

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Driscoll v. Fennell, 2009 NSSM 9

BETWEEN:

LOIS DRISCOLL

Claimant

- and -

WILLIAM FENNELL

Defendant

ORDER

Adjudicator: David T.R. Parker

Heard: February 26, 2009

Decision: March 23, 2009

Summary: Loan versus a Gift-what is required for each

Counsel:

**Erinn G. Moore represented the Claimant
The Defendant was self-represented**

Parker: This case involves monies paid by the Claimant to the Defendant William Fennell in the amount of \$9,285.00 on June 23, 2003. There was also monies paid by the Claimant to Fennell Construction Ltd. in the amount of \$6,992.00 and that occurred on July 29, 2003. The Company is not a party to these proceedings. It is the Claimant's position that the monies were to be paid back by William Fennell and that appears why the action is taken against William Fennell.

I noticed the case cited by Counsel, *McKenzie v. Lepine et al.* in the British Columbia Supreme Court that the son-in-law asked the Plaintiff mother-in-law to advance monies. That is not the case here. In this case it was the daughter who asked her mother for money for her husband, the mother's son-in-law.

The Claimant alleges this was a loan to be repaid. The Defendant alleges it was not a loan but it was for the benefit of both he and his wife for the building of their matrimonial home.

The case *Phillips v. Phillips*, 2008 B.C.S.C. 1233, referred to this court makes reference to an earlier case *Wiens v. Wiens* (1991) 31 R.F.L. (3d) 265, which deal with factors to determine if advances made by parents should be characterized as loans. A number of factors articulated in that case are obvious in determining whether it is a loan or not. Such factors would be:

- 1) **Whether there are any contemporaneous documents evidencing a loan;**
- 2) **Whether the manner for repayment is specified;**
- 3) **Whether there is security held for the loan**
- 4) **Whether there are advances to one child and not others or advances of unequal amounts to various children;**
- 5) **Whether there has been a demand for payment before separation of the parties;**
- 6) **Whether there has been any partial repayment;**
- 7) **Whether there was any expectation, or likelihood of repayment.**

These points are in my view not all inclusive but are at best a guide. They do not consider the opposite side of the ledger as to whether an advance is a gift. Consideration must be given to;

- **what is the intention of the person making the advance;**
- **what are the circumstances existing at the time of the advance; and**
- **what are the circumstances at the time the issue becomes forward for a court determination.**

In this case the Claimant provided monies intended to be for her retirement. She was not going to receive a pension other than the Canada Pension. The Claimant clearly said she

told the Defendant she expected to have these monies paid back to her. This statement was never challenged.

The Claimant professes that the cheques were payable to the Defendant William Fennell notwithstanding that later in the hearing it was learned by the court that the second cheque was payable not to William Fennell but rather to another entity.

The Defendant William Fennell and his former wife, Julie Fennell gave testimony that the money went to pay creditors of the company. William Fennell said it was a company owned by his wife and himself. He also said the money was used in the construction of their matrimonial home. Julie Fennell would not admit to this, she said she just didn't know. Both her and her mother argued it doesn't matter, the cheques were made out to the Defendant and he should pay the money back.

There is no question this was a loan which came about as a result of Julie Fennell asking her mother, the Claimant, to provide her husband, the Defendant with monies. These monies were clearly advanced for the benefit of Julie Fennell and her husband William Fennell.

I understand Ms. Julie Fennell is not a party to this action, nor for that matter is the construction companies owned by Julie and William Fennell. Theoretically if a decision was for William Fennell to pay back the loan except for the second cheque which would be paid back by the Company or for the first and second cheque to be paid back with the Defendant then taking action against his former wife for her share if that were possible then in either event litigation has the potential of going much further than the case before this court.

This decision is intended to avoid repetitive court battles between these parties for monies although payable to two different entities were in actual fact intended for the benefit of both Julie Fennell and her husband William Fennell equally and that as a married couple they would be equally responsible for paying back the Claimant. The

total amount of the cheques was \$16,280.00 of which the Defendant William Fennell would be responsible for one half. I doubt the Claimant will be taking an action for the other half against her daughter but if she did on the facts I have heard existed I would hold Julie Fennell responsible for one half of the loan.

IT IS THEREFORE ORDERED that the Defendant William Fennell pay the Claimant the following sums:

\$8,140.00
174.13 Court costs
\$8,314.13

Dated at Halifax, this 23 day of March, 2009.

David T.R. Parker
Small Claims Court Adjudicator