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Docket: PR 13-01-93843  
CI 16-01-02237  
(Winnipeg Centre)  
Indexed as: Mucz et al. v. Popp et al.  
Cited as: 2017 MBQB 101

## **COURT OF QUEEN'S BENCH OF MANITOBA**

### **IN THE MATTER OF: THE ESTATE OF CAROLYN STEPHANIE POPP**

**BETWEEN:**

CHERYL ANGELA MUCZ and  
CAREN AGNES SYCH,

- and -

MICHAEL JOHN POPP and  
BARRY MICHAEL POPP,

respondents.

) **APPEARANCES:**

)

) J. Edward (Ted) Crane

) for the applicants

)

) Douglas G. Ward, Q.C. and

) Eric Blouw

) for the respondents

)

) Judgment delivered:

) May 29, 2017

## **TOEWS J.**

### **Introduction**

[1] All four parties to these two applications are the children of Carolyn Stephanie Popp. The two applicants on the probate application, Cheryl Angela Mucz and Caren Agnes Sych, are sisters who seek an order directing a formal passing of accounts in regard to the administration of the estate of their mother who died on September 18,

2012. Probate was granted by the court on May 1, 2013. All four children are the executors and equal beneficiaries of their mother's estate.

[2] The same two applicants have also brought a civil motion for an order of sale of the property owned by the four parties to these proceedings in respect of which each has an undivided one-fourth interest. This property was owned and farmed by the parents of the beneficiaries and was transferred from the estate of the mother in 2015 by the consent of all four beneficiaries. The applicants also seek an accounting from the respondents as to all farming income and profits in regards to the land owned by the four parties.

[3] At the conclusion of the arguments before me, I granted the applicants an order in respect of the probate application in the form set out in the applicants' probate application brief at Tab 1. I am satisfied that there is no genuine issue for denying the applicants the order sought by them directing a passing of the accounts of the estate.

[4] At the conclusion of the hearing, the parties were able to reach an agreement in respect of the farming of the land in question for the 2017 crop season. The terms of that agreement are without prejudice to any issues presently before the court in this litigation.

[5] I reserved my decision in respect of the civil motion for an order of sale of the land which all four parties own as tenants in common and in respect of which each has an undivided one-fourth interest. The applicants have proposed that the order which the court should grant be in the form of order set out at Tab 1 of the civil motion

application brief of the applicants. These are my reasons in respect of the civil motion for an order of sale.

### **The Position of the Parties**

[6] The applicants seek a judgment directing the sale of the five parcels of land that they own as tenants in common with the respondents, who are the brothers of the applicants. They submit that there is no genuine issue for hearing as they are entitled as of right to the direction for the sale of the land. In support of this submission, the applicants rely of the decision of Yard J. in *Dickson v. Dickson*, 2009 MBQB 274, 247 Man.R. (2d) 56. The relevant principles have been summarized by the applicants in their brief as follows (at para. 4):

- 1. The applicant has a prima facie right to an order for partition and sale;***
- 2. This right may be denied by the exercise of the court's discretion although this discretion is a judicial one, to be exercised according to certain rules;***
- 3. The application may be denied by the court if the application itself is vexatious or if the effect of the order would be oppressive to the party resisting: mere hardship or inconvenience to the resisting party is insufficient; and***
- 4. As the relief sought is equitable in nature the application may also be denied by the court in its discretion if the applicant does not come to court with clean hands.***

[7] Furthermore, the applicants submit that they are entitled to an accounting from the respondents and that the judgment sought by the applicants is virtually identical to that granted by Burnett A.C.J. (as he then was), in *Shumilak v. Shumilak*, 2013 MBQB 54, 289 Man.R. (2d) 208. In *Shumilak*, two brothers were the registered

owners of an undivided one-half interest in two parcels of land. The plaintiff there sought a direction for the sale of the land and an accounting. In the circumstances of that case, the court ordered the sale and an accounting of all rental and farm income and expenses associated with the property from the date of the testatrix's death.

[8] The respondents do not agree with the granting of an order directing the sale of the land or the request for an accounting. The respondents submit that they wish to retain the family farm for a number of reasons, the first being sentimental value. Also, one of the brothers presently makes a living by farming the land and therefore wishes to retain the land so that he can continue to make a living.

[9] The parties originally agreed to obtain appraisals for the land and based on the two appraisals obtained, the applicants were to receive an amount of money reflecting their respective interest in the land. The offers made by the respondents in that respect were turned down by the applicants.

[10] The respondents agree that on the basis of the law in Manitoba, the applicants have a *prima facie* right to seek partition or sale of the jointly owned land. However, they submit that since the applicants were offered fair market value for their interest in the land by the respondents, the partition or sale is unnecessary, vexatious and oppressive to the respondents. In this context, the respondents state that this behaviour is oppressive because one of the respondents has farmed this land for the last 25 years and he would suffer financial hardship if the land was sold.

[11] As an alternative, the respondents submit that the land could be partitioned between the parties without a need for a subdivision. The proposal advanced by the

respondents would be advantageous to them as they would be able to retain the land where the farm equipment is kept and where the storage facilities and outbuildings are located. The respondents submit that the five titles in which the land is presently held by all four parties should be divided between all four parties with the respondents retaining the homestead. The respondents submit that the parties that receive the greater value of the land through this process can make an equalization payment to the others to ensure a true equal distribution of the value of the land.

[12] In respect of the accounting requested by the applicants as to all farming income and profits since the date the land was transferred to the four parties from the estate, the respondents state that the land was leased to one of the respondents through a holding company for the price of \$50 per acre in the years 2012 to 2016 inclusive.

[13] The respondents submit therefore that the brother who farmed the land and his holding company are tenants in respect of the land and are not subject to an accounting to the owners of the land in that regard. The respondents submit that if the farming income and profits were deemed to be property of the estate, the estate and its beneficiaries would be unjustly enriched as each would receive 25% of the farming income and profits as well as the rental income.

## **Decision**

[14] In my opinion, there is no basis upon which to deny the applicants the order that there be a sale of the property which was transferred to them from the estate of their mother and in respect of which all four parties have an equal and undivided interest. While it is understandable that the property may have sentimental value to one or more

of the parties and that ordering the land sold may cause a hardship to the brother who has been farming it, I would note that despite the fact that the land was a family farm and that one of the siblings was primarily involved in farming it, the bequest made by the testatrix did not recognize either of those factors in making her bequest. The bequest was that each of her children would receive an undivided one-quarter interest in the land. In these circumstances, the appropriate order is to direct a sale of the land.

[15] However, there is no prejudice to the other beneficiaries to allow the brother who is presently farming the land to match any third party arm's length offer made to purchase the land on the same terms and conditions as the third party offer, within a week of the third party offer being made, and I would include that provision in the direction to sell the land.

[16] I would also make an order that there be an accounting since the date the land was transferred to the four parties from the estate. In that regard, I recognize that the respondents take the position that the land was being farmed by one of respondents, Barry Popp, through a lease by his corporation, Highplains Agro Inc. That position is being contested by the applicants.

[17] In my opinion, if there is no lease in place, an accounting by the respondents engaged in farming the land is appropriate and just. However, if there is a lease in place as alleged by the respondents, it would result in an unjust enrichment to the applicants if the purported tenant was required to provide an accounting of income and profits in that regard. However, since that matter is a substantive dispute between the

parties that would require findings on an appropriate factual basis which is not in place, an application of this nature is not the appropriate forum in which to resolve this dispute. If that matter cannot be resolved between the parties, I am prepared to direct a trial of that issue.

[18] If it is subsequently determined by the court or agreed to by the parties that there is a lease in place as alleged by the respondents, then the applicants are not entitled to an accounting of the income and profits in respect of the use of the land and property covered by the lease. If there is no lease in place, then the applicants are entitled to an accounting of all rental and farm income and expenses in relation to the property, including the house and the outbuildings and that each party would then share equally in such income and expenses.

[19] Subject to the determination by the court following a trial of the issue or by the agreement of the parties as to the existence of the lease of the land to the respondent Barry Popp or his corporation Highplains Agro Inc., the applicants shall have an order in the form set out Tab 1 of the applicants' civil application brief ordering that there shall be a reference to a master of the court for directions and for conduct of the sale of properties set out at paragraph 1 of the draft order.

[20] If the parties are unable to agree on costs, they may be spoken to.

\_\_\_\_\_ J.