

CANADA / JUDGMENT

Westergaard v. Westergaard

2024 BCSC 2464

COURT

Supreme Court of British Columbia

DECIDED

27 November 2024

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2024 BCSC 2464 Westergaard v. Westergaard

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Westergaard v. Westergaard,

2024 BCSC 2464

Date: 20241127

Docket: S2464162

Registry: Prince George

Between:

Kathleen Louise Westergaard

Petitioner

And

Floyd Elmer Wilfred Westergaard, Gary Charles Simmons and

Susan Josephine Dempsey

Respondents

Docket: S2463888

Between:

Kathleen Louise Westergaard

Petitioner

And

Floyd Elmer Westergaard, Susan Josephine Dempsey, and

Gary Charles Simmons

Respondents

Before: The Honourable Justice Thomas

Oral Reasons for Judgment

In Chambers

The Petitioner, appearing in person:

K. Westergaard

Counsel for the Respondents:

M.A. Wright

Place and Date of Trial/Hearing:

Prince George, B.C.

November 26-27, 2024

Place and Date of Judgment:

Prince George, B.C.

November 27, 2024

- [1] THE COURT: There are two petitions before the court, action #2464162 seeks damages from the respondents; action #2463888 seeks the sale of property pursuant to the Partition of Property Act, R.S.B.C. 1996, c. 347 [PPA].
- [2] The petitions arise from the same facts so I find the following facts in both petitions. The petitioner's father received a one-quarter common interest in the property. Her father's three siblings each owned an additional one-quarter common interests in the property. The named respondents are on title as the current owners of the three other one-quarter common interests in the property. The property cannot be legally subdivided into four lots.
- [3] A memorandum of agreement was signed by the four siblings. The essential elements of the agreement for the issues to be decided today are as follows. The memorandum requires the land to be owned by direct descendants of the petitioner's grandfather, it subdivides the lot into four parcels and assigns the parcels to the four common-interest owners.
- [4] The petitioner's father pled guilty to sexually assaulting the petitioner as a child in June of 1992. The petitioner made allegations that the petitioner's father's father also engaged in sexual assaults. Shortly thereafter the petitioner's father died of a heart attack. The petitioner's father's will made his wife the executrix and bequeathed all of his property,

quote, "both real and personal of every nature and description of which I may die possessed or in which I may have an interest over which I may have the power of appointment or disposal to". The will was made prior to the execution of the agreement.

- [5] The petitioner's mother, the executrix of the will, did not probate her former husband's estate. From 2007 to 2009 the petitioner's mother looked into passing the interest in the property to her daughter, Donna. The petitioner's mother did not probate the will because when she looked into the estate she realized that she only had a life interest in the property, and the remaining value of the estate was not worth probating.
- [6] On March 18, 2012, the petitioner's mother died. The executor of her estate was Theresa Rathje. The petitioner removed Ms. Rathje as executor of her mother's estate. The petitioner applied for and became executor of her father's estate on October 9, 2019. The petitioner transferred the title of her father's share of the property to her father's estate on February 10, 2020. The petitioner subsequently transferred the title of her father's share of the property to herself on August 26, 2020.
- [7] There has been some animosity between the respondents and the petitioner. The existence and legal status of the memorandum of agreement has caused further confusion and animosity between the petitioner and the respondents. It is clear the parties cannot co-exist as joint or common owners of the property. No applications have been made to remove title from any of the parties pursuant to the Land Title Inquiry Act.

LEGAL FINDINGS

- [8] I make the following legal findings with respect to the two petitions:
 - 1. The memorandum of agreement is not enforceable with respect to the dividing of the property between the common interest holders of the property and is of no effect to that regard. I make the following findings based upon the application of the memorandum of agreement to the petitioner's father's will through s. 41 of WESA, and my findings of fact stated previously.
 - 2. The petitioner's father's legal title to the property transferred to the petitioner's father's wife until her death. This would be called, in colloquial terms, a life interest.
 - 3. The petitioner's mother was the executor of the petitioner's father's estate until her death. I am satisfied this is the case due to the application of the will and my findings of fact that I noted previously.
 - 4. The petitioner's father's legal title to the property then returned to the petitioner's father's estate at the death of the petitioner's mother. The petitioner's father's legal title to the property remained in her father's estate until it was transferred to the petitioner on August 20, 2022.

- [9] I make no further findings with respect to what knowledge the various parties had of these facts, the legal effects of the memorandum, or the petitioner's father's will.

PETITION FOR DAMAGES

- [10] The petitioner claims for damages arising from loss of profits associated with the property and for breach of trust for the respondents, whom she alleged acted as her trustee for her share of the property. This could only arise if they were acting in the capacity as the executor of her father's estate in my view; therefore, any potential claim for breach of trust is limited to the time between the petitioner's mother's death and the time that she became the executor of her father's estate on October 9, 2019. To the extent that there are claims for breach of trust outside of this time period, those allegations are struck.
- [11] In the damage petition, the petitioner seeks the transfer of the three one-quarter shares of the property to herself, which she values at \$20,000 per each share. This issue is struck from the damage claim and will be dealt with in the petition for the sale of property.
- [12] There are clear triable issues with respect to the assessment of damages the petitioner says she is entitled to. Unfortunately, there is not sufficient time or agreement on factual issues to determine if the petitioner's claim for damages raise triable issues or to be able to see if any of them are quantifiable. I say this because the fact of whether triable issues exist remains a live issue for the respondents to raise in the damage petition, if necessary, at some future time.
- [13] I order that the damage petition be put on the trial list and that the rules of procedure and trial govern the resolution of the petition that would apply if the matter were brought as an action. The parties may convert the petition into an action by consent or direction of the court. This would require the drafting of a notice of civil claim and responses and counterclaims by the respondents.
- [14] Before any steps are taken to advance the damage petition, the parties are ordered to attend a case planning conference. The parties must exchange case proposals setting out the procedural steps necessary to resolve the matter, and a proposed time estimate for completion prior to the conference. The legal findings that I have made, as well as the findings with respect to the potential time period for possible breach of trust claims by the petitioner, and the striking of the remedy for transfer of the shares to the respondents' interest in the property to her, apply to the damage petition, and also would apply to the action if it is converted into an action.
- [15] It may be helpful to include the findings of facts that I have made in this petition in the pleadings if the pleadings are revised into a notice of civil claim, or the petition is further amended, but that is an issue that I will leave to the parties, and perhaps should be addressed at the case planning conference.

PETITION FOR SALE OF THE PROPERTY

- [16] The petitioner applies for sale of the property pursuant to the PPA. In my view the case of *Singh v. Virk*, 2023 BCSC 917, at paras. 5-11 [Singh], are directly on point and should apply to this petition.
- [17] The petitioner seeks a sale of the property pursuant to s. 2 of the PPA. The respondents provide an unconditional undertaking to the court to purchase the petitioner's share of the property. I find that the respondents have met the requirements of s. 8(2) of the PPA and as a result, pursuant to s. 8(3) of the PPA, I order the sale of the petitioner's interest in the property to the respondents.
- [18] The respondents say that the considerable investment in fixtures that have been invested in the property were made by them and the previous owners of their shares, and it would be unjust for the petitioner to benefit from these investments. The petitioner says that the respondents were acting as her trustee when these investments were made, the investments were made without her consent, and therefore, pursuant to *Tellier v. Borchert*, 1960 CanLII 519 (AB KB) [Tellier], she should be solely entitled to the value of any fixtures.
- [19] I do not accept that *Tellier* applies to this situation. The previous owner of the respondent's interest, that is her father, agreed to the land being dealt with in this manner, and it was not unreasonable for the parties to make investments in fixtures consistent with this agreement. All the relevant fixtures were incurred by the respondents or their previous share owners, therefore I find that the petitioner is only entitled to the value of the land, but not the value of the fixtures on the land. Pursuant to my discretion under s. 8(2) of the PPA, the petitioner is ordered to sell her one-quarter common interest in the property to the respondents as follows, I am going to follow much of the procedure set out by Justice Lamb in *Singh*, such that the petitioner is ordered to sell her one-quarter common interest in the property to the respondents as follows:
- (a) if the parties are unable to agree by June 6, 2025 on the price to be paid by the respondents to the petitioner then each party may obtain and serve on the other party an appraisal of the fair market value of the value of the land only on the property, as the value of the fixtures are excluded, by no later than February 10, 2025. Either party has leave to bring an application after February 10, 2025, on eight business days' notice for an order that:
 - (i) fixing the price to be paid by the respondents to the petitioner for the land value of the property;
 - (ii) prescribing the form in terms of the purchase and sale of agreement for the purchase by the respondents for the petitioner's one-quarter common interest in the property.
- [20] The parties are at liberty to apply for further directions regarding the manner in which the purchase by the respondents from the petitioner of her one-quarter common interest shall be completed.

- [21] I am not seized of either petition.
- [22] The cost of the hearing of the damage petition are in the cause, that is they are not to be assessed at this time, but will follow the successful litigant in the damage action.
- [23] The costs of the sale of the property petition, to the extent that those costs and expenditures are not duplicated in the damage petition, will go to the respondents, as they were successful.
- [24] I would like to thank both parties for their helpful submissions.
- [25] Okay, those are my reasons, since the respondents were successful I would like them to draft the order, they will then provide the draft order to Ms. Westergaard for her approval, and once approved the order can be submitted to the court.

"Thomas J."

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