SUPREME COURT OF NOVA SCOTIA
Citation: *Wambolt v. Wambolt*, 2018 NSSC 224

Date: 20180426
Docket: Tru No. 461280
Registry: Truro

Between:

Wayne Robert Wambolt

Applicant

v.

Kendalene Karla Wambolt

Respondent

D E C I S I O N

Motion for Sale and Division under the *Partition Act*

Judge:	The Honourable Justice Christa M. Brothers
Heard:	April 24 and 26, 2018, in Truro, Nova Scotia
Oral Decision:	April 26, 2018
Written Decision:	September 27, 2018
Counsel:	Daniel Boyle, for the Applicant Kendalene Karla Wambolt, Self-represented Respondent

Brothers, J.: (Orally)

Overview

[1] This proceeding involves a dispute between the parties about property that the two parties hold as tenants in common. The parties are family. The Applicant is the Respondent's uncle. Unfortunately, the parties have had an acrimonious relationship which pre-existed this proceeding.

[2] Wayne and Kendalene Wambolt each hold a 50 percent interest in the property at 5741 Highway 2, Bass River, Nova Scotia. Neither of them live in the home, which is currently vacant. Lottie Gamble, Mr. Wambolt's mother and Ms. Wambolt's grandmother, once resided in the home.

[3] Mr. Wambolt commenced this application in Chambers seeking an order that the property be sold and the net proceeds be divided equally between the parties. The Applicant pleaded the *Partition Act*, R.S.N.S. 1989, c. 333.

[4] The parties reached agreements, via a consent order dated April 5, 2018, that was amended on May 23, 2018 on the following:

1. The real property at 5741 Highway 2, Bass River, Nova Scotia (PID 20226635) (hereinafter the "subject property") shall be forthwith placed on the open market for sale.
2. The initial listing price shall be a figure set by a realtor who is knowledgeable of property values in the area where the subject property is located – specifically, Fran Grant or another real estate agent employed by RE/MAX Fairlane Realty.
3. No reasonable offer shall be refused by either party and neither party shall withhold consent to reasonable advice offered by their realtor regarding issues such as, but not limited to, adjustments to listing price, open houses, etc.
4. Both parties shall have the option of re-appearing before this Court by Motion in Chambers for determination as to whether an offer which has been received is "reasonable", or whether any advice offered by their realtor which is disagreed with by the parties is "reasonable".
5. Neither party shall withhold consent to reasonable advice offered by their realtor regarding issues of maintenance which may be required to make the subject property more marketable. Where the realtor determines that maintenance is required, the parties shall consent to contractors and quotes for such maintenance, and if no such consent can be reached, both parties shall have the option of re-appearing before this Court by Motion in Chambers for determination as to

whether suggested maintenance is "reasonable" or for determination of appropriate contractors or quotes.

6. The cost of any maintenance to be performed by consent or by court order as contemplated herein shall be shared equally as between the parties. If one party pays a maintenance bill in its entirety, an appropriate adjustment shall be made to compensate such party at closing.

7. The subject property shall remain vacant pending sale, and the Respondent shall at her own expense remove any personal property remaining in the subject property forthwith.

8. Both parties shall co-operate fully in the listing and sale of the property and each is to, without delay, sign whatever documentation may be required to bring the sale to its ultimate conclusion.

9. Should the subject property be sold before the final hearing of the application is concluded, net proceeds of sale, after legal expenses, real estate expenses, and other applicable expenses are satisfied, shall be paid into court pending final determination of these proceedings.

Issue

[5] Originally, there were several issues to be decided:

1. Should the property be sold pursuant to the *Partition Act*?
2. If the property is to be sold how should proceeds from the sale be distributed as between the parties?
3. Are costs appropriate in this matter and if so in what quantum?

[6] The first issue has been answered by agreement of the parties. The parties are in the process of cooperating to effect a sale of the property. The remaining issues are how the proceeds from the sale should be distributed, who receives costs and in what amount.

Law and Analysis

[7] I have had the benefit of affidavit evidence and briefs filed by the parties. I will provide a brief review of the affidavits and *viva voce* evidence heard on April 24, 2018. Furthermore, I have only considered the evidence that is properly before the Court pursuant to the court order dated April 5, 2018, and the agreement of the parties striking portions of several affidavits.

[8] The Applicant submitted two affidavits himself, dated March 10, 2017, and February 16, 2018. The Respondent submitted the following affidavits:

1. Affidavit of Lisa McInnis (February 14, 2018);
2. Affidavit of Mary-Ellen Hillier (February 14, 2018);
3. Affidavit of Vernon Wambolt (February 20, 2018);
4. Affidavit of Lillian Wall (February 20, 2018);
5. Affidavit of Madge Foster (February 27, 2018);
6. Affidavit of the Respondent Kendalene Wambolt (February 21, 2018).

[9] I heard evidence from six witnesses on April 24, 2018. The Applicant gave *viva voce* evidence. I heard the following witnesses for the Respondent: Keith Field, Vernon Wambolt, Lillian Wall, Madge Foster, and the Respondent, Kendalene Wambolt.

[10] I will review the positions of the parties.

The Applicant's Position

[11] The Applicant argues that equal distribution of proceeds of the sale of the property should be considered the starting point in this matter. The Applicant acknowledges that the Court can order equitable allowances in the context of claims under the *Partition Act*.

[12] The Applicant quotes from *Finanders v. Finanders*, 2005 NSSC 145. In that case, Edwards, J. ordered a property sold pursuant to the *Partition Act* and the proceeds divided 75 percent to the Defendants and 25 percent to the Plaintiff. The Defendants, a husband and wife, held 50 percent as joint tenants. The Plaintiff, who was the brother of the Defendant husband, held 50 percent of the property as a tenant-in-common. Edwards, J. said:

> In making an order for sale, the Court takes into account any equitable allowances. In this regard see *Mastron v. Cotton* [1926] 1 O.L.R. 767, a decision of the Ontario Supreme Court, Appellate Division. The Court there stated:
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> > "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 G.r.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 the advantage of increased price without submitting for allowance for the improvements: *Leigh v. Dickson*,

> 15 Q.B.D. 60, per Cotton L. J., p. 67; 21 A. a.l.s., p. 851, para. 1595. and, once again, when, as here, one tenant has paid more than his share of encumbrances, he is entitled to an allowance for such surplus: re *Curry, Curry v. Curry* (1898), 25 A.R. (Ont.) 267; 33 Court. J.u.r., p.909.
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> These allowances being made as equitable allowances, there may as a matter of course, be circumstances under which they should not be made. For instance, the circumstances may indicate that the improvements were made or the surplus payments were made or intended to be as gifts by one tenant to the other."

[20] Also in *Lasby v. Crewson*, [1891] O.J. No. 76, (O.H.C.J..) the Court stated:

> "I think the authorities determine beyond any question that in a suit for partition a co-tenant is entitled to lasting improvements or repairs, by which he has enhanced the value of the property. I refer to *Rice v. George*, 20 Gr. at p. 226; *Wood v. Wood*, 16Gr. 471; *Morley v. Mathews*, 14 Gr. 551; *Pascoe v. Swan*, 27 Beav. 508; *Teasdale v. Sanderson*, 33 Beav. 534, and *Leigh v. Dickeson*, 15 Q. B.D. 60. The judgment of Cotton, L.J., in the latter case, puts the questions in my judgment beyond any doubt. He says at p. 67: 'Therefore, no remedy exists for money expended in repairs by one tenant in common; so long as the property is enjoyed in common; but in a suit for partition it is usual to have an enquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is desired to put an end to that state of things, it is then necessary to consider what has been expended in improvements or repairs: the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value. There is, therefore, a mode by which money expended by one tenant in common for repairs can be recovered, but the procedure is confined to suits for partition'."

[21] In *Handley v. Archibald,* (1899), 30 S.C.R. 130, an appeal from a decision of the Supreme Court of Nova Scotia, Sir Henry Strong of the Supreme Court of Canada noted in an action amongst tenants-in-common:

> "The appellants are entitled to an account of and allowance for the improvements made by them or any of them, but if they insist on such an account they must also themselves account for the rents and profits received by them or for an occupation rent and that at the improved value. The case for an account of the improvements is made by the clear added defence, and it is also claimed in the appellant's factum. The law on this head appears clear. An action cannot be maintained by one tenant in

> common against another for the value of improvements alone. But in a partition action in equity such an allowance was always made."

[22] *Anger and Honsberger Real Property*, 1985, Canada Law Book, at page 822 states:

> "At common law there could be no action of account by one tenant in common against another who had occupied the whole property unless he had appointed the latter as his bailiff so as to make him liable to account in that capacity. In equity, however, a tenant in common is liable to account in an action by the others and, by statute, a tenant in common who receives more than his share is made liable to account to co-tenants."

[13] Mr. Wambolt quotes this case as support for his claim for an equitable allowance for the contributions he made to the property taxes.

[14] Further, Mr. Wambolt says, in addition to the taxes he paid in relation to the property, the Court should impute occupation rent of $400 per month from June 21, 2016, until the present. Mr. Wambolt says he actively tried to exercise ownership and sell the property and was unable to do so because of the inaction of the Respondent. At a minimum he seeks rent from March 2017, when he filed this application.

The Respondent's Position

[15] The Respondent contests this application. Ms. Wambolt seeks an unequal division of proceeds in her favour. Simply put, she says she contributed a significant amount of "sweat equity" and funded repairs which increased the value of the home, or, at the least, made it liveable and now sellable.

[16] The Respondent seeks a division of the net proceeds of the home on a 70/30 basis in her favour. In addition, she claims expenses totalling $9,295.93 for payment of:

1. A plumber for broken radiators and pipes;
2. A carpenter
3. Property taxes
4. Sanding equipment
5. Hot water heater
6. Payment to Lisa McInnis for cleaning the home.

[17] In the alternative, the Respondent says she would have been prepared to have Mr. Wambolt buy her half-interest in the home for $25,000.

[18] Mr. Wambolt argues that the Respondent should not benefit from an unequal distribution based on the expenses and "sweat equity" the Respondent claims she put into the home, as these claims were not satisfactorily proven on the evidence.

Law and Analysis

[19] It is settled law that there is a presumption in favour of equal division under the *Partition Act*. That has not been disputed by the parties.

The Applicant's Claims

[20] Mr. Wambolt's claim for occupation rent is based on limited evidence. In *Soubliere v. MacDonald*, 2011 NSSC 98, Jollimore J. canvassed the law on occupation rent. The basis of such a claim must be rooted in the fact that a joint owner who is entitled to possession has been excluded from their property and is therefore entitled to charge the owner in possession for occupation rent. In *Soubliere*,*supra*, occupation rent was granted to the wife. Her husband had changed the locks and denied her entry into her home. The facts of that case were quite extreme, with the husband's behaviour being a factor in the decision.

[21] The evidence here does not satisfy me that Mr. Wambolt has been excluded from the home. He could have exercised his interest, but there is no evidence of his attempts to do so aside from his counsel's letters in September 2017. Mr. Wambolt filed two affidavits and was cross-examined. The only reference to being excluded from the property in his March 10, 2017, affidavit is para. 13, which states:

> I have never received keys to, and I have never entered, the home on the Property since acquiring an interest in the property.

[22] In his February 16, 2018, affidavit, Mr. Wambolt states, at para. 15:

> Since March 2017, I have made efforts to obtain access to the property subject to these proceedings, both to verify the condition of the property and to obtain an appraisal. I am advised by Daniel Boyle, and do verily believe that he wrote the Respondent on September 5, 2017, requesting that the Respondent provide me with a key with these objectives in mind.
> . . .

[23] Attached to the affidavit were letters from counsel for the Applicant requesting a key from the Respondent. There were two letters sent in September 2017 seeking a key. There is no evidence of the Applicant attempting to exercise ownership and being prevented, other than these two requests for a key. On cross-examination, the Respondent was not given an opportunity to explain this.

[24] In order to be satisfied that occupation rent was appropriate, the Court needs more evidence of exclusion. I will not order occupation rent in these circumstances.

[25] I do find Mr. Wambolt paid $800 in property taxes – $500 on September 18, 2017, and $300 on October 16, 2017. On that basis, I order an equitable allowance of $400 to Mr. Wambolt from the net proceeds of the sale of the property.

The Respondent's Claims

[26] Ms. Wambolt seeks an unequal division of the net proceeds of the sale of the property in recognition of the "sweat equity" she says she contributed to the home for several years, including years before she had a property interest. She seeks to recover funds she provided for supplies and labour to repair the home over the years.

[27] The law does allow such unequal division where cogent and convincing evidence proves the expenditures and work on a balance of probabilities. However, the Court cannot speculate in order to make such an award.

[28] Equitable allowances have been ordered by the courts. The Ontario Supreme Court, Appellate Division, discussed such orders in *Mastron v. Cotton*, [1926] 1 D.L.R. 767, [1925] O.J. No. 134. The Court in that decision stated at paras. 17 and 18:

> 17 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. Again, if one tenant has made improvements which have increased the selling value of the property, the other tenant cannot take the advantage of increased price without submitting to an allowance for the improvements: *Leigh v. Dickeson*, 15 Q.B.D. 60, per Cotton, L.J., at p. 67; Halsbury's Laws of England, vol. 21, p. 851. And, once again, when, as here, one tenant has paid more than his share of encumbrances, he is entitled to an

> allowance for such surplus: In re *Curry, Curry v. Curry* (1898), 25 A.R. 267; 33 Corpus Juris, p. 909.
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> 18 These allowances being made as equitable allowances, there may as a matter of course be circumstances under which they should not be made. For instance, the circumstances may indicate that the improvements were made or the surplus payments were made or intended to be made as gifts by one tenant to the other . . .

"Sweat Equity"

[29] In her affidavit of February 21, 2018, Ms. Wambolt deposes that since 2011 she has helped her father, Vernon Wambolt, to assist her grandmother, Lottie Gamble, the property's occupant at the time, as her father was in ill health with COPD and the home was intended to be her inheritance. Ms. Wambolt's "sweat equity" included:

1. In September 2011, Ms. Wambolt completed paperwork to seek grants from the government to fund necessary repairs to the home. However, the evidence from the Respondent and Ms. Foster is that the grants were obtained for Ms. Gamble's benefit because she did not want to leave her home and the home required work for her to remain there.

   I accept that, while the paperwork was completed, it was done for Ms. Gamble's benefit.

2. Ms. Wambolt deposed that Lottie Gamble was a hoarder, the home was in poor condition, and she started to clean out the house from the time her grandmother fell and broke her hip in April 2012. She further testified the cleaning continued into this year. This was supported by the affidavit of Lisa McInnis, who witnessed the hoarding and witnessed Ms. Wambolt and others (though not the Applicant), clean the house over a period of four to six months. Lisa McInnis witnessed truck loads of items being removed by Ms. Wambolt, but did not specify the time of the year this work was done. Mary Ellen Hillier's affidavit says she witnessed Ms. Wambolt cleaning out the home but does not say when or over what period. Ms. Gamble testified the cleaning continued up until a few weeks before this hearing when they completed the removal of clothing from the attic, which had signs of rat infestation. Many witnesses agreed that the cleaning done, while Lottie Gamble was alive and after her fall in April 2012, was intended to ensure her continued safety and to ensure that paramedics could access the home. This was confirmed by Lillian Wall and the

Respondent. Vernon Wambolt also confirmed the cleaning that was undertaken beginning in 2012 was for Ms. Gamble's benefit as well as for his own and his daughter's.

I accept the witnesses evidence that cleaning was done not just for the benefit of the home and its state but also for Ms. Gamble's comfort and safety while she was alive.

3. In July 2012, Ms. Wambolt and her spouse built a back deck with an accessible ramp. The affidavit of Lisa McInnis corroborates this, but does not say when the work was done. Witnesses for the Respondent indicated that this ramp was built to access the home after Ms Gamble's fall.

   Based on the evidence, I am satisfied the ramp was built for Ms. Gamble's benefit while she resided in the home.

4. In November 2013, Ms. Wambolt and her spouse rebuilt the corner of the home, which was rotten. The affidavit of Lisa McInnis corroborates this but does not say when the work was done. Mary – Ellen Hillier's affidavit supports this as well but does not give a time frame when the work was done, or indicate why it was done. Ms. Wambolt's affidavit attaches photographs of the state of the home before and after this work. However, on cross-examination she said the supplies were obtained from her spouse.

   The evidence does not satisfy me that these expenditures as such should be considered in distributing the proceeds of the sale.

5. In April 2014, Ms. Wambolt tore up old carpets and sanded floors. Ms. McInnis states in her affidavit that Ms. Wambolt laid flooring but does not say when.

   I accept this was done in 2014. There was evidence that there was water in the carpets and the floors needed to be done to increase access for Ms. Gamble.

[30] Vernon Wambolt's evidence supported that of Ms. Wambolt. He confirmed the work Ms. Wambolt says she performed on the home. In addition, Vernon Wambolt gave evidence that before he had a property interest in December 2012, the Applicant removed all the furniture from the home. In cross-examination, he admitted that some furniture remained. In addition, Vernon Wambolt gave much more detail about the extent of the hoarding and the consequent necessity to clean

and the time it took to do so. He described clutter throughout the home from floor to ceiling, requiring a hundred trips to the dump and hundreds of garbage bags.

[31] Vernon Wambolt agreed on cross-examination that the initial clean up in April 2012 was motivated by safety concerns for his mother and to ensure that she could stay in her home as long as possible.

[32] Lillian Wall's affidavit supports all of the claims of Ms. Wambolt, but provides little detail of dates and years.

[33] Madge Foster's affidavit confirms the contents of Ms. Wambolt's affidavit. Much of her affidavit focuses on the years 2011 to 2013. On cross examination, she gave additional detail, indicating that there were numerous bags and boxes of old clothes and wet books in the home that needed to be removed and destroyed. Ms. Foster also testified that only about 20 percent of the contents of the home were salvageable.

[34] I do not accept that all the work performed by Ms. Wambolt should result in an unequal distribution. Much of the work was done during the period of time between Ms. Gamble's fall in 2012 and her death in 2014. The witnesses, including Ms. Wambolt, all candidly acknowledged that the work done to clean, build a ramp, and fix the corner of the home, were done for Ms. Gamble's benefit so she could remain in her home. I do not doubt that Ms. Wambolt wished to make things better for her grandmother. As a result much of this work was a gift not only for her grandmother, but for her father who could not do all the work himself.

[35] However, there is a component of the "sweat equity" performed by the Respondent that undoubtedly benefited the home, and I am convinced that this work, done over the last several years to clean the property and rid it of items collected by Ms. Gamble, benefits the value of the property and in turn the Applicant.

Costs for House Repairs

[36] Ms. Wambolt has claimed costs for the repair of the home be shared by the Applicant. These costs are as outlined below:

1. Keith Field's bill for $5,332;

2. Arthur Hunt's carpentry bill for $500 (Mr. Hunt was not called as a witness by the Respondent. I am not satisfied that this amount has been proven, nor the reasoning behind it);
3. Property taxes ($2,320);
4. Sanding equipment ($173.94);
5. Hot water heater ($344.99); and
6. Lisa McInnis's fee for cleaning out the house ($625).

[37] In total the expenses the Respondent has presented are $9,295.93. She is seeking payment of half this total by the Applicant, in the amount of $4,647.96.

[38] Keith Field, a plumber and pipe fitter, gave direct evidence for Ms. Wambolt and was cross-examined. The Court gave an earlier order that allowed him to testify in the place of an affidavit. He confirmed his work to replace broken radiators, pipes, and install a water heater, for a total amount of $5,332.43. He could not confirm payment from the Respondent, but testified he received payment from Vernon Wambolt.

[39] Vernon Wambolt gave evidence that it was Ms. Wambolt who gave him the funds to pay Keith Field. Vernon Wambolt further testified he is a senior citizen on a fixed income and could not have afforded the work done, and he relied on Ms. Wambolt to fund the repair work. He further testified he was more than happy to do the work for his mother and would have done anything for her. Vernon Wambolt was asked whether he gave Ms. Wambolt his interest in the land to compensate her for the expenditures. He denied this and said it was because he loved her that he gave her his interest in the land.

[40] I have difficulty with many of these items claimed. The Keith Field's payment goes back to July 2012. It was not until January 20, 2016, that the Respondent had a property interest, nearly four years later. I accept that this expense was paid by the Respondent for several reasons: to assist her grandmother to be able to continue to reside in her home and to assist her father to ensure his mother could reside where she wished.

[41] The expenses for sanding equipment and the hot water heater were incurred in 2014 and again were items obtained to assist her grandmother and father. I am of the view that these were gifts.

[42] I am not satisfied the $625 amount to Lisa McInnis should be the subject of an equitable adjustment. I do not know when this money was paid, for what period, and for what amount of time. There is a statement in the Respondent's affidavit that the work was done by many people between February and June 2014, but I am left unconvinced.

[43] I take a different view of the payment of property taxes. Ms. Wambolt paid $2,320 in property taxes from August 2015 until December 2015. I accept her evidence and find this is a definite benefit to the property and to the Applicant who held an interest in the property during that time. Consequently, the Respondent is entitled to an additional $1,160 from the net proceeds of the sale of the property.

Conclusion

[44] On cross-examination, Mr. Wambolt was asked whether he thought the work Ms. Wambolt performed and paid for to ready the house for sale assisted the parties. He responded that he thought anything done would help to sell the property but then went on to say he would think so but did not know. This was a candid response and summarizes nicely what the Court is left with. The evidence has established that Ms. Wambolt did work herself to improve the property's condition, both before and after she had an actual interest in the property. The evidence also establishes that Mr. Wambolt did not do any work to clean the home. The fact is the Court is left with a difficult task of trying to figure out what the value of this work is without the benefit of an appraisal of the property before and after the work was completed. Also, it is clear based on the cross-examinations that some of the work done was for Lottie Gamble's benefit and her safety, some was a gift by a granddaughter and daughter, Ms. Wambolt who was assisting and benefiting her grandmother and her father. This is admirable. However, I am left with the inescapable conclusion that it was also for the benefit of the value of the home and by extension the Applicant has benefited from her "sweat equity" and funding of projects. I can not ignore all of the evidence that has been provided on these issues.

[45] The difficulty is how to proceed given the lack of evidence on the increase of value of the property. I have concluded the only thing I can do to do justice between the parties is to give an unequal division with the net proceeds being split 60/40 in favour of the Respondent.

[46] As for costs, the Applicant is correct and Tariff C applies. This was a full-day proceeding and the Tariff amount is $2,000. The question is which party was

successful. Both parties had some success. The Applicant was not completely successful, but he was successful on several issues as can be seen in the consent order filed on April 5, 2018, and in terms of the equitable allowance for his tax payment.

[47] While the Respondent realized some success, there is the fact that she failed to engage in the court process early on. There were a number of missed court appearances as catalogued in the Applicant's brief. The Respondent herself in closing admitted candidly that she "did not go about it the right way" and did not show up to court on occasion. This caused a prolonged court process and wasted time for the Applicant, his counsel and the Court as well as increased costs to the Applicant. Given this, I award increased costs of $2,750 payable by the Respondent. I will hear from the parties as to whether this should come from the Respondent's portion of the proceeds of the sale.

[48] The Applicant has sought disbursements and has filed an affidavit of counsel seeking $864.15. This is largely made up of photocopying charges at 30 cents a page. This Court does not usually allow photocopies on this scale. Given the mixed success of the parties, I would only allow half of the disbursements, and a third of the copying charges, for a total of $225.47, plus $125.73 (one-third of the photocopying charges) for a total of $351.20.

Brothers, J.