

Focus

FAMILY LAW



With this ring, I... take thee to court

Who gets the ring when the engagement is ended? Three possibilities to consider



Anna Wong

These days, engagement rings come in a dazzling array of shapes, sizes, and colours, from the blue sapphire presented to Kate Middleton to the emerald-cut diamond worn by Angelina Jolie.

Unfortunately, an engagement does not always end with a trip down the aisle.

When an engagement is called off, etiquette maven Emily Post categorically instructs that “the engagement ring and all other gifts of value must be returned.”

The law, however, is not so clear cut.

Courts have taken three different approaches to the question of whether an engagement ring has to be returned when the marriage does not take place.

First, some courts have regarded an engagement ring as a conditional gift, and whether it must be returned in the event of a breakup will depend on who reneged. If it's the donor, the donee keeps the ring. If the donee ended the engagement, the donor is entitled to demand the ring back.

This approach is predicated on the notion that an engagement ring is something to bind the agreement to marry, given on the understanding that the party who calls off the mar-

riage is not entitled to the engagement ring. It dates from the 18th century decision of *Robinson v. Cumming* (1742), 2 Atk. 409, 26 E.R. 646, and has been followed in a string of Ontario cases including: *Illiopoulos v. Gettas*, [1981] O.J. No. 2992 (Co. Ct.); *Marcon v. Cicchelli*, [1993] O.J. No. 968 (Gen. Div.); *McArthur v. Zaduk*, [2001] O.J. No. 2284 (S.C.J.); *Okhai v. Sharify*, [2004] O.J. No. 4186 (S.C.J.); *Konopka v. O'Meara*, [2011] O.J. No. 2767.

In *McArthur*, for example, the man cancelled the wedding after discovering that his fiancée had been unfaithful during their European vacation. He contended that she breached a fundamental condition of their agreement to marry: sexual fidelity. And so, she was the one who ended their engagement, and therefore must return the ring.

Superior Court Justice Ruth Mesbur disagreed.

She found that there was no firm agreement, as a condition of their agreement to marry, to be sexually faithful, since the woman never saw fidelity as a hallmark of their relationship. Therefore, the man broke the engagement, and on that basis he is not entitled to the ring. Justice Mesbur decided the case on the additional ground that having failed to ask for the ring back when he broke the engagement, he is estopped from seeking its return later.

The second approach treats an engagement ring as an unconditional gift, which cannot be undone where the marriage does not occur. It becomes the absolute property of the recipient upon acceptance of it: *Rakus v. Piccolo*, [1989] O.J. No. 2435 (Dist. Ct.). As Deputy Justice J.S. Winny put it in *Mastromatteo v. Dayball*, [2011] O.J. No. 1600 (Sm. Cl. Ct.), “a gift is a gift. Once per-

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Focus FAMILY LAW

Association aims to reduce family conflict



Andrew Feldstein

In family law, it is always the extreme cases that make the A section of your newspaper or the evening news. Whether it is an abduction by a mother or father where children are taken out of the country, or family violence perpetrated by spouses or partners who at one time were in love with each other, family law is fraught with emotion and stress.

The Association of Family and Conciliation Courts (AFCC) is a professional organization whose goal is to help reduce and resolve conflict in families experiencing separation/divorce, and achieve better outcomes, especially for their children.

"AFCC is an interdisciplinary organization and our focus is the family," says Barbara Jo Fidler, a psychologist and president of the Ontario Chapter of AFCC who did her PhD dissertation on the effects of custody and access disputes on children.

AFCC is indeed a unique, international professional association with close to 5,000 members. In the U.S., the parent organization (www.afccnet.org) will celebrate its 50th anniversary in Los

Angeles in May, 2013. Ontario's chapter (www.afccontario.ca) is four years old and British Columbia and Alberta are organizing their own AFCC chapters

Our members do not share a common profession; quite the opposite—we are the most diverse and multi-disciplinary of teams. Among AFCC's members are judges, family law lawyers, court administrators, mediators, social workers, psychologists, psychiatrists, addiction specialists, counselors, researchers, and many others.

In a world with too much conflict already, AFCC does important work for the benefit of the family. That's why "in the best interests of the child" is a paramount principle in Canadian family law.

Why was the AFCC formed? What societal need do we fill?

AFCC is a referral network for its members. A referral can come from lawyers, mental health professionals, social workers, or others.

We help parents who make the same relationship mistakes over and over again, such as using their lawyer to vent their rage, or engaging their children as confidants to take their side, as messengers or spies—all huge mistakes. Sometimes we work with families where a parent purposefully tries to prevent the child from having a relationship with the other parent.

In many cases, it is the children of parents undergoing separation

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[W]e know that about 10 to 20 per cent of separating or divorcing families continue to engage in conflict, years after the separation.

Barbara Jo Fidler
Ontario Chapter of the
Association of Family and
Conciliation Courts

and divorce, not the parents themselves, who suffer life-changing consequences. When children are involved in their parents' conflict, it robs them of a childhood and often causes irreparable harm.

AFCC has a strong commitment to education, innovation and interdisciplinary collaboration in order to benefit communities, empower families and promote a healthy future for children. Members deal with custody and access disputes and child protection matters through a variety of dispute resolution approaches.

AFCC offers its members training throughout the year, at conferences, workshops, think tanks and task forces. Online resources are available at both the chapter and parent websites.

"From our work and research with families over decades, we know that about 10 to 20 per cent of separating or divorcing families continue to engage in conflict, years after the separation," Fidler says. "These 'high conflict' families pose significant challenges for family law professionals... [as they] continue to be mired in unresolved emotional and psychological issues... [and] are unable to effectively separate."

In high-conflict separations, one or both partners are unable to move on emotionally. "So, fighting is a way to keep them engaged to avoid making the real separation," says Fidler.

The key to these high-conflict families, as many AFCC members have observed, is early intervention. The earlier families receive appropriate dispute resolution service—which may mean appearing before a judge in some cases—the better it will be for everyone concerned. But in certain courts, like the Greater Toronto Area for example, parents without lawyers account for about 50 per cent of cases. AFCC provides a venue for professional discourse on how to address this significant problem.

Today, AFCC Ontario has about 325 members, at least one quarter or more of which are family law lawyers. Yet, according to the Law Society of Upper Canada, there are 4,506 family law lawyers in Ontario.

For those family law lawyers who are not yet AFCC members, here is the perfect opportunity: The AFCC's fourth annual conference is coming up on October 18 and 19, 2012, in Toronto. It is a great place to meet new professionals, network with colleagues, learn the latest news, and share your own expertise. Please join us: http://www.afccontario.ca/afcc_ontario_conferences.html.

Andrew Feldstein is managing partner of Feldstein Family Law Group, one of the largest Family Law firms in Greater Toronto. He has been a member of AFCC Ontario since January 2008.

Ring: Preferred approach is to treat it as an unconditional gift

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affected by delivery, it cannot be recovered. Since a promise to marry cannot be enforced, and long after divorce on a no-fault basis became accepted in Canada, the concept of a battle over ownership of the engagement ring appears artificial and anomalous at the very least." The third approach, applied in several British Columbia decisions, views the offer and acceptance of an engagement ring as evidence of mutual promises to marry such that if the contract is terminated, the parties ought to be restored to their pre-contract position. The analysis is founded upon principles of commercial and contract law, rather than principles of gift. See *Hitchcox v. Harper*, [1996] B.C.J. No. 1861 (S.C.); *Sperling v. Grouwstra*, [2004] B.C.J. No. 463 (S.C.); *Zimmerman v. Lazare*, [2007] B.C.J. No. 932 (S.C.).

In *Zimmerman*, the bride told the groom that their engage-

ment was over after a heated quarrel. The groom sued for recovery of the ring. Justice Ian Pitfield held that it does not matter who caused or what contributed to the termination of the engagement. If the engagement is dissolved, then, in the absence of agreement to the contrary, the ring must be returned in order to put the couple back to the positions they were in before the engagement.

The treatment of engagement rings varies among Canadian

jurisdictions. The weight of Ontario authorities dictates that ownership of the ring is determined by reference to who broke the engagement. However, this appears to be at odds with s. 33 of Ontario's *Marriage Act*, which provides that "where one person makes a gift to another in contemplation of or conditional upon their marriage to each other and the marriage fails to take place or is abandoned, the question of whether or not the failure or

abandonment was caused by or was the fault of the donor shall not be considered in determining the right of the donor to recover the gift."

This approach also suffers from the difficulty of having to find who terminated the engagement, either by words or by conduct, which is not always easy, as illustrated by *McArthur*. The demise of a relationship is rarely attributable only to one party.

It is high time that we inject some consistency and clarity

into the law. The preferred approach is a simple one: to treat the ring as an unconditional gift to the recipient. This way, each party is clear on where they stand, and draw-out litigation over who gets the ring is avoided.

Anna Wong practises civil litigation at Landy Marr Kats LLP in Toronto.

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