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Sunday, April 21, 2019 - Issue 417

HIGHLIGHTS

* A Justice of the Alberta Court of Queen's Bench has dismissed an action commenced by the Executor of an Estate for directions that land which had been transferred by a deceased farmer to himself and one of his sons in joint names for a consideration of $1.00 and natural love and affection was held by the son pursuant to a resulting trust. The Court concluded that there was ample evidence to rebut the presumption of resulting trust. The Court also rejected the Executor's argument that an agreement between the deceased father and his son was unenforceable because it violated the Statute of Frauds and because there was no corroboration for the agreement. The Court held that the Statute of Frauds did not apply and that there was no corroboration for the agreement. The case contains a good discussion of principles concerning the application of the principle of resulting trust to transfers between a parent and a child, the fact that Statute of Frauds does not apply to evidence of an agreement which rebuts the presumption, and with respect to the evidence needed to corroborate oral agreements when one of the parties is deceased.] [Editor's note: This is yet another case which illustrates the dangers involved in using a transfer of land to joint tenants as an Estate planning tool.]. (Bauer Estate v. Bauer, CALN/2019-008, *[2019] A.J. No. 392*, Alberta Court of Queen's Bench)

NEW CASE LAW

Bauer Estate v. Bauer;

Alberta Court of Queen's Bench,

J.T. Neilson J.,

April 1, 2019.

CALN/2019-008

[2019] A.J. No. 392 | *2019 ABQB 227*

Transfer of Farm Land by Parents to Children — Oral Farm Succession Agreements — Resulting Trust — Statute of Frauds — Corroboration.

The personal representative of the Estate of Herbert Bauer, deceased ("Herbert" and the "Estate") sued one of Herbert's sons, James Bauer ("James") seeking determination of a number of issues, including the issue of whether two quarter sections of land formerly owned by Herbert formed part of the Estate by a resulting trust or whether the land remained the property of James by right of survivorship pursuant to a joint tenancy.

Herbert and his wife had carried on a farming operation on two quarter sections of land west of Rimbey, Alberta. Herbert acquired one of the quarter sections in 1945. Mary acquired the other quarter section in 1967. After Mary died in 2010, Herbert became the sole registered owner of both quarters.

Herbert and Mary had used the land for a cow-calf operation. They had 4 children, Arlon, James, Alvin and Leroy.

One of the children, Arlon, was the Executor of the Estate.

Arlon left the farm after he reached the age of majority and became involved in the construction business. He was never involved in the farming operation as an adult.

Leroy was seriously injured in a drilling rig accident in 1989 and was estranged from the family after that.

Alvin was also injured in a work-related accident. He offered to purchase the farm from his parents in the 1990's after the accident and worked on the farm for a number of years. His proposal to purchase the farm was not accepted.

James subsequently made an offer to purchase the farm for $300,000.00 but Herbert was opposed to James borrowing this amount of money in fear of jeopardizing the family farm should James not be able to repay the loan.

James testified that an agreement was reached in 1995 to purchase the land on terms which would involve the management of Herbert and Mary's entire cow herd under a cow lease arrangement pursuant to which Herbert would receive 50% of the calf proceeds instead of the normal 25% for the owner and 75% for the operator. Under this agreement 25% was Herbert's share from calf sales and 25% was attributed to payments for the farm. Payments would be made for the joint lives of Herbert and Mary. James would be responsible for covering all expenses for the farming operations including providing feed for the cattle, paying for fuel and veterinary bills, and would involve all labour required to take the cattle to market. In addition, Herbert would continue to receive lease payments for the oil leases on the property and Herbert and Mary would be allowed to live on the farm, rent-free, for the rest of their lives.

Accounting evidence called to confirm that Herbert received over $150,000.00 attributed to the purchase of the farm and surface lease payments for the leases of over $182,000.00.

Herbert and Mary were very frugal. They were also generous to all of their children. Notwithstanding their frugality and their generosity, Herbert managed to save $1 million which was on deposit in his bank when he died.

On March 12, 2012, Herbert attended to the office of his solicitor and executed a transfer of title whereby Herbert and James became the owners of the two quarter sections as joint tenants. The transfer indicated that the consideration was $1.00 and natural love and affection

although the value of the land according to the transfers was almost $300,000.00.

The Estate argued that the onus was on James to rebut the presumption of resulting trust; that the alleged agreement was between James and Herbert was unenforceable by virtue of the provisions of the Statute of Frauds 1677 (U.K.), 29 Cha 2, (3), and that there was no corroboration to support the agreement.

Decision: Neilson, J held [at para. 63] that a resulting trust with respect to the farm lands had not been established and that James remained the owner of the lands by right of survivorship.

Neilson, J considered the following issues:

1. Presumption of resulting trust

Neilson, J summarized the law as follows, quoting from a decision of Pecore v Pecore, *2007 SCC 17* when a transfer between a parent and a child is challenged [at para. 39]:

> 24 The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see Waters' Law of Trusts, at p. 375, and E.E. Gillese and M. Milszynski, The Law of Trusts (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.
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> 25 The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.
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> 26 In cases where the transferor is deceased and the dispute is between the transferee and a third party, the presumption of resulting trust has an additional justification. In such cases, it is the transferee who is better placed to bring evidence about the circumstances of the transfer.

Neilson, J accepted James' evidence of the agreement he had reached with his father and observed [at para. 51] that for more than 20 years he had performed "his end of the bargain with his father for the purchase of the lands". He concluded that the transfer for title was for valuable consideration and that this consideration rebutted the claim for resulting trust, stating as follows at para. 52:

> [52] I find that when Herbert transferred the joint title interest to his son James, it was for valuable consideration which rebuts the claim for a resulting trust. As stated by the British Columbia Court of Appeal in Halagan v Reifeli, *2001 BCCA 434* at para. 47:
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> > [47] In my opinion, even absent a finding of contract, the presumption of a resulting trust may be rebutted. This is because the presence of an agreement supported by consideration is not always sufficient to establish the existence of a contract [see, for example, A.G. Guest et al., Chitty on Contracts, 27th ed., vol. 1 (London: Sweet & Maxwell, 1994) at para. 1-003]. Having to prove the existence of a contract to rebut the presumption may impose an unwarranted burden. In my opinion, all that is necessary to rebut the presumption that a resulting trust exists is to prove that the property was received for value. In other words, there is no requirement that the alleged trustee prove that receipt of the property in exchange

for consideration occurred under the umbrella of a contract. In that regard, the following extract from Professor Waters' text, Law of Trusts in Canada, 2d ed. (Toronto: Carswell, 1984) at 299 is of assistance:

> Broadly speaking, a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who did give value for it.

2. Whether the agreement was unenforceable by virtue of the provisions of the Statute of Frauds.

Neilson, J observed, at para. 42, that it was not open for the plaintiff to rely on the Statute of Frauds because the action was not brought by James. James was not attempting to enforce a contract to sell land. He was entitled to rely on an oral agreement to defend the Estate's claim.

Neilson, J, relying on the decisions of the Alberta Court of Appeal in Whissel Enterprises Ltd. v. Eastcal Developments Ltd., *1980 ABCA 264* and Bergman v Bergman, *2004 ABCA 194*, held [at para. 42]:

> [42] The agreement for the sale of the North West and South West Quarters between James and Herbert was oral, it was not in writing, signed by the person to be charged. However, it is not open to the Plaintiff to assert the Statute of Frauds in order to defeat James' claim to sole ownership of the land. This is because the action is not brought by James. In defence, he simply relies on the fact that he is the rightful owner. Under the Statute, "The contract may be a shield, although it cannot be used as a sword..."

3. Whether there was corroboration for the agreement.

Neilson, J referred to s. 7 of the Alberta Evidence Act, *RSA 2000, c A-18* which provides as follows:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on that party's own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.

Neilson, J summarized the test which had to be met to satisfy the provisions of s. 11 of the Alberta Evidence Act at para. 45, stating:

> ...the Court of Appeal has set out the tests to be met in order to establish corroboration of the party's own evidence, in Stochinsky v Chetner (Estate of), *2003 ABCA 226*), at para. 29:
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> > The principles for assessing whether the evidence is sufficiently corroborated have been set out by this Court in Harvie v. Gibbons (1980), *1980 ABCA 38*), *109 D.L.R. (3d) 559*, quoting with approval Stephenson v. McLean et al (1978) et al. (1978), *[1977] A.J. No. 393*, *4 Alta. L.R. (2d) 197* at 209-10, where Greschuk, J., reviewed the extensive case law on this subject and derived the following principles as a guide to assessing whether there is sufficient corroboration:
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> > > (1) The statute does not require independent proof of the plaintiff's evidence and so the evidence relied on as corroboration need not completely prove an agreement or go so far as the plaintiff's evidence.

(2) The statutory prohibition differs from the common law and should not be extended any further than its precise words require.

(3) The test for corroboration is whether the evidence in question makes the plaintiff's evidence more probable or "strengthened by some evidence which appreciably helps the judicial mind to believe one or more of the material statements".

(4) It is enough that the testimony produces inferences or probabilities tending to support the truth of the plaintiff's statement.

(5) Corroboration may be circumstantial evidence and fair inference.

Neilson, J. then concluded, at para. 46, that there was ample material evidence to corroborate James' evidence concerning the purchase of the land including income tax returns, evidence concerning the payments he had made to pay for the cattle, and other evidence, which is summarized at para. 46 to 51.

CREDITS

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