

**CITATION:** Houston v Houston, 2023 ONSC 3727  
**COURT FILE NO.:** CV-21-180  
**DATE:** 20230621

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**B E T W E E N:**

Scott Gregory Houston

Applicant

**AND:**

The Estate of Wayne Cameron Houston, Lorraine Marie Meredith, Suzanne Isabella Gillick,  
Sara Loreen Houston and Curtis Jordan Houston

Respondents

**BEFORE:** The Honourable Mr. Justice H. Leibovich

**COUNSEL:** Daniel McConville, for the Applicant

Izaak de Rijcke, for the Respondents

**HEARD:** May 19, 2023

**REASONS FOR DECISION**

1. The applicant seeks an order for the sale of a cottage property in Cardiff, Ontario (the "property") pursuant to the *Partition Act*. The applicant owns the property as a tenant in common with his niece and nephew, the respondents. Originally the property was owned by the applicant's father. It was left to the applicant and his brother, the respondents' father, who has since passed away. The applicant seeks the sale of the property as he is in financial difficulty and needs the money.
2. The respondents object to the sale, stating that it is abusive as it was always the intent of the grandfather that this cottage remain in the family. They submit that an application should be made to the town to have the lots severed, and that the applicant should pay for half of this application. They also submit the applicant does not have, as he claims, a 50% interest in the property.
3. For the reasons set out below, I find that this is an appropriate case for the sale of the property. The property cannot be severed at the moment as the municipality has not consented to its severance. I also find that the applicant has a 50% interest in the property.

## **Factual overview**

4. Stanley Houston (“Stanley”) is the applicant’s father, the respondents’ grandfather, and the previous owner of the property. Stanley passed away in 2011 and by his will attempted to divide the property as follows: the north lot was to be divided into three parcels: one to the applicant; one to the respondents’ father (Wayne); and the third containing the middle cottage to the respondents’ father Wayne, with life interests to Stanley’s ex-wife Susan Gillick and her daughter Lorraine Meredith<sup>1</sup>. The will also provided that the south lot was to be divided evenly into two parcels, for each of the applicant and his brother, Wayne. The residue of Stanley’s estate was divided evenly between the applicant and the respondents’ father, Wayne. The will stated:

The rest residue and remainder of my estate and property (hereinafter referred to as my residuary estate); into two equal shares and to pay or transfer one of such equal share to my son WAYNE CAMERON HOUSTON and the other equal share to my son SCOTT GREGORY HOUSTON.

5. Stanley attempted to sever the property in the manner set out by his 2010 Will, however, such severance was not completed prior to his death nor was it attainable after his death by the terms of his Will. As set out in the affidavit of Joanne Houston, who is Wayne's widow and the executor of his estate:

In 2010, Stanley Houston retained the services of a local solicitor in Bancroft for purposes of attempting to effect a severance of the cottage properties. In that regard, a letter was sent to a local land surveyor, also in Bancroft, with a request that he initiate an application for severance to the local Land Division Committee.

6. Following Stanley’s death, the property was transferred to the respondents’ father, Wayne, and the applicant as tenants in common. When Wayne died, his share in the property was transferred to his children, being the respondents.
7. The respondents retained a professional planner to investigate the feasibility of severing the property in question. The opinion of the planner was that:

The above detailed analysis demonstrates that the proposed severance using either the preferred option or the alternative, complies with the County Official Plan, the Highlands East Official Plan and with the intent of the Zoning By-law. Furthermore, both options for the proposed severance would comply with the applicable provisions of the Act including those in s. 51 (24).

The preferred option involves a lot line adjustment which is allowed under Section 2.2.2.2 (ix) of the Official Plan, but may be subject to site specific

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<sup>1</sup> There is no dispute amongst the parties that the life interests have lapsed.

zoning regulations. In the preferred option, which includes the closure of the Burleigh Road allowance, both lots resulting from the severance would have frontage on assumed municipal roads that are maintained year-round. The lots would meet the frontage requirements for the SR1 zone and it appears that many other regulations of the SR1 zone would be met.

8. The planner also noted that:

Both options will likely require a Zoning By-law amendment as a condition of consent in order to recognize existing deficiencies or to implement consistent zoning across the subject lands. In addition, the Land Division Committee can impose additional conditions on approval of the consent. However, the need for additional studies is not anticipated, and if a Zoning By-law amendment is required, it should not require a complicated application and process.

9. The applicant set out in his affidavit his financial difficulties:

I am a sole proprietor of the business in the live corporate entertainment industry.

Since January 2020, the declining economic activity and Government mandated cancellation of live events, as a result of the Pandemic, has had serious financial consequences for my profession. Live corporate events have ended and have essentially not returned in Canada.

My son Benjamin has Asperger's Syndrome a form of Autism and thus requires significant resources to maintain his structured life. I have a financial responsibility towards my Autistic son, Benjamin (born November 1, 1996). As a result of my current financial situation, I am only able to provide the minimum support of 462.00 as ordered by the court.

Other than CERB (Canada Emergency Response Benefit), I have had no income since February 2020. Attached to this my Supplemental Affidavit and marked Exhibit "D" is a true copy my 2021 T4 statement.

My savings are diminishing and I am living off credit.

### **Law and Analysis**

*Is this an appropriate case for sale under the Partition Act?*

10. Co-owners have a right to compel the sale of the property. Section 2 of the *Partition Act*, R.S.O. 1990, c. P.4, states:

All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by the curtesy, mortgagees or other creditors having liens on, and all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, whether the estate is legal and equitable or equitable only.

11. As stated by Perrell J. in *Brienza v. Brienza*, 2014 ONSC 6942, at para. 25:

Only in exceptional circumstances will a joint tenant or tenant in common be denied his or her request that the property be partitioned or sold. The court's discretion to refuse partition and sale is narrow, and there must be malicious, vexatious or oppressive conduct to justify the refusal to grant partition and sale[cases omitted].

12. The onus is on the party resisting the application to demonstrate why it should not be granted: *Davis v. Davis*, [1954] O.R. 23, 1 D.L.R. 827.
13. The respondents, in their factum (at paras. 28-31), seem to have accepted the above description of the law and argued that the applicant's conduct has been oppressive. However, in oral submissions, the respondents submitted that the above legal test is limited to cases involving the sale of the matrimonial home. The respondents were unable to provide a case that asserted that there was a different or higher standard to obtain the sale of a property that was not the matrimonial home. The standard is the same in both contexts, except that when dealing with the sale of a matrimonial home additional considerations may apply: *Szabo v. Jukes*, 2023 ONSC 330, at para. 3; *Charbonneau v. Gracie*, 2022 ONSC 3804.

*Has there been malice, oppression or vexatious intent?*

14. Cullin J. in *Charbonneau* stated that in determining whether a party has engaged in malicious, vexatious, or oppressive conduct, the court is limited to a review of conduct related to the application for partition and sale. In *Greenbanktree Power Corp. v. Coinamatic Canada Inc.*, [2005] 75 O.R. (3d) 478 (Ont. C.A), the Court of Appeal confirmed that the scope of the court's discretion to refuse an applicant's request for a remedy pursuant to the *Act* also includes a consideration of hardship. The court stated at para. 2:

In our view, "oppression" properly includes hardship, and a judge can refuse partition and sale because hardship to the co-tenant resisting the application would be of such a nature as to amount to oppression.

15. The respondents, in their factum, submit that:

Malice, oppression and vexatious intent towards the Respondents has been established as a result of the emotional harm and injury caused by the applicant to them and their mother, Joanne Houston.

16. In support of the above assertion, the respondents state that the property has been in the Houston family since the 1940s when the respondents' grandparents received a patent from the Crown. Nothing in the Last Will and Testament of Stanley Houston directed that the property be sold and the money divided. The respondents and their mother, Joanne, wish to maintain the legacy of ownership of the property.
17. I understand the respondents' position that they wish to maintain the family cottage. However, I do not see the applicant's request to sale as oppressive or vexatious or done with malice, nor do I see it as resulting in a hardship to the respondents. The applicant's financial concerns are set out in his affidavit. He was not challenged on these assertions during his cross-examination nor have the respondents taken any issue with the applicant's evidence on this point. He needs money to live and to help support his son who has special needs. In these circumstances, it certainly is reasonable that he would want to obtain money from the sale of the property. As stated by Cullin J. in *Charbonneau* at para. 25:

The mere act of bringing an application for partition and sale does not amount to bad faith, nor does it constitute oppressive or vexatious conduct. Likewise, mere disappointment does not rise to the level of hardship; the party seeking to oppose the sale must provide the court with objective evidence that hardship would arise if the sale were permitted to proceed [citations omitted].

18. There is no objective evidence that hardship would arise to the respondents if the property was sold.

*The proposed severance*

19. The primary basis upon which the respondents oppose the application is their proposed severance plan. The respondents submit:

A sale of the property is not the only and appropriate remedy when the Respondents have demonstrated that a severance is feasible and likely to succeed. In fact a severance, once obtained, will permit the wishes of both the Applicant and the Respondents to be satisfied, and with expected greater economic benefit to all parties

...

In the face of Scott Houston's application to seek an order to sell, the Respondents took steps to determine the feasibility of whether the property could be severed so that, if Scott Houston wished to sell, he could sell his interest, and if the Respondents wished to ensure that Stanley Houston's legacy for his family would continue, they could retain their interest. A partition would offer both parties their desired solution.

While historically a severance may not have been available during Stanley Houston's lifetime, for whatever reason(s), it is feasible now.

20. The respondents ask that this Court make an order:
- a. Directing that the parties submit a severance application to the local municipality forthwith, and that the cost of making such application be divided equally between the Applicant and the Respondents.
  - b. That this Court directs a reference or remains seized of this application for the continued supervision of these next steps:
    - i. The determination of the new separating boundary between the Applicant's and the Respondents' portions of the Paudash Lake property;
    - ii. The configuration of the severance itself, including planning considerations;
    - iii. A determination of the net benefit to the Applicant in being able to sell his own Parcel "A" to a buyer; and,
    - iv. A determination of respective financial adjustments and shares so as to determine an equalization payment to the Respondents.
  - c. That this Application be adjourned to a directed reference and once a severance and transfers of ownership to the respective parties has been concluded and the equalization payment has been made, this Application will then be dismissed.
  - d. Costs of the Respondents are payable by the Applicant.
21. The respondents' proposal is not appropriate and is unfair to the applicant. A past application for severance was not successful. The municipality has not consented to the respondents' new plan for severance nor has the plan even been submitted. This application was started at the end of 2021. It is now June 2023. Both proposed severance options would require a zoning by-law amendment. The best the respondents can say is that there is a possibility at some point in the future that the municipality will consent to the severing of the property. This possibility is not an appropriate basis to resist the request for sale. As stated in *O'Brien v. McGilvray*, 2018 ONSC 2442, at paras. 24-25:

Severance of the farm property into two equal parcels is not an option. No order under the *Partition Act* for partition of land has any effect unless the requisite consent by the municipality is forthcoming (*Planning Act*, R.S.O. 1990, c. P.13, s. 50(20), *Grace v. Draper*, 2013 ONSC 7112 (Div. Ct.), at

para. 7). There is no evidence before me that the municipality may allow the severance of the property into equal parcels.

For these reasons, I find that the farm property is not suitable for a reasonable and fair partition, and I am persuaded that it is more advantageous to the parties to order the sale of the property.

22. I also agree that that nature of the property makes it difficult, even if there was municipal consent, to sever the properties fairly. The property consists of one irregular lot with three cottages on it, and a separate lot consisting of a rocky forest. The respondents' proposed division would require the applicant to build a road and would have the respondents retaining the majority of the shoreline. As stated in *Grace v. Draper*, 2013 ONSC 7112, at para. 5:

The property consists of both halves of a semi-detached house and a larger lot that abuts one of the homes. Given this configuration, it would be difficult to physically sever the property into two parcels in a way that would make sense and be fair. In any event, the balance of factors favours sale rather than physical severance.

23. The balance of convenience in this case clearly favours sale over severance. Furthermore, the respondents' proposal would require the applicant to spend money at a time when he has financial constraints and would require the court to be involved in a protracted and cumbersome process.

Percentage of ownership

24. The respondents submit that the applicant is not entitled to 50% ownership in the property and that the exact percentage must still be determined. The whole of the respondents' submissions on this issue is set out in their factum as follows:

It remains to be determined what in fact the Applicant's interest or share as tenant in common in the Paudash Lake property is. His bequest from Stanley Houston of one of three parcels, and one of the three cottages on that parcel, leaves that interest presumptively at no more than one third, or 33.33%.

25. I do not accept this submission. It is evident from Stanley's Will that the applicant and the respondents each have a 50% ownership in the property. The specific bequests of the property as set out in Stanley's Will failed. A gift that cannot be completed under a will lapses. As a result, the property should have been distributed under the residual clause in the will that provided that the applicant and the respondents' father each get 50% of the property: *Ksianzyna Estate v. Pasutшок*, 2008 CanLII 59321, at para. 8. This reality was accepted early on by the respondents' father, Wayne, who wrote to his solicitor after Stanley passed away and said:

Attached is a copy of the Will of Stanley Dunsmore Houston as well as the copy of the Testimony for the Probate. *As we had discussed yesterday, the desire is to transfer the Estate Property from "The Estate of Stanley Dunsmore Houston" into "Tenants in Common," 50/50 split between Scott [the applicant] and Myself.* As Dad has begun the process, as you are well aware of, to split the property and we will be unable to complete it, this is in fact our only option, unless you can see another. [emphasis added]

26. I also find the respondents' submission on this issue surprising, given that they have filed other affidavits that have asserted that they have a 50% interest (and not more) in the property. In support of one adjournment request, the respondents' counsel's law clerk wrote:

I also note that the owner of the property today with respect to the 50 % interest previously owned by Wayne Cameron Houston is now vested as tenants in common by his son and daughter, Curtis Houston and Sara Houston respectively. This is stated in the Transfers/ Deeds of Land which appear as exhibit to the Affidavit of Joanne Houston sworn Tuesday, March 8, 2022.

27. The respondents' mother and father's estate trustee also referenced in her affidavit filed in response to this application that Wayne Houston owned 50% of the property in question.

### **Conclusion**

28. The application is allowed. I order as follows:

- (1) There will be a sale of the property municipally known as 1036 Ruthven Road, Cardiff, Ontario, KOL 1 CO pursuant to the *Partition Act*, R.S.O. 1990, c. P.4, as amended (the "Act") and legally described as:

PT LT 26 CON 5 CARDIFF; PT RDAL IN FRONT OF LT 26 CON 5  
CARDIFF CLOSED BY H141930 PT 1 TO 4 19R3400 & AS IN H113558  
& H136366 N OF A TRAVELLED RD; SIT DEBTS IN H113558;  
HIGHLANDS EAST.

- (2) There will be a sale of the property pursuant to the *Act* legally described as:

PT LT 26 CON 5 CARDIFF AS IN H113558 & H136366 S OF A  
TRAVELLED RD; srr DEBTS IN H113557; HIGHLANDS EAST

- (3) The net proceeds from the sale of the property shall be split equally between the applicant (50%) and the respondents (Sara Houston 25% and Curtis Houston 25%).
- (4) One independent and qualified real estate brokerage firm shall be retained by the parties as the listing agent to sell the property.



- (5) The cost of retaining the listing agent shall be shared equally between the parties, payable from the net proceeds of sale.
  - (6) The parties shall retain and instruct an appropriate real estate lawyer to complete the transaction for the sale of the property.
  - (7) The cost of retaining the real estate lawyer shall be shared equally by the parties, payable from the net proceeds of sale.
  - (8) If the parties cannot agree on a real estate brokerage firm or a real estate lawyer by August 2, 2023, then I may be spoken to for the selection and appointment of such a firm and/or lawyer from their list of proposed candidates.
  - (9) The parties shall forthwith cooperate in arranging for the sale of the property in accordance with these terms, and shall provide necessary documents and information to the listing agent and the real estate lawyer, respectively, as necessary, to cause the listing, sale and closing of the sale to occur and be finalized, as may be required.
  - (10) The parties shall have the opportunity to bid on the purchase of the subject property and to receive all relevant information concerning the property and its sale in order to perform their own due diligence.
  - (11) No party shall enjoy a right of first refusal or right of first offer in connection with the sale of the property.
  - (12) The highest offer for the property shall be accepted, subject to the right of such offer to be improved through negotiation based on any recommendation by the listing broker, unless the parties agree otherwise and subject to further order by the court.
  - (13) The net proceeds of sale shall be paid into the trust account of the lawyer retained to handle the sale and shall be paid out in accordance with the parties' respective shares following closing.
  - (14) I shall remain seized to deal with any implementation issues.
29. The applicant was the successful party. In the event that the parties cannot agree with respect to costs, the applicant shall have 15 days from the release of this decision to file his bill of costs and written submissions, totaling not more than two pages. The respondents shall have 20 days from the release of this decision to file their written submissions, totaling not more than two pages.



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Justice H. Leibovich