

SHERIFFDOM OF LOTHIAN AND BORDERS AT LIVINGSTON

[2019] SC LIV 59

A50/15

JUDGMENT OF SHERIFF SUSAN A CRAIG ADVOCATE

in the cause

THOMAS GREENSHIELDS

Pursuer

against

TRACY JANE CAREY

Defender

Pursuer: Hempleman, Solicitor; Messrs Morisons, LLP
Defender: Morrison, Solicitor; Messrs Sneddon Morrison, Solicitors

LIVINGSTON, 24 August 2016

The sheriff, having resumed consideration of the cause:

Finds the following facts admitted or proved

The family unit

- 1 The parties were in a relationship from around late 2001.
- 2 The relationship ended on 23 August 2013 when the defender discovered the pursuer in a compromising position with another woman.
- 3 Although they had been engaged, the parties never married.
- 4 The defender has a son, D.
- 5 D was about 6 months old when the parties' relationship commenced.
- 6 Although the pursuer is not D's natural father he treated D as his child.

7 The pursuer referred to D as “his son”, and to the defender and D as “my wee
family.”

8 In around mid-2008, just after the death of his mother, the pursuer wrote a will in
which he nominated D as the sole beneficiary.

9 As at September 2009 D remained the sole beneficiary.

10 D bore the pursuer’s surname and, until the end of the relationship and for a short
time thereafter, had been known as by that surname.

11 Other than by the defender’s immediate family, who knew the correct position, the
pursuer was regarded by all as D's natural father.

12 D believed the pursuer was his natural father and was not aware that he was not
until after the relationship ended.

13 He was devastated when he learned the true position.

The proposed sale of Dechmont

14 The defender owned a property in Dechmont (“B”).

15 Throughout their relationship although the pursuer maintained a postal address at
another property in Dechmont (“H”), from where he ran his business, the parties
regularly stayed together, as a family, at B.

16 The pursuer’s mother, who died in June 2008, had also lived at H.

17 Following her death the pursuer became embroiled in an acrimonious dispute with
his family about his mother’s estate.

18 By mid-2009 the pursuer’s relationship with his family had broken down entirely
and he had by then already executed a will in favour of D as beneficiary.

19 In the summer of 2009 the parties agreed that they would all move together to H.

- 20 That property was in a poor state of repair; work was required to build an extension and to bring the property up to a comfortable standard.
- 21 Nevertheless the defender agreed to move to H with D, where they would live while the work was underway.
- 22 The defender agreed she would sell B to realise capital, some of which could be used to fund the work.
- 23 The defender contacted an estate agent with a view to placing B on the market.
- 24 A Home Report was commissioned.
- 25 Prior to the property going on the open market and prior to the Home Report being available, the pursuer told the defender he knew of a couple - Tomasz Walter and his wife – who were looking to buy a property similar to B.
- 26 The pursuer arranged for Mr and Mrs Walter to view the property.
- 27 They liked it and made an offer of £120,000 subject to that being in line with the Home Report valuation.
- 28 That valuation was £115,000.
- 29 The parties arranged to meet again with Mr and Mrs Walter.
- 30 That meeting took place at H.
- 31 Immediately prior to their arriving the pursuer told the defender there was no need for her to sell B.
- 32 Taken by surprise, the defender asked the pursuer to explain.
- 33 The pursuer told her he did not want her to sell B; that he was going to pay off the mortgage on the property and that that would provide security for her and D for the future.

34 Asked how they were going to be able to afford the work required to H, the pursuer
said he already had all the necessary materials, had friends who could source
anything else required and that he did not need funds from B to carry out the work.

35 The pursuer also explained that he was awaiting funds from another property which
was part of the ongoing family dispute but which he expected to receive shortly.

36 Up until that point the defender had been willing to, and had intended to, sell B.

37 The defender had not asked the pursuer to pay off her mortgage; the pursuer's
statement that he would do so was unilateral and unprompted.

38 When Mr and Mrs Walter arrived there was some discussion about the sale price,
about which agreement was not reached, and they were told the property was not
for sale.

39 Having decided not to sell B, rather than leave it empty the defender arranged for it
to be let as a short assured tenancy to a family friend for a monthly rent of £550.

40 The tenant gave notice to her then landlord and did not take up the tenancy until
1 October 2009.

41 The tenant paid the rent throughout until she moved out of the property in
September 2010.

42 The defender used the rental payments to fund general expenditure for the
household which was by then living at H.

The mortgage over B

43 The defender had bought B prior to the start of her relationship with the pursuer.

44 It was purchased with the assistance of a mortgage and, until September 2009, was
subject to a standard security in favour of the Royal Bank of Scotland.

45 In September 2009 the redemption figure for that mortgage was around £37,000.

46 As the property had been valued at £115,000, there was equity of around £78,000.

47 Until September 2009 the defender was in receipt of state benefits, including child tax credits, and was able to meet the monthly payments on the mortgage.

48 The mortgage was not in arrears and there were no demands for payment of the indebtedness.

49 In the period leading up to September 2009 the defender was not in any financial difficulties and had no debts she was not able to meet or service.

50 On 10 September 2009 the pursuer paid off the mortgage by depositing the sum of £37,000 into the defender's account with the Royal Bank of Scotland.

51 Although the parties had together obtained a redemption statement, and had the conversation that led to B being withdrawn from sale, the pursuer had not told the defender he was going to pay off the mortgage that day.

52 The pursuer went to the bank by himself and organised the deposit without informing the defender.

53 Later that day the defender and her mother, Rosemary Carey, were at B. They were cleaning in preparation for the tenant moving in.

54 The pursuer came into the kitchen and announced to the defender and her mother that he had paid off the mortgage.

55 The pursuer said words to the effect that "Tracey and D will be secure knowing the house is safe for them."

56 The defender had not really expected the pursuer to pay off the mortgage.

57 The defender threw her arms around the pursuer and told him how delighted she was. She told him she felt very happy, loved and secure.

58 Mrs Carey - who the pursuer sometimes referred to as his mother in law - expressed similar sentiments and thanked the pursuer for his generosity.

59 In September 2009 the parties' relationship was solid and secure; they were happy together.

60 The defender's brother, Graham Carey, and the pursuer were also very close.

61 Mr Carey regarded the pursuer as a brother.

62 The next time Mr Carey saw the pursuer he thanked him, saying how delighted he was that the pursuer had given the defender and D security.

63 The pursuer replied: "Don't worry about it. It's what you do for the people you love."

64 The pursuer then used the phrase "give and gave" which Mr Carey took to mean that the pursuer was giving to his family for what they gave him.

65 At no time, and on no occasion, did the pursuer refer to the payment of £37,000 as a loan.

66 At no time, and on no occasion, did the pursuer say there were any conditions attached to the payment.

September 2009 to 23 August 2013 et seq

67 The parties, along with D, lived together at H until September 2010 when the defender and D returned to B.

68 The work required to bring H up to standard had been very slow and by September 2010 was still not completed.

69 The defender believed the state of disrepair was adversely affecting D's health.

70 By agreement with the pursuer she and D returned to her property, the tenant
having by then moved out.

71 Notwithstanding, the parties relationship continued as before, and the pursuer spent
much of his time staying with the defender at B.

72 They continued to live as a family albeit that the pursuer would spend some of his
time at H where his business continued to trade.

73 In May 2013 the pursuer, the defender and Mrs Carey together attended D's school
to watch his P7 leavers play.

74 In July 2013 the pursuer would tell the defender he loved her.

75 On 23 August 2013, having found the pursuer in a compromising position with
another woman, the defender brought the relationship to an end.

76 On 8 September 2013 the pursuer sent the defender a text saying:

"Could you please have all my stuff ready for me to pick up tonight thanks. Also I
don't mean this in a bad way but I will not be taken D to football or picking him up
after not paying for school dinners no more money from me. Sorry I just fell I
desreved more respect not doing it any more as I will be marring Isabella." (sic)

77 On 23 September 2013 the pursuer sent a further text saying: "Need my suit and
watch back and also the return of the money I put into the house through the bank
tranction" (sic)

78 The defender's response, by text, was: "Not a chance, happy life"

79 The pursuer sent a further two texts that day, the first saying "Mind the dole" and
the second: "Suit clothes watch the mora and get a morgage sorted out thanks." (sic)

80 The defender sent him texts on 8 October and 7 November 2013 explaining that D
was concerned and asking what she should do about D's second name.

81 The pursuer did not reply.

82 The pursuer did not contact the defender again until a text on 26 January 2015 saying: “R u any further forward with regard to getting my money back”.

83 The defender did not reply.

Finds in fact and in law that

1 The pursuer gave the sum of £37,000 to the defender as a gift.

2 It was not a loan.

3 The pursuer is not entitled to demand repayment of the sum.

4 The defender is entitled to retain the sum gifted to her.

Therefore

1 **Sustains** the defender’s first, second and third pleas in law;

2 **Repels** the pursuer’s first and second pleas in law;

3 **Assoilizes** the defender from the crave of the writ;

4 **Finds** the pursuer liable to the defender in the expenses of the action as taxed and allows an account of expenses to be given in and remits same, when lodged, to the Auditor of Court to tax and report;

NOTE

Introduction

[1] This was a claim by the defender’s former partner for repayment of a sum of money - £37,000 - that had been used to pay off the mortgage over the defender’s property, B, Dechmont. Put simply, the pursuer said that money was a loan; the defender said it was a gift.

[2] A proof before answer was ordered. It was a matter of agreement the onus fell on the defender to prove a gift (there being a presumption against donation) and she was ordained to lead.

[3] It was not in dispute that the pursuer paid the sum in September 2009. He averred that it was a loan and set out, at Article 2, the terms of that loan. He said it was subject to the condition that it be repaid “on demand” on the earlier of two conditions (presumably intended to mean “occurrences”) namely, if the defender sold the property or at any other time if the pursuer required repayment. In due course the pursuer led no evidence about those matters.

The law

[4] There was no dispute about the law and I heard very brief submissions. The pursuer lodged a list of authorities.¹

[5] Parties were agreed that in Scotland there is a long standing presumption against donation. Where one party makes a payment of money to another party it is presumed to be a loan unless the other party can prove it was a gift. The onus is on the putative donee.

[6] It is a strong presumption which requires unimpeachable evidence to overcome (*Sharp* and *Walker and Walker*). The party seeking to prove donation requires evidence which is reasonably convincing and which is so clear as to displace all other explanations

¹ *The British Linen Company v William Martin* (1849) 11 D 1004
William Little v Mrs Euphemia Liddle or Little and others (1856) 18 D 701
Mary Sharp (Matthew’s Executrix) v Margaret Sharp or Paton and others (1883) 10 R 1000
Mrs Elizabeth M’Kenzie or Dawson v Thomas M’Kenzie (1891) 19 R 261
 Stair I Title VIII, 2, page 106
 Erskine, Title III, 92, page 797
 Walker and Walker: Evidence, Fourth Edition, pages 48 - 49
 Evidence, Davidson, Page 131
 Glog and Henderson, The Law of Scotland, Thirteenth Edition, page 296, para 13.28

put forward in evidence as being reasonable in the known circumstances of the case (*Grant's Trustees*). If the transfer can on the evidence be ascribed to a purpose other than donation, the onus has not been discharged (*Grant's Trustees* and *British Linen*).

[7] That echoes the institutional writers.

“No deed is presumed a donation if it can bear another construction; for no person is presumed to do what, in place of bringing him profit, must certainly be attended with some pecuniary loss” (Erskine).

“It is a rule in law, donation non præsumitur, and therefore, whatever is done, if it can receive any other construction than donation, it is constructed accordingly” (Stair).

[8] It is also clear from the authorities that it is an onus that can be displaced and that the whole circumstances of the payment must be considered. That includes considering the nature of the relationships between the parties and whether there was evidence available from both sides of that relationship (*Sharp*). Where the putative donor was deceased and not available to speak to his or her intentions a greater degree of scrutiny would be required of the donee's evidence.

[9] If the transfer is by a debtor to his creditor, or where services have been rendered the onus is hard to displace, it is said. But where the recipient of the services is a near relative the onus of proving donation is more easily discharged (*Walker and Walker*).

[10] Although not directly addressed on this point, the passage in *Walker and Walker* highlighted by the pursuer continues:

“When payments are made by a parent or by a person in loco parentis (in the role of parent) there may be a presumption, contrary to the general presumption, that the payments are gifts made ex pietate (family devotion) in which case the onus is upon the person seeking repayment to prove the contrary. Whether or not such a presumption arises must depend upon the exact relationship of the parties and the whole surrounding circumstances.”

The issues

[11] Standing the admission that the payment was made the issue to be decided was whether it was made as a gift. The onus to displace the presumption rested on the defender who said that in the circumstances of the family relationship, where the pursuer acted as father to her son, his testamentary beneficiary, and there being no need for her to pay off the mortgage, the money was a gift. If she could displace that presumption it would fall to the pursuer to prove that he was entitled to demand repayment and the circumstances of the lending, in the usual way.

The evidence

[12] I heard from six witnesses

- Tracy Carey, the defender
- Rosemary Carey, the defender's mother
- Graham Carey, the defender's brother
- Thomas Greenshields, the pursuer
- Paul Smith, a friend of the pursuer
- Tomasz Walter, who had viewed B

[13] Overall, and for the reasons set out, I found the defender, her mother and Mr Carey to be credible witnesses on whose evidence I could rely. They were each clear and measured, not indulging in hyperbole and, to their credit, not inappropriately critical of the pursuer. They spoke of him warmly and it was clear they had valued and cherished his relationship with the defender and D. Their disappointment in him did come through, but more in respect of the effect of his behaviour on D who had been devastated by the breakup of his family and having to learn that the pursuer was not his father.

[14] They, and the defender in particular, were impressive witnesses and I accepted their evidence on matters of conflict.

[15] In contrast the pursuer did not present as a credible or reliable witness in matters of conflict. His attempts to explain away the evidence that pointed to the ongoing relationship and the nature of the payment of the £37,000 were unimpressive and unpersuasive. They are rejected.

The evidence about the family relationship

[16] The defender, her mother and brother all gave evidence about the defender's relationship with the pursuer, describing it as loving, supportive and caring. The parties were, they all said, in love, and had been for years.

[17] They spoke about his relationship with the defender's son, D. He treated him like his son, they said, and as far as D was concerned the pursuer was his father. D had taken the pursuer's surname before he started school and outside of their own family everyone thought the pursuer was D's father.

[18] In his evidence the pursuer accepted that was the position.

[19] The pursuer and D were, they all said, incredibly close. D would follow the defender around and was always at his side. D had a number of hobbies including horse riding and go-karting, and it was the pursuer who bought the expensive kit associated with those hobbies and took him to events and competitions. The pursuer had bought a lorry specifically so he could transport D and his horses to events.

[20] The defender gave evidence that the pursuer and D would go on annual holidays together, without her, and spend father and son time together. She was very happy with

that, and gave a description of a very supportive and loving relationship between the pursuer, D and herself.

[21] Mrs Carey spoke of the pursuer sometimes introducing her as his “mother in law”. Mr Carey spoke of regarding the pursuer as his brother. They both gave evidence about the pursuer referring to the defender and D as “my wee family”. While the pursuer denied regarding them as his family, he accepted that as recently as May 2013 he sent a text to the defender where he said she would: “...burn candles at both ends, all cook for ma family sat you have a rest xxx”.

[22] He agreed that “all cook” meant “I’ll cook” and was a reference to his cooking for them, something he said he did frequently.

[23] The defender, her mother and brother spoke of what Mr Carey described as the “slightly unusual” living arrangements. However they all gave evidence that from the start of the relationship up until August 2013 the pursuer and the defender were partners, living much of the time under the same roof, but for some of the time with the pursuer staying overnight at H. That was not surprising, they said, because he ran his business from that property, his mother lived there until her death and it was where the horses were stabled.

[24] All three spoke to the defender and D moving to H in September 2009 but returning about a year later because the living conditions there were not ideal. His sister was, said Mr Carey, “a lady” and the property was not clean or suitable. They also all spoke to the continuation of the relationship *after* the defender returned to B in September 2010, and that it carried on just as it had before.

[25] Both the defender and Mrs Carey gave evidence that D was devastated when the relationship with the pursuer came to an end. They both said that was in August 2013 and each said it followed the defender finding the pursuer with another woman. They spoke

movingly of the effect on D of the ending of his relationship with the man he believed was his father. As Mrs Carey put it, the pursuer had “kicked D to the kerb.” He was, said the defender, heartbroken by the idea that he might have to change his surname.

[26] All of these witnesses were challenged about the length of the relationship, it being claimed by the pursuer to have come to an end in 2010, not 2013. They each roundly rejected that suggestion, maintaining that it was the discovery of the pursuer’s infidelity that brought it to a sudden end.

[27] That evidence was consistent with the fact - accepted by the pursuer in his evidence - that he attended D’s P7 school play in May 2013. He therefore continued to have a role in D’s life at that time, which was inconsistent with his other evidence that he only saw D once after they returned to B in September 2010.

[28] The defender’s witnesses’ evidence was also consistent with the text messages exchanged between the parties in the months leading up to August 2013. Up to that point the pursuer’s texts - which he accepted sending - were affectionate and loving. He was asked if the relationship had ended in 2010 why in May and July 2013 was he sending the defender texts telling her he loved her and signing off with “xxx”. His response, that it is just how he writes texts, was unconvincing.

[29] The pursuer also accepted that he sent a text message on 8 September 2013 asking that the defender: “...have all my stuff ready for me to pick tonight.” He went on:

“Also I don’t mean this in a bad way but I will not be taken D to football or picking him up after not paying for school dinners no more money from me. Sorry I just fell I deserved more respect not doing it any more as I will be marring Isabella.” (sic)

[30] The pursuer also accepted that on 23 September 2013 he sent another text where he said he: “...need my suit and watch back...”.

[31] Neither was consistent with the pursuer's evidence that the relationship had ended in 2010. Instead they were consistent with the defender's position.

[32] The pursuer had led evidence from an acquaintance, a Paul Smith. He was asked about a series of texts he exchanged with the defender from the end of August 2013. In the first, which the defender sent on 30 August 2013, she described herself as "tommy's ex" to which Mr Smith replied that he gave: "...the new 1 around 2 weeks!!!"

[33] The tenor of those texts was a jilted person asking questions to find out about the "new woman". In texts sent on 1 September 2013, the defender said to Mr Smith that she did not: "know her name... Where's she from." In another she asked: "...how long has he been seeing her...".

[34] Mr Smith's replies were rather robust and unflattering of the pursuer, generally expressing disappointment with him. In one, sent in November 2013, Mr Smith referred to the pursuer telling him that: "...he needs the 75K he got left tae finish his new house...!!! Fukin unbelievable lyin useless greasy bass...total delusional wanker."

[35] That exchange was again consistent with the defender's position that she found out about the pursuer's new relationship in August 2013, and that was when the relationship came to an end.

[36] It was not entirely clear why the pursuer led evidence from Mr Smith. All he was asked was whether the pursuer had ever discussed with him why he had transferred money to the defender. Although not a direct response to that question he replied it was: "...to build a house, something like that."

[37] The pursuer did not offer that explanation for the transfer in his evidence. Indeed, he was not asked for one, at least in chief.

[38] In his evidence the pursuer accepted that in 2008 he made a will naming D as the sole beneficiary, the relationship with his own family having broken down after his mother's death and the dispute over her estate. There was no evidence that the will had been rewritten or that, at the time of the payment of £37,000, that D was not the pursuer's sole beneficiary.

[39] The pursuer agreed that he, the defender and D were very close but said that was only between 2002 and 2009. It was his evidence that the relationship with the defender had come to an end in 2010 when she moved out of H. Thereafter, he said, he did not see D other than on one occasion at the end of 2010 when he took him ten pin bowling.

[40] The pursuer agreed that D bore his name and believed the pursuer was his father, only finding out that he was not in 2013. The pursuer was not asked to explain how that came about or why the truth was not revealed until 2013, rather than in 2010 when he said the relationship ended.

[41] The pursuer's position about attending a school play in May 2013 was unconvincing. As observed, the pursuer agreed it was D's end of school P7 play but could not explain why he would have gone if the relationship had ended three years earlier and he had, in effect, lost touch with D. Nor did the pursuer offer a credible explanation for his assertion he had only gone with Mrs Carey despite texts between himself and the defender making arrangements to travel together to the play. It is also observed that the position the pursuer advanced in evidence was not put to either the defender or Mrs Carey, both of whom had given evidence about their attending the play as a family but which went unchallenged in cross examination.

[42] Nor was the pursuer's position about the length of the relationship supported by the exchange of text messages or by the evidence from Mr Smith.

[43] Taken together, there was a strong body of evidence in support of the defender's position that the parties, together with D, operated as a family unit, albeit not always sleeping under the same roof every night, which continued up until August 2013 and was subsisting in September 2009. Equally there was a strong body of evidence to support the defender's position that there was a father / son relationship between the pursuer and D, of the pursuer treating the defender and D as his family and making D the sole beneficiary of his estate.

The evidence about the payment of £37,000

[44] The defender gave evidence that the suggestion the mortgage be paid off came entirely from the pursuer. She was not in any financial difficulties, she said, and was easily meeting all of her debts. There was no reason at all why she would need money from him to pay off the outstanding mortgage, and her evidence on these matters was not challenged in cross.

[45] Nor was there any challenge to the evidence that she was in the process of selling B. Indeed it was the pursuer's position that the property was about to be placed on the market for sale and that he had sourced a potential buyer. There was some conflict in the evidence about the precise reason why the sale fell through, but that was of little moment given that there was no dispute that the sale did not proceed, the pursuer made the payment to the defender and the property was then let out. In so far as the matter requires to be resolved, I rejected the evidence given by Mr Walter on this point. It did not sit with the other evidence that I did accept.

[46] The defender's evidence was that the pursuer told her she did not have to sell the property. She said he told her he could afford to carry out the repairs and renovations

required through a combination of DIY and funds he was expecting from his mother's estate. She said the pursuer told her he wanted to pay off the mortgage to give security to her and D should something happen to him.

[47] None of that evidence was challenged in cross examination. It finds some support in the text she received from Mr Smith when he spoke of the pursuer telling him he needed the "75K he got left" (ie not the money given to the defender, but his inheritance) to finish his new house.

[48] The pursuer was not asked about any of these matters in examination in chief.

[49] In the course of his evidence the pursuer was asked why he loaned her the money. His response was: "Because I needed the money back from Tomasz after he had bought the property. Tomasz Walter. He was the person who was going to buy the house."

[50] He was also asked what his position was on the £37,000. His response was: "I gave her a loan and after the house was sold to Tomasz and Theresa the money was to be returned to me after property sold."

[51] No other explanation was given. He did not explain why he would lend money to the defender at a time when she had otherwise been willing (and was in the process of selling) to sell the property or why, if he needed money to renovate H he transferred money to the defender rather than retaining it to use for the renovations.

[52] The explanation the pursuer gave made no sense. He paid off the mortgage *after* the sale fell through so there was no question of Mr and Mrs Walter buying the property. What he said suggested it was they who would be indebted to him, not the defender.

[53] Put shortly, the pursuer's explanation for the transfer of £37,000 to the defender's bank account just days after B was withdrawn from the market and let out was confused and confusing. Moreover, there was no record on the point.

[54] The pursuer gave no evidence contradicting the account given by the defender and Mrs Carey about what was said in the kitchen at B the day the deposit was made, and their evidence was not challenged. It was their position that the pursuer came into the kitchen, announced he had paid off the mortgage and said: "Tracy and D will be secure in the knowledge that the house was safe for them."

[55] Mr Carey was unchallenged in the evidence he gave about going to see the pursuer to thank him for paying off the mortgage. It was his evidence that the pursuer said words to the effect that that is what you do for those you love, and used the expression "give and get". The pursuer was not asked about that matter in chief.

[56] The pursuer was also in some difficulty in explaining his choice of words in the text of 23 September 2013 when he spoke about the "...return of the money I put into the house through the bank tranction" (sic).

[57] He could not explain why he did not refer to that as a loan nor why he would ask for the payment then as opposed to September 2010 when, as he would have it, the relationship ended.

[58] In short, there was no credible or reliable evidence from the pursuer about the circumstances surrounding the payment of the £37,000 or why it was paid.

[59] Instead, taken together, there was a strong body of evidence supporting the defender's position that the pursuer took it upon himself to pay off the mortgage over her house. The evidence pointed to the pursuer being concerned to ensure security for the defender and D should something happen to him [the pursuer]. The payment was made at a time when the parties were operating as a long standing family unit and the pursuer treating D as his son, appointing him his heir when he had fallen out with his blood relatives. At the time the payment was made D was still the beneficiary of the pursuer's

estate so had the pursuer not made the payment but died, D would have inherited the funds anyway as the beneficiary of the estate. There was no evidence that the defender needed to pay off the mortgage or had any financial concerns. There was therefore a strong body of evidence pointing towards an intention to make a donation of money to those the pursuer regarded as his family at the time ie the defender and, through her, to D.

[60] In contrast to that body of evidence, the pursuer's evidence about the payment - such as it was - was neither credible nor reliable.

Submissions

[61] These were very brief.

[62] For the defender it was said that, on the evidence, it was open to the court to find the onus had been displaced and that she had proved the payment was a gift. In the circumstances of the relationship between the parties it was quite proper, and entirely understandable, for the pursuer to want to pay off the defender's mortgage as an unconditional gift.

[63] For the pursuer it was said that the defender had not displaced the strong presumption against donation. It was submitted that if a transfer could, on the evidence, be ascribed to a purpose other than donation, then the onus will not have been discharged. It was submitted that the defender had not met the requirement to lead evidence that was reasonably convincing and so clear as to displace all other explanations put forward in evidence.

[64] Pressed on where the evidence was of another purpose behind the payment or what other explanations for the payment could be considered, Mr Hempleman was in some difficulty, conceding that there was no such evidence. He accepted that he had not led

evidence to support the position on record anent the conditions of the loan. Ultimately his position came to this – the pursuer made the payment “because he could” and that was sufficient for him to succeed, said Mr Hempleman.

Conclusion

[65] The pursuer was entitled to put the defender to her proof, and require her to lead clear and convincing evidence before she could displace the burden on her. In my view she did just that.

[66] I was satisfied that it had been proved that the parties were in a family relationship, albeit one that was a little unconventional. In cross-examination the pursuer agreed that he regarded D as his son.

[67] It was notable – and not in dispute – that in 2009 the defender intended to throw her lot in with the pursuer, in a financial sense, and put her house on the market and use the free proceeds as part of the renovations to H. There was no suggestion that the defender would be doing that as anything other than an investment in a home for her, her son and her partner, the pursuer. There was no evidence that arrangements was conditional or required a transfer of ownership of the pursuer’s property to the defender.

[68] The undisputed evidence was that the house was not on the market because the defender needed funds to pay off any debts. The mortgage was being paid and she had no financial concerns. It was on the market as a precursor to her and D moving in to H while the renovation work was underway.

[69] However, the property was withdrawn from the market. The evidence about the precise circumstances leading to the withdrawal was disputed, albeit that the fact it was

withdrawn was not in dispute. The payment was made after the sale fell through in circumstances where the only credible explanation was that advanced by the defender.

[70] Based on the facts established I was satisfied that the defender had discharged the burden on her and established that the pursuer intended to give the money to her as a gift. That being so, the pursuer is not entitled to demand repayment and his pleas in law fall to be repelled. I sustain the defender's pleas in law and award her expenses to be taxed in the usual fashion.