VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE: BP256/2017

CATCHWORDS

Co-ownership of land – by deed the applicant promises to make a will leaving his interest in the land to the respondent – an obligation inconsistent with the application for order for sale – proceeding dismissed – *Property Law Act 1958* ss 228, 229.

APPLICANT:	Alexander Joseph McColley (also called Alexander John McColley)
RESPONDENT:	Norman Leslie Mathers
WHERE HELD:	Melbourne
BEFORE:	Senior Member A. Vassie
HEARING TYPE:	Hearing
DATE OF HEARING:	25 August 2017
DATE OF ORDER:	21 September 2017
DATE OF REASONS:	21 September 2017
CITATION:	McColley v Mathers (Building and Property) [2017] VCAT 1529

ORDERS

1. The application is amended so that it names the applicant as Alexander Joseph McColley (also called Alexander John McColley).

2. The proceeding is dismissed.

A. Vassie
Senior Member

APPEARANCES:

For the Applicant:	Mr. R. Antill of Counsel
For the Respondent:	In person

REASONS

1. The applicant Alexander Joseph McColley (who is also known as Alexander John McColley) and the respondent Norman Leslie Mathers are registered as proprietors, as tenants in common in equal shares, of a house property at 5 Bemersyde Drive, Berwick described in Certificate of Title volume 9299 folio 729 ("the land"). In the Certificate of Title Mr McColley is named as Alexander John McColley. They are step-father and step-son respectively.

2. By his attorney Brian Maurice Goldberg Mr McColley has made an application under Part IV Division 2 of the *Property Law Act 1958* ("the Act") for sale of the land. Mr Goldberg holds an enduring power of attorney (financial) from Mr McColley. Mr Mathers opposes the application. His defence is that Mr McColley had agreed to leave to him by will Mr McColley's interest in the land.

3. Mr McColley and Mr Mathers are co-owners of the land within the meaning of the Act. Sections 225 of the Act provides that a co-owner of land may apply to VCAT for an order for sale of the land and the division of the proceeds amongst co-owners. Section 228 provides that VCAT may make any order it thinks fit to ensure that a just and fair sale of land occurs, and that VCAT may order a sale of the land and the division of the proceeds of sale amongst the co-owners. Section 229 provides that if VCAT determines that an order should be made for sale and division of land it must make an order for a sale of the land and the division of the proceeds of sale amongst the co-owners unless it considers that it would be more just and fair to make an order for physical division of the land or for a combination of sale and physical division. I have paraphrased only the parts of those sections which are relevant to Mr McColley's application.

4. Neither of the parties has claimed that a physical division of the land is possible or desirable. Mr Goldberg gave evidence that a physical division is not possible. So the outcome of this proceeding will be either an order for sale and division of proceeds or an order dismissing the proceeding.

5. The parties became co-owners of the land as a consequence of the will of Mr Mathers' mother, Florence Evelyn McColley. The land was the only asset of her estate. By her will she left it to Mr McColley and Mr Mathers as tenants in common in equal shares.

6. The parties signed a document headed "Deed of Arrangement" dated 29 March 2005 ("the Deed"). After reciting the death of Mrs McColley, the date of her will, the date of the grant of probate to the named executor David Henry Shaw, the fact that the land (described in the Deed as "the Property") was the only asset of the estate of Mrs McColley and that the parties were left equal shares as tenants in common in the net estate, and after identifying Mr McColley as "Alex" and Mr Mathers as "Norman", the Deed provided:

The parties agree as follows:

1. Alex is permitted to reside at the Property rent free for the term of his life on [sic] until he permanently vacates the property.

2. During this period of residency Alex will be responsible for the payment of all outgoings including rates, taxes and insurance premiums and will maintain the property in its present condition.

3. Alex will execute a Will in which he will devise to Norman his one-half interest in the property.

7. At the hearing I was given a photocopy of the Deed. Correspondence indicated that Lempriere Legal, solicitors, who have acted for Mr Mathers from time to time, had sent a copy of the Deed to Casey Business Lawyers Pty Ltd, solicitors for the applicant (by his attorney). The correspondence from Lempriere Legal did not indicate whether that firm held the original Deed or, if not, who did. At the hearing Mr Antill of Counsel for the applicant did not suggest that the document was anything other than authentic. I have proceeded on the footing that the photocopy Deed of Arrangement was a true copy of an original that the parties signed in 2005.

8. Mr McColley resided in the house on the land until August 2016. He is now in a nursing home. Mr Goldberg told me that the advice from doctors is that he is not in a fit condition to return home. So I find that he has permanently vacated the land. Mr Goldberg's aim is to be able to sell the land and use Mr McColley's share of the proceeds of sale to pay a bond to the nursing home so that the daily fee that has to be paid to the nursing home is reduced.

9. As Mr Mathers' evidence at the hearing revealed, the parties have been estranged for many years.

10. In *Yeo v Brassil*[1] Judd J, hearing an appeal from a VCAT order dismissing an application for an order for sale of co-owned land, had to decide a question of whether VCAT's discretion under s 228 of the Act should be exercised with "a propensity in favour of the sale or division of co-owned property in the absence of any contractual, proprietary or fiduciary obligation with which an order for sale or division could be inconsistent".[2] His Honour followed decisions in New South Wales,[3] dealing with comparable legislation, and in effect answered "Yes" to the question.

[1] [2010] VSC 344.
[2] [2010] VSC 344 at [14].
[3] *McNamara, Re & Conveyancing Act* (1961) 78 WN (NSW) 1068 and *Hogan v Baseden* (1997) 8 BPR 15.723 at 15, 726 -729; see [2010] VSC 344 at [21] and [22].

11. The issue becomes whether the Deed created a contractual or other legal or equitable obligation upon Mr McColley with which an order for sale of the land would be inconsistent. If the Deed did create such an obligation, I should exercise my discretion to dismiss his application. Otherwise, I should exercise my discretion to grant it.

12. A contract to make a will, or to make particular provisions in a will, is valid and enforceable, despite the fact that a will is inherently revocable.[4] A contract not to revoke an existing will is also valid and enforceable.[5] The person to whom is made a contractual promise to make a will, or to make a particular provision in a will, in favour of that person has rights during the lifetime of the promisor which were described by the majority of the Judicial Committee of the Privy Council, in *Schaefer v Schuhmann*[6], as follows (underlining added):

> If the contract is to devise or bequeath specific property the position of the promisee during the testator's lifetime is stronger than if the contract is simply to leave a legacy. If the testator sells the property during his lifetime the promisee can treat the sale as a repudiation of the contract and recover damages at law which will be assessed subject to a reduction for the acceleration of the benefit and also if the benefit of the contract is personal to the promisee subject to a deduction for the contingency of his failing to survive the promisor. <u>But if he can intervene before a purchaser for value without notice obtains an interest in the property he can obtain a declaration of his right to have it left to him by will and an injunction to restrain the testator from disposing of it in breach of contract</u>: *Synge v Synge* [1894] QB 466. No doubt if the property is land he could also register the contract or a caution against the title.

Mr Mathers has registered caveat no. AN634457G in relation to the Certificate of Title for the land. In the caveat he claims a "freehold estate" on the grounds of an agreement with Mr McColley.

13. The case of *Synge v Synge*, cited in the above passage, decided that where a proposal in writing to leave by will a defined piece of real property, made to induce a marriage, was accepted, but the promisor then conveyed the real property to someone else, the promisee could recover damages for breach of contract; but the Court of Appeal went on to say that a court of equity could "decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers",[7] if asked to do so.

[4] G.E. Dal Pont and K.F. Mackie, *Law of Succession* (2013), paras 1.25.
[5] G.E. Dal Pont and K.F. Mackie, *op-cit*., paras 1.25 and 1.31.
[6] [1972} AC 572 at 584.
[7] [1894] 1 QB 466 at 470-471.

14. The actual decision in *Schaefer v Schuhmann* was that the land which the testator promised to leave in his will to his housekeeper was not an asset of his estate for the purpose of the operation of testator's family maintenance legislation, so that person making a claim for further provision out of the estate under that legislation had no claim on that land. The High Court in *Barns v Barns*[8] declined to follow that decision, holding that the deceased's promise to make a particular disposition by will was subject to the potential operation of the testator's family maintenance legislation. But no member of the High Court expressed any disagreement with the passage from *Schaefer v Schuhmann* that I have quoted above; on the contrary, Gleeson CJ quoted part of that passage with apparent approval.[9] Textbook writers in Australia[10] regard it as being good law.

15. There is no basis for a claim that at present he has a "freehold estate" in Mr McColley's undivided half share in the land as tenant in common with him, as Mr Mathers has claimed in his caveat. Nor is it correct to say, as Lempriere Legal has said in correspondence, that Mr Mathers "is now entitled to full ownership" of the land and entitled to a transfer of it into his name solely. But if the Deed was a contract to devise Mr McColley's half interest in the property to Mr Mathers, Mr Mathers presently has equitable rights to obtain a declaration of entitlement to have that half interest left to him by will and to obtain an injunction restraining Mr McColley from disposing of it in breach of contract.

16. Mr Antill argued that the Deed did not constitute such a contract. He argued that the Deed included merely a promise to make a will in Mr Mathers' favour, not a promise to make a will and not revoke it; Mr McColley would discharge his contractual obligation by making such a will in which he devised his half interest in the land to Mr Mathers – there is no evidence as to whether or not he has made such a will – but would be free to revoke it, so that there was then no contractual or other obligation inconsistent with his seeking of an order for sale of the land.

17. The Deed, like any other written contract, has to be construed objectively. Its meaning is to be determined by what a reasonable person would have understood it to mean, when regard is had not only to the text of the Deed but also to the surrounding circumstances known to the parties, and to the Deed's purpose and object.[11] That approach to the interpretation of the Deed is much the same as the approach adopted in an authority which Mr Antill cited to me: the expressed intention of the parties is to be found in the answer to the question, "what is the meaning of what the parties have said?, not to the question "what did the parties mean to say?"[12]

[8] (2003) 214 CLR 169.
[9] (2003) 214 CLR 169 at 182.
[10] G.E. Dal Pont and K.F. Mackie, *Law of Succession* (2013), para 1.28; K. Mackie, *Principles of Australian Succession* Law, 3rd edition (2017), para 2.23.
[11] *Pacific Carriers Limited v BNB Paribas* (2004) 218 CLR 451 at 461-462; *Toll (FGCR) Pty Ltd v Alphafarm Pty Ltd* (2004) 219 CLR 165 at 179.
[12] *Byrnes & Anor v Kendle* (2011) 279 ALR 212 at [53].

18. The language in the Deed's text is mostly simple, but paragraph 3 includes the technical legal word "devise": a word which connotes an effective testamentary disposition of land. Paragraph 3 is more than a promise to "execute a will"; it is a promise that the executed document "will devise" the testator's one-half interest in the land to Mr Mathers: that it is intended that it should effect (once probate is granted) a testamentary disposition of that one-half interest. It can have that effect only if it is an unrevoked final will of the testator. The text of paragraph 3 of the Deed points to an intention that Mr McColley's promise was one to execute a will, standing as his last will and testament, devising his one-half interest in the land to Mr Mathers.

19. Paragraph 1 of the Deed describes a substantial consideration moving from Mr Mathers in return for that promise. He gave up his right, which he shared with Mr McColley, to occupy the land; he promised to permit Mr McColley to reside on it, rent free, for the rest of his life or until he permanently vacated. A reasonable person standing in the position of the parties would regard the Deed, designed as it was to alter their respective entitlements in relation to the land, as being intended not only to confer a substantial new sole occupancy right upon Mr McColley but also to impose upon him a substantial obligation in return: an obligation to make a testamentary disposition of his half interest in the land to Mr Mathers. A mere obligation to execute a will, without an obligation not to revoke it and to have it stand as his last will, would be illusory.

20. I conclude that the Deed imposed upon Mr McColley an obligation to execute a will in which he devised his half interest to Mr Mathers, not to revoke that will, and to have it stand as his last will.

21. The right which Mr Mathers gained under the Deed was not some new or greater interest in the land itself but a right to an equitable remedy against a threatened disposition of Mr McColley's half interest in the land which would put it out of his power to devise it by will. Precisely how the right should be classified is not clear. One argument is that upon the execution of the Deed Mr McColley became a constructive trustee of his half interest for the benefit of Mr Mathers. Textbook authors who later became distinguished equity judges expressed the view that there is no constructive trust created but the maxim, that equity regards as done by the promisor that which he ought to have done, operates to create the right to prevent the threatened disposition.[13] Whatever may be the correct way to classify the right, I consider that the making of an order for sale of the land, as Mr McColley has sought, would be inconsistent with that right, and so should not be made.

22. For those reasons the proceeding will be dismissed.

[13] R.P. Meagher and W.M.C. Gummow, *Jacobsl Law of Trusts in Australia*, 4th edition (1977), paragraphs [267] and [268], under a section of the book headed "Trusts and Testamentary Contracts". Unhappily, editors of later editions of that work have omitted that section.

23. Had I been of the view that the making of an order for sale and division of the proceeding of sale would not be inconsistent with any right or obligation that the Deed created, I would have made an order for sale and, subject to one possible variation, I would have ordered an equal division of the proceeds of sale between the parties. The possible variation arose out of evidence of Mr Mathers that he had paid municipal and water rates and part of an insurance premium in relation to the land. Whether his payments covered periods while Mr McColley was occupying the land, or after he vacated it, was not clear. If they covered periods of Mr McColley's occupation, there should be an adjustment[14] so that the division of the proceeds of sale should allow him one-half plus whatever he had paid. If they covered a period after Mr McColley had vacated, the adjustment would be for one-half, not the whole, of whatever he paid, because it would follow from paragraph 2 of the Deed that each co-owner shares a liability with the other to pay rates, taxes and insurance once Mr McColley no longer occupied the land. Either way, the adjustment would probably not exceed $1,000.00.

24. Because of a doubt about Mr McColley's correct second given name I shall amend the application so that it describes him as Alexander Joseph McColley, also called Alexander John McColley. Otherwise I shall order that the proceeding is dismissed.

25. After I had reserved my decision, Lempriere Legal for Mr Mathers sent further correspondence to the principal registrar about this proceeding. They were not entitled to do that. I have ignored the correspondence.

A. Vassie
Senior Member

21 September 2017

[14] Section 233(1) and (2) empowers VCAT to make an order for compensation that reflects the adjustment.