

KEEPING CURRENT

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Partition Act application denied due to oppression (*Stothers v. Kazeks*)

By James Cook and Christina Tassopoulos

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James Cook
Partner
416.865.6628
jcook@grllp.com

Christina Tassopoulos
Articling Student
416.865.6708
ctassopoulos@grllp.com

When properties are owned by two or more persons, situations may arise when one of the owners wishes to sell the property contrary to the wishes of the other. The Ontario [Partition Act](#) provides a way for joint tenants, tenants in common, or other parties with an interest in any land to request an order from the court for the partition or sale of the land. In the majority of [Partition Act](#) cases, the courts are inclined to grant the order that the land be partitioned or sold since it would be unfeasible for the co-owners to be required to continue to hold the property in the face of an ongoing disagreement. Conversely, the decision of the Ontario Superior Court of Justice in [Stothers v. Kazeks, 2023 ONSC 5021 \(CanLII\)](#) is an example of a rare situation in which a [Partition Act](#) application was refused.

In [Stothers](#), the applicant (Stothers), and the respondent (Kazeks), lived together, in a common law relationship, in a home at 150 King Street in Toronto from 1998 to 2005. The property originally belonged to Kazek's mother, who then transferred title to herself and her son

as joint tenants. Stothers moved in with Kazeks and his mother.

In December 2003, Kazeks' mother moved out of the home, and transferred her interest to her son. Kazeks then transferred his sole interest to himself and Ms. Stothers as tenants in common. However, their amicable co-ownership was short-lived, as their relationship ended in April 2005, and Stothers moved out of the house.

For the next 18 years, Kazeks continued to live in the home and paid all the expenses associated with the house.

In 2023, Stothers brought an application to sell the home because she had learned that she had terminal cancer, with a prognosis of only a few months to live, and wanted to get her affairs in order. By the time of the application, Kazeks was 76 years old and had lived in the property for some 40 years.

There was no doubt that the wording of the [Partition Act](#) provided Stothers, as a tenant in common, with a *prima*

facie right to the partition and sale of the home. Under section 3, any person with an interest in a property may bring an action or make an application for the partition or sale of that property under the directions of the court, “if such sale is considered by the court to be more advantageous to the parties interested.”

Nevertheless, the common law has recognized that courts have the discretion to refuse such relief in narrow circumstances. The onus is on the party resisting the sale to demonstrate why the court should deny the relief that the applicant seeks. In most cases, it is only where the court finds malice, vexatious intent, or oppression that the respondent will have met their burden to show that the application should be refused.

To demonstrate oppression, a respondent must show that they would suffer more than mere inconvenience and adverse financial consequences from the partition or sale. Some examples of oppression include sales that would require the relocation of a person with disabilities or a home business: *e.g. Barker v. Barker*, [2010 ONSC 408 \(CanLII\)](#); *Mitchell v Leach*, [2015 ONSC 6041 \(CanLII\)](#). As part of the analysis in determining whether a partition or sale would be oppressive, the courts use a contextual approach and consider the parties’ relationship, their reasonable expectations regarding the home, the nature of the conduct between them, and the impact of a court-ordered sale.

The application judge first looked to the nature of the relationship between the parties. Kazeks and Stothers were in a personal romantic relationship at the time that title was apportioned between them, not a commercial one. The court noted that many situations end up being litigated because people fail to take a commercial approach to their romantic

relationships, and fail to consider what may happen if the relationship breaks down.

Next, the court considered the reasonable expectations of the parties when creating their respective interests in the property. Stothers was a tenant in common and held a statutory right to compel the sale of the home. However, she had moved out of the home 18 years earlier and had not once paid any of the expenses, or attempted to exercise her right since that time. Kazeks had paid all of the expenses to maintain the property and had not considered that he would suddenly be forced to sell his home many years later.

Furthermore, Kazeks’ evidence was that he had not intended to gift 50% of the home to Stothers and that he was not informed by the law firm that assisted in the transfer of title that the transfer would give her an ownership interest in the property.

There was voluminous evidence to show that the forced sale of the property would cause serious hardship to Kazeks not only financially, but also personally and emotionally. In that regard:

- he had osteoarthritis and had suffered from two heart attacks, an aneurysm, and a hip replacement and it would be difficult to relocate to another home;
- his doctor, dentist, physiotherapist, and veterinarian were all within walking distance; his friends and family who helped care for him were in the neighbourhood
- He used approximately 30% of the home as his workspace for his electrician job and was unsure whether he would be able to continue working somewhere else;



- He did not have a high income and was still working at the age of 76 just to make ends meet (his annual expenses exceeded his earnings by \$18,000 a year); and
- The house had significant sentimental meaning to him.

As for Stothers' circumstances, the application judge concluded that it did not appear that she needed the funds from the sale to provide for her immediate health and comfort.

Of note, Stothers and Kazeks were also involved in a concurrent, ongoing, family law proceeding regarding whether Stothers held her interest in the property in trust for him and for related relief. In cases where a partition application is intertwined with other litigation, the courts generally exercise caution so as not to prejudice the rights asserted in the broader litigation.

In the circumstances, the court concluded that ordering the sale of the home would cause serious hardship amounting to oppression for Kazeks and [dismissed](#) the application.

This decision illustrates the high threshold that must be established to defeat a [Partition Act](#) application. Fortunately for Kazeks, he was able to provide sufficient evidence as to his personal circumstances to persuade the court that the order sought would be oppressive.

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