

Stuartburn (Municipality) v Kiansky, 2001

MBQB 94

Wright J.:

[1] This is an application by the Rural Municipality of Stuartburn ("the Municipality") for a declaration that its Reeve, the respondent David Theodore Kiansky ("Kiansky") is disqualified from holding office.

[2] The Municipality alleges Kiansky does not meet the election requirements as set forth in *The Municipal Act*, S.M. 1996, c. 58 - Chap. M225 and *The Local Authorities Election Act*, R.S.M. 1987, c. L180 ("the LAE Act").

[3] *The Municipal Act* establishes that eligibility for election includes the requirement the person must be an elector of the Municipality. If a person ceases to be qualified as an elector, he/she thereupon is disqualified from continuing in office. Once disqualified, the person cannot be re-elected, even though he/she becomes qualified again, until the next general election in the Municipality.

[4] The *LAE Act* governs the eligibility to be an elector. "Elector" is defined as "a person qualified to vote at an election of members of a council". Section 5(1) of the *LAE Act* spells out the qualifications for voting and being named in the list of electors, as follows:

Qualification of electors

5(1) Subject to this Act, the right to have his name placed upon the list of electors of, and to vote at elections in, local authorities belongs to each of the following persons; that is to say, a person who

- (a) is a Canadian citizen of the full age of 18 years, or who will be 18 years of age at the date of the election, and is not disqualified under this Act, or otherwise by law prohibited, from voting; and
- (b) is an actual resident in the authority and will have been resident therein for a period of six months at the date of the election;

and, in the case of elections in a municipality, the right of being named in the list of electors and of voting also belongs to any person who is qualified as provided in clause (a) and who, whether resident in the authority or not, is, in his own right, at the date of the election,

- (c) an owner of land which is assessed in the latest revised realty assessment roll; or
- (d) a tenant or occupier of land whose name is entered on the latest revised realty assessment roll as the owner of a right, interest or estate in the land.

[5] Kiansky was first elected Reeve in October 1995. He was re-elected in 1998. Until July 31, 2000 it is not disputed that he met the necessary requirements for office, including both ownership of land and residence in the Municipality. However, on that date he moved out of the Municipality and sold his home and related land. The Municipality says that when this occurred Kiansky no longer met either the residency or property qualifications for Reeve and became disqualified.

[6] Kiansky does not deny that he sold his home and related land and moved out of the Municipality as the Municipality says, but he contests the claim he was then disqualified from being an elector. He relies on the fact that when he moved from the Municipality he was the holder of a remainder interest in other real property in the Municipality expectant on the death of his grandmother, Mary Kiansky, who held the life interest. Kiansky argues that pursuant to s. 5(1) he retained “the right of being named in the list of electors and of voting” because he, “whether resident in the authority or not”, was “in his own right, at the date of the election, . . . (c) an owner of land which is assessed in the latest revised realty assessment roll”.

[7] The subject land is a quarter section of real property in the Municipality. At all material times Kiansky was recorded in the land titles office in relation to this land as “registered owner of an estate in remainder expectant upon the decease of Mary Kiansky of Vita, Manitoba . . . “. Mary Kiansky herself was recorded as “registered owner of a life estate during the term of her natural life . . . “.

[8] The land is and was assessed in the latest revised realty assessment roll.

[9] The first issue then on the application is whether Kiansky’s remainderman interest is sufficient to classify him as “an owner of land” despite the sale of his residence property and move from the Municipality. The exact phraseology in s. 5(1) is “is, in his own right . . . an owner of land . . . “. These words have to be considered in the context of the meaning of “owner” and the nature of the remainder interest.

[10] “Owner” is defined in the *LAE Act* to mean (in part) “subject as herein otherwise provided, a person who is an owner of a freehold estate in land in a local authority . . . “ (which includes a municipality).

[11] For the purposes of a municipality only and relative to eligibility to be on the Municipal electors list, the meaning of “owner” is expanded by s. 5(2)(a) of the *LAE Act* to include a person who “has acquired, by purchase under agreement for sale or otherwise, an estate or interest in land . . . “.

[12] In my opinion, this expanded definition has no application to the circumstances now before me. I interpret the wording to intend that the acquisition mentioned must have arisen by a purchase by some means. If acquisition other than by purchase was the purpose of s. 5(2)(a), there would be no need for insertion of the words “by purchase under agreement for sale or otherwise”. The provision probably should be read in the context of s. 5(6) which deals with

the entitlement of a purchaser of an owner's interest in land to be placed on the list of electors. In the present case it is not suggested Kiansky obtained his remainder interest by purchase. Rather, the inference more reasonably can be made that this benefit was obtained by inheritance or by gift, *inter vivos*, but not by purchase.

[13] If the expanded definition of ownership does not apply, then we are left with the base or primary definition which, as noted, describes an "owner" as a person who "is an owner of a freehold estate in land" in the Municipality.

[14] I take this definition, in the context of the wording of s. 5(1), to mean the person must be the *present* owner of a freehold estate in land. The ownership must be of a currently existing freehold estate. In the case of Kiansky this means that his remainder interest must be capable of identification as a freehold estate owned by him at the same time as his grandmother was exercising her rights in respect of the life estate.

[15] What then is a freehold estate?

[16] Freehold is a measure of the nature and degree of a person's interest in land. It includes a life interest and a fee simple. Both are for an indeterminate period. The life interest will expire on the death of the owner (or tenant as it is often termed). The fee simple may be inherited.

[17] At common law, both the life interest and the fee simple could be alienated but any disposition was subject to the limitations of the freehold. The fee simple interest is the broadest freehold.

[18] The word "estate", when used in conjunction with "freehold" can be thought of as synonymous with the words "right", "title" and "interest" [*Black's Law Dictionary* (6th ed.), p. 547]. Thus, freehold estate can be interpreted to mean a freehold right, title, or interest in land.

[19] The nature of Kiansky's remainder interest is of a right to a freehold interest in fee simple. This can also be described as a right to a freehold *estate* in fee simple.

[20] Most importantly, the remainder interest is a *present* right. It co-exists with the life estate even though enjoyment and possession of the real property is postponed until termination of the life interest. This arises from the common law requirement that there could be no abeyance of seisin; that is, that there could be no abeyance of the ownership or transfer of the ownership of the freehold interest if the transfer was to be effective. Therefore, an instant vesting took place. Thus, as in the present circumstances, a grant of a life estate to one person with the remainder in fee simple to another, was and remains a grant to each effective as of the time of the grant. Seisin did not require *actual* possession, although it did require possession in the sense of title or ownership.

[21] Support for these legal interpretations can be found in *Anger and Honsberger Real Property*, Vol. 1 (2nd ed., 1985), and in particular from the following

passages from that text:

The doctrine of estates is one of the most remarkable and enduring in the history of English land law. The term “estate” is probably derived from status, for in a landholding society the relationship one had to one’s land no doubt defined one’s standing in the community. Later, however, the term “estate” described the quantity of a person’s interest in land. The concept of the estate is unique to English law. It is an abstraction, interposed between the tenant and the land so that a person does not own the land itself absolutely or allodially as in the civil law. Indeed, he cannot own the land for the Crown owns it. Instead, he owns an estate or interest in the land. Furthermore, it is the concept of seisin which links the abstract concept of the estate with the physical thing, the land. The person who has the seisin, or who is entitled to it in the future, has an estate in the land. Moreover, the idea of estates, as distinct from ownership of land, makes possible the fragmentation of ownership among different persons in succession. Thus, for example, land may be granted “to A for life, then to B in tail, remainder to C in fee simple”. In this example all three persons have estates in the land and they exist in the present, that is, they are capable of present ownership. The latter is a precondition of an estate. Even though the seisin rests in A only for the time being, the ownership of B and C also exists in the present. [p. 26-27]

. . . An estate is an abstract concept distinct from the land itself. In essence, the word describes the rights a person may have in land for a period of time. The quantum of the estate thus varies with time. The largest estate possible is the *fee simple*. In theory it may last forever, being passed on by transfer or succession. It ends only when the owner of it dies intestate without an heir. In that event it passes to the Crown. It may be carved up into lesser estates, namely, the *fee tail*, which lasts only so long as the direct descendants of the original tenant in tail survive, and the *life estate* which lasts for the duration of the life specified. These three estates are known as estate of *freehold* and they are thus distinguishable from *leaseholds*. . . . [p. 11]

These several estates may exist in *possession*, in *remainder*, or in *reversion*. The first of these terms is self-explanatory. When X is entitled to an immediate life estate he is entitled to enjoy it in possession. An estate in remainder is created when a person is given an estate but he is not entitled to possession until the expiration of a prior estate created by the same instrument. An estate in reversion is the estate retained by the grantor when he conveys away a lesser estate. Thus, in a conveyance by G to “A for life and then to B in fee tail”, A has a life estate in possession, B has an estate in fee

tail in remainder and G retains an estate in fee simple in reversion. Moreover, these estates are said to be *vested* in that they are presently existing, even though the owners are not all immediately entitled to possession. Vested thus normally means “vested in interest” and not “vested in possession”. . . . [pp. 11-12]

In other words, a remainder limited to take effect automatically upon the expiration of the prior particular estate is a vested remainder because a present estate is conferred although it is not to be enjoyed until that future time. . . . [p. 395]

A future interest is an interest in property in which the right to possession or enjoyment of the property is postponed to a future time. Nevertheless, it is a presently existing interest in the property and it is thus part of the total ownership of the property. . . . [p. 335]

. . . at common law, livery of seisin was necessary to grant any freehold estate and the freehold could never be in abeyance, for there had to be someone at all times to perform the feudal services and against whom actions could be brought. . . . [p. 392]

[22] Counsel for the Municipality referred to a tax publication, *Goodman on Estate Planning* (Vol. V, No. 3, 1996), and on a ruling of the Canada Income Tax Directorate, both of which contain statements that appear to accept the proposition a legal remainder interest in real property is *not* a freehold interest. It will be evident from my above reasons that I am not in accord with any such opinions. I do note, for what it is worth, that Dr. Goodman, in his commentary, does support my conclusion that a remainder interest in real property reflects an ownership interest, when he states:

. . . The owner of a remainder interest in real property, whose right of possession is deferred until the termination of the preceding life interest, is just as much an owner as someone who has a freehold interest. . . . [p. 328]

[23] For all the reasons above expressed, the conclusion I have reached, therefore, is that Kiansky’s remainder interest allows him to be classified as a present owner of a freehold estate in the Municipality. This meets the requirement of s. 5(1) of the *L.A.E. Act*.

[. . .]

[24] In the result then, for the reasons stated, I hold that Kiansky did not become disqualified as the Municipality has alleged, and at all material times was entitled to be an elector and hold office as Reeve.

[25] The application, therefore, is dismissed with costs in favour of Kiansky. If the amount of the costs cannot be agreed, counsel may speak to me in my chambers.

Application dismissed.