

Court of King's Bench of Alberta



Citation: McCallum (Re), 2023 ABKB 399

Date:
Docket: SES02 07525
Registry: Drumheller

Court File Number	SES02 07525
Court	Court of King's Bench of Alberta (Surrogate Matter)
Judicial Centre	Drumheller
Estate Name	Richard McCallum
Applicant (Plaintiff)	Terry Lynn McCallum
Respondent (Defendant)	Morgan Wilson as administrator for the Estate of Richard Marvin McCallum

**Reasons for Decision
of the
Honourable Justice R.A. Neufeld**

Background

[1] Richard McCallum and Terry McCallum began co-habiting in November 2011. They married in July 2014. Mr. McCallum had two children from a previous relationship; and Ms. McCallum had one daughter.

[2] Before and after their marriage, the couple both worked with Richard's parents in the operation of the Circle 3 Farm. As a wedding present, Richard's parents gave the couple a 4.9-acre parcel of land, subdivided out of the larger farm, as joint tenants (the "Acreage"). It contained a house, barn and quonset, the latter two of which were used on a day- to- day basis for Circle 3 farm operations. The home also shared a well with the adjacent residence, occupied by Richard's parents.

[3] On November 24, 2020, the couple separated. Ms. McCallum left the home, taking her daughter with her. The departure was sudden and followed an argument that Ms. McCallum said left her in terror. She stayed with a friend temporarily and then found rental accommodation in Strathmore, returning only once to the farm to retrieve personal belongings. She also stopped working for Circle 3 and found another job.

[4] At questioning, Ms. McCallum testified that at that point in time the relationship was finished. Although Mr. McCallum wanted to try counselling again, she recalled saying "No, I'm not – I'm done. We're not going to move ahead with any kind of -like we're going to get separated and divorce eventually. And we both agreed to try mediation to try and separate financial."

[5] At mediation, the couple discussed division of matrimonial assets. These included the house, three vehicles, a side by side, and a Bobcat. They also discussed division of credit card and mortgage debt.

[6] The mediation was not immediately successful, but an oral agreement was subsequently reached in the Fall of 2021 regarding the vehicles, leaving only the house under discussion.

[7] In March 2022, Ms. McCallum contacted Mr. McCallum to advise that her daughter needed to sell a half ton that she believed had been promised to her and inquired as to the whereabouts of the second set of keys for the vehicle. There was no response.

[8] On May 5, 2022, Ms. McCallum followed up with a registered letter to Mr. McCallum. It stated as follows:

[9] May 5, 2022

Rick:

Re: Divorce and Matrimonial Matters

Sent "With Prejudice"

It has now been over thirty days since my email sent to you on March 22, 2022 and I have not received a response from you. A copy of that email is attached.

I'm giving you one last opportunity to contact me to engage in meaningful settlement negotiations between the two of us before I commence legal action against you.

For your information, if I have to take this matter to the Courts, the legal action will include my immediate application to the Court to have the house and acreage judicially listed and sold together with an application that disclose under oath all of your personal assets and that you pay all of the costs of my having to go to Court against you.

I will give you one further week from the date of this letter to respond back to me failing which I will proceed without any further notice to you.

Terry

[10] Once again there appears to have been no response from Mr. McCallum although he did retain legal counsel.

[11] Tragically, on May 19, 2022, Mr. McCallum was involved in a single vehicle accident, and died from his injuries. He died intestate.

[12] After Mr. McCallum's death, the home remained empty. He had been making property tax and mortgage payments on the Acreage since the couple's separation, and after his death those payments were made by his daughter Morgan Wilson as Administrator of his Estate, with utilities continuing to be paid by Circle 3. At no time did Ms. McCallum contribute these payments.

[13] Following Mr. McCallum's death, Ms. McCallum attempted to have title to the Acreage issued in her name only as surviving joint tenant by the Land Titles Office. This was successfully resisted by Mr. McCallum's family pending a determination of whether the joint tenancy had been severed. She now applies for exclusive possession of the Acreage. The Estate cross-applies for an order declaring that the joint tenancy was severed by conduct. It also requests that the Court order that the Acreage be sold to Circle 3, which has tendered a cash offer of \$400,000.

[14] The focus of argument before me was the cross-application, as both parties agree that the Acreage should at some point be sold.

Issues

[15] To decide this application, I must determine whether the joint tenancy of the Acreage was severed prior to Mr. McCallum's death. The answer to that question depends on whether the course of dealings between the owners shows that they were treating their interests as ones that were not joint in nature but rather as common owners (i.e. tenants in common). If the joint tenancy was severed, I must decide whether the Acreage should be sold to Circle 3 as proposed so that the property can be monetized, and the proceeds divided in a fair and efficient way.

[16] I have determined that the conduct of the parties clearly shows that they were proceeding toward division of the Acreage as part of their separation and divorce, with Mr. McCallum assuming sole responsibility for its upkeep and maintenance in the interim. This was no longer a joint tenancy in fact or in law. I have also determined that sale of the Acreage on a non-arm's length basis and over the objection of Ms. McCallum would be premature. To the extent that she has concerns regarding the fairness of the Circle 3 offer she should have the opportunity to obtain a new appraisal and undertake further discussions with the Estate. However, if no resolution is reached within 45 days of this decision wither party will be entitled to request further direction from the Court, including approval of the Circle 3 offer in its current form or with a modified price.

[17] My reasons for these determinations follow.

General Principles

[18] The law relating to severance of joint tenancies is canvassed in detail in *Flock v Flock Estate*, 2021 ABQB 502 (“*Flock*”); *Keith v. Keith*, 2015 ABQB 409 and *Hansen v. Hansen*, 2012 ONCA 112. Because of its factual similarities, the *Flock* decision is most instructive.

[19] In *Flock* at para 26, Johnston, J. summarizes the difference between tenancies in common and joint tenancies as follows:

The within case illustrates the significance of the manner in which parties can hold title to real property. On the one hand, in a joint tenancy, the co-owners hold the property as a unified whole such that each holds an equal interest in the property. With a tenancy in common, one co-owner may be entitled to a greater proportionate interest in the property than the other. The critical distinction between the two is what has been referred to as “the remaining grand incident” – being the right of survivorship. Through the right of survivorship, the interest of a co-owner in a joint tenancy will pass on to the surviving co-owner upon his or her death. In contrast, the interest of a co-owner in a tenancy in common will pass on to that co-owner’s estate upon his or her death: *Hansen Estate v Hansen*, 2012 ONCA 112 at paras 29-31.

[20] Joint tenancies can be severed by a unilateral act of one joint tenant; a mutual agreement; or a course of dealing which shows that the interests of all were mutually treated as a constituting a tenancy in common (*Sorenson v. Sorenson*, 90 D.L.R. (3d) 26 (Alta CA)).

[21] In considering course of conduct severance, the Court will have regard to the circumstances surrounding how the property was held and managed. For example, was the property in joint possession, or was it lived in or used by only one of the owners? Was it being paid for by both owners in equal amounts, or were the costs borne disproportionately? Were the disruptions to unity of title, time, interest and/or possession temporary or permanent? Had either party taken proceedings that would result in monetization of land held in joint tenancy, or evinced an intention to do so?

[22] Severance of a joint tenancy is an equitable remedy. It therefore engages fundamental principles of equity and fairness.

Assessment

[23] In this case Mr. and Ms. McCallum lived separate and apart from their separation on November 24, 2020, until Mr. McCallum’s untimely death in May 2022. Ms. McCallum candidly conceded in questioning that from her perspective the relationship ended on November 24, 2020, and she had no interest in reconciliation. Although they had separated and reconciled in the past, it is clear from Ms. McCallum’s evidence that this separation was final, and the only matter left for discussion was how to deal with the house.

[24] Any doubt regarding those intentions is dispelled by Ms. McCallum’s “with prejudice” demand letter of May 5, 2022, and Mr. McCallum’s almost immediate retention of counsel following receipt of the letter.

[25] In addition to the subjective intentions of the couple, it is also clear that from the date of separation Ms. McCallum had virtually no role in the management or upkeep of the Acreage.

She also did not seek to possess the property. This is understandable given its proximity to her husband's parents and the fact that she no longer worked on the farm. With Mr. McCallum's death, the Acreage simply became an asset to be monetized and fairly divided – nothing more.

[26] In argument, counsel for Ms. McCallum fairly agreed that the May 5, 2022, demand letter was strong evidence of an intention to deal with the property in the division of matrimonial property. She argued however that it is not at all unusual for couples to reconcile after separation. Accordingly, evidence of their intentions at any given time may not be a reliable predictor of whether the divorce and family law action would have actually proceeded to a final result.

[27] I agree that family law disputes can take many twists and turns, including reconciliation and abandonment of pending actions. I do not agree that the possibility of reconciliation in this case outweighs the evidence of Ms. McCallum given in questioning, and the actual actions of the couple post separation in focussing on the division of their assets as opposed to rekindling their emotional attachment. In my view the evidence clearly demonstrates a course of conduct that is consistent with severance of the joint tenancy.

[28] I also consider that the severance of the joint tenancy is, in this case, both fair and equitable. Mr. and Ms. McCallum each brought children into their marriage. Had Ms. McCallum been the victim of a fatal accident in mid May of 2022, there can be no doubt that her children would properly have expected to inherit her share of the Acreage rather than having it lost to her estranged husband as her survivor in joint tenancy. Mr. McCallum's children deserve no less.

Sale and Distribution of Proceeds

[29] The Estate requests that I approve sale of the Acreage to Circle 3. An offer to purchase the Acreage for \$400,000 has been tendered by Circle 3.

[30] The Estate argues that \$400,000 is a fair price for the Acreage, even though it was appraised at \$510,000 in August 2022. Ms. McCallum is not opposed to sale of the Acreage. She does not agree that \$400,000 is fair value but did not offer a value that she considers would be fair.

[31] In defense of the offer, the Estate notes that the real estate market has softened since August 2022, when the appraisal was done. It also takes issue with the appraisal itself. It says that the acreage was carved out from the existing farm, is essentially surrounded by the Circle 3 farm, and continues to be used for farming operations on a day-to-day basis. It also shares water supply with the main farmhouse. The Estate says that the 2022 appraisal did not account for these peculiarities, which would make the Acreage much less desirable for a third-party purchaser. The Estate also argues that the Circle 3 offer would save the cost of realtor fees and continued carrying costs on the property.

[32] While some of the criticisms made by the Estate are well-taken, it is somewhat concerning that a non-arms-length purchase would be ordered at what may be less than market value, and without consent of one of the property's owners. I will therefore direct that the parties resume discussions regarding a fair purchase price, with the benefit of this decision and an updated appraisal (if Ms. McCallum wishes to have that done). If no agreement is reached within 45 days, either party may seek further direction from the Court regarding the proposed sale including whether the Acreage is to be sold to Circle 3, and at what price.

Heard on the 15th day of June, 2023.

Dated at the Town of Drumheller, Alberta this 30th day of June, 2023.



R.A. Neufeld
J.C.K.B.A.

Appearances:

Alya M. Nazarali
for the Applicant

Lisa Handfield
for the Respondent