



When Blood Becomes Thinner than Water

Resolving a mortgaging co-owner's registered interest in a property proves tricky if their intentions are not properly documented

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PROBLEM

Sometimes a client's financial circumstances are insufficient to qualify for a mortgage needed to complete a desired real estate purchase. For example, the level of the client's provable income, equity in the property to be mortgaged and/or credit rating may be insufficient for a lender to approve the loan. • Part of the expertise a mortgage broker brings to the table is the ability to recognize shortcomings in a client's application and explore possible solutions, before applications are submitted to potential lenders. This can involve an additional person signing the mortgage as a guarantor/covenantor. • The additional person most often is a relative of the client whose provable income, equity in other properties and/or credit rating helps overcome the shortcomings in the client's application.

In some instances the lender or the additional person will insist that the additional person not be a guarantor/covenantor but rather be a co-borrower, a key distinction being that a co-borrower is registered as having an ownership interest in the property. This can, particularly if there is later a falling-out between the client and the additional person, create substantial legal issues for the client and the additional person as to the nature of the additional person's ownership interest:

- Did the additional person sign the mortgage documentation gratuitously or was the person purchasing an interest in the property?
- Were the parties intending that the additional person hold the registered interest for himself or herself, or was the interest to be held in trust for the client?
- If the additional person was not meant to hold the registered interest for himself or herself, did the parties intend for the additional person to:

- *have a different interest in the property?*
- *be compensated for losses or opportunities passed on, such as being unable to obtain a further mortgage to purchase their own property while the subject mortgage was outstanding?*

Courts resolve these issues largely by referring to assumptions provided in law and by examining all of the circumstances to determine, if possible, the joint intentions of the parties. The problem is that:

- the assumptions can sometimes result in outcomes the parties did not expect and
- parties sometimes sincerely differ as to intentions/recollections or, particularly after a falling-out, later lie about what their intentions were at the time of the transfer.

The disputes can result in lengthy, expensive and stressful court actions to resolve the issues.

EASY SOLUTION

A mortgage broker can provide valuable service to the client by recommending that the parties' intentions and expectations, including as to the above questions, be documented at the time of the transaction. The recommendation need not carry with it an obligation for the mortgage broker to prepare the document. In fact, it would be prudent for the parties to have a lawyer

prepare the document. Had the intentions of the parties been documented at the time of the transaction, the issue in the following illustrative case would not have arisen. Failing to address the intentions appropriately and in a timely manner does not necessarily avoid the possibly uncomfortable discussion; it postpones it. It allows the discomfort to grow and for circumstances to change such that a party may come to have motivations to falsely describe their intentions and expectations in having entered into the arrangement. It very much increases the risk the parties will later have to spend great amounts of time and money to litigate the matter.

remained with the mother. The mother purchased the family's hookah shop from her husband; the daughter and one of the other children assisted with the operation of the shop from time to time.

After the divorce, the mother located a home to purchase. Her "subject to financing" offer was accepted and she made the deposit. Her broker advised her that her income was insufficient to qualify her for a mortgage without an appropriate co-borrower.

The purchase was ultimately completed, with the daughter signing the mortgage as a co-borrower and being registered on title as a joint tenant (note: a joint tenant has survivorship rights over the interest of the

Having no documentation confirming the intentions and expectation of the parties, the court decided the case on the basis of which party was more believable.

ILLUSTRATIVE CASE

The B.C. Supreme Court case *Jafar-Gholizadeh v. Larijani*, 2018 BCSC 279 illustrates how messy things can get when a relative helps a person qualify for a mortgage and the parties later have a falling-out. Of note is that the court, in the absence of a written document setting out the intentions and expectations of the parties at the time of the transaction, was left to sift through lengthy conflicting evidence to determine them. From the volume and the nature of the evidence, it would appear the case was expensive for both parties.

WHAT HAPPENED?

The case involves a mother as the borrower and her 36-year-old daughter (the daughter) as the additional borrower. The mother had two other children (aged 33 and 26), neither of whom was directly involved in the transaction.

The daughter had previously loaned her parents \$10,000 for use toward the purchase of a condominium. That loan was repaid within a year and a half.

Upon the parents' divorce, the children

other person and so the daughter potentially could have owned the entire property to the exclusion of her siblings). The daughter loaned the mother a further amount of approximately \$23,000 to pay out the father regarding the divorce settlement.

The mother resided at the home continuously. The daughter resided in the home for a couple of years but then became estranged, after which she had very little communication with her mother. The daughter began sending her mother vitriolic and hateful emails containing serious accusations. The emails, in part, demanded repayment of the balance owing under the \$23,000 loan; the mother quickly paid it back, plus interest.

During the period of estrangement, the mortgage came up for renewal. Because of the conflict between them, the mother tried to sign the renewal documents without the daughter's involvement and signature. Not surprisingly, the lender rejected those documents as being incomplete. Wanting to avoid another round of vitriolic emails from the daughter, the mother signed the



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mortgage renewal document for both herself and her daughter. The mother admitted this at trial, realized it was wrong, and expressed remorse.

The daughter became aware of the forgery and threatened to go to the police. She claimed she was not able to qualify for her own mortgage because of being a signatory for the debt with the mother. She claimed to have lost her entitlement to the first-time homebuyer benefits because of having been on title with the mother. The mother indicated to her daughter that she would cover any such losses. The daughter demanded that her mother sell the property and pay her one half of the proceeds. If the mother did this, the daughter was willing to forego \$80,000 of salary she was claiming for having worked at the hookah shop.

The home by the time of the dispute had increased in value considerably. There was little doubt there was considerably more equity in the property than needed to pay out the existing mortgage.

There was no agreement setting out the intentions and expectations of the parties in having the daughter sign the mortgage and be registered on title.

Among the mother's assertions were that:

- the daughter was facilitating only the financing;
- she did not understand there to be any ownership implications arising from the daughter's assistance; and
- the daughter did not indicate, until after the issues started arising, that she thought she had any interest in the home.

Among the daughter's assertions were that:

- she was an integral part of the decision to locate and purchase the home;
- she and her mother discussed that she would be entitled to 50% of the house in exchange for working for free at the family business and providing loans to her mother; and
- she had offered to make mortgage payments, but her mother said that wasn't necessary while her mother owed her money under the outstanding loan.

DECISION

The B.C. Land Title Act states that a person registered on title as having an interest in the title has that interest in the title. The

courts have interpreted that provision to be a presumption capable of being set aside where any of the following apply:

- The person with the registered interest gave no value for it.
- The parties made an agreement contrary to what is registered on title.
- The underlying equitable interests are different than the interests registered on title (simply put – fairness dictates otherwise).

Having no documentation confirming the intentions and expectation of the parties, the court decided the case on the basis of which party was more believable. It decided in favour of the mother, finding that the daughter's evidence was not believable. It dealt with the above three bulleted criteria in essentially the following way:

The daughter had given value for the transfer. Co-signing the mortgage and pledging her credit exposed her to risk. She was jointly and severally responsible for the entire amount due under the mortgage. Without the daughter's involvement, the mother could not have purchased the home.

Considering the entire evidence, it was not the intention of either party at the time of the transaction that the daughter acquire an interest in the property. The daughter was giving her mother a gift, as she had done in helping at the hookah shop and providing interest-free loans. It was a clear understanding that this was the mother's purchase and she would be solely responsible for all matters relating to the home, including all mortgage payments. The mother had made all the mortgage payments, paid the property taxes, paid all maintenance costs and paid \$100,000 for renovations.

The mother has been unjustly enriched by having owned the home in an increasing market. This was possible only with the help of the daughter giving the mother use of her creditworthiness. It would be unfair for the daughter to not be rewarded for the services provided and the risk undertaken. The court awarded the daughter a 10 per cent interest in the property.

As offered up by the mother, the court ordered the home to be sold and the proceeds divided 90 per cent to the mother and 10 per cent to the daughter. ■■