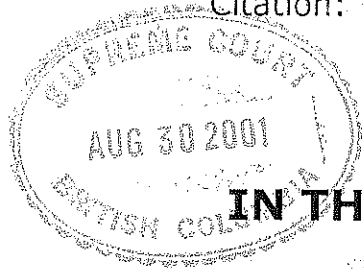


Citation: Howarth v. Doucette et al.
2001 BCSC 1245

Date: 20010830
Docket: S064171
Registry: New Westminster



IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

STANLEY HOWARTH

PLAINTIFF

AND:

**ARTHUR THOMAS DOUCETTE, EXECUTOR OF THE LAST WILL
AND TESTAMENT OF ANNIE MAY DOUCETTE,
ARTHUR THOMAS DOUCETTE AND HELEN HAMEL**

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE PRESTON

(IN CHAMBERS)

Counsel for the Plaintiff:

R.T. Todd

Counsel for the Defendants:

✓ C.R. Bacon

Date and Place of Hearing:

August 2, 2001
New Westminster, B.C.

[1] This 18A application arises from a contest between the beneficiaries of the estate of Annie May Doucette and the plaintiff Stanley Howarth with whom the deceased had resided in a common-law relationship between 1979 and October 20, 1989.

[2] The central issue is whether Mr. Howarth must pay occupational rent to Ms. Doucette's children, the beneficiaries under her will, for his occupation of the home Mr. Howarth and Ms. Doucette held in joint tenancy and later, tenancy in common.

Chronology of Relevant Events

[3] The following is the chronology of events:

- October 1979: Mr. Howarth and Ms. Doucette began a marriage-like relationship. Mr. Howarth was 57, Ms. Doucette was 65.
- April 23, 1980: Mr. Howarth transferred a one-half interest in his home that he owned free and clear of any mortgage to Ms. Doucette in joint tenancy.
- October 20, 1989: Ms. Doucette left the home either because: (1) she was turned out by Mr. Howarth, or (2) her continued residence was rendered intolerable by him, or (3) because of her failing health she could no longer live outside an institutional setting.

- October 25, 1989: Ms. Doucette was admitted to Foyer Maillard, a nursing home in Coquitlam, B.C. The doctor who cared for her in that facility stated:

She suffered from diabetes, hypertension and a long-standing anxiety disorder and was unable to look after herself independently, and thus was admitted to the nursing home.
- February 14, 1994: Ms. Doucette severed the joint tenancy by conveying her one-half interest in the home to herself.
- October 20, 1999: Ms. Doucette died leaving her estate to her two children, the defendants in this action.
- December 14, 2000: this action was commenced by Mr. Howarth claiming relief under the **Wills Variation Act**, R.S.B.C. 1996, c. 489.
- January 11, 2001: a counterclaim was filed on behalf of Ms. Doucette's estate seeking dismissal of the plaintiff's claim, and occupational rent for the period October 20, 1989 to October 20, 1999.
- On February 2, 2001: Mr. Justice Hood held in **Einfeld v. Einfeld** [2001] BCSC 92 that the section of the **Estate Administration Act**, R.S.B.C. 1996, c. 122 permitting common-law spouses to avail themselves of the benefits that statute confers on "spouse" speaks to the nature of the relationship at the time of death. By implication, Mr. Howarth and Ms. Doucette were not common-law

spouses for the purposes of the **Wills Variation Act** at the time of the death of Ms. Doucette. Accordingly there is no foundation for Mr. Howarth's action under that statute.

[4] The defendants' notice of motion seeks:

1. Dismissal of the plaintiff's **Wills Variation Act** claim.
2. Judgment against the plaintiff for occupational rent.
3. Sale of the property and equal division of the proceeds.

[5] In light of the decision in **Einfeld**, the plaintiff does not contest the dismissal of his **Wills Variation Act** claim nor does he contest the sale and division of the property. The issue is whether it is appropriate, in the circumstances, to require the plaintiff to pay occupational rent.

Is Occupational Rent an Equitable Remedy?

[6] The basic rule is that stated in **Mastron v. Cotton**, 58 O.L.R. 251, [1926] 1 D.L.R. 767:

While the general rule is that one joint tenant, unless ousted by his co-tenant, may not sue another for use and occupation, it seems clear that when the joint tenancy is terminated by a Court order for partition or sale, the Court may in such proceedings make all just allowances and should give such directions as will do complete equity between the parties: **Gage v. Mulholland** (1896), 16 Gr. 145; **Rogers v. Mackenzie** (1799), 4 Ves. 752, 31 E.R. 389; 33 C.J. 909; *Taylor's Equity* 166, para. 376.

What is just and equitable depends on the circumstances of each case. For instance, if the tenant in occupation claims for upkeep and repairs, the Court as a term of such allowance, usually requires that the claimant shall submit to an allowance for use and occupation: **Rice v. George** (1873), 20 Gr. 221; **Pascoe v. Swan** (1859), 27 Beav. 508, 54 E.R. 201. Again, if one tenant has made improvements which have increased the selling value of the property, the other tenant cannot take advantage of the increased price without submitting to an allowance for the improvements: **Leigh v. Dickeson** (1884), 15 Q.B.D. 60 per Cotton L.J., at p. 67; 21 Hals. 851, para. 1595. And, once again, when, as here, one tenant has paid more than his share of the encumbrances, he is entitled to an allowance for such surplus: **Re Curry v. Curry** (1858), 25 O.A.R. 267; 33 C.J. 909.

[7] Mr. Howarth has not advanced a claim for upkeep, improvement or repairs. There was no mortgage on the property at any time material to these proceedings.

Ouster

[8] In the circumstances before me, the defendants must establish ouster in order to obtain judgment for occupational rent. The material before me on this application sets out two different versions of the facts surrounding Ms. Doucette's leaving of the home. The affidavits filed by the parties hint at the layered nuance of circumstances surrounding the breakdown of the personal relationship between Ms. Doucette and Mr. Howarth that forms the factual background upon which the defendants' assertion of ouster depends. It is clear that Ms. Doucette had severe health problems. She was 75 years of age. The factual determination of

whether there was, or was not, ouster is not suitable for determination under Rule 18A.

[9] For the purposes of considering this application further, I will assume that the defendants have established ouster and go on to consider whether, on that assumption, they are entitled to judgment for occupational rent.

[10] In order to establish an entitlement to occupational rent, the defendants must show that it is just and equitable in the circumstances of the case. On the facts before me the circumstances in which Mr. Howarth advanced a one-half interest in his home to Ms. Doucette strongly suggest that it was their intention that the home provide a residence for both of them for the remainder of their lives. In the words of Ms. Doucette's admitting physician she was, five days after leaving the home she shared with Mr. Howarth, "unable to look after herself independently". Mr. Howarth continued to live in their home. Her expenses of living in the nursing home do not have a causal link to her ouster from the residence. No claim for occupational rent was advanced by Ms. Doucette during her lifetime or after her death until these proceedings were commenced.

[11] In the circumstances of this case, even if Mr. Howarth ousted Ms. Doucette from the residence in 1989, granting judgment to Ms.

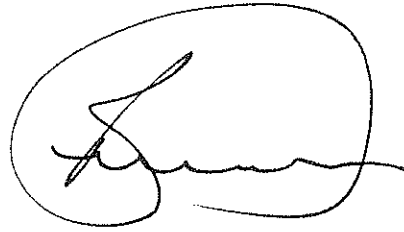
Doucette's heirs for occupational rent would not be just and equitable in the circumstances. There are compensatory underpinnings to the cases dealing with occupational rent that are absent in this case.

Ms. Doucette's health and age rendered her unable to live independently. She voiced no legal objection to Mr. Howarth's continued residence in the home. Her act of severing the joint tenancy in those circumstances can be seen as motivated by a desire that her heirs receive her half of the property -- not Mr. Howarth, from whom she was then estranged. The order sought placing the property for sale and dividing the proceeds equally will accomplish that.

[12] There will be an order that the subject property be listed for sale and sold. The proceeds of sale are to be divided equally between Mr. Howarth and Ms. Doucette's beneficiaries after payment of all charges and expenses associated with the sale. Mr. Howarth and the Executor of Ms. Doucette's estate are to have joint conduct of sale. The listing is to be delayed for 60 days from the date of this order to permit Mr. Howarth to find alternate accommodation.

[13] The plaintiff has been successful on the principal issue at this hearing. However, the two issues upon which he was not successful remained in contention until the hearing. Success has been divided. If

the parties wish to make submissions on costs they may do so; if not, they will bear their own costs.

A handwritten signature in black ink, enclosed within a hand-drawn oval. The signature is stylized and appears to read 'B.M. Preston J.'.

B.M. Preston J.