



## Real Estate Litigation – Property Held in Trust

While a title search will identify the registered owner of a property in Ontario, that does not always tell the complete story. This is because the law recognizes a distinction between registered and beneficial ownership.

A beneficial owner has been described by the Court “as the real owner of property even though it is in someone else’s name”.

In some cases, a person may be a beneficial owner through an express agreement. In those circumstances, the “express trust” will state that the registered owner holds the property in trust for the beneficial owner (who is not registered on title).

In other cases, a person’s beneficial ownership arises under the law without any express agreement. This can occur through a constructive trust, or more commonly, a resulting trust.

A resulting trust occurs where the purchase of an asset is funded by one person, but the asset is placed in the name of another person. In that situation, the law presumes that the registered owner holds the property in trust for the person who provided the funds (unless it was intended that there be a gift).

For example, if you paid for 100% of the purchase price and carrying costs of real estate which is registered in the name of someone else, then a resulting trust arises: the law considers you to be the “real owner” of the property even though your name does not appear on title.

Similarly, if you paid for 40% of the purchase price and carrying costs, then the registered owner is presumed to hold 40% of the property in trust for you.

However, to the outside world (such as potential purchasers and lenders who conduct a title search), the registered owner will appear to be the sole owner of the property. Unless they have notice to the contrary, third parties are entitled to treat the title records as complete and accurate.

As such, even if the property is subject to an express trust or resulting trust, the registered owner could encumber or sell the property (to a third party) without your consent. The registered owner could also then move the proceeds of sale out of your reach. This scenario often leads to litigation.

If you want to try to prevent the sale in these circumstances, you can commence legal proceedings which seek an Order vesting (or transferring) title to the property into your name. To provide further protection while the legal proceedings are ongoing, you may also be able to [register a temporary](#)

[Caution against title to the property and seek a Certificate of Pending Litigation from the Court.](#)

In other situations, such as debtor-creditor litigation, you may actually want to assert that certain real estate is being held in trust for someone else entirely.

Consider a situation where the Court has previously issued a Judgment requiring a debtor to pay you a sum of money but the debt remains unpaid. Instead of paying you, the debtor funds the purchase of a new property which is registered in their spouse's name. As a result, the property is presumed to be held in trust by the spouse for the debtor.

The Ontario Execution Act does allow the sheriff to seize/sell lands which are held in trust (by someone else) for the debtor. In practice, however, the sheriff will not seize and sell such property without a Court Order. To obtain such an Order, the creditor can commence legal proceedings asserting that the debtor is the beneficial owner of the property (through an express trust, resulting trust or constructive trust).

These claims are often worth pursuing, though they can present evidentiary challenges given that the creditor may only have limited information about the source of the funds used to purchase the property.

In other cases, the resulting trust may be more obvious. Consider a situation where the debtor is already the registered owner of real estate when the debt is incurred. If the debtor were to suddenly transfer that real estate to their spouse for little-to-no value, the creditor can commence a fraudulent conveyance lawsuit to reverse the transfer. The land titles system will have recorded the date of, and amount paid for, the transfer. This publicly available information can serve as critical evidence in the fraudulent conveyance proceeding.

In summary, the land title records do not always reveal the "real owner" of property. The registered owner may be holding the property in trust for someone else. In certain circumstances, a litigant can advance a claim to have the title records amended to reflect the true ownership of real estate.

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