

Zombie Deed Sparks Reoccurring Legal Debate

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Absent a sequel by way of appeal, the Ontario Superior Court of Justice may have struck the final blow to the head of “zombie deeds”. A “zombie deed” generally refers to a transfer of an interest in land registered *after* the death of the transferor as if they were still alive. In some cases, the documents effecting the transfer were signed but left unregistered due to inadvertence; in other cases, there may have been an intentional decision to leave the transfer unregistered until after death to avoid probate and/or disclosure of the transfer to another party (typically a spouse).

This practice seemed to have received tacit judicial approval in a 2015 decision by the Honourable Justice Patillo which upheld the validity of an unregistered transfer: *Winarski v. Sproul*, 2015 ONSC 812. However, Justice Patillo’s decision did not address the potential consequences of unregistered deeds on the *Land Titles Act* registry system which is based on the principle that what is shown in the registry reflects the true state of title. The Director of Titles in Ontario has taken the position for some time that transfers effected pursuant to so-called “zombie deeds” are ineffective and, if discovered, will be rejected by the Land Registry Office.

These issues have now been addressed in more fulsome reasons by the Honourable Madam Justice Macleod-Beliveau in *Thompson v. Elliott Estate*, 2020 ONSC 1004 (CanLII) .

The case involved a “zombie” transfer registered on behalf of the deceased, Ms. Elliott, by her lawyer shortly after the date of her death in respect of the matrimonial home which she had owned in joint tenancy with her husband, Mr. Thompson. The transfer at issue severed the joint tenancy. Mr. Thompson took issue with the transfer and sought a declaration that he held a 100% interest in the property by right of survivorship. By the time the matter was heard in Court the property had been sold to a third party (with the cooperation of the estate and Mr. Thompson) and the dispute concerned whether or not Ms. Elliott’s estate was entitled to a 50% interest in the net proceeds of sale as a tenant in common.

Justice MacLeod-Beliveau firstly assessed whether the joint tenancy had been severed. Her Honour noted that the law in Ontario is settled in that it is the “delivery” and not the actual registration of a deed/transfer that determines if a joint tenancy has been severed. Evidence of “delivery” is established by words or conduct showing that the transferor’s intention was to be immediately and unconditionally bound by the terms set out in the deed/transfer. If established, then the validity of a transfer/deed as between the parties is determined on the date of execution rather than the date of registration.

On the facts of the case, it was clear to Madam Justice MacLeod-Beliveau that Ms. Elliott had in fact intended to sever the joint tenancy prior to her death. Ms. Elliott met privately with a lawyer while in the hospital, signed the required documents to sever the joint tenancy, and provided clear instructions (unbeknownst to Mr. Thompson) to register the severance so that her adult children inherited her 50% interest in the home. Through her lawyers’ inadvertence, the transfer document was misfiled and was not immediately registered. Ms. Elliott then passed away and the transfer severing the joint tenancy was registered a few days after her death. As between Ms. Elliott’s estate and Mr. Thompson, the Court had little difficulty finding that delivery in law had occurred notwithstanding the failure to complete the registration prior to Ms. Elliott’s death. In the result, Justice MacLeod-Beliveau held that Ms. Elliott’s estate and Mr. Thompson were each entitled to a 50% share of the net proceeds of sale

In reaching this conclusion, Justice MacLeod-Beliveau took the opportunity to address the use of “zombie” deeds and strongly disapproved of the steps taken by Ms. Elliott’s estate (and its lawyer) to effect the registration after her death. In the Court’s view, the practice of completing a registration based on a zombie transfer is “highly problematic” as it allows for two types of registrations – registrations done honestly and accurately based on truthful law statements in the electronic registration system by the lawyer at the time of registration of the transfer, and other registrations based on false and inaccurate law statements in the electronic registration system by the lawyer at the time of registration of the transfer.

In the case at hand, Justice MacLeod-Beliveau stated that the lawyer erred by registering the “zombie” transfer severing the joint tenancy in the property after Ms. Elliott’s death based on his erroneous understanding that her instructions survived her death. The instrument itself contained statements indicating that Ms. Elliott was over 18 years of age and was a spouse which were necessarily false statements given that she was deceased. Further, the date of death was changed for the purpose of avoiding detection by the Land Registry Office.

In Justice MacLeod-Beliveau’s view, instead of completing a transfer pursuant to an unregistered “zombie” deed, the estate ought to have brought a court application for a declaration of an interest in land to correct the “error” made by the lawyer after Ms. Elliott’s death, requesting a certificate of pending litigation and a declaration of an interest in land and for a vesting order. In the Court’s view, the aggrieved party should not have to discover the error made and then bring a court application for appropriate relief after the fact. Further, the Land Registry Office cannot be misled with false and inaccurate law statements on transfer documents as to the true nature of the factual circumstances surrounding the transfer of an interest in land at the time of registration.

Even though Mr. Thompson’s application was dismissed, the Court was clearly of the view that he was the “aggrieved party” and that costs would not necessarily follow the event in the ordinary course. As a result, while not deciding the issue, Justice MacLeod-Beliveau suggested that Mr. Thompson would not be responsible for costs.

Presumably the Land Registry Office will be pleased with the Court’s decision as it provides support for the refusal to register and potential de-registration of instruments made pursuant to “zombie” deeds, and outlines the appropriate procedure to be followed in cases where the transferor is deceased prior to registration. As a result, anyone who may be aware of an unregistered zombie deed sitting around in a desk drawer or file would do well to take heed of Justice MacLeod-Beliveau’s decision.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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