CITATION: Kent v. Kent, 2019 ONSC 6873
COURT FILE NO. 28/18
DATE: 20191127

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Ronald Gordon Kent

Applicant

– and –

Elissa Laurel Kent, Graham William Blakely Kent
and the Estate of Marian Laurel Graham

Respondents

Brian Sherman, for the applicant
Miriam Vale Peters, for the respondent Elissa Laurel Kent
Aleksander Bolotenko, for the respondent Graham William Blakely Kent

Heard: May 16, 2019

BALE J.:

REASONS FOR DECISION

[1] Marian Graham died in March 2018. She was predeceased by her daughter Janice Kent, but survived by her grandchildren Elissa Kent and Graham Kent, and by her daughter's husband, the applicant Gordon Kent.

[2] On this application, Gordon requests a declaration that he is entitled to a two-thirds share of Marian's home in Fenelon Falls, and that Elissa and Graham are entitled each to a one-third share.

Background facts

[3] In September 1996, Marian registered a transfer of 245 Raby's Shore Drive in Fenelon Falls to herself and Janice as joint tenants. The transfer was gratuitous, and following the transfer, Marian continued to reside at the property alone. Marian's existing will, at the time of the transfer, named Janice as her sole beneficiary; provided that if Janice predeceased her, Janice's issue would be her beneficiaries; and further provided that if Janice died without issue, Gordon would be her beneficiary.

[4] In 2008, Janice and Gordon moved in with the deceased, and resided with her until Janice's death in July 2014. Following Janice's death, Gordon continued to reside with Marian until she moved to a long-term care home in July 2015, and has continued to reside in her home since.

[5] On July 14, 2015, Marian made a new will. The will contained the following devise: "To transfer any home or condominium I may die possessed of to my son-in-law Ronald Gordon Kent, and my grandchildren, Graham William Blakely Kent and Elissa Laurel Kent." Under the terms of Marian's previous will, Graham and Elissa would have inherited the whole of the property.

[6] On July 30, 2015, Marian registered a survivorship application on the title to the property, and a deed conveying the property to herself, Elissa, Graham and Gordon as joint tenants.

[7] Marian paid all of the expenses of the home while Janice and Gordon resided with her, and following her move to the long-term care home, she continued to do so until her death in March 2016.

[8] Pursuant to the provisions of Janice's will, Gordon was the sole beneficiary of her estate.

Positions of the parties

[9] Gordon's position is that he is entitled to a two-thirds share of Marian's home, and that Elissa and Graham are entitled each to a one-third share. He argues that when Janice and he moved into the home, it became their matrimonial home. He then relies upon s. 26(1) of the *Family Law Act* to the effect that the joint tenancy was deemed to be severed immediately before Janice's death, and argues that pursuant to the provisions of her will, he became a one-half owner of the property with Marian as tenants-in-common.

[10] The position of Elissa and Graham is that each of the three parties is a one-third owner of Marian's home. They rely upon the presumption of resulting trust, and argue that the transfer from Marian to Janice in September 1996 was for estate-planning purposes only, and did not result in a transfer to Janice of a beneficial interest. They argue that s. 26(1) of the *Family Law Act* does not apply, because at the time of her death, Janice did not have a beneficial interest in the home.

[11] In reply, Gordon argues that he has rebutted the presumption of resulting trust, and that the transfer from Marian, to Marian and Janice, was a gift to Janice of a beneficial interest in the home.

Analysis

[12] I agree with the respondents that if there is a resulting trust, s. 26(1) of the *Family Law Act* does not apply. If Janice did not have a beneficial interest in the property, it cannot be argued that such an interest in favour of Gordon was created by virtue of the provisions of s. 26(1) and Janice's will.

[13] The transfer from Marian, to Marian and Janice, was from a parent to a child, and accordingly, a presumption of resulting trust applies to the transfer: *Pecore v. Pecore,* 2007 SCC 17, at paras. 33-37. The primary issue is therefore whether, on the whole of the evidence, Gordon has rebutted the presumption. The evidence required to rebut a presumption of resulting trust is evidence of the transferor's contrary intention, at the time of the transfer, on a balance of probabilities: *Pecore*, at para. 43.

[14] In this case, both the transferor and transferee are deceased, and there is no contemporaneous evidence of Marian's intention. Gordon admits that he had "nothing to do with" the transfer, and only learned about it afterward. However, evidence of events subsequent to the transfer may be admitted, provided that it is relevant to the intention of the transferor, at the time of the transfer: *Pecore,* at para 59.

[15] In my view, there is no evidence capable of rebutting the presumption of resulting trust. Counsel for the applicant provided a written summary of the evidence he says amounts to a rebuttal ("Evidence Points Rebutting any Presumption of Resulting Trust"). However, all of the evidence referred to in the summary is either equally consistent with the existence of a resulting trust, or begs the question.

[16] Following Janice's death, Gordon did not register an interest in the property pursuant to her will, nor has he produced any documents relating to the administration of her estate. Because he did not assert an interest in the property until after Marian's death, her evidence as to intention is unavailable.

[17] However, the provisions of the will and transfer made by Marian in July 2015 suggest that she believed that she was the sole owner of the property, and in a position to dispose of it as she did. There is no evidence to suggest that her actions were self-serving, or reflected a change of intention, in relation to the original transfer.

Disposition

[18] For these reasons, the application is dismissed.

Costs

[19] As the successful parties to the litigation, the respondents are entitled to costs. They argue that those costs should be fixed on a substantial indemnity basis, based upon an offer to settle served in May 2018, and (presumably) rule 49.10(2). I disagree, for the following reasons.

[20] First, as it stood at the commencement of trial, the offer was an offer to settle on the basis of a dismissal of the application, with partial indemnity costs to the date of the offer, and substantial indemnity costs from the date of the offer. The difficulty with this offer is that it presents a worse result for the applicant than the result that would obtain, if the offer had not been made. Under rule 49.10(2), where a plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date of the offer, and the defendant is entitled to partial indemnity costs from the date of the offer.

[21] Second, the application has been dismissed, with the result that the applicant has not obtained a judgment. Where an action or application is dismissed, rule 49.10(2) has no application: *Schwark Estate v. Cutting,* 2010 ONCA 299, at para. 6. As may be seen, this is actually of benefit to the respondents, since they are entitled to their partial indemnity costs throughout, rather than the set-off of costs provided for by the rule.

[22] Elissa Kent calculates her partial indemnity costs to be $24,752, which is somewhat less than the partial indemnity costs that would have been sought by the applicant ($25,913). Graham Kent calculates his partial indemnity costs to be $16,252. The total partial indemnity costs requested by the respondents is therefore $41,004.

[23] Under rule 57.01(1)(h), in exercising its discretion to award costs, the court may consider "whether it is appropriate to award any costs, or more than one set of costs, where a party in defending a proceeding separated unnecessarily from another party in the same interest, or defended by a different lawyer. In the present case, the respondents were in the same interest, and no satisfactory explanation was given as to why they were separately represented. When questioned on this issue from the bench, counsel for Graham Kent said only that the respondents were each entitled to a lawyer of their own choice. While this is true, it does not explain why separate representation was either necessary, or desirable, in this case.

[24] Under rule 57.01, in exercising its discretion to award costs, the court may consider "the amount of costs that an unsuccessful party could reasonably expect to pay." In my view, as a result the unnecessary separate representation of the respondents, the total costs claimed are somewhat excessive on this count. In discounting the amounts claimed for this reason, I do, however, take into account the fact that counsel for Graham Kent participated on a reduced basis (as reflected in the lower amount asked), and that but for the participation of his counsel, Elissa Kent's costs may have been somewhat higher.

[25] In the result, after the application of a discount of approximately 15 *per cent,* the costs of Elissa Kent and Graham Kent will be fixed in the sum $21,000 and $14,000, respectively.

Released: November 27, 2019

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