

Parent's Claim to Recover Home Transferred to Daughter Dismissed

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Property is often transferred between family members without money exchanging hands. There are many reasons for doing so, including estate planning, assisting children with buying a home, removing property from the reach of family law claims by a new partner, or simply a gift. The parties may intend the transfer to be in name only, with the property being held in trust for the former owner. In other situations, the transfer is intended to be a gift, with or without ongoing conditions. Issues may arise, however, if one of the parties later changes their mind about the purpose of the transaction and there is a lack of documentation confirming what they actually intended at the time.

In *Hertendy v. Gault*, 2020 ONSC 7555 (CanLII), the plaintiff Mother sought to recover legal ownership of a property in Smith Falls, Ontario, which was transferred to the defendant, her Daughter, in 2012. No money changed hands at the time of the transfer.

The Daughter was appointed a year earlier as her Mother's Attorney for Property and Personal Care, but she was not expressly acting pursuant to the Power of Attorney at the time of the transfer in 2012.

A single lawyer prepared the transfer documents and registered the transfer from the Mother to the Daughter. The Mother attended at his office with her Daughter and signed the documents in the lawyer's presence, albeit outside as a passenger in a vehicle driven by her Daughter. Apparently, the Mother was not mobile at the time of signing as a result of recent knee surgery.

After the home was transferred, the Daughter paid some of the property taxes and insurance. In 2017, the Mother removed her Daughter from her Will, and eventually commenced an action to recover the property even though she had retained a life interest to live in the home.

In 2020, Justice J.M. Johnston of the Ontario Superior Court of Justice heard a motion for summary judgment to resolve the dispute. At issue was whether the transfer in 2012 was intended to be a gift from the Mother to the Daughter, or whether the Daughter was only holding the property in trust for her Mother.

The Mother argued that she did not know or appreciate the effect of the legal documents she signed at the time of the transfer. She claimed that the documents were prepared by her Daughter's long-time lawyer who was acting solely for her Daughter. The Mother argued that she did not receive independent legal advice on the transfer, and that the transfer occurred while her Daughter had control over her affairs. The Mother claimed she placed complete trust in her Daughter and was duped by her to sign over her home. Further, she argued, the transfer occurred at a time when she was depressed and in mourning for the loss of her husband. She also claimed that she was taking heavy pain medication as a result of knee replacement surgery and was still dealing with injuries suffered in a fall. Most importantly, there was no payment or consideration at all in exchange for the transfer and she never intended to transfer the land to her Daughter during her lifetime.

In response, the Daughter argued that the transfer of the home was done for consideration, namely, a promise to help pay carrying expenses for the home. The Daughter argued that her Mother may have changed her mind years later, but the gift of the home had been completed at the time of the transfer in 2012, and could not be undone. Further, the transfer was not initiated by the Daughter in her capacity as Attorney for Property. Her Mother signed all the documentation herself, there was no undue influence, and her Mother was not under medical or other disability at the time.

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For her claim, the Mother sought to rely on the legal doctrine of the presumption of resulting trust, a general rule which applies to gratuitous transfers. A “resulting trust” occurs when property is put in the name of one party but because they provided no value for the property, ownership “results” back to party who originally transferred it. In order to rebut a presumption of resulting trust, the person who received the property for free must demonstrate that at the time of the transfer the transferor actually intended to make a gift of the property at issue – “This is so because equity presumes bargains, not gifts”: *Pecore v. Pecore*, 2007 SCC 17 (CanLII), [2007] 1 SCR 795 at para. 24.

An adult child who receives a gratuitous transfer of assets from his or her parents bears the burden of rebutting the presumption of a resulting trust by showing on a balance of probabilities that a gift was intended: *Madsen Estate v. Saylor*, 2007 SCC 18 (CanLII), [2007] 1 SCR 838, at para. 17. The focus in any dispute over a gratuitous transfer is the actual intention of the transferor at the time of the transfer, and the presumption of resulting trust will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities: *Pecore*, paras. 5 and 44. The reliability of evidence of intention that arises subsequent to a transfer must be carefully assessed to determine weight, guarding against evidence that is self-serving or reflects a change in intention.

In the case at hand, Justice Johnston approached the evidence by considering whether a person would gift their home to someone, even a family member, in return for a vague pledge of assistance for payment of expenses. The Daughter's payments would likely have been far less than fair market value of the home.

A complicating evidentiary point was that the lawyer who had acted on the transfer was deceased at the time of the court proceedings in 2020, so the Court had to refer to his file as his evidence. The lawyer had previously acted for the Daughter and her spouse, but had also acted in 2011 for the Mother to prepare her Will. The Mother received a reporting letter from the lawyer's office following the transaction in 2012 about the transfer of the home. She made no issue about the transfer at that time, although she claimed in the court proceedings that she did not see the letter.

Justice Johnston was satisfied that when the Mother signed the transfer document, she intended to do so, and that she received a benefit in exchange (however modest compared to the value of the property). Further, she paid the lawyer for the transfer and made no complaint until at least three years later. Her admitted explanation was that in hindsight, she should have asked more questions.

The Mother relied primarily on a decision of the Ontario Superior Court of Justice in *Bannister v. McGraw* (2016) 23 ETR (4th) 124 (not on CanLII), in which the parents sought to recover a home which had been transferred to their adult child. However, in *Bannister* the purpose for the transfer was clearly to protect the home from potential legal claims against the parents, as a result of the father's motor vehicle accident. The transaction occurred quickly for no consideration, there was no independent legal advice, and no life interest was reserved to the parents. As a result, the Court in *Bannister* found a resulting trust on the basis the parties all intended to shield the parent's property rather than to transfer ownership.

Conversely, Justice Johnston did not find the Mother to be vulnerable. The Judge also found that the Mother had retained a life estate, which was consistent with her Will at the time of the transfer in 2012, which then provided that the Daughter was to become the owner of the property on her Mother's death. Based on the evidence, the intention between the mother and daughter was for ownership to transfer, on an understanding the Mother would have the right to remain in the home and her Daughter would assist with the bills.

As a result, the Daughter owned the property free and clear of any resulting trust in favour of her Mother. The case demonstrates the perils of undertaking a transaction which on its face appears to be for no money or other obvious purpose. Had the lawyer been alive at the time of the summary judgment motion, he may have been able to speak to the intentions of the Mother and Daughter as conveyed to him at the time. Due to the potential application of the presumption of resulting trust to any seemingly gratuitous transfer, it would be prudent for a transferee (and their lawyer) in similar circumstances to obtain clear written confirmation that the transfer is intended to be a gift and that the transferor appreciates the legal consequences of completing the transaction. A deed of gift or similar document could also be prepared to confirm that the transfer is indeed a gift.

Although not expressly addressed in the decision, the proper test for the determination of a gift in Ontario Law is (i) an intention on the part of the donor to make a gift without consideration or expectation of remuneration; (ii) an acceptance of the gift by the donee; and (iii) a sufficient act of delivery or transfer of the property to complete the transaction: *Abdollahpour v. Banifatemi*, 2015 ONCA 834 (CanLII) at para 14 and *McNamee v. McNamee*, 2011 ONCA 533. In recent years the issue has arisen in many situations which have addressed whether a transfer is truly a gift in certain cultures or family traditions. In addition, given the prevalent practice of parties assisting others with obtaining mortgage financing, courts have held that a gift of a beneficial interest in a property is not generally established where a party is on title for the sole purpose of obtaining financing and remains liable on the mortgage with no contribution to the mortgage payments or the upkeep of the property: *Bouffard v. Bouffard*, 2020 ONSC 3079 (CanLII) at para. 163. In all cases, documentation demonstrating the parties' intentions at the time of a transfer of property is of crucial assistance to avoid litigation by parties who subsequently change their mind.



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