Trust Me-This Property Is Mine : A Brief Summary of Claims in Real Property via Trust Law and Gift

*By Ken Nathens and Glen Schwartz**

Family Law property division is not straight forward. Despite equalization rules that govern property division for married parties that are set out in the *Family Law Act*, there are still valid reasons for a married party to claim an ownership interest in real property in which legal title is held by his or her partner, for instance, where the value of property has increased post separation.

Further, the equalization scheme set out in the *Family Law Act* does not govern non-married couples or parties not involved in intimate relationship with each other. Non-married parties are required to assert a trust interest in order to claim an ownership interest in property legally held by another.

Part I-Trusts

There are three types of trust interests that may be claimed in a family law context to assert an ownership interest in real property to which legal title is held by another: These are:

1. Constructive trust/unjust enrichment;

Prior to determining whether a constructive trust remedy exists, one must first establish that a case of unjust enrichment has been made. A claim for unjust enrichment can only be established when the following three factors are found as outlined in the Supreme Court of Canada case of *Kerr v. Baranow[2011]* SCC 10 CarswellBC 240:

a) An enrichment or benefit to the defendant;

b) A corresponding deprivation of the plaintiff;

c) The absence of juristic (legal) reason for the enrichment.

Once a claim for unjust enrichment has been made, the remedies if the claim is successful are either a monetary award or a constructive trust (ownership interest). It is clear in the case law that a monetary award should be considered prior to a constructive trust award. A constructive trust award providing a plaintiff with a proprietary interest ought to only be awarded if the unjust enrichment cannot properly be remedied by simply providing a sum of money to the plaintiff.

The constructive trust is often used in situations involving common law couples who claim an ownership interest in property held by the other, for instance, the family home. In these cases, the court will look at whether or not there is a "joint family venture" in support of a constructive trust interest in the home.

For there to be a "joint family venture" there must be evidence that the common law spouses engaged in mutual effort for the good of the relationship and integrated their financial affairs for the benefit of each other and their family. If a constructive trust/joint family venture is found to exist, the non-titled spouse may be granted an ownership interest in the property, or if not an ownership interest, compensation for his or her efforts.

2. Resulting Trust

The explanation of resulting trust is set out in the Supreme Court of Canada's decision in *Kerr v. Baranow:*

> *"The underlying notion of the resulting trust is that it is imposed to return property to the person who gave it and is entitled to own it beneficially, from someone else who has title to it. Thus, the beneficial interest 'results' (jumps back) to the true owner".*

There are two types of resulting trusts which can exist in common law situations. (1) as a result of a gratuitous transfer of property from one person to another, and (2) a joint contribution by two partners to the acquisition of property where title is only placed in one parties' name. The point of the resulting trust is that the transferor is asking for his/her property back at the end of the day after the transfer has been made.

In deciding whether a resulting trust situation exists or not, it is solely the intention of the grantor which ought to be taken into consideration. Meaning, did the transferor intend to gift the property at the time of transfer? If not, then it is to be returned to him/her.

As outlined in *Kerr*, the resulting trust principle can only be applied to claims arising at the time the property was acquired. For instance, if contributions are made over time to an existing asset (such as paying down a mortgage or contributions to maintenance of the property), then arguments for a resulting trust cannot succeed and it must be brought by way of unjust enrichment/constructive trust argument.

In most circumstances, the law presumes resulting trust for a gratuitous transfer and this presumption must be rebutted. Thus, if one party advances money to another, it is presumed that the second person holds title to the property in trust for the first, as the law does not presume gift. This presumption applies event to married spouses, as set out in section 14 of the *Family Law Act.*

3. Proprietary estoppel

Proprietary estoppel is a remedy more closely related to estate law than it is to family law although it may be used in a family law context, most likely in conjunction with constructive trust/unjust enrichment. The concept of

proprietary estoppel was recently discussed in the Supreme Court of Canada case of *Cowper Smith v. Morgan,* [2017] 2 SCR 754.

In this case, a son was promised an eventual ownership interest in the home owned by his ailing mother. The son left his place of residence, his employment, his cottage lease, his social contacts, and his children in order to care for his mother with the expectation of an ownership interest in the property once she passes. The Court was required to determine if this promise to the son of property ownership was enforceable in law.

The Court held that in order to establish proprietary estoppel, one must first establish an equity of the kind that proprietary estoppel protects. An equity arises when (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on the expectation by doing or refraining from doing something and his reliance is reasonable in all of the circumstances; and (3) the claimant suffers a detriment as a result of the reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word and insist on strict legal rights. If the above circumstances are met, proprietary estoppel attaches to that interest and protects the equity by making the representation or assurance binding.

One could imagine a situation of proprietary estoppel between common law spouses when one spouse foregoes purchasing his or her own property in order to continue to cohabitate in the home owned by the other. The first spouse relies on the second's promise to grant an eventual ownership interest in the family home should he or she continue to live there and remain committed to the relationship. If the second spouse reneges, the first has a claim based on proprietary estoppel to an interest in the family home as he or she has given up the opportunity to build equity in their own home based on the promise of future ownership in the partner's home.

Part II-Gift

To prove transfer of real property by way of a gift alone without a trust interest in the property is very difficult. The law does not presume gift. Evidence in writing of the intention to gift real property must be shown before a valid gift of real estate may be found to exist.

In the case *McNamee v. McNamee* 106 O.R. (3d) 401 [2011] ONCA 533 the Ontario Court of Appeal sets out what constitutes the act of providing a 'gift'. In the *McNamee* case, the issue was the transfer of common shares from father to son.

> *Although the term "gift" is not defined in the Family Law Act, a gift, generally speaking, is a voluntary transfer of property to another*

> *without consideration: Black's Law Dictionary, 7th ed. (St. Paul, MN: West Group, 1999), at p. 696; Birce v. Birce (2001), 2001 CanLII 8607 (ON CA), 56 O.R. (3d) 226, [2001] O.J. No. 3910 (C.A.), at para. 17. A transfer of property by contractual agreement involves a mutual exchange of obligations ("consideration"), but a transfer by way of gift involves a gratuitous, unilateral transaction: Mary Jane Mossman and William Flanagan, Property Law: Cases and Commentary, 2nd ed. (Toronto: Emond Montgomery Publications, 2004), at p. 439. As McLachlin J. observed in Peter v. Beblow, 1993 CanLII 126 (SCC), [1993] 1 S.C.R. 980, [1993] S.C.J. No. 36, at p. 991-92 S.C.R., "[t]he central element of a gift [is the] intentional giving to another without expectation of remuneration".*
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> *The essential ingredients of a legally valid gift are not in dispute. There must be (1) an intention to make a gift on the part of the donor, without consideration or expectation of remuneration, (2) an acceptance of the gift by the donee and (3) a sufficient act of delivery or transfer of the property to complete the transaction: Cochrane v. Moore (1890), 25 Q.B.D. 57 (C.A.), at pp. 72-73 Q.B.D.; Mossman and Flanagan, supra, at p. 441, Bruce Ziff, Principles of Property Law, 5th ed. (Toronto: Carswell, 2010), at p. 157.*

According to the Court of Appeal in *McNamee,* to be a valid gift, the donor must divest himself or herself of all power and control over the property and transfer such control to the donee.

The *Statue of Frauds* R.S.O. 1990 specifies at Section 1 that any interest in a land must be created by a written instrument signed by the parties. Section 1 reads as follows:

> *1.(1) Every estate or interest of freehold and every uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments shall be made or created by a writing signed by the parties making or creating the same, or their agents thereunto lawfully authorized in writing, and, if not so made or created, has the force and effect of an estate at will only, and shall not be deemed or taken to have any other or greater force or effect.*

Section 10 of the *Statute of Frauds* provides an exception to the rule that the transfer of property must be evidenced in writing in situation where transfer of ownership takes place as a result of a trust interest:

> *10. Where a conveyance is made of lands or tenements by which a trust or confidence arises or results by implication or construction of law, or is transferred or extinguished by act or operation of law, then and in every such case the trust or confidence is of the like force and effect as it would have been if this Act had not been passed. R.S.O 1990, c. S.19, s. 10.*

What to Do?

To avoid legal headaches and expense, it is best to put any intention regarding property in writing, regardless if you are married, common law, or otherwise engage in a relationship, intimate or not, that may involve property. Common law and married couples are able to set out their intentions regarding property ownership and division in Marriage and Cohabitation Agreements. These agreements are enforceable if drafted properly, negotiated fairly, with proper back up financial disclosure.

For parties not involved in marriage or common law relationships, for example, an adult child who lives in his or her parent's home and pays rent, a signed memorandum is effective to determine if an ownership interests is intended to pass to the adult child, and if so, when. If not a formal memorandum, there should be at the very least some correspondence that sets out the parties' intentions regarding property and its ownership. In Court, solid written evidence of intent trumps unsupported and contradicted oral evidence every time.

**Ken Nathens and Glen Schwartz are partners in the law firm of Nathens, Siegel LLP, a Toronto law firm dedicated to the practice of family law, including mediation, arbitration and collaborative law.*