

KEEPING CURRENT

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Bare trustee denied order for sale of property under Partition Act (*Weise v. Weise*)

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Given the high cost of real estate in Ontario, friends and relatives may sometimes assist with the purchase by agreeing to be registered as joint title holders for financing purposes. In such cases, depending on the terms of their involvement, they may be a "bare trustee" without any rights to compel a sale of the property if circumstances change in the future.

In *Weise v. Weise*, [2023 ONSC 5227 \(CanLII\)](#), the applicant sought a court order to sell a property in Sault Ste. Marie that was registered in her name jointly with her former sister-in-law.

In 2006, the respondent began to rent the subject property, which backed onto her childhood home. She met the applicant's brother (TW), in 2007, and he moved into the property with her. The respondent and TW married in September 2009.

In 2011, the respondent and TW sought out financing to buy the property from their landlords. Due to their credit standing, they could not get jointly approved for a mortgage. At the recommendation of the mortgage lender,

TW asked his sister, the applicant, if she would assist.

The applicant agreed to be the bare trustee of the property and that her sister-in-law would be the beneficial owner. The parties entered into a written trust agreement and the applicant and her sister-in-law were registered as joint owners of the property.

The applicant and her sister-in-law also entered into a mortgage as joint mortgagors. The respondent was to be responsible for all expenses under their trust agreement.

TW and the respondent used a lawyer for the purchase. In his reporting letter, the lawyer stated that since the applicant was "a mere guarantor and not a trust owner other than for the purposes of the lender, we prepared a simple trust agreement between the parties to reflect this."

After the purchase, the respondent and TW opened a joint bank account from which the mortgage payments were drawn during their marriage. The applicant made no financial contribution, either directly or indirectly,

to the property during the respondent's marriage to her brother.

In January 2021, the respondent and TW separated and TW vacated the property. The respondent remained responsible for the household maintenance and cost.

The applicant grew unhappy after three mortgage payments were taken from her personal account by the lender when the respondent's account had insufficient funds. She was repaid by the respondent but demanded that her name be removed from title and the mortgage.

The respondent contacted the mortgage lender about the required steps necessary to remove the applicant's name from the mortgage and title. However, the mortgage company advised that they required a separation agreement to be drafted before such refinancing could be considered.

After she grew unhappy with the delay, the applicant applied under the Ontario [Partition Act](#) for an order directing the sale of the property.

Section 3(1) of the [Partition Act](#) provides that: "Any person interested in land in Ontario, or the guardian of a minor entitled to the immediate possession of an estate therein, may bring an action or make an application for the partition of such land or for the sale thereof under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested".

The respondent opposed the application on the basis that she had a connection to the property and wished to retain it. She had paid TW a "buy-out" for all joint property and had sought financing to ensure the home could be transferred into her name. She blamed the applicant for moving precipitously before a formal separation agreement and divorce from TW could be completed.

At the hearing in 2023, only an unsigned copy of the trust agreement was filed since a signed version could not be located. The parties nevertheless agreed that the trust agreement had been fully executed at the time of purchase in 2011.

Even though a signed copy of the trust agreement could not be located, the court noted that a bare trust may be formed without the requirement of a written document provided that the requirements to settle a trust are met, namely: (a) intention to create a trust; (b) identification of the specific subject matter of the trust; (c) an identified beneficiary of the trust; and (d) a transfer of the trust property to the trustee: *White v Gicas*, [2014 ONCA 490](#).

The court reviewed the wording of the lawyer's reporting letter and concluded that it was never intended for the applicant to have any beneficial ownership of the property and that her involvement was related to securing financing. The trust agreement gave no independent powers, discretion, or responsibilities to the applicant, and she could not without the written consent of the respondent, convey or encumber her interest in the property.

The court further noted that the trust agreement provided that the respondent was the beneficial owner and the applicant would have no entitlement to possession, immediate or otherwise and/or any of the proceeds of disposition with respect to the property. The respondent was to be responsible for all expenses. The applicant's relief from liability was indemnification from and to be saved harmless by the respondent only. There was no term that permitted her to seek partition and/or sale of the property.

In the court's view, it was the applicant's choice to assist her brother and the respondent and she agreed to be a bare trustee rather than a joint owner with rights, powers and obligations.

A bare trustee holds legal title to property on behalf of another and has no independent power, discretion or responsibility in connection with the property: *Paragon Development Corporation v. Sonka Properties Inc.*, [2011 ONCA 30](#), at paragraph 6, and *Trident Holdings Ltd. v. Danand Investments Ltd.* ([1988](#)), [1988 CanLII 194](#) (ON CA).

The court was satisfied that the applicant was not entitled to compel a sale since she was not entitled to the immediate possession of the property under [3\(1\)](#) of the *Partition Act*.

The court was also satisfied that the respondent was taking steps to resolve the issues arising from the breakdown of her marriage to TW. Resolving the issues from the breakdown of the marriage was taking time, and there was no evidence provided to indicate that the time taken to date was unreasonable in the circumstances.

The court also found that it would be unfair and oppressive to order a sale of the property in the circumstances since the applicant was not entitled to any of the proceeds of the sale and the respondent wanted to continue living in the home as she had since 2007. The lender had advised that the applicant could be removed from title and the encumbrance once the separation with TW was finalized. The court did not consider a sale to be more advantageous to the parties in the interim. The application was therefore [dismissed](#).

The decision demonstrates the potential issues that may arise when someone agrees to become a bare trustee. What may seem like a kind and generous gesture at the time may result in long-term commitments that are difficult to end. It should be noted, however, that there wasn't any evidence of incurred or anticipated harm to the applicant since no claims for indemnification were being made. In the application judge's words, the applicant's request for relief under

the *Partition Act* was "putting the cart before the horse," to potentially satisfy a judgment that did not exist.

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.

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