
CANADA / JUDGMENT

Ruskowsky v. Hadden

2021 BCSC 1141

COURT

Supreme Court of British Columbia

DECIDED

19 April 2021

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2021 BCSC 1141 Ruskowsky v. Hadden

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ruskowsky v. Hadden,

2021 BCSC 1141

Date: 20210419

Docket: S2011543

Registry: Vancouver

Between:

Beverley Irene Ruskowsky

Petitioner

And

Irving Roy Hadden and Carol Arlene Hadden

Respondents

Corrected Judgment: The text of the judgment was redacted at paragraphs 39 to 60 for publication purposes on June 9, 2021.

Before: The Honourable Mr. Justice Crossin

Oral Reasons for Judgment

Counsel for Petitioner:

E.M. Hatch

Counsel for Respondents:

J.L. Ginther

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 7 and 9, 2021

Place and Date of Judgment:

Vancouver, B.C.

April 19, 2021

- [1] THE COURT: This is a petition seeking a partition or sale of a residential property located in White Rock, British Columbia ("Pacific Avenue Property").
- [2] The petition is brought pursuant to the terms of the Partition of Property Act, R.S.B.C. 1996, c. 347 [Act].
- [3] The parties to the petition are siblings. The Pacific Avenue Property is owned by the siblings in one-third undivided interests as tenants in common. The state of title is as a consequence of certain estate planning by their mother. Their mother died in 2003. The respondents live together on the Pacific Avenue Property. The petitioner and her husband live elsewhere.
- [4] The petitioner is 80 years of age. Her husband, Mr. Ruskowsky, is 85 years of age. Ms. Ruskowsky currently suffers from dementia. The claim of the petitioner is being advanced by her husband who is her power of attorney. No issue is taken with Mr. Ruskowsky having standing to pursue matters on her behalf pursuant to the provisions of the Act.
- [5] The respondents are Mr. Hadden, the twin brother, of the petitioner; and Ms. Hadden, who is her sister. Mr. Hadden is as well 80 years of age. Ms. Hadden is 62 years of age.
- [6] The issue before the Court is whether the interests of justice is such that the order sought by the petitioner ought to be dismissed.
- [7] The Pacific Avenue Property is a longstanding family property in White Rock. The property is approximately 8,600 square feet. The house on the property is modest in size, consisting of two bedrooms and one bathroom. The evidence suggests the home is in disrepair, with really no prospect that it will not continue to deteriorate.
- [8] The recent assessed value of the Pacific Avenue Property is approximately \$1.1 million. The valuation consists almost entirely of the land value. There is estimated to be a relatively small charge against the property in the amount of approximately \$20,000 as a result of the property tax deferral agreement. This is the only charge against the property.

- [9] The petitioner and her husband reside in a home also located in White Rock, British Columbia. This residence also has a similar assessed value as the Pacific Avenue Property and is free and clear of encumbrances. The petitioner desires to have the use of the value of her one-third undivided interest in the Pacific Avenue Property. The evidence reveals she is motivated to seek a sale, at least in part, because of the cost of ongoing medical care.
- [10] Ms. Hadden has lived on the property her entire life, and Mr. Hadden has lived on the property for many years. The respondents submit they want to remain living on the Pacific Avenue Property and submit it would be unjust to order a partition or sale.
- [11] It is common ground that if an order is granted the order will be for sale. Partition is not feasible according to the parties.
- [12] The relevant portions of the Act are as follows:

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.

...

7 In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if it appears to the court that because of the nature of the property involved, or of the number of parties interested or presumptively interested in it, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the interested parties than a division of the property, the court may

- (a) on the request of any of the interested parties and despite the dissent or disability of any other interested party, order a sale of the property, and
- (b) give directions.

[13] The application of these sections is uncontroversial and helpfully summarized in *Zackariuk Estate v. Chepsiuk*, 2005 BCSC 919, where Mr. Justice Smith stated as follows:

[27] In *Harmeling v. Harmeling*, [1978] 5 W.W.R. 688 (B.C.C.A.), the court considered what is now s. 2 of the Act. At para. 10 it stated:

I think that we ought to accept without qualification the general statement that there is a prima facie right of a joint tenant to partition or sale and that the Court will compel such partition or sale unless justice requires that such an order should not be made.

[28] *Harmeling* involved an application for an order for sale by a joint tenant under the equivalent of s. 2 of the Act. That section applies equally to any co-owner, tenant in common, or party who has an interest in land.

- [29] Section 2 provides the gateway through which a party with an interest in land may have the court consider whether to order a partition or sale of the property. A party who does not wish to "suffer partition or sale" bears the onus of demonstrating to the court that justice requires that the order for partition or sale not be made. Failing such a demonstration, the court must enforce the interested party's prima facie right to partition or sale.
- [32] Having met the s. 2 threshold, the court must next consider the application of ss. 6 and 7 of the Act in dealing with the court's discretion to order partition or sale.
- [33] Where a party or parties hold less than 50 percent interest in the property, s. 7 places the burden on the party or parties to establish why a sale and distribution of the proceeds would be more beneficial to the interested parties than a partition of land.
- [34] A number of cases cited by both the petitioner and the respondent, while distinguishable on their facts, demonstrate the strength of the prima facie right of a co-owner to compel sale. In each of the cases, sale was ordered because the opposing party did not demonstrate that justice required no order made. It also demonstrates that partition or actual division of the land as opposed to sale is a rare order.
- [14] These comments reflect the issue at bar. As stated in *Zackariuk Estate*, a party who does not wish to suffer partition or sale bears the onus of demonstrating to the court that justice requires that an order for partition or sale not be made. Failing such a demonstration, the court must enforce the interested party's prima facie right to partition or sale.

Analysis

- [15] The Pacific Avenue Property has been in the family for decades. It was purchased by the parents of the siblings after the war. The father built the house in 1948.
- [16] The Pacific Avenue Property is located in an area of White Rock known as Five Corners. It is convenient to amenities and various apartment complexes in and about the area.
- [17] Mr. Hadden is retired. He describes himself as in fair health, being able to walk moderate distances and still willing and able to drive a car. He has the benefit of four pensions. A pension (undescribed) in the amount of \$325 per month. He also receives CPP and OAP. In addition, he states he has a small US pension that he has difficulty accessing. No more information was provided in this regard. He has a bank account of less than \$15,000 and no other liquid assets. Mr. Hadden has two adult children who are financially self-sufficient.
- [18] Concerning the consequences of an order for partition and sale, Mr. Hadden states in his affidavit that he and his sister "live a lot cheaper than if we lived in a senior's residence."
- [19] Ms. Hadden's evidence is also somewhat sparse. She is 62 years of age and is unable to be employed because she suffers from anxiety and depression. She receives a disability pension in the amount of \$1,175 per month and has a small bank account with less than \$5,000. She has no other assets.

- [20] There is evidence that the Pacific Avenue Property is in poor condition and has not been properly maintained by the respondents. The condition of the property reflects the apparent hoarder habits of the respondents, or at least one of them. The observations of the petitioner's husband is that the rooms of the house are dirty and the bathtub and beds are stacked high with newspapers, magazines and other miscellaneous items. Ms. Hadden appears to be sleeping on a piece of plywood in the living room. The roof of the house is leaking and covered with tarps. This evidence is not disputed by the respondents.
- [21] In my view the evidence of the respondents is, at best, unclear whether one or both of the respondents would suffer any hardship or disadvantage in the event of a sale, much less whether any such hardship, disadvantage, or other circumstance would be at a scale that might tip the balance in favour of refusing to grant an order pursuant to s. 2 of the Act.
- [22] A sale would generate a good deal of capital to the respondents. Even if sold at the assessed value, it would generate net proceeds of approximately \$360,000 to each sibling. This capital, properly invested, coupled with pension income, would provide a reasonable standard of living to the respondents in the area of White Rock that they are familiar with and apparently attached to. The respondents have not suggested they could not find suitable alternative affordable housing in the event that the Pacific Avenue Property was sold.
- [23] There is evidence before the Court that there is a selection of rental apartment property in and about the location of the Pacific Avenue Property which rental property appears desirable, appropriate and relatively affordable. The evidence before me indicates that, for example, a two-bedroom with den condominium rents for \$2,400 a month. A two-bedroom house, a four-minute drive from the Pacific Avenue Property, rents for \$2,600 per month. A two bedroom and den, a two-minute drive from the Pacific Avenue Property, rents for \$2,995 per month.
- [24] The petitioner has waited 18 years to seek the value of the interest in the Pacific Avenue Property. Her life circumstances have now caused her to seek partition or sale so as to enjoy those proceeds in her lifetime. It is suggested it is reasonable to conclude that the mother of the siblings intended the petitioner to enjoy the benefit of the undivided one-third interest during the petitioner's lifetime.
- [25] The petitioner, since 2003, has paid one-third of the Pacific Avenue Property insurance and taxes until the taxes were deferred pursuant to the property tax deferral agreement. Mr. Hadden and Ms. Hadden have never paid occupational rent to the petitioner since the death of their mother in 2003.
- [26] Counsel on behalf of the respondents, in his very able submissions, says that the petitioner has come to court with unclean hands. The respondents submit there is not full and complete disclosure of the financial circumstances of Mr. and Mrs. Ruskowsky. This failure, submits counsel, ought to cause the court to refuse an order for sale.

- [27] In my view, the doctrine of unclean hands has no application in the circumstances of this case. If the submission of the respondents is to the effect that the petitioner must provide full and complete financial disclosure as a prerequisite to pursuing and/or succeeding on the application, I respectfully disagree.
- [28] In my opinion, such a suggestion is not consistent with the approach required by the jurisprudence. Rather, it is my opinion the nature and extent of the financial circumstances of the petitioner that are before the Court may be weighed as one of many factors in the context of a determination under s. 2 of the Act.
- [29] That said, it is to be observed that there is a good deal of evidence concerning the financial circumstances of the petitioner and her husband.
- [30] It is only necessary for me to highlight this evidence. In the spring of 2019, the petitioner was hospitalized and diagnosed with dementia. Thereafter she resided in a care facility, Evergreen Care. The health difficulties of the petitioner were exacerbated, however, by the onset of COVID-19. Visitation was restricted. The evidence before the Court is that the petitioner became withdrawn and depressed, lost weight and stopped eating regularly. On the advice of medical professionals, Mr. Ruskowsky moved the petitioner back to their family home in July 2020. Mr. Ruskowsky, at the age of 85, required assistance to care for his wife, and since July 2020 the petitioner has had in-home care provided by Royal Charm Care Provider. The care is costly. Invoices between July 2020 and December 2020 amount to approximately \$37,000.
- [31] Mr. Ruskowsky has sworn that the health care costs are a financial burden to the couple. Mr. Ruskowsky provided evidence that his pension is \$2,600 per month plus OAP and CPP, and states that the combined pensions of he and his wife do not cover the health care expenses. Certainly on the evidence, there will be ongoing health care costs to the petitioner. The evidence also reveals that the retirement savings plan of the petitioner is now depleted as a result of these recent events concerning her health.
- [32] Mr. Ruskowsky states in his affidavit that they have a modest lifestyle, and in addition to the health care expenses, they have the usual living expenses, which include property taxes. Finally, Mr. Ruskowsky swears that "we do not have the resources that would enable us to obtain a mortgage."
- [33] It is to be noted again it was only when the petitioner's health significantly deteriorated and health care costs mounted that she pursued this application. Indeed, there is evidence before the Court that the petitioner reached out to the respondents over the course of some months in an attempt to find a solution short of sale; including the suggestion that the respondents enter into a reverse mortgage in order to finance a payout to the petitioner so as to avoid a sale of the property.

- [34] I have determined the evidence does not cause me to conclude justice requires that I refuse the order pursuant to s. 2. In addition, I am of the view that the sale of the Pacific Avenue Property would certainly be more beneficial to the parties than a partition of the land. In any event, as previously stated, the parties do not suggest partition to be feasible.
- [35] In my opinion, in the context of s. 2 of the Act, the analysis of the notion of justice demands an assessment of what is reasonable, fair and sensible in all the circumstances. The court must have regard to all relevant perspectives, including the financial, emotional and/or physical difficulties that an order for partition or sale may create such that, from the respondents' perspective, it would not be just to make such an order.
- [36] I have concluded on the whole of the evidence that while a sale of the Pacific Avenue Property may be inconvenient or disruptive or disquieting to the respondents, the evidence falls well short of allowing a conclusion it would be unjust to grant such an order. In fact, it appears to me it would be perfectly reasonable, fair and sensible to order such a sale.
- [37] I order that the property be listed for sale no sooner than July 22, 2021. In the circumstances, upon delivery of these reasons, I will hear submissions from counsel concerning the conduct of sale and any ancillary matters arising from this decision.
- [38] I have postponed the listing for sale in order to provide the respondents time to organize their affairs, including making any financial arrangements they may deem advisable in order to purchase the interest of the petitioner if they so choose.

[DIALOGUE REDACTED.]

"Crossin J."

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