] This is a most unfortunate case.
- [2] The plaintiff, Kailar Braydan Alois Preskar (the "Plaintiff"), is a young man whose father passed away in January of 2020. The defendant, Lynda Dawn Wagner also known as Lynda Wagner (the "Defendant"), is the plaintiff's mother. The circumstances are such that the plaintiff has lost his father and has a fractured and now litigious relationship with his mother.

The Factual Background and Litigation History

- [3] The Defendant and the Plaintiff's father, Peter Preskar, were in a marriage-like relationship that commenced in or about 1994. During the course of this relationship, in 1999 the Plaintiff was born. The Defendant also had another son from a prior relationship, who Peter Preskar assumed a parental role in relation to. Importantly, however, the Defendant and Peter Preskar never married.
- [4] In 2002, the Defendant and Peter Preskar purchased certain real property located at 1508 - 38 Street, Vernon, British Columbia (the "Property").
- [5] The Property was registered at the Land Title Office as being held in joint tenancy between the Defendant and Peter Preskar.
- [6] Peter Preskar, the Defendant, the Plaintiff and the Defendant's son from a prior relationship all resided at the Property from the time it was purchased in 2002 until in or about 2006.
- [7] In 2006, title to the Property was free of any encumbrances. It continued to be held in joint tenancy which, by law, presumptively conveyed a right of survivorship to each of the joint tenants.
- [8] In or about November 2006, the Defendant and Peter Preskar ceased living together in a marriage-like relationship. Following their separation, Peter Preskar remained living in the Property and the Defendant lived elsewhere.

- [9] In May of 2007, Peter Preskar commenced a family law action against the Defendant. In accordance with the relevant rules of court in force at that time, the proceeding was commenced by filing a writ of summons and statement of claim (the "Family Law Proceeding").
- [10] Coincident with commencing the Family Law Proceeding, Peter Preskar filed a certificate of pending litigation against the Property, which was registered with the Land Title Office.
- [11] The Defendant filed a counterclaim in October 2007, in the Family Law Proceeding. The Defendant claimed various relief in the counterclaim, including a trust interest in the Property and an order for partition and sale of the Property pursuant to the Partition of Property Act, R.S.B.C. 1996, 347.
- [12] Coincident with filing the counterclaim, the Defendant also filed a certificate of pending litigation against the Property, which was registered with the Land Title Office.
- [13] The Family Law Proceeding was highly contentious. There were various court appearances and resulting court orders.
- [14] This type of high conflict family law litigation can be taxing on the parties--both financially and emotionally. This can lead to litigation fatigue.
- [15] In this case, I conclude that litigation fatigue resulted in the Defendant and Peter Preskar failing to resolve their competing claims regarding the Property in the Family Law Proceeding, either by agreement or by court order.
- [16] Unfortunately, neither Peter Preskar nor the Defendant took the simple step of retaining a real estate lawyer or notary to file the necessary documentation with the Land Title Office to sever the joint tenancy and convert the ownership of the Property to tenants in common.
- [17] Following what I was advised was a lengthy battle with illness, Peter Preskar passed away on January 1, 2020.
- [18] Pursuant to his last will and testament dated October 28, 2017 ("the Will"), the Plaintiff was appointed the executor of Peter Preskar's estate. He is also the primary beneficiary, although there are specific bequests to the Defendant's son who Peter Preskar had acted in locus parentis to.
- [19] Of significance, and as I will return to, the Will does not specifically reference the Property. However, after making the specific bequests which pertain to certain chattels and tools, the Will provides that the Plaintiff is entitled to the residue of the Estate.
- [20] As part of the process of applying for probate of Peter Preskar's estate, counsel for the Plaintiff sent correspondence to counsel for the Defendant in April 2020 seeking an acknowledgement that the joint tenancy of the Property had been severed.

- [21] The Defendant, however, had already transferred the Property to herself as the surviving joint tenant by virtue of the right of survivorship on or about March 13, 2020. This was possible, notwithstanding the certificates of pending litigation registered against title to the Property, because those certificates were filed by the Defendant and Peter Preskar.
- [22] Consistent with the above, the Defendant's counsel sent responding correspondence on April 21, 2020 advising that the Defendant's position was that the joint tenancy was in tact and that she was thus entitled to sole ownership of the Property free from any claim by the Plaintiff on behalf of the estate of Peter Preskar.
- [23] This resulted in the commencement of these proceedings on May 21, 2020.
- [24] It has taken some time for this matter to come before the Court for determination, which I understand to be at least in part due to the consequences of certain motor vehicle accidents that the Defendant has been involved in.
- [25] The final part of the factual matrix that I note of significance for the record is that the Defendant has not filed a Counterclaim in this proceeding. In noting this, I am not concluding that the Defendant was precluded from doing so by virtue of s. 146 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 because the limitation period set forth in that provision of the legislation is not engaged by virtue of the fact that the issues between the Defendant and Peter Preskar in the Family Law Proceeding were unresolved at the date of his death. However, the Defendant ultimately did not file a counterclaim, which is a point I will return to at the conclusion of these reasons.

The Relief Sought

- [26] The notice of application filed February 9, 2022 seeks the following relief:
1. That this matter is appropriate for determination in a summary trial.
 2. That the joint tenancy as between the deceased, Peter Milan Preskar, and the Defendant, Lynda Dawn Wagner also known as Lynda Wagner, has been severed.
 3. A declaration that the Property (as defined herein) is co-owned by the Plaintiff and the Defendant, each as to an undivided one-half interest as tenants in common.
 4. Such further and other orders as the court deems just, including any orders necessary or incidental to the implementation of the relief sought herein.
 5. Costs.

Suitability for Summary Trial

- [27] This matter came before Mr. Justice G.P. Weatherill previously, on June 8, 2022. At that time, Mr. Justice G.P. Weatherill made an order that this action was suitable for determination by way of summary trial.

- [28] In light of this order and the consensus of the parties that this matter was suitable for summary determination, I will not engage in a substantive review of R. 9-7 of the Supreme Court Civil Rules or the principles set forth in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, 36 B.C.L.R. (2d) 202 (C.A.).
- [29] I will simply state that, consistent with the conclusion of Mr. Justice G.P. Weatherill, I am also satisfied that this matter is appropriate for determination by way of summary trial pursuant to R. 9-7 of the Supreme Court Civil Rules as the relevant facts can be discerned, without controversy, from the affidavit material before the Court and that it is not unjust to do so: *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31.
- [30] I reach this conclusion notwithstanding some of the contents of the affidavit # 2 of the Defendant made July 15, 2022, which make some quite controversial assertions as to the conduct of Peter Preskar and involvement of him and certain family members in the trafficking of controlled substances.

The Law Applicable to the Former Family Law Proceeding

- [31] The deceased and the Defendant never married.
- [32] They separated, as indicated, prior to March 18, 2013. This is very significant because this means that neither the deceased nor the Defendant had the ability to make claims with respect to property under the Family Relations Act, R.S.B.C. 1996, c. 128. Specifically, under the Family Relations Act the relevant provisions pertaining to the division of family assets (as they were then referred) were only applicable to parties who were married.
- [33] Parties such as the deceased and the Defendant were thus limited to making claims under the common law or in equity, such as, for example, relying on the doctrine of unjust enrichment or the Partition of Property Act, R.S.B.C. 1996, c. 347.
- [34] The lack of ability to obtain relief under the Family Relations Act presented a further challenge because it also precluded the deceased and the Defendant from being able to obtain a declaration pursuant to s. 57 of the Family Relations Act.
- [35] A declaration pursuant to s. 57 of the Family Relations Act operated as a triggering event under that legislation. Once a triggering event occurred, the proverbial "line in the sand" was drawn and there would have been no dispute that the joint tenancy of the Property was severed, even though the parties failed to resolve the property issues as between them on the basis of s. 56 and possibly s. 65 of the Family Relations Act.
- [36] Fortunately, with the enactment of the Family Law Act, S.B.C. 2011, c. 25 effective March 18, 2013, parties in marriage-like relationships have the same ability to make family property claims as do married parties. Further, the Family Law Act simplified matters significantly by making the separation date of parties the relevant triggering event, thus removing any requirement to obtain a declaration from the court.

- [37] Unfortunately, these changes to the governing family law legislation in British Columbia do not assist the parties in this particular case.

Severance of Joint Tenancy at Common Law

- [38] Given, as set out above, the parties were unable to avail themselves of the provisions of the Family Relations Act relating to the division of family property. Further, because the parties commenced litigation but never entered into a separation agreement or final order of this court, there is no alternative effective triggering event.
- [39] As such, the issue of whether the joint tenancy of the Property was severed must be determined based on common law principles.
- [40] In this regard, I was referred by counsel for the Plaintiff to the following three authorities: *Farley v. Pearlson*, 2001 BCSC 1237; affirmed 2003 BCCA 37; *Zeligs v. Janes*, 2016 BCCA 280; and *Mayer v. Mayer Estate*, 2018 BCSC 2225.
- [41] In *Farley*, the circumstances were relatively similar but for the fact that the parties were married and there was a rudimentary written agreement between the parties. To summarize in a general way, Mr. and Ms. Pearlson were married in 1973 and in 1974 purchased an acreage on Denman Island. That property was recorded in the relevant Land Title registry as being held in joint tenancy. They separated shortly thereafter and were divorced in 1977. Despite the divorce and the passage of some 20 years, this property on Denman Island remained held in joint tenancy. The intention of the rudimentary agreement was that there would be a subdivision of the Denman Island property. Consistent with this, both parties resided separate and apart on that property for some approximately eight years.
- [42] However, due to the fact that the Denman Island property was a designated property under the Agricultural Land Commission Act, S.B.C. 2002, c. 36, such approval was not forthcoming. In April 1997, Mr. Pearlson passed away. Mr. Pearlson then transferred the Denman Island property into her sole name by virtue of the right of survivorship. This resulted in litigation on behalf of the estate, whose beneficiaries were the adult child of Mr. and Ms. Pearson and a further adult child of Mr. Pearson from a subsequent relationship.
- [43] Following a summary trial (conducted pursuant to R. 18A of the Supreme Court Rules which was the precursor to R. 9-7 of the British Columbia Supreme Court Civil Rules), it was concluded that the joint tenancy of the Denman Island property was severed at the time of the agreement made in 1977 (para. 35).
- [44] In reaching the conclusion in *Farley*, the Court helpfully reviewed the law as to severance of a joint tenancy of real property. Specifically, paras. 21 to 26 and 34 provide as follows:

- [21] It is the position of the plaintiff that the joint tenancy was severed by the agreement between Mr. and Mrs. Pearlson in or about 1977 to divide the property into two parcels with each to own one-half. It is argued that the severance resulted in spite of the refusal of the Agricultural Land Commission to permit a subdivision of the property.
- [22] The leading case of *Williams v. Hensman* (1861), 1 J.& H. 546, 70 E.R. 662, 30 L.J. Ch. 878 stated that a joint tenancy may be severed in three ways: a unilateral act of any one joint tenant in relation to his or her own interest, by mutual agreement, and "by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common"(p.557-8).
- [23] Counsel for the plaintiff submits that the evidence supports a finding that the joint tenancy at issue in this case was severed by mutual agreement. He submits further that the course of dealing between Mr. and Mrs. Pearlson demonstrates that they treated their interest in the land as a tenancy in common.
- [24] It does not appear that the law requires a mutual agreement to be one that is enforceable. In *Burgess v. Rawnsley*, [1975] 3 All E.R. 142 (C.A.) Sir John Pennycuik referred to this second method of severing a joint tenancy as "rule 2". At p.152 he stated:

Counsel for Mrs. Rawnsley contended that in order that rule 2 should apply, the agreement must be specifically enforceable. I do not see any sufficient reasons for importing this qualification. The significance of an agreement is not that it binds the parties: but that it serves as an indication of a common intention to sever, something which it was indisputably within their power to do.

- [25] The third way of severing a joint tenancy identified by Vice-Chancellor Page Wood in *Williams v. Hensman*, supra, was considered by the Court of Appeal in *Kish v. Tompkins* (1993) 99 D.L.R. (4th) 193 (B.C.C.A.). Southin J.A. stated at p. 199:

In my opinion, the Vice-Chancellor was postulating a species of estoppel which might be put thus: if joint tenants conduct themselves in their legal dealings with one another on a footing consonant only with their interests being several and not joint, one of them may not resile and assert the interest was joint if a right of survivorship in him would be unjust to his fellow co-tenants who have themselves proceeded on the footing the interests were several. ...

It follows that I am not wholly in accord with the learned trial judge's conclusion that severance requires either alienation or agreement. I prefer to say that it requires either alienation or agreement or facts which preclude one of the parties from asserting that there was no agreement.

- [26] Counsel for Mrs. Pearlson submits that the following statement of Southin J.A. made at p.199 of *Kish v. Tompkins*, fits the circumstances of Mrs. Pearlson in the case at bar:

Here there is not the slightest shred of evidence that Mr. Tompkins did or did not do anything in reliance on anything done or not done concerning this property by the respondent.

...

- [34] Alternatively, many of the facts noted above can be characterized as a "course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common" (*Williams v. Hensman*, supra) or "facts which preclude one of the parties from asserting that there was no agreement" (*Kish v. Tompkins*, supra).
- [45] As noted, the Court of Appeal dismissed the appeal in *Farley* in very brief oral reasons for judgment.
- [46] *Zeligs* is also a decision of our Court of Appeal which follows *Farley*. The facts in that case, however, are quite different. The cross-appellant, Ms. Janes, held certain real property in joint tenancy with her mother, for whom she held a power of attorney for. Ms. Janes then sold the property and, after discharging the secured encumbrances on title, briefly deposited the funds into a joint account with her mother before withdrawing the funds to use them for the personal benefit of her and her spouse.
- [47] At the trial of the matter, the court concluded that Ms. Janes unilaterally effected severance of the joint tenancy by using the sale proceeds from the property for her sole benefit. In dismissing the cross appeal, the Court of Appeal outlined the relevant governing principles of law regarding joint tenancy, tenancy in common, the right of survivorship and severance of joint tenancy as follows at paras. 38 to 55:

Joint Tenancy, Tenancy in Common and the Right of Survivorship

- [38] Joint tenancy and tenancy in common are the two most common forms of concurrent property ownership in Canada. In a joint tenancy, the "four unities" of title, interest, time and possession are present and co-owners hold an equal interest in the property as a unified whole. The common law treats joint tenants as a single tenant: each holding the whole for all, with no distinct shares held by anyone. In contrast, in a tenancy in common one co-owner may hold a greater proportionate interest in the property than the other co-owner(s): *Hansen Estate v. Hansen*, 2012 ONCA 112 at paras. 29-30; *Felske Estate v. Donszelmann*, 2007 ABQB 682 at para. 31, aff'd 2009 ABCA 209; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 at 459.
- [39] Unity of title means the title of each joint tenant arose from the same act or instrument. Unity of interest means their holdings are perfectly equal in nature, extent and duration. Unity of time means all the interests vested simultaneously. Unity of possession means each joint tenant has a right to present possession and enjoyment of the whole property, but no right to exclusive possession of any individual part of the whole. Assuming all four unities are present, the question of whether a joint tenancy or a tenancy in common has been created is determined by the intention of the grantor: B. Ziff, *Principles of Property Law*, 6th ed. (Toronto: Carswell, 2014) at 336; *Felske Estate* at para. 31.

- [40] Joint tenancy is often the chosen form of concurrent ownership for family holdings, usually for estate planning purposes. This is unsurprising. The legal fiction of a unified singularity composed of more than one person may fit comfortably in a family context. Unfortunately, however, unity can be fragile and families are not always happy. As Abella J. remarked in *Pecore*, when divisions arise that unhappiness often finds its painful way into a courtroom.
- [41] The principal and distinguishing characteristic of joint tenancy is the right of survivorship, the *jus accrescendi*. When one joint tenant dies, his or her interest in the property is extinguished and passes to the surviving joint tenant(s). The right of survivorship is, however, a revocable expectancy that manifests only upon success in the so-called "ultimate gamble" - survival - and then only if the joint estate has not been previously destroyed by an act of severance: *Estate of Propst*, 788 P.2d 628 at 631 (Cal. Sup. Ct. 1990). When given *inter vivos*, a gift of survivorship rights is to what is left, if anything, when the gamble is won: *Simcoff v. Simcoff*, 2009 MBCA 80 at para. 64.
- [42] The interest of a tenant in common is different with respect to survivorship. Unlike that of a joint tenant, a tenant in common's interest in property remains intact upon death and passes into his or her estate: *Fuller v. Harper*, 2010 BCCA 421 at para. 53.
- [43] Importantly, parties may hold legal title to property in one form of co-ownership while holding equitable title in another. For example, a mother and daughter may be joint tenants in law and tenants in common in equity with respect to jointly-held property by virtue of a trust or an act of severance. If the mother dies first, the daughter assumes full legal title by right of survivorship, but the mother's equitable interest, being held in common, passes to her estate and the daughter holds legal title as trustee for the beneficial owners, namely herself and her mother's estate: *Pecore* at paras. 4-5; *Ziff* at 341-342.
- [44] Equity leans against joint tenancies: Law Reform Commission of British Columbia: Report on Co-Ownership of Land (1988) at 23. As explained in J. McGhee, ed., *Snell's Equity*, 31st ed. (London: Sweet & Maxwell, 2005) at 103, the relevant maxim is that equity is equality. When a joint tenant dies the whole belongs to the survivor(s) and the deceased's estate takes nothing, which favours the tenant(s) of longevity and is thus unequal, except perhaps for an equal chance at survival. For this reason, equity often treats persons who are joint tenants at law, such as business partners or unequally contributing co-owners, as tenants in common: *Mischel Holdings Pty Ltd. v. Mischel*, [2013] VSCA 375 at paras. 60-61.

Severance of a Joint Tenancy

- [45] Like any owner, a joint tenant is entitled to deal freely with his or her interest in property. Accordingly, a joint tenant may sever a joint tenancy, with or without the consent or knowledge of the other joint tenant(s) and subject to contrary statutory provision. After a joint tenant dies, however, severance is no longer possible because death extinguishes the joint interest. For this reason, a testamentary disposition cannot sever a joint tenancy: *Bergen v. Bergen*, 2013 BCCA 492 at para. 40; *Hansen Estate* at para. 63; *A.J. McClean*,

"Severance of Joint Tenancies" (1979) 57 Can. Bar Rev 1 at 2, 38-41.

- [46] When a joint tenancy is severed, the joint tenancy is converted into a tenancy in common and the right of survivorship is extinguished. In consequence, each affected co-owner becomes entitled to a distinct share rather than an undivided interest in the whole: *Bergen* at para. 40; *Flannigan v. Wotherspoon* (1952), 7 W.W.R. (N.S.) 660 at 665 (B.C.S.C.). In joint tenancies composed of more than two persons, a blend of interests may be present. For example, if A, B and C are joint tenants a severance of A's interest will convert it into a tenancy in common, however, B and C will continue to be joint tenants with rights of survivorship between themselves: *McClellan* at 6; Law Reform Commission of British Columbia at 5.
- [47] Severance is typically effected in one of three ways: by one person's acting unilaterally upon his or her own share so as to destroy the four unities (for example, by selling it); by mutual agreement (for example, by written contract); or by "any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common" (for example, by conduct which demonstrates all tenants mutually dealt with their interests as several). Other possible modes of severance include bankruptcy, partition or an order made under matrimonial property legislation: *Williams v. Hensman* (1861), 70 E.R. 862 (Eng. Ch.); *Tessier Estate v. Tessier*, 2001 SKQB 399 at para. 8.
- [48] Vice-Chancellor Wood described the three primary modes of severance, now known as the "three rules", in *Williams* at 867:

A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi*. Each one is at liberty to dispose of his own interest in such a manner as to sever it from the joint fund - losing, of course, at the same time, his own right to survivorship. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected, as happened in the cases of *Wilson v. Bell* [(1843), 5 IR. Eq. 501 (Eng. Eq. Exch.)] and *Jackson v. Jackson* [(1804), 9 Ves. 591 (Eng. Ch.)]

- [49] Rule 1 concerns the destruction of an essential unity by a joint tenant's unilateral action. As a matter of law, any such act automatically severs a joint tenancy: *Bergen* at para. 40. Rules 2 and 3 concern the joint tenants' common intention and operate in equity. Where it would be unjust to permit parties to assert survivorship rights because of their conduct, equity intervenes to prevent them from doing so: *Hansen Estate* at para. 39; *Ziff* at 345.

- [50] Vice-Chancellor Wood's judgment in *Williams* is the usual starting point in a severance analysis, although some jurists and commentators disagree on its meaning. In particular, the extent to which rule 2 and rule 3 differ is controversial, as is the role, if any, that estoppel doctrine plays. For example, in *Tompkins Estate v. Tompkins* (1993), 99 D.L.R. (4th) 193 (B.C.C.A.) Southin J.A. opined that Vice-Chancellor Wood was postulating a species of estoppel in rule 3 and disagreed with the trial judge's view that severance requires either alienation or agreement, preferring to say it requires "either alienation or agreement or facts which preclude one of the parties from asserting that there was no agreement" (199). However, to the extent she interpreted rule 3 as a species of estoppel requiring proof of detrimental reliance, Winkler C.J.O. disagreed in *Hansen Estate*, observing that a course of dealing sufficient to sever requires only that the co-owners knew of the other's position and mutually treated their interests as several (at paras. 46-51). In addition, some commentators question whether rules 2 and 3 are truly distinguishable: McClean at 16; Ziff at 345-347.
- [51] This case is primarily concerned with rule 1, the unilateral destruction of an essential unity. As in *Farley v. Pearlson*, 2003 BCCA 37, it is thus unnecessary to analyse the full reach and meaning of *Williams* with respect to rules 2 and 3. Nevertheless, at trial Mr. Zeligs argued that there was a rule 3 severance based on the parties' course of conduct and the judge considered both rules 1 and 3, noting the diverging authorities. In these circumstances, I think it prudent to comment on certain factors that may contribute to the controversy and suggest a possible route to its resolution.
- [52] The leading English authorities on severance are *Williams* and *Burgess v. Rawnsley* [1975] Ch. 429 (Eng. C.A.). The reasons for judgment in both state that rules 2 and 3 cover separate methods of severing a joint tenancy, with severance by mutual agreement covered by rule 2. However, in undertaking a rule 3 analysis courts sometimes focus on whether there was an implied agreement between the parties. In other words, the parties' course of dealings is sometimes analysed under rule 3 as evidence of facts from which an agreement to sever is inferred rather than as a separate method of severance: see, for example, Flannigan. In my view, this approach blurs the line between rules 2 and 3.
- [53] I agree with Winkler C.J.O. in *Hansen Estate* that rule 3 is a conceptually distinct method of severance which does not encompass implied agreement. I also agree with Wright J. in *Tessier* that the parties' conduct may provide an evidentiary basis from which agreement can be inferred (at para. 12). Nevertheless, mutual agreement, express or implied, is captured by rule 2 and should be analysed accordingly. The question under rule 3 is whether, in the absence of agreement, it would be unjust to permit a party to assert survivorship rights because of the parties' mutual treatment of their interests.
- [54] Further, I see no reason to limit Southin J.A.'s rule 3 requirement of "facts which preclude one of the parties from asserting that there was no agreement" to cases involving detrimental reliance, nor do I think she necessarily did so. Rather, in my view, on the facts of *Tompkins Estate* Southin J.A. considered it just to permit the respondent to assert survivorship rights, given the matrimonial context and the parties' conduct, which, unlike

the conduct at issue in Williams, included no element of reliance. However, on different facts it might well be unjust to do so where co-owners have mutually demonstrated a common intention to treat their interests as several. Depending on the circumstances, this may be true regardless of whether detrimental reliance can be shown: Hansen Estate at paras. 35-51.

- [55] Ascertaining whether a joint tenancy has been severed is a factual question, often determined on the basis of reasonable inference(s). It requires the application of a legal standard to the facts as found by the trial judge. Accordingly, on appeal the standard of palpable and overriding error applies to the judge's finding that a severance has been effected: Fuller at paras. 36-38; Flannigan at 666; Tessier at para. 12.
- [48] While all of the foregoing comments are instructive and binding on this Court, the key takeaway is that ascertaining whether or not a joint tenancy has been severed is a factual question to be determined by the trial judge (in this case the summary trial judge).
- [49] The final and most recent decision is Mayer. In Mayer, the parties were in a long-term marriage-like relationship. During the course of that marriage-like relationship, they purchased a property on East 37th Avenue in Vancouver. At the time of that purchase in 1986, the parties registered title to the residence in joint tenancy with the Land Title Office.
- [50] The parties continued to reside together for some 30 years in the East 37th Avenue until Mr. Mayer passed away in 2015. The property passed to his spouse, Ms. Breidt, by virtue of the right of survivorship and she continued to reside in the property as at the date of trial in 2018. The litigation arose because in 2002, Mr. Mayer executed a will in which he bequeathed half of his estate to his daughter from a prior marriage (the other half being bequeathed to Ms. Breidt).
- [51] Following the law set forth in Zelig, the Court concluded at paragraph 121 that the parties intended to hold title as true joint tenants with the right of survivorship. Importantly, the court confirmed that the onus of proof rests on the party asserting the severance of a joint tenancy (para. 127) and conduct what may constitute a "course of dealing" sufficient to establish severance (paras. 130-133).
- [52] Specifically, Mayer refers to Hansen Estate v. Hansen, 2012 ONCA 112 which states as follows at para. 39:
- [39] While the determination under the course of dealing test is an inherently fact-specific assessment, the underlying rationale for rule 3 is that it is a means of ensuring that a right of survivorship does not operate unfairly in favour of one owner (or owners) where the co-owners have shown, through their conduct, a common intention to no longer treat their respective shares in the proper as indivisible, unified whole. For example, in the context of negotiations between spouses who are in the midst of a marriage breakdown, even failed or uncompleted negotiations can lead to severance because "the negotiation of shares and separate interests represents an attitude that shows that the notional unity of ownership

under a joint tenancy has been abandoned" . . .

Conclusion

- [53] Having considered and applied the foregoing law, including the fact that the onus of proof in lies with the Plaintiff, I have concluded that the joint tenancy of the Property was severed prior to Mr. Preskar's passing.
- [54] Specifically, I find that based on the totality of the affidavit evidence before me, it is clear that the Defendant and deceased had an acrimonious separation and that each was asserting independent claims in respect of the Property. Those claims included a claim by the Defendant for relief pursuant to the Partition of Property Act.
- [55] This is a course of dealing consistent with severance of joint tenancy.
- [56] In this regard, I find that factual matrix is entirely on all fours with the factual matrix described in Hansen Estate wherein, as set out above, the court contemplated a situation in which spouses may be in failed or uncompleted negotiations following a separation prior to the death of one tenant.
- [57] Further, unlike Mayer, there was no conduct consistent with an intention to sever the joint tenancy except for the portion of the affidavit of the Defendant which asserts that the Peter Preskar attended at her residence in the months shortly prior to his death and communicated to her the fact that he had a terminal illness and that he wished her to retain the Property to make amends for previously failing to pay her support. I simply do not accept this evidence as being sufficient to outweigh the totality of the other evidence which is consistent with the fact that the parties had long separated and had each asserted but ultimately not resolved independent claims in relation to the Property.
- [58] As a final note in this regard, I note that the third party affidavit evidence tendered as part of the Defendant's case confirms that a conversation did occur between the Defendant and Peter Preskar, but the affidavit does not contain any corroboration as to the subject matter of that conversation. It simply describes a conversation that was "calm, quiet and well demeanored".
- [59] I further am not prepared, as was suggested by counsel for the Defendant at the hearing, to make any orders with respect to other properties. I would hope that with the benefit of my reasons the parties can resolve these matters outside of court as it is most unfortunate, as mentioned, that the Plaintiff is litigating with his sole remaining parent. However, I have absolutely no jurisdiction to make such an order as there is no application before me in relation to other properties.
- [60] I shall thus grant the orders sought at paragraphs 2 and 3 of the Plaintiff's notice of application filed February 9, 2022 as set out above.

Costs

- [61] Neither party in this proceeding sought leave to appear back before me on the issue of costs after the rendering of my reasons for judgment. As such, I have concluded that it is appropriate to exercise the discretion afforded to me under the Supreme Court Civil Rules to address the issues of costs at this time.
- [62] The Plaintiff has been substantially successful in this matter. There is nothing in the evidence or submissions before the Court that suggests he should not be entitled to his costs of this proceeding.
- [63] Accordingly, in addition to the substantive relief set forth above, the Plaintiff shall be entitled to his costs of this proceeding in accordance with the Supreme Court Civil Rules' tariff on the basis of this being a matter of ordinary difficulty.

"Hardwick J."

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Prepared on 29 October 2026 · Esheria