
CANADA / JUDGMENT

Whieldon v. Alexander

2018 BCSC 2119

COURT

Supreme Court of British Columbia

DECIDED

30 November 2018

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2018 BCSC 2119 Whieldon v. Alexander

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Whieldon v. Alexander,

2018 BCSC 2119

Date: 20181130

Docket: S202113

Registry: New Westminster

Between:

Vickie Ann Whieldon

Petitioner

And

Deanna Clara Mae Alexander

Respondent

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for Petitioner:

W.R. Neufeld

Counsel for Respondent:

I.D. MacKinnon

Place and Date of Hearing:

New Westminster, B.C.

September 19, 2018

Place and Date of Judgment:

New Westminster, B.C.

November 30, 2018

Introduction

- [1] The petitioner seeks the following relief pursuant to the Partition of Property Act, R.S.B.C. 1996, c. 347 [PPA]:
- a) a declaration that the petitioner is entitled to an undivided legal and equitable one-half interest in lands and premises situated at 7665 Columbia Street, Mission, British Columbia with a legal description of PID: 004-949-781; Lot 336, District Lot 4, Group 3, New Westminster District Plan 51639 (the "Property");
 - b) an order that the Property be sold;
 - c) an order that the petitioner be granted exclusive conduct of the sale or, in the alternative, that the parties may apply for the appointment of a trustee to conduct the sale and distribute the proceeds as the court directs;
 - d) an order that the proceeds of the sale, after payment of all necessary costs, be divided equally between the parties; and
 - e) an order that all necessary accounts, directions and inquiries be taken in conducting the sale and distributing the proceeds.
- [2] The respondent opposes all of the relief sought in the petition.

Background Facts

- [3] The petitioner, Ms. Whieldon, is the daughter of Lloyd Harrison Alexander and Joan Alexander. Joan and Lloyd Alexander were married in or around 1952. In or around 1992, Joan Alexander passed away.
- [4] In 1998, Mr. Alexander bought the Property. Title to the Property was placed in the names of Mr. Alexander and the petitioner as joint tenants. The petitioner did not provide any funds or other moneys to assist in the purchase of the Property.
- [5] In or around 2002, Mr. Alexander started dating the respondent. In 2004, Mr. Alexander and the respondent married.

- [6] Since the Property was purchased, it has been the residence of either Mr. Alexander or Mr. Alexander and the respondent. The petitioner lives elsewhere. The only parties paying expenses relating to the Property, such as property taxes, utilities, repairs and maintenance, were either Mr. Alexander or him and the respondent together.
- [7] The respondent deposes that, shortly after Mr. Alexander and the respondent married, Mr. Alexander asked the petitioner to give up her undivided one-half interest in the Property so that Mr. Alexander and the respondent could be recorded as joint owners of the entirety of the Property. The petitioner refused this request.
- [8] Subsequently, on or about May 12, 2004, Mr. Alexander transferred his undivided one-half interest in the Property to himself and the respondent as joint tenants.
- [9] On March 25, 2018, Mr. Alexander passed away. From 2009 until Mr. Alexander's death, the respondent was the sole caregiver for Mr. Alexander, whose health was deteriorating rapidly after about 2010. The respondent states that the petitioner "played little or no role" in caring for Mr. Alexander from 2009 to 2018. The petitioner states that this is because the respondent failed to advise her of Mr. Alexander's failing health and, indeed, only advised the petitioner of her father's death one month after the fact.
- [10] As a result of Mr. Alexander's death, the respondent as surviving joint tenant became the sole owner of an undivided one-half interest in the Property. The Property is now owned by the petitioner and the respondent, each holding an undivided one-half interest as tenants in common.
- [11] The respondent is the only one who currently resides at the Property. She does not pay rent.
- [12] The respondent is presently 76 years of age and has very limited financial resources. Her assets consist of cash and savings accounts totaling approximately \$40,000. She receives Canada Pension Plan and Old Age Pension Plan income of approximately \$1,000 per month and further pension income of \$180 per month.
- [13] The respondent asserts monthly expenses including expenses relating to the Property such as property taxes, Hydro, gas, cable as well as household maintenance and repair. The respondent further asserts that she has difficulty paying these expenses on a monthly basis and would have greater difficulty paying these expenses if she also had to pay rent.
- [14] The petitioner and the respondent have a strained relationship. Each accuses the other of treating the other "unfairly and with contempt." The respondent states that, while Mr. Alexander was alive, the petitioner did not speak to her directly and did not acknowledge her presence. The petitioner states that the respondent caused her to miss the chance to say goodbye to her father and attend his funeral.

The Law

[15] Section 2(1) of the PPA provides that "[a]ll 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." The petitioner and the respondent are tenants in common of the Property and, as such, may be compelled to sell the Property.

[16] The petitioner relies specifically on s. 6 of the PPA, which provides as follows:

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.

[17] Since the petitioner owns one-half of the Property, the court must order a sale of the Property unless it sees "good reason" not to do so. This is confirmed in *Harmeling v. Harmeling* (1978), 90 D.L.R. (3d) 208 (C.A.), where Seaton J.A., writing for the majority, held at para. 10 that "there is a prima 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."

[18] The court's jurisdiction to compel partition or sale is discretionary: *Harmeling* at para. 3 citing *Evans v. Evans*, [1951] 2 D.L.R. 221 (B.C.C.A.). The court's discretion is "broad and unfettered": *Sahlin v. The Nature Trust of British Columbia, Inc.*, 2011 BCCA 157 at para. 24. In *Bradwell v. Scott*, 2000 BCCA 576 at para. 45, the court commented as follows on the factors that may impact the court's discretion to refuse an order for sale:

Serious hardship to a respondent may be a proper ground for refusing an order for sale, as might lack of "good faith, vexatiousness or maliciousness" on the part of the petitioner. But these are not the exclusive measure of "good reason". I agree with Mr. Justice Seaton [in *Harmeling*] that we should not limit the discretion by creating a general rule that might serve to justify refusal in any given case. The facts and circumstances of each case must be examined to determine whether a good reason, of whatever sort, exists for refusing the order.

[19] Thus, the issue on this petition is whether, given all of the facts and circumstances, there is "good reason" not to order a sale of the Property as requested by the petitioner. The onus is not on the respondent to demonstrate "good reason" not to order a sale: *Sahlin* at para. 23 citing *Bradwell* at para. 35. It is for the court to decide this question, having regard to the evidence adduced by both parties.

Analysis

- [20] The petitioner submits that there is no good reason not to order the sale of the Property and an equal division of the proceeds.
- [21] The respondent submits that justice requires that the Property not be sold. In particular, the respondent argues that sale of the Property would impose a "massive financial hardship" on her, and that the petitioner "is acting vexatiously and maliciously in her dealings with the Respondent".

Hardship

- [22] The respondent relies on several cases to support her position that a sale of the Property would impose serious hardship on her. I find, however, that these cases are distinguishable and do not assist the respondent.
- [23] In Harmeling, the parties were married old age pensioners. The case was heard in 1978, when the petitioner was 71 years old and the respondent 63 years old. Both had medical problems. Most of the funds to buy the property involved came from Mr. Harmeling's trout farm, which he had worked on with his first wife prior to her death and thereafter by himself. After Mr. Harmeling's second marriage, the trout farm was operated by him and his new wife. Some monies for the construction of the new house came from a settlement Ms. Harmeling received from an award respecting a back injury. In 1975, Ms. Harmeling left the home and began living with another man. Thereafter, she started proceedings for partition and sale of the property.
- [24] The Court of Appeal in Harmeling refused to order a sale of the property. The Court concluded at para. 15 as follows:

If this order stands, Mr. Harmeling will be ousted from the home that was built largely from his money to provide for his retirement. It is particularly adapted to his interests. His half of the sale proceeds, together with his other assets, will not be sufficient to provide him with similar accommodation. It is too late in life to start again. At over 70 years of age he ought not to be turned out. In all the circumstances I think that justice requires that the order for sale be refused at this time.

- [25] In *Bergen v. Bergen* (1969), 68 W.W.R. 196 (B.C.S.C.), the property involved was registered in the names of the parties as joint tenants. The home had been occupied by the plaintiff husband, defendant wife, and their two children until September 1967 when the plaintiff left to live elsewhere. Afterwards, the property continued to be occupied by the defendant wife and the two children aged 12 and 15. The wife received \$190 per month for support for herself and the two teenage children. Her only further income was \$16 per month in a family allowance cheque.

- [26] The court in Bergen refused to order sale of the property. Mr. Justice Seaton found that it was economically infeasible for the wife to purchase her husband's interest or find equivalent accommodation elsewhere. The court concluded that ordering a sale would be "disastrous for the defendant and the children" (para. 8), and that the husband was acting "oppressively" by failing in his legal obligation to provide necessities for his wife and children (para. 12).
- [27] To similar effect is *Phillips v. Phillips* (1980), 24 B.C.L.R. 194 (C.A.). In that case, the Court of Appeal overturned an order for partition and sale of property formerly occupied by the parties and their children as their matrimonial home. The husband sought sale of the property in order to pay off his loans. The court held at para. 20 that the husband's "desire to rid himself" of his obligations to his wife and children (including adopted children) "ought not to overcome" those obligations. The order for partition and sale was set aside.
- [28] These cases are distinguishable. They deal with situations of husband and wife. In the case at bar, however, the legal obligations flowing from marriage as an economic partnership do not apply. The petitioner has no legal obligation to provide for the respondent, as the petitioners did in *Harmeling*, *Bergen*, and *Phillips*.
- [29] The respondent also relies on *Mowat v. Dudas*, 2012 BCSC 454. In that case, the property at issue was a common law condominium development (which is now prohibited) comprising 177 apartments and townhouses owned by 135 different owners. A minority of owners wanted to sell the entire complex. The court held that it would be unjust to order a sale. The evidence demonstrated that a sale "would force particularly vulnerable people out of their homes": para. 162. The court found that it would be "difficult or impossible" for these people to find similar accommodation elsewhere: para. 162.
- [30] The facts in *Mowat* are wholly unlike the facts in the case at bar. The respondent has not established that sale of the Property would result in the disastrous consequences that would have resulted if the properties in *Mowat*, or the properties in the other cases, were sold.
- [31] The question which has not been answered here is whether there is available accommodation, likely on a rental basis, at a cost lower than or similar to maintaining the Property. The court is not permitted to speculate on the answer to this question. Counsel made reference to the assessed value of the Property as \$420,000. There was no market value appraisal. Obviously, the court would be asked to speculate again about the proceeds of sale, but assuming each party received something in excess of \$200,000, then the respondent would have a significant sum to provide for her future expenses. Life does not come with guarantees of financial well-being for all time.

Conduct of the Petitioner

- [32] The respondent further submits that justice requires that the court refuse to order a sale of the Property on the grounds that the petitioner has engaged in vexatious, malicious, or otherwise improper conduct by failing to care for or visit her father and by treating the respondent "unfairly and with contempt". The respondent also questions why the petitioner has brought this petition now rather than many years ago.
- [33] I cannot accept the respondent's submissions. I accept the petitioner's evidence that this petition is motivated by financial considerations. She seeks to benefit financially from the Property given to her by her father. Further, justice does not require that the petition be dismissed based on the timing of the petition and the petitioner's conduct toward the respondent. The law does not require the petitioner to speak to the respondent directly, to acknowledge her on social occasions, or to forego benefiting from the petitioner's interest in the Property for the sake of the respondent.

Other Considerations

- [34] The respondent says that a factor against the sale of the Property is the costs that she has expended while living in the property. Insofar as the expenses for current usage such as Hydro, property taxes and cable are considered, those do not add to the value of the Property but are used by the occupant of the Property.
- [35] Expenses representing maintenance for daily wear and tear are likewise a direct consequence of the occupancy by the respondent and in no way contribute to any improved value in the Property. The respondent might consider the expenses referred to as an offset for rent. These expenses are not a justice issue which would prevent the sale of the Property.
- [36] Finally, both parties submitted that their respective positions are supported by Mr. Alexander's intentions.
- [37] The respondent states that Mr. Alexander told her on a number of occasions that he wanted her to continue to reside in the Property during her lifetime.
- [38] The petitioner adduced evidence from Ms. Merna Hamilton, a "close lifelong friend" of Mr. Alexander and the petitioner. Insofar as her affidavit is admissible, it strongly suggests that Mr. Alexander had no intention of reversing the transfer to the petitioner which was said to honour the memory of his first wife. Ms. Hamilton also states that Mr. Alexander gave the petitioner her interest in the Property in order to "take care" of her after he passed away. Ms. Hamilton states that whenever the respondent would raise the issue of the petitioner's interest in the Property, Mr. Alexander "would resist the discussion and change topics or otherwise make it clear that he was not wanting to discuss the matter to the invariable frustration of Deanna."

- [39] This profound conflict on the evidence cannot be resolved by a judge in chambers based on affidavits which record opposite views of Mr. Alexander's intentions. The respondent seeks to cancel the actions of Mr. Alexander in conveying a one-half interest in the property to the petitioner, but she has not met the onus of proof to do so.
- [40] If Mr. Alexander intended to make some other arrangement concerning the Property for either of the parties, his intentions were not expressed by any positive action for the period from 1998 up to and including 2018.

Conclusion

- [41] Having regard to all of the circumstances and the evidence, I conclude that justice does not require denying a sale of the Property. I exercise my discretion to grant the relief sought in the petition herein as follows:
- a) the petitioner is declared to hold an undivided legal and equitable one-half interest in the Property;
 - b) the Property shall be sold forthwith;
 - c) the proceeds of sale, after payment of all necessary costs of sale and encumbrances, shall be divided equally between the petitioner and the respondent;
 - d) all necessary accounts, directions and inquiries shall be taken;
 - e) the petitioner is granted exclusive conduct of sale of the Property; and
 - f) costs of this petition shall follow the event after assessment pursuant to Appendix B of the Supreme Court Civil Rules, B.C. Reg. 168/2009, as a matter of ordinary difficulty and are payable to the petitioner from the respondent's share of the proceeds of sale of the Property.

"Ball J."

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