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HIGHLIGHTS

* An Alberta Master has granted summary judgment directing that farmland which had been held in the joint names of a father, his son and his daughter-in-law, be either transferred to the son and daughter-in-law irrevocably as joint tenants, or as sole owners, after the father purported to sever the joint tenancy. The Master concluded the evidence established that any resulting trust arising from the initial transfer of the farmland into the name of his son and daughter-in-law had been rebutted, and that his son and daughter-in-law had an absolute right to ownership of the land in any event. The Master also directed that a livestock brand registered in the joint names of the father and the son be transferred to the son if the father could not demonstrate that he still owned cattle. (Bos v Bos, *CALN/2018-027*, *[2018] A.J. No. 1107*, Court of Queen's Bench of Alberta)

* A Justice of the Saskatchewan Court of Queen's Bench has held that a farmer cannot oppose an application under s. 11 of the Saskatchewan Farm Debt Security Act for leave to commence foreclosure proceedings by arguing that the mortgage in question is not valid. The Court held that it was only required to consider whether it was reasonably possible for the farmer to meet his obligations under the mortgage and that he was making reasonable efforts to do so, as well as the other conditions stipulated by the SFSA. An objection to the validity of the mortgage because the lender failed to obtain a proper non-owning spouse declaration in compliance with the Homesteads Act (Saskatchewan) could only be made after the foreclosure action had been commenced. (Raymore Credit Union v Olson, *CALN/2018-028*, *[2018] S.J. No. 340*, Saskatchewan Court of Queen's Bench)

NEW CASE LAW

Bos v Bos;

Court of Queen's Bench of Alberta,

Master W.S. Schlosser,

September 19, 2018.

CALN/2018-027
[2018] A.J. No. 1107 | *2018 ABQB 671*

Jointly Owned Farmland — Declaration of Irrevocable Joint Tenancy.

Brands — Order to Transfer Ownership of Brand.

John and Marion Bos ("John" and "Marion") brought an application for summary judgment claiming ownership of a quarter section of farmland (the "Farmland") registered in the names of John, Marion and Cornelius Bos ("Cornelius") and for ownership of a brand registered in the joint names of John and Cornelius.

Cornelius brought an application for summary judgment against John on a Counterclaim for a tractor and trailer which had been paid for by Cornelius, but was bought pursuant to a bill of sale which listed John as the owner.

Marion and John also applied for summary dismissal of Cornelius' claim and Cornelius applied for summary dismissal of John and Marion's claims.

These applications were all brought before an Alberta Court of Queen's Bench Master in Chambers.

Cornelius is John's father.

Marion is John's wife.

Cornelius purchased the Farmland in 1982. John alleged that Cornelius promised him the Farmland if he worked full-time on the family farm for 7 years.

John quit school in 1977 and worked on the family farm for over 40 years. Marion worked on the family farm for 31 years.

In February of 1986, Cornelius and his wife gave John a birthday card which said that the Farmland "is.yours". The card included a hand drawn picture of a house and a pickup truck as well as reference to St. Paul's second letter to the Corinthians which includes an exhortation to be generous. The card was signed "Mom and Dad".

In 1995, the Farmland was transferred into the name of Cornelius, his wife (John's mother) and John as joint tenants.

John then built a house on the land and Marion was added to the title, so that the Farmland was owned by Cornelius, John and Marion as joint tenants.

John's mother died in 2012.

There was a falling out between John and Cornelius and Cornelius purported to sever the joint tenancy by giving notice under s. 65 of the Land Titles Act (Alberta). Cornelius' one third interest in the land as a tenant in common would go to four beneficiaries under his Will.

Cornelius offered to restore the joint tenancy however John and Marion sought a declaration that any presumption of resulting trust has been rebutted so that the interest in joint tenancy would be irrevocable and a further declaration that the Farmland belonged to them absolutely.

Cornelius bought a farm tractor and trailer in 2009 and 2011 and had the bills of sale drafted in

John's name, on the condition that John pay for them, however John did not do so. Cornelius counterclaimed for judgment for approximately $40,000.00, being the amount he paid for this equipment.

John and Cornelius jointly owned a registered brand. Cornelius retired from farming in 2009. As the registered joint owner of the brand, Cornelius would be entitled under Alberta law to have any sale proceeds for the sale of cattle bearing the brand made payable jointly to himself and John. John maintained that Cornelius had no cattle and sought an Order for absolute ownership of the brand.

Decision: Master W.S. Schlosser granted John and Marion an Order directing Cornelius to restore the joint tenancy on the basis that it would be irrevocable or that Cornelius' interest in the land be transferred absolutely to John and Marion [at para. 20], and an Order requiring Cornelius to demonstrate, by Affidavit, ownership of cattle on the family farm, failing which ownership of the brand would pass absolutely to John [at para. 28]. He also granted Cornelius judgment against John for the cost of the farm machinery [at para. 24].

Master Schlosser considered the following issues:

(a) Joint tenancy with an irrevocable right of survivorship.

The Master held that the evidence had established that a resulting trust had been rebutted, and, in addition, that John and Marion had an absolute right to ownership of the Farmland, stating at para. 19 and 20:

> [19] Khullar, J (before she went to the CA) found a joint tenancy with an irrevocable right of survivorship in Pohl v Midtal, *2017 ABQB 711*, *[2017] A.J. No. 1238*, *2017 ABQB 722*, *[2017] A.J. No. 1306* (this case is under appeal). But, with respect, I do not appreciate the distinction btween a joint tenancy with an irrevocable right of survivorship and an outright gift unless the joint tenants are engaged in something that would involve splitting income and expenses (for example). But that issue is moot here. Cornelius is no longer involved in the farming operation at this level and I suspect he would be happy to be free of the one third liability with respect to the home quarter. Cornelius has raised the Limitations Act in his Amended Defence, but in my view, the clock began to run when he purported to sever the joint tenancy, or raise this resulting trust.
>
> [20] It is time to bring closure to this issue. In my view, either Cornelius restores the joint tenancy on the basis that the joint tenancy is irrevocable; thus insuring a right of survivorship, or that his interest be transferred absolutely to John and Marion. The very thing that rebuts a resulting trust (a gift) also gives rise to an absolute right of ownership.

(b) Ownership of the farm equipment

Master Schlosser rejected John's argument that the limitation period to claim the amount payable for the tractor and the trailer had passed because it was "saved" by s. 6(1) of the Limitations Act because it was advanced by way of Counterclaim [at para. 24].

(c) Ownership of the brand

Master Schlosser had difficulty accepting Cornelius' unsubstantiated claim that he still had 80 head of cattle on the farm, if he had retired from farming in 2009 [at para. 27]. He indicated that there was no evidence of any intrinsic value for a share in a brand but observed that when a

brand is jointly owned and cattle are sold, cheques are made jointly to the owners of the brand on the cattle. Master Schlosser stated, at para. 28:

> [28] In my view, Cornelius shoul demonstrate, by affidavit, ownership of cattle on the family farm under the jointly owned brand and if he cannot do this, then ownership of the brand will pass absolutely to John.

Raymore Credit Union v Olson;

Saskatchewan Court ofQueen's Bench,

J.E. McMurtry J.,

August 27,2018.

CALN/2018-028
[2018] S.J. No. 340 | *2018 SKQB 226*

Saskatchewan Farm Debt Security Act — Application for Leave to Commence Foreclosure Proceedings — Whether Validity of Mortgage can be Challenged at the Leave Application.

Raymore Credit Union (the "Credit Union") brought an application under s. 11 of the Saskatchewan Farm Security Act, *SS 1988-89, c. S-17.1* ("SFSA") directing that s. 9(1)(d) of the SFSA did not apply to a January 23, 2014 mortgage granted by Brett Olson ("Olson") with respect to a quarter section of land owned by Olson.

The declaration sought by the Credit Union would have entitled the Credit Union to commence foreclosure proceedings with respect to Olson's farmland.

Olson acknowledged he was in default with respect to the mortgage, but argued that the Credit Union was not entitled to the Order because the mortgage in question was a nullity, as the Credit Union had failed to obtain a proper non-owing spouse declaration in compliance with the Homesteads Act, 1989, SS 1989-90, c H-5.1.

The issue in the application was whether Olson could challenge the validity of the mortgage before foreclosure proceedings had been commenced.

Section 7(1) of the Homesteads Act provides:

> 7(1) A non-owing spouse who executes a consent to a disposition of a homestead shall acknowledge separate and apart from the owning spouse that he or she:
>
> (a) understands his or her rights in the homestead; and
>
> (b) signs the consent to the disposition:
>
> (i) of his or her own free will and consent; and
>
> (ii) without compulsion on the part of the owning spouse.

Section 9(1)(d) of the SFSA provides:

> 9(1) Notwithstanding any other Act or law or any agreement entered into before, on or after the coming into force of this Act:
>
> .
>
> (d) subject to sections 11 and 21, no person shall commence an action with respect to farm land;

Section 11(1) of the SFSA provides, in part:

> 11(1) Where a mortgagee makes an application with respect to a mortgage on farmland, the court may, on any terms and conditions that it considers just and equitable:
>
> (a) order that clause 9(1)(d).

Sections 13 to 21 of the Act set out the provisions a Court is to consider when an application is made pursuant to s. 11 of the SFSA.

With respect to homesteads, s. 17(1)(b) provides:

> 17(1) Where:
>
> .
>
> (b) the court is satisfied that:
>
> (i) property which is the subject of the action is a homestead;
>
> (ii) the mortgage relating to the homestead was entered into prior to the coming into force of this Part; and
>
> (iii) the farmer is making a sincere and reasonable effort to meet his or her obligations under the mortgage;
>
> the court shall dismiss the application with respect to the homestead.

In a report dated June 12, 2017, the Saskatchewan Farmland Security Board (the "Board") observed that $950,268.00 was owing on the mortgage; that Olson would have to make annual payments of $82,863.00 to payout the mortgage debt over 20 years; that Olson had limited income and had provided no reliable documents to establish his income, and that there was no reasonble possibility that Olson would meet his obligations under the mortgage.

On the other hand, the Board also stated that it found no evidence that Olson had funds which he was not directing towards the mortgage, and the Board therefore concluded that Olson was "sincerely and reasonably making efforts to satisfy the mortgage" [at para. 15].

Decision: McMurtry, J granted the Credit Union's application for an Order that it was entitled to proceed with its foreclosure action [at para. 26].

McMurtry, J referred to the purpose of s. 11 applications, and the process applicants must follow, at para. 9, by quoting extensively from the decision of the Saskatchewan Court of Queen's Bench in Lemare Lake Logging Ltd. v 3L Cattle Co., *2016 SKQB 230*, *[2016] S.J. No. 374*.

McMurtry, J, after discussing the decisions of the Saskatchewan Court of Queen's Bench and the Saskatchewan Court of Appeal in Royal Bank Canada v White *(1989), 77 Sask R 179*,

[1989] S.J. No. 89 (QB), aff'd *(1989), 77 Sask R 176*, *[1989] S.J. No. 457* Prairie Security Fund Ltd. v Gustafson *(1996), 144 Sask R 152* (CA); and Saskatchewan Trust Company (Liquidator) v Darwall Enterprises Ltd. *(1995), 134 Sask R 183*, *[1995] S.J. No. 504* (CA) (WL), concluded that Olson could not object to the validity of the mortgage during a s. 11 application, and that he could only do so in the course of an action, after a foreclosure action had been commenced, stating at para. 23:

> [23] It is clear from the case law, therefore, that Mr. Olson must bring his objections within the course of the action, and not at this stage of the proceedings.

McMurtry, J concluded [at para. 26] that there was no reasonable possibility that Olson could meet his mortgage obligations and that the Credit Union was therefore entitled to proceed with the action.

D McMurtry, J observed [at para. 25] that while Olson denied the validity of the mortgage, he did not deny the debt owing to the Credit Union.

CREDITS

This NetLetter is prepared by Brian P. Kaliel, Q.C. of Miller Thomson LLP, Edmonton, Alberta.