

Mortgage to a child – Still Enforceable?
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It is not uncommon for a parent to assist a child in the purchase of a home or vacation property. The assistance may be documented as a mortgage on the particular property without interest and payable on demand. The parent may not intend to call for repayment. Rather, the mortgage is placed for reasons of protection. If the child does not face adverse circumstances, such as a divorce, the parent may ultimately choose to forgive the debt in his or her Will. Often the mortgage will remain registered on title but lie dormant. Suppose the parent later wishes to enforce the mortgage, is it still enforceable? Is there a limitation period issue?

A demand mortgage is essentially a demand debt secured by land. Readers may recall the uproar following the decision in *Hare v. Hare* 2006 CanLII 63693 (ONS.C.) which held that the limitation period commences to run from the delivery of a demand note, both under the “old” limitations legislation and under the “new” Limitations Act. In response to heavy lobbying, there was an amendment which provided that the limitation period on a demand obligation commences to run only following demand. However, the Limitations Act does not apply to all claims. Instead, the limitation period for certain proceedings related to real property claims is addressed in a separate statute named the Real Property Limitations Act. Under this latter statute, there can be no action upon a covenant to repay money secured by a mortgage ten years after the “cause of action” arises. There are also interpretive issues because the two statutes do not use similar wording. When the above amendment to the Limitations Act was made, there was no correlative amendment to the Real Property Limitations Act. Therefore, in the case of a demand mortgage, the limitation period to enforce payment commences to run ten years after the cause of action arises. However, the limitation period on a demand debt commences to run only after demand has been made.

When does the cause of action arise in respect of a demand mortgage? In a decision released last year (*The Mortgage Insurance Company of Canada v. Grant Estate* 2009 ONCA 655), the Ontario Court of Appeal confirmed that in the case of a demand mortgage, the cause of action arises upon execution of the mortgage. This means that an action to enforce payment must be commenced within ten years thereafter, or else it is statute barred. The Court of Appeal also discussed a collateral mortgage given to secure a debt and recognized that the collateral mortgage could be provided by a third party or the principal debtor himself. Where the collateral mortgage security is provided by a third party, the Court held that the cause of action accrues only after demand is made on the collateral mortgage (similar to the case of a guarantee). However, if the person providing the collateral mortgage security is the same as the principal debtor, the Court considered that there was no difference between this situation and the case of a simple demand mortgage.

What are the consequences of the above if a parent advances funds to help his or her child purchase a home?

- If the parent takes a demand mortgage on the property, then the ten year limitation period under the Real Property Limitations Act starts to run immediately.
- As an alternative, the parent may accept a demand promissory note from the child who gives a collateral mortgage on the home as security. In this case, the “new” Limitations Act seems to apply to the demand promissory note so that the limitation period to enforce the note does not start until demand is made. However, once the parent makes demand, the parent will presumably seek to enforce payment under the collateral mortgage. The Real Property Limitations Act applies to an action to enforce payment and imposes a ten year period after the cause of action arises. As the court in *The Mortgage Company of Canada v. Grant Estate* held, this situation is equivalent to a demand mortgage, there may be confusion because it seems that the limitation periods do not start running from the same date; i.e., not from the date of demand for the note but from the date the mortgage is executed in the case of the mortgage (notwithstanding that it is collateral security).

While ten years may be sufficient time for a parent to decide to forgive or enforce, this will not always be true. A possible answer may involve consideration of when the “cause of action arises” being the relevant concept in the Real Property Limitations Act and also, the wording in the “old” limitations legislation. Jurisprudence involving limitations concepts distinguished a delay promissory note (e.g., payable 10 days following demand) from a demand promissory note. In former case, the cause of action was held to arise only following default, i.e., once the time for action following demand had expired. Thus, consideration should be given to having the child deliver a promissory note to the parent for the amount of the loan where the payment and enforcement provisions of the collateral mortgage explicitly provide it is enforceable only at a certain time period after demand is made. This may permit the argument that the ten year limitation period starts running only after that time.