

Family Cottage Squabbles: Court orders family members to stop interfering with each other's enjoyment of cottage property

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13 April 2021

Cottage properties may be used by extended families over the years without regard to who has legal title or whether there are legally binding rules for ownership and use. When senior members of family age, disputes may arise between the younger generations over the successional ownership and ongoing use of the property.

In *Holt v. Greig*, 2021 ONSC 2683 (CanLII), Justice J. Di Luca addressed a dispute between two siblings and their extended families over a cottage property owned by their elderly aunt who lacked capacity to act as the family adjudicator. In most of these instances, the court noted, responsible adults will be able to settle their differences and move on. This was not such a case.

The aunt Dolores – who never married and had no children – owned the property for over 60 years. Her niece and nephew, Darlene and Brian, grew up going to the property. After they married and started their own families, they continued to use the cottages on the land.

There were two separate cottage dwellings on the property, one close to the lake and a larger one closer to the road. Brian and his family usually used the cottage closer to the lake while Darlene's family used the roadside cottage. Over the years, the families had to cooperate in order to access the lake, parking and recreational use of the land between the dwellings. Both families contributed to maintenance costs, insurance, and taxes.

In 2007, Dolores began to plan her estate and she transferred the cottage property into Brian's name for stated consideration of \$160,000, in the form of a debt forgiveness agreement between Dolores (as creditor) and Brian (as debtor). Brian also entered into a trust agreement requiring him to hold the property in trust for Dolores. In 2008, Brian transferred the cottage property into a tenancy in common with Darlene.

Around the same time, the property had fallen into disrepair and neighbours complained to municipal authorities. Over the next few years, the family members took steps to extensively renovate the property. As often happens between family members there was no clear arrangement as to their proportionate contributions in funds or labour.

In 2015, the Public Guardian and Trustee became involved following concerns that were raised about Brian's handling of Dolores's affairs. The 2008 transfer from Brian into tenancy in common with Darlene was set aside as it violated the 2007 trust agreement with Dolores, as was a subsequent encumbrance placed on the property by Brian. Brian resumed sole ownership of the property in trust for Dolores.

By 2020, the situation had deteriorated to the point where Brian decided that he no longer wished to share the property with his sister and her family. Brian alleged that Darlene misused the property and had conflicts with the neighbours. In March 2021, Brian changed the locks and installed security cameras. He told Darlene that she was no longer welcome.

Litigation quickly followed. Darlene claimed an interest in the property on the basis of constructive and/or resulting trust, and sought a certificate of pending litigation to prevent Brian's sale of the land. Darlene also sought an injunction allowing her to continue to use the property pending a determination of their dispute.

In addition to the issue of use and enjoyment of a summer cottage, the dispute involved a valuable asset. While in 2008, the property had been valued at approximately \$196,000, by 2021, it had increased in value to approximately \$1 million.

A certificate of pending litigation (CPL) provides notice of a claim to an interest in land pending final determination of a dispute. A party seeking a CPL must establish that they have an interest in the property at issue, based on well-established factors, including whether the land is unique and whether an alternative claim for damages would provide a satisfactory remedy: para. 22; *Perruzza v. Spatone*, 2010 ONSC 841 at para. 20.

There was no question that the constructive and/or resulting trust sought by Darlene over the cottage property was sufficient to establish that she claimed an "interest in land" for the purposes of a CPL. Brian argued, however, that his sister's claim could be remedied by a damages award as the land was not particularly unique.

The Court was not persuaded by this argument. Justice Di Luca noted that Darlene was seeking to continue using a cottage property that had been in the family for more than two generations. She claimed to have acquired a proprietary interest in the property through constructive and/or resulting trust as a result of her contributions to the building and maintenance over the years. Further, even though her title as tenant in common was invalidated, it acknowledged her contributions and the validity of her claims. Damages would be insufficient in the circumstances and there was no pressing reason why the property needed to be dealt with before the dispute was determined.

As for injunctive relief, Darlene had to establish that she would establish "irreparable harm" if the injunction were not granted. Justice Di Luca followed an earlier [decision](#) involving a cottage property noting that "irreparable" refers to the nature of the harm suffered, rather than its magnitude: *Galati v. The Corporation of the Township of Tiny*, 2020 ONSC 6442 at para. 33. Being suddenly locked out of a cottage that had been used and maintained for years was sufficient to establish irreparable harm in the circumstances.

Brian attempted to argue that he was fulfilling his obligations as trustee of the property and that allowing Darlene to use the cottage would interfere with those obligations and his potential need to encumber and/or sell the property in order to pay for the cost of caring for Dolores. There was insufficient evidence to support his position, however, and to Justice Di Luca it appeared more likely that Brian had simply decided to use the entire property for himself.

In ordering the families to permit each other access the cottages, the lake, and the rest of the property, Justice Di Luca stated that the families were expected to cooperate fully and honestly, to "act maturely and responsibly," and were not to engage in behaviour which undermined each other's rights to the use and enjoyment of the property. Justice Di Luca summarized his decision as follows:

The summer months are as short as they are precious. In a global pandemic, this is even more the case. I urge the parties to use this time wisely, enjoy the cottage property much like they have for over 60 years, and resolve their differences.

The balance of the dispute between Brian and Darlene was left to be adjudicated in due course.

Despite Justice Di Luca's urging, one expects that the families will feel a noticeable chill at the cottage rather than the traditional comfort of summer warmth as a result of the need for judicial intervention. While family squabbles are foreseeable when a senior family member is no longer able to oversee the use of the property by the younger generation, presumably Dolores never anticipated that her nephew would change the locks and try to bar his sister from the property. The decision represents the court's effort to impose a reasonable balance of the *status quo* until such time as the family's dispute is resolved. A PDF version is available to download [here](#).

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