



SUPERIOR COURT OF JUSTICE

**COUNSEL SLIP/ENDORSEMENT**

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REGISTRAR: L. Lewis

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TITLE OF PROCEEDING: Watson et al v Lopes

BEFORE JUSTICE: Dietrich

**PARTICIPANT INFORMATION**

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Name of Person Appearing	Name of Party	Contact Info

## **ENDORSEMENT OF JUSTICE DIETRICH**

### **Overview**

[1] The applicant, Kenneth Watson (the “Applicant”), and the late Suzanne Crawford (the “Deceased”) were common law spouses. Prior to the Deceased’s death on October 21, 2021, they lived together in a residence at 22 Hawkins Crescent, in the Town of Ajax, Ontario (the “Residence”).

[2] From the time the Residence was purchased in 2001, the Deceased and her only child, the respondent, Kerri-Ann Lopes (the “Respondent”), owned the Residence as joint tenants with right of survivorship. The Respondent lived with the Deceased and the Applicant for some time following the purchase, but the Respondent was not residing with them at the time of the Deceased’s death.

[3] Apart from a right to remain in the Residence for one year following her death, the Deceased made no provision for the Applicant in her last will and testament, made the 20<sup>th</sup> day of March, 2018 (the “Will”). Once the Applicant moved out of the Residence, the Respondent sold the Residence.

[4] The Applicant commenced an application naming the Respondent and Deceased’s estate (the “Estate”) as respondents. In that application, he seeks a declaration that he is entitled to the net proceeds from the sale of the Residence (the “Proceeds”), and he makes a claim for dependant’s support under the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the “SLRA”). The Applicant makes the former claim based on a resulting trust. He claims to have contributed to the Residence by making mortgage payments, paying utility bills, paying for a swimming pool, and renovating the Residence. He makes the latter claim on the basis that he was financially dependant on the Deceased from the time he retired to the time of her death.

[5] At this hearing, the Applicant asks the court to consider only that part of his application in which he seeks an interim order preserving the Proceeds and an order that the Proceeds be paid into court. The Respondent has agreed to the non-dissipation of the Proceeds until a decision is made on this relief.

[6] The Respondent asserts that the Applicant is not entitled to the relief sought because he has not met the test for the preservation of the Proceeds.

[7] For the reasons that follow, I find that, based on the evidentiary record currently before the court, the Applicant has failed to discharge his onus to show that his claims pose a serious issue to be tried and that the balance of convenience favours him.

### **Background Facts and Evidence**

[8] The Applicant submits that the Deceased and he were common law spouses for approximately 26 years prior to the Deceased’s death, and that for the last 11 years, they lived together at the Residence. The Respondent agrees that the Applicant usually resided at the Residence during the week, but submits that on weekends, the Deceased and he would spend their time at the Applicant’s property in Fenelon Falls, Ontario.

[9] The Applicant and the Respondent do not agree on the facts relating to the Residence and the Applicant’s contributions to it. For example, the Applicant asserts that he paid a \$5,000 deposit to purchase the Residence, and that he also paid a \$5,000 deposit on a residence in Scarborough that the Deceased purchased in 1998 (the “Scarborough residence”), prior to purchasing the Residence.

[10] The Respondent submits that the Applicant has no documentary proof of these deposits. She further submits that \$40,000 to \$50,000 of the funds used to purchase the Scarborough residence came from her grandparents and that the Applicant had his own residence at that time. The Respondent submits that the Applicant had no role in choosing or purchasing the Scarborough residence, or the Residence, or in dealing with the lawyers and real estate agents. The Applicant does not deny these facts.

[11] The Respondent also submits that she contributed \$25,000 to assist in the purchase of the Residence using funds paid to her on an insurance claim. The Applicant disputes that claim and submits that the insurance claim payment was owing to and paid to the Deceased and not the Respondent.

[12] The Applicant and the Respondent agree that the proceeds from the sale of the Scarborough residence were used to purchase the Residence.

[13] The Applicant submits that he made the mortgage payments on the Residence. He submits that the Deceased had full access to his Simplii Financial bank account so she could withdraw funds from that account and deposit them to her own account for the purposes of making the mortgage payments on the Residence. The Respondent submits that withdrawals and e-transfers shown on the Applicant's Simplii Financial bank account records do not correspond with deposits into the Deceased's TD Bank account from which she was making the mortgage payments. The Applicant submits that withdrawals from the Simplii Financial bank account could have been made to another of the Deceased's bank accounts but nonetheless still used to pay down the mortgage. He submits that all of the Deceased's bank account statements have not yet been produced because full production has not yet been ordered. The Respondent submits that the Deceased's TD Bank statements, which have been produced, show that the Deceased was making the mortgage payments using rental income from the basement apartment at the Residence and from her pension income.

[14] The Applicant has adduced bank statements from his Simplii Financial account in support of his claim that he paid some property taxes, utility bills, and phone bills in respect of the Residence. Based on these statements, the Applicant submits that he contributed approximately \$115,361.32 to the Residence between 2015 and 2021, of which \$71,127.03 was on account of mortgage payments. By contrast, he submits that the Deceased suffered from several medical conditions that prevented her from working during most of their relationship, and that he was the breadwinner. He submits that between 2013 and 2021, he earned between \$46,412.07 and \$63,577.35 per annum, whereas the Deceased's income for the same period was limited to Canada Pension Plan (CPP) payments and Old Age Security payments (OAS) and ranged from \$13,159.98 to \$18,742.23 per annum.

[15] There is no evidence to suggest that the Applicant paid any rent to the Deceased regarding his occupancy at the Residence.

[16] The Applicant also submits that he paid an estimated \$25,000 for a swimming pool at the Residence, and that he paid for renovations to the Residence. The Applicant claims to have drawn down on his personal line of credit for this purpose, and he produced a statement from Scotiabank showing a cash advance on the line of credit in his name in the amount of \$25,007.50 on May 7, 2018. The Respondent submits that the Applicant cannot prove that a withdrawal of \$25,000 shown on the line of credit statement was actually used to pay for the swimming pool. The Applicant has not provided any receipts for goods or services relating to the swimming pool. Further, the Respondent disputes that any significant renovations were made to the Residence while the Applicant resided there.

[17] The Applicant also submits that the Deceased and he arranged for the preparation of a deed/transfer of land to transfer title to the Residence from the Deceased and the Respondent to the Deceased and the Applicant, but the Respondent refused to sign the transfer documents. The Respondent's evidence is that the transfer was the Applicant's idea, and the Deceased disagreed with it and told the Respondent to ignore the Applicant's request to have the Respondent removed from the title to the Residence.

[18] The parties do not dispute that, under the Will, the Deceased named her only child, the Respondent, as her executrix and trustee, and she left the Estate to the Respondent, subject to the right she gave to the Applicant to reside in the Residence for one year following her. It is undisputed that the Applicant stayed at the Residence for 10 months following the Deceased's death and, during that time, he paid some utility bills for the Residence. The Respondent submits that she paid the property taxes and the insurance premiums relating to the Residence during that 10-month period. The Applicant then moved to British Columbia to live with his daughter.

[19] Following the Applicant's move to British Columbia, the Respondent arranged for the Residence to be transferred to her as the surviving joint tenant with right of survivorship. The Respondent then sold the Residence on September 30, 2022 for \$960,000, and the sale was completed on November 17, 2022. It is undisputed that the Proceeds, net of the mortgage, real estate commission and expenses related to the sale of the Residence, are \$742,921.23.

[20] On November 14, 2022, the Applicant wrote to the Respondent's realtor and the lawyer who assisted on the sale and advised them of the within application that he was then planning to bring. The Applicant asked that they undertake not to dissipate any of the Proceeds pending the final determination of his application. They did not give this undertaking. The Respondent did agree to not dissipate the Proceeds prior to this hearing and has since agreed to not dissipate the Proceeds pending the release of my decision.

### **Issue**

[21] The issue to be decided is whether the Applicant is entitled to an order that the Proceeds be paid into court pursuant to rr. 45.01 or 45.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*").

### **Positions of the Parties**

[22] The Applicant submits that there are serious issues to be tried with respect to whether the Deceased has a beneficial interest in the Proceeds and whether he is a dependant of the Deceased entitled to support from the Estate. Therefore, he submits that he should be entitled to a preservation order over the entire Proceeds.

[23] The Applicant further submits that the only precondition under the *Rules* for an order for the preservation of any property is that the "property [the Proceeds] is in question in a proceeding or relevant to an issue in a proceeding". He submits that he has met this precondition because he is claiming an interest in the Proceeds on the basis of a resulting trust and that the Estate may have a similar claim to the Proceeds on the basis of a resulting trust. The Applicant further submits that the balance of convenience favours him because if the order is not made, the Respondent may dissipate the Proceeds prior to the determination of the balance of his application.

[24] The Respondent asserts that the Applicant does not meet the test for the interim preservation of a specific fund because he has not demonstrated that there are serious issues to be tried or that he has a serious

prospect of ultimate success. In the alternative, she submits that if an interim preservation order were to be granted, it should be granted over considerably less than the entire Proceeds.

## Law

[25] The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party: r. 45.01(1) of the *Rules*.

[26] Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just: r. 45.02 of the *Rules*.

[27] In *BMW Canada Inc. v. Autoport Limited*, 2021 ONCA 42, 456 D.L.R. (4th) 443, the Court of Appeal of Ontario held that there is no single test to be applied to all r. 45.01 motions. The court should consider all the circumstances of the case depending on the purpose of the moving party seeking the order.

[28] In *Taribo Holdings Ltd. v. Storage Access Technologies Inc.*, [2002] O.J. No. 3886 (S.C.), the court held that the moving party claiming an interest in property must meet the following test:

- (1) The assets sought to be preserved constitute the subject matter of the dispute or a right to a specific fund or are relevant to an issue in the proceeding.
- (2) There is a serious issue to be tried regarding the applicant's claim.
- (3) The balance of convenience favours granting the relief sought by the applicant.

[29] A "specific fund" is defined as "a reasonably identifiable fund earmarked for the pending litigation": *Nazar v. Nazar*, 2014 ONSC 1563, at para. 18.

[30] With respect to the second and third branches of the test, this court in *Kuleshnyk v. Kuleshnyk*, 2017 ONSC 2696, at para. 12, stated as follows:

The second and third requirements ensure that interference with the defendant's disposition of assets is limited to cases where the plaintiff has a serious prospect of ultimate success. In considering the balance of convenience, the plaintiff must adduce compelling evidence, such as real concern that the defendant will dissipate the specific fund sufficient to outweigh the defendant's freedom to deal with her property.

[31] As set out in *Guz v. Olszowka*, 2019 ONSC 5308, at paras. 32 and 58, relief sought under r. 45.02 is a "limited exception to the law's deep-seated aversion to providing a plaintiff with execution before a trial". In order to meet the balance of convenience test, the court notes as follows:

a "serious interest to be tried" requires the plaintiff to demonstrate "a serious prospect of ultimate success," a higher standard than that of a "triable issue" to support the issuance of a CPL, which, as stated above, is a low threshold. The requirement for a serious prospect of ultimate success is informed by the policy direction enunciated by the Court of Appeal in *Sadie Moranis* placing strict limits on execution before trial.

See also: *Sadie Moranis Realty Corporation v. 1667038 Ontario Inc.*, 2012 ONCA 475, 111 O.R. (3d) 401, at para. 20.

### **Analysis**

[32] The Applicant relies on the case of *Angeloni v. Angeloni*, 2017 ONSC 7344, 34 E.T.R. (4th) 258, in which the court found that the three-part test favoured the granting of a preservation order where the applicant was making a claim for dependant's support and a resulting trust claim with respect to the proceeds of sale of the matrimonial home. The court found that the applicant claimed a right to the funds in the estate as well as to proceeds from the sale of the matrimonial home. The serious issues to be tried included the applicant's dependant's support claim and damages against the estate. In that case, the respondents had not provided any evidence that they would suffer prejudice as a result of the non-dissipation order. The court ordered that the funds be paid into court to the credit of that proceeding.

[33] However, it is worth noting that in the *Angeloni* case, the applicant wife was an equal registered owner in the matrimonial home. After she became incapacitated, and her husband moved her into long term care, he used his power of attorney to sever the joint tenancy and to sell the matrimonial home. He then treated all of the proceeds of sale as his own and disbursed them prior to his death. In my view, these facts make the *Angeloni* case distinguishable from the case at bar.

[34] In the present case, the Applicant asserts that he meets the three-part test.

#### *The subject matter of the dispute*

[35] On the first branch of the test, the Applicant submits that the Proceeds constitute the subject matter of the dispute because, in his notice of application, he claims a beneficial interest in the Proceeds. He supports this claim with his assertion that he made "the vast majority of financial contributions toward the [Residence]". The Applicant also asserts that the Estate is also entitled to a share of the Proceeds based on a resulting trust because the Deceased made a gratuitous transfer of a one-half interest in the Residence to the Respondent. The Applicant submits that this transfer gives rise to the presumption of a resulting trust in favour of the Estate in respect of that interest. The Applicant submits that the value of the Respondent's share of the Proceeds can be clawed back into the Estate pursuant to s. 72 of the *SLRA* and made available to pay his claim for dependant's support.

[36] The Respondent submits that the Applicant has no claim to the entire Proceeds because he is unable to quantify his claim. She submits that, at best, he has a speculative claim to some partial, undetermined interest, or a damages claim against her or the Estate. On cross-examination, the Applicant deposed that he was only claiming a partial interest in the Residence, though he did not identify the proportion.

[37] I agree with the Applicant that the Proceeds are the subject of the litigation in the sense that he is asserting a resulting trust over the entire amount of the Proceeds; however, he has been unable to identify the amount of the Proceeds to which he is entitled. The Applicant, at this stage in the proceeding, is unable to quantify his actual contributions to the Residence as he has no documentary evidence to support the deposits he claims to have made on the Residence and the Scarborough residence, or the mortgage payments he submits he made. Regarding his dependant's support claim, I accept that the quantum of the support owing, if any, will be determined by a judge. However, the Applicant has not provided the required sworn Financial Statement showing his income and expenses. In the absence of such evidence, the Applicant's claim to the Proceeds is

speculative and cannot even be estimated with any precision. Based on the record before the court, I cannot conclude that the Applicant has a claim to the entire Proceeds.

[38] I agree that at least a share of the Proceeds constitutes the subject matter of the dispute.

*A serious issue to be tried*

[39] On the second branch of the test, the Applicant submits that there is a serious issue to be tried as to whether he owns a beneficial interest in the Proceeds based on resulting trust, and whether he is entitled to support from the Estate. He submits that the latter would be funded, in part, from the Estate's interest in the Proceeds, based on a resulting trust.

[40] The Applicant asserts that his claim for based on a resulting trust should succeed because he made a contribution to the purchase price but did not take legal title to the Residence. In making this submission, he relies on *Andrade v. Andrade*, 2016 ONCA 368, 131 O.R. (3d) 532, at para. 58, where the court held that a purchase money resulting trust can occur "where a person advances a contribution to the purchase price of property without taking legal title", citing *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438, at para. 21. Similarly, the Applicant argues that he made mortgage payments in respect of the Residence, and that his payments for utilities and property taxes should also be considered as contributions to the property that give rise to the presumption of a resulting trust.

[41] The Applicant also asserts that he was financially dependant on the Deceased because he was living at the Residence, which the Deceased and the Respondent owned, and he benefited from a significant inheritance that the Deceased received from her mother. The Applicant submits that the inheritance allowed the Deceased and him to improve their lifestyle, including through travel. Further, the Applicant asserts that he retired prior to the Deceased's death with no significant means; he had a 26-year relationship with the Deceased; he cared for the Deceased who had several medical issues; he had become accustomed to a standard of living which he cannot replicate; and he incurred significant personal expenses to maintain and renovate the Residence. He contends that, despite his contributions to the Deceased's wellbeing, and his financial dependence on her, especially following his retirement, he was almost entirely excluded from the Will.

*The balance of convenience*

[42] On the third branch of the test, the Applicant submits that the balance of convenience favours preserving the Proceeds pending the final determination of the application. He asserts that his claim to a beneficial interest in the Proceeds will be defeated if the Respondent is free to dissipate the Proceeds. Further, he asserts that based on the application for a Certificate of Appointment of Estate Trustee with a Will filed by the Respondent, the Estate value is only \$211,738.48, which would be insufficient to meet his claims. Finally, he submits that the Respondent has not shown any prejudice to her as a result of a preservation order, should one be made.

[43] The Respondent asserts that the Applicant has not met the three-part test regarding his claim for a resulting trust over the Proceeds.

[44] I agree with the Respondent that the Applicant has not met the test to show a serious issue to be tried regarding his claim for a beneficial interest in the Proceeds based on a resulting trust.

[45] While the Applicant is not required to show a *prima facie* case on the merits, my assessment of the merits of the resulting trust claim based on the evidence adduced leads me to conclude that the Applicant has not shown that there is a serious issue to be tried. The Applicant claims a purchase money resulting trust, but

he has no documentary evidence to show that he actually made a \$5,000 deposit towards the purchase price of either the Scarborough residence or the Residence. His evidence on the point is refuted by the Respondent, whose evidence is that the Scarborough residence was purchased with funds gifted from the Deceased's parents, and some funds from the Respondent. The Respondent submits that she was added as a joint owner, and also added to the mortgage as a mortgagor on the Residence. The Respondent lived with the Deceased at the Scarborough Residence until it was sold, and also lived at the Residence for a time.

[46] Similarly, the Applicant's evidence regarding his contribution to mortgage payments is weak. The Applicant claims that for the period November 2015 to September 2021, funds were either withdrawn from his Simplii Financial account or transferred from his account to a bank account belonging to the Deceased, and in turn, applied towards the mortgage. On cross-examination, the Applicant admitted that he included in the \$71,127.03 he claims to have paid toward the mortgage, every ATM withdrawal that appeared on his bank statement that exceeded \$80. He did so on the theory that his practice was not to withdraw more than \$80 in cash from his bank account for his own expenses. The Simplii Financial statements that he adduced do indeed show withdrawals in excess of \$80, but do not in any way support that these withdrawals were used to make mortgage payments. The Applicant's own evidence is that he included on his list of payments made on account of the mortgage every withdrawal over \$80.

[47] The Respondent's evidence, which includes copies of the Deceased's bank records, shows that the mortgage payments for the Residence were made from her TD Bank account, and there is no evidence of deposits into the TD Bank account that correspond to the withdrawals or e-transfers from the Applicant's bank account, which he attributes to mortgage payments. The TD Bank account statements show rental income from a basement apartment of between \$750 and \$900 per month and semi-monthly mortgage payments of \$500. The TD Bank statements show that the Deceased's pension income was also deposited into this account and used, in whole or in part, to make the mortgage payments.

[48] Regarding the \$25,000 that the Applicant claims to have contributed to add a swimming pool at the Residence and for renovations at the Residence, the Applicant's evidence is weak and inconsistent. He claims to have used money from a line of credit, and he produced documentary evidence showing a \$25,000 withdrawal from a Scotiabank line of credit in his name. However, he produced no documentary evidence to show that this \$25,000 was actually used to install a swimming pool at the Residence. Further, under cross-examination, the Applicant admitted that some of the renovations at the Residence may have been made from funds raised on a refinancing of the mortgage. The Applicant was not a party to the mortgage.

[49] There are many inconsistencies in the Applicant's evidence and there is insufficient corroboration. I find that the Applicant has not established a serious prospect of ultimate success in his claim for a beneficial interest in the Proceeds based on a resulting trust. A similar finding was made in *Guz v. Olszowka*, 2019 ONSC 5308, where the court found that similar allegations of resulting trust based on contributions to a property were not sufficient to establish a serious prospect of ultimate success to ground an interim preservation request.

[50] Regarding the Applicant's claim for dependant's support, the Respondent also asserts that the Applicant has not met the three-part test.

[51] My assessment of the merits of that claim also leads me to conclude that, on the record before the court, the Applicant has not shown that there is a serious issue to be tried. Again, there is a serious lack of documentary evidence or other reliable evidence. The Applicant acknowledges that in order to pursue the dependant's relief claim, he will need production of financial records, the real property lawyer's files, and the Deceased's medical records, which has not yet been ordered.



[52] Despite that lack of production, I find that the Applicant has not adduced evidence that would be available to him, and which is required to support a dependant's support claim. The Applicant claims to have been a dependant on the Deceased since his retirement in 2020. A claimant for dependant's support must disclose his current assets and means, as this is an important factor in the determination of his entitlement to support. He must also show the assets and means he is likely to have in the future, his needs, and his capacity to support himself. In the record before the court, the Applicant has provided little evidence of his current assets and means. In his supporting affidavit, he states that he is 67 years of age, retired, and without any significant assets or means. He states that he receives "about \$1,800 per month, from a mix of a retirement pension from the City of Toronto and about \$1,000 in CPP and OAS payments." The Applicant states that he was "forced to move across the country to live with his daughter as he was not able to continue living in Ajax with a similar standard of living."

[53] The lack of sworn evidence is compounded by the fact that it appears that the Applicant has failed to disclose certain assets. On cross-examination he admitted that throughout his relationship with the Deceased, he owned a property in Fenelon Falls. He confirmed that he sold that property, he did not share the proceeds with the Deceased, and he contributed at least \$92,000 to an RRSP from the proceeds of sale. The Applicant could have provided documentary evidence of the current value of his RRSP, but he did not.

[54] Evidence regarding the sale of the Fenelon Falls property could have been adduced by the Applicant. That evidence he could have obtained without a court order, but he did not. The Respondent deposed that the Applicant owned a joint bank account with the Deceased that passed to him by right of survivorship, and the Respondent gave him US\$8,000 from the Deceased's US dollar account because he demanded it, saying that it was money that he and the Deceased were saving for trips. The Applicant did not disclose these assets.

[55] I find that the Applicant's failure to adduce evidence of his assets, expenses and a budget make it impossible for me to establish that he has a serious claim for dependent's support that is likely to succeed.

[56] I find that, on the evidentiary record before the court, the Applicant has not shown a serious prospect of ultimate success in his claim for dependant's support.

[57] In assessing the balance of convenience, the moving party must adduce evidence of a real concern that the defendant will dissipate the fund sufficient to outweigh the freedom of the responding party to deal with the property in question: *Kuleshnyk*, at para. 12.

[58] I find that the Applicant has not shown compelling evidence of a risk of dissipation of assets by the Respondent. The Respondent has adduced evidence to show that she owns real property and other assets (including the Proceeds, and the approximately \$200,000 she received from the Estate as the sole beneficiary). She deposed that these assets are in the Province of Ontario, and that she has no intention of moving them or leaving the jurisdiction. The Respondent is employed as a financial services manager in Ajax.

### **Disposition and Costs**

[59] For the foregoing reasons, I find that the Applicant has not met the three-part test in support of his claim to an interest in the Proceeds. Accordingly, a preservation order is not warranted at this time, and I decline to make an interim order preserving the Proceeds or directing the Proceeds to be paid into court.

[60] A timetable for the hearing of the balance of the application should be set, if that step has not already been taken.

[61] The Respondent has been successful in obtaining an order dismissing the Applicant's request for an interim preservation order and the payment of the Proceeds into court. Each of the parties has submitted a costs outline. The Respondent seeks costs on a partial indemnity basis of \$6,613.88. Had the Applicant succeeded, he would have sought costs on partial indemnity basis of \$12,069.16. Having considered the relevant factors set out in r. 57.01, I fix the Respondent's costs at \$6,613.88, inclusive of disbursements and HST, payable by the Applicant within 30 days.

*Dietrich J.*

Released: June 23, 2023