

[4] The Respondent and the parties' daughter live in a condominium that the Respondent purchased after separation for approximately \$890,000.

[5] In addition to the matrimonial home, the parties own an investment property, which is registered in joint names. The investment property is the property that is the subject of this motion.

[6] The Respondent submits that the property was initially purchased in 2007 to build a home for the parties. They obtained a variance and a permit to build a larger home on the property but never began construction. When they bought the property, there was already a home on the lot. They rented the home out for the first year only. The home on the property is not habitable now.

[7] The parties disagree on the value of the property. The Respondent submits that the property has been appraised at \$2.1 million, for its redevelopment value. The Respondent submits that the Applicant will receive approximately \$795,000 from the sale of the property, with \$1 million to be held in trust, being his share of the next proceeds of sale and an amount sufficient to pay the capital gain taxes. The Applicant's valuator valued the property between \$1.5-\$1.7 million.

The parties' positions:

[8] The Respondent submits that, in the Application the Applicant sought an order for the sale of the investment property and therefore she should not be objecting to this motion for sale. He submits that the Applicant will not suffer any prejudice by the sale of the property. Although the Applicant has expressed an interest in purchasing the Respondent's share in the property to use as an income source, the Applicant does not have a right to force a buy-out.

[9] The Respondent recognizes that he will owe the Applicant a large equalization payment, and he submits that he is trying to liquidate some of his assets in preparation for making his equalization payment. I do not accept this is the motive behind this motion for the sale of the property, but it does not affect the outcome of the motion in any event.

[10] The Applicant objects to the sale of the home. She has a number of concerns. She submits that the Respondent's motion is malicious, vexatious and oppressive, consistent with his behaviour since separation.

[11] The litigation began in February 2024, and this is the third motion argued, with the Respondent having expressed plans to bring further motions. The Respondent did not pay any spousal support following separation. The Applicant brought an urgent motion for support. The Respondent's 2023 income was \$928,000. He voluntarily retired in 2023. The Applicant was employed as a teacher through the Toronto District School Board but is currently on leave. She is challenging a decision denying her long-term disability. The Applicant was imputed with an income of \$96,000 for the purpose of the support motion. The Respondent took the position that the motion for spousal support should be dismissed. On July 30, 2024, just days before this motion was argued, Justice Diamond released a decision on the motion for spousal support. Justice Diamond ordered the Respondent to pay spousal support in the sum of \$15,000 per month (in the medium to high range) and found the Respondent was intentionally under-employed.

[12] Another motion was argued for an order that the parties' daughter attend reunification therapy with the Applicant. The Applicant had not spoken to or seen the parties' daughter since the Respondent and child moved from the home in November 2023. There was a finding by the Children's Aid Society that there was verified emotional harm to the child due to the Respondent's involving the child in the conflict. The Applicant submits that this is another example of the Respondent's malicious behaviour towards her.

[13] The Applicant submits that the Respondent is forcing the sale of the property to lower his support obligation. He wants her to use this capital to support herself. She submits this is a continuation of his malicious and vexatious behaviour towards her.

[14] Finally, the Applicant submits that she wants to keep the property as an income source, in light of the Respondent's early and voluntary retirement. She acknowledges that the Respondent pays the expenses on his condo, on the matrimonial home and on the investment property. The investment property costs approximately \$1,000 per month. Now that the Applicant is receiving spousal support, she is willing to pay her 50% of the expenses.

Analysis:

[15] The Applicant submits that the motion should be dismissed without prejudice, to be brought back once some of the issues have been resolved. However, the parties have been separated for three years. They cannot even agree on the date of separation. There is approximately a \$3 million swing in the Respondent's net worth between the two dates of separation. The parties' pensions have not been valued. This is not a motion for the sale of the matrimonial home, where the Applicant is living. For that motion, determination and payment of the equalization payment is an issue.

[16] I am not confident in the parties' ability to resolve the issues without a trial. This matter needs to move forward and that includes resolution of the issues that do not need to wait for trial. The sale of jointly owned property need not wait until trial.

[17] The Respondent submits that he wants to sell the property to be able to pay the equalization payment. As set out above, I do not accept this explanation. He used \$890,000 of his liquid assets to purchase a condominium, mortgage free, which he subsequently renovated. He also has over \$3.5 million in investments. He has also kept the matrimonial home in his name. He is not liquidating his assets; he is liquidating the Applicant's assets. If he wanted to pay the equalization payment or at least a partial payment, he has liquid assets and could have done so.

[18] Further, the Respondent is not proposing that the Applicant receive an advance on the equalization payment that he owes from the proceeds of sale, but simply that she receives her share of the net proceeds of sale.

[19] But as I said above, this does not change the outcome of this motion.

[20] Section 2 of the *Partition Act* stipulates that all joint tenants or tenants in common may be compelled to partition or make a sale of all or a portion of land. Under the *Partition Act*, a joint tenant has the *prima facie* right to an order for the partition or sale of lands jointly held with another tenant and that tenant has a corresponding obligation to permit that sale: *Steele v Doucett*, 2020 ONSC 3386 at paras 80-81.

[21] Although there is some discretion available to the Court, a court is required to compel a sale of jointly held land if no sufficient reason can be shown why such an order should not be made. Each case must be considered on its own facts. The court must consider all relevant factors in exercising its discretion. *Davis v. Davis* 1953 CanLII 148 (ON CA), [1954] O.R. 23 (C.A.); *Steele v Doucett*.

[22] The onus is on the Applicant to establish sufficient reason why the court should exercise its discretion and not order the sale. Where a sale would be the inevitable result at trial, there is little justification for delaying the sale. *Zargar v Zarrabian* 2016 ONSC 2900 (SCJ); *Giglio v Giglio* 2015 ONSC 8039 (SCJ); *Keyes v. Keyes* 2015 ONSC 1660 (SCJ).

[23] The court cannot compel the Respondent to sell his interest to the Applicant. The Court cannot give the Applicant the right of first refusal to purchase the property: see *Balter v. Balter* (1998), 67 O.R. (2d) 355 (H.C.) and *Sanvictores v. Sanvictores*, 2022 ONSC 2673 at para. 13. While some Courts have delayed a sale of property where a recipient of an equalization payment may propose to set their entitlement off against their former spouse's share of the equity in the home, the facts of those cases are quite different from the fact of this case and almost exclusively deal with situations of a matrimonial and the best interest of children.

[24] There is no competing claim on the property that will be prejudiced by the sale, such as a claim for exclusive possession, because it is not a matrimonial home. No one lives in the property.

[25] I find the sale of the property is inevitable at trial.

[26] The Applicant submits that a court has discretion to deny a sale that is malicious, vexatious, or oppressive. The malicious, vexatious, or oppressive conduct must *relate to the partition and sale issue* in order to avoid the sale. *Silva v. Silva* (1990) 1990 CanLII 6718 (ON CA), 1 O.R. (3D) 436 (ON CA); *Jama v. Basdeo*; *Steele v Doucett*.

[27] A co-owner's motion for the sale of a property cannot be deemed to be vexatious: *Kaing v Shaw*, 2017 ONSC 3050 (CanLII) at para. 28 and *Kaphalakos v. Dayal*, 2016 ONSC_3559 (Div. Ct.).

[28] Oppression can include hardship, but there is no one living in the investment property.

[29] It is necessary to look at the reasonableness of the positions taken by the parties as it relates to the application for partition and sale. *Osborne v. Myette*, 2004 Carswell Ont. 3331 (S.C.J.) at para. 12 and *Oppong Nketiah v. Oppong Nketiah*, 2021 ONSC 4807 (CanLII). If the sale of the property is an inevitable outcome at trial, the motion for the sale of the property is not malicious,

vexatious or oppressive. And while there may be concerns about the Respondent's motives for the sale, it is not sufficient to defeat his right to force the sale.

[30] The cases relied on by the Applicant in which motions for the sale of property were dismissed, can be easily distinguished on the facts. For example, many of the cases address the premature sale of a matrimonial home, when a spouse does not know what they can afford as alternate accommodations, until support and property have been resolved.

[31] The Applicant argues that it is hard for her to make any plans with respect to her finances (whether investing, finding a new home, etcetera) without the full picture and without starting to receive some of the significant equalization payment owing to her, but this would be relevant if the Respondent brought a motion for the sale of the matrimonial home or brought an order for exclusive possession, not a motion for the sale of a jointly owned investment property.

Moving to Trial:

[32] I am concerned about the amount of litigation that is occurring between the parties. I am concerned about the imbalance of resources available to the parties. The Court is required at all times to consider the primary objectives of the *Family Law Rules*, which is to deal with cases justly. Justly includes:

- (a) ensuring that the procedure is fair to all parties;
- (b) saving expense and time;
- (c) dealing with the case in ways that are appropriate to its importance and complexity; and
- (d) giving appropriate court resources to the case while taking account of the need to give resources to other cases. O. Reg. 114/99, r. 2 (3).

[33] Rule 2(5) provides that a court shall promote the primary objective by active management of cases, which includes:

- (d) setting timetables or otherwise controlling the progress of the case;
- (e) considering whether the likely benefits of taking a step justify the cost;

[34] Justice Diamond left open the possibility of bringing the support motion back once and if the investment property was sold. The Respondent raised bringing back on his motion for support once the property is sold. The Respondent has already advised that he had leave to bring a WAGG motion and may bring other motions in the interim.

[35] I have concerns that this is not a balanced playing field for so long as the significant equalization payment has not been paid, with the Respondent having resources to continue with motions without moving the matter forward to final resolution.

[36] The parties have a settlement conference scheduled for October 2024. There shall be no motions pending the settlement conference, except with respect to enforcement of any of the order if needed, and the WAGG motion, for which leave has already been granted.

[37] The parties reached an agreement on the other relief sought on the motion. I will make an order in accordance with the draft consent order filed.

Costs:

[38] Under r.24(10), costs are to be decided on a summary basis promptly after dealing with a step in a case. As the successful party, the Respondent is entitled to his costs of this motion. His costs, on a partial indemnity basis were \$7,069.

[39] In determining the quantum of costs, I have considered the factors set out in r.24(12), having regard to the reasonableness and proportionality. This was a simple motion for partition and sale of a property. I am entitled to consider the Applicant's ability to pay and the behaviour of each party. As set out above, although the Respondent's behaviour does not rise to the level of vexatious and malicious, I have concerns about the way in which he is proceeding in this litigation. I find that considering all of the factors, the sum of \$2,500 is reasonable in the circumstances, payable by the Applicant to the Respondent from her share of the net proceeds of sale. Although the parties did not file their offers to settle, this was a binary issue, either the property would be sold, or it wouldn't, and therefore the offers would not change my position on costs.

Order:

[40] Order to go as follows:

- a. On consent, the Applicant shall provide the Respondent's appraiser access to the matrimonial home on August 7, 2023, between 5pm and 6pm.
- b. The parties shall cooperate in the listing and sale of the jointly owned investment property, municipally known as 67 Wanless Crescent, Toronto, Ontario (the "Property").
- c. Within seven days of release of this endorsement, the Applicant shall provide the Respondent with the names of three real estate agents. Within seven days of receipt of those names, the Respondent shall choose one of the names. If the Respondent fails to choose one within seven days, the Applicant may choose the real estate agent.
- d. The property shall be listed at a price determined by the agent. The parties shall accept the first reasonable offer, reasonable being within 10% of the listing price.

- e. Upon sale of the Property, the Applicant shall receive her 50% share of the net proceeds of sale. The Respondent's net proceeds of sale shall be held in trust pending further order of this court or agreement between the parties.
- f. The parties shall cooperate in determining the capital gains taxes owing on the property and each party shall be responsible for paying his/her 50% share of those taxes.
- g. No motions may be brought in advance of the settlement conference, except for motions for enforcement of orders if needed and the WAGG motion. Thereafter, motions may be brought with leave of the court.
- h. Each party shall serve all outstanding disclosure at least 2 weeks in advance of the settlement conference.
- i. As set out in the *Family Law Rules*, the parties shall serve all expert reports they intend to rely on at trial, in advance of the settlement conference.
- j. In addition to offers to settle the outstanding issues on a final basis, the Applicant shall also serve and file an offer with respect to partial payment of the equalization payment.
- k. The Applicant shall pay the Respondent costs in the sum of \$2,500.00 inclusive of HST, from her share of the net proceeds of sale of the Property.

Shore, J.

Released: August 23, 2024

CITATION: Tsombanakis v. Lambis, 2024 ONSC 4699
COURT FILE NO.: FS-24-40955-0000
DATE: 20240823

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Mary Tsombanakis

Applicant

– and –

James Lambis

Respondent

ENDORSEMENT

Shore, J.

Released: August 23, 2024