

CANADA / JUDGMENT

Robinson v. Kuypers

2020 BCSC 770

COURT

Supreme Court of British Columbia

DECIDED

22 May 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 770 Robinson v. Kuypers

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Robinson v. Kuypers,

2020 BCSC 770

Date: 20200522

Docket: S215471

Registry: New Westminster

Between:

June Marguerite Robinson

Plaintiff

And

Gerald Wayne Kuypers and Diane Lynn Kuypers,
trustees of the Kuypers Joint Spousal Trust, Gerald

Wayne Kuypers, Diane Lynn Kuypers,

Henry Joseph Kuypers, and

Marguerite Catherine Kuypers

Defendants

And

June Marguerite Robinson

Defendant by way of Counterclaim

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Plaintiff, appearing by telephone:

P. Hansen

Counsel for the Defendants, appearing by telephone:

G. Behan

A. Pearl

Counsel for G.W. Kuypers and D.L. Kuypers, in their personal capacities, appearing by telephone:

S. Taylor

A. Peng

A. Karia, Articled Student

Place and Date of Hearing:

New Westminster, B.C.

April 24, 2020

Place and Date of Judgment:

New Westminster, B.C.

May 22, 2020

- [1] The applicants seek summary dismissal of the plaintiff's claim pursuant to Rule 9-6 of the Supreme Court Civil Rules based upon the expiry of the limitation period. If successful, they seek the sale of the subject matter of the litigation, 25205 - 56th Avenue, Langley, British Columbia, ("56th Avenue") upon terms to be spoken to.
- [2] The plaintiff opposes the application.

Background

- [3] As set out in the Amended Notice of Civil Claim (the "ANOC"), the plaintiff's claim arises from an agreement dated August 1, 2007 between her and her parents, Henry Joseph Kuypers ("Henry") and Marguerite Catherine Kuypers ("Marguerite"). The plaintiff, ("June") alleges the agreement provided her parents with a life interest in the property and the plaintiff would, according to the joint tenancy created in October 2007, be entitled to the whole of the equity in 56th Avenue upon the death of her parents.

- [4] Throughout the ANOCC June refers to the August 1, 2007 agreement as the Exclusive Use Agreement.
- [5] The agreement provided that the parties were registered as joint tenants of the property on 56th Avenue, although the actual transfer of a one-third interest to June as joint tenant did not take place until October 2007.
- [6] It is the plaintiff's contention that the agreement, when seen in conjunction with the creation of the joint tenancy, irrevocably provided her with the right of survivorship to her parents' combined two-thirds interest in the property.
- [7] The agreement provided that Henry and Marguerite were entitled to exclusive occupancy of 56th Avenue so long as they, or one of them, was living and in occupation of the property. During their occupation, Henry and Marguerite were responsible for all of the costs associated with their ongoing use of the property and could mortgage the property so long as their estate paid any outstanding balance due upon their death.
- [8] It is undisputed that in mid-August 2014 the plaintiff received a without prejudice letter from counsel for her parents requesting her consent and cooperation in returning her one-third interest in the property back to her parents based on the proposition that she held that interest on resulting trust for her parents.
- [9] More or less concurrent with the demand from her parents counsel, June learned that Henry and Marguerite had asked the personal defendant, Gerald Wayne Kuypers ("Wayne"), their son and June's brother, to act as their attorney, and in his capacity as same, he severed the joint tenancy with the plaintiff. The joint tenancy was severed August 1, 2014 and, by no later than August 17, 2014, June was aware that the joint tenancy was severed.
- [10] Thereafter she remained an owner of one third of 56th Avenue as a tenant in common with her parents.
- [11] The defendants argue that the severance of the joint tenancy and the plaintiff's knowledge of same constitutes the commencement of the limitation period for June bringing an action against her parents. This action was not commenced until June 2019 and, according to the defendants, is well outside the limitation period and should be dismissed.
- [12] June is one of three children of Henry and Marguerite. In addition to June, Henry and Marguerite have two sons, Wayne and Barry.
- [13] June deposed to the fact that her parents advised her in or around 2007 of the fact that they had made arrangements during their lifetime to advance monies to both Henry and her other sibling, Barry, during their lifetime and they wished to make provision for June ensuring that she receive the equity the 56th Avenue property upon their death.

- [14] Barry confirmed in a statutory declaration that was his understanding, as well, because both he and his brother had received benefits amounting to an advance on their expected inheritance.
- [15] Unbeknownst to June until after the commencement of this action, Henry and Marguerite prepared letters provided to the solicitor who prepared their wills dated November 1, 2007, confirming their intention to transfer a one-third interest in the property on 56th Avenue to June as joint tenant "with the intention that she will benefit from the entire equity in the property upon the death of me and my husband".
- [16] That correspondence was only provided to the plaintiff days before this application was heard. She was unaware of it at the time she received the transfer of one-third interest and in 2018 when she first learned that her parents had transferred their two thirds interest in 56th Avenue into a trust.
- [17] June sought legal advice upon receipt of the letter from her parents' attorney in 2014 and was advised that she could commence proceedings based upon the severance of the joint tenancy, but that she could wait until the death of her parents before instituting proceedings if, in fact, she did not receive the balance of the equity in the property.
- [18] She did not reply to the without prejudice letter, nor did she sign the necessary document to transfer her one-third interest in the property back into the names of her parents. She acknowledged the property was transferred to her without consideration but contends the transfer, together with the right of survivorship, was an irrevocable gift to her.
- [19] No further steps were taken by Henry and Marguerite to compel June to re-convey the one-third interest transferred to her in October 2007.

The Agreement

- [20] The salient features of the agreement underlying June's claim provide that June, Henry and Marguerite are the registered owners as joint tenants of the subject property and that June agrees to grant Henry and Marguerite exclusive right to use and occupy the property during their lifetime on the terms contained therein.
- [21] June, in her pleadings, correctly describes the agreement for what it is: an exclusive use agreement. It did not create a life interest in favour of Henry and Marguerite. They retained 2/3 of the beneficial interest in the property until its transfer into the trust in 2014.
- [22] At para. 3, the agreement reads, "the Kuypers shall be responsible for payment of all expenses associated with the lands and buildings while life tenants" (emphasis added).
- [23] It further provides that the agreement will may be terminated at any time by Henry and Marguerite by giving June 30 days' written notice of their intention to terminate or by June upon the death of both of her parents or if neither Henry or Marguerite continue to occupy 56th Avenue for a period of three continuous months. Henry and Marguerite were to pay for

all expenses while in occupation of the property. They could mortgage the property but any outstanding amount owing at the time of their death was to be paid from their estate. No other relevant terms were contained.

- [24] In June 2011 a modification agreement was prepared by Henry and Marguerite's solicitors, albeit never signed by June. The only interesting feature of the modification agreement is the preamble which contains the following passage:

Whereas by a certain indenture of life interest agreement dated the first day of August, 2007 the said Robinson did grant unto the said Coopers exclusive right to the use and occupation of the lands and premises .

[Emphasis added.]

- [25] The modification purported to delete para. 4(b)(ii) of the Exclusive Use Agreement, the provision whereby June could give notice in the event the Kuypers ceased to occupy the property for three continuous months.
- [26] As noted, June never signed the agreement, but she says it is relevant because of the reference to the "life interest agreement".
- [27] June points to other developments which she says favour her position; namely a meeting with her parents financial advisors in 2014, prior to the August 2014 letter from the Kuypers' lawyers, wherein it was discussed that her parents would take out a mortgage for \$400,000 on the property, advance June \$100,000 of the mortgage funds and invest the other \$300,000 in her name. That plan was abandoned when it became clear that Henry and Marguerite did not have sufficient cash flow to service the mortgage. June was advised of that on June 24, 2014 before the severance of the joint tenancy or the communication from the Kuypers' lawyer in August.
- [28] June was not immediately aware of the fact that following the severance of the joint tenancy, her parents transferred their two-thirds undivided interest as tenants in common in 56th Avenue into a joint spousal trust. Henry and Marguerite were originally the trustees of the Kuypers Joint Spousal Trust but, in 2018, Henry and Marguerite appointed Wayne and his wife Diane as trustees of the Kuypers Joint Spousal Trust.
- [29] Wayne then registered the transfer in the Land Title Office and notice was sent to June notifying her of the change.
- [30] In June 2019, Henry died. Shortly thereafter June began residing in a care home, although the affidavit material filed on her behalf by Wayne notes that she returns one week every two months or so to resume occupation of the property. No reason is given for this peculiar change in residency. Marguerite is in her nineties.

- [31] The movement appears, frankly, a contrivance to comply with the terms of the August 1, 2007 agreement rather than for any practical purpose. Marguerite is paying for accommodation in the care home and that is being advanced as one of the reasons for the urgency requiring sale.
- [32] That said, Marguerite's continued occupation of 56th Avenue does not inform the outcome to the defendant's application.

The Amended Notice of Civil Claim

- [33] In the ANOCC June asserts of the following:
7. Over a number of years, Henry and Marguerite made advancements to Wayne and Barry on their inheritances, either by way of funds for investments or arrangements regarding the purchase of the family business. In order to equalize the share to each child, Henry and Marguerite added the Plaintiff as a joint tenant to the Property, so that the Plaintiff would receive the Property entirely when both Henry and Marguerite had passed away.
 8. On or about October 5, 2007, Henry and Marguerite granted a 1/3 interest as joint tenant to June in the Property, which is civically described as 25205 - 56th Avenue, Langley, British Columbia, and legally described as:

PID: 005-062-977

Lot 27, Section 11, Township 11, New Westminster District Plan 1618.

9. A joint tenancy provides an additional right of conveyance of the Property to the surviving joint tenant upon the other joint tenants.
10. The transfer of the Property into joint tenancy was a true gift to the Plaintiff from Henry and Marguerite with the intent to make a gift to the Plaintiff of the right of survivorship. (Emphasis added)
11. On or about August 1, 2007, June, Henry and Marguerite entered into an agreement ("Exclusive Use Agreement"), wherein they confirmed that June, Henry and Marguerite were joint tenants of the Property and whereby it was provided that June granted Henry and Marguerite the exclusive right to use and occupy the Property during their lifetime, to encumber and mortgage the Property during their lifetime, provided that any indebtedness would be repaid from their respective estates at the time of the termination of the life interest, and provided that Henry and Marguerite would pay all the expenses associated with the Property while life tenants.
12. The Exclusive Use Agreement further provided that Henry and Marguerite would indemnify and save harmless June from any claims by themselves or any third parties arising from their use and occupation of the Property, including any claims inter alia for damages, liens or claims of any kind whatsoever, save and except for claims arising from the gross negligence of the Plaintiff.

13. The Exclusive Use Agreement further provided that Henry and Marguerite would not have the right to assign their rights under the Agreement.
- [34] At para. 18 of the ANOCC, June asserts that the circumstances described in paras. 7-13 "constitute a trust relationship between the defendants as trustees and the plaintiff as beneficiary, and the defendants breached their trust obligations when they acted in a way so as to sever the joint tenancy with the plaintiff".
- [35] The ANOCC goes on to allege the defendants, Wayne and Diane, as trustees of the Kuypers Joint Spousal Trust, owe the plaintiff a fiduciary duty. The relief sought includes general damages, special damages, restitution or rescission, punitive, exemplary and/or aggravated damages together with "a declaration that the plaintiff has an interest in the property as a joint tenant with the right of survivorship" together with "a declaration that the defendants have been unjustly enriched and that the defendants hold the property on a constructive trust for the benefit of the plaintiff".
- [36] At para. 23 of the ANOCC, the plaintiff "demands restitution from the Defendants of her joint tenancy in the Property and disgorgement of any corollary benefits obtained by the Defendants".

Discussion

- [37] It is clear from the ANOCC that the plaintiff's claim, whatever the relief sought, is grounded in the severance of the joint tenancy. While the affidavit evidence in opposition to the defendants' motion is replete with allegations against Wayne that speak to undue influence causing his parents to appoint him as their attorney in 2014 and then sever the joint tenancy and transfer their interest into the Kuypers Joint Spousal Trust, that is not how the present action is framed.
- [38] Wayne denies those allegations but, given the absence of any claim founded on such allegations in the pleadings in the ANOCC, I agree with the submission of counsel for the defendants that those allegations do not inform the outcome of the application.
- [39] As advanced by the applicants, a joint tenancy gives rise to three potential scenarios in terms of the beneficial interest of the titleholders:
- 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, wherein only one joint tenant has any beneficial interest in the property and the other joint tenant, usually a gratuitous transferee, holds title in trust for the other and has no beneficial interest in the property.

- c) A scenario which is sometimes referred to as a "gift of the right of survivorship," wherein a joint tenant is gratuitously placed on title and has no beneficial entitlement to the property during the lifetime of the donor, but if the donee survives the donor, the donee will receive the entire property by right of survivorship. In *Bergen v. Bergen*, 2013 BCCA 492 at para. 37 [Bergen], Newbury J.A. described a gift of the right of survivorship in a joint account as "an immediate gift of a joint interest consisting of whatever balance exists in the account on the transferor's death, assuming he or she dies first."

Petrick (Trustee) v. Petrick, 2019 BCSC 1319 at para. 40

- [40] June's pleadings allege "the transfer of the property into joint tenancy was a true gift to the plaintiff from Henry and Marguerite with the intent to make a gift to the plaintiff of the right of survivorship".
- [41] The law seems clear that a joint tenant may sever the joint tenancy at any time and when a joint tenancy is severed it becomes a tenancy in common and the right of survivorship is extinguished: *Petrick* at para. 74.
- [42] Regardless, if such were actionable, it became actionable at the time the party deprived of the right of survivorship became aware of the change in title. Here, that was in August 2014.
- [43] There is no clear language in the agreement or elsewhere in the material that has been filed in opposition to the application which gives rise to a conclusion that there was any separate agreement other than that executed by June and her parents in August 2007. The letters recently disclosed by the defendants concerning the testamentary intentions of both Henry and Marguerite speak to the intentions at the time the letter was drawn in 2007. The letters confer no legal rights on June nor do they form part of the basis upon which the action was brought.
- [44] The letters were not provided to June when written and even were they, it is not clear what the legal effect would be given the later severance of the joint tenancy and disposition by Henry and Marguerite of their remaining interest in 56th Avenue.
- [45] June has not suggested her receipt of the letters at this late stage of the action would cause her to reframe her action as currently pleaded, although her material references a contemplated amendment to allege that her parents' actions in 2014 were as a result of improper influence by Wayne. No application to amend is before me.

Summary Judgment - Rule 9-6

- [46] An application pursuant to Rule 9-6 is an assertion that the claim is factually without merit. If there is no genuine issue for trial, the claim will be dismissed: *International Taoist Church of Canada v. Ching Chung Taoist Assn. of Hong Kong Ltd.*, 2011 BCCA 149, at para. 9.

[47] An action which is statute-barred may be dismissed pursuant to Rule 9-6. In *Tinaburri v. North Vancouver (District)*, 2014 BCSC 661, Baker J. noted:

[107] Although caution must be exercised in dismissing an action on a summary basis because of the expiry of a limitation period, where an action has clearly been commenced out of time, dismissal pursuant to Rule 9-6 is warranted.

[48] The Limitation Act, S.B.C. 2012, c. 13, provides as follows:

6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;
- (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[49] Sections 9 to 11 of the Limitation Act have no application here.

[50] Section 12 of the Limitation Act set out the provisions for the discovery and the running of time in respect of an alleged breach of a trust. They read:

12 (1) In this section, "fraud or trust claim" means

- (a) a claim based on fraud, or fraudulent breach of trust, to which a trustee was a party or privy,
- (b) a claim to recover from a trustee trust property, or the proceeds from the trust property, if
 - (i) that property is or those proceeds are in the possession of the trustee, or
 - (ii) that property was or those proceeds were previously received by the trustee and converted to the trustee's own use, or
- (c) any other claim arising out of the fiduciary relationship between a trustee and a beneficiary if the trustee
 - (i) wilfully conceals from the beneficiary the fact that
 - (A) injury, loss or damage has occurred,
 - (B) the injury, loss or damage was caused by or contributed to by an act or omission, or
 - (C) the act or omission was that of the person against whom the claim is or may be made, or

(ii) wilfully misleads the beneficiary as to the appropriateness of a court proceeding as a means of remedying the injury, loss or damage.

(2) A fraud or trust claim is discovered when the beneficiary becomes fully aware

(a) that injury, loss or damage had occurred,

(b) that the injury, loss or damage was caused by or contributed to by the

(i) fraud,

(ii) fraudulent breach of trust,

(iii) conversion, or

(iv) other act or omission

on which the claim is based,

(c) that the fraud, fraudulent breach of trust, conversion or other act or omission was that of the person against whom the claim is or may be made, and

(d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

(3) For the purposes of subsection (2), the burden of proving that a fraud or trust claim has been discovered rests on the trustee.

[51] Here, the defendants argue that the severance of the joint tenancy in 2014, when coupled with June's knowledge of the change in the legal title, commenced the running of the limitation period, acknowledged to be two years. This action was not commenced until May 29, 2019.

[52] The plaintiff argues that the letter from her parents' counsel in August 2014 was insufficient to draw to her attention her parents' intention to revoke the right of survivorship. Further, the solicitor's letter failed to advise June of the creation of the Kuypers Joint Spousal Trust: the action that effectively removed ownership from Henry and Marguerite and transferred it to the trust. June did not learn of the existence of the trust and its ownership of the other two thirds of 56th Avenue until notified by the Land Title Office in 2018.

[53] With respect, I agree with counsel for the applicant that the notification of the transfer of her parents' interest from joint tenancy into a tenancy in common was sufficient, at law, to commence the running of time under the Limitation Act. As noted in Petrick at para. 39, June's interest was a present interest prior to the severance of the joint tenancy. Once June received notice of that present interest being removed, her claim became discoverable.

- [54] The advice from her counsel that "she could wait until her parents passed away before commencing an action" does not lend itself to the conclusion that she could delay commencing an action based upon the act of severance, given that is how the action is framed.
- [55] Further, any advice from her parents following the 2014 severance as to the joint tenancy as to their intentions as to the disposition of their interest in the property on the death of the last of them does not pause the running of time given the pleadings frame the action on the 2007 contract and the formation of the joint tenancy. Nowhere does the ANOCC reference the subsequent assurances alleged to have extended the running of time.
- [56] As to June's suggestion that the running of time was postponed under s. 3(1)(c) of the Limitation Act, she wrongly characterizes the 2007 agreement as creating a life interest for Henry and Marguerite with her as "remainderman". In fact, the 2007 agreement is nothing more than an agreement respecting the use of 56th Avenue during their lifetimes.
- [57] The ANOCC refers to the agreement, rightly, as an exclusive use agreement. It did not create a life interest for Henry or Marguerite, nor was June, at any time, a remainderman.
- [58] Further, despite June's assertion to the contrary, the agreement, on a reasonable reading of it, does not provide June with the right of possession to the whole of the property if Henry and Marguerite leave the property for more than ninety days.
- [59] June's alternate submission that her claim is exempt from the two year limitation pursuant to s. 3(1)(b) of the Limitation Act because her claim is "for possession of land if the person entitled to possession has been dispossessed in circumstances amounting to trespass" is without basis in fact given she was never, until arguably June 2019, entitled to possession, and there is no basis to assert Henry and Marguerite were trespassers.
- [60] June's action against the defendants is founded upon breach of the 2007 agreement and the joint tenancy creating the right of survivorship; not subsequent utterances from her parents, or one of them, as to their intentions regarding the property on the death of the last of them nor improper/undue influence by Wayne over his parents' disposition of their interest in 56th Avenue.
- [61] Accordingly, for the reasons above, I find the plaintiff's claim is statute barred and accordingly is dismissed. As invited to do so in the Counterclaim, I also dismiss the Counterclaim seeing a declaration that June holds her interest in 56th Avenue in trust for Henry and Marguerite.
- [62] Nothing said here should be seen as affecting any claims not contained within the ANOCC; specifically allegations of undue influence by Wayne or a want of capacity in Henry and Marguerite to appreciate the effect of their severance in 2014.

The Order for Sale

[63] The applicants seek an order for sale of the property and rely upon the Partition of Property Act, R.S.B.C. 1996, c. 347, which reads, in part:

2 (1) All joint tenants, tenants in common, coparceners, mortgagees or other creditors who have liens on, and all parties interested in any land may be compelled to partition or sell the land, or a part of it as provided in this Act.

(2) Subsection (1) applies whether the estate is legal or equitable or equitable only.

6 In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if the party or parties interested, individually or collectively, to the extent of 1/2 or upwards in the property involved request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property, the court must, unless it sees good reason to the contrary, order a sale of the property and may give directions.

[64] Neither the Response to Civil Claim nor the Counterclaim reference the Partition of Property Act. The Counterclaim only seeks relief in the event the ANOCC is not barred by the Limitation Act. The order for sale is raised for the first time in the application by the Kuypers Joint Spousal Trust.

[65] Having acceded to the application to dismiss the plaintiff's claim as statute barred, and given the conditional nature of the defendants' counterclaim, there is nothing remaining in the proceeding allowing me to make orders under the Partition of Property Act or Rule 13-5 of the Supreme Court Civil Rules.

[66] While there may be merit in the application to sell the property and distribute the proceeds in accordance with the parties' legal ownership, such must be founded in a proper proceeding under the Partition of Property Act.

[67] Just as the plaintiff brought no application to amend the proceedings to allow for consideration of claims relating to allegations of undue influence, despite raising such in the responsive material, the applicants did not seek leave to amend the Counterclaim to seek partition and sale.

[68] As such, the application for sale of the property is dismissed without prejudice to properly initiate proceedings now that the issue of the parties' respective entitlement to the beneficial ownership has been determined based on the successful limitation defence.

Costs

[69] Absent submissions from June as to why costs ought not to follow the event, the defendants will have their costs at Scale B. I note there should be only one set of costs for the application. Although Mr. Taylor appeared on behalf of the personal defendants, such was only to adopt the submissions of the Kuypers Joint Spousal Trust.

"Harvey J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/07/2020BCSC0770.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/robinson-v-kuypers-2020>

Prepared on 26 October 2026 · Esheria