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It Is Probably a Good Idea to Speak to a Family Lawyer When…

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As lawyers, we can easily forget that it is sometimes important to pick up the phone or walk down the hall to talk to a colleague who practices in another practice area.
The purpose of this short paper is to provide some practical considerations for the real estate lawyer from a family lawyer's perspective.

Your clients buy, sell, transfer or encumber their property in all sorts of different situations and for many different reasons. These kinds of transactions often coincide with different life events such as cohabitation, marriage, divorce, and family estate planning. Your client may be bringing their home into a marriage or sharing their home with a new partner. Your client may be gifting a property to a child or giving their child money to purchase a home. Your client may be contemplating separating from their spouse. Each of these situations has legal implications that affect your client's rights and entitlements over their assets.

You should be mindful of your client's life events when are considering the following types of transactions:

1. Transfers;
2. Purchases;
3. Loans.

1) Transfers

This category can be broken down into two parts:

A) Gratuitous transfers of property from a parent to a child and
B) Gratuitous transfers between spouses.

A) <u>Parent to Child Transfer</u>

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Some parents decide that it would be nice to help their child acquire a home. This could take the form of a transfer directly between parent and child or by the parent providing the child with money to fund the purchase of a property.

The Supreme Court in *Pecore v. Pecore*[1] decided that gratuitous transfers between parents and adult independent children do not form a gift but a loan. In other words the presumption of advancement does not apply. The law presumes a resulting trust.
This may be ok from the parent's perspective. They can decide whether or not to call the loan. Unfortunately life does not always go according to plan and feelings and expectations change when the child marries or faces the reality that his or her marriage is at an end. Suddenly your parent client sees his or her loan challenged and the asset potentially being shared by operation of the equalization provisions of the Family Law Act with a former son or daughter-in-law.
Similarly, your client may gift an asset to his or her married child. Under the Act, gifts of property are excluded from the equalization regime except the matrimonial home or property that is traceable to the matrimonial home, for example, the gift of money that your parent client made to help the child purchase the home.

B) Spousal Transfers

Ownership matters. The equalization regime is title driven but the *Family Law Act* also preserves the doctrine of resulting trust. This creates a host of considerations when dealing with gratuitous transfers. Your client spouse may wish to transfer his or her asset, in whole or in part, to his or her spouse. This might be done to credit proof. This might be done out of love and kindness. The recipient spouse may believe they are receiving gift or they may believe that they are helping the transferor credit proof. In either case, both spouses need to understand the risk on separation.

The CA decision in *Launchbury v. Launchbury*[2] held that even if a spouse intended to transfer a house to his spouse to protect the asset from creditors, it was still open to him to argue that the presumption of resulting trust applied. Similarly, in the recent CA decision of *Korman v Korman*[3], the court held that while the husband may have intended to transfer the house to his spouse to credit proof, he also did not intend to gift it to his spouse. His spouse could not prove that he intended the transfer to be a gift and as such could not rebut the presumption of resulting trust. On separation the titled spouse suffered a claw back and lost the ability to benefit from any post separation growth in value of an asset to which she had title

[1] 2007 CarswellOnt 2753
[2] 2005 CarswellOnt 1335
[3] 2015 CarswellOnt 578

It is wise to consult with a family law lawyer in these circumstances to ascertain your client's needs and objectives and to provide the best possible advice on how to deal with these issues.
The parent transferor will likely want to have their gift that was made during marriage properly documented to ensure that the gift passes the exclusion test and is not shared by operation of the equalization regime.

From a parent transferor's perspective, if they intended a gift to their child, they may want their child to insist on negotiating a domestic contract with his or her spouse to preserve the asset and ensure that the asset and any income/growth that may be derived from the asset is excluded from any equalization calculation altogether.

As between spouses, it is in both spouse's interests to enter into a marriage contract at the time of transfer that crystalizes the parties' intentions about the property in question. By operation of contract, the parties could ensure that on separation their rights will be governed by the contract, at the very least on a limited basis. The intention is to avoid conflict in an already difficult time.

2) Purchases

    a) Matrimonial homes

Your client spouse may not be aware that the definition of matrimonial home under the FLA includes <u>every</u> property that at the time of separation was ordinarily occupied by the person and his or her spouse as their family residence. This captures the cottage or ski chalet that he or she has purchased and is bringing into a marriage or will be purchasing during a marriage.

This is problematic for your client in two ways. Firstly, if your client is bringing such an asset into the marriage, he or she will lose the ability to deduct the value of the asset as at the date of marriage. Secondly, the non-titled spouse has *in personam* possessory rights against the titled spouse which only end when they cease being spouses unless the titled spouse can secure an agreement or obtain a court order terminating the possessory right.

Your client will be able to secure the date of marriage deduction by contracting for it under a marriage contract. However, marriage contracts that require the non-titled spouse to vacate a matrimonial home within a specified period of time after separation are not enforceable by operation of the FLA [s. 52(2)].

You client should discuss these issues with a family law lawyer. At the end of the day, this is really only about family and financial planning. It is better that your client and his or her spouse figure out at the outset how title will be taken and how the asset will be treated if the parties separate.

b) Joint Tenancy in Matrimonial Home with Third Party (non-spouse)

If a spouse jointly owns what is his or her matrimonial home with a third party as joint tenants, s.26 of the FLA deems the joint tenancy as severed on the spouses' death. The purpose of this section is really to protect the non-titled spouse to ensure that the deceased spouse's asset is equalized. This has implications for the joint tenants and the non-titled spouse. The reasons for which the joint tenancy is taken could be many: a) estate planning between parent and child or b) securing a debt obligation. At the outset of the transaction, all three parties may need to understand their rights from a family law perspective.

c) Property Purchases by Unmarried Spouses

Unmarried spouses do not benefit from the equalization regime. As such, title governs property division, subject to any equitable remedies by operation of the resulting and remedial constructive trusts.

Resulting trust

There are two common scenarios that give rise to beneficial entitlements by operation of a resulting trust. First, both spouses contribute to the purchase of a property but title is only taken by one spouse. Second, one spouse contributes the entire purchase price for a property and title is taken by both spouses. In each case, there is a gratuitous transfer. Somebody is getting something for nothing. It used to be that a resulting trust may have existed in situations where title did not reflect the common intention of the parties by operation of the common intention resulting trust. In other words, even if title was taken by one spouse, if the parties' intention was to share the property, the untitled spouse would have an interest.

The Supreme Court of Canada's decision in *Kerr v Baranow*[4] killed the common intention resulting trust. Your clients who are unmarried but spouses need to understand that the law presumes a resulting trust in the context of gratuitous transfers. In other words the party that receives the benefit for no consideration is really just a trustee for the contributing spouse. The onus will be on the spouse that received the benefit to prove a gift. This may or may not match your client's expectations.

Constructive Trusts

[4] 2014 CarswellSask 324

Without getting into the mechanics of this type of claim, the common situation is one where a non-titled spouse makes a contribution (money or money's worth) to the titled spouse's asset. On separation, it could be a very difficult and costly exercise for the non-titled spouse to prove a claim in based on principle of unjust enrichment.

It is far more sensible and practical that your client's try to turn their minds to how to deal with their division of property at the purchase phase of their relationship rather than their separation. While the real estate lawyer can advise on taking title, the family lawyer can assist in crafting the mechanics of how to untangle property rights on separation by way of domestic contract.

d) Debts

A typical scenario involves the client who decides to lend money to their child or pays off a child's mortgage. They may intend that the funds are repayable on demand. They may even sign a promissory note and take a mortgage. The problem arises on separation when the child claims the debt in calculating his or her net family property.

Without getting into the various types of loans that exist, the problem is really twofold: For the lending parent, they may have an enforceability problem by operation of the Limitations Act. It is important that they receive advice in order to preserve their rights respecting the loan. Ideally, the debtor should make regular payments towards the loan or, at least, periodic acknowledgements of the debt. For the recipient spouse who intends to include the debt in any calculation of net family property, the debt could ultimately be discounted to nil where no payments have ever been made and it appears unlikely to be the case that a demand would ever be made by the parent.

From a family law perspective, the spouse should be made aware of these issues so that he or she can make sure that the debt is not discounted.