

Real estate co-ownership dispute leads to sale under Partition Act

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9 March 2022

Given the high price of real estate in Ontario, co-ownership of properties between friends and family members is increasingly common. Title may be registered in varying ownership percentages which may or may not reflect the parties' actual interests. Due to the informality of some relationships, the parties may not have a written co-ownership agreement to determine their rights or ways to resolve disputes that may arise between them. Ontario's [Partition Act](#) provides a procedure for joint tenants, tenants in common, and others with a specified interest to compel the sale of a property in appropriate circumstances.

Zappacosta v. Zappacosta, 2022 ONSC 944 (CanLII), involved a dispute between parents and their son over a property on Clinton St. in Toronto. The registered title stated that the son had a 99% interest in the property while his father held 1%. There was no written agreement between the parties clarifying their true ownership interests.

The parents had owned a clothing store business in Toronto. The father was also an investor and dealer in real estate. Their son was in his mid-30s at the time of the court proceedings.

The son's evidence was that in 2008, after graduating from university, he returned to Toronto to work in the family's retail clothing business. Initially, he lived at the family's home but over the years it was an ongoing struggle for him to wrestle control from his commanding parents. In 2019, he gave up and withdrew from the family business.

Over the years the son's parents had also used him as an instrument in the family's real estate investments, which the court described as a "family business".

In 2013, the family purchased a condominium, with the parents paying approximately \$148,000 towards the down payment and improvements. The son testified that these amounts were a gift while his father claimed that the funds were a loan. The parents claimed that they were supposed to eventually become the owners of the property, which was held in trust for them by their son. The balance of the purchase price was paid with a mortgage registered in the son's name.

When the condominium was sold in 2016, the proceeds were repaid to the parents. The son claimed that he only did so for safekeeping because he was planning to live with his partner in a new residence, but they did not have a co-habitation agreement.

The family then purchased a second condominium unit on Davenport Road in Toronto. The father had been offering consulting services to the developer of the condominium project, for which he was entitled to purchase a unit and credit his consulting fee against the purchase price. The father decided to sell the unit to his son. To implement this investment, the father paid the deposits and balance due on closing for the unit and registered title in his son's name. The family used the proceeds from the sale of the prior condominium.

The son moved into the Davenport Road unit and lived there with his partner until it was sold in 2018. He moved back into the family home pending the purchase of the Clinton St. property.

In March 2018, the father entered into an agreement for the purchase of the Clinton St. property, "in trust," for the purposes of making his son the notional owner of the property.

As was the case with the two prior properties, the plan was that the son obtain a mortgage to finance the purchase. However, to obtain the mortgage, it was necessary for the father to be a registered owner. Thus, before the closing of the transaction, he agreed to go on title for a 1% interest to bind himself to his son's mortgage covenant. This agreement enabled the son to obtain the mortgage loan. Before the closing of the transaction, the father signed a declaration that his son

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was the beneficial owner of the 1% interest in the property.

The relationship between the family members deteriorated thereafter and the parties brought competing [Partition Act](#) applications to determine their ownership interests in the property.

Under the [Partition Act](#), a joint tenant, tenant in common or other person with a specified interest in the property may compel a partition or sale unless the court finds that there is a sufficient reason why such an order should not be made: *Davis v. Davis*, 1953 CanLII 148 (ON CA). An application for partition and sale will generally only be refused in exceptional circumstances where the request is malicious, vexatious or oppressive: *Steele v. Doucet*, 2019 ONSC 544 (CanLII).

In the proceedings, each side took the position that they were the 100% beneficial owners of the Clinton St. property. However, the application judge rejected these arguments and determined that the property had been purchased as part of the family's real estate investment planning in which the son's principal residence would be used as a means to fashion a more or less tax-free investment. In the application judge's view, the family's investment plan was to flip each of the properties that had been purchased while building up equity to reinvest in the rising Toronto residential real estate market.

The court determined that the arrangement between the parties was in the nature of a joint venture between the parents on the one side and their son on the other. The Clinton St. property was an asset of this family enterprise that was to be divided 50:50 between the joint venturers. The parents contributed purchase monies that were, along with the growth in the equity of the property, rolled forward into the next transaction. The son's 50% ownership interest could be explained as being the result of his own contribution to the purchase of the property by his taking out a mortgage on each property.

The son's ownership interest was also subject to a resulting trust reflecting the contribution made by his parents. A resulting trust arises when title to a property is placed in a party's name, but that party gave no value for the acquisition of the property.

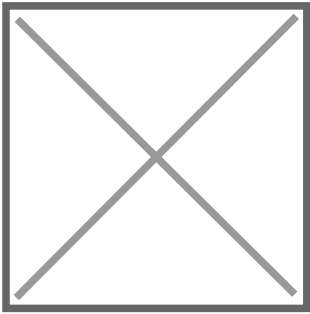
In the result, the court concluded that the father and son were 50:50 owners of the Clinton St. property notwithstanding their disproportionate registered interests, and ordered that the property be sold pursuant to the [Partition Act](#), with the net proceeds of the sale to be divided 50:50 between them. No costs were ordered for the court proceedings.

The decision shows what may occur when parties do not document a transaction to reflect their actual ownership interests and purposes. Contrary to the positions of the family members, the court found that there were neither gifts nor loans involved in their transactions. Each side claimed a 100% interest in the property and neither side obtained the relief that they were seeking.

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