

Unfulfilled Promise to Transfer Family Property Upheld by Court of Appeal for Ontario

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In a recent decision, the Court of Appeal addressed the longstanding relationship in estate litigation between the enforceability of promises, unjust enrichment, and the remedy of constructive trust. Parents who are considering making arrangements to transfer property to their children or other family members should keep in mind the possible legal implications of unfulfilled promises: *Tomek v. Zabukovec*, 2021 ONCA 723.

The case pitted the interests of a husband and wife—who were in the process of divorcing—against the interests of the estate of the husband's late father in the land on which the couple's home had been constructed. The property in question was a 15-acre wooded parcel of land in Caledon acquired in the late 1980s, which the father planned to sever into separate lots to sell for profit. The father gave his son a portion of the land and encouraged him to build a house for him and his family.

During the course of the construction, the father primarily treated the house as the property of his son and daughter-in law. He did not have any input in the design of the home. The construction of the home was entirely funded by the son and his wife.

Shortly after the son's house was completed in 1989, the father attempted to sever the lot from the rest of property so that he could convey it to his son. It turned out that a severance of the lot containing the son's house was not possible.

The father died intestate in 2004 without any formal transfer of title having been made. Following the father's death, the son and his wife continued to reside in the home, pay taxes, and make improvements to the property.

In 2011, the son separated from his wife. They were able to resolve most of the issues relating to their marriage and separation in a comprehensive settlement agreement, with the only significant issue in dispute being their ownership interest in the land which remained in the name of son's late father.

At trial, the son and his wife relied on principles of unjust enrichment and proprietary estoppel to argue that they held a beneficial interest in the property. In that regard, the wife argued that there was both intention and agreement between her and her husband on the one hand and the father on the other to convey the house lot to them.

In response, the father's estate argued that the son and his wife has been invited to build their house on a portion of the property during a period when they were in a dire financial position, but that there was never any intention to gift them the portion of the property on which the house was located.

The trial judge ruled in favour of the son and his wife, finding that the father's estate had been unjustly enriched with respect to the house's construction, improvement, and maintenance, but not with respect to the other parts of the property: *Tomek v. Zabukovec*, 2020 ONSC 2930 (CanLII). The trial judge rejected the submission that there was an oral agreement between the son, wife, and father that the entire property would be conveyed to the couple in the future. The trial judge observed that since the time of the property purchase, all parties had treated it as two separate units: the house lot belonged to the couple and the rest of the land belonged to the father.

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However, the trial judge emphasized that the son and wife had made significant contributions to the property over the years. They had completed significant upgrades to the home, including installing the kitchen, bathrooms, flooring, and a sauna. They improved the grounds around the house. In the end, as all of the improvements were funded by the son and wife alone, the court found that it was reasonable for them to expect to receive some benefit for 30 years of upkeep.

Accordingly, the trial judge held that the estate had been unjustly enriched by the husband and wife with respect to the construction, improvement and maintenance of the house, but not with respect to the acreage.

In addition to unjust enrichment, the court found that the elements of proprietary estoppel had been made out:

1. The father made implied representations to the son that he would obtain the benefit of the full 1.13-acre parcel of land;
2. The son relied on the expectation that he would receive an interest in the property, and as a result built a house for himself and his family on the property; and
3. The son suffered a detriment since he and his wife could have invested their money and time on a different property had they not believed that they would receive an interest in the house that they built.

In assessing the appropriate remedy, the trial judge noted that the only reliable and tangible evidence provided to the court was the value of the *entire* property -- 15 acres with a large home. The trial judge relied on expert evidence to determine that the value of the property, based on a cost approach that valued the land and the house separately, was \$813,000. The court granted the husband and wife joint beneficial ownership of 75% of the property.

On appeal, the estate challenged the appropriateness of the trial judge's remedy. In particular, the estate took the position that the trial judge erred with respect to the value of the land and failed to consider the contribution that the father made to the construction of the house. The estate valued the father's contribution at \$100,000. Accordingly, the estate argued that there was a mutual conferral of benefits between the parties.

Although the Court of Appeal agreed that the trial judge erred in the assessment of the land value by apportioning the full value of the house to the son and his wife, it was not persuaded that it should interfere with the trial judge's decision.

In that regard, the Court of Appeal's view was that the estate's position ignored the available remedies where the elements of proprietary estoppel have been proven. Where a claimant has established proprietary estoppel, a court has considerable discretion in crafting a remedy that suits the circumstances and an appellate court should not interfere unless the trial judge's decision evinces an error in principle or is plainly wrong: *Cowper-Smith v. Morgan*, 2017 SCC 61, at para. 46.

In this case, there was ample evidence to establish that it was always the intention of the parties that the husband and wife would receive both the house lot and the house since that was the purpose of the father's aborted severance application. The order of the trial judge was entirely consistent with that intended result as it awarded the value of the house and the lot.

As the father died intestate, it was up to the court to decide what his intentions had been notwithstanding that it may have seemed obvious that his son and wife should have received title to the home they built. A valid will may well have avoided the trial and subsequent trip to the Court of Appeal. A PDF version is available to download [here](#).

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