

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N** )  
)  
GABRIEL NUSSBAUM ) *James D Singer*, Counsel for the Plaintiff  
(Plaintiff) )  
)  
**–and–** )  
)  
LILY NUSSBAUM ) *Sheilagh M. O’Connell*, Counsel for Lily  
WASSERMAN, MATHEW LTD., ) Nussbaum  
TRUSTEE IN BANKRUPTCY ) *Gary S. Joseph*, Counsel for Wasserman,  
(Defendants) ) Mathew Ltd.  
)  
) **HEARD:** July 26, 2004

**KARAKATSANIS J.**

**REASONS FOR DECISION**

[1] This case raises the issue of whether a spouse’s conveyance of property to a spouse with the intention of protecting assets from creditors will disentitle him to a declaration that he has an equitable interest in the property.

[2] The husband seeks a declaration that a two-thirds interest in a property held in his wife’s name is held in trust for him as beneficial owner. The husband Gabriel paid for the purchase price and improvements. The wife Lily claims that because the husband sought to put the property beyond the reach of his creditors, he gifted his interest in the property to her. After separation the wife declared bankruptcy and the Trustee in bankruptcy is a party to the application.

[3] The husband submits that pursuant to the *Family Law Act* and the presumption of resulting trust, the wife holds the property in trust for him. The husband submits that even if I find as a fact that there was an illegal purpose in putting the property in her name, it would not bar his recovery because he would rely on the presumption of resulting trust and need not rely on the illegal purpose to prove his claim. The husband submits that there was no illegal purpose in putting the property in his wife’s name because he was not trying to evade specific creditors and no creditors have in fact been prejudiced. Finally, he submits that any finding of illegal purpose should not be a bar in any event because he has ‘repented’ of his purpose and wishes to use his interest in the property to pay off his creditors.

[4] The wife takes the position that there was no common intention that she hold the property in trust for the husband. Counsel submits on her behalf that the husband's intention to put the property out of reach of his creditors is evidence of his intention to gift the property to her. The presumption of resulting trust does not therefore apply. The respondents rely upon a number of Canadian cases that have been reluctant to allow a person who seeks to avoid creditors to subsequently benefit from the court's intervention. They submit that because his individual creditors are his mother and brother, the court should not be swayed by his intention to repay his creditors given that the property is currently the sole support for his children. The respondents did not argue that the wife was entitled to a share of the beneficial ownership based upon her contributions during the marriage; their submissions were that the property had been gifted to her.

### **Issues**

1. Is there a presumption of resulting trust?
2. Is the presumption of resulting trust rebutted by evidence that the parties intended that the husband's interest be gifted to the wife?
3. Does the evidence of illegal intention disentitle the husband to equitable relief?
4. If so, is there an exception because the husband did not have specific creditors and no harm was occasioned by the illegal purpose?

[5] For the reasons that follow, I find that there is a presumption of resulting trust on the facts of this case that has not been displaced by evidence the applicant intended to gift the property to his wife. The illegal purpose is not a bar because the applicant does not rely upon his illegal purpose to prove his claim. It is therefore not necessary that I determine there were no specific creditors at the time of the transaction and that no creditors had been prejudiced in this case. I therefore grant the relief requested.

### **Background**

[6] Gabriel and Lily Nussbaum married in 1992 and separated December 2002, living together under the same roof until June 2003. There is one significant asset – a rental triplex at 87 Beaty - purchased November 3, 1997 for \$186,000.

[7] Gabriel says he purchased the income producing property together with a one-third partner Desmond Patterson. The agreement of purchase and sale was in Gabriel's name. Gabriel provided two-thirds and Des provided one-third of the down payment and of the costs of renovations. They each provided time and effort to improve and operate the rental business. Gabriel deposed that much of his initial cash outlay came from credit cards and a loan from his mother. Lily made no financial contribution to either the purchase price or the cost of renovations.

[8] The property was put in Lily's name. The partner, Des, was not immediately put on title purportedly because of mortgage considerations. Gabriel says he put the property into Lily's

name because he was a businessman and it was prudent to protect his family in case of financial catastrophe. Lily says that Gabriel always said he wanted to 'max out' his credit cards and put his assets into her name so that if he went bankrupt, he would still have cash and assets.

[9] Gabriel immediately opened up a bank account in his name in which all rents were deposited. In 1998 the account was put in the name of Gabriel and Des. All expenses were paid from that account. Des was responsible for all the repairs and maintenance. Gabriel was responsible for all administration. Gabriel prepared annual statements of revenue and expenses indicating 'Gabriel 2/3' and 'Des 1/3'. Gabriel retained counsel in April 1998 to prepare a co-tenancy agreement between himself and Des documenting the partnership. It was never signed because Des did not agree with some of the contents and they both felt secure in how the business dealings were going.

[10] In early 2001, Des wanted his share reflected on title and Gabriel asked Lily to convey a one-third interest to Des. The transfer was registered May 2001. Gabriel and Des took out a mortgage for \$227,250 in November 1998, thereby recouping some of their investment. The mortgage is in Gabriel's name and the mortgage statements have been sent to him.

[11] Gabriel declared his income from the property and deducted the expenses, including interest on the loan related to the property, in his income tax forms for the three years until separation. Lily did not declare the income on her income taxes. The mortgage was in Gabriel's name and he paid the mortgage. Lily did not contribute any money for the purchase, the renovations or the expenses of the property.

[12] Lily concedes that Gabriel looked after administration of the property with Desmond's help during the marriage. After separation she took control of the administration and the finances, with Desmond's assistance. She asked the tenants to deliver the rent to her and they opened a new bank account. The leases had always been in her name. Des says that he and Lily assumed control of the finances on July 16, 2003.

[13] Gabriel deposes that he had fallen into deep debt, that he has continued to pay interest to his creditors and that he will use his equity in Beaty to meet his debts. Lily has used the income from the property (about \$1000 to \$1200 per month) to sustain the children since the separation.

[14] The parties clearly had financial difficulties throughout the marriage. Gabriel admits that he owed about \$300,000 as a result of Beaty, household assets and spending at the time of separation.

### **1. Does the presumption of resulting trust arise on the facts of this case?**

[15] Under section 14 of the *Family Law Act* and case law, a resulting trust arises when one spouse contributes money, or property, directly toward the acquisition or improvement of a specific property to a greater extent than is reflected by legal ownership. The spouse's contribution must be directly traceable into the property. There must be an intention or agreement that the donor spouse retain a beneficial interest in respect of his or her contribution.

This intent may be implied or presumed under a presumption of resulting trust. If the contribution is intended as a gift, clearly no trust arises.

[16] In this case, Gabriel and Des contributed the money, time and effort in purchasing, improving and operating this rental property. Gabriel paid the down payment of \$22,365 and Des repaid him his one-third share. They invested about \$75,000 in repairs and renovations and Gabriel paid the two-thirds and Des paid the one-third of those expenses. There was no argument before me, and no facts to suggest that the wife had contributed money. Any other contribution appears to be extremely limited. Lily testified that she would sometimes clean apartments and interview tenants subject to her childcare and household duties. However, Desmond testified that all his dealings were with Gabriel. Des said that “Lily would basically take messages, that was her participation,” but Gabriel was always the person who would deal with the tenants. Although Desmond did not have any first-hand knowledge, it is consistent with Gabriel’s evidence that he did the work and Lily’s role was extremely limited.

[17] While Gabriel suggests that there was an explicit agreement that Lily would hold the property in trust for him, Lily denies any discussion on the issue of Gabriel’s interest in the property. She submits that there was no common intention that she was holding the property in trust for him. She states that she was against Gabriel ‘maxing out’ on his credit cards. She states that she never agreed or intended to hold the property in trust for him and did not understand that she did so.

[18] I find that in this case there was no explicit agreement. As in many matrimonial cases, the intentions of the parties are more often implied from the circumstances. In this case, the husband paid for the property and improvements and these circumstances give rise to the presumption that the wife holds the property for the husband. I agree that if the circumstances are inconsistent with a resulting trust, the presumption need not apply. I do not find that this is such a case. In this case the onus is on the wife to lead evidence to rebut or displace the presumption of resulting trust and establish that the conveyance was a gift.

**2. Rebuttal of the presumption of resulting trust. Did Gabriel gift the property to Lily by placing it in her name in order to protect the property from creditors?**

[19] Lily takes the position that because Gabriel intended to put the assets beyond the reach of his creditors, he therefore intended to gift the property to her.

[20] I agree with counsel that intention to gift the property trumps the presumption of resulting trust. However, I do not agree that the facts of this case lead to the conclusion that the parties intended the transfer to be a gift. In reaching that conclusion, I rely upon both the parties’ statements about their understanding and the circumstances surrounding the acquisition and the administration of the property during the marriage.

[21] Gabriel deposes that he purchased the property for himself and his partner Desmond Patterson. Gabriel says he put the property into Lily’s name “because he was a businessman and it was prudent to protect his family in case of financial catastrophe.”

[22] In her affidavit of September 23, 2003 Lily states:

It is true that the deed for this property in my name, **although the Plaintiff clearly has a beneficial ownership in the property**. The Plaintiff has planned to go bankrupt for years. He always said that he would “max out” his credit card and put all the assets in my name so that if he needed to go bankrupt **he would still have** cash and assets....[emphasis added]

[23] Lily’s evidence itself does not support a clear intention that Gabriel’s interest would be gifted to her. She does not depose that was the intention at the time of transfer. She states that she and the plaintiff purchased the property together and that she does not agree that he owned two-thirds of the property. She never agreed or stated that she was holding the property in trust for her husband. Nothing was ever discussed with him regarding his interest in the property, although she did believe that he had a beneficial interest in the ownership of the property. Lily testified that she also considered it her property on the basis that they were married and benefited from each other.

[24] As well, the circumstances indicate that Gabriel and Lily continued to treat the property as Gabriel’s. Gabriel continued to pay two-thirds of the expenses after the property was acquired in Lily’s name. He provided all the administration, deposited the income in his name, paid the mortgage in his name and declared the rental income and deducted the expenses, including loan interest, in his income tax returns. Des’s evidence is that he dealt with Gabriel as his partner and that Lily’s role appeared to be restricted to taking messages for Gabriel. A draft co-tenancy agreement reflects the partnership between Gabriel and Des. Desmond considered that until title would be put in his name there was an unwritten trust that one-third of the property was held for him. All the contemporaneous documents, including statements of annual income and expenses prepared for Des, indicate that Gabriel is the two-thirds owner of the property. As Lily subsequently transferred one third of the interest in the title to the property to Des; she clearly understood that the fact that the property was in her name did not mean that it belonged entirely to her. Lily accepts that Gabriel provided all the administration until after separation. She did not contribute money and did not declare the income or expenses on her tax returns.

[25] The fact that the mortgage was in Gabriel’s name or that he treated the property as his for tax purposes, would not necessarily have negated an intention to gift the property. The tax treatment was in his financial interest; it appears that the interest expenses resulted in reducing his overall income tax liability. As well, Lily appears to have left business and tax matters up to Gabriel.

[26] However, all the circumstances of the acquisition and operation of the property until separation support the conclusion that the parties intended Gabriel to continue to have a beneficial interest in the property. There is no requirement that Lily explicitly agree to hold the property in trust for Gabriel. These circumstances, together with Lily’s own statements that she understood Gabriel had a beneficial interest in the property and that he would have assets even if he went bankrupt, are inconsistent with her position that the property was intended to be a gift to

her. I am not satisfied as a factual matter that the parties intended that the property would belong to Lily.

[27] I find that there was no intention that Gabriel would gift his interest to Lily. The presumption of resulting trust is not rebutted.

### **3. Does the evidence of illegal intention disentitle the husband to equitable relief?**

[28] Lily's position can only succeed if the court is not prepared to transfer property to Gabriel because he intended to defeat his creditors. The courts have been reluctant to lend its aid to those whose claim is founded in an unlawful purpose or intention.

[29] However, the caselaw where someone seeks return of property they put into another's name in order to avoid creditors is somewhat confusing. Perhaps because the rule is based upon public policy, and the equities between the parties are not always clear, the development of the rules has been somewhat arbitrary. The principle that the court would not lend its aid to those who must rely upon an unlawful act in order to prove their claim has evolved. In *Tinsley v Milligan*, [1993] H.L.J. No. 24, the House of Lords held that an illegal purpose would not be a bar where the claimant need not rely upon the illegality, as in the presumption of resulting trust. The fact that illegality was raised as a defence was not a bar to recovery. Historically this resulted in an arbitrary distinction based upon the relationship between the parties. Where there was a presumption of advancement, or gift, as between spouses, or parent and child, recovery would not be possible; in those cases the plaintiff would have to rely upon the illegal purpose to rebut the presumption of gift and therefore could not succeed.

[30] In Canada, the courts have acknowledged the claimant may recover an interest where it was not necessary to rely upon the illegal purpose to establish the facts giving rise to the presumption of a resulting trust, unless the presumption was rebutted. See *Gorog v Kiss* (1977), 16 O.R. (2d) 569 (C.A.). In *Maysels v Maysels* (1974), 3 O.R. (2d) 321, the Court of Appeal of Ontario accepted that principle but determined that the claimant in the case before it could succeed only by proving his illegal purpose. *Maysels* was decided before the *Family Law Act* established a presumption of resulting trust between spouses. At the time there was a presumption of advancement between husband and wife and the husband was required to rely upon his intent to protect his assets against creditors in order to rebut the presumption of gift. The court cites the well known passage of Lord Denning in *Tinker v Tinker*, [1970] 1 All E.R. 540 at 542:

...I am quite clear that the husband cannot have it both ways. So he is on the horns of a dilemma. He cannot say that the house is his own and, at one and the same time say that it is his wife's. As against his wife, he wants to say that it belongs to *him*. As against his creditors, that it belongs to her. That simply will not do. Either it was conveyed to her for her own use absolutely; or it was conveyed to her as trustee for her husband. It must be one or the other. The presumption is that it was conveyed to her for her own use; and he does not rebut

that presumption by saying that he only did it to defeat his creditors. I think that it belongs to her.

[31] The Court in *Maysels* goes on to find that the intention to truly evade creditors was necessarily an intention to gift all interest in the property to his wife.

[32] In Canada, the courts appear reluctant to allow the claimant to have it both ways. Even following the amendment of the *Family Law Act* to provide for a presumption of resulting trust between spouses, there is a line of cases, based upon the reasoning in *Maysels*, where the court has found that the specific intention to evade creditors means an implied intention to deprive oneself of beneficial ownership. See *Cowan v Cowan*, [1987] O.J. No. 798; *Stewart v Stewart*, [1989] O.J. No. 29; *Jukolsky v Jukoksy*, [1990] O.J. No. 2470; *Matheson v Mace*, [1990] O.J. No. 175. The intent to gift defeats the presumption of resulting trust. In my view these cases do not undermine the principle that an illegal purpose is not a bar where the claimant may rely upon the resulting trust to establish his claim. As well these cases do not override the principle that the parties' intentions at the time of the conveyance are a question of fact to be determined upon the evidence. The cases do not purport to impose a 'constructive' intention of gift where there is an illegal purpose to defraud creditors. While evidence that someone intended to fully evade creditors can be evidence that they intended to gift their entire interest in the property, the intention of the parties is a question of fact to be determined from all of the evidence.

[33] As indicated above, in this case the presumption of resulting trust arises and the claimant need not rely upon the illegal purpose to prove his claim. As well, the factual circumstances of this case are inconsistent with the parties' intention to deprive Gabriel of beneficial interest in the properties. I am not prepared to find that Gabriel intended to deprive himself of beneficial ownership.

**4. If so, is there an exception because the husband did not have specific creditors and no harm was occasioned by the illegal purpose?**

[34] Given my finding that there was no intention to gift the property, the issue of illegal purpose does not arise and I need not determine the issue of whether there were specific creditors at the time of the conveyance and whether the claimant could nonetheless succeed because he has repented of his illegal purpose and wishes to use the property to pay his creditors.

[35] A final word. The wife has suggested that Gabriel should not be granted relief because he has not paid child support. That issue may no doubt be the subject of further claims. However, there was no authority cited to me that it would act as a bar in recovery in this application. The rental income from the property will obviously be income upon which child support will be calculated. That matter is not before me in this application.

[36] Judgment to go as follows;

Lily Nussbaum's 2/3 interest in 87 Beaty Ave Toronto, Ontario is held in trust for the benefit of Gabriel Nussbaum

All right title and interest of Lily Nussbaum in the property shall be vested in Gabriel Nussbaum.

[37] The applicant may make brief written submissions on costs within 15 days. A brief written response by the respondents may be made within 15 days thereafter. Any reply to follow within 5 days.

Released:

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KARAKATSANIS J.



**Court File No.:03-FA-012141 FIS**  
**Date: 20040914**

ONTARIO  
SUPERIOR COURT OF JUSTICE

B E T W E E N:

GABRIEL NUSSBAUM

(Plaintiff)

–and–

LILY NUSSBAUM  
WASSERMAN, MATHEW LTD., TRUSTEE IN  
BANKRUPTCY

(Defendant)

**REASONS FOR JUDGMENT**

A. KARAKATSANIS J.

**Released:** September 14, 2004