COURT OF APPEAL FOR ONTARIO

CITATION: Kent v. Kent, 2020 ONCA 390
DATE: 20200617
DOCKET: C67851

Gillese, Brown and Jamal JJ.A.

BETWEEN

Ronald Gordon Kent

Applicant
(Appellant)

and

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

Respondents
(Respondents)

Ronald Kent, acting in person

Aleksandr G. Bolotenko, Phillipa C. Goddard and Miriam Vale Peters, for the respondents

Heard: In Writing

On appeal from the order of Justice Stephen T. Bale of the Superior Court of Justice, dated November 27, 2019.

Gillese J.A.:

[1] *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, provided welcome guidance on how to approach a gratuitous transfer of property from a parent into joint names with a capacitated adult child. It held that, in such circumstances, a

rebuttable presumption arises that the child holds the property on resulting trust for the parent (para. 36). However, when the transfer is of real property and, following the transfer, the child and her husband occupy the property for a lengthy period, family law considerations enter the equation. How are the two sets of legal considerations to be reconciled? This appeal depends on the answer to that question.

[2] The family law provisions engaged on this appeal are ss. 18(1) and 26(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "FLA"). For ease of reference, I set them out now.

> **Matrimonial Home**
>
> 18 (1) Every property in which a person has an interest and that is … ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.

> **Joint tenancy in matrimonial home**
>
> 26 (1) If a spouse dies owning an interest in a matrimonial home as a joint tenant with a third person and not with the other spouse, the joint tenancy shall be deemed to have been severed immediately before the time of death.

BACKGROUND

[3] Marian Laurel Graham ("Marian") had only one child, a daughter named Janice. Janice married Ronald Gordon Kent ("Gordon") and they had two children: Elissa Laurel Kent ("Elissa") and Graham William Blakely Kent ("Graham").

[4] Gordon is the appellant in this proceeding; the two children and Marian's estate are the respondents (together, the "Respondents").

[5] In 1983, Marian bought a property in Fenelon Falls, Ontario (the "Property") and began living on it.

[6] In September 1996, Marian was the sole owner of the Property. She transferred title to herself and Janice as joint tenants (the "1996 Transfer"), for nominal consideration. Janice was an adult at that time.

[7] At the time of the 1996 Transfer, Marian had a will dated July 24, 1978 (the "1978 Will"). Under the terms of the 1978 Will: Janice was the beneficiary; if Janice predeceased Marian, Janice's issue alive at Marian's death were the beneficiaries; and, if Janice predeceased Marian and had no issue alive at the time of Marian's death, Gordon was the beneficiary.

[8] After the 1996 Transfer, Marian continued to live alone on the Property.

[9] In 2008, Janice, Gordon and their two children moved in with Marian. For the purpose of this appeal, I will assume that Janice and Gordon lived with Marian,

on the Property, until Janice's death on July 22, 2014.[1] Pursuant to Janice's will, Gordon was the beneficiary of her estate.[2]

[10] After Janice died, Gordon continued to reside with Marian on the Property.

[11] Marian moved to a long-term care home in July or August 2015. Gordon continued to reside on the Property.

[12] Marian paid all of the costs and expenses of the Property until she died in 2016, including after she moved into long-term care. At no time did Janice or Gordon pay rent while living on the Property.

[13] On July 14, 2015, Marian made a new will (the "2015 Will"). The 2015 Will named Elissa and Graham as the executors and trustees. Clause 4(b) of the 2015 Will is the provision most relevant to this appeal. It reads as follows:

> 4. **I GIVE, DEVISE AND BEQUEATH** all my property of every nature and kind and wheresoever situate, … to my said Trustee[s] upon the following trusts, namely:
>
> > (b) 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**. [Emphasis in the original.]

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[1] On the Application, the Respondents disputed Gordon's claim that the Property was the matrimonial home on factual grounds, as well as legal ones. Among other things, they said that Janice did not live full time on the Property between the fall of 2012 and October 2014 when she attended school in Peterborough and stayed in accommodation there.

[2] Janice's will further provided that if Gordon did not survive her or died within 30 days of her death, her estate was to go to her children.

[14] On July 30, 2015, Marian registered a survivorship application on title to the Property in her name alone. She then registered a transfer deed to the Property in which she conveyed the Property to herself, Elissa, Graham, and Gordon as joint tenants (the "2015 Transfer").

[15] After Marian's death, questions arose as to the ownership of the Property. In March 2018, Gordon brought an application for a declaration that he owned a two-thirds share of the Property (the "Application").

[16] The Respondents opposed the Application. They claimed that Gordon, Elissa and Graham were each entitled to a one-third share of the Property.

THE APPLICATION

The Parties' Positions on the Application

[17] Gordon claimed a two-thirds entitlement to the Property. He maintained that when he and Janice moved in with Marian, the Property became their matrimonial home and it was their matrimonial home at the time of Janice's death. Based on s. 26(1) of the FLA, he contended that the joint tenancy in the Property was deemed to have been severed immediately before Janice's death with the result that, as the beneficiary under Janice's will, he became a one-half owner of the Property with Marian as tenants-in-common. After Marian's death, based on her 2015 Will, Gordon said that he became entitled to an additional one-third share of Marian's one-half interest in the Property. Hence, he claimed to be entitled to a two-thirds

interest in the Property and that Elissa and Graham were each entitled to a one-sixth interest in it.

[18] The Respondents contended that each of Gordon, Elissa and Graham were entitled to a one-third interest in the Property. They maintained that Marian transferred title to the Property to herself and Janice as joint tenants in 1996 for estate planning purposes. Thus, they argued, the 1996 Transfer raised the presumption of a resulting trust, Janice did not have a beneficial interest in the Property, s. 26(1) of the FLA did not apply, and Marian's 2015 Will operated to give each of Gordon, Elissa, and Graham a one-third interest in the Property.

[19] In reply, Gordon argued that he had rebutted the presumption of resulting trust and that the 1996 Transfer was a gift to Janice of a beneficial interest in the Property.

The Decision Below

[20] The application judge began his analysis by agreeing with the Respondents that if there was a resulting trust, s. 26(1) of the FLA did not apply. He then relied on *Pecore* to conclude that the 1996 Transfer from Marian to Marian and Janice, as joint tenants, raised the presumption of resulting trust.

[21] Thus, the application judge saw the primary issue on the Application to be whether, on the whole of the evidence, Gordon had rebutted that presumption. The application judge noted that the evidence required to rebut the presumption is

evidence of the transferor's contrary intention, at the time of the transfer, on a balance of probabilities: *Pecore*, at para. 43. However, he also noted that evidence of events subsequent to the transfer could be admitted, provided it was relevant to the testator's intention at the time of the transfer: *Pecore*, at para. 59.

[22] The application judge observed that both the transferor (Marian) and the transferee (Janice) were deceased and there was no contemporaneous evidence of Marian's intention in making the 1996 Transfer. He also noted that Gordon admitted he had "nothing to do with" the 1996 Transfer and only learned about it afterward.

[23] The application judge found no evidence capable of rebutting the presumption of resulting trust. He described Gordon's written summary of the evidence on which he relied to rebut the presumption as evidence that was "either equally consistent with the existence of a resulting trust, or begs the question". He also observed that after Janice's death, Gordon did not register an interest in the Property pursuant to her will nor had he produced any documents relating to the administration of her estate. The application judge added that because Gordon did not assert an interest in the Property until after Marian's death, Marian's evidence as to intention was unavailable.

[24] The application judge found that the provisions in Marian's 2015 Will and the 2015 Transfer suggested that Marian believed she was the sole owner of the

Property. Further, he saw no evidence to suggest that those actions were self-serving or reflected a change of intention in relation to the 1996 Transfer.

[25] Accordingly, by order dated November 27, 2019, the application judge dismissed the Application with costs to the Respondents.

THE ISSUES

[26] On appeal, Gordon makes three submissions.

[27] First, he contends that as Janice was Marian's only child and Marian was a widow, the 1996 Transfer was a completed gift to Janice. He says that the application judge erred in failing to so find.

[28] Second, he argues that if the 1996 Transfer did raise the presumption of resulting trust, the 1978 Will in which Marian designated Janice as her residuary beneficiary rebuts the presumption.

[29] Third, he submits that because Marian allowed Janice – an owner of the Property by joint tenancy – and her husband to live on the Property, beginning in 2008, Marian created a "matrimonial home circumstance" governed by s. 26(1) of the FLA, thereby removing any consideration of resulting trust.

ANALYSIS

Was the 1996 Transfer a Gift?

[30] In submitting that the 1996 Transfer was a gift from Marian to Janice, Gordon asks this court to apply the legal principles relating to the making of *inter vivos* gifts. This submission cannot stand in the face of *Pecore.* Although *Pecore* concerned the gratuitous transfer of title to a bank account into the joint names of the parent and child, it is clear that its dictates are intended to encompass the gratuitous transfer of title to other forms of property from parent to adult capacitated child. The fact that Janice was Marian's only child and Marian was a widow does not change the applicability of the legal principles in *Pecore*.

[31] Consequently, the application judge was correct when he determined that the legal principles in *Pecore* applied and that the presumption of resulting trust arose in respect of the 1996 Transfer. And, as I explain below, I see no error in his determination that the presumption had not been rebutted. Therefore, the 1996 Transfer was not a gift of an interest in the Property to Janice.

Was the Presumption of Resulting Trust Rebutted by the 1978 Will?

[32] On this ground of appeal, Gordon argues that Marian's 1978 Will naming Janice her trustee and residuary beneficiary was evidence that rebutted the presumption of resulting trust. He raised this same point on the Application in a

document entitled “Evidence Points Rebutting any Presumption of Resulting Trust” (the “Document”).

[33] The application judge did not deal specifically with Gordon’s argument that the 1978 Will was evidence capable of rebutting the presumption. However, he dealt with the Document as a whole, at para. 15 of his reasons, stating that all of the points in it were “equally consistent with the existence of a resulting trust, or begs the question”.

[34] I see no error on the part of the application judge in so finding.

[35] I would add the following observations, however.

[36] Paragraphs 55 - 59 of *Pecore* provide guidance on what evidence was to be considered in determining Marian’s intention in making the 1996 Transfer. At para. 56, the Supreme Court reiterates the traditional rule that evidence adduced to show the transferor’s intention at the time of the transfer ought to be “contemporaneous, or nearly so” to the transaction. In paras. 57-59, the Court explains that evidence of intention arising subsequent to the transfer and which is relevant to intention at the time of the transfer is also admissible. However, the Court cautions judges to assess the reliability of such evidence and to determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention.

[37] The 1978 Will was made almost two decades before the 1996 Transfer was effected so falls into neither category of evidence: it was not “contemporaneous or nearly so” to the 1996 Transfer nor was it made subsequent to the 1996 Transfer. As the 1978 Will was operative at the time Marian made the 1996 Transfer, its provisions may provide context – but that does not elevate it to evidence of Marian’s intention in making the 1996 Transfer.

[38] The application judge followed the dictates in *Pecore* in determining whether the presumption of resulting trust had been rebutted. After finding no contemporaneous evidence of Marian’s intention at the time of the 1996 Transfer, he considered evidence of events subsequent to the Transfer that were relevant to her intention at that time. He found that Marian’s actions in 2015 indicated that she believed she was the sole owner of the Property. He also found that Marian’s conduct in 2015 was neither self-serving nor reflective of a change in intention.

[39] I see no palpable or overriding error in these findings.

[40] It will be recalled that Janice died in July 2014 and that Marian took three significant steps in July 2015. First, Marian made the 2015 Will, in which she devised “any home” of which she might be possessed at the time of her death to Gordon, Graham and Elissa. Second, Marian registered a survivorship application on title to the Property in which she transferred title back into her name alone. In the survivorship application, Marian gives Janice’s date of death and states “The

property was not a matrimonial home within the meaning of the Family Law Act of the deceased at the time of death". Third, Marian registered the 2015 Transfer on title to the Property. The 2015 Transfer was from Marian to Elissa, Graham, Gordon, and herself, as joint tenants.

[41] The application judge made no error in concluding that the presumption of resulting trust had not been rebutted. On the contrary, on the findings of the application judge, that conclusion appears inescapable.

Was the Property a Matrimonial Home?

[42] I do not accept Gordon's submission that in allowing him, Janice, and their children to live on the Property together with her, beginning in 2008, Marian made the Property their matrimonial home and thereby removed any consideration of resulting trust.

[43] Determining whether the Property was Janice and Gordon's matrimonial home begins with a consideration of s. 18 (1) of the FLA. It will be recalled that s. 18(1) provides that:

> Every property in which a person has an interest and that is … ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.

[44] Although the application judge made no express finding on the matter, it appears beyond dispute that Janice and Gordon occupied the Property as their family residence, beginning in 2008 when they, together with their children, moved

onto the Property and began living there with Marian. Thus, in determining whether the Property was Janice and Gordon's matrimonial home, we must decide whether either Janice or Gordon had "an interest" in the Property within the meaning of s. 18(1).

[45] Did Janice have an interest in the Property within the meaning of s. 18(1) of the FLA? In my view, she did not.

[46] Janice became a joint tenant of the Property with Marian as a result of the 1996 Transfer. As I have explained, the 1996 Transfer raised the presumption of resulting trust and, on the findings of the application judge, the presumption was not rebutted. Thus, the 1996 Transfer had the effect of placing Janice on title to the Property in the capacity of a trustee. As this court stated at para. 45 of *Spencer v. Riesberry*, 2012 ONCA 418, it is self-evident that the duties and powers of a trustee are not an interest in the property within the meaning of s. 18(1) of the FLA because those powers and duties are held not in a personal capacity but in the fiduciary role of a trustee. Consequently, the 1996 Transfer did not give Janice an interest in the Property within the meaning of s. 18(1).

[47] Did Gordon have an interest in the Property within the meaning of s. 18(1) of the FLA? In my view, he did not. In reaching this conclusion, I reject Gordon's submission that s. 26(1) of the FLA gave him such an interest. Recall that s. 26(1) reads as follows:

> If a spouse dies owning an interest in a matrimonial home as a joint tenant with a third person and not with the other spouse, the joint tenancy shall be deemed to have been severed immediately before the time of death.

[48] It is correct that when Janice died, she appeared on title to the Property as a joint tenant with Marian, a third person. However, as I have just explained, as Janice was on title to the Property in the capacity of a trustee, she did not have an interest in the Property within the meaning of s. 18(1) of the FLA. Thus, when Janice died, she did not own an interest in a matrimonial home as a joint tenant with Marian, a third person. Consequently, s. 26(1) does not apply and Gordon cannot claim an interest in the Property pursuant to it.

DISPOSITION

[49] Accordingly, I would dismiss the appeal with costs to the Respondents. If the parties are unable to agree on the quantum of those costs, they make written submissions on that matter, to a maximum of three pages in length, such submissions to be received by this court no later than ten days from the date of release of these reasons.

Released: June 17, 2020

EEG

E.E. Gillese J.A.

I agree. [illegible] J.A.

I agree. [illegible] J.A.