

GETTING BACK YOUR 'GIFT'



It can pay to make it clear why money is being transferred – particularly when dealing with family members

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ISSUE

More and more often, more parents are putting up more money to help their children with more expensive house purchases than in the past. There is considerable potential for true misunderstandings and disputes of convenience as to whether these large amounts of money were intended as a gift, loan or investment.

Our Spring 2014 edition at page 36 (see the Magazine Archive at <https://www.cmbabc.ca/>) sets out a detailed summary of some key points and considerations to minimize the potential for later difficulties. The primary suggestion is to determine and document the intentions of the parties. The article also sets out presumptions Courts make as to the intentions of the parties in the absence of proof otherwise. You are highly encouraged to read, or reread, that article together with this article.

The BC Supreme Court in *Iberg v Claridge*, 2019 BCSC 165 provides an excellent example of what a Court might do if it finds that one party was unjustly enriched by the transfer of monies.

WHAT HAPPENED?

An approximately 65-year-old mother provided well over \$100,000 toward the purchase of a house to live in with her 35-year-old son.

She also paid significant sums for furniture, appliances in the two suites, and landscaping. Her understanding was that her son and her would each live in their own suite; indeed, that is how it was for about 10 years.

The son contributed no money toward the purchase but did sign the mortgage as the sole borrower. The mother and son paid equally toward the mortgage payments and expenses.

When the relationship unravelled, the mother claimed she was a joint owner of the property; the son claimed he was the sole owner and that his mother had gifted him the down payment. He wanted her evicted for unpaid rent, the mother having missed her first “rent” payment in 10 years.

The mother discovered around this time that when closing the purchase she had assigned the purchase agreement to her son and signed a residential tenancy agreement making her a tenant of her son.

The mother wanted the Court to declare an interest for her in the house on the basis that the son has been unjustly enriched by the monies she put toward the purchase.

LEGAL REQUIREMENTS

Courts presume, as a starting position, that a

gift was intended where a parent gratuitously makes a transfer to a dependent minor child. The presumption does not apply to a transfer made to a dependent adult child.

Equity assumes bargains and not gifts. The son has to similarly prove the gift to show that he has not been unjustly enriched.

For there to be unjust enrichment, there must be:

- enrichment (in this case, receiving the benefit of the transferred money)
- corresponding deprivation (in this case, being out the money provided)
- no juristic reason for the enrichment and deprivation (in this case, no reason why the son should be enriched at the expense of the mother. For example, the mother did not owe the money to the son to satisfy a debt or obligation.)

It really comes down to the Court looking at the circumstances and determining whether it would be fair to let the person keep the money they gratuitously received.

OUTCOME

The presumption of a gift did not apply in this case because it was made by a mother to an adult son. The presumption is that the money was not intended as a gift.



Clearly the son was enriched by the monies provided by his mother toward the purchase of the property and his mother was correspondingly deprived of those funds. The question is whether there is any juristic reason for the enrichment and deprivation.

The burden is on the son to provide a juristic reason that his mother intended the funds as a gift to her son. The son says the juristic reason is that his mother gifted the money to him to purchase the house to be his alone. The onus of proving the gift falls on the son.

The transaction was structured as it was on the advice of the mortgage broker. The mother had the down payment but would not qualify for the needed mortgage because of her debts, credit rating, and lack of income history. The son had no down payment but had a good job with a decent income. The broker suggested putting the application in the name of the son, for the mother to be cast as a tenant to enhance the son's income, and designating the mother's down payment as a gift (supported by a gift letter). The broker explained that both parties would have to say it was a gift, but

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if they had a different understanding between them, they could deal with that separately. The broker testified that, notwithstanding all of this, it was his understanding both the son and mother were buyers. (Curiously the Court accepted the broker's explanation without noting

that his description could amount to involving mortgage application fraud. Notably the Court had declined to believe the son's explanation as to an earlier transfer because it could amount to involving fraudulent conveyance.)

The mortgage broker's evidence was important in the Court's deciding that the mother had made an investment, not a gift. The son had failed to show that the monies were intended as a gift.

The Court then proceeded to determine the contributions of each party and divided the ownership accordingly. The property was to be sold and the proceeds divided, unless the son bought out the mother.

TAKEAWAYS

Determine and document the true intention of the parties as to whether the advancement of monies is a gift, loan, or investment. It can spare the client a difficult and upsetting litigation process. **MB**