

CANADA / JUDGMENT

Sushnyk v. Meyer

2023 BCSC 275

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 275 Sushnyk v. Meyer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sushnyk v. Meyer,

2023 BCSC 275

Date: 20230227

Docket: S211134

Registry: Vancouver

Between:

Roberta Christine Sushnyk and Christopher Grant Sushnyk

Petitioners

And

Joanne Mary Meyer

Respondent

Before: The Honourable Justice Kent

Reasons for Judgment

In Chambers

Counsel for the Petitioners:

D. Manson

Counsel for the Respondent:

C. Cho

K. Bartella

Place and Date of Hearing:

Vancouver, B.C.

February 21, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 27, 2023

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Introduction

- [1] The petitioners are the only children of Mr. Nicholas Sushnyk who died on November 6, 2020. They were the sole beneficiaries of his estate.
- [2] On February 3, 2021 this petition was filed seeking a declaration that Mr. Sushnyk's estate (and thus that the two children as beneficiaries of that estate) was the beneficial owner of an undivided half interest as a tenant in common in a strata lot located at 1008 - 9521 Cardston Court, Burnaby, British Columbia (the "Condominium"). The petition also seeks a sale of the Condominium pursuant to the provisions of the Partition of Property Act, R.S.B.C. 1996, c. 347.
- [3] The respondent, Ms. Meyer, was Mr. Sushnyk's common-law spouse. She and Mr. Sushnyk held title to the Condominium as joint tenants. Following Mr. Sushnyk's death, she registered a transfer which put title to the Condominium into her name alone as the surviving joint tenant. She maintains she is rightfully the sole legal and beneficial owner of the Condominium.
- [4] The parties appeared before me in chambers for a "threshold hearing" which, by agreement of the parties, was to be based on the pleadings alone "without reference to the filed affidavits" to determine whether the petition proceedings are statute-barred and should thus be summarily dismissed. They prepared a consent order authorizing such a hearing and submitted it to the registry for processing as a desk order. It appears the desk order has not yet been processed, however the parties begged to proceed nonetheless so there could be an

efficient and economic resolution of a critical legal issue that might be dispositive of the case.

- [5] The court decided to proceed as if the consent order had in fact been granted and notwithstanding the rather irregular and arguably hypothetical nature of the application.

Background Facts

- [6] The parties have agreed to the uncontested facts which follow.
- [7] Mr. Sushnyk and Ms. Meyer started living together in a marriage-like relationship in February 2002.
- [8] The Condominium was purchased in February, 2004. Mr. Sushnyk was registered on title as the sole owner of the Condominium, although the couple lived there together following the February 2004 purchase.
- [9] In October 2013 Mr. Sushnyk transferred title to the Condominium into joint tenancy with Ms. Meyer.
- [10] Ms. Meyer moved out of the Condominium in June or July 2017. Mr. Sushnyk continued to reside in the Condominium following Ms. Meyer's departure.
- [11] Mr. Sushnyk made a Will on September 14, 2020, leaving the residue of his estate to his two children in equal shares. He had been ill with cancer for some time but died of a heart attack on November 6, 2020.
- [12] The following day Ms. Meyer moved back into the Condominium and changed the locks on the doors to the property. The next month she registered in the land titles office a transfer of title to the property into her name alone as the surviving joint tenant owner.
- [13] As noted, these petition proceedings were filed on February 3, 2021.

Threshold Issues to be Decided

- [14] The most significant factual and legal issue in dispute is whether Mr. Sushnyk and Ms. Meyer "separated" in June or July 2017 when the latter moved out of the Condominium and started residing in a nearby apartment. The petitioner beneficiaries say that such a separation did indeed occur. Ms. Meyer, on the other hand, says the spousal relationship continued to exist notwithstanding temporary occupation of different premises.
- [15] The court is not being asked on this "threshold hearing" to decide whether separation occurred. Rather, it is asked to assume such separation for the purposes of determining whether the petition is statute barred by limitation periods prescribed under s. 198(2) of the Family Law Act, S.B.C. 2011, c. 25 (two years following separation) or s. 6(1) of the Limitation Act, S.B.C. 2012, c.13 (two years following the day on which the claim is discovered).

[16] The fundamental question is whether the assumed separation resulted in Mr. Sushnyk and Ms. Meyer holding an undivided half interest in the Condominium as "tenants in common" or as "joint tenants" at the time of Mr. Sushnyk's death.

Analysis and Determination

[17] Some of the differences between joint and common ownership of property have been described as follows:

There are two main differences between joint and common ownership. First, the interests of joint tenants must be identical, whereas the interests of tenants in common can differ from each other. Second, joint tenants have the right of survivorship (sometimes called the *jus accrescendi*), but tenants in common do not. When a joint tenant dies, their interest ceases to exist, and the surviving joint tenants keep the asset for themselves. If there is only one surviving joint tenant, then the joint tenancy has come to an end, and the survivor is the sole owner. When a tenant in common dies, their interest continues after their death and will be transferred by will or on intestacy to someone who will join the survivors as a tenant in common.

Robert Chambers, *The Law of Property* (Toronto: Irwin Law, 2021) at 83

[18] Our court of Appeal puts it this way:

When dealing with real property an undivided one-half interest held as a joint tenant is to be distinguished from a divided one-half interest held as a tenant in common. Upon death, the interest of a tenant in common passes into his or her estate while the interest of joint tenant, which carries with it the right of survivorship, passes to the surviving joint tenant.

Fuller v. Harper, 2010 BCCA 421 at para. 53.

[19] Part 5 of the Family Law Act governs division of "family property" upon spousal "separation", including the following provisions:

Equal entitlement and responsibility

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

Family property

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,

- (i) property that is owned by at least one spouse, or
- (ii) a beneficial interest of at least one spouse in property;

Excluded property

85 (1) The following is excluded from family property:

- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

Orders under this Division

88 A spouse may make an application to the Supreme Court under this Division at any time before a final agreement or final order is made in relation to a family law dispute respecting property division.

Orders respecting property division

94 (1) The Supreme Court may make an order under this Division on application by a spouse.

Unequal division by order

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
- (b) divide family property as required under Part 6 [Pension Division].

Giving effect to property division

97 (1) For the purposes of giving effect to a division of property or family debt under this Part or Part 6 [Pension Division], the Supreme Court may

- (a) determine any matter respecting the ownership, right of possession, or division of the property or family debt, and
- (2) Without limiting subsection (1), the Supreme Court may make an order to do one or more of the following:
 - (a) declare who has ownership of, or right of possession to, property;
 - (d) require partition or sale of property and payment to be made out of the proceeds of sale to one spouse or both in specified proportions or amounts;
 - (i) transfer property to a spouse.

Rights under this Part

104 (1) If there is a conflict between this Part and the Partition of Property Act, this Part prevails.

- (2) The rights under this Part are in addition to and not in substitution for rights under equity or any other law.

Time limits

198 (1) Subject to this Act, a proceeding under this Act may be started at any time.

- (2) A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, no later than 2 years after,
- (a) in the case of spouses who were married, the date
 - (i) a judgment granting a divorce of the spouses is made, or
 - (ii) an order is made declaring the marriage of the spouses to be a nullity, or
 - (b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.
- (5) The running of the time limits set out in subsection (2) is suspended during any period in which persons are engaged in
- (a) family dispute resolution with a family dispute resolution professional, or
 - (b) a prescribed process.

[20] In this case, title to the Condominium was held by both Mr. Sushnyk and Ms. Meyer as "joint tenants" at the time of the assumed separation. What then is the effect, if any, upon that joint tenancy of s. 81 of the Family Law Act which provides for "equal entitlement" to "family property" by way of a "right" on the part of each spouse upon "separation" and then "to an undivided half interest in [the] family property as a tenant in common"?

[21] Ms. Meyer's position is that s. 81 of the Family Law Act creates only a "qualified" right, one that in order to become effective "needs to be enforced and adjudicated by the court within the Family Law Act statutory framework", including compliance with the two-year limitation period prescribed by s. 198.

[22] Put another way, Ms. Meyer argues that s. 81 "statutorily creates a property right that may conditionally vest upon separation, on the condition that it must be claimed within two years of the separation for marriage-like relationships pursuant to section 198 and the other provisions of" the legislation.

[23] Because Mr. Sushnyk took no steps to enforce his conditional right to an undivided half interest in the Condominium before the expiry of the two-year limitation period, so the argument goes, any such claim is now barred and through operation of the common law respecting joint tenancy, 100% title to the Condominium has devolved to her by the right of survivorship.

- [24] For their part, the petitioner beneficiaries submit that the triggering of s. 81 of the Family Law Act by the assumed separation severed the pre-existing joint tenancy and converted it into a tenancy in common which "crystallized" and took effect on the date of separation regardless of whether any legal proceedings were instituted to enforce that right under the Family Law Act.
- [25] Hence, so the petitioners' argument goes, Ms. Meyer wrongfully converted Mr. Sushnyk's undivided half interest in the Condominium, an interest that did not abate on his death but rather became part of his estate, when she filed the transfer in the land titles office that resulted in title being issued in her name alone in December 2020.
- [26] The petitioners say the petition is not a proceeding under the Family Law Act but rather is one seeking a declaration that Ms. Meyer's conduct was illegal under the Land Title Act, R.S.B.C. 1996, c. 250 and that an order for partition and sale pursuant to the Partition of Property Act is the appropriate remedy in the circumstances. They say this cause of action accrued in December 2020 and the court proceeding was instituted less than two months later, well within the applicable two-year limitation period prescribed by s. 6(1) of the 2012 Limitation Act.
- [27] The facts of this case are unusual and it is perhaps not surprising there is no case law precisely on point. The case law that does exist, however, favours the petitioners' interpretation of the law.
- [28] In *Cook Estate (Re)*, 2019 BCSC 417, Justice Abrioux, as he then was, denied summary determination of certain proceedings under the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 but referred to related litigation between the parties involving issues similar to this case as follows:

52 In June 2017, in her capacity as personal representative of Eleanor's estate, Jennifer commenced an action against Alec in the Supreme Court of British Columbia, Vancouver Registry No. S175543 (the "Property Action"), seeking to recover Eleanor's share of properties that had been co-owned by Eleanor and Alec. Pursuant to s. 81 of the Family Law Act, R.S.B.C. 1996, c. 128, the joint tenancy would have been severed on the date of separation and converted into a tenancy in common.

53 Alec filed a response to civil claim in the Property Action on September 29, 2017. In his response, he asserted that he remained Eleanor's spouse at the time of her death and that the properties therefore devolve to him by the right of survivorship.

[Emphasis added]

[29] The underlined sentence in the above excerpt might be a simple proposition of law pronounced by Justice Abrioux, albeit without reference to any authority. Another possibility, however is that he was simply reciting the argument being made by the estate in the related litigation and that he did not actually decide the point. Whether some sort of final determination was made by the court in later proceedings is not known and certainly no such decision was brought to my attention.

[30] However, much more powerful is the recent discussion by the Court of Appeal in *Weaver Estate v. Weaver*, 2022 BCCA 79, a case which decided that the administrator of an estate of a separated and deceased spouse is entitled under British Columbia law to start a family law action seeking division of family property and family debt after the spouse's death. In that case, the unanimous court stated:

53 The "personal obligation" cases relied upon by Mr. Weaver (such as *Price and Carpentier v. British Columbia (Director of Family Maintenance Enforcement)*, 2017 BCSC 250, *aff'd* 2018 BCCA 109), do not assist him.

54 First, this appeal is not about a claim for accrued or prospective spousal or child support, the type of action at issue in those cases. Rather, the Administrator seeks to advance a property and debt claim that is grounded in Ms. Weaver's statutory entitlement to "an undivided half interest in all family property as a tenant in common, and [equal responsibility] for family debt" (FLA, s. 81(b)). These are substantively different actions.

55 Second, at common law property claims were generally considered exempt from the *actio personalis* rule: *Monahan Estate* at paras. 9, 61. Indeed, the binding law of this jurisdiction holds that Ms. Weaver's family property interest is a statutory claim to property rights that did not abate on her death: *Dowell Estate v. Dowell*, 2009 BCCA 175 at para. 31.

56 In his *factum*, Mr. Weaver argued that the s. 81 interest does not vest until a spouse has personally commenced a court action for division and the claim has been judicially determined. At the hearing of the appeal, he moved away from that position, submitting that the s. 81 interest does not vest until the claimant spouse has personally filed an NOFC. Of course, that is a step that can only be taken while living.

57 Mr. Weaver's position is contrary to *Dowell Estate*, which is binding on us. Under s. 81 of the FLA, there is only one triggering event -- separation. The statute does not require that a spouse start a court proceeding before the undivided half interest in family property takes effect. It is only a final valuation of the interest that awaits determination under Part 5: *Dowell Estate* at para. 31. The s. 81 interest "crystallizes" on separation: *Howland* at paras. 19-20, 23, 27.

58 On this point, I find the White Paper on Family Relations Act Reform (Victoria: Ministry of Attorney General, Justice Services Branch, July 2010) "White Paper" instructive. As explained in *Li*, the White Paper proposed various, sweeping recommendations to family law in British Columbia and included a discussion on a draft Family Law Act" (at para. 27). This Court has used the White Paper as an extrinsic aid for statutory interpretation purposes in recognition of the fact

that the Legislature adopted many of its recommendations when enacting the FLA (Li at paras. 27-28). The White Paper describes separation as a triggering event that eliminates the need to start a court action before the property entitlement arises (at 86):

The proposed Act will replace the existing triggering events with one triggering event - the date of separation. Spouses would not be required to go to court to trigger entitlement to an interest in family property. Using the date of separation accords with most people's expectations; that is, it makes intuitive sense for spouses to use the date of separation as the point from which to disentangle their overlapping financial lives. The recommended approach should also eliminate problems that can arise in the existing model if, for example a spouse dies or declares bankruptcy between the date of separation and the occurrence of the triggering event.

[Emphasis added.]

59 The notion of an immediate vesting is also consistent with government's published explanatory notes to the FLA. In my view, The Family Law Act explained also meets the criteria for an extrinsic aid to statutory interpretation: Reference re Firearms Act (Can.), 2000 SCC 31 at para. 17. These notes indicate that upon separation "spouses will not be required to go to court or negotiate a separation agreement to trigger entitlement to an interest in family property" (Part 5 - Property, s. 81, emphasis added).

60 It is clear that a court application to enforce the s. 81 interest is not a legal precondition to its crystallization. In crafting s. 81, the Legislature intentionally moved away from entitlement depending on a future occurrence.

[Emphasis added]

- [31] The Weaver Estate case involved spouses who were formerly married and was governed by the two-year limitation period provided for in s. 198(2)(a) of the Family Law Act i.e. upon the granting of a divorce or a declaration of nullity. The limitation period was not actually an issue in the case but the court did opine in para. 81 of the decision that the two-year limitation period for the purposes of that subsection would likely commence on the date of the separated spouses' death.
- [32] Weaver Estate is clear, however, that s. 81 of the Family Law Act creates an undivided half interest in family property that takes effect upon separation and that litigation under the Family Law Act is not a legal precondition to crystallization.
- [33] Put another way, the Family Law Act provides for presumptive equal entitlement to and sharing of family property, a presumption which will prevail following the expiry of any two-year limitation period unless one of the spouses brings a claim in the interim for an alternative disposition of the property. In the present case, neither spouse issued such litigation under the Family Law Act and Mr. Sushnyk's "crystallized" statutory entitlement to an undivided half interest in the Condominium as a tenant in common prevailed from the date of the assumed separation to his death and beyond through to his estate.

- [34] Assuming separation did occur, the parties' interests as joint tenants in the Condominium were severed and statutorily transformed into undivided half interests as tenants in common. Ms. Meyer was not entitled to file documents at the land title office registering title to the Condominium in her name alone. She was no longer a joint tenant and the survivorship rule was inapplicable.
- [35] In such circumstances, the registration bestowed upon the estate a cause of action for "wrongful conversion" of Mr. Sushnyk's property interest in the Condominium, an action governed by s. 6(1) of the 2012 Limitation Act. The petition proceedings would therefore not be statute-barred assuming separation did in fact occur.

"Kent J."

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