

CANADA / JUDGMENT

Tutush v. Tutush

2025 BCSC 2387

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Supreme Court of British Columbia

DECIDED

27 May 2025

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2025 BCSC 2387 Tutush v. Tutush

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tutush v. Tutush,

2025 BCSC 2387

Date: 20250527

Docket: S256349

Registry: New Westminster

Between:

Tatiana Tutush also known as Tania Elizabeth Tutush

Petitioner

And

Ariana Tutush and Warren Armbruster

Respondents

Before: The Honourable Justice Whately

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

W.A. Berger

B. Park, Articled Student

Counsel for the Respondents:

T.E. Watkins

Place and Date of Hearing:

New Westminster, B.C.

May 8, 2025

Place and Date of Judgment:

New Westminster, B.C.

May 27, 2025

- [1] THE COURT: This is my ruling on a petition that came before me in chambers on May 8, 2025. I heard from counsel for the petitioner, Tatiana Tutush and counsel for the respondents, Ariana Tutush and Warren Armbruster.
- [2] This is an oral ruling. If a transcript is ordered I will edit for typographical, grammatical, and other errors, and may adjust for clarity, and organization. I will also include more fulsome references to evidence or case citations or quotes from caselaw that I will not read out today in their entirety in the interests of time. The substantive decision will remain the same, however.
- [3] For ease of reference in this decision, I will refer to the parties by their commonly used first names as that is how they were referred to during the hearing. I mean no disrespect in doing so.
- [4] Regrettably, this matter is a dispute between a mother and her daughter and her son-in-law. It is always upsetting to see a family come before me in court as opposing parties as it invariably represents deep hurt and issues that go far beyond what I can address in this forum.
- [5] The petitioner, who I will refer to as Tania, seeks an order under the Partition of Property Act, R.S.B.C. 1996, c. 347 for the sale and distribution of proceeds of a property she owns along with her daughter, Ariana, and her son-in-law, Warren. Ariana and Warren oppose the petition.
- [6] Tania relies on several affidavits sworn by her, as well as an affidavit sworn by a lawyer named Keith Barron, who assisted all of the parties with the conveyance of the property in question. He also assisted Tania with the drafting of a co-ownership agreement, and later, an amendment to that agreement. I pause here to note that along with disputing the petition generally, the respondents also challenge the premise that Mr. Barron only acted for Tania with respect to the co-ownership agreement.
- [7] For the reasons that follow, I am granting the orders sought by the petitioner.

Background

- [8] For the background facts I relied on paragraphs 1 to 12 of Part 2 of the petition. The facts listed in these paragraphs are not in dispute and largely just record the dates of the co-ownership agreement and the amendment, and refer to excerpts from those agreements.

Purchase of the House and the Co-Ownership Agreement

- [9] By way of summary, the parties sold their respective properties and agreed to combine their resources to purchase a home together in Maple Ridge. Tania says that she, her daughter, and son-in-law decided to purchase the property at 10891 Morrisette Place in Maple Ridge on April 26, 2021 for a price of \$1,449,000 plus GST. The parties entered into a co-ownership agreement setting out the rights and obligations with respect to their shared ownership of the property some time later, on August 11, 2021.
- [10] Pursuant to the agreement, Tania contributed \$395,859.69 towards the purchase price of the property. Ariana and Warren contributed \$206,936 towards the purchase price of the property.
- [11] Eighty thousand dollars of Tania's contribution amount was in the form of a loan to Ariana and Warren, pursuant to the terms of a promissory note signed by the parties. This loan is disputed by the respondents in their response to petition; in fact, they allege that this promissory note was obtained by misrepresentation tantamount to fraud. Wisely, this position was not argued by counsel at the hearing.
- [12] Together, the contributions of the family members totalled approximately \$602,000, with a mortgage covering the balance of the purchase price. By mutual agreement, the respondents would be responsible for paying the mortgage, although all parties were listed on it. Title was registered in the name of Tania with an undivided one-third interest as tenant-in-common with Ariana and Warren having two-thirds undivided interests as joint tenants.
- [13] The co-ownership agreement contained a term stating that any party shall have the right at any time to cause the sale of the property by providing the other parties with written notice of their intention that the entire property be sold.
- [14] Further, in the event that one of the parties notified of a wish to sell, the other party or parties would have a right, but not the obligation to purchase the notifying party's interest in the property at fair market value. If the fair market value could not be agreed to, an appraisal would be obtained and deemed to represent the fair market value. Absent an agreement to purchase the interest, the property would be listed for sale on the open market within 30 days delivery of the written notice with the parties agreeing to cooperate with the sales process.

- [15] According to the co-ownership agreement, the sale proceeds would be distributed to Tania with her principal investment and to the respondents with theirs, and then the remaining proceeds distributed on the one-third, two-third basis according to their respective interests.

The Amendment

- [16] In March of 2024, the parties entered into an amendment to the co-ownership agreement. This amendment was entered into as a result of Warren and Ariana's desire to refinance some of their debts and obligations by accessing some of the equity of the property, which had increased in value since the purchase. Tania, wishing to protect her own equity in the property before agreeing to any increase in the mortgage against title, negotiated the amendment, which, in her view, was necessary in light of her daughter and son-in-law's financial management which she felt was poor.
- [17] Tania agreed to assist with the respondents' refinancing, but as they were accessing the joint equity in the home to use for personal reasons, Tania wished to crystallize, in effect, her portion of the equity in the property as of the date of the amendment. The amendment therefore stated that at the time of the amendment, the respective capital contributions of the parties were \$504,000 approximately for Tania and \$177,000 for the respondents. I am not clear, based on the materials, on where the \$177,000 number came from, whether it is their contribution less the amount still owed on the loan provided by Tania, but that is the number agreed to in the Amendment.
- [18] The amendment went on to illustrate the agreement in even more concrete terms in paragraph 12, which provided a calculation of what Tania's interest would be in the event the property's fair market value was the even number of a million dollars. This calculation consisted of the now increased capital contribution of \$504,000 plus one-third of the remaining amount once the respondents' capital contribution of \$177,000 was subtracted.
- [19] Paragraph 14 of the amendment went on to specify the order of distribution of the proceeds: First to the discharge of the mortgage, liens, and encumbrances, then to legal bills, followed by the capital contribution of Tania. Then, any remaining would go to the respondents' contribution, and if there were still remaining proceeds, it would be divided into three equal shares divided amongst the parties according to their proportionate share.
- [20] Paragraph 11 of the original ownership agreement, which referred to any party having the right to trigger a sale, remained untouched by the amendment.
- [21] According to Tania, the consideration for entering into this agreement was her agreement and cooperation with the respondents with regard to the refinancing of the mortgage on the property which resulted in the respondents receiving \$246,000 from the equity, and an increase in the mortgage against the property. Tania did not receive any portion of \$246,000. The respondents received and used the entire amount for their own purposes.

Position of the Parties

- [22] Tania says that one of the main reasons she agreed to purchase the house with the respondents has not worked out as anticipated, or at all, such that it no longer makes sense for her to live there.
- [23] Specifically, she says that due to tensions in the relationship with her daughter and son-in-law, she is not receiving support or day-to-day assistance with errands, nor is she enjoying the family closeness that was contemplated when she agreed to the co-ownership arrangement. Further, Tania already has health and eyesight challenges, and she anticipates that her needs in this respect will grow in the future. As Tania rarely drives, she feels increasingly isolated in the home, and needs easier access to amenities.
- [24] As such, pursuant to the terms of the co-owner agreement she wishes to exercise her option to either trigger the sale of the property or require that her share in that property be bought out by the respondents so that she can recover her investment and equity.
- [25] Tania states that the co-ownership agreement and subsequent amendments are valid and enforceable and any misunderstandings or alternate interpretations the respondents wish to argue with respect to their intentions in entering into the agreements are based on regret, and not actual mistake.
- [26] The respondents oppose the order sought by the petitioner. In plain terms, the respondents say that this is their home, and that they feel that the agreements are unfair. They say they should not be required to sell, and they cannot buy Tania out. In support of this position, they pose several legal arguments.
- [27] First, they say that neither the co-ownership agreement nor the amended agreement should be enforced because they are internally inconsistent and void for uncertainty. They say that the agreements do not reflect the parties' actual intentions and, further, that the terms are oppressive.
- [28] Second, Warren and Ariana say that the petitioner chose to take steps to enforce the agreement only a month after agreeing to assist them in the refinancing of the property so they could repay debts. In doing so, they say Tania made an implicit promise that she would not force the sale for at least the term of the new mortgage, which is five years. This is, in essence, an estoppel argument.
- [29] Third, the respondents also assert that the petitioner will be unjustly enriched if the agreement terms are enforced. Therefore, they say that the parties' interests should be subject to a remedial trust.
- [30] The respondents also say that both parties need rectification of the contracts because the intention of the parties are not represented in the agreements or, alternatively, the contracts disproportionately advantage the petitioner to the detriment of the respondents.

- [31] Ultimately, the respondents state that the agreement should not be enforced. They say that if a sale is to occur the parties should only be able to take the original amounts they put in and take a proportional share of equity after full indemnity from the mortgage.

Discussion

- [32] I have considered the arguments of both the petitioner and respondents, as well as the case law provided with respect to common and mutual mistake (*Hannigan v. Hannigan*, 2007 BCSC 365, citing *Rob Ghitter Property* at para. 63), unjust enrichment (*1153765 BC Ltd v. Dann*, 2024 BCSC 2148), and estoppel (*Coast Capital Savings Federal Credit Union v. Smith*, 2025 BCSC 765). I carefully reviewed the evidence and affidavits of both parties.
- [33] I find that the co-ownership agreements and amendment are valid and enforceable, notwithstanding some adjustments to the numbers to reflect payments made. I do not find that there was a mutual misunderstanding about the terms of the agreements, nor was there a common mistake about the terms. I do not see where both parties have made a mistake, nor do I see that one party was unaware of the other's mistake.
- [34] I find that Warren and Ariana relied on the financial contribution of Tania to purchase a home that they otherwise would not have been able to afford and did so on various terms that were clearly set out in the agreement. They also relied on her cooperation when they needed to withdraw equity from the shared property. In their response, with respect to the amendment and the refinancing, the respondents clearly state that they were pleased to have consolidated their debts and fixed their monthly payments.
- [35] Warren and Ariana were encouraged to get independent legal advice and were offered opportunities to do so. In terms of the role of Tania's then-counsel, Mr. Barron's affidavit provides some context to what is, in my view, a poorly written waiver of conflict letter, but the parties' affidavits and the evidence attached fill in the blanks in terms of how the agreements came to be, and what advice was sought, and provided.
- [36] Warren and Ariana were not pressured to enter into any of the agreements; they willingly did so because it served their needs in the moment. Any pressure that may have existed did not come from Tania, but was as a result of the respondents' own needs, interests and financial pressures.
- [37] I find this to be evident with respect to the initial agreement, and it is most certainly evident with respect to the amendment. Warren and Ariana sought the financial cooperation and support of Tania, and they were willing to agree to terms that allowed Tania to protect her interest in return for getting what they, in turn, needed from her at that moment in time. Now, they assert that the terms they agreed to are no longer fair, or do not work for them in their present situation.

- [38] The outcome of the agreements the parties entered into is not unexpected or inadvertent because the agreements were unclear, unfairly drafted, or signed under duress. Rather, the outcome is simply not what the respondents prefer to have happen at this time. They either regret the agreement they made and seek to avoid the consequences, or they convinced themselves that it would never come to pass, and therefore did not think things through to the possible end. Neither of these scenarios are a sufficient reason to void a valid contract that was freely entered into.
- [39] I do not accept the argument that Warren and Ariana were confused about the numbers being put forward by Tania during either the negotiation of the original agreement, nor during the amendment process.
- [40] In the alternative, if they were confused, it was not because a lack of clarity in Tania's intentions or communications. Rather, it was because the respondents did not care - in that moment - what the terms were or what the outcome of certain events might be in the future. Essentially, they needed what they needed when they needed it, which was either money to purchase the house initially, or an agreement from Tania to refinance at the expense of the shared equity in the property.
- [41] Rectification is not a tool to address inner intentions, or regret as to the terms of the contract. It is also not meant to assist those who decide in hindsight that they would have made a different agreement if they thought a certain outcome might occur. The respondents' position is largely based on frustration with respect to the deal that was made and not confusion as to why it was made. I find no mistake.
- [42] Further, it is significant that in regard to their position on rectification, the respondents fail to account for or acknowledge the \$246,000 that they already removed from the equity of the house. They say that this is because they are solely responsible for making the mortgage payments. But while they are responsible, by agreement, to pay the mortgage monthly, all three parties are subject to the mortgage, and it must be paid from the proceeds of the property.
- [43] The size of the mortgage directly impacts the proceeds each takes from a sale of the property. Both Tania's initial contribution and the profit she was to take from the proceeds would be subject to the mortgage payout. She clearly communicated that, in order to agree to the refinancing, her stake in the property at that time would have to be preserved. Otherwise, her other option could have been triggering the sale of the property then and there.
- [44] The respondents' failure to account for this is fatal to their position on the distribution of the proceeds.
- [45] There is no unjust enrichment on the part of Tania, who simply negotiated a crystallization of equity as at a point in time in exchange for an agreement to increase the mortgage. There would be an unjust enrichment if the respondents were able to take out their full equity,

after agreeing to do the opposite, in order to obtain Tania's agreement on the refinancing, which was solely to their benefit. The evidence, in the form of emails exchanged during this negotiation, shows that both Ariana and Warren explicitly acknowledged the deal Tania sought to make to preserve her interest.

- [46] The argument regarding whether an assessment of the fairness of the agreement would be different if Tania were forcing the sale after many years of mortgage payments made by the respondents is not relevant to the application. These are not the facts before me. I also find that the evidence shows that the parties explicitly contemplated that this imbalance would occur after several years as a result of the terms of the agreement and the amendment, and they signed anyway.
- [47] I also reject the estoppel argument, which is based on the suggestion that Tania implicitly promised not to enforce the sale provision in the contract simply by negotiating and entering into the amendment. This is not supportable on its face as the clear wording of the sale term was not changed at all by the amendment. The parties did not discuss doing so and there is nothing that suggests to me that any such promise was made in clear unequivocal or an unambiguous way.
- [48] The respondents make reference to an email in which Tania encourages the respondents to have "a solid financial plan" in place in order to stay out of debt, so that increasing the mortgage will not put them in a deeper hole. I am asked to interpret this motherly advice as a promise to forebear on her legal rights under the agreement and amendment. This is a stretch that I do not accept. I also see no evidence that the respondents entered into the amendment agreement in reliance on such a promise. This may have been an error of judgment or a lack of foresight, but the fact of the matter is that this issue was not discussed by the parties.
- [49] Two final matters I will address very briefly; namely, the hardship caused by the sale, and the legal advice received.
- [50] First, with respect to the argument put forward in Mr. Armbruster's affidavit about becoming homeless as a result of Tania's application. This was not pushed by the respondents' counsel during the hearing, to their credit. This is not supported by evidence and by all accounts is an exaggeration given the family income of the respondents.
- [51] Second, with respect to the suggestion that Mr. Barron was in a state of conflict when he acted for all parties with regards to the conveyance, but acted just for Tania with respect to the drafting of the agreement. I agree that Mr. Barron was not as clear as he could have been in terms of the so-called "standard conflict letter," but I find that he was more than clear in other communications at the time, in stating who he was acting for.

- [52] Also, Mr. Barron has sworn and I accept, that not only were the respondents encouraged on more than one occasion to seek independent legal advice, but that they confirmed that they did obtain legal advice, and intimated the lawyer they purportedly consulted did not think some aspects of the initial agreement made sense to him or her. I was advised during the hearing that the respondents never consulted a lawyer, despite these statements. That choice cannot be laid at the feet of the petitioner now.
- [53] In the end, Mr. Armbruster's own affidavit provided the support for my finding that the respondents' opposition to the petition rests on regretting the deal they made, as opposed to not understanding it, or that there was a mistake as to the terms. Notably, he uses the term "in hindsight" on more than one occasion, which I find telling. I find his claims about not understanding terms to be disingenuous and contradicted by rather clear evidence to the contrary.

Disposition

- [54] Counsel for Tania conceded that certain payments made by the respondents to Tania towards the \$80,000 promissory note linked to the capital contributions were not included in initial calculations. In light of that, the initial contributions of the parties must be adjusted to reflect those payments. and I believe this is reflected in the draft order that was in the materials.
- [55] The house will be sold as per the terms of the agreement between the parties.
- [56] I order that the parties will have joint conduct of sale. While the petitioner argued that she should have sole conduct of sale, there is no evidence before me that suggests at this point that the respondents would behave in such a way as to frustrate the efficient sale of the property and the maximization of the return on the sale of that property. I expect them to conduct themselves such that they can maximize their own profit on the sale, and will not drag things out. I am of the view that joint conduct of sale is appropriate in all the circumstances.
- [57] However, for clarity, I will order the following with respect to the joint sale:
- a) All parties shall provide reasonable assistance and information required by the realtor for the listing and marketing of the property.
 - b) The parties shall not unreasonably withhold their agreement to any adjustments to the list price recommended to them from time to time by the realtor and the parties shall not unreasonably withhold their agreement to accept an offer to purchase the property.
 - c) Once the property sells the proceeds will be distributed as follows:
 - i. Discharge of mortgages, liens, charges, or encumbrances affecting the property at the date of sale.

ii. Payment of legal bills.

iii. Distribution of the parties' capital contributions, which will go first to the petitioner in the amount of \$453,915.62; second to the respondents up to the amount of \$227,048.66.

iv. Any remaining profit after all of the above distributed divided into three equal shares with one going to the petitioner and two to the respondents.

[58] I will award costs to the petitioner.

[59] Finally, I note that in the event that the parties are unable to agree on the acceptance of an offer to purchase, the parties may apply to court in respect of the listing of or the offer to purchase the property in order to facilitate a reasonable sale of the property, and I am not seized of any such application that may be brought by a party.

[60] As previously mentioned, I note that the amounts of the capital contributions are intended to reflect my acceptance of the terms of the amendment and also to ensure that the respondents' payments to Tania with respect to the promissory note are included in those amounts. It is my understanding that the numbers in the petitioner's draft order reflected the current amounts with those payments in mind and if that is not the case you can let me know now.

[61] CNSL W. BERGER: No. Those are the figures that are in the draft order.

[62] THE COURT: Okay.

[63] CNSL W. BERGER: Thank you.

[64] THE COURT: Okay. Thank you. Are there any questions?

[65] CNSL W. BERGER: No, Madam Justice.

[66] CNSL T. WATKINS: No, Madam Justice. And I haven't actually got a copy of the draft order, but I take my friend's word for it and I'm sure I can work it out with him if I see any mathematical issues.

[67] THE COURT: Okay. Thank you. I appreciate it. Thank you all very much. We are adjourned.

[68] THE CLERK: Order in court.

"J. Whately, J"

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