Recent Trusts Cases

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RECENT CASES ON TRUSTS in Manitoba have tended to centre around trusts arising by operation of law, such as resulting and constructive trusts, particularly in connection with family disputes.

Over the past 15 years the Supreme Court of Canada has developed the constructive trust to provide a remedy where there has been an unjust enrichment of one of the parties in a marriage or common law relationship at the expense of the other. This possibly reached its culmination in 1989 in *Rawluk* v. *Rawluk*[1] where the Supreme Court held that a constructive trust could be imposed even where there was provincial family legislation making provision for property allocation on a spousal separation.

In the recent Manitoba case of *King* v. *King*,[2] the Court of Queen's Bench has decided, however, that there are limits to the extension of the remedy of the constructive trust in marital cases. In that case the applicant's husband died leaving virtually no estate. What he did have was an insurance policy payable to a named beneficiary, his mother (the respondent), as well as a pension entitlement of which the beneficiary was again his mother. In addition to a claim under the *Dependents Relief Act* to the proceeds of the insurance policy and to the pension entitlement (which was dismissed because neither actually formed part of the deceased's estate), the applicant sought some form of relief based upon an implied or constructive trust. There had been a 20 year long marriage so the issue was whether there had been some unjust enrichment of the husband so as to provide restitution to the applicant widow. On the basis of the well known Supreme Court of Canada cases of *Rathwell v. Rathwell*[3] and *Sorochan* v. *Sorochan*,[4] Kennedy J. emphasized that a party making a claim for restitution must prove that there has been an enrichment, a corresponding deprivation and the absence of a juristic reason. Unfortunately, in this case

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[1] [1990] 65 D.L.R. (4th) 161 (S.C.C.)

[2] (2 November 1990), 90-01-20008 (Man. Q.B.).

[3] [1978] 2 S.C.R. 436.

[4] [1986] 5 W.W.R. 289 (S.C.C.)

the unjust enrichment did not come about through any real contribution by the applicant to the insurance policy or the pension proceeds. While the learned judge clearly wished to make some provision for the destitute widow, he did not feel that he could dispense with any of the three prerequisites outlined above for the establishment of a constructive trust.

This was indeed a very hard case, but we cannot help but agree that Kennedy J. had little or no room to manoeuvre. When the Canadian Courts first developed the constructive trust as a remedy for unjust enrichment, the Supreme Court was careful to lay down the guidelines of the three prerequisites mentioned in this case. This was because Lord Denning's rather vague requirement of "justice and good conscience" in *Hussey* v. *Palmer*[5] had led the English House of Lords to shy away from the constructive trust as an unjust enrichment remedy, since this smacked too much of "palm tree justice." This is unfortunately still the general attitude in England. It is essential, therefore, that if the development of this remedy in Canada is to continue, it should be based on the relatively firm grounds established by the Supreme Court.

The above case should be compared with the next constructive trust application in Manitoba, in *Orobko* v. *Orobko*.[6] Here the applicant and the respondent had lived together for 30 years but were never legally married. In addition to a claim for spousal maintenance, the applicant was seeking an interest in the family home which stood in the name of the respondent. The home had been acquired about 4 or 5 years after the start of the cohabitation. Originally they had both contributed a modest amount for the down payment with the balance on a mortgage. This mortgage was paid off by Mr. Orobko during the cohabitation: but while he was doing this, Mrs. Orobko was paying other living expenses which presumably allowed Mr. Orobko to make the mortgage payments. Mullally J. found that the house would of course have appreciated in value in the approximately 25 years since its purchase and thus at the time of the separation Mr. Orobko had been enriched by the value of the appreciation. He also found that there had been a corresponding deprivation to Mrs. Orobko because during the 5 years before the purchase of the house she had provided Mr. Orobko with free rental accommodation so that he was able to put aside money for his portion of the down payment. Subsequently, when

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[5] [1972] 3 All E.R. 774 (C.A.)

[6] (28 May 1991), FD 88-01-16136 (Man.Q.B.).

they lived together in the house, Mrs. Orobko provided carpets, drapes and flooring as well as furniture and appliances and made contributions to the household expenses. Finally, the learned judge found that there was no juristic reason for the enrichment and therefore he had no difficulty in holding that there was a constructive trust and that Mrs. Orobko was entitled to an interest in the house. The interesting question was what should be the amount of that interest, since there had been so many different contributions made by Mrs. Orobko. In the end the decision was that each party should be given a one-half interest in the house. It is instructive to notice two points from this case. First, that Mullally J. was careful to work his way through and apply the three prerequisites for a constructive trust which we have discussed above. Second, that where it is difficult to assess the value of the contributions made by the parties the court has resort (as it indeed should in this area of equitable jurisdiction) to the age-old equitable principle that equality is equity.

The next case which involved consideration of both the resulting and constructive trusts concepts was *Mehta* v. *Canada Trust*[7] which arose not out of a spousal dispute but as a result of the deaths of both spouses in the tragic Air India plane crash in 1985. The husband's estate (as plaintiffs) asserted that, pursuant to a resulting trust, the wife's estate (as defendants) held a 50% interest in the G.I.C.s and in the R.R.S.P.s registered in her name as a trustee for and on behalf of the plaintiff's estate. The marriage had been a happy one and the wife's main concern was the home and the welfare of the two children, with the husband being the main provider of the financial resources. The wife had some professional training and she did do some part time work, first as a bookkeeper for a company owned by her brother-in-law. The learned judge found that the income was only incidental household or spending money in the wife's hands. Later she worked part-time at a pharmacy until her untimely death. Unfortunately her income tax returns were somewhat deficient and inexact and the major part of her income came from investments such as G.I.C.s and R.R.S.P.s. There was clear evidence that one G.I.C. was paid for by a withdrawal from her husband's bank account, but apart from that, the records of both husband and wife did not really disclose with exactitude the source of the funds used to purchase the investments. One thing was certain: even if all the wife's part-time earnings had been accumulated they would not have been sufficient to purchase these investments. De Graves J. therefore inferred that these investments

[7] (18 December 1990), C1-88-01-26164 (Man.Q.B.).

arose from the husband's earnings and savings. It was also clear that both parties had intended that the income and investments should be shared in this way for tax purposes.

In the light of the above findings, the court went on to find that there was a resulting trust back in favour of the husband's estate and that no special gift had been intended. The learned judge also found that the wife should be given recognition for her contribution to the creation of both her's and her husband's estates. Again, however, because of the difficulty in defining that contribution, he decided on equal sharing following the principle mentioned earlier regarding equality.

While not affecting the final decision, there are a couple of small points to be noticed with regard to the judgment. First, the learned judge stated that it is now well settled that there is no longer any presumption of advancement justifying the finding of a spousal gift. This was of course with regard to the investments bought by the husband in the wife's name, since the presumption of advancement where there had been a transfer from husband to wife would rebut the original presumption of a resulting trust. With the greatest respect, however, this statement by DeGraves J. is possibly too dogmatic in Manitoba. We are one of the few provinces where there has been no legislative abolition of this presumption and, as Prof. Waters has written, we "remain free to invoke the presumption for whatever significance it continues to have."[8] As was noted in this writer's comment in 1990[9] in the case of *Carter Estate* v. *Johnston Estate*[10] Scott A.C.J. (as he then was) still referred to the doctrine of advancement with regard to resulting trusts. While the doctrine may well have led to no different conclusion in the present case, it is a pity it was so summarily dismissed without any consideration.

The second point in De Graves J.'s judgment which is a little strange is his statement that "there are three essential criteria establishing a resulting trust." He then went on to set out those put forward by Mr. Justice Dickson (as he then was) in the case of *Pettkus* v. *Becker*,[11] namely enrichment, corresponding deprivation and lack of any juristic reason. As mentioned in the two earlier cases dealt with above these essential criteria apply to constructive and not resulting

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[8] D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 315.

[9] "Recent Trusts Cases" (1990) 19 Man. L.J. 215 at 216.

[10] (19890, 55 Man. R. (2d) 158.

[11] [1980] 2 S.C.R. 834.

trusts. The learned judge was of course quite right to consider these criteria when deciding upon the wife's possible constructive trust for her contribution to the estate of her husband and possibly, therefore, this was simply a lapsus linguae on his part.

The final case, which is perhaps the most legally interesting for comment this year, was *Lyons* v. *Anderson*.[12] This was again decided on the basis of the Court imposing a constructive trust; but while the end result was probably correct, there are some interesting legal questions which were unfortunately not developed.

The plaintiff was seeking a declaration that a house in St. Boniface was held in trust by the two defendants for the plaintiff and the said two defendants as to a one-third interest each. Briefly, the facts were that in 1953 Kathleen Lyons was the sole owner of the St. Boniface house and at that time she had two children from her first marriage, being the two defendants who were then aged 29 and 23 and one child by her second marriage, being the plaintiff then aged 3. In 1953, the *Statute of Frauds*,[13] which required evidence in writing for the creation of any trust relating to land was still in effect in Manitoba. At that time Kathleen Lyons transferred title to the house to herself and to the two defendants as joint tenants. The house was maintained as a rental property and Kathleen Lyons took all the income for herself. In 1984 Kathleen Lyons died. Her will made no reference to the St. Boniface property and left the residue of the estate to all her children. By virtue of the doctrine of survivorship, the title to the St. Boniface house then came to stand in the names of the two defendants as joint tenants.

The plaintiff, supported by the defendant De Lucia claimed against the two defendants a one-third interest in the St. Boniface house. In his evidence, the defendant De Lucia said that about the time of the transfer of the property in 1953, his mother indicated in the presence of himself and the other defendant that, on her death, the (then) infant plaintiff was to have an equal share in the house. He also said that she never used the word "trust" but then and in later conversations she referred to this intention. He also testified that at the time of his mother's death, he told his co-defendant that all three of the children were to have a one-third interest in the property. There was unfortunately no written evidence of this intent of the mother. He also stated that his sister, the co-defendant, seemed to concur in his

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[12] (4 March 1991), C1-88-01-28135 (Man. Q.B.).

[13] 29 Car. 2, c. 3.

statement. He was in fact his mother's lawyer and looked after her financial affairs.

The co-defendant, in resisting the action, said she had accepted her brother's statement as to division of the property into three shares only because she did not know then of the legal character and effects of a joint tenancy. She denied all recollection of any 1953 meeting with her mother and brother about the property. All she remembered was agreeing to do what she could to look after the plaintiff, then age three, should their mother die.

It was admitted that if there was an express trust then it was unenforceable for lack of writing by virtue of the *Statute of Frauds*. However, section 8 of that statute contains an express exception to the requirement of writing for any constructive or resulting trust created by operation of law. Smith J. stated that there was no resulting trust to be found in this case, so that if the plaintiff was to succeed, a constructive trust had to be present. On the evidence before him, he found on the balance of probabilities that a constructive trust had been created. It would seem that the learned judge felt that there was some kind of a trust here, but because of the *Statute of Frauds*, he was forced to declare a constructive trust because of the lack of writing.

This is another interesting example of the problems that have bedeviled Courts of Equity for years. The *Statute of Frauds* was enacted in 1677 to reduce the opportunity for perjury when dealings with land could be created in oral form. However, it was soon apparent that the Statute could be used as a way to escape obligations, whether by contract or by trust. A person who had taken as a trustee of land for another could avoid the obligation by pleading the lack of writing. To overcome this, the courts applied the concept of fraud and developed the principle that the *Statute of Frauds* should not be used as an engine of fraud. The leading case where it was established that an oral trust would be enforced so as to avoid such a fraud was *Rochefoucauld* v. *Boustead*.[14] But what is meant by fraud? The authorities suggest that fraud is proved simply by the claimant of the trust showing that the grantee of the land had originally agreed to hold it for the claimant. However, in the Canadian case of *Brown* v. *Storoschuk*,[15] the dissenting judge, Sidney Smith J.A., thought more was needed, since fraud is a most serious charge. In fact, in

[14] [1897] 1 Ch 196 (C.A.).

[15] [1947] 1 D.L.R. 227 [hereinafter *Brown*].

1889, the Manitoba Court of Appeal in *Waterous* v. *Orris*[16] was reluctant to see the *Statute of Frauds* avoided in this way and stated that evidence of an alleged oral trust was inadmissible because the statutory requirement of writing was absent.

This may be why Smith J. took the other route of not purporting to enforce an express trust which was not in writing but rather imposing a constructive trust so as to prevent unconscionable retention of what was intended to be trust property. Thus the *Statute of Frauds* is observed, since constructive trusts are expressly exempt from the Statute. The editorial note to *Brown* puts it well: "courts have, however, been so astute as to avoid the rigours of the statute that we may well wonder why it is allowed to remain in the statute books. Unless the statute is to be judicially repealed it would seem difficult to go forward".[17]

In Manitoba we have now, fortunately, repealed the *Statute of Frauds*,[18] so one hopes that if the trust in question had arisen today, the learned judge would have been able to enforce it as an express trust, rather than having had to resort to the device of the constructive trust. One is, however, left to wonder a little about this, in light of the judgment of Mr. Justice Huband in the contracts case of *Megill Stephenson Co. Ltd.* v. *Woo*,[19] where he wrote "while the Statute of Frauds has been repealed in this jurisdiction, the idea lying behind it remains valid. The courts should be reluctant to impose binding contracts on parties based on conversations, particularly where the usual practice has been to reduce such contracts into writing."[20] Presumably, therefore, if there is no evidence in writing of the trust, the Court will require (as indeed it should) very clear evidence to be produced in order to be satisfied of the intended creation of a trust.

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[16] (1889), 6 Man. R. 177.

[17] *Supra*, note 15 at 228.

[18] *An Act to Repeal the Statute of Frauds*, S.M. 1982-83-84 c. 34.

[19] (1989), 59 D.L.R. (4th) 146.

[20] *Ibid.* at 157.