IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Presseau v. Presseau Estate, 2010 NSSC 201

Date:2010 05 31
Docket: SFHMPAY-068042
Registry: Halifax

Between:

Robert Marcel Presseau

Applicant

v.

Presseau Estate

Respondent

Judge:	The Honourable Justice Leslie J. Dellapinna
Heard:	May 20, 2010, in Halifax, Nova Scotia
Counsel:	M. Moore counsel for Robert Presseau T. Sheppard counsel for Robert Stephen Presseau

By the Court:

[1] This case involves an application by Robert Marcel Presseau pursuant to sub-section 8 (2) of the *Matrimonial Property Act* S.N.S. 1980, c.9 to set aside a deed executed without his knowledge by his late wife, Carol Ann Presseau, in December 2004.

[2] Briefly the background facts are as follows:

[3] The Applicant and Carol Ann Presseau were married on August 18, 1983. They had two children, Robert Stephen Presseau (now 21 years of age) and Jennifer Ann Presseau (now 19 years of age).

[4] Mr. and Mrs. Presseau purchased a property located at 124 Ashgrove Avenue in Cole Harbour, Nova Scotia in August 1993. They took title as joint tenants.

[5] From August 1993 until approximately February 5, 2008 the parties lived together in the house on that property. There is no dispute that the property constitutes "a matrimonial home" as defined in section 3 of the *Matrimonial Property Act*.

[6] In 2004 Ms. Presseau was diagnosed with cancer. There also appears to be little doubt that also in 2004 Ms. Presseau became unhappy in the marriage.

[7] On December 22, 2004 Ms. Presseau executed a will naming the parties' two children as her beneficiaries. The Applicant was not named as a beneficiary nor was he named as an Executor.

[8] On the same day Ms. Presseau executed a warranty deed which effectively transferred her interest in the matrimonial home to herself. That is to say she was both the sole grantor and the sole grantee named in that deed.

[9] Ms. Presseau passed away on February 6, 2008.

[10] The Applicant did not consent to the deed signed by Ms. Presseau in December 2004. He only learned of its existence in May 2008 after his wife's death.

[11] A Grant of Probate was issued on October 2, 2008 naming Ms. Cherald Tutt of British Columbia as Executrix. Ms. Tutt made it clear during a pre-trial conference that she was not interested in representing the estate in this matter and the Court has been informed that the parties' son, Robert Stephen Presseau has been or will soon be named as the Executor of his mother's estate and with Ms. Tutt's permission is representing the estate in response to this application.

[12] Subsections 8 (1) and (2) of the *Matrimonial Property Act* read as follows:

> 8 (1) Neither spouse shall dispose of or encumber any interest in a matrimonial home unless
>
> (a) the other spouse consents by signing the instrument of disposition or encumbrance, which consent shall not be unreasonably withheld;
>
> (b) the other spouse has released all rights to the matrimonial home by a separation agreement or marriage contract;
>
> (c) the proposed disposition or encumbrance is authorized by court order or an order has been made releasing the property as a matrimonial home; or
>
> (d) the property is not designated as a matrimonial home and an instrument designating another property as a matrimonial home of the spouses is registered and not cancelled.
>
> Disposition contrary to subsection (1)
>
> (2) Where a spouse disposes of or encumbers an interest in a matrimonial home contrary to subsection (1), the transaction may be set aside by the other spouse upon an application to the court unless the person holding the interest or encumbrance acquired it for valuable consideration, in good faith and without notice that the property was a matrimonial home.

ISSUES

[13] This application raises the following issues:

1) Does a deed by one joint tenant to her/himself sever a joint tenancy?
2) Was Ms. Presseau's deed from herself to herself a disposition or an incumbrance of an interest in the matrimonial home within the meaning of subsections 8 (1) and (2) of the *Matrimonial Property Act*?

3) Should the deed be set aside?

ANALYSIS

[14] Section 21 (1) of the *Matrimonial Property Act* provides as follows:

> **21 (1)** The rule of law applying a presumption of advancement in questions of the ownership of property as between husband and wife is abolished and in place thereof the rule of law applying a presumption of a resulting trust shall be applied in the same manner as if they were not married, except that
>
> (a) the fact that property is placed or taken in the name of spouses as joint tenants is *prima facie* proof that each spouse is intended to have on a severance of the joint tenancy a one-half beneficial interest in the property; and
>
> (b) money on deposit in a chartered bank, savings office, loan company, credit union, trust company or other similar institution in the name of both spouses shall be *prima facie* proof that the money is on deposit in the name of the spouses as joint tenants for the purposes of clause (a).

[15] Section 21 (1) makes it clear that the *Matrimonial Property Act* contemplates the possibility that a joint tenancy as between spouses can be severed.

[16] The severance of a joint tenancy is significant to the co-owners. While a joint tenant and a tenant in common both have the right to use and possess their property in undivided shares the last surviving joint tenant obtains sole ownership of the property upon the death of his or her fellow joint tenants. The right of survivorship is not shared by tenants in common.

Griffiths, J. in ***Robichaud v. Watson*** (1993), 147 D.L.R. (3d) 626 (Ont. H.C.) said at paragraph 28:

> "...A joint tenancy depends on the continuance of three unities of title, interest and possession and the destruction of any such unities severs the joint tenancy and creates a tenancy in common. In determining whether a joint tenancy has been severed, one turns first for guidance to the oft-quoted passage of Sir W. Page Wood V.-C. in Williams v. Hensman (1861), 1 J. & H. 546 at pp. 557-8, 70 E.R. 862:

> A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his own interest in such survivorship. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common..."

[17] In ***Mills v. Andrews*** (1982) 54 N.S.R. (2d) 394 Rogers, J. considered a case involving a husband and wife who jointly owned a matrimonial home purchased in 1962. The wife gave her son (from a previous relationship) her Power of Attorney which he used in January 1982, while the wife was in the hospital, to execute a deed from the wife of her interest in the matrimonial home to himself and then another deed from him back to his mother. In February 1992 the wife conveyed her interest back to her son. The deeds were designed to severe the joint tenancy and transfer the wife's interest in the property to her son. The husband's consent was not requested.

[18] The husband applied to the court to set aside the transactions and the son applied to dispense with the husband's consent. The wife died before the applications were heard.

[19] Rogers, J. set aside the transactions. He said beginning at paragraph 19:

> 19 The first question to be determined is whether either or both of the conveyances from Phyllis Mills of her interest in the matrimonial home was a disposition of an "interest" within the meaning of s. 8(1) of the Act.
>
> 20 The deed of 25th January 1982 from Mrs. Mills by her attorney, Peter Andrewes, was expressly made with the intention of severing the joint tenancy with Mr. Mills. The deed of 23rd February 1982 made no such specific reference to the joint tenancy. In my view, however, Mrs. Mills intended this result by conferring upon her son her interest in the matrimonial home in the atmosphere of tension, acrimony, and distrust which existed at the time among the Mills and Peter Andrewes.

> 21 The further question arises, however, as to whether the severance amounts to a conveyance of an "interest" as set out in s. 8(1) of the Act. In the case of *Re Van Dorp and Van Dorp* (1980), 30 O.R. (2d) 623, 16 R.P.R. 161 (Co. Ct.), Carley Co. Ct. J. addressed this very question. After considering various authorities, including *Re Murdoch and Barry* (1975), 10 O.R. (2d) 626, 64 D.L.R. (3d) 222, a decision of the Ontario High Court of Justice, and *Sorensen v. Sorensen*, [1977] 2 W.W.R. 438, 90 D.L.R. (3d) 26, 3 A.R. 8, a decision of the Alberta Court of Appeal, Carley Co. Ct. J. held that a conveyance of a deed from one spouse joint tenant to himself in an attempt to sever the joint tenancy was a conveyance of an "interest" in the matrimonial home.
>
> 22 In the *Van Dorp* case the husband, shortly before his death, executed and registered a deed to himself of his interest in a farm owned by himself and his wife as joint tenants in a manner that made it clear it was intended to sever the joint tenancy. After the husband's death, the wife brought an application to have the transaction set aside so far as it related to the matrimonial home.

[20] After considering what was then section 42 of the *Ontario Family Law Reform Act* R.S.O. 1980, c.152 which was very similar to ss. 8(1) and (2) of the *Matrimonial Property Act* of Nova Scotia Rogers, J. set aside the deeds saying, beginning at paragraph 31:

> 31 While it is argued on behalf of Mr. Andrewes that s. 21 allows for severance of a joint tenancy of a matrimonial home, such an argument, in my view, first of all disregards the decision in *Van Dorp* and, second, flies in the face of those provisions of the Act to which I have referred that confer a special status upon the matrimonial home, a status not to be lightly interfered with. In other words, the Act here, as in Ontario, has placed protective barriers around the matrimonial home for the benefit of each spouse.
>
> 32 Furthermore, if the argument is accepted that a joint tenancy in a matrimonial home can be severed without the consent of the other spouse, it would mean that one spouse could terminate the other spouse's interest in the first spouse's part of the ownership of the matrimonial home without consent. This would offend the whole scheme of the Matrimonial Property Act with its emphasis on equality between the parties to a marriage and, in particular, s. 6(1), which reads:

> 6(1) A spouse is equally entitled to any right of possession of the other spouse in a matrimonial home.

> 33 What s. 21(1)(*a*) of the Act does do is set out the respective rights of the spouses once a severance has been made either by consent or by authorization of the court, not before.
>
> 34 In summary, then, the Matrimonial Property Act in Nova Scotia has, as has the Family Law Reform Act in Ontario, superimposed itself upon the common law respecting the severance of a joint tenancy as it applies to a matrimonial home, to achieve the social objective of protecting the family home from arbitrary disposition or encumbrance by one of the parties to a marriage.

[21] The facts in ***Mills*** were different than the facts in the case presently before the Court. In ***Mills*** the wife's son, acting on the wife's Power of Attorney conveyed the property from the wife to the son and then from the son back to the wife. Justice Rogers then relied on the ***Van Dorp*** decision which involved a husband who executed a deed from himself to himself. As counsel for Robert Steven Presseau correctly points out ***Van Dorp*** was considered again by the Ontario Court of Appeal in ***Re Horne and Evans***, [1987] O.J. No. 495. In ***Re Horne*** a husband, shortly before his death and without his wife's knowledge or consent, executed a deed transferring his interest in the parties' jointly held home to himself for the purpose of severing the joint tenancy. After his death his widow applied under sections 42 and 44 of the *Family Law Reform Act* of Ontario to set aside the conveyance on the grounds that it constituted a disposition of an interest in the matrimonial home made without her consent. The Ontario Court of Appeal referred favourably to the Ontario High Court of Justice's decision in ***Re Lamanna v. Lamanna*** et al. (1983), 145 D.L.R. (3d) 117 in which case the Court upheld a conveyance by a wife to herself of her interest as a joint tenant of a matrimonial home so that she might be able to bequest her interest (as a tenant in common) to the parties' five children.

[22] Robins, J.A. said in paragraph 6:

> 6 In *Lamanna v. Lamanna* (1983), 32 R.F.L. (2d) 386, 27 R.P.R. 142, *(*sub nom. *Re Lamanna and Lamanna)* 145 D.L.R. (3d) 117 (Ont. H.C.), a husband similarly sought to set aside a conveyance by his wife to herself of her interest as a joint tenant of the matrimonial home made so that she might will the interest to

their five children. In this case, Mr. Justice Walsh, disagreeing with the conclusion reached by Judge Carley [in Re Van Dorp], held that the conveyance by a joint tenant to herself did not constitute a "disposition" within the meaning of s. 42 requiring the consent of the other spouse and was therefore effective to sever the joint tenancy. After referring to the passages from *Re Van Dorp* reproduced above, Walsh J. said at pp. 119-20:

With respect, I find it difficult to accept the conclusion that "by doing so *disposed* of the wife's right of survivorship in the property" [emphasis added]. It is clear that a deed from an individual to himself severs the joint tenancy because the unity of title is destroyed. A tenancy in common is thereby created as the alienee and the remaining tenant hold their interest in land by virtue of different titles and not under that one common title which is essential to the existence of joint tenancy. Thus, the nature of the interest of the alienee in the property must be determined with reference to the latter deed from himself to himself and his title deemed to flow from that deed and not the earlier joint deed. **While it is also true that after the execution and registration of a deed from himself to himself the joint tenant has lost his right of survivorship in the property this, however, is not as a result of a *disposition* of his interest as *Van Dorp* holds, but rather, because the nature of the title by which he holds such an interest has changed — the undivided one-half interest in the property remains the same.**

[23] And further beginning at paragraph 12:

"**Does the conveyance by one joint tenant to himself or herself for the purpose of severing a joint tenancy "dispose of" an "interest" in a matrimonial home within the meaning of s. 42 of the F.L.R.A (or s. 21 of the F.L.A.)**?

12 In my opinion, such a conveyance is not covered by the legislation and the question must therefore be answered in the negative. Clearly, a deed from a joint tenant to himself or herself destroys the unity of title essential to the continuance of a joint tenancy and operates to create a tenancy in common. This, unlike the encumbrance of a spouse's interest or the conveyance of that interest to a third party, cannot affect the other spouse's right to possession or occupation under Pt. III of the F.L.R.A. or Pt. II of the F.L.A. The significance of a conveyance of this nature is that it eliminates the incident of joint tenancy by which the death of one joint tenant extinguishes his or her interest in the property so that the survivor becomes seized and possessed of the whole. However, although the right of survivorship is thereby eliminated, each spouse nonetheless continues to hold his or her proprietary right to an undivided one-half interest in the property. For the purposes of s. 42 (s. 21 F.L.A.), a deed from a joint tenant to himself or herself conveying his or her interest in the matrimonial home, as the court agreed in *Kozub v. Timko* (p. 561), does not "dispose of" the right of survivorship of the other joint tenant nor, I would add, of the grantor. Its

effect, in my respectful view, is correctly stated by Walsh J. in *Lamanna v. Lamanna* at pp. 119-20 to which reference was made earlier in these reasons:

"It is clear that a deed from an individual to himself severs the joint tenancy because the unity of title is destroyed. A tenancy in common is thereby created as the alienee and the remaining tenant hold their interest in land by virtue of different titles and not under that one common title which is essential to the existence of joint tenancy. Thus, the nature of the interest of the alienee in the property must be determined with reference to the latter deed from himself to himself and his title deemed to flow from that deed and not the earlier joint deed. While it is also true that after the execution and registration of a deed from himself to himself the joint tenant has lost his right of survivorship in the property this, however, is not as a result of a *disposition* of his interest as *Van Dorp* holds, but rather, because the nature of the title by which he holds such an interest has changed — the undivided one-half interest in the property remains the same."

13 **Both the F.L.R.A. and the F.L.A. have limited application to the matrimonial home after the death of a spouse. They provide for equal spousal rights to possession of the matrimonial home (s. 40(1) F.L.R.A., s. 19(1) F.L.A.). But, subject to a court order or separation agreement, under s. 40(2) of the F.L.R.A., that equal right of possession ceases upon the spouse ceasing to be a spouse, and under s. 19(2) of the F.L.A., when only one of the spouses has an interest in the matrimonial home, the other spouse's right of possession is personal as against the first spouse and ends when they cease to be spouses. The parties cease to be spouses when a spouse dies...**

14 **In light of the scheme of these Acts and their very restricted and carefully defined effect on spousal rights to the matrimonial home after death, I cannot accept that the legislature intended to include a joint tenant's "right of survivorship" in the class of "interests" in the matrimonial home to which the restrictions against alienation imposed by s. 42 of the F.L.R.A and s. 21 of the F.L.A. are applicable. These Acts do not purport to dictate the manner in which spouses may hold title to their matrimonial home. A severance of a joint tenancy neither interferes with nor affects the existing balance between spouses with respect to the ownership or occupation of their matrimonial home during their marriage.** In practical terms, its only consequence is that the spouses' undivided one-half interests thereafter form part of their individual estates thereby permitting them to devise their respective interests as they wish. **This result gives a spouse no rights beyond those of a spouse in the case of a matrimonial home owned by him or her alone or with a third person or in the case of a spouse who holds his or her interest by way of a tenancy in common; nor does it place the surviving spouse in any different position than that of a surviving spouse when title is held in some form other than joint tenancy** and the deceased spouse's interest in the matrimonial home does not by reason of title pass on death to the survivor...

15 **The right of a joint tenant to sever a joint tenancy unilaterally is a long-recognized common law right. In my opinion, the family law legislation in question ought not to be construed as restricting that right in the absence of express language to that effect.** As the Acts are now framed, a severance is not inconsistent with the general scheme of the legislation or incompatible with the provisions respecting matrimonial homes. No policy considerations have been advanced which compel the conclusion that a party to a marriage, without the consent of the other party or a court order, should be barred so long as the marriage subsists (and regardless of the state of the marriage) from taking the steps necessary to ensure that this property interest forms part of his or her estate and that the survivor, whichever party that might be, does not acquire sole

> ownership by operation of law. **In my view, no matter how the "right of survivorship" may be characterized in law, a deed from a joint tenant to himself or herself designed to remove that right does not constitute the "disposition" of an "interest" covered by s. 42 of the F.L.R.A. or s. 1 of the F.L.A. In sum, I agree with the result reached by Walsh J. in *Lamanna v. Lamanna* in this factual situation.**"[emphasis added]

[24] The Court therefore concluded that the husband's conveyance to himself was not a disposition or an incumbrance of an "interest" in the matrimonial home that required the consent of his spouse notwithstanding the fact that the conveyance severed the joint tenancy. That is because the statutory restrictions on a disposition of a matrimonial home were designed to preserve the rights of possession (which are unaffected by such a transfer) not the *jus accrescendi*.

[25] With the greatest of respect to Justice Rogers I agree with the Court's conclusion in ***Re Horne and Evans*** (*supra*). The provisions of the *Matrimonial Property Act* are not unlike those provisions of the *Family Law Reform Act* of Ontario as they existed at the time of the ***Horne*** decision. The *Matrimonial Property Act* confers on a matrimonial home (as defined in section 3(1)) a special status that is not shared by other matrimonial assets. For example, section 6(1) provides:

> "A spouse is equally entitled to any right of **possession** of the other spouse in a matrimonial home." (emphasis added)

[26] Section 6(2) provides:

> "Subject to an order of the court under this or any other Act and subject to a separation agreement that provides otherwise, **a right of a spouse to possession by virtue of subsection (1) ceases upon the spouse ceasing to be a spouse**."(emphasis added)

[27] Section 11(1)(a) authorizes the court to:

> "direct that one spouse be given exclusive possession of a matrimonial home, or part thereof, **for life of for such lesser period as the court directs**..."(emphasis added)

[28] Nowhere in the *Act* is the right of survivorship guaranteed. A joint tenant, a tenant in common or a spouse with no legal title to the matrimonial home receive the same protection as far as their possession of the matrimonial home is concerned.

[29] A joint tenancy can therefore be severed by one joint tenant executing and registering a conveyance to her or himself because it destroys the unity of title essential to the continuance of a joint tenancy and operates to create a tenancy in common. It does not, however, impact either spouses' right of possession to the matrimonial home.

[30] I am therefore asked by counsel for Robert Stephen Presseau to rely on the reasoning of the Ontario Court of Appeal and dismiss the application presently before the Court. While I believe the Ontario Court of Appeal's reasoning is sound there is a distinction between the law in Ontario and the law in Nova Scotia. At common law a conveyance to one's self is a legal impossibility. See ***Knowlton vs. Bartlett*** [1984], 16 D.L.R. (4th) 209 (N.B.Q.B.) at paragraph 10. However such conveyances are possible if allowed by provincial legislation. Ontario's *Conveyancing and Law of Property Act* R.S.O. 1990, c. 34 is one such statute. Sections 40 and 41 of that statute provide as follows:

> Assignment of Property to Self and Others
>
> 40 Any property may be conveyed by a person to the person jointly with another person by the like means by which it may be conveyed by the person to another person.
>
> Conveyance of Property to Self
>
> 41 A person may convey property to or vest property in the person in like manner as the person could have conveyed the property to or vested the property in another person.

[31] The *Real Property Act* R.S.N.S. 1989, c. 385 provides, at section 10:

> "Freehold land may be conveyed by a person to himself jointly with another person, including his spouse, by the like means by which it may be conveyed by him to another person, and may in like manner be conveyed by a husband to his wife and by a wife to her husband, alone or jointly with another person."

[32] There is no provision in Nova Scotia's *Real Property Act* similar to section 41 of Ontario's *Conveyancing and Law of Property Act* nor could I locate any other legislative authority that would allow for the conveyancing of a deed to one's self. Similarly, counsel could not locate such an authority.

[33] In the absence of such legislation I am compelled to declare that Ms. Presseau's deed to herself dated December 22, 2004 and registered on January 5, 2005 is a nullity. I therefore find in favour of the Applicant.

[34] Counsel for Robert Stephen Presseau asked that I find that the joint tenancy was nevertheless severed by "a course of dealing" that reveals a common intention of the parties that the joint tenancy should be severed (see ***Robichaud v. Watson*** (*supra*)) referred to earlier in this decision. The only application before the Court is with respect to the legitimacy of the deed signed by Ms. Presseau in 2004. My decision is restricted to that application.