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Batler v. Batler
(H.C.J.)

67 O.R. (2d) 355

[1988] O.J. No. 2115

Action No. ND 156935/88

ONTARIO
High Court of Justice

Granger J.

December 29, 1988.

Family law -- Property -- Division of assets -- Order for sale of property prior to trial -- Husband requesting order for sale of jointly owned recreational property prior to trial -- Wife opposing order because of her wish to acquire husband's interest in property at conclusion of trial in lieu of equalization payment -- No power to make order for sale under Family Law Act -- Request to be made pursuant to Partition Act -- Request granted -- Wife's claims at trial not being prejudiced by order for sale -- Court reluctant to transfer property to satisfy equalization payment -- Family Law Act, 1986, S.O. 1986, c. 4, ss. 9, 23 -- Partition Act, R.S.O. 1980, c. 369 -- Rules of Civil Procedure, rule 20.01

In proceedings for the division of property brought pursuant to the Family Law Act, 1986, S.O. 1986, c. 4, the respondent husband sought an order, prior to trial, for the sale of a recreational property owned jointly with the petitioner wife. The wife opposed the sale on the ground that she wished to retain the property and acquire the husband's interest at the conclusion of the trial in lieu of an equalization payment.

Held, the order for the sale of the property should be granted pursuant to the Partition Act, R.S.O. 1980, c. 369.

The wife's desire to purchase the husband's interest in the property at a price to be fixed by the court should be rejected. A court should not transfer property to satisfy an equalization payment or allow a joint owner to purchase his or her co-tenant's interest for a fixed price. Unless the parties agree to a transfer of property at an agreed upon price, the property should be sold in an open market to ensure that its fair market value is obtained. The wife's claims will not be prejudiced by a sale of the property prior to trial if she is not claiming sole ownership or exclusive possession of the property.

There is no jurisdiction under the Family Law Act, 1986, to grant an order for sale of jointly held property. However, the husband is entitled to the relief sought under the Partition Act.

Wilson v. Wilson (1988), 14 R.F.L. (3d) 98, 30 E.T.R. 1; Henry v. Cymbalisty (1986), 55 O.R. (2d) 51; Davis v. Davis, [1954] O.R. 23, [1954] 1 D.L.R. 827; Szuba v. Szuba, [1950] O.W.N. 669, [1951] 1 D.L.R. 387, consd

Other cases referred to

Binkley v. Binkley (1988), 14 R.F.L. (3d) 336; Rametta v. Rametta (1987), 6 R.F.L. (3d) 294; Borsch v. Borsch (1987), 9 R.F.L. (3d) 444

Statutes referred to

Family Law Act, 1986, S.O. 1986, c. 4, ss. 9(1)(d)(ii), 12, Part II, 23
Partition Act, R.S.O. 1980, c. 369

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rule 20.01

APPLICATION for an order for the sale of certain jointly owned property prior to the trial of an action under the Family Law Act, 1986.

Gregory W. Cooper, for applicant.

Natalie Pilcow, for respondent.

GRANGER J.:-- The respondent husband seeks an order, prior to trial, for the sale of the recreational property located on Concession 1 West End, Part of Lot 25, Mono Township, Ontario, which he owns jointly with the petitioner.

Mrs. Batler opposes the sale on the grounds that she wishes to retain the property and acquire her husband's interest at the conclusion of the trial, in lieu of cash on equalization.

In Wilson v. Wilson (1988), 14 R.F.L. (3d) 98, 30 E.T.R. 1 (Ont. H.C.J.), I held that a court should not transfer property to satisfy an equalization payment or allow a joint owner to purchase his or her co-tenant's interest for a fixed price.

A joint tenant is entitled to the highest price for his or her interest which may be more than the appraised value of the property. In today's real estate market, the appraised value of the property may not reflect the fair market value. The true test of the fair market value is to sell the property in an open market. Unless the parties agree to a transfer of the property at an agreed price, the property should be listed for sale and sold, to ensure that fair market value is obtained.

Accordingly, the desire of the wife, to purchase her husband's interest in the property at a price to be fixed by the court at the conclusion of the trial should be rejected, and is not an answer to the husband's request to sell the property prior to trial.

The wife is not claiming sole ownership or exclusive possession of the property and accordingly, her claims will not be prejudiced by the sale of the property prior to trial. In Binkley v. Binkley (1988), 14 R.F.L. (3d) 336, the Ontario Court of Appeal refused to order the sale of the matrimonial home on an interlocutory application as a sale would defeat the claims of the wife intended to put forward at trial.

If jointly owned property is sold prior to trial, prima facie the net proceeds of sale should be held in trust pending the determination of equalization to avoid prejudice to either spouse arising from the sale. If the parties agree or if there are sufficient assets to satisfy the potential equalization payment the funds could be dispersed.

As the property herein is jointly owned, it should be sold, if there is jurisdiction in this court to sell the property, prior to trial. Section 9 of the Family Law Act, 1986, S.O. 1986, c. 4 (the "Act"), is an implementation section, and if there is a requirement for an equalization payment the court will resort to s. 9 of the Act to determine the most appropriate method to satisfy the equalization payment. If the payor spouse has sufficient cash to satisfy an equalization payment, the court should not order a sale of jointly owned property under s. 9(1)(d)(ii).

Under "Part II, Matrimonial Home" of the Act, a court can authorize the sale of a matrimonial home by cancelling the personal possessory right of a non-consenting spouse, but this jurisdiction does not clothe the court with jurisdiction to order the sale of jointly owned property.

In Henry v. Cymbalisty (1986), 55 O.R. (2d) 51, Steinberg U.F.C.J. succinctly set out the purpose and effect of Part II of the Act stating at pp. 54-6:

> Under this provision the Legislature has provided for the right of each spouse in a marriage to reside in and have possession of their matrimonial home, unless they agree to the contrary in a domestic contract or a court orders otherwise. This right of possession is a personal one and creates no estate in the property in question. In fact nowhere in the Family Law Act is a spouse, upon separation, granted any remedy arising from the material relationship, either to an interest in or a right to a division of any specific asset of the other spouse. The concept of the "division of family assets" in s. 4 of the now repealed Family Law Reform Act, R.S.O. 1980, c. 152, has been replaced by the general notion of the equalization of the "net family properties" of the spouses, as set out in s. 4 of the Family Law Act. The old statutory classification of "family assets" and its accompanying provisions for their division in specie between spouses have no place in the present law of Ontario.
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> A spouse's personal right to possession of a matrimonial home is protected under the provisions of s-ss. (1) and (2) of s. 21 of the Family Law Act.
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> . . . . .
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> Section 23 of the Act provides the mechanism, under s. 21(1)(c), whereby a court may authorize the disposal or encumbrance of a matrimonial home, without the consent of a spouse.
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> In my view, ss. 23 and 21(1)(c) can only be invoked so as to limit or cancel the right of possession of a non-consenting spouse in a matrimonial home. They cannot be interpreted so as to defeat a spouse's legal or equitable estate in a matrimonial home, no matter how unjustly or irrational he or she may be behaving in regards to the administration of the property.

In Rametta v. Rametta (1987), 6 R.F.L. (3d) 294 (Ont. H.C.J.), McKay L.J.S.C. found that he lacked jurisdiction under s. 23 of the Act to direct the sale of a property, owned by the husband.

In Borsch v. Borsch (1987), 9 R.F.L. (3d) 444 (Ont. H.C.J.), Galligan J. ordered the sale of the matrimonial home prior to trial. The home was registered solely in the husband's name and the interlocutory motion pursuant to s. 23 of the Act was to authorize the sale of the home when the non-titled spouse refused to release her right of possession.

In Binkley v. Binkley, supra, the Court of Appeal did not deal with the jurisdiction under the Act to order the sale of a jointly owned property.

The sale provisions of s. 9 of the Act can only be invoked to satisfy an equalization payment, and there is no jurisdiction to order the sale of jointly owned property prior to trial unless, under s. 12 of the Act, the property should be sold to preserve the asset.

Although this application must fail for lack of jurisdiction under the Act, the respondent is entitled to the relief sought under the Partition Act, R.S.O. 1980, c. 369, and Rule 20.01 of the Rules of Civil Procedure, which allows for summary judgment on all or part of his claim. Under the Partition Act an application by a joint tenant for sale should only be refused if the application is vexatious or malicious. In Davis v. Davis, [1954] O.R. 23 at pp. 30-1, [1954] 1 D.L.R. 827 at pp. 831-2 (C.A.), Laidlaw J.A. stated:

> On the other hand, it appears to me that an order compelling the respondent to partition or sell the lands would occasion only inconvenience and difficulty to him in carrying out his legal obligation to maintain the children entrusted by the Court to his custody. That is not a sufficient reason to deprive the appellant of her prima facie right. The evidence does not disclose any want of good faith on her part in making the application for partition or sale. It does not appear that there was any vexatious intent or conduct or any malice on her part in taking that proceeding to enforce her right. In that respect the case can be readily distinguished from Re Hutcheson and Hutcheson, supra.

In Szuba v. Szuba, [1950] O.W.N. 669 at p. 673, [1951] 1 D.L.R. 387 at p. 391 (H.C.J.), Ferguson J. stated:

> Therefore, keeping in mind that the rules laid down must not be too rigid, I think I should go no further than adopt the principle stated by Willes J. in Lee et al. v. The Bude and Torrington Junction Railway Company, supra, that when there is a prima facie right to partition or sale which the applicant seeks to enforce without vexation or oppression, and the applicant comes to Court with clean hands, the order sought is of right. In Re Hutcheson and Hutcheson, supra, the application was clearly oppressive and the applicant did not come to Court with clean hands. The application was refused. In the case at bar I think the applicant complies with the rules I have laid down and I ought therefore to exercise my discretion in favour of the applicant. As it seems plain that the lands cannot be partitioned, an order will go for sale with the usual reference to the Master, upon the applicant filing an affidavit describing the lands by metes and bounds. The costs of this motion will be to the applicant.

In order to successfully resist an application for sale, the wife should have an order for interim exclusive possession or show that the claims she intends to put forward at trial will be prejudiced by immediate sale.

As the wife is not seeking exclusive possession and her claims will not be prejudiced by immediate sale, accordingly an order will go for sale of the property with a reference to the master at Toronto to conduct and complete the sale. The net proceeds shall be paid into court and shall be paid out pursuant to the discretion of the trial judge. Costs reserved to the trial judge.

Application allowed; order for sale granted.