

# Oral agreement to transfer family home results in years of litigation between father and daughter

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Agreements between family members are often informal and not reduced to writing, even if they involve substantial assets such as real estate. The parties may think that they have agreed on some of the terms but they may neglect to resolve others with any certainty. Further, the parties' own belief that they have entered into an oral agreement may not mean that they have done so in the eyes of the law.

The lack of a written agreement may lead to years of costly litigation while a court determines what the parties purportedly decided, as shown by the result in *Downey v. Arey*, 2021 ONSC 2781 (CanLII).

The case involved an oral agreement between a father, his daughter and her partner, according to which the father allegedly agreed to transfer the family home in Mississauga to the couple for \$850,000.

The property at issue was bought by the father and his late wife in 1978. In 2015, the father decided to downsize and move into a condominium. At that time, the daughter moved back into the home with her partner and their children. The daughter was thrilled to move back into the home, which was full of memories. She was raised in the house and nursed her dying mother in it.

There was no question that the father and the couple believed that they had entered into an oral agreement for the sale of the house with a closing date of 31 August 2016. After moving in, the daughter and her partner were to pay for the utilities until closing while the father continued to pay the insurance, taxes and mortgage. The couple also began significant renovations in anticipation of closing, which ultimately would cost them over \$160,000.

However, the transaction did not close in August 2016 as scheduled. The couple took the position that the parties orally amended their oral agreement shortly before the closing date, which extended the closing to 31 May 2017. The couple began paying \$1,800 per month to cover the insurance, taxes and mortgage. They called this payment "rent".

The father's position was that the couple asked to extend the closing to 31 May 2017, due to their financial circumstances at the time and that he neither agreed nor disagreed with the new May 2017 date. He decided to give them more time, although no final date was set.

By March 2017, however, he was tired of waiting. The market was rising and he now wanted \$1.25 million for the property, thinking that his demand would start another round of negotiations given the increase in market prices. He told the couple that they had to get out of the house by July 2017 as he was going to sell it.

The couple's response was to sue for specific performance (title to the house) or alternatively for damages for breach of contract, and special damages of approximately \$166,000.00 comprising the amount they spent to renovate the home, and lost profit and opportunities in a business which suffered when the daughter's partner—as a contractor—did the renovations to the house.

The father counterclaimed for rent in an amount to be set by the court from May 2017 (when he demanded that the couple vacate the home) to the judgment date, less any amounts the couple paid to date. While the father conceded that he owed the couple compensation for the work that they did on the house he disputed the amount they claimed.

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In a decision released in 2021, almost four years later, the trial judge commented that it was “astounding” that the parties had not put their alleged agreements into writing given the significance of the property to them. They were not inexperienced or unsophisticated with real estate matters. Rather they simply relied on family trust. Given the lack of a written agreement, the decision turned largely on the trial judge’s assessment of the parties’ credibility.

The main issue was whether there was a binding oral agreement to sell the property in the first place. An oral agreement may be binding where it contains the requisite legal criteria of offer, acceptance and consideration: *S&J Gareri Trucking Ltd. v. Onyx Corp.*, 2016 ONCA 505 at para. 7. The test of what the parties agreed to requires an objective determination rather than the parties’ subjective intentions.

Further, while oral agreements regarding the transfer of land are generally unenforceable under the *Statute of Frauds*, “part performance” of an oral contract may avoid this rule: *Erie Sand & Gravel v. Seres’ Farms Ltd.*, 2009 ONCA 709 (C.A.), at para. 70. In the case at hand, there was no question that the renovations undertaken by the daughter and her partner constituted part performance. The father did not challenge this point since he was aware of and had authorized the renovations.

Notwithstanding the shared position of the parties, however, the trial judge found that they had *not* entered into a binding oral agreement in the first place. In that regard, they had failed to agree upon a fundamental term—the price.

While the oral agreement was for the amount of \$850,000.00, they disagreed over when and how a ‘family discount’ was to be applied. The father said that he had valued the house at \$950,000 but agreed to \$850,000 due to his relationship with his daughter. Conversely, the couple’s position was that the purchase price was effectively \$750,000, because at some (unspecified) point shortly before closing the father was supposed to forgive \$100,000.

Given these divergent positions, the trial judge accepted that each of the parties honestly believed their version of the price of the home and that an objective, reasonable bystander would conclude that, in all the circumstances, the parties were not agreed on price, which was a fundamental term to any contract.

Accordingly, the oral agreement had never been finalized.

Similarly, the trial judge found that there was no second oral agreement to extend the closing date to 31 May 2017. While the parties agreed that the couple could continue to live in the property, and they made efforts to address a second closing date, there was no meeting of the minds on the date or other terms of the alleged extension agreement.

Based on those findings, the court dismissed the daughter’s action to enforce the oral contract to obtain title to the house.

The daughter and her partner were nevertheless entitled to compensation for the substantial improvements they had made to the house. They had removed a load-bearing wall to open up the basement and put a beam to replace it. They created a bedroom and a full bath in the basement. They opened up the main floor by removing two loadbearing walls. They replaced stairs, flooring, and renovated the second-floor bathroom. This work was 70% complete by the original closing date in August 2016.

The father did not dispute the extent of the renovations and he had originally agreed to the couple moving in before the closing date and commencing renovations in the basement. He was present at various stages through the renovations to see what was being done.

The trial judge found that the couple was entitled to compensation for the proven cost for materials (\$99,003.46), expenses (\$25,389.38), labour and contracting (\$38,866.51). However, the trial judge denied the claim of the daughter’s partner for “foregone business” while working on the home, as this was a personal choice and not something necessary under the circumstances.

The trial judge also found that the couple had failed to prove that the work that they performed on the property increased the value of the home, independent of any general market increases. An expert in valuing residential real estate agreed as a general proposition that renovations to a home increase the home’s value, with kitchen renovations and bathroom renovations contributing the most. However, the expert had not provided an appraisal of the increased value of the house due solely to the plaintiffs’ renovations.

In the result, the couple obtained a damages award for \$163,259.35 based on the value of their proven renovations to the property. The father was confirmed to be the legal owner of the property.

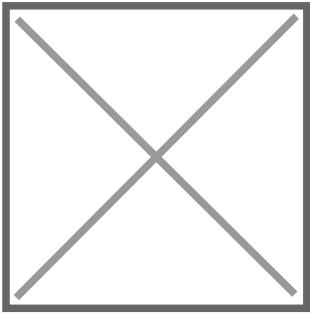
The father is now free to market and sell the home. Until that time, his daughter and her family may remain in the home provided that they cooperate fully in marketing and showing the property. The couple was ordered to continue to pay “rent” in the amount of the cost to the father of any mortgage, property insurance, and property tax expenses, the total of which shall not fall below \$1,800 per month.

One expects, sadly, that the relations between the family members have been irreparably harmed as a result of the years of litigation resulting from the lack of a written agreement documenting their initial intentions. A PDF version is available to download [here](#).

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