VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP22/2019

CATCHWORDS

Co-ownership of land – by deed respondent promises to make a will leaving his interest in the land to applicant – applicant seeks order for transfer of that interest to him – application refused – no entitlement arises before respondent's death – alternative claim for compensation succeeds – *Property Law Act 1958* s 233(1), (2).

APPLICANT	Norman Mathers
RESPONDENT	Alexander Joseph McColley
WHERE HELD	Melbourne
BEFORE	Senior Member A. Vassie
HEARING TYPE	Hearing
DATE OF HEARING	1 August 2019
DATE OF ORDER	21 August 2019
DATE OF REASONS	21 August 2019
CITATION	Mathers v McColley (Building and Property) [2019] VCAT 1230

ORDER

1. The respondent must pay the applicant $4,005.75.

2. Otherwise the proceeding is dismissed.

A. Vassie
Senior Member

APPEARANCES:

For Applicant	In person
For Respondent	Mr. B. Goldberg (attorney under power)

REASONS

1. The applicant Norman Mathers and the respondent Alexander Joseph McColley 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-son and step-father respectively.

2. The parties became co-owners of the land, Mr Mathers' mother, Florence Evelyn McColley, having left it to them in her will as tenants in common in equal shares.

3. Mr Mathers has made an application under Part IV of the *Property Law Act 1958* ("the Act") for an order that Mr McColley transfer to him (Mr Mathers) his interest in the land. The Tribunal has power under the Act to make such an order.[1]

4. Two years ago Mr McColley, by his attorney Brian Maurice Goldberg, made an application of his own under Part IV of the Act for an order for sale of the land and division of the proceeds of sale between him and Mr Mathers. I dismissed the application because by a deed dated 29 March 2005 Mr McColley promised to make a will that left his one-half interest in the land to Mr Mathers, in return for Mr Mathers permitting him to reside in the house on the land for his lifetime or until he permanently vacated it. That deed, I decided, created an equitable right for Mr Mathers to intervene to prevent any sale of the land and with which an order under the Act for a sale of the land, and division of the proceeds of sale, would be inconsistent.[2]

5. The history behind the making of the deed between Mr McColley and Mr Mathers was as follows:

   (a) Florence Evelyn Mathers (as she then was) made a will dated 8 December 1967 in which she left her estate to Mr Mathers.

   (b) She and Mr McColley married in early 1986. Upon the marriage the will dated 8 December 1967 was automatically revoked.[3]

   (c) Mrs McColley made her last will on 4 April 1986; she appointed David Henry Shaw (of Campbell & Shaw, solicitors) as her executor and left her estate to Mr McColley and Mr Mathers as tenants in common in equal shares.

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[1] *Pavlovich v Pavlovich* [2012] VCAT 809.
[2] *McColley v Mathers* [2017] VCAT 1529.
[3] *Wills Act 1997* s 13(1).

(d) According to Mr Mathers' evidence, his mother on 7 April 2004 made a promise to him that she would leave the house property to him alone, and went on to say that Mr McColley after her death could go and live in his caravan which was in a caravan park. Mr Mathers told me that he made a note of the date and substance of this conversation with his mother because he expected that this promise would cause trouble between him and Mr McColley.

(e) Mrs McColley died on 10 November 2004. Probate of the will dated 4 April 1986 was granted to Mr Shaw on 8 March 2005.

(f) Campbell & Shaw prepared a "Deed of Arrangement" between Mr McColley and Mr Mathers and sent it by post to Mr Mathers for his signature. Mr Mathers signed it. So did Mr McColley.

6. Mr Mathers produced a signed original of the deed at the hearing on 1 August 2019. It identified Mr McColley as "Alex" and Mr Mathers as "Norman". It recited the death of Mrs McColley, the date of her will, the date of the grant of probate to Mr Shaw, that the parties were left the land as tenants in common in equal shares, and that the land was the only asset of the estate. The last recital in the deed, and its substantive provisions, were:

H. Alex and Norman have agreed to the following terms and conditions in respect to their entitlements to the estate.

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.

The word "on" in the first paragraph is an obvious typographical error for "or". The entitlement that Mr McColley gained under the deed was to reside in the house on the land during his lifetime or until he vacated it permanently.

7. If Mr Mathers ever gained, by reason of what he said was his mother's promise, any right that was more than a half interest in the land, he gave up that right when he signed the deed. Instead of that right, if it ever existed, he received Mr McColley's promise to make a will leaving his half interest to Mr Mathers.

8. Mr McColley resided in the house on the land until August 2016 when he went to live in a nursing home. In the previous proceeding I made findings that he was not in a fit condition to return to live in the house and that he had vacated the land permanently.

9. There has been no evidence of whether Mr McColley has made a will, or, if he has, whether in that will he has devised his one-half interest in the land to Mr Mathers. Since the evidence of Mr Mathers (which Mr Goldberg, who represented Mr McColley at the hearing, did not dispute) has been that he and his step-father are on bad terms, it is improbable that Mr McColley has made or would make a will in Mr Mathers' favour.

10. In my opinion, Mr Mathers does not presently have any right to require Mr McColley to transfer his interest in the land, and his application for an order compelling the transfer is premature.

11. Mr McColley is 86 years old. Mr Mathers is 75 years old. Ordinarily one would expect Mr Mathers to outlive Mr McColley, but he may not. Mr Mathers might die first. If he does, the prospective interest that he gains from the deed lapses. A contract to leave property by will is subject to lapse if the promisee pre-deceases the promisor, and is subject to other contingencies, such as the operation of testator's family maintenance legislation if there are surviving dependants, or if the promisor marries and the marriage ends in divorce which leads to Family Court orders that affect the property.[4] Only on the promisor's death does equity enforce a contract to leave property by will "by fastening a trust on the estate to give effect to the contract."[5]

12. So I refuse Mr Mathers' application for an order requiring Mr McColley to transfer his interest in the land to Mr Mathers.

13. At the hearing Mr Mathers made an alternative application, orally, for an order compensating him for outgoings and maintenance costs in relation to the land that he has paid since Mr McColley vacated the house. The house has remained vacant. The outgoings and maintenance costs he claimed were:

Municipal rates	$4,116.00
Water rates (South East Water)	1,462.10
Insurance	853.80
Gas service charges	348.55
Changing locks	220.00
Water leak detection	411.05
Water leak repair	600.00
	$8,011.50

Mr Goldberg did not dispute the figures or Mr Mathers' entitlement to an order for Mr McColley to pay him $4,005.75 which is one-half of those outgoings and maintenance costs. The Act empowers me to make such an order[6] whether or not there is an order for sale or any other order.

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[4] *Delaforce v Simpson-Cook* (2010) 78 NSW LR 483 at [33].
[5] Ibid, at [31].
[6] S 233(1), (2).

14. Mr Mathers also sought an order for payment to him of legal costs, a filing fee and a hearing fee. I refuse that application. There is no reason to depart from the general rule that parties to a Tribunal order bear their own costs[7], particularly as Mr Mathers has failed in his primary application for an order for transfer.

15. There have been two proceedings now where neither of the co-owners has obtained what he sought, or primarily sought. The present state of affairs helps neither of them. Leaving the house vacant puts its value at risk. An obvious solution would be an agreement to sell the land and to divide the proceeds of sale in proportions which should favour Mr Mathers but not exclude Mr McColley.

16. Nevertheless, all I can order and do order is that Mr McColley pay Mr Mathers $4,005.75 and that otherwise the proceeding is dismissed.

A Vassie
Senior Member

21 August 2019

[7] *Victorian Civil and Administrative Tribunal Act 1998*, s 109(1).