

ESTATES CASES & THE REMEDIAL CONSTRUCTIVE TRUST

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INTRODUCTION

In contrast to express trusts, which are created directly by an intention to create them, constructive trusts arise by operation of law. In recent years, the constructive trust has been used extensively to resolve matrimonial and cohabitation property disputes. In this context, the traditional view of the constructive trust was considered inadequate. Consequently, the Canadian courts adopted the remedial constructive trust as a remedy against unjust enrichment. This approach was discussed at some length in the Supreme Court of Canada case of *Pettkus v. Becker*¹. Seventeen years later, in *Soulos v. Korkontzilas*², the Supreme Court of Canada held, however, that the traditional constructive trust has not been superceded by the remedial constructive trust and continues to co-exist with it.

A constructive trust is imposed where monetary damages are inadequate and an established link between contribution and the property in which the trust is claimed. Generally speaking, a constructive trust is raised and expressed through the concept of equity.³

This paper looks at the use of the remedial constructive trust in the particular context of estate cases with reference to recent case law.

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¹ [1980] 2 S.C.R. 834.

² [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214.

³ *Clark Drummie & Co. v. Ryan* (1999), 170 D.L.R. 266 (C.A.).

BACKGROUND: UNJUST ENRICHMENT AND RESTITUTION

Unjust enrichment usually arises as a basis of liability, often in the absence of an alternate source of a claim. As laid down in *Pettkus v. Becker*⁴, there are three elements of a cause of action in unjust enrichment: 1) an enrichment; 2) a corresponding deprivation; 3) the absence of any juristic reason for the enrichment.

Unjust enrichment can also be claimed where the defendant acquires a benefit through some conduct which amounts to a wrong against the plaintiff even if the plaintiff is not deprived in the process. For example, in *Keech v. Sandford*⁵, the defendant acquired a leasehold interest in land as a result of breaching a duty of loyalty to the plaintiff. The plaintiff did not suffer “corresponding deprivation”, but an action stood in “unjust enrichment by wrongdoing”. That is, the plaintiff was allowed to take away the wrongful gain even though this gain was not directly at this expense.

There is ever-more estate litigation in relation to resulting and constructive trust claims, as well as claims for services. These claims can generally be divided into two categories: 1) claims usually made by way of a claim for a resulting trust that are determined by reference to the deceased’s intention with respect to certain property; 2) claims that are more compensatory and arise from the deceased’s acceptance of services or contributions that maintain or enhance the value of an estate.⁶

⁴ *Supra* note 1.

⁵ (1726), Sel. Case. T. King 61, 25 E.R. 223(Ch. Div.).

⁶ Jennifer J. Jenkins and H. Mark Scott. *Compensation & Duties of Estate Trustees, Guardians & Attorneys* (Aurora: The Cartwright Group Ltd., 2007) at s. 18.

There is some confusion about the presumptions applicable to these various remedies. Recently, the courts have retreated from an immediate application of the presumptions by first considering the totality of evidence in finding intention. In this way, the difficulty for the claimant posed by the combination of the presumptions and the requirement for corroboration stipulated by s.13 of the *Evidence Act* is diminished, taking into account that since the deceased is not available for corroboration, the deck can sometimes be stacked against the claimant.

Resulting trusts differ from constructive trusts in that it is only in the case of the former that a common intention between the parties to share the property is required. The prototypical case of a resulting trust is one in which a person transfers property to another gratuitously; since equity presumes against gifts, the law applies the presumption that the property ‘results’ to the donor. A constructive trust, on the other hand, is imposed where one person provides services or makes contributions to property legally held by another. The two notions can overlap. For example, where a court declares that a contribution to the property was intended by both parties, a finding either of a resulting trust or constructive trust may be justifiable.⁷

Where resulting trusts are concerned, certain long-standing common law presumptions are employed. These include the rebuttable presumption of a resulting trust which is based on equity’s assumption of bargains not gifts. However, a presumption of advancement has historically replaced a presumption of resulting trust where a gratuitous

⁷ *Ibid.*

transfer is made from a husband to his wife, or from a father to his child . This presumption is rebuttable on a balance of probabilities.

In the Supreme Court of Canada's recent companion decisions of *Pecore v. Pecore*⁸ and *Madsen Estate v. Saylor*⁹, the court held that these presumptions continue to have a role to play. Justice Rothstein, speaking for the majority of the court, found that the presumption of advancement should now apply equally to fathers and mothers, but also that it should be limited in application to transfers to minor children. Where an adult child is the transferee, s/he has the burden of rebutting the presumption of a resulting trust on a balance of probabilities by showing that his or her parent intended to give a gift.

Justice Abella, concurring in *Pecore* and in dissent in *Madsen Estate*, was of the opinion that the presumption of advancement should continue to be applied to all gratuitous transfers from parents to their children, and not be restricted to transfers to non-adult children.

The other related claim is that of quantum meruit, which is a claim for services made on the basis that the deceased represented that the plaintiff would be compensated. *Deglman v. Guaranty Trust Co. of Canada and Constantineau*¹⁰ is the leading case on quantum meruit awards. Both quantum meruit and constructive trust claims are based on unjust enrichment. To both applies the presumption that reasonable compensation is to

⁸ 2007 SCC 17.

⁹ 2007 SCC 18.

¹⁰ [1954] S.C.R. 725, 3 D.L.R. 785.

be paid. Where a family member provides services however, the law assumes that such services are provided gratuitously. The difference lies in the connection with the property and the inadequacy of monetary compensation that are requirements of a constructive trust claim.¹¹

While there are clear doctrinal differences between the three claims, in practice, the line between them is not always so clear.

Even within the realm of constructive trusts, the terminology is much disputed. Some scholars, including Peter Birks¹², take the view that cases of profitable wrongdoing where the plaintiff does not suffer a corresponding deprivation should not be called “unjust enrichment”. Taking this view further, the remedy for such wrongful gain is not properly called “restitution”, but rather “disgorgement” of wrongful gains.

Restitution or disgorgement can be accomplished by granting the plaintiff a personal remedy – alleging a debt – or a proprietary remedy – alleging a right of property in a particular asset. Personal claims abate proportionately in bankruptcy while proprietary rights survive bankruptcy. Another distinction between personal and proprietary rights is that the plaintiff’s entitlement is in the former case unaffected by fluctuations in the value of the property, whereas in the latter, the plaintiff’s interest rises or falls with the value of the property.

¹¹ *Ibid.*

¹² Peter Birks (1941-2004) was Regius Professor of Civil Law at the University of Oxford and Fellow of All Souls College.

The constructive trust has a very wide application. It can be used to address unjust enrichment, as a remedy for wrongful gains as well as a means of perfecting intentions. Our particular interest in this paper is with constructive trusts in the context of wrongful gains upon death and perfecting intentions with respect to transfers upon death.¹³

AS A REMEDY FOR UNJUST ENRICHMENT

As mentioned above, a constructive trust interest can be successfully imposed after death to redress an unjust enrichment. Once the court determines that there has been unjust enrichment, there are two possible remedies: an award of money on the basis of the value of the services rendered, or an imposition of a constructive trust if sufficient proximity to the property in question can be established. See the case of *Peter v. Beblow*.¹⁴

In order for a constructive trust to be imposed, money must be inadequate and there must be a causal link between the services rendered and the property upon which the trust is claimed. See Justice McLachlin in *Peter v. Beblow*.¹⁵

...I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed.

¹³ Oosterhoff on Trusts: Text, Commentary and Materials, 6th ed. (Toronto: Thomson Carswell, 2004) 625-645.

¹⁴ [1993] 1 SCR 980 at para. 21.

¹⁵ *Ibid.*, at para. 26.

In *Schnogl v. Blazicevic*¹⁶, Justice Cullen applied this principle to find that a man living in the basement apartment of the testators' house was entitled to an interest by way of constructive trust. In this case, the man made a financial contribution to the maintenance of the house, provided ongoing maintenance of the house and yard, and also had a reasonable expectation of an entitlement to the property arising out of the representations made to him and the nature of the relationship that was forged between him and the house's owners. In particular, the plaintiff was found to have provided, "a source of companionship and activity related to the house".¹⁷

That is, Justice Cullen found that in those circumstances, there was a significant link between the plaintiff's overall contribution and the property at issue that justified the imposition of a constructive trust as opposed to a monetary award.

In contrast, in *Perilli v. Foley Estate*¹⁸, a common-law spouse claiming that her deceased spouse had been unjustly enriched because of her contributions to the home in which they lived, and because of her personal care for Foley while he was suffering from Alzheimer's disease, was denied the remedy of a constructive trust.

Justice J.R. Henderson of the Ontario Superior Court found that there was unjust enrichment in terms of personal care and care for the home provided over the three year period when the spouse was unable to take care of himself or the home. His Honour concluded, however, that there was sufficient money in the estate to compensate the

¹⁶ 2004 BCSC 1335.

¹⁷ *Ibid.* at para. 174.

¹⁸ 2006 CanLII 3285.

claimant and that it was therefore illogical and unnecessary to impose a constructive trust. He also found that there was not a sufficiently strong link between the services rendered by the claimant and the property.¹⁹ The services relating to cleaning and maintenance related to the property, most pertained to the spouse's personal care as opposed to the property itself.

Accordingly, Justice Henderson found that the obligation to pay the unjust enrichment claim was one of the legal obligations of the estate that should be considered under the *Succession Law Reform Act* claim for support. That is, he found that the two claims, that is the claim in unjust enrichment relating to the personal services, and the support claim, should be considered in tandem. The result would be one global award out of the estate.

Most recently, in *Belvedere v. Brittain Estate*²⁰, the plaintiff had been in a committed relationship with a man for 23 months and was found entitled to claim unjust enrichment where she was not entitled to anything under the will. Justice Browne, of the Ontario Superior Court, found that the plaintiff had enriched the defendant in the following ways²¹:

[She] performed domestic engineering services/duties, including housekeeping, meals, laundry, gardening, vegetable gardening, lawn mowing, some modest amount of snow removal, stone picking, loading of wood to be transported, child care in all of its aspects for Kenny, making available health benefits through Air Canada, making available through Air Canada benefits of rights to air flights and accommodation for father and son with minimal flight costs and other travel requirements obtainable at a discount. Lora conferred a significant enrichment upon Brittain.

¹⁹ *Ibid.*, at para. 46.

²⁰ 2007 CanLII 32666 (ON S.C.).

²¹ *Ibid.*, at para. 82.

In addition, Justice Browne found that there was corresponding deprivation, since the plaintiff had given up full time work at Air Canada upon becoming involved with the defendant, and an absence of juristic reason. Indeed, on the facts, there could be no juristic reason for enrichment at the plaintiff's expense. Accordingly, Browne J. found that the plaintiff was entitled to a constructive trust in the RRSPs at the time of the defendant's death. Since the RRSPs no longer existed, Browne J. gave the plaintiff an award in the amount of \$1,750,000.

AS AN ALTERNATIVE TO A DEPENDANT SUPPORT CLAIM

Those who are defined as dependants under the Succession Law Reform Act, R.S.O. 1990, c. S.26 may be entitled to support under that Act where they have not been provided for in the will. In such cases, the support claim will ordinarily be primary and constructive trust perhaps argued in the alternative.

Section 58(1) of the Act provides for dependant support as follows:

Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them. R.S.O. 1990, c. S.26, s. 58 (1).

A "dependant" is defined under the Act as (a) the spouse of the deceased; (b) a parent of the deceased; (c) a child of the deceased; or (d) a brother or sister of the deceased to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death. A "parent" for the purposes of the

Act includes a grandparent and a person who has demonstrated a settled intention to treat the deceased as a child of his or her family, except under an arrangement where the deceased was placed for valuable consideration in a foster home by a person having lawful custody.

A “spouse” means a spouse as defined in subsection 1 (1) of the Act and in addition includes either of two persons who, (a) were married to each other by a marriage that was terminated or declared a nullity, or (b) are not married to each other and have cohabited, (i) continuously for a period of not less than three years, or (ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

Individuals who qualify in this way under the Act will sometimes claim constructive trust in the alternative, but should be wary of Justice Ferrier’s remarks in the case of *McCoy v. Hucker*²² referred to recently in *Bukvic v. Bukvic*²³:

A constructive trust is not meant to be a tactical tool used routinely in family law cases.

TO CORRECT WRONGFUL GAINS UPON DEATH

²² [1998] O.J. No. 2831 (Ont. Gen. Div.) at para. 19.

²³ 2007 CanLII 14323 (Ont. Sup. Ct.).

The law of probate may not allow a person to wrongfully acquire property upon someone's death. Probate may, for example, be refused where there is proof that the will was induced by fraud, duress or undue influence.

For example, in the case of *Danchuk v. Calderwood*²⁴, a will was refused probate upon proof that a housekeeper had exerted undue influence over a senile testator. Instead, the previous will of the testator was accepted for probate.

However, where the wrongful conduct is not exposed until after probate has been granted, a constructive trust will be imposed upon the person who improperly induced the will and in this way, wrongfully obtained a benefit. In such a case, the trust operates in favour of the testator's estate.²⁵

In *Tiffin Estate v. Tiffin*²⁶, an action was commenced by the plaintiff to recover from the defendants, his brother and his sister-in-law, one-half of the value of the estate of his late parents. The basis of the claim was lack of testamentary capacity on the part of the elderly parents, undue influence, exercised by the brother and sister-in-law, and breach of fiduciary duty to the elder parents by the same.

Justice Laing found that there was no doubt that the brother and sister-in-law had breached their fiduciary duty²⁷:

²⁴ [1996] B.C.J. No. 2383.

²⁵ See, e.g. *Teele v. Graves*, 425 So. 2d 1117 (Ala, 1983).

²⁶ 2004 SKQB 60.

²⁷ *Ibid.*, at para. 101.

The law does not allow a person who has accepted a fiduciary obligation to act as a power of attorney to profit at the expense of the grantor, nor can such a fiduciary confiscate money or assets that are the property of the grantor. Having determined there was no gift over from either of the elder Tiffins to Rob or Kaaras [the brother and sister-in-law], their subsequent appropriation of all of the assets of the elder Tiffins for their own use and benefit was a clear breach of their fiduciary duty.

Justice Laing held that the law imposed a constructive trust on the wrongfully taken assets as a remedy, benefiting the estates of the elderly parents.

Similarly, if a legatee wrongfully prevents a testator from revoking a gift, a trust will be constructed in favour of the estate if the testator did not intend to make another will, or in favour of the person who would have benefited if a will had been executed as intended.

If an heir wrongfully induces the revocation of a will in order to acquire a greater benefit on the intestacy, a constructive trust may be created in favour of those who would have benefited but for the wrong.

Where a person wrongfully induces the owner of an insurance policy to put her name down as beneficiary, or wrongfully prevents the owner from changing the beneficiary designation in favour of another individual, again the court will create a constructive trust in favour of the individual who would have benefited but for the wrong.²⁸

²⁸ See generally, Oosterhoff, *supra* note 4 at 795.

TO PERFECT INTENTIONS WITH RESPECT TO TRANSFERS UPON DEATH

Secret Trusts

In a secret trust, a will is drafted leaving property to a certain person who secretly agrees with the testator to hold the property for the benefit of a third person. A fully-secret trust is one where the will itself is completely silent as to this secret agreement. A semi-secret trust is one where the trustee is identified as such, but the identity of the beneficiary is concealed.

Secret trusts are used to achieve many different ends. A testator may leave everything to a trusted solicitor as a matter of simplification. Or, where the testator's intention is likely to cause ill-feelings, the testator may prefer to keep her intentions a secret until after death. Also, since a probated will is a public document, the testator may want to maintain secrecy even after her death.

To prove a secret trust, three elements must be present: communication by the testator to the trustee about the intended trust, acceptance of this arrangement by the trustee, and appropriate timing of these two communications.

With respect to the first element, the testator must make it clear that he is imposing an obligation, rather than expressing mere precatory words. Mere precatory words will not impose a trust. As for acceptance by the trustee, silent acquiescence has

been held to suffice.²⁹ Where timing is concerned, for a semi-secret trust, the agreement must have occurred before the written will was drafted. No such restriction applies for a fully-secret trust.

Where a fully-secret trust fails, the would-be trustee is often allowed to retain the property beneficially. In sharp contrast, where the language of the will reveals that the money is to be kept in trust, failure results in the asset returning to the estate.

With the exception of holograph wills, the *Succession Law Reform Act*³⁰ requires testamentary dispositions to be in writing and signed by the testator in the presence of two witnesses. The disposition under a secret trust to the intermediary individual may be in writing, but since the terms of the intended trust are un-stated, the will is invalid. Equity responds to this legal obstacle by impressing a constructive trust upon the property in the trustee's hands.

The constructive trust in such a case cannot be properly characterized as arising from unjust enrichment, since the immediate recipient's gain is not really a deprivation for the ultimate intended beneficiary, but rather for the testator. That is, the immediate recipient made no promise to the ultimate beneficiary, but only to the testator.

Alternatively, this kind of trust is often characterized as arising from fraud. The difficulty with this characterization is that a constructive trust may arise prior to, or in the

²⁹ See *Russell v. Jackson* (1852) 10 Hare 204, 68 E.R.900; *Charlton v. Cipperley* (1984), 12 D.L.R. (4th) 582.

³⁰ R.S.O. 1990, c. S.26.

absence of any actual fraud. That is, we want to say that the constructive trusts arises at the moment of the testator's death, which event clearly would precede any fraud on the part of the would-be trustee. Secondly, the characterization of fraud does not allow for the situation in which the would-be trustee has an honest but mistaken belief that he is entitled to benefit himself.

Oosterhoff therefore suggests that the best explanation may be that a constructive trust interest arises to perfect intentions and to protect detrimental reliance.³¹ In this way, equity enforces the promise made by the initial recipient to the trustee and upon which the testator relied in acting in the way that she did.

Mutual Wills

Another example of the use of the remedial constructive trust to perfect intention upon death is in the case of mutual wills. Such wills are typically drafted by spouses or partners. In contrast to mutual wills, reciprocal wills mirror each other, but in a way that does not attract any special legal consequences. With reciprocal wills, each party is free to change his or her will at any time and has no special obligation to the individual with the reciprocal will. In the case of a mutual will, typically the parties draft wills that mirror each other and they also agree to have certain provisions upon death. For example, the parties may enter into an agreement that says each party is free to revoke during the other's life, but can no longer do so once one has died. In such cases, equity

³¹ *Supra* note 4 at 816.

will when necessary, impose a trust in order to hold the surviving party to his or her agreement to the deceased individual.

Snell's Equity, 13th ed., Sweet and Maxwell, London, (date unknown) set out the doctrine of mutual wills as follows at pp.219-20:

Where two persons make an arrangement as to the disposal of their property and execute mutual wills in pursuance thereof, the one who predeceases the other without having departed from the arrangement has performed his part of the bargain and dies with the implied promise of the survivor that it shall hold good. Usually the parties give each other a life interest with remainders over to the same person but they may give each other an absolute interest with a substitutional gift in the event of the other's prior death. The principle applies even where they agree to make wills leaving their property to third parties and no part to each other. The arrangement will not be presumed from the simultaneous execution of virtually identical wills but must be proved by independent evidence of an agreement not merely to make identical wills but to dispose of the property in a particular way. It must amount to a contract at law.

Once one of the parties dies, the arrangement becomes irrevocable, at least if the survivor accepts the benefits conferred on him by the other's will. Until the first death, either may withdraw from the arrangement; and any material alteration by one party of his will without the agreement of the other party will prevent it from being binding....

*Durouf v. Pereira*³² was the first known case to impose a constructive trust in a case of mutual wills. In that case, a husband and wife made a joint will that contained evidence that they had agreed not to alter it. After the husband's death, the wife made a new will that differed substantially from the agreement. After her death, the would-be beneficiaries under the mutual will sought to impress a trust in their favour on her estate. In this, they succeeded.

³² (1769), 1 Dick. 419, 21 E.R. 332.

The wording of the agreement between the parties is of course crucial and the existence of an agreement must be proved. The question of proof is often a difficult one and courts may look both to the terms of the wills themselves and to extrinsic evidence.³³

This matter was visited by the B.C. Court of Appeal in *University of Manitoba v. Sanderson Estate*³⁴, in which Rowles J.A., observed the following at para. 46:

The guiding principles to be applied in this case are to be found in *Dufour v. Pereira, supra*, in which the enforcement of an agreement in a joint will was held to be within equity's jurisdiction to prevent fraud. Equity considers it a fraud upon the deceased, who has acted upon and relied upon the mutually binding nature of the agreement, for the survivor to change the will and break the agreement. As the deceased cannot intervene to enforce the obligation, equity will enforce the survivor's obligation, despite the survivor's subsequent intentions.

The onus is on the person alleging the doctrine of mutual wills to prove the existence of the agreement not to revoke. As Cullity J. said in *Edell v. Sitzer*³⁵ at para. 58:

The most fundamental prerequisite for an application of the doctrine [of mutual wills] is that there be an agreement between the individuals who made the wills. It has been repeatedly insisted in the cases that: a) the agreement must satisfy the requirements for a binding contract and not be 'just some loose understanding or sense of moral obligation'; b) it must be proven by clear and satisfactory evidence; and (c) it must include an agreement not to revoke the wills.

³³ See for example, *Patamsis Estate v. Bajoraitis* (1994), 2 E.T.R. (2d) 200 (Ont. Gen. Div.); *Bell v. Bell* (1998), 24 E.T.R. (2d) 169 (B.C.S.C.).

³⁴ (1998), 155 D.L.R. (4th) 40.

³⁵ (2001), 55 O.R. (3d) 198, 40 E.T.R. (2d) 10 (S.C.J.), *affd.*, (2004), 9 E.T.R. (3d) 1 (C.A.), application for leave to appeal to S.C.C. dismissed [2004] SCCA No. 372 (Aug. 27, 2004).

More recently still, in 2005, Justice Barrow of the BCSC considered whether there was an agreement not to revoke mutual wills in *Huculak v. Kallenberger et al.*³⁶ In this case there was no dispute that the husband and wife had simultaneously made wills that had similar terms. However, there was also no reference in the wills to any agreement not to revoke nor was there any other evidence of an express agreement to that effect. The claimant argued that the court should infer an implied agreement on the basis that a) the wills were prepared simultaneously and are similar in their terms; b) in daily life, no distinction was made between the testator's child and step-child who received less under the last will made by the wife subsequent to the husband's death; c) the assets were the product of the joint efforts of the testators acquired over a 30-year marriage; d) the wife didn't change her will until shortly after the husband's death; and e) the husband and wife had been happily married, were beginning to experience declining health and were unlikely to acquire any further significant assets.

Justice Barrow found as follows at para. 20:

All of the foregoing may be circumstances in which it might not be surprising to find an agreement not to revoke mutual wills. They do not, in my view, amount to any more than that.

Justice Barrow also quickly dismissed the claimant's argument that the decision in *Soulos v. Korkontzilas*³⁷, suggests that the court should reconsider the strict evidentiary standards that apply to the issue of whether an agreement not to revoke has been proven (para. 28):

³⁶ 2005 BCSC 239.

³⁷ [1997] 2 S.C.R. 217.

There is no suggestion in *Soulos* that the rules that govern the availability of the remedy of a constructive trust in those situations where it has been traditionally applied are somehow wanting; rather, the court was dealing with a novel situation in which the defendant sought to limit the reach of the remedy by strict application of principles developed in and applicable to the more traditional or common situations in which the remedy has been imposed. In short, I do not read *Soulos* as inviting a relaxation of the principles, whether substantive or evidentiary, which govern the availability of the remedy in situations such as those under consideration here.

The B.C. court's approach can perhaps be contrasted with the tact taken by Justice Pierce of the Ontario Superior Court in 2006 in *Hall v. McLaughlin Estate*³⁸.

In that case, the testator, Emily McLaughlin predeceased her second husband, John, to whom she left her entire estate. Upon his death, all of his estate passed to his children, leaving nothing to Emily's daughters. Emily's daughters contended that Emily and John made a contract upon their marriage that the first partner to die would leave his or her estate to the survivor; when the last partner died, he or she would benefit the families of both partners. Indeed, John and Emily instructed their lawyer to prepare wills in this fashion, and in due course, these wills were executed.

Justice Pierce answered the question of whether there was an agreement not to revoke the 1992 wills and make new ones in the following way at para. 93:

There is no behaviour on Emily's part to suggest any different agreement. On Johnnie's part, *apart from drawing new wills*, his behaviour is equally consistent while Emily had testamentary capacity. However, even his two

³⁸ 2006 CanLII 23932 (ON S.C.).

subsequent wills refer to Emily's 1992 will, suggesting he felt bound to protect Emily's estate for her children. These subsequent wills corroborate the existence of an agreement. Johnnie was not prohibited from making a new will; he was, however unable to execute a new will that did not adhere to the agreed upon scheme.

Accordingly, Justice Pierce found that there was clear and satisfactory evidence that Emily and John McLaughlin intended to enter into an agreement and did enter into a binding agreement that the survivor of them would divide his or her estate into two equal shares, to be divided among their beneficiaries, as set out in their wills dated June 12, 1992. As a remedy for John's breach of the agreement, a constructive trust on one half of the net value of the estate was imposed on the estate for the benefit of Emily's daughters in equal shares.

While Justice Barrow of the B.C.S.C. and Justice Pierce approached the same question using different evidentiary standards. That is, while Justice Barrow found at para. 20, "circumstances in which it might not be surprising to find an agreement not to revoke mutual wills" entirely insufficient proof of agreement, Justice Pierce found at para. 93 that, "no behaviour to suggest any different agreement" supportive of an agreement. These cases leave somewhat open the question of who bears the onus of proof where an agreement not to revoke mutual wills is concerned.

Other Attempts to Perfect Intention

There are of course situations other than those involving secret trusts or mutual wills, in which a constructive trust may be invoked to perfect a testator's intention.

In the 2004 case of *Re Meier (Estate of)*³⁹, the Alberta Court addressed the issue of whether effect can be given to a provision in a will which purports to devise real property owned by a corporation of which the testator is the sole shareholder, officer and director. The testator left a will directing his executor to give his farmlands to his brother. However, at the time of his death, legal title to the farmlands was held by a corporation, Meier Auctions Ltd., of which the testator was the sole shareholder and director. The brother submitted that the testator, not the corporation, was the beneficial owner of the farmlands described in the Will. In the alternative, the brother argued that he was the beneficial owner of the farmlands by virtue of constructive trust principles arising from the fact that he worked for the testator, often for no pay, for 25 years.

Associate Chief Justice Sulatycky found that the legal and beneficial interest in the farmlands was vested in the corporation at the time of the testator's death, despite the testator's clear intention to benefit his brother. Justice Sulatycky also found that there was no evidence of the brother's beneficial interest in the land and that no evidence was produced to support a clear proprietary relationship between the work allegedly performed by the claimant and the specific farmlands over which he claims beneficial ownership: *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38; and *Peter v. Beblow*, [1993] 1 S.C.R. 980.

Of particular interest, Justice Sulatycky also found that the brother's evidence that the testator offered to pay him for work performed on the property interfered with his

³⁹ 2004 ABQB 352.

constructive trust claim. In addition, the brother's evidence that he had a verbal agreement with the testator to pay rent for the use of the farmlands over a two-year period was, "difficult to square with the proposition that the claimant was the beneficial owner of those lands"⁴⁰.

BUT NOT TO CORRECT MISTAKES?

In *Martindale Estate v. Martindale*⁴¹, Justice Southin for the British Columbia Court of Appeal held that the trial judge in the Court below had erred in finding that a trust – whether a resulting trust or constructive trust – arose from the deceased's mistaken belief that she had changed the beneficiary of her life insurance policy. Justice Southin found that there was no authority for the proposition that where a testator is mistaken about the legal effect of what she has done, the legal effect should be corrected to conform with the intention behind it. Therefore, where no change is made to the designated beneficiary under a life insurance policy, the named beneficiary remains entitled to collect.

There is an old principle of equity that says that it will not allow even an act of Parliament to be used as an instrument of fraud. More recently, equity has expanded beyond *malo animo* and constructive trusts have been imposed in many cases where the defendant did nothing that could be characterized as "fraudulent". There was no fraud,

⁴⁰ *Ibid.*, at para. 17.

⁴¹ (1998), 162 D.L.R. (4th) 475.

for example, in *Pettkus v. Becker*⁴² or in *Hussey v. Palmer*⁴³, in which Lord Denning spoke of imposing a trust "whenever justice and good conscience require it".

Ultimately, Southin J. found that it would be against good conscience for the appellants to keep this money because the named beneficiary had, by the separation agreement, surrendered any right he might have had to the property of the deceased:

A policy of life insurance is a species of property of the insured, albeit the amount payable under the contract of insurance does not fall into possession until the insured's death, and, by law, cannot be taken by the insured's creditors.

For the appellant, Mr. Martindale, to claim from the insurer the proceeds was a breach of the separation agreement and such a breach is sufficient, in my opinion, to call in aid the doctrine of the remedial constructive trust. To put it another way, it is not the mistaken belief of Mrs. Martindale which gives rise to a remedy; it is the bargain which Mr. Martindale made.⁴⁴

In contrast, in the Ontario Superior Court case of *Gaudio v. Gaudio*⁴⁵, Justice Clarke for the Court found on similar facts that the deceased chose to leave the respondent as designated beneficiary in both the life insurance policy and the RRSP's in spite of the separation agreement. Justice Clarke accepted the principle that it was his duty to construe the words actually used by the deceased and not to speculate as to what may have been in his mind. His Honour found that the general boilerplate clauses in the separation agreement did not constitute a declaration of revocation in law with respect to the designated beneficiary in the assets in controversy.

⁴² *Supra* note 1.

⁴³ [1972] 3 All E.R. 744.

⁴⁴ *Ibid.*, at paras. 26, 27.

⁴⁵ (2005), 16 R.F.L. (6th) 72.

Justice Clarke distinguished *Martindale* on the following basis at para. 9:

In *Martindale*, there was evidence of great bitterness before the separation agreement was executed. Also, in that case, the parties subsequently divorced, and the husband remarried. The court in *Martindale* found on the evidence before it that the deceased intended Roberts, her sister, who cared exclusively for her when she was dying of cancer, to inherit her entire estate. Both the sister and deceased assumed that all appropriate action had been taken to make the sister the beneficiary of the insurance policy. Indeed, three days before the deceased's death, the deceased told her sister that she had "taken care of it". Several witnesses also testified to the intention of the deceased and the court found that it was unequivocal and clear that the deceased intended her sister to be the beneficiary of the group life insurance policy and believed she had taken all necessary steps to revoke the existing designated beneficiary. In the case at bar, as opposed to *Martindale*, the evidence (and particularly the absence of evidence of intention) failed to raise the issue of good conscience and call into play the doctrine of remedial constructive trust. There was no compelling evidence of the deceased's intention (or the parties for that matter) or that he erroneously believed as in *Martindale* that the change in the designated beneficiary had been "taken care of".

ELECTION

It should be noted that since the remedial constructive trust is an equitable remedy, a person must choose either to benefit under a will *or* to proceed in equity:

any person who accepts a benefit under a will is taken to have accepted the whole tenor of the will and must renounce any right that is inconsistent with any provision of the will.⁴⁶

The doctrine of equitable election was reviewed by the Ontario Court of Appeal in *Granot v. Hersen*⁴⁷. Doherty J.A. for the court confirmed the application of the doctrine in Ontario and set out four principles at p.434:

1. the doctrine of election applies only where the testator clearly intended to dispose of another's interest in property while at the same time making a gift to that person under his will;

⁴⁶ *Feeney, Canadian Law of Wills*, 3rd edition v.2 1987, p. 214.

⁴⁷ (1999), 43 O.R. (3d) 421.

2. that intention must be made express or appear by necessary implication from the terms of the will;

3. one starts from the premise that the testator only intended to dispose of her own property in the will;

4. general words in a will like "all my estate" or a residuary gift in general terms will not, standing alone, evince an intention to dispose of property or an interest in property which the testator was not entitled to dispose of in his will.

These principles are drawn from a line of English authorities. For example, in *Dummer v. Pitcher*, Lord Brougham L.C. said the following⁴⁸:

There is nothing more undoubted in the law than that to make a case of election the intention must appear certainly and clearly, both as to the property assumed to be disposed of and as to the implied condition to be fulfilled. A person is not, without strong indications of such an intent, to be understood as dealing with what does not belong to him. As for his supposing himself to have rights which he had not, unless that appears plainly upon the face of the will, it would be most dangerous to be guided by any conjecture that may be raised to this effect or to let in extrinsic evidence in proof of it.

Granot v. Hersen was followed by the Ontario Superior Court of Justice in *Bickley v. Bickley Estate*⁴⁹.

CONCLUSION

The remedial constructive trust remains controversial both in theory and in practice. It can arise as a remedy. As a matter of equitable foundation, it can be used to address unjust enrichment, a wrong, and perfection of intention. As a practical matter, the applicable evidentiary standards prove somewhat illusory. As drafters, this means that we must always endeavor to ascertain the intention of our clients and reflect these

⁴⁸ (1833), 39 E.R. 944 at 949.

⁴⁹ 29 E.T.R. (2d) 132.

intentions as clearly as possible. As litigators, we must be aware of the case law that in some instances supports alternative approaches, and always keep in mind that as the remedial constructive trust is an equitable remedy, we must strive to show that the facts support the conclusion that equity is on our client's side.