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Jointly Owned Real Estate



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Much has been written about the need for a shareholders' agreement to govern the affairs of a private company, but not all business ventures are held in a corporation. Real estate, for example, is commonly held in simple co-ownership. Family members may purchase property together, and their real estate venture may pass to the next generation. In such a case, a co-ownership agreement is an important vehicle for addressing the expectations of the investors.

In the corporate context, remedies for shareholders' disputes are provided in the governing corporate statute. The Ontario *Business Corporations Act*, for example, provides an oppression remedy. In addition, the Act allows a shareholder to bring an application for the winding up of a corporation on just and equitable grounds in suitable circumstances. In the case of real estate co-ownership, the Ontario *Partition Act* provides an analogous remedy.

Di Felice v. 1095195 Ontario Limited, 2013 ONSC 1, is a case in which three siblings had invested in commercial properties in Toronto over a 20-year period. The co-ownership arrangement governing each property was not identical, but all arrangements involved at least two branches of the family and sometimes included spouses as well. The properties had appreciated significantly in value from the time when they were purchased. Following the death of the family matriarch, there was a breakdown of the relationship between two of the siblings. One branch of the family brought an application under the *Partition Act*, seeking the sale of the properties and the distribution of the proceeds among the owners. The other siblings opposed the application.

The siblings who opposed the application asserted the existence of a "fundamental understanding" among the parties regarding the use and sale of the properties. In particular, they claimed that the families had agreed that they would not sell the properties on the open market without unanimous consent because they intended to maintain the properties for the next generation; furthermore, they asserted the existence of a right of first refusal in the event that one family no longer wished to invest in the properties.

The court found that there was no agreement, written or otherwise, among the siblings in respect of the acquisition, use, and disposition of the properties. Despite contrary claims from the siblings who opposed the application, the court found no evidence that the parties had agreed to afford other family members a right of first refusal in the event that one branch of the family wished to withdraw its investment in any particular property.

The court reviewed the *Partition Act* and the principles developed in related case law. Pursuant to the statute, all joint tenants and tenants in common in Ontario are subject to having their property partitioned or sold on the application of another tenant in common. The court noted that there is a presumption in favour of partition, rather than sale, but that a sale will be ordered if the court considers it to be more advantageous to the parties than partition. A court may also order a sale if a property is not suitable for partition. A tenant in common has a prima facie right to compel a partition or sale, and such an application will be denied only in the event of vexatious or oppressive conduct on the part of an applicant.

In *Di Felice*, the court considered these principles and held that the nature of the properties made partition commercially unfeasible. Although there was a breakdown in the relationship of trust among the parties, the court found that there was no conduct on the part of the applicant that constituted malice or oppression or that revealed a vexatious intent. The court therefore ordered a court-supervised sale of the properties. It did not give a right of first refusal or a right of first offer to any of the co-owners but noted that any co-owner was entitled to bid in the sale process.

Di Felice illustrates the need for parties to enter into a co-ownership agreement when real estate is held jointly. Without such an agreement, any co-owner may bring a successful application for a court-ordered sale.

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