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Chattel or fixture? ©

You have recently sold your home, and purchased a new one. Moving day is coming, and your real estate agent informs you that the purchasers of your house would like to do a final inspection before closing as entitled under the agreement.

During the visit they ask you about your grandmother's antique mirror which you carefully removed from the main floor powder room. You explain that it could not possibly have been included in the purchase price, as it was only hanging from a nail on the wall. Besides you never intended to sell it, and intend to replace it with a new mirror.

Immediately, you call your agent and ask her about the mirror. She replied that according to the agreement, all fixtures are included, unless otherwise mentioned in the agreement of purchase and sale. What will you tell grandma when she notices that her mirror is absent from your new home? What will you say to her? *"I sold it with the house, and got a good price for it!"*

Your contract is the best starting point to determine if an item is included in the purchase price. If the contract is unclear in that it does not specifically exclude a fixture, or specifically include a chattel, a characterization will have to be made if the item is a chattel or a fixture.

The Conveyancing and Law of Property Act, R.S.O. 1990, Chapter C.34 tends to include all items unless an exception is specifically made, so houses, outhouses, sheds, and trees etc. are included, but there is a grey area in respect to chattels.

In interpreting whether an item is a chattel or a fixture, a court may apply one of two tests.

The 1902 English case favors the purchaser. It states that objects even slightly affixed are part of the land unless circumstances exist to show that they were intended to continue as chattels. This test states the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation. In a contest for the

mirror you would surely lose if a court applied this test, regardless of your intention not to sell it.

A 1990 BC case would require a court to look at the degree and object of the annexation. Factors considered by the court were the intention, inferred from the nature of the article, the relation and situation of the party making the annexation, and the purpose or use the annexation has been made. In this case the court determined a mobile home was a permanently affixed to the land and formed part of the real property. The fact that the mirror was not permanently attached and easily removable like a framed picture supports the home seller by characterizing it as a chattel.

So you have a legal argument for both buyer and seller. Yet taking your dispute to court can be expensive and time consuming, and will only result in a win lose situation.

I would suggest that all items you wish to exclude are clearly identified in the listing agreement and marketing materials, and the agreement of purchase and sale. Even better, remove and replace family heirlooms, light fixtures, and items you intend to take along to the next house before putting your home for sale. After all you will need to pack them anyway. If you choose not to pack away these items you should specifically exclude them in your agreement of purchase and sale so there will be no confusion as to what comes with the house. If in doubt, do not hesitate to call your lawyer before you make a deal.

For more information about this or any other real estate law related topics please do not hesitate to contact John Poletes at 416-482-1902, or e-mail him @ john.poletes@bellnet.ca