

Nephew not entitled to verbal life interest in aunt's property

Litigation | Litigation & Dispute Resolution | Real Estate

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Living arrangements between adult family members are often informal and based upon the nature of their close relationship rather than any expectation of acquiring legal rights. In the context of real estate, this may pose difficulties if someone seeks to enforce an ownership interest in property that is not documented in a written agreement.

In *Kostiuk v Porchuk*, 2022 ONSC 6141 (CanLII), the court addressed a dispute between an aunt and her adult nephew concerning whether the nephew had acquired a legal interest in his aunt's Toronto property, in which she had lived for almost 60 years.

The nephew had worked as a machinist but retired when he was 48 years old after someone told him that he was "too old to work." Until his retirement, the nephew had lived with his mother. She passed away in 2005, and he inherited her house.

By 2015, the nephew had amassed mortgage debt against the house of about \$600,000, and amongst his other debts, he had borrowed \$50,000 from his aunt. His sole source of income was an early CPP pension. As he had run out of money to carry his debts and had insufficient equity left in his house to support further borrowing, his aunt generously agreed to let him live with her.

After moving in with his aunt, the nephew sold his house and went through a consumer proposal under the *Bankruptcy and Insolvency Act* to resolve his remaining indebtedness.

By 2022, after suffering a stroke, the aunt had moved out of the property into a long-term care facility in Haliburton. She lacked capacity to care for herself or to manage her affairs. The cost of long-term care exceeded her monthly income by almost \$1,000 each month. She was also responsible for utilities and taxes on the house.

The aunt's niece, as her power of attorney, decided that the Toronto house would need to be sold to pay for her aunt's care since she would never return to live in the house.

The nephew opposed the sale on the basis that he had lived in the property for six years and had a right (he claimed) to remain in the house for the rest of his aunt's life. The nephew refused to vacate the property when served with a trespass notice. When police attended at the property, the nephew told them that he was a tenant so they refused to intervene.

In October 2022, the court heard an application brought by the aunt's niece for a writ of possession to require the nephew to leave the house so that it could be sold. As the nephew had never paid rent, he could not claim status as a tenant under the Ontario *Residential Tenancies Act*.

The nephew's principal position was that he acquired his right to remain in the house by agreement with his aunt. The nephew claimed that he agreed to take care of his aunt, drive her to appointments, and be a handyman for any maintenance to the home. He also testified that he would buy some small items of groceries when asked by his aunt (but he agreed that he consumed them as well).

In Ontario, the *Statute of Frauds* generally requires written evidence of any agreement affecting interests in land for the purpose of having evidence to protect against fraudulent oral claims. Accordingly, as a starting point, any alleged agreement between the nephew and the aunt under which she purportedly agreed to sell to him a life interest in the house was unenforceable unless it was evidenced in writing. The aunt and nephew had never signed a written agreement confirming the terms upon which he would be allowed to reside in the property.

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In some cases, an agreement concerning land can be proven by oral evidence where the buyer has partly performed the agreement: *Ireland v. Cutten*, 1939 CanLII 68 (ON SC). The court noted, however, that such acts of part performance must be “unequivocally referable” to the alleged oral agreement, meaning that “only where the acts of part performance have no other purpose or reason that they effectively can prove the existence of the oral contract” (para.46).

The nephew's inconsistent position undermined his claim that his acts were done for the sole purpose of acquiring a life interest in the property. Amongst other issues, the nephew's position that his aunt had granted him a “life interest” had evolved from his initial stance that he was a tenant.

In the court's view, the agreement that the nephew claimed as a basis to stay in the house was not a conveyance of any type of interest. Rather, the evidence was that he was just told that he could come and live with his aunt permanently and he would not have to leave. There were no limits on the aunt's entitlement to sell her house if she wished to do so.

Further, none of the acts on which the nephew relied to try to prove an agreement were unequivocally referable to an oral agreement under which he bought a “life interest” or obtained some other enforceable right to live in the house permanently. All his efforts to help around the house and to drive his aunt to appointments were equally consistent with a nephew who was grateful to his aunt for allowing him to stay in her house rent-free.

Accordingly, the court found that the nephew had not proven that he and his aunt entered into an enforceable agreement to transfer a life interest in the property to him or any other binding right to stay in the house if his aunt decided to sell it.

The court granted the application and issued a writ of possession, allowing the nephew until February 2023 to move out so the property could be sold.

The nephew argued that he should not be responsible for costs of the application as he was of “modest means”. While the amount of costs will be determined at a later date, the court noted that the normative approach in Ontario is that people bear some responsibility for the legal expenses they inflict on others by advancing unsuccessful positions in litigation. This rule is intended in part to provide settlement impetus for all parties and to make litigants think carefully about advancing positions with little merit while avoiding the cost consequences of doing so. A PDF version is available to download [here](#).

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