

Condominium owner ordered to reconvey title to former brother-in-law (Burbidge v. Casullo)

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In Ontario, the *Statute of Frauds* generally requires that agreements for the transfer or ownership of an interest in land must be made in writing. This rule poses issues for family members and close friends who sometimes hold property interests for each other without the formality of written agreements. While such arrangements are understandably based on the trust that such persons have for each other, the lack of written documentation may lead to litigation over whether a binding agreement was ever created.

In *Burbidge v. Casullo*, 2023 ONSC 5808 (CanLII), the Ontario Superior Court of Justice addressed a dispute between two former brothers-in-law, Randy and Pat, over an oral agreement to title to a condominium in Toronto.

The condo was purchased by Randy for \$165,000 in 2001. The money for the purchase came from Pat, and Randy provided a mortgage to Pat and Pat's wife Denise for \$145,000. Pat also obtained a promissory note from Randy for \$20,000, which Denise knew nothing about. Randy lived in the condo.

In 2006, title to the condo was transferred from Randy to Pat and Denise. The registered transfer stated that the consideration was \$175,000, but no money changed hands. At the time, Randy was scheduled to be incarcerated for 26 months following an impaired driving conviction.

Randy was released from prison in 2009 and moved back into the condo. He made payments to Pat and Denise thereafter until 2019, at which point he requested that title be transferred back to his name. Litigation ensued when Pat and Denise refused to do so.

Randy claimed that Pat and Denise held title to the condo for him under an oral trust agreement that they had made before Randy was scheduled to spend his time in prison. In response, Pat and Denise took the position that the transfer of the condo into their names in 2006 was a foreclosure due to Randy's default under their mortgage. They claimed that he lived in the condo thereafter as their tenant rather than because he held a beneficial interest.

At trial, the court held that Randy's claim for an oral trust agreement failed due to [section 9](#) of Ontario's *Statute of Frauds*, which states that "all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by a writing signed by the party who is by law enabled to declare such trust, or by his or her last will in writing, or else they are void and of no effect."

Simply put, this meant that Randy's claim for an "oral" trust agreement failed because the agreement was not in writing. The trial judge was otherwise satisfied based on the evidence that there was an oral agreement between the parties under which Pat and Denise had agreed to hold title to the condominium in trust for Randy while he was incarcerated and to protect him from creditors.

Under the oral agreement, Randy received the benefit of Pat and Denise's ongoing payment of the condo's expenses and Pat and Denise obtained the benefit of having better security if Randy did not repay the loan, as well as not having to take formal and expensive foreclosure proceedings if he did not. However, Randy could not rely on the oral agreement to compel Pat and Denise to transfer title back into his name.

Fortunately for Randy, [section 10](#) of the *Statute of Frauds* provides an exception for trusts that arise or result by "implication or construction of law". Accordingly, Randy claimed that Pat and Denise held title to the condominium for him by way of "resulting trust" on the basis that he transferred title to them in 2006 for no

money or other consideration.

In most cases, when property is conveyed without consideration, there is a rebuttable presumption that the person to whom the property is transferred holds the property in trust for the transferor by way of resulting trust: *Kerr v. Baranow*, 2011 SCC 10, at paragraph 19.

In *Goodfriend v. Goodfriend*, 1971 CanLII 28 (SCC), the Supreme Court of Canada noted that it was “trite law” that where a person transfers his property into another’s name gratuitously, a resulting trust in favour of the grantor is created and the grantee must prove that what was intended was a gift.

The onus was therefore upon Pat and Denise to show that they were not holding the condominium in trust for Randy and that he was their tenant.

There was no written rental agreement or any evidence of any written communications between the parties advising Randy of any matter related to his “renting” the condominium. Further, the manner in which Randy made payments to Pat and Denise was not in the usual form of monthly rental payments. The overall amount owing fluctuated each year (both up and down), which supported Randy’s position that he was simply making large payments towards his debt whenever he could. Neither Pat nor Denise had claimed any rental income on their taxes or deducted any rental expenses.

The trial judge therefore rejected the argument that Randy was a tenant from 2009 onwards under any rental agreement.

The trial judge also rejected the argument that the 2006 transfer was a foreclosure. It made no sense that Randy would have simply agreed to give up title to the condominium and as a matter of law there was no consideration for the transfer of the beneficial interest since there was no forgiveness of Randy’s debt by Pat and Denise.

Lastly, the trial judge found that Pat and Denise would be unjustly enriched if they were allowed to retain title to the condo as “a matter of public policy and morality.” Pat and Denise had received the benefit of ongoing payments under their agreement with Randy and the current value of the condo was \$560,000. If Pat and Denise were permitted to retain title, they would have an asset valued at \$560,000 plus the benefit of payments made by Randy in the total amount of \$275,861.36 after having lent him just \$165,000.

In the result, the court declared that Pat and Denise held title to the condo in trust for Randy by way of resulting trust or by way of constructive trust imposed as a remedy for unjust enrichment. The court directed that the condo be transferred into Randy’s name and ordered a reference to determine if any amounts remained owing by Randy in respect of the loan and carrying costs.

The case demonstrates that while legal doctrines such as resulting or constructive trusts may protect unregistered interests in land, confirming the ownership in writing would always be prudent in order to avoid future disputes and the costly litigation they entail. A PDF version is available for download [here](#).

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