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Stepfather's mortgage to stepdaughter determined to be a gift rather than a loan

By James R.G. Cook

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Family members who provide financial assistance to each other for the purpose of purchasing real estate may intend that such funds be a gift without any expectation of repayment. If the funds are not intended to be a gift but a loan, then they should consider taking steps to ensure that their intentions are accurately documented. While there is a legal presumption in Ontario law that a parent is presumed *not* to have intended a gift when advancing funds to adult children, this can be disproven.

In *Pavlovski v. Skrak*, [2021 ONSC 4631 \(CanLII\)](#), the applicant homeowners sought to discharge a mortgage that was registered on their property by a former family member, and to declare that no funds were owing to him on the grounds that any funds advanced to the applicants by the respondent were actually a gift.

The applicants were a husband (FP) and wife (TP). TP was the stepdaughter of the respondent, who was married to TP's mother. TP's mother and stepfather had been estranged from one another since October 2019. Prior to then,

the stepfather had registered a second mortgage in the amount of \$160,000 on the applicants' house in Brampton.

In February 2021, the applicants decided that they wished to sell their Brampton property and sought a discharge of the stepfather's second mortgage registered thereon. The stepfather refused. Instead, he demanded payment of the full amount of the mortgage and served a notice of sale for the amounts due under the mortgage.

The stepfather took the position that he provided an interest-free loan of \$160,000 to his stepdaughter during the years 2010 and 2011 when she was single and had purchased a townhouse in Brampton. That loan, he said, was secured by a charge on the townhouse in October 2011.

The charge on the townhouse was discharged in 2017 when the stepdaughter sold the townhouse, but a virtually identical charge was placed on the applicants' Brampton house which they purchased together in 2017.

The stepdaughter acknowledged that her mother and stepfather had provided her some money (but not \$160,000) during 2010 and 2011 to assist her with buying the townhouse. However, she claimed that the funds were a gift. Further, she claimed that the mortgage on the townhouse was registered at her stepfather's suggestion in order to protect the gift in case she married and her marriage broke down.

As TP's mother went on title to the townhouse to assist in qualifying for a mortgage, the mother was not also registered as a mortgagee. The stepfather's mortgage was payable "on demand" and there was no interest. No agreements were signed, nor any other document prepared which confirmed whether the funds advanced were a loan or a gift.

In 2017, when the townhouse was sold, a mortgage in the same amount was placed on the Brampton house in favour of the respondent. TP's evidence was that she did this to protect the gift made to her in 2010 and 2011, and to protect the appreciation in value of the townhouse that she had realized since 2011.

The evidence further showed that TP brought more assets into her marriage than her husband. Although FP was unaware of the second mortgage until closing, he agreed to its registration.

On both transactions, TP and her stepfather were represented by the same lawyer, although the lawyer mainly took instructions from the stepfather. Further, as is common in such transactions, the lawyer also acted for the first mortgagee, the bank. In that capacity, the lawyer obtained statutory declarations from the applicants stating that there was no secondary financing registered on closing.

At no time between 2011 and February 2021 did the respondent seek repayment of any money advanced towards either of the two properties.

In March 2020, after the stepfather separated from TP's mother, and while in the process of resolving property and support issues between them, the stepfather provided a sworn financial statement in which he said he was not owed money by anyone. No mention was made of the mortgage, or a loan of any kind. His financial statement was prepared with the assistance of a lawyer.

In February 2021, the stepfather demanded payment on the mortgage, and later revised his sworn financial statement.

In the [Reasons for Judgment](#), the court noted that there is a presumptive "resulting trust" when a parent makes a gratuitous transfer to an adult child. The adult child is presumed to hold the property in trust and the parent holds an interest in the asset (whether it is real estate or another type of asset); in other words, the parent is presumed *not* to have intended a gift. However, this presumption is rebuttable based on the evidence: *Barber v. Magee*, [2015 ONSC 8054](#), at para. [40-42](#).

In the case at hand, the consistent evidence of TP and her mother was that the money provided to TP in 2010 and 2011 was a gift. There were no contemporaneous documents evidencing a loan. The manner of repayment was simply "on demand," but no demand was made for a decade. Demand was only made some two years after TP's mother and stepfather had separated. Demand was only made after the stepfather had sworn that there was no money owing to him, which suggested it was not a loan at all, and that he had no expectation of repayment.



As well, the stepfather was unable to give any details of how money was provided to TP or produce any supporting documents. As a purported mortgage lender seeking to enforce a mortgage, the stepfather bore the onus to prove that he made the advances to support the charge: *S.A. v. A.A.*, [2017 ONCA 243](#) at para. [45-47](#).

The court found that the money advanced to TP in 2010 and 2011 by her mother and stepfather was a gift and that the presumption of a resulting trust was therefore rebutted.

In the result, the court declared that no monies were due and owing to the stepfather under the mortgage. The stepfather's notice of sale was also declared invalid, and the mortgage was ordered to be discharged from title to the applicants' Brampton home.

As the application judge noted, the irony of the case is that the stepfather's mortgage was registered to protect TP from a potential breakdown of her marriage, but what happened instead was that her parents were the ones who broke up. While the stepfather may now regret the generosity he showed to his stepdaughter, had he truly intended any of those funds to be a loan, he ought to have prepared some documentary evidence to support his claim back in 2010-2011, or at *any* point thereafter. Instead, the lack of documentation supported his stepdaughter's position.

Contact us

If you have a litigation matter and are in need of legal advice, please contact [James Cook](#), at 416.865.6628 or jcook@grllp.com.

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