Judgment Creditors, Resulting Trusts, and the Matrimonial Home

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1. INTRODUCTION

The most common debt problem encountered with real property is the mortgage, and mortgage remedies are a well trodden area of legal research. However, the mortgage lender is not the only one who can make a claim against real property. The equity in a home is subject to seizure by any type of creditor. This is a particular concern for people who run their own businesses. In the unfortunate situation where a person cannot pay business debts, his or her share of the family home is at risk. The extent of that share can be contentious, particularly in situations where the marriage has broken down.

A common scenario is that one spouse is worried about being sued by creditors, and puts title to the home entirely in the name of the other spouse. That may be successful in protecting the home from being seized, but it is not completely foolproof. Care must be taken regarding how and when it is done. A court may find that there is a resulting trust in favour of the spouse who is not on title, and in some cases creditors have been able to seize the debtor's share of the property.

In different situations, either the creditor or the homeowner may be in for an unpleasant surprise. There are a number of variants that can occur, and these will be discussed in turn.

2. JOINT TENANCY

A commonly encountered situation is where only one of the spouses is a judgment debtor and the home is owned by the spouses as joint tenants. A variety of complications can arise here, including questions about the reality of the joint ownership and whether it has been severed.

A creditor only has an entitlement to the share of the property that is owned by the debtor. If a property is registered as a joint tenancy with two joint tenants this share is typically presumed to be half, but it is a rebuttable presumption.[1] As noted by Perell J., "each joint tenant ... holds everything and yet holds nothing."[2]

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[1] *Ryser v. Rawlings,* 2008 BCSC 1050, 2008 CarswellBC 1633, [2008] B.C.J. No. 1474 (B.C. S.C.); *Gonzalez v. Soto,* 2009 ABQB 454, 2009 CarswellAlta 2223, [2009] A.J. No. 1533 (Alta. Q.B.); *Family Law Act,* R.S.O. 1990, Ch. F.3, s. 14(a).

[2] *Royal & SunAlliance Insurance Co. v. Muir*, 2011 ONSC 2273, 2011 CarswellOnt 6852, [2011] O.J. No. 1688 (Ont. S.C.J.) at para. 23.

In order for the creditor to get a measurable share of the property, the joint tenancy must be severed and changed into a tenancy in common.

The right to seize the interest of a joint tenant has been part of the common law since time immemorial, and is now laid out in statutes such as Ontario's Execution Act:[3]

> 9. (1) The sheriff to whom a writ of execution against lands is delivered for execution may seize and sell thereunder the lands of the execution debtor, including any lands whereof any other person is seized or possessed in trust for the execution debtor and including any interest of the execution debtor in lands held in joint tenancy.

Joint tenancy is a special type of ownership where, on the death of one of the joint tenants, his or her share automatically and immediately vests in the remaining joint tenants. It does not pass through the estate of the deceased joint tenant, and therefore it is not subject to probate or the debts of the estate.

A joint tenancy can be severed, converting it into a tenancy in common where each spouse owns a specific percentage share which can be conveyed to others. Seizure of the property by the creditor is one of the ways to effect a severance. The issue becomes a question of when that seizure has taken place.

Severance into a tenancy in common can occur without any formalities such as a change being registered with the Land Titles office. The joint tenants can do so themselves through an explicit written statement to each other, or by a variety of actions that imply an intention to sever the joint tenancy.[4]

The severance of a joint tenancy can be significant for a variety of reasons, such as where only one spouse has filed for bankruptcy. In *Toronto-Dominion Bank v. Phillips,*[5] estranged spouses had taken out a joint overdraft facility with a bank. The wife subsequently filed a proposal under the *Bankruptcy and Insolvency Act*. She argued, successfully, that the joint tenancy of their house had been severed, and her share was protected by a stay of execution due to the proposal. Therefore, her husband had to bear the whole burden of the debt out of his share of the proceeds from the house.

Joint tenancy has its greatest significance with respect to the right of survivorship, and therefore some of the most interesting cases occur when one of the joint tenants has died.

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3 R.S.O. 1990, c. E.24. Note that this is unchanged from the version extant in 1932, referred to below. Similar provisions exist in most provinces, but in some the language has been modernized, e.g., *Civil Enforcement Act*, R.S.A. 2000, Ch. C-15, s. 76; *Court Order Enforcement Act*, R.S.B.C. 1996, Ch. 78, s. 81.

4 *Hansen Estate v. Hansen,* 2012 ONCA 112, 2012 CarswellOnt 2051, 9 R.F.L. (7th) 251, [2012] O.J. No. 780 (Ont. C.A.), provides a good review of the law on severance of joint tenancy in matrimonial disputes. Here, the husband had died after separation but before the formal division of property. The joint tenancy was deemed to be severed, and his half of the house went to his daughters from a previous marriage.

5 2014 ONCA 613, 2014 CarswellOnt 11878, [2014] O.J. No. 4004 (Ont. C.A.).

(a) Death of a Joint Tenant

The precise time at which the severance occurs is the decisive issue if one of the joint tenants dies. If the debtor dies and the joint tenancy was not severed before the debtor's death, his share automatically vests in the other joint tenant, and nothing remains for the creditor to seize. Conversely, if it is the debtor spouse who survives, the deceased spouse's estate will want to argue that it was severed earlier, so that the creditor cannot seize the whole of the property.

Once a court order has been issued establishing that a debt is owing, the creditor has to take further defined steps in order to collect the money. If the creditor wants to seize real property, the next step is to present the order to the registrar to obtain a writ of seizure and sale. This writ is then filed with the sheriff, and no steps to commence the sale may be taken by the sheriff for another four months after that filing. Subsequently, before the sale, there must be proper notification, including publication of a notice in the *Ontario Gazette*.[6]

One of the key legal questions is at what point in this process the joint tenancy is deemed to be severed. The landmark case in this area is the Ontario Court of Appeal's 1932 decision in *Power v. Grace*.[7] A mother and daughter owned a property as joint tenants. The mother was the debtor who had died. The Court's decision refers to the hoary pedigree of this area of law:

> [I]t has been undoubted law for centuries that where a writ under which an interest in land may be taken by the sheriff has been placed in his hands against a joint-tenant, and the joint-tenant dies before execution, the other joint-tenant surviving holds it discharged of the execution. *Lord Abergavenny's Case* (1607), 6 Co. 78a, 79a. This law has never been doubted; and the sole question for decision is whether the delivery of the writ to the sheriff is "execution."

The issue of the time of execution was in turn decided by reference to statute, and in particular the *Execution Act* and the *Rules of Civil Procedure*. Referring to the *Execution Act,* Riddell J.A. noted that:

> [I]t would savour of absurdity to say that a sheriff "to whom a writ of execution against lands is delivered for execution may seize and sell thereunder" if the delivery itself was equivalent to seizure.

The Court decided that execution does not occur until some other steps have been taken. Advertising in the *Gazette* was mentioned as being sufficient for execution, but perhaps other steps would also qualify. No such steps had been taken before the mother's death, and the daughter took the whole property by right of survivorship, free of the claims of the creditor.

The law as declared in *Power v. Grace* represents an unfortunate incentive for debtors to commit suicide in order to frustrate their creditors. That is not an idle

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6 Ontario *Rules of Civil Procedure,* 60.07(17)-(19).

7 1932 CarswellOnt 104, [1932] O.R. 357 (Ont. C.A.).

risk, as people in severe financial straits are at a low point in their lives and susceptible to depression.

In the case of *Maimets v. Williams,*[8] a 1997 decision of the Ontario Court of Appeal, Ms. Maimets was the survivor in a joint tenancy after the suicide of her spouse Mr. Mullerbeck. Mr. Mullerbeck had promised to grant a mortgage on the property to Williams because of a prior debt, but the mortgage was never registered. When Mullerbeck failed to provide the mortgage documents, Williams obtained a judgment against him. On the same day that the judgment was returned, Mullerbeck committed suicide.

Williams argued that the promise to grant a mortgage was enough to sever the joint tenancy, and he won in the lower court. The Court of Appeal overturned this decision, ruling that Mullerbeck, as a joint tenant, could not by himself mortgage the property, and his promise to do so was a nullity. Therefore, there was no severance, and Maimets was entitled to the whole property free of the debt by right of survivorship. In this case, the writ had not been filed with the sheriff until after Mullerbeck died, but the Court noted that it would not have been sufficient even if it had been filed prior to his death:

> The death of one joint tenant even after delivery to but before execution by the Sheriff of a writ of execution vests the property in the survivor free from the claim of the execution creditor: see *Power v. Grace*.[9]

The traditional roles were reversed in *Royal & SunAlliance Insurance Co. v. Muir*.[10] Here, a condominium in Barrie had been jointly owned by two spouses. Mr. Muir was the debtor, and his wife had died. The creditor sought to argue that he owned the whole property by right of survivorship so that there would have been more for it to seize (Muir's unpaid debt was much larger than the whole value of the condo). In 2001, the writ was filed with the sheriff, who advertised it for sale as required, but no sale took place. Subsequently, Mrs. Muir made a will, leaving her half of the condo to her son. For this to be effective, she would need to have become a tenant in common rather than a joint tenant. Perell J. had no hesitation in deciding that this had happened:

> In *Power v. Grace*, the issue was whether the mere delivery of the writ to the sheriff brought about the severance. The Court of Appeal held that something more than lodging the writ with the sheriff was required; that something more was the commencement of the execution process.... I conclude that the execution process was well past being commenced and there was a severance of the joint tenancy. The joint tenancy having been severed by Royal's actions, the situation as of September 2001 was that Mr. and Mrs. Muir became tenants-in-common. They owned the condominium together, and Mrs. Muir had

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8 1997 CarswellOnt 2173, 101 O.A.C. 151, [1997] O.J. No. 2522 (Ont. C.A.).

9 [1932] O.R. 357 at 358 (Ont. C.A.). *Ibid.* at para 8.

10 2011 ONSC 2273, 2011 CarswellOnt 6852, [2011] O.J. No. 1688 (Ont. S.C.J.).

> an undivided half-interest that she was capable of conveying by testamentary disposition.[11]

(b) How the Creditor Can Realize on Property Seized from a Joint Tenant

After all the issues in the foregoing section have been resolved, the creditor is still not in full control. The fact that it is gaining access to a property that was jointly owned means it is getting a piece of something that may not be easily converted into money. The primary tool for doing so is the *Partition Act*, which is rather a blunt instrument.[12]

One point that is well established is that the sheriff has no authority to apply for partition. "The sheriff has no interest in the land and the seizure and sale does not give the sheriff the right to possession."[13] Only a person who already owns an interest in the land may apply for partition. Any partitioning of the property has to be applied for by the party who purchases the debtor's interest and becomes a new tenant in common, taking the share of the debtor. That requires a two-step process that creates additional cost and risk, and is likely to result in a lower realization for the judgment creditor.

The Court of Appeal acknowledged the inconvenience to the creditor:

> From a practical point of view a sale of Civiero's undivided interest would not attract outside bidders and would result in a bidding contest between the family respondents and the appellant. The appellant, understandably, does not wish to invest further money in pursuit of her $700,000 debt and therefore seeks to use her status as an execution creditor to accomplish what would normally be pursued by a co-tenant - a sale of the entire parcel in lieu of partition.[14]

Even once the creditor (or some other party) becomes a co-owner, the right to partition is not automatic. The *Partition Act* is based on principles of equity. The granting of partition is discretionary on the part of the judge. The operating verb is "may":

> All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by the curtesy ... may be

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[11] *Ibid.* at paras. 29-32.

[12] When the contest is between two spouses rather than a spouse and a creditor, there may be other complications in applying for partition. This is discussed by Professor Berend Hovius, "The Family Home: Legal Treatment in Ontario," 29 Can. Fam. L.Q. 119.

[13] *Ferrier v. Civiero,* 2001 CarswellOnt 1717, 147 O.A.C. 196, [2001] O.J. No. 1883 (Ont. C.A.) at para. 5. Similar decisions are found in other provinces, which have inherited the same English partition law, e.g., *Morrow v. Eakin,* 1953 CarswellBC 101, [1953] 2 D.L.R. 593, [1953] B.C.J. No. 117 (B.C. S.C.); *Deer v. Larocque,* 1982 CarswellSask 519, 141 D.L.R. (3d) 190, [1982] S.J. No. 753 (Sask. Q.B.); *Cady v. Cady,* 1996 CarswellBC 351, [1996] B.C.J. No. 377 (B.C. S.C. [In Chambers]).

[14] *Ferrier, ibid.,* at para. 2.

> compelled to make or suffer partition or sale of the land, or any part thereof.... R.S.O. 1990, c. P.4, s. 2.

Partition will only be granted if partition appears equitable. It has been denied in numerous cases for a variety of reasons, including the "reasonable expectations" of the other co-owners.[15] There are several cases where creditors have asked directly for partition, and as noted above, they were denied. In one case, the sale was delayed by 90 days to give the wife of a bankrupt the opportunity to raise funds to bid for her husband's half, even after there had been a fraudulent conveyance of it to her.[16]

There does not appear to be much case law on applications for partition from co-owners who acquired their interest through a sale for debt. It can be a long and arduous process, as in one reported case it took eight years.[17] It is not obvious that such a person would always be entitled to partition, because it could be argued that he knew what he was getting, namely a piece of the property as a tenant in common. If one spouse incurred a debt, where the other spouse perhaps had no knowledge of it and no benefit of it, the second spouse could legitimately argue that being forced out of her home would violate her reasonable expectations. By contrast, the creditor will typically be a sophisticated business or financial institution that ought to have made proper enquiries about the financial situation of the debtor and the nature of his security.

In such a situation, the new co-owner (who may be the former creditor, if he purchased it at the sheriff's sale) would have to fall back on the right of co-owners to receive a reasonable occupation rent from the occupier of the property. "An obligation [by the tenant in possession to] account to his co-tenants was imposed upon him by the courts of equity,"[18] and is now included in section 122(2) of the *Courts of Justice Act*.[19]

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[15] *Garfella Apartments Inc. v. Chouduri,* 2010 ONSC 3413, 2010 CarswellOnt 5138, 102 O.R. (3d) 624 (Ont. Div. Ct.); *First Capital (Canholdings) Corp. v. North American Property Group,* 2010 ONSC 3196, 2010 CarswellOnt 3931, [2010] O.J. No. 2504 (Ont. S.C.J.). In the first one, a new co-owner who had bought a majority share sought a sale against the wishes of the pre-existing owners, and it was denied based on the reasonable expectations of the earlier co-owners. In the second case, the parties were all sophisticated investors who bought the property together, and partition would have been reasonably expected.

[16] *Whetstone, Re,* 1984 CarswellOnt 157, 47 O.R. (2d) 719 (Ont. Bktcy.).

[17] *Warzecha v. Phillips,* 1998 CarswellOnt 3365, 80 O.T.C. 67, [1998] O.J. No. 3474 (Ont. Gen. Div.), affirmed 2000 CarswellOnt 251 (Ont. C.A.). It might have taken even longer, but it was discovered that it was not a matrimonial home, as the spouses were not legally married.

[18] *Foffano v. Foffano,* 1996 CarswellOnt 4267 (Ont. Gen. Div.) at para. 13. *Osachuk v. Osachuk,* 1971 CarswellMan 12, 18 D.L.R. (3d) 413, [1971] M.J. No. 7 (Man. C.A.) provides a lengthy history of the doctrine.

[19] R.S.O. 1990, c. C.43.

3. DIFFERENT COMBINATIONS OF REGISTERED OWNERSHIP AND ALTERNATIVE CLAIMS

(a) Only One Spouse is on Title: Creditor Claims Fraudulent Conveyance

One of the saddest and most ironic cases in this area is *Bank of Montreal v. Bray*.[20] Mr. Bray was the owner of a rivet company, and he gave the bank a personal guarantee for $750,000 to secure a line of credit for his business. In the fall of 1989, he was diagnosed with cancer, at the same time as his business was failing. The family home was held in joint tenancy, but in 1990 he conveyed his half to his wife for little consideration. Given that he was heavily in debt, this was clearly an attempt to evade his creditors, and therefore void against them by the provisions of the *Fraudulent Conveyances Act*.[21]

In early 1991 he died, a few days before the bank issued a certificate of pending litigation against the property. If the property had still been held as a joint tenancy, Mrs. Bray would have owned it all by right of survivorship, and it is unlikely that the bank could have made any claim against her.

The lower court had ruled in Mrs. Bray's favour. The trial judge recognized that there had been a fraudulent conveyance which was void, but held that reversing the fraudulent conveyance would merely restore the joint tenancy. Mrs. Bray would still take the whole property as the survivor.

Unfortunately for Mrs. Bray, the Court of Appeal disagreed. It ruled that, as against the creditors, the property was effectively held by the spouses as tenants in common. Any kind of conveyance by one of the joint tenants is sufficient to disturb the "four unities" that define a joint tenancy. A fraudulent conveyance is still a conveyance, and therefore sufficient for severing the joint tenancy. Being fraudulent, it is subject to being reversed, and therefore it ended up as ineffective in actually conveying anything to Mrs. Bray. The Court therefore concluded that Mr. Bray died owning half the property as a tenant in common, and his share would have to go towards paying the debts of his estate.

The moral of this case is that fraudulent conveyances are quite obvious and rarely succeed. They often make the situation worse for the debtor and his family.

(b) Only One Spouse is on Title: Creditor Claims a Resulting Trust

A common strategy for couples where one of the spouses is in business is to put the family home exclusively in the name of the other spouse. People who are engaged in business or certain professions are at a higher risk of incurring claims for debts or liabilities of the business. Incorporation of the business to create a limited company does not provide much protection, as major creditors and landlords will typically require a personal guarantee from the owner of the

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[20] 1997 CarswellOnt 3903, 36 O.R. (3d) 99, [1997] O.J. No. 4277 (Ont. C.A.).

[21] R.S.O. 1990, CHAPTER F.29.

company.[22] The hope is that, if the worst happens, the family home can be protected from these debts.

On the whole, this appears to be a safe assumption if it is done right. The most important thing is to transfer ownership to the safe spouse well before there is any hint of trouble, and preferably before the business debts are even incurred. Creditors may be able to impugn transfers that occurred five years or more in the past, where that transfer was to a related person for undervalue.[23]

There is no actual time limit under the *Fraudulent Conveyances Act,* and events in the distant past can be challenged. In *Reisman v. Reisman,*[24] a matrimonial dispute regarding a family trust, the wife argued that an estate freeze that occurred eight years before their separation was a fraudulent conveyance. The claim failed on the facts, because there was no marital dispute at the time of the estate freeze, and there were valid tax planning reasons for undertaking it. As this case shows, it is important to preserve documents and evidence to defend against possible challenges many years after the event.

Fraudulent conveyance claims are very fact-specific. The creditor seeking to prove a fraudulent conveyance may have to meet a standard of proof higher than the balance of probabilities with regard to the intent of the conveyance.[25]

One pitfall is that the law, as reflected in section 9 the *Execution Act* cited above, allows the seizure not just of assets directly owned by the debtor, but also assets held in trust on his behalf: "including any lands ... in trust for the execution debtor." Clearly, in any situation where there is an explicit, formal trust with a trust deed that names the debtor as the beneficiary, it will be subject to seizure.

However, the law also recognizes implied trusts, such as constructive trusts and resulting trusts. This is hardly a new doctrine, and it has always been available for the benefit of creditors in the courts of equity, as can be seen in a 1915 decision from Nova Scotia. Sir Charles Townshend C.J. stated:

> The law is not so helpless as to leave the party wronged without a remedy, and therefore holds the person to whom such a conveyance has been made as a trustee for the rightful owner. In other words a resulting trust follows. And so in this case, the Court, on equitable principles, holds that Jane E. McNeil in respect to this property, is simply a trustee

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[22] Additionally, the members of a professional corporation remain personally liable for professional negligence.

[23] A five year limit is found in the *Bankruptcy and Insolvency Act,* s. 96(1). The *Fraudulent Conveyances Act* does not have a limit: *Whetstone, Re,* 1984 CarswellOnt 157, 47 O.R. (2d) 719 (Ont. Bktcy.).

[24] 2012 ONSC 3148, 2012 CarswellOnt 7030, 22 R.F.L. (7th) 423, [2012] O.J. No. 2536 (Ont. S.C.J.), affirmed 2014 ONCA 109, 2014 CarswellOnt 1496, 42 R.F.L. (7th) 1, [2014] O.J. No. 663 (Ont. C.A.).

[25] *CIT Financial Ltd. v. Zaidi,* 24 R.F.L. (6th) 78, [2006] O.J. No 1073 2006 CanLII 8469 (Ont. S.C.J.), at para. 23; *Mawdsley v. Meshen,* 2012 BCCA 91 (CanLII), at paras. 62-63.

> for the plaintiff, and for the benefit of the creditors of Sparrow and McNeil.[26]

A resulting trust occurs in a situation where one person has provided the money to purchase something, but the legal title is in somebody else's name. Barring evidence that it was intended to be a gift, the courts will enforce a resulting trust and declare that the person who provided the money is the beneficial owner. This can arise between people in any context, but it most commonly arises between spouses. It is not uncommon that the property was put into the name of one spouse, because of worry about creditors. It often turns out that there is no claim from creditors, but the spouses end up divorcing. In such a situation, the spouse claiming a resulting trust will cite his past concern about creditors as a motive, to rebut the argument that the transfer was intended as a gift.

This might support an argument that the spouse demanding the return of the property is not coming to the court with "clean hands," which would traditionally bar him from making a claim in equity. Following the lead of the House of Lords in *Tinsley v. Milligan,*[27] "modern courts are less concerned about the clean hands doctrine, as long as there has not been any actual fraud against the creditors." One of the spouses had committed a fraud against the welfare authorities by pretending not to be a property owner, but that did not justify the other spouse committing a fraud against her by keeping the whole property when they separated. This view had in fact been anticipated quite a few years earlier in *Goodfriend v. Goodfriend.*[28] This was the situation in *Nussbaum v. Nussbaum,*[29] where Karakatsanis J. (as she then was) granted judgment in favour of the husband claiming the resulting trust interest:

> While evidence that someone intended to fully evade creditors can be evidence that they intended to gift their entire interest in the property, the intention of the parties is a question of fact to be determined from all of the evidence.... As indicated above, in this case the presumption of resulting trust arises and the claimant need not rely upon the illegal purpose to prove his claim. As well, the factual circumstances of this case are inconsistent with the parties' intention to deprive Gabriel of beneficial interest in the properties.[30]

(i) Successful Resulting Trust Claims by Creditors

There appears to be only one Ontario case where the creditors succeeded in realizing on the assets held in a resulting trust, *Fontaine & Associates Inc. (Trustee of) v. Albert.*[31] Here, the property in contention included not just the

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[26] *McNeil v. Sharpe,* 1913 CarswellNS 111, 15 D.L.R. 73, [1913] N.S.J. No. 15 (N.S. S.C.), affirmed 1915 CarswellNS 84 (S.C.C.).

[27] [1993] UKHL 3, [1993] 3 All E.R. 65 (U.K. H.L.).

[28] 1971 CarswellOnt 131, 1971 CarswellOnt 150, [1972] S.C.R. 640 (S.C.C.).

[29] 2004 CarswellOnt 3731, [2004] O.T.C. 805, [2004] O.J. No. 3763 (Ont. S.C.J.).

[30] *Ibid.* at para. 33-34.

matrimonial home, but shares owned by the husband. It was specifically noted that these shares had been purchased through a loan originally taken out by both parties jointly. The wife had operated a business, and declared bankruptcy because of business debts. The judge ruled in favour of the trustee:

> I also find the wife can be successful on the basis of a resulting trust. Their joint monies, however acquired, financed the purchase of the shares of which she is entitled to one half as she paid for one half.... Any monies awarded to the wife in this judgement of course vest in the Trustee in Bankruptcy to be administered pursuant to law.[32]

In the Saskatchewan case of *Moody v. Ashton*, a former professional hockey player who engaged in a risky business venture put the bulk of the family assets in his wife's name:

> Susan has had no independent source of income since 1983. Yet some 10 years later, she owned assets worth several hundred thousand dollars.... It follows from the testimony of the Ashtons and their subsequent conduct, that the transfers of funds pursuant to the agreement were clearly not made unconditionally. In other words, they were not absolute or unconditional gifts made by Brent to Susan.... Considering the testimony of the Ashtons and their subsequent conduct, I conclude that the family agreement was of the nature of a flexible resulting trust. It is evident that it did not constitute a series of future unconditional and absolute transfers of one half of Brent's annual income to Susan. It is also evident that Brent retained a beneficial interest not only in those funds that he transferred to Susan, but also in the assets that were acquired by Susan with those funds.[33]

The judge found a resulting trust and ordered seizure of the wife's investment portfolio on behalf of the husband's creditors.

(ii) Resulting Trust Claims by Creditors that Failed on the Evidence

In the British Columbia case of *Vandokkumberg v. H. Meyer Construction Ltd.* , the creditors failed to establish a resulting trust. In that case, the house had been bought in the wife's name from the husband's construction company, before the couple was married. The wife had money for the down payment that came from a previous house that she had owned. The plaintiff' sought to rely on the fact that, during the course of the marriage (11 years), the mortgage payments had been made entirely by the debtor husband. The judge thought that nothing should be read into this fact, given that the husband had the benefit of living in the house. It was not sufficient to create a resulting trust.

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31 1997 CarswellOnt 6324, [1997] O.J. No. 6265 (Ont. Gen. Div.).

32 *Ibid.* at paras. 18-19.

33 2004 SKQB 488, 2004 CarswellSask 816, 248 D.L.R. (4th) 690, [2004] S.J. No. 758 (Sask. Q.B.) at para. 25, 30 and 32.

What is interesting in this judgment as a point of law was the obiter statement that:

> In any event, any issues concerning the making of those payments are not ones which can be enforced by the plaintiff when there has been no triggering event that would create separate property regimes for Mr. and Mrs. Meyer.[34]

This appears to reflect a view that, in a family law action on separation, Mr. Meyer might have been able to enforce a claim of a resulting trust, but the creditors could not step into his shoes to do so. Family law statutes do make reference to resulting trusts, as in Ontario's *Family Law Act:*

> 14. The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between spouses, as if they were not married...

This provision eliminates the ancient presumption of advancement between spouses (by which anything given by the husband to the wife was automatically to be a gift). However, this presumption had become a very weak one long before this enactment.[35] It would be rebuttable in equity even without this provision in the *Family Law Act*. Therefore, a creditor should still be able to sue for a resulting trust even though he does not have standing to make a family law claim.

(c) Evidence of Intention to Create a Resulting Trust

The factual issues that need to be made out for a resulting trust claim were highlighted in the New Brunswick case of *Clark Drummie & Co. v. Ryan*. The creditors succeeded at the trial level, but that was reversed on appeal.

Mr. and Mrs. Ryan bought a house in 1984 which was registered only in Mrs. Ryan's name. He was a lawyer, and she was a teacher. They testified that they had registered it in Mrs. Ryan's name because of concern that lawyers were at risk of being sued for liability. During the relevant times, their salaries were approximately equal, and the judge concluded that they both contributed about the same amount to the down payment and upkeep of the house. Sadly, their concern about professional liability was well founded, as Mr. Ryan was caught stealing from clients in 1990. He was sentenced to two years in jail, and the law firm, Clark Drummie, had to pay $300,000 to reimburse clients.

In considering the claim for a resulting trust, the judge emphasized that the existence of the trust depended on inferring evidence about the intention of the parties. This is based on a long line of jurisprudence from the House of Lords

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[34] 2007 BCSC 1341, 2007 CarswellBC 2076, [2007] B.C.J. No. 1964 (B.C. S.C. [In Chambers]) at para. 22.

[35] *M. Dhaliwal Holdings Inc. v. Pacific Blue Farms Ltd.*, 2014 BCSC 1482, 2014 CarswellBC 2345 (B.C. S.C.).

and the Supreme Court of Canada cited in the decision. The judge found no evidence of an intention that the house should belong absolutely to Mrs. Ryan:

> In this case the Ryans had a common intent that title would be in Mrs. Ryan's name. It was done for the limited purpose of avoiding potential creditors of Mr. Ryan. There was no evidence of any discussion, let alone agreement, on beneficial ownership. If the hypothetical question were posed of Mr. Ryan "do you own your own home?", I believe he would have answered "Yes - title is in my wife's name". Under the circumstances such an answer would have been more likely and correct than "No, my wife owns it". They each put in half of the down payment, each contributed half the mortgage payments and half the annual expenses.[36]

A resulting trust was found, but the judge, exercising equitable discretion, put some interesting twists on the disposition:

> Since Mr. Ryan's interest is equitable a very important question arises, and that is in conscience and fairness should I order the house sold at this time as requested to satisfy his debt.[37]

The value of Mr. Ryan's share of the equity as of the date of discovery of the thefts was awarded to the plaintiff, but not the capital appreciation to the time of trial. Moreover, the payment would be much delayed. The judge decided that, as Mrs. Ryan was completely innocent of the fraud, the home would not be sold until her youngest child (9 years old at the time of trial) reached the age of majority.

Mrs. Ryan appealed, and did even better at the Court of Appeal. That court placed a considerably different interpretation on the facts and intentions of the spouses. It found that nothing could be inferred about the parties' intention from the fact that Mr. Ryan paid half the expenses. It concluded that Mr. Ryan, specifically because he was a lawyer, would have had difficulty in claiming a resulting trust in the event of a marital breakdown:[38]

> Mr. Ryan, a practising lawyer at all material times, knew the law and would have had to know that when the property went into his wife's name alone, his position became irrevocable. In my opinion he could not, without an agreement or conclusive evidence to the contrary, rely on the presumption of a resulting trust. Even more so for a creditor-stranger. It would be unconscionable for any lawyer to deliberately mislead and deceive his or her spouse by purporting to convey or relinquish his or her interest to the spouse while at the same time being

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[36] 1997 CarswellNB 179, 146 D.L.R. (4th) 311, [1997] N.B.J. No. 165 (N.B. Q.B.) at para. 17, reversed 1999 CarswellNB 47 (N.B. C.A.).

[37] *Ibid.* at para. 19.

[38] New Brunswick's *Marital Property Act,* S.N.B. 1980, c. M-1.1, s. 15(1), has a default presumption of resulting trusts identical to Ontario's. However, a creditor could not use that, and would have to establish the resulting trust based on evidence.

> fraudulently duplicitous about the beneficial interest the lawyer surreptitiously retains. I strongly doubt that a lawyer, having conveyed or relinquished his or her interest to a spouse could, on marriage breakdown, convince a judge, except in the most unique and rare circumstance that the lawyer should be able to retain a beneficial interest in the marital home property.[39]

The Court of Appeal noted that, even if a resulting trust had been found, the court would not have the discretion to order a sale of the house at the behest of the judgment creditor:

> [T]he party applying must have an identifiable interest in the land which is the subject of the application. The intent is to partition the defined interests of persons in the lands. If partition is not viable then the court defaults to a sale of the interest. In the case on appeal before us, there is no such interest.[40]

New Brunswick does not have a statutory provision for partition of property. Partition is a purely equitable doctrine, governed by the Rules of Court.[41] However, the Court of Appeal concluded that the right to partition is effectively the same as in other provinces, as discussed above, and only somebody with a current ownership interest in the land may bring an application. A creditor may well be strongly interested, but that does not translate into a legal interest.

In general terms, nothing in the Court of Appeal's decision questions the right of creditors to pursue a debtor's resulting trust interest in the matrimonial home, as found by the lower court. In this case, the Court imposed a higher evidentiary burden to establish the existence of that interest.

(d) Only One Spouse is on Title: Other Spouse Claims a Resulting Trust

In the cases above, the creditor sought to prove the existence of a resulting trust to get access to a share of the property that was registered in the non-debtor spouse's name. In other circumstances, the property may happen to be registered in the debtor spouse's name. The other spouse will want to establish she has a resulting trust in order to prevent the whole property from being seized.

Schwartz v. Schwartz[42] is an interesting application of this principle. The matrimonial home in Thornhill was bought in 1992, in joint ownership. The wife sold clothing from the home, and in 2005 she received a warning from the RCMP that she was selling counterfeit branded products. The husband worried that she would be sued, and convinced her to transfer ownership entirely to his name, for no consideration. In reality, that transaction would not have shielded the wife,

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[39] *Clark Drummie & Co. v. Ryan,* 1999 CarswellNB 47, 170 D.L.R. (4th) 266, [1999] N.B.J. No. 46 (N.B. C.A.) at para. 19.

[40] *Ibid.* at para. 29.

[41] New Brunswick Regulation 82-73, Rule 67.02.

[42] 2010 ONSC 2556, 2010 CarswellOnt 11108, [2010] O.J. No. 6001 (Ont. S.C.J.), reversed in part 2012 CarswellOnt 4362 (Ont. C.A.).

since against her creditors it would have been viewed as a fraudulent conveyance. As it turned out, nobody sued the wife. However, the husband had guaranteed the debt of his business, which failed, and his creditor sued him for the whole value of the house.

The couple separated in 2006, and as part of the divorce settlement Mrs. Schwartz asked for a declaration that she had a resulting trust interest in the house. The motion judge accepted the applicant's claim that she never intended to gift her share of the house to her husband:

> Mr. Greenstein for the applicant argues that the applicant never had an intention to gift the matrimonial home to the respondent. He asserts that it just does not make sense that someone would give up their presumptive right to the most valuable asset in most people's lives.[43]

The judge acknowledged that the creditor, who was also a party at the hearing, was an innocent victim that had been misled by the husband into believing that he owned the whole of the house. That was not a sufficient reason to deprive Mrs. Schwartz of her entitlement:

> In this case the fair distribution of matrimonial property is at stake. To allow this purported transaction to stand may satisfy the very legitimate interests of Vast-Auto in trying to recover its debt, but would substantially sacrifice the rights of the applicant to the satisfaction of Vast-Auto. One can have sympathy for Vast-Auto, a bona fide creditor, but that sympathy cannot parlay into an injustice to the applicant.[44]

The creditor Vast-Auto appealed to the Court of Appeal, and the appeal was allowed in part. The Court of Appeal accepted that there was a resulting trust for Mrs. Schwartz. Instead of simply setting aside the transfer, the judge should have decided what the value of her interest was:

> In its recent decision in *Kerr v. Baranow,* 2011 SCC 10, [2011] 1 S.C.R. 269, the Supreme Court of Canada confirmed the basic principle that a resulting trust may arise in the domestic context where there has been a gratuitous transfer of property.[45] That said, in making a finding that Ms. Schwartz had an interest in the matrimonial home by way of resulting and/or constructive trust, it was, in my view, incumbent on the motion judge to determine the extent of the interest held in trust by Mr. Schwartz for Mrs. Schwartz.[46] I would remit the matter to the motion judge to determine the extent of Ms. Schwartz's interest in the matrimonial home as of March 6, 2006. Subject to further order by the motion judge, I would restrain Vast-Auto from executing on its writ of

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[43] *Ibid.* at para. 25.

[44] *Ibid.* at para. 57-58.

[45] *Schwartz v. Schwartz,* 2012 ONCA 239, 2012 CarswellOnt 4362, [2012] O.J. No. 1680 (Ont. C.A.) at para. 41.

[46] *Ibid.* at para 49.

> seizure and sale against the matrimonial home pending determination of the extent of Ms. Schwartz's interest in it. Finally, I would dismiss the motion to set aside the March 2006 conveyance.[47]

An interesting variation on this theme occurred in a bankruptcy case, *Adourian, Re*. Mr. Adourian went bankrupt due to his business debts. The couple's home remained legally registered in both names, and the trustee sought to realize on Mr. Adourian's share. Mrs. Adourian presented evidence that she had used her own money to buy Mr. Adourian's share of the house, and he had spent that money in the failed business. They had drawn up a written agreement for the transfer of Mr. Adourian's share to Mrs. Adourian, but they had not registered the change on title, in order to save legal fees. The Master accepted this evidence:

> I am therefore satisfied that, on the facts before me, Rita Adourian is the sole beneficial owner of the real property that was registered in her name and the name of her, now bankrupt, spouse. That being determined, I hold that the Bankrupt's estate has no interest in the property at 60 Upton Crescent.[48]

Under the *Land Titles Act,* an unregistered beneficial interest would not have priority over a bona fide purchaser for value, even if the purchaser had notice of it.[49] However, in this case, the *Bankruptcy and Insolvency Act*[50] applies. Section 67(1)(a) provides that "The property of a bankrupt divisible among his creditors shall not comprise... property held by the bankrupt in trust for any other person." This trust for another person is protected from seizure without any need for registration, as long as there is sufficient evidence of its existence.[51]

4. DOES EXECUTION AGAINST THE MATRIMONIAL HOME CONTRAVENE THE *FAMILY LAW ACT*?

In a number of cases where a judgment creditor files an execution against the matrimonial home, the other spouse has cited the *Family Law Act*[52] as a defence. This almost always fails.

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47 *Ibid.* at para. 69.

48 2013 ONSC 5559, 2013 CarswellOnt 12194, [2013] O.J. No. 3937 (Ont. S.C.J.) at para. 39-40.

49 *Randvest Inc. v. 741298 Ontario Ltd.,* 1996 CarswellOnt 3074, 30 O.R. (3d) 473, 139 D.L.R. (4th) 321, [1996] O.J. No. 3182 (Ont. Gen. Div.). The trustee in bankruptcy of a beneficial owner with an unregistered interest cannot prevail against a purchaser.

50 R.S.C., 1985, c. B-3.

51 *Ehrmantraut v. Ehrmantraut (Trustee of),* 2008 MBQB 140, 2008 CarswellMan 263, [2008] M.J. No. 196 (Man. Q.B.), affirmed 2008 CarswellMan 541 (Man. C.A.), had facts similar to Adourian. The non-bankrupt joint tenant adduced circumstantial evidence that he had a beneficial interest in the whole property. This defence failed due to a lack of documentary evidence.

52 R.S.O. 1990, c. F.3.

The non-debtor spouse attempts to rely on Section 21, which prevents one spouse from "encumbering" the matrimonial home without the consent of the other.

> Alienation of matrimonial home 21. (1) No spouse shall dispose of or encumber an interest in a matrimonial home unless, (a) the other spouse joins in the instrument or consents to the transaction; (b) the other spouse has released all rights under this Part by a separation agreement; (c) a court order has authorized the transaction or has released the property from the application of this Part;

Section 21 has been interpreted narrowly by the courts to refer to the specific act of mortgaging or putting a lien on the real property. In *Maroukis v. Maroukis,* the Supreme Court construed the identically worded provision of the predecessor Act, and found that "on the plain meaning of its words, [it] cannot be extended to include an execution taken by a creditor against one of the parties to the marriage."[53]

This was reiterated by the Court of Appeal in *Bank of Montreal v. Bray et al:*

> [T]he matrimonial home occupies a special place in family property relations. That is not, however, sufficient reason to give the term "encumber" such an unusual meaning that would seriously interfere with normal commercial transactions.... [that would] require the consent of his or her spouse before entering into any kind of commercial transaction that could result in the creation of an unsecured debt. In my view, the term "encumber" in s. 21 must be given its ordinary meaning as a burden on property, a claim, lien or liability attached to property.

With respect, the logic in these statements is not very convincing. Nobody is saying that one spouse should need the consent of the other spouse every time he incurs any type of debt. Section 21 could be read as stipulating that the creditor who chooses to make such a loan can resort to any property of the debtor spouse, with the exception of the matrimonial home.

The protection given by section 21 has been diluted even further, given the way that the discretion in section 21(1)(c) has been interpreted. The courts have declared that a commercial debt undertaken by one spouse is not an encumbrance. The court may, however, decide to convert that debt into an actual mortgage on the matrimonial home (over the protest of the other spouse), even though that is an undoubted encumbrance.[54]

One exception to the rule is found in the very peculiar facts in *Boyd v. Boyd.*[55] This was a contested divorce proceeding, in which the husband owed $35,000 for unpaid legal fees to his divorce lawyer. The latter sued the husband for this debt,

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[53] *Maroukis v. Maroukis,* 1984 CarswellOnt 268, 1984 CarswellOnt 803, [1984] 2 S.C.R. 137 (S.C.C.) at p. 138 [S.C.R.].

[54] *Watkins v. Watkins,* 2014 ONSC 2506, 2014 CarswellOnt 5287, [2014] O.J. No. 1965 (Ont. S.C.J.).

which the husband did not oppose, and the lawyer filed a writ of execution against the matrimonial home for the debt. The judge distinguished this transaction from indebtedness for ordinary commercial purposes:

> In contrast to the circumstance in *First City Trust,* this is not (to paraphrase Borins J.) an indirect result of commercial transactions ... but rather a direct transaction relating to the matrimonial home, just as direct in its intended effect as the sale or mortgaging by a spouse of his or her interest matrimonial home, without the consent of the other spouse....It is the non arm's length acquiescence to judgment encumbering a matrimonial home subject to litigation that constitutes a disposition in the present case.[56]

The judge set aside the disposition, and in addition ordered the lawyer to resign from representing his client in the matrimonial dispute.

5. CONCLUSIONS

Real property, and particularly the matrimonial home, is an asset of special importance to people, and the law provides a variety of protections for it. A judgment creditor will try to execute on any real property owned by the debtor, but this is not always a straightforward process.

The principle of resulting trust has not been much discussed in this context, but it can easily arise with respect to spousal property. The beneficial ownership may be quite different than the legal ownership. At different times, this may be a useful argument for either the creditor or the debtor. In some cases, the creditor may use it to seize an unregistered beneficial interest of the debtor. In some other circumstances, the debtor's spouse may use it as a defence, arguing that property registered in the debtor's name is actually held in trust for the other spouse.

A common strategy for business people is to put the family home in the name of only one spouse to protect it from creditors. In some cases, that can be defeated by the finding of a resulting trust. It has to be done right to provide the maximum amount of protection.

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[55] *Boyd v. Boyd,* 2008 CarswellOnt 198, 54 R.F.L. (6th) 460, [2008] O.J. No. 180 (Ont. S.C.J.).

[56] *Ibid*., at para. 18 and 23.