



Bob Aaron bob@aaron.ca

July 16, 2005

## Get advice about down payment gifts

### Parents should consult lawyer before providing house loan *Demand mortgage may not offer adequate future protection*

When young couples buy a home for the first time, it's not uncommon for the parents of one partner or the other to provide financial assistance. It may be offered either as a down payment, or if finances permit, for much of the purchase price.

Many times in my own practice, I have seen certified cheques for some, or all, of the purchase price signed by a parent of the purchaser or one of two young purchasers.

When I ask, I'm usually told that the money is either a gift, a forgivable loan, or a mortgage either to be registered or unregistered against the property.

If I'm aware that the source of the funds is a parent, I often insist that he or she receive independent legal advice on whether the purchase, money, gift or loan should be documented in any way, and if so, whether it should be registered on title as a mortgage in favour of the parent.

Depending on the circumstances, a parent might say that the money is a gift and there is no requirement or expectation that it be repaid. If the money is a loan, the parent will, in some cases, be advised that it should be secured on title as a mortgage.

Sometimes, a mortgage from a parent will be signed and registered so that the money will be treated as an asset of the parent's estate on death, resulting in an equitable division with other siblings who may not have received similar treatment.

In other cases, a parent's mortgage will be registered on title to protect the money in the event the marriage goes sour and there is a dispute between the spouses over the equity in the house. If the marriage survives, the money will eventually be forgiven or written off in the parent's will.

Until recently, the typical way of protecting a parent's money in similar cases was for the recipient couple to sign a mortgage in favour of the parent for the sum advanced, with or without interest, and repayable "on demand" in other words, whenever the parent wants the money back.

The use of a demand mortgage or a mortgage without payments in parent-child situations will probably change in the wake of a decision of Justice Sherrill Rogers in Newmarket Family Court in March.

In 1988, Purissima and Tomasso Cioccio purchased a home and signed a mortgage in favour of the parents of the husband, Angelo and Antonio Cioccio. The mortgage was written and signed as a conventional five-year mortgage with monthly payments. After the house purchase, the parents never asked for payments and no payments were ever made on the loan. In fact, it was not registered on title until February 2004, about two months after Purissima and Tomasso separated.

Purissima then took her husband to court, claiming among other things, that the advance of monies from her in-laws was a gift and the mortgage was unenforceable. Tomasso's position was that the money was a conventional mortgage and would have to be repaid to his parents if the house was ever sold.

The legal question before the court was the interpretation of the Real Property Limitations Act. In short, the legislation says that a mortgage becomes void if no payments have been made or demanded in a 10-year period, and if the borrowers have not acknowledged owing the debt during that time.

But when does the 10-year period start running from the day the first payment fell due in 1988, or the day in 2004 when the parents made a formal demand for return of their money?

Dana Cohen, lawyer for the wife, argued that the 10-year period ran out in 1998 and the mortgage was no longer enforceable in 2005. Milton Bernstein, counsel for the husband, said the 10-year period only starts when a demand is made.

Ultimately, Justice Rogers decided that the mortgage was not a demand mortgage, but a conventional mortgage calling for regular payments and containing a fixed maturity date. The court ruled that the mortgage began in 1988 and ran out in 1998. As a result, it was no longer enforceable and was ordered to be discharged from title to the house.

Another Ontario case in 2004 (Alter vs. Csontos) dealt with a similar fact situation on a home in Forest Hill. Justice Susan Greer decided that the limitation period on a demand mortgage started running when the mortgage was signed and not when the demand for money was made at some later date.

In the aftermath of these two decisions, it becomes even more important for parents to receive independent legal advice when lending or gifting money for a house purchase by their children.

In order to prevent the statute of limitations from running out, it's a good idea for payments to be made from time to time.

An annual payment of only \$1, preferably by cheque, might well be the difference between a mortgage being enforceable or invalid after the 10-year period has expired.

---

**Bob Aaron** is a Toronto real estate lawyer. He can be reached by email at [bob@aaron.ca](mailto:bob@aaron.ca), phone 416-364-9366 or fax 416-364-3818. Visit the column archives at <http://www.aaron.ca>.