

Family

Is sale of property in family law dispute 'necessary' or 'expedient'?

By **Kendelle Pollitt**

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(August 4, 2021, 11:49 AM EDT) -- The family home is often a point of heated contention between divorcing spouses. Often, the home is the couple's most valuable asset, or at least one of the most valuable. Further, family homes often carry with them sentimental value, family memories, as well provide an anchor of familiarity and comfort during the otherwise unfamiliar and turbulent time of separation.

All these factors have the potential to inflame conflict when couples need to decide when and if to sell the family home, or whether one spouse will remain in the family home and buy out the other's interest.

The B.C. Court of Appeal recently addressed the issue of a court-ordered sale of a family home in the family law context in *Dosanjh v. Lalli* 2021 BCCA 204 (*Dosanjh v. Lalli*). In particular, the Court of Appeal examined

Rule 15-8 of the B.C. *Supreme Court Family Rules* (SCFR).

Rule 15-8 of the B.C. SCFR provides as follows:

Court may order sale

(1) If in a family law case it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.

Conduct of sale

(2) If an order is made directing property to be sold, the court may permit any person having the conduct of the sale to sell the property in the manner the person considers appropriate or as the court directs.

Directions for sale

- (3) The court may give directions for the purpose of effecting a sale, including directions
- a) appointing the person who is to have conduct of the sale,
 - b) fixing the manner of sale, whether by contract conditional on the approval of the court, private negotiation, public auction, sheriff's sale, tender or some other manner,
 - c) fixing a reserve or minimum price,
 - d) defining the rights of a person to bid, make offers or meet bids,
 - e) requiring payment of the purchase price into court or to trustees or to other persons,
 - f) settling the particulars or conditions of sale,
 - g) obtaining evidence of the value of the property,
 - h) fixing the remuneration to be paid to the person having conduct of the sale and any commission, costs or expenses resulting from the sale,
 - i) that any conveyance or other document necessary to complete the sale be

executed on behalf of any person by a person designated by the court, and j) authorizing a person to enter on any land or building.

Applications for directions

(4) A person having conduct of a sale may apply to the court for further directions.

Certificate of sale

(5) The result of a sale by order of the court must be certified in Form F70 by the person having conduct of the sale and that certificate must be filed promptly after completion of the sale.

Vesting order

(6) The person having conduct of the sale may apply to the court for a vesting order in favour of a purchaser.

One key takeaway from the Court of Appeal in *Dosanjh v. Lalli* is that Rule 15-8 of the SCFR governs not only the initial order for sale of a property, but also the subsequent court order approving (or disallowing) the sale. On an application for approval of the sale of a property, the court must look not only at the terms of the original order providing for the sale, but also consider Rule 15-8 and particularly whether the proposed sale is "necessary or expedient."

As noted above, in determining whether a property ought to be ordered for sale, the court must determine whether the sale is necessary or expedient. In the family law context, the court will exercise its discretion and consider various relevant factors such as the needs of children, the availability of alternative accommodation and external economic factors.

If *expediency* as opposed to *necessity* is the basis upon which a court-ordered sale is sought, the "sale of property must be advantageous to both parties ..." In stating this legal principle, the court cited various authorities spanning back to the Court of Appeal case of *Reilly v. Reilly* 1992 B.C.J. No. 2561.

In addressing whether a proposed sale ought to be approved, the Court of Appeal stated at paragraph 34 of *Dosanjh v. Lalli*:

The relevant circumstances on an approval application will include the terms of the initial order for sale and the manner in which the sale process was conducted, which may well inform the court's assessment of whether a particular proposed sale is provident. In other words, where an order for sale made under Rule 15-8 includes a term that any sale is subject to court approval, the "necessary or expedient" criterion applies to both the initial order for sale and any subsequent order approving a proposed sale.

At para. 35, the court continued: "When deciding whether to approve a proposed sale of property, in the absence of exceptional circumstances, the court should ensure that the property has been exposed to the market." In quoting Justice Mary Southin in *Fright v. Fright* [1996] B.C.J. No. 661, the court asserted that, "[o]nly then can there be any confidence that a proposed sale is prudent ..." Further, any cases where market exposure is unnecessary for a proposed sale to be "demonstrably provident," such a situation would be exceptional in nature.

In the case at hand, the husband obtained an order for the sale of the family home, in which the wife and the couple's three children continued to reside. Generally, the terms of the order for sale provided for the husband to have sole conduct of sale, for the parties to each have their interests represented by a realtor by way of a co-listing, and for the sale to be approved by court order.

At the time of the order, an appraisal had been completed valuing the home, though the wife argued that the value set out therein was unreliable. In setting the appraisal value as the default listing price of the home in the event the parties could not agree, the court specifically contemplated that market forces, as determined by offers made by potential buyers, would address the wife's concern about the default listing price.

Notwithstanding the requirement for a co-listing, the husband's realtor listed the family home for sale unilaterally one week after the court order for sale was made. Six days after that, the husband accepted an offer to purchase from his parents at the default listing price, which was the only offer made.

The terms of the listing agreement included terms that, according to the wife, were overly restrictive, designed to limit marketability and therefore unfairly advantaged the husband's parents as potential buyers. For example, the listing agreement included a requirement that all offers include a letter of pre-approval or proof of funds and a 10 per cent non-refundable deposit to be paid within 24 hours of acceptance of the offer in the form of a bank draft, among other terms.

The evidence also showed that the husband had told the children that he would be moving back into the family home soon.

The husband's application to approve the sale was granted at a subsequent court hearing, finding that there had not been, "any substantive non-compliance with the order [for sale]." The order approving the sale was overturned on appeal as the court failed to consider the requirements of Rule 15-8 in addition to the terms of the original order for sale.

In this case, the Court of Appeal, in a concise yet thorough manner, discussed the threshold test of *necessity and expediency*, both with respect to the terms of the original order for sale, and any subsequent approval of sale. The Court of Appeal confirmed that *expediency* as contemplated by Rule 15-8 of the SCFR requires that a sale be advantageous to *both* spouses.

A sale of property, by its very nature, is final in result, regardless of whether the application was brought on an interim basis. Accordingly, care must be taken to ensure that one party in a family law dispute is not unfairly prejudiced to the advantage of the other, or even that costs/benefits to one party are neutral while the other benefits.

Many advantages may come from the sale of a property prior to a final resolution of all matters in a family law action, including the potential promotion of settlement and the parties' access to capital, to name a couple. However, in the case at hand, without adequate exposure to the market, the Court of Appeal found that court could not be confident that the husband was not being unfairly advantaged over the wife, particularly given that his parents were buying the home and his comments to the children that he was moving back into the family home.

This judgment serves as a good reminder that even if one party is granted sole conduct of sale of a property, they are not granted free rein to market, negotiate and sell the property as they wish. They must take steps to ensure that the sale is provident and does not benefit one's needs and wishes to the exclusion of the other spouse.

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