

CITATION: Nakeff v. Nakeff, 2026 ONSC 2077
COURT FILE NO.: CV-22-2844
DATE: 20260408

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: RONALD NAKEFF, Applicant
AND:
TERRANCE NAKEFF, Respondent
BEFORE: The Hon. Justice S.E. Fraser
COUNSEL: Eric Turkienicz, Counsel for the Applicant
Mick Hassell, Counsel for the Respondent
HEARD: January 30, 2026

ENDORSEMENT

I. Nature of the Motion

- [1] This is a motion to vary an order and for directions. The parties are brothers who co-owned real property. As both parties share the same last name, I will refer to them by their first names for clarity. I mean no disrespect by it.
- [2] On March 16, 2023, Dawe J., as he then was, ordered the sale of the property they owned as joint tenants (“the Order”). The Order was made over the objection of Terrance Nakeff.
- [3] Justice Dawe also ordered a reference before an Associate Justice to determine how to distribute the proceeds of the sale and other matters, specifically, in paragraph 2(e) of the Order, “to the extent the parties cannot otherwise agree, determine the distribution of the net proceeds of sale”.
- [4] The matter did not come before an Associate Justice. The parties appeared at their appointment on the reference. For reasons unclear to the parties and to the Court, the parties wound up before an Assessment Officer.
- [5] They initially agreed to have the Assessment Officer deal with matter and set a timetable. However, Terrance was not satisfied that the Assessment Officer had jurisdiction.
- [6] The parties now appear before me for directions.
- [7] Ronald seeks an order that I vary Justice Dawe’s Order *nunc pro tunc* to replace “Associate Justice” with “Assessment Officer” so that the matter can proceed before the Assessment

Officer who now has familiarity with the matter. The parties have exchanged materials and set a timetable.

- [8] Terrance seeks directions, an order for a mini-trial, and other relief. He wants the adjudicator to assess the value of his contribution to building the house on the property. He asserts that the matter be dealt with by an Associate Justice or a judge so that his claims for equitable relief can be addressed.
- [9] Terrance seeks a declaration that he is entitled to be compensated for the fair value of his work in maintaining the property over the 38-year period the parties owned it. He frames his claim based on restitution, *quantum meruit*, unjust enrichment and/or constructive trust and asks that this be determined on the reference.
- [10] Specifically, Terrance claims one-half of the labour he put in to build the house, one-half of the labour to maintain the property and other expenses for a total of \$152,654.00. He seeks an Order that the proceeds of sale which are presently held in trust with the lawyer who acted on the sale of the property, be placed into an interest-bearing account.
- [11] Ronald argues that Justice Dawe did not intend that the Associate Justice value Terrance's contribution to the property, if any. Ronald states that this was a business venture. He submits that because Terrance has not commenced a claim for equitable relief, it is not properly before the Court. Ronald asserts that this motion is a delay tactic which will only further delay this matter.

II. Issues

- [12] The issues on this motion are:
- a. What is claimed in the Application?
 - b. When can an order be varied under Rule 59.02?
 - c. Does the Assessment Officer have jurisdiction under Rule 54.03(1) of the *Rules of Civil Procedure*?
 - d. Should the Order be varied to permit consideration of Terrance's claims for equitable relief?
 - e. Should I order a mini-trial or convert this Application to an action?

III. Analysis

- [13] I will address these issues in turn.

A. Application

- [14] The Application was commenced under the *Partition Act* to force the sale of the property. The property was sold and the parties could not agree on the distribution of the proceeds of the sale.
- [15] Terrance did not commence any action. He argued on the motion that it would be unfair to sell the property. He wanted to purchase the property based on its appraised value. Justice Dawe found that the law did not favour Terrance's position.
- [16] Justice Dawe held:

I am also satisfied that putting the land up for sale on the open market would not be "oppressive" to Terry. He will be free to bid for Ron's share. It is possible that this will result in his having to pay more for Ron's share than he would have had to pay if they had agreed on a price without putting the property on the open market. It is also possible that Terry will be outbid by a third party.

However, in my view Terry will have no legitimate cause for complaint if either of these possibilities materialize. He has no right to acquire Ron's share of the property at a discount, and cannot claim hardship if he has to pay the price set by the market. He equally cannot claim hardship if he is outbid, particularly since part of the sale price will ultimately flow to him.

An order will go accordingly directing that the property be sold. That leaves the question of how the mechanics of the sale will be determined. I am satisfied that the most expeditious and efficient course will be to direct a reference to an associate judge pursuant to Rule 54 of the Rules of Civil Procedure. Counsel for the applicant shall file an order to that effect for my signature and seek to obtain Terry Nakeff's approval as to its form and content. If there are issues about which the parties are unable to agree, a teleconference call with me may be arranged through my judicial assistant.

- [17] Terrance commenced no proceeding of his own.

B. When can an order be varied under Rule 59.06?

- [18] Rule 59.06(1) and (2) provide:
- (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.
 - (2) A party who seeks to,

- (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
- (b) suspend the operation of an order;
- (c) carry an order into operation; or
- (d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

[19] Ronald relies on Rule 59.06(2)(d).

[20] In *Bowen v. JC Clark Ltd.*, 2023 ONCA 181, the Court of Appeal for Ontario held at para. 10 that:

With respect to rule 59.06(2), the appellants rely on subrule (d), which permits a party to bring a motion in a proceeding to “obtain other relief than that originally awarded” (emphasis added). Rule 59.06 cannot be read as being so broad as to apply to any request by a moving party for a different order than that made by the court. If that were sufficient to invoke rule 59.06(2)(d), finality of judgments would be illusory. The appellants are not seeking relief other than that originally awarded. The nature of the relief they seek is the same as what the court ordered – costs. What the appellants challenge is to whom the costs are payable. This is not relief other than that originally awarded. Rather, the appellants are seeking relief that this court considered and declined to grant: *Render*, at para. 8.

[21] In my view, the relief that Ronald seeks fits within the parameters of the rule.

C. Jurisdiction of Assessment Officer?

[22] Ronald asserts that under Rule 54.03(1), I may direct that this matter be heard by an assessment officer. He argues that this is the most just and expeditious result.

[23] Terrance asserts that the matter properly belongs before an Associate Justice or a Judge.

[24] Rule 54.03(1) provides that a reference may be directed to the referring judge, to another judge with that judge’s consent, to a registrar or other officer of the court or to a person agreed on by the parties.

[25] I can find no basis for this matter to be before an Assessment Officer. Ronald submits that they fall within the definition of “officer of the court” in Rule 54.03. Assessment officers deal with the assessment of costs. I have been provided with no authority to support that they could conduct this type of reference.

- [26] Further, I note that assessment officers are creatures of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (“*CJA*”). Section 90(3) of the *CJA* provides that every assessment officer has the jurisdiction to assess costs in a proceeding. The *CJA* grants no other powers to an assessment officer, and I find that the jurisdiction of assessment officers is limited to assessing costs in a proceeding in any court.
- [27] I therefore decline to vary the Order to provide that the matter be referred to an assessment officer.

D. Should the Order be varied to permit consideration of Terrance’s Claims?

- [28] Terrance submits that his claims of unjust enrichment and constructive trust must be considered on their merits. He claims that he did virtually all the work to build and maintain the house.
- [29] In support, he relies on *Billimoria v. Mistry*, 2021 ONSC 1939, where the trial judge ordered a property sold under the *Partition Act* and imposed a constructive trust. However, in that case, there was a claim for a constructive trust, and the order was made following a trial.
- [30] The pleading underlying the motion is Ronald’s Notice of Application. I would err in law in granting relief that was not pleaded and where the record was insufficient. See: *Foodies Curry & Shawarma Inc. v. Royal Paan Leasing Ltd.*, 2026 ONCA 26, at paras. 2 and 11.
- [31] I therefore decline to make the orders sought by Terrance. In my view, Justice Dawe did not intend to have the issues of Terrance’s alleged contributions to the property decided by the Associate Justice. They were not pled, and it does not appear that they were argued.

E. Should a mini-trial be ordered or the Application be converted to an action?

- [32] As I have determined that Terrance’s claims are not properly before the Court, I decline to order a mini-trial or convert this Application to an action.

IV. Disposition

- [33] This matter was intended to be heard by an Associate Justice. There is no need for the parties to start over again and incur additional fees. The Notice of Appointment called for an Associate Justice and this matter shall be scheduled to be heard before an Associate Justice.
- [34] I therefore make the following orders:
- a. the reference proceed in accordance with paragraph 2 of Justice Dawe’s Order and that the reference be expedited before an Associate Justice;

- b. the materials filed on the reference before Assessment Officer Sellers be used on the reference before the Associate Justice, subject to any further direction of the Associate Justice;
- c. the Trial Coordinator's office shall ensure that this matter is placed before an Associate Justice;
- d. the parties shall arrange to have a case conference with an Associate Justice to determine whether any other necessary steps to get this matter to proceed to a hearing;
- e. if the parties are unable to resolve the division the proceeds of sale as between themselves within 30 days, the proceeds of sale presently standing in trust with Mark Altwerger, shall be paid to the Accountant of the Ontario Superior Court of Justice at Newmarket, to be held to the credit of this proceeding pending further order of this Court or the joint direction of the parties; and
- f. the cross-motion is dismissed.

[35] I kindly ask the parties to attempt to resolve the issue of costs between them. Success has been divided. If they are unable to do so, I shall decide the issue of costs based on written submissions. Ronald shall have until April 19, 2026 to serve and file his costs submissions of not more than two double-spaced pages exclusive of supporting documentation. Terrance shall have until May 5, 2026 to serve and file his submissions of similar length.

[36] I thank the counsel for their assistance with this matter.

Justice S.E. Fraser

Released: April 8, 2026