

Wills, Trusts & Estates

Clash of the Toronto islanders: What is a child?

By **Peter Askew**

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(August 16, 2021, 8:31 AM EDT) -- To most Torontonians, the Toronto Islands (the Islands) are known as a calm refuge away from the city, featuring beaches and picnic areas with picturesque views of the city skyline a short ferry ride from the downtown core. Some may also be aware that the Islands are home to a small, tight-knit community of artists, intellectuals and others drawn to the attractions of island living. It therefore may come as a surprise to many that the Islands were recently the site of a divisive property dispute that escalated to litigation between a resident and the trust that governs property ownership on the Islands.

The court's decision in *Toronto Islands Community Trust Corporation v. Peter McLaughlin and Steven Whitfield*, 2021 ONSC 206 (Toronto Islands), may be of interest to some observers because it provides a glimpse into the inner workings of the insular community of Toronto Islanders. However, most pertinent for our purposes as lawyers who deal with estate and trust litigation matters, the decision is notable for the manner in which the court dealt with the issue of whether rights should be bestowed on an "adult child" (see my previous blog, *What is a "child"?*). Specifically,

the question before the court was whether it should recognize the adoption of a 58-year-old by a 90-year-old adult in circumstances where the adoption allowed him to transfer ownership of his property to his "child" under the terms of a trust that would otherwise prevent the transfer or sale of the property.

Background

Broadly speaking, the background to the dispute in *Toronto Islands* goes back to at least 1955, when Toronto's city council decided to convert the Islands to parkland and demolish the dwellings there, which were more numerous than today. This decision was met with stiff opposition, and several decades later a compromise was ultimately reached whereby people were permitted to continue living on the Islands, subject to certain rules designed to preserve the natural environment.

As a result, the Islands are now subject to a unique property ownership structure under which residents may only lease the lots on which their houses stand and transfers of their homes are subject to strict regulation administered by a statutory trust. Unlike other people living in Toronto and throughout the province, residents of the Islands may not sell their homes on the open market, nor receive market value for them.

Framework for property ownership on the Islands

The *Toronto Islands Residential Community Stewardship Act*, 1993, SO 1993, c. 15. (the Act) provides that homes on the Islands can only be transferred through a statutory trust (the Trust), subject to exceptions outlined below. Selling price is based on replacement value only (rather than market value), and is set by a third-party appraiser. Once the selling price is determined, homes are offered by the Trust to the first in line on a lengthy waiting list of people wanting to buy an Island house.

However, there are three exceptions to this regime. Under certain conditions, an owner can transfer a home to a spouse, a joint tenant or a child. The Act defines child to include an adopted child.

The dispute

Peter McLaughlin and Steven Whitfield met on the Islands in 1984 and developed a close friendship over the ensuing decades, despite their 31-year age difference. Whitfield eventually moved in with his second wife and lived in their home on Ward's island, a 10-minute walk away from McLaughlin's home, and McLaughlin was a regular presence at family gatherings. Whitfield also spent a lot of time at McLaughlin's home over the years, and even helped him with renovations.

The dispute arose when in February of 2020, it came to the attention of the Trust that McLaughlin had transferred a half interest in his house to Whitfield. After Whitfield justified the transfer on the basis that McLaughlin had adopted him three years earlier at age 90 (Whitfield was 58 at the time), the Trust took the position that the adoption and transfer were an intentional circumvention of the Act, and commenced court proceedings seeking a declaration that the adoption bestowed no legal right to Whitfield to obtain title to McLaughlin's home, a permanent injunction prohibiting Whitfield from obtaining title to the home, as well as fines and legal costs against McLaughlin and Whitfield.

The decision

In the court proceeding, the Trust relied heavily on the fact that McLaughlin had not provided any evidence with respect to the purpose for which he adopted Whitfield. However, the court accepted that McLaughlin was unable to give evidence as he was by that point 92 years old and suffering from dementia.

The Trust also asserted that although the Act defines "child" as including an "adopted child," it does not include an adopted adult within that definition. The court did not accept this submission, noting that the dictionary definition of child includes a son or daughter of any age, and found that in any event, when the Act was passed, the law in Ontario permitted adult adoptions and therefore the legislature should be presumed to have known about the possibility of adult adoptions.

Whitfield argued that adult adoptions are subject to a court process whereby the adopter and adoptee have to establish that the adoption is genuine, and given that the process was followed by both men and the adoption order was granted, the Trust's position was a collateral attack on the adoption order.

However, the court also declined to accept Whitfield's argument that the analysis should end in accepting the validity of the adoption order, as the adoption process is designed with a view to the purposes of the *Child, Youth, and Family Services Act* rather than the *Toronto Islands Residential Community Stewardship Act*.

Instead, the court focused on the nature of McLaughlin and Whitfields' relationship in interpreting the Act's language in a manner that recognized its context, purpose and legislative history. The court reviewed the evidence, which included photographs and other documents spanning 37 years, and found there to be a genuine father-son relationship. The court found it unlikely that the men would engage in a 37-year relationship involving their immediate and extended family to engineer the transfer of McLaughlin's home in circumvention of the Act, and therefore held that Whitfield was McLaughlin's child for the purposes of the Act.

As such, the court dismissed the Trust's application and awarded full indemnity costs in favour of Whitfield.

Takeaways

The court's conclusion in the *Toronto Islands* decision might be difficult for some to accept without an appreciation of the evidence in this case. How is it possible that a 90-year-old can adopt a 58-year-old where there is such a clear financial benefit in doing so? The answer is that here, the court looked beyond the parties' technical legal arguments and made an assessment of the true nature of McLaughlin and Whitfield's relationship based on the evidence before it, which it found to demonstrate a genuine father-son relationship. This serves as an important reminder that in most cases the evidence, rather than strict legal arguments, will underpin the court's conception of what is just and thereby determine the outcome.

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