

# KEEPING CURRENT

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## Gift or loan? Father failed to ensure his intentions were made known

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How is an adult child able to prove whether funds or property transferred to them by a parent were intended to be a gift rather than a repayable loan? In a recent decision, the Ontario Superior Court of Justice considered this issue.

*Falsetto v Falsetto*, [2022 ONSC 3701 \(CanLII\)](#), arose from a dispute between a father and his adult son (Sam), to whom the father (Salvatore) had transferred substantial sums of money. These funds were used by the son to acquire and develop several properties. Salvatore subsequently claimed that these funds were loans and the properties were to be purchased in his name while Sam claimed that they were gifts, except for funds obtained from Salvatore's line of credit.

The relationship between Salvatore and Sam had a complicated history. Sam was estranged from his father for several years after his parents divorced. It was only when Sam was in his late teens that the pair reconciled. From then on, they developed a tight bond as they began to

work together buying, renovating, selling, and renting properties for Salvatore's construction business. Through his work, Salvatore developed a considerable amount of expertise in the real estate field. The work that Sam performed for his father's business was unpaid, but his father insisted that "[Sam] was not working for free" and that "what [he] worked for, [he would] give it to [Sam] one day".

In 2007, Sam incorporated Falsetto Homes Inc., a company through which he built several successful projects in Ottawa. A few years later, Sam had a conversation with his father about a potential property to purchase, after which his father advised him to go ahead. Salvatore went with Sam to the bank, where he obtained a cheque for \$475,000 to give to Sam to complete the purchase.

Between 2010 and 2016, Salvatore provided Sam with additional funds, either in the form of monies from

a settlement agreement, cheques from his personal accounts, or title to property. During each one of these transactions, Sam verified with Salvatore that he intended the funds or property to be a gift. No cheque was ever written from Salvatore's account without his consent.

In [Reasons for Decision](#) following a trial in 2022, the court applied the legal tests for several important issues: the determination of a gift, undue influence, unjust enrichment, and fiduciary duties as a Power of Attorney ("POA").

In *Barber v Magee*, [2017 ONCA 558](#), the Court of Appeal for Ontario described a gift as "a transfer in which the absence of an expectation of repayment tends to be reflected in the absence of security, recording, payments, or efforts to collect payments." The Supreme Court of Canada's decision in *Pecore v Pecore*, [2007 SCC 17](#) confirmed the principle that when a parent gratuitously transfers property to their adult child, there is a presumption of resulting trust unless there is clear, convincing and cogent evidence of (1) an intention to gift, (2) acceptance of the gift, and (3) sufficient transfer or delivery of the gift. The Court considered each of these requirements in detail.

Here, the trial judge found that Sam met the burden of proving Salvatore's intent to gift. Salvatore's extensive experience in the real estate field suggested that if he had truly intended for the funds to have been used to purchase properties in his own name, he would have known that he would be required to sign the closing documents himself, which never occurred. Furthermore, all of the bank drafts and cheques that were used to transfer funds to Sam had been personally obtained by Salvatore, and several credible witnesses were able to testify that he told them of his intention to gift either money or property to Sam. Finally, all of the transfers from Salvatore's account were for large

sums of money, which were clearly shown on the bank statements that he received each month. Thus, if the funds were not intended as gifts, Salvatore had ample opportunity to object to the transfers, yet he never did. Consequently, the court found that there was clear, convincing and cogent evidence of intent to gift.

The second requirement of gifting is acceptance of the gift. The trial judge found that Sam was clearly aware of the transfers, and understood that Salvatore intended for him to receive the funds and/or property that he was transferring. The funds were ultimately used to acquire additional properties, while the property that was transferred to Sam was torn down for redevelopment, thus constituting acceptance of the gifts.

Finally, it is required that sufficient delivery of the gift occurs where the donor divests control and the receiver obtains same. *Teixeira v Markgraf Estate*, [2017 ONCA 819](#) used the example of gifting a cheque to demonstrate that sufficient delivery occurs when the cheque is cashed and the monies are paid.

In [Falsetto](#), each bank draft or cheque that Salvatore gave to Sam was deposited into either Sam's personal bank account, Falsetto Homes' bank account, or held in trust by their respective lawyers. With regards to the properties, all of them were successfully registered in Sam's name, thereby giving Sam control.

Thus, the gifts all met the requirement of being successfully delivered, and Sam effectively met the onus of rebutting the presumption of resulting trust.

Although the main issue in the case was determining whether the transfers of money and property from Salvatore to Sam were gifts or loans, the court also considered other relevant

issues, including:

- a) whether Sam breached a fiduciary duty he owed to Salvatore as his POA;
- b) whether Sam exercised undue influence over Salvatore, and;
- c) whether Sam was unjustly enriched by the transfer of funds and property from Salvatore.

The court determined that there was no breach of fiduciary duty.

In *Alberta v. Elder Advocates of Alberta Society*, [2011 SCC 24](#), the Supreme Court of Canada held that a fiduciary duty arises where the relationship between the parties renders one vulnerable to the power of the other.

Despite being Salvatore's POA, Sam was unaware and was never informed that he could make decisions as to personal property for Salvatore-- his understanding of his role as POA was that he was to make decisions as to Salvatore's end-of-life care. Salvatore had always made his own business and investment decisions and had full capacity to consent to each transfer throughout the whole gifting period between 2010 and 2016. Thus, the court decided it would not be following the principles of equity to create fiduciary obligations on Sam, and even if he did owe such duties, Sam was not in breach because he had followed Salvatore's instructions for each transfer.

The court additionally considered undue influence and determined that it was not a factor in this case. The exercise of undue influence by an adult child over their parent, which may be actual or presumed, invalidates a gift. Actual undue influence occurs when a parent's free will is overborne by the adult child's acts of manipulation, abuse of power, coercion, or fraud. Presumed undue influence occurs where "the

potential for domination inheres in the nature of the relationship itself", as stated in *Geffen v Goodman Estate*, [1991 CanLII 69 \(SCC\)](#).

Here, Salvatore made his gifts to Sam with "full free and informed thought." In fact, witnesses testified to Salvatore's resolute strength of will that it would be difficult to manipulate even if that was Sam's intention. Thus, the gifts were not made under undue influence.

Finally, the court determined that Sam was not unjustly enriched.

To succeed with a claim of unjust enrichment, a plaintiff must prove that: (1) the defendant was enriched; (2) the plaintiff suffered a corresponding deprivation; and (3) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason: *Moore v Sweet*, [2018 SCC 52](#). However, "donative intent" is a recognized type of juristic reason. Thus, regardless of whether Sam was found to have been unjustly enriched if the transfers of funds and property were found to be gifts, Sam's enrichment was based on juristic reason.

This case illustrates the required elements of differentiating between a gift and loan in the context of gratuitous transfers from parent to child. Ultimately, the presumption of resulting trust remains, and the burden of proof to rebut such presumption lies on the individual claiming the transfer was a gift. It took a contested multi-day trial between a father and his son for the issue to be determined.

### Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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