

2011 CarswellBC 814, 2011 BCSC 435

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Durfeld v. Kurkiniemi

Rudi Durfeld and Cathie Durfeld, Plaintiffs and Susan Kurkiniemi, Risto Kurkiniemi, Rita Sowden and Brian Sowden, Defendants

British Columbia Supreme Court

B. MacKenzie J.

Heard: February 28 - March 1, 2011

Judgment: April 7, 2011

Docket: Vancouver S054733

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Counsel: L.J. Zivot, for Plaintiffs / Respondents

M. Wassermann, for Defendants

Subject: Property

Real property.

B. MacKenzie J.:

Introduction

1 This is an application pursuant to the *Partition of Property Act*, R.S.B.C. 1996, c. 347, to partition 12 acres of lakefront property in Williams Lake.

2 The plaintiffs and defendants purchased this property in 1993 and hold it as tenants in common. It is comprised of two legal lots. Lot D bisects Lot B roughly in the middle of the property.

3 The parties agreed that, based on their respective financial contributions, the Durfelds would have 25% of the property, the Sowdens 25% and the Kurkiniemis 50%. However, these percentages have been modified slightly by agreement in order to compensate for unique aspects of the property, both positive and negative.

4 After considerable discussion and compromise, it was agreed that the Kurkiniemis would have the middle lot. This property had a house already located on it near the lake shore. Part of the reason for the Kurkiniemis obtaining the middle piece of property was that the Sowdens and Kurkiniemis are related and wanted to have

their properties beside each other. The Durfelds were content with either the east or west lots but because of the position taken by the Sowdens and a vote that was taken between the Sowdens and the Kurkiniemis, the Durfelds have the eastern portion of the property.

5 The defendants do not oppose partition; indeed the initial plan in 1993 when the property was acquired was that it was to be subdivided. The parties also agree that the plaintiff's share should be reduced to account for a public access that the City may require to be placed on what will become the defendants' share of the property should the defendants chose to subsequently subdivide.

6 However, the parties dispute the amount by which the Durfeld's property should be reduced to account for this access. The plaintiffs say that only 1,600 square meters are necessary for the public access and that their share should only be reduced to reflect this amount. The defendants say that an access of 3,200 square meters, and taking a less direct route, is necessary in order to allow the Sowdens to build a house of their preferred size and at their preferred location, close to the lakeshore. The defendants say that the Sowdens want to build with the same liberty as the Kurkiniemis and the Durfelds and that fairness dictates that each party bear a proportionate share of the longer access road that would permit them to do so.

Applicable Law

7 Section 2 of the *Partition of Property Act* permits the court to order the partition of land:

Parties may be compelled to partition or sell land

2 (1) All joint tenants, tenants in common, coparceners, mortgagees or other creditors who have liens on, and all parties interested in any land may be compelled to partition or sell the land, or a part of it as provided in this Act.

...

8 In resolving an application for partition under this act, I must "strive to effect the most beneficial course for all parties with regard to their legitimate interests" (*Sahlin v. Nature Trust of British Columbia, Inc.*, 2010 BCSC 318 at para. 17).

9 In order to determine the course that is most beneficial for the parties, and best protects their legitimate interests, some further background is required.

Background

10 The Durfelds want to build a lake-front home. Before this can be accomplished, they must file a subdivision application, which necessarily includes an application to rezone their lot to comply with minimum lot size requirements. However, before this plan can be filed, all parties must sign various documents to comply with the *Land Title Act*, R.S.B.C. 1996, c. 250, and the requirements of the Ministry of Transportation in order to have the City of Williams Lake consider the Durfelds' application.

11 Unfortunately, this was never accomplished due to the disagreement, mentioned above, as to how much property should be allocated to account for a future public access that the City may require be placed on the Sowden and Kurkiniemi's portion of the property.

12 There had been much uncertainty as to what requirements the City would have respecting public access and whether one or two access roads would be required. Early on the Sowdens proposed a plan in anticipation of a public access requirement on the far west boundary adjoining their lot as well as on the far east boundary adjoining the Durfelds' property. In order to determine what would be required by the City, the Sowdens made an application for subdivision in the fall of 2010. This application was not intended to result in subdivision but rather to prompt a response from the City expressing the requirements of such.

13 In due course it was determined that there would be no requirement for public access over the Durfelds' property and that the only public access that would be required would be off of Signal Point Road, a road which stops at the western boundary of the property and that has been continued through the property giving the Kurkiniemis and Sowdens access to their respective properties.

14 The present application is before the court because the City has advised the parties that it would be content with public access coming off Signal Point and either going across midway through the Sowden property to the boundary between proposed Lots 2 and 3, or dropping straight down from Signal Point Road along the western boundary as initially envisioned by Mr. Sowden.

15 These options were laid out by a planner for the City, Mr. Roberts, in a letter dated February 17, 2011:

The most suitable option seems to be dropping an access straight off the end of Signal Point Road along the western edge of proposed Lot 3, or extending the road reserve from the end of Signal Point Road to the boundary of proposed Lot 2 and 3 and dropping the access down from there.

16 These options involve different amounts of land and the parties could not agree on which option was reasonable to use as the basis for calculating the Durfelds' allocation.

17 Before proceeding to discuss the two proposals, I note that I do not accept the plaintiff's submission that the defendants have unreasonably delayed the plaintiffs' application to subdivide. Having reviewed the large volume of correspondence and communication between the parties that was contained in the various affidavits, I am satisfied there has not been *mala fides* or intentional delay on the part of the defendants such that their actions should affect the outcome of the plaintiffs' application. I agree with counsel for the defendants that the inability to reach agreements over the years have been for legitimate reasons, not simply to delay the Durfelds from building on their property.

The Signal Point Road Proposal

18 With regard to the first proposal, the plaintiffs say that dropping the access road from Signal Point along the west side of the property would result in the least amount of property being taken up for this purpose.

19 The order for partition that the plaintiffs seek is based on this proposal; it is based on the calculation that to create this access would result in a loss of approximately 1,600 square meters of property.

20 The Sowdens submit that they would be unduly prejudiced if this was the public access route because it would mean that the usable portion of their property would begin 20 meters to the east. If they chose to build, this would result in them having to approach an aboriginal archaeological site on which a number of cultural depressions (also known as quiggly holes) are located. The Sowdens submit that they want to build a large home near the water and if they were forced 20 meters to the east, they would be required to incur substantial expense

in the form of mitigation work necessary to permit them to build over the cultural depressions.

The Lots 2 and 3 Boundary Proposal

21 According to the second proposal suggested by the City, the public access would go from the west side of the property across to the boundary between the new Lots 2 and 3. This would result in a much greater area being utilized for the access, approximately 3,200 square meters.

22 The defendants submit that even though this proposal would affect more property, it would alleviate the prejudice to the Sowdens that would result if the first proposal were accepted.

23 In addition, the Sowdens say that their property near the lake would be further reduced by the requirement for setbacks from the public access road thereby pushing any proposed building site further to the east or causing them to build a much smaller residence than they desire. The other option for the Sowdens is to move the proposed building site further away from the waterfront or, alternatively, to encroach upon the archaeological site, thereby incurring the costs of mitigation.

24 The Sowdens argue that although the defendants' proposal results in a greater area of land devoted to the public access, the portion of the access running between Lots 2 and 3 will traverse a large portion of land encumbered by the cultural depressions. Placing an access road over the depressions will not incur mitigation costs and will also maintain an unencumbered area available for the construction of a home.

25 The plaintiffs say the concern expressed by Mr. Sowden is based on a projection for a residential building that is substantially larger than even the house that is located on the Kurkiniemis' property and therefore should not be considered in determining what is the fairest proposal given the interests of all three parties in this application.

26 The plaintiffs also argue that Mr. Sowdens' concern over losing much of his lot that is not part of the cultural depressions is mere speculation at this time given his equivocal position as to whether or not the Sowdens will be building, will sell the property or will subdivide it further.

Discussion

27 It must be remembered that none of the parties can direct the City where to put this public access road. However, the latest correspondence from the City, mentioned above, seems to suggest that even though a new application for a subdivision is going to have to be made, there would be no resistance from the City in respect of either proposal should the Sowdens and Kurkiniemis decide to pursue subdivision.

28 Viewing both proposals therefore as viable options available to the defendants in the future, two main considerations govern my determination of the proposal that should form the basis for calculating the plaintiffs' allocation. First, I should give weight to an allocation based on a proposal for public access that maximizes the amount of usable land as this is in the best interests of all the parties. Second, where the negative and positive characteristics of the lands have been already taken into account by the parties in determining their respective lot sizes, I should endeavour to respect these existing arrangements.

29 With regard to such arrangements, it is relevant to note that in the fall of 2000, the plaintiffs engaged Ron Hume, a real estate appraiser, to propose an equitable division of the property to satisfy the respective interests (25%, 25% and 50%) held by the parties. Hume prepared an initial report, which he subsequently

amended to take account of the negative values of the cultural depressions. The Hume reports led to an agreement between the parties on July 4, 2002. In this agreement, the percentage allocation of the property between the parties was altered (25.35% - Sowdens, 26.65% - Durfelds, 48% - Kurkiniemis), in order to compensate for the positive value of the house on Lot D and the negative value of the cultural depressions.

30 It is this proportional allocation of the lands that continues to serve as the baseline from which further adjustments are to be made.

31 Although the agreement does not specify the route of the public access on the western side of the property, it noted that "access to Lot 1 will be by way of Signal Point Road..." It was also anticipated that at this point in time the City would require public access through the Durfeld property on the east side of the property.

32 The plaintiffs say that this agreement indicates that the Sowdens appreciated the logical location for one of the public access roads would be down from Signal Point Road along the western boundary with appropriate adjustments to be made to account for this development.

33 I am satisfied that because the parties have agreed to adjust their proportional shares of the property to reflect the negative impact of the cultural depressions, it would not be just to also consider these features in determining the amount of land to be reallocated from the Durfelds' share to account for the public access.

34 As a result, I accept the plaintiffs' argument that they have "notionally paid for the liability of those depressions on the Kurkiniemi and Sowden lots. They accepted this and received the lots they wanted."

35 I am therefore satisfied that the Durfelds' allocation for the purpose of partition should be calculated on the basis of a minimum length public access descending directly from Signal Point Road to the lakeshore.

36 I emphasize that this determination is notional and for the purpose of effectuating the Durfelds' subdivision. In the event that the Kurkiniemis and Sowdens decide to subdivide and that a public access becomes necessary, the defendants will be at liberty to place the access where they chose, subject to the City's approval.

37 The Sowdens will also be at liberty to undertake the mitigation work that would permit them to build on the land occupied by the cultural depressions.

Conclusion

38 I am therefore satisfied that fairness to all parties dictates the division of property largely as proposed by the Durfelds and set out in Schedule A.

39 However, the Durfelds' proposal should be modified to reflect an accurate measurement of the property that will be used for public access. The plaintiffs acknowledge that their measurement was from the bottom or the south side of the Signal Point Road access road and as such there should be an increase in the square meters allotted for the access road.

40 The defendants say that if the plaintiffs' application is granted, the amount of property involved is actually 2,100 square meters and not 1,600 square meters suggested by the plaintiffs. On this point, the plaintiff submits the actual size is not the 2,100 square meters suggested by the defendants but rather 1,960 square meters. I will leave it to the parties to determine the actual dimension from the top of Signal Point Road to the lakeshore and this area that is agreed to by the parties will form part of any revised schedule submitted by the plaintiffs in

their subdivision application.

41 With regard to the appropriate order in these circumstances, I note that pursuant to s. 17 of the *Partition of Property Act*, an order for partition is deemed to effect a subdivision as defined in the *Land Title Act* and is subject to compliance with the *Land Title Act*. The relevant requirements include that the subdivision plan be tendered for examination and approval and ultimately be approved by the approving officer.

42 However, in these circumstances I do not find it appropriate to order a subdivision plan be placed before the approving officer where this plan conflicts with the applicable zoning requirements.

43 In these circumstances, I would order partition in the manner described at paras. 38-40 of these reasons conditional upon the necessary zoning approval of the City.

44 Even though counsel suggests there should be no problem with respect to signing documents and complying with the requirements of the City once this issue has been disposed of, I will make the ancillary orders sought by the plaintiffs with regard to the subdivision process.

45 I order that the defendants:

- a) Comply forthwith or as soon as practicable with any requirements set out by the City of Williams Lake or any local or provincial government with respect to achieving the zoning approval and proposed subdivision.
- b) Arrange to have moved or removed any structures that encroach on areas of the boundaries of the proposed subdivision as required by the approving officer of the City of Williams Lake.
- c) Enter into any easement or encroachment agreements required by the City of Williams Lake or the plaintiff as needed to complete the proposed subdivision.

46 The Plaintiffs seek an additional order that the costs related to the subdivision plan and other related expenditures be borne by the parties proportionately to their respective shares in the property. However, I see no reason to grant this order as this subdivision is for the benefit of the Durfelds. Should the Kurkiniemis and Sowdens subsequently decide to subdivide, the Kurkiniemis and Sowdens will bear the costs of that process.

47 The plaintiffs have been substantially successful in this application and as a result the plaintiffs are entitled to costs on Scale B.

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