

Family

Rare finding of fraudulent conveyance in family law proceeding

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(November 18, 2020, 12:04 PM EST) -- In *Iacobelli v. Iacobelli* 2020 ONSC 3625, Justice John McDermot ordered the husband's equity in the \$1-million matrimonial home to be vested in his former wife's name, to satisfy part of the equalization and spousal support lump sum payments owing to her, after finding that payments of hundreds of thousands of dollars were fraudulent conveyances of matrimonial funds to his mother.

According to the trial judgment, the man's past misconduct in the case included removing funds from the registered education savings plan (RESP) accounts of the couple's children, as well as surreptitiously transferring funds to his mother in an attempt to have them excluded from equalization and support calculations.

"Under such circumstances, there is a legitimate fear that [the former husband] will not comply with the payment orders that I have made in this judgment," Justice McDermot concluded. "He has shown bad faith in the past, and there is no remedy that will work."

As a result, the trial judge ordered that the husband's one-half share in the couple's matrimonial home be vested in the wife's name. Even after accounting for the \$530,000 value of his equity, the husband still owed his wife \$147,535 in lump-sum spousal support, which the judge gave him 30 days to pay or face a further judgment for that amount.

The couple separated in 2014 after 19 years of marriage. Blaming financial and personal difficulties for multiple breaches of a temporary support order made in 2014, the husband claimed his former spouse should become immediately self-sufficient and that their house should be sold — allowing him to realize the value of his share. He also claimed that his income had dropped to around \$50,000 per year, with his ability to earn more impaired by complications resulting from a cancer diagnosis.

The wife claimed that her former husband had understated his income from a designer blind business co-owned with his mother, and raised questions about payments made between the two in the dying days of the marriage.

One particular exchange highlighted in the decision dealt with the husband's explanation for the lack of records showing cash he received from the business. Under cross-examination, he admitted to disposing of the phone on which he allegedly had tallied up all his cash income after the litigation had begun, despite undertaking not to destroy any evidence.

"When that was brought to his attention, he then said that his phone had crashed and the contents of the hard drive was lost. Although he testified that he took it to Apple to unsuccessfully retrieve his data, he had nothing proving that," the judge wrote. "It was similar to a child telling his teacher that the dog had eaten his homework and as believable."

Ultimately, the court imputed the husband's annual income at \$142,000, ordering him to pay just

over \$3,000 per month in child support, as well as \$335,000 to his ex-wife in lump sum spousal support.

When it came to the equalization of assets, the husband was ordered to pay \$340,000 after the judge found he had made fraudulent conveyances to his mother with the intent of defeating his wife's matrimonial claims.

The trial judge reviewed the "badges of fraud," found at paragraph 52 of the decision of *Indcondo Building Corp. v. Sloan* 2014 ONSC 4018, which can raise an inference of intent resulting in a shift of the onus on the conveying party to explain himself.

Two transactions were called into question in the *Iacobelli* case, as noted by the trial judge. The first was the payment of \$149,000 by the husband to his mother. He claimed that this was to repay her for cash that he had taken out of the business over the six previous years which he owed her. The second was the repayment of a \$200,000 mortgage registered against the matrimonial home in favour of his mother in 1995.

The mother acknowledged receiving around \$350,000 from her son in the last few years of the marriage and admitted under cross-examination that the same money may have been used to pay for a house bought in her daughter's name in 2014. Following the daughter's death that same year, the home was transferred to the mother.

The trial judge was satisfied that the series of transfers worth \$149,000 from joint accounts shared by the former spouses to the husband's mother bore a number of the badges of fraud:

... A number of the "badges" are present in respect of the payment of the \$149,000 to [the husband's mother]. These transactions were kept secret from Ms. Iacobelli and were set up to conceal the true nature of them. Mr. Iacobelli knew that there were "threatened legal proceedings" as he knew that the marriage was breaking down, and that he needed to protect these assets from Ms. Iacobelli's equalization and support claims. The transfer documents were patently false and intended to deceive. And the consideration is "grossly inadequate"; Mr. Iacobelli said that he owed his mother \$114,000 which was the cash that he had removed from the business over the previous six years; however, he acknowledged in his submissions that he had in fact over paid his business partner by \$57,000 as he only owed [his mother] half of the cash payments that he had received. This leaves \$92,000 in unexplained transfers to [his mother].

The husband "has not explained the transactions which were suspicious in both the method by which they were effected, and as to the purpose of the transfers. Therefore, I find that the transfer of these funds was a fraudulent conveyance," the trial judge concluded.

In addition, the trial judge found that the \$200,000 repayment of a mortgage held by the mother on the couple's home was another fraudulent conveyance, noting that the 10-year limitation period on the loan had already passed without demand for repayment.

"If there was ever an intent to repay the loan, that intent had long expired by the time the loan was paid by [the husband] in March, 2012. This was, by the time it was repaid, an unenforceable debt, and [he] failed to adequately explain how it was repaid or why it was repaid as the marriage broke down, and at the same time he was diverting funds to transfer \$149,000 to his mother," the judge wrote.

Finding that the wife was successful at trial, the judge concluded that the husband's bad faith conduct required him to assess costs on a full recovery basis. The husband was ordered to pay the wife costs of \$250,000, inclusive of disbursements and HST, collectable as support.

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