

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARY MARTHA WALLACE

Plaintiff

- and -

LAWRENCE WILLIAM WALLACE

Defendant

REASONS FOR JUDGMENT

1 The plaintiff and defendant were divorced in 1993 after twenty-one years of marriage. In this action commenced in September 1995 the plaintiff (former) wife seeks an equitable division of property acquired by the parties during the marriage. She relies both on the statutory remedy prescribed in the *Matrimonial Property Act*, R.S.N.W.T. 1988, ch.M-6, and the constructive trust remedy accepted by the Supreme Court of Canada in *Pettkus v Becker* [1980] 2 S.C.R.834 and subsequent cases.

2 The defendant (former) husband applies for summary judgment. He says that the plaintiff's action is bound to fail for the following reasons:

- (a) the plaintiff cannot invoke the provisions of the *Matrimonial Property Act*, as the parties are no longer married.

- (b) the plaintiff's claim for a constructive trust remedy is barred by the *Limitation of Actions Act*, R.S.N.W.T. 1988, ch.L-8, and
- (c) the claim for a division of property is without merit in any event.

3 I shall firstly deal with this latter submission.

4 In her affidavit filed in response to the defendant's application, the plaintiff
avers that:

- (i) She worked outside the matrimonial home throughout the marriage. Until the date of separation in 1986, her earnings were deposited into the parties' joint bank account.
- (ii) Throughout the marriage the parties acquired various assets.
- (iii) The defendant (a former banker) managed the couple's financial affairs.
- (iv) In 1985 the parties, and another couple, purchased a hotel business in Norman Wells. Both parties actively worked in the business thereafter. The plaintiff ceased working in the business in 1990.
- (v) All of the parties' financial resources, with the exception of a \$10,000 term deposit in the name of the defendant, were invested in the hotel acquisition in 1985.
- (vi) The hotel business was acquired via a corporation, Rayuka Developments Ltd. For their investment, these parties received 51% of the voting shares and 50% of the equity shares of the corporation. All of these voting shares are in the name of the defendant, one-half of these equity shares are in the name of each of plaintiff and defendant.
- (vii) Upon separation, the only matrimonial assets were:
 - A. household effects, which were divided between the parties,
 - B. the \$10,000 term deposit which remained in the

name of the defendant,
C. the shares in Rayuka which remained as in (vi) above.

(viii) The parties at no time reached agreement on a division of matrimonial property, other than household effects in (vii)A above.

5 In this action, the plaintiff seeks a beneficial interest in assets in the name of the defendant, in particular the voting shares in Rayuka Developments Ltd.

6 For his part, the defendant in his affidavit swears that the parties reached final agreement on the division of matrimonial property at the time of separation.

7 There is thus a sharp divergence between the facts being alleged by each party on an important issue. Such a conflict in itself is a bar to summary judgment. *Alexis Homes v Bissinger* (1990) 71 O.R.(2d) 223 (C.A.).

8 The defendant's application for summary judgment is made pursuant to Rule 175:

"175. A defendant may, after delivering a statement of defence, apply with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

176.(1) In response to the affidavit material or other evidence supporting an application for summary judgment, the respondent may not rest on the mere allegations or denials in his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence the Court shall grant summary judgment accordingly."

9 The purpose of Rule 175 is to provide to a defendant, at an early stage, a mechanism whereby he can get rid of an action in a summary way by showing that it has no merit. The issue on a Rule 175 application is whether there is a *bona fide* triable issue. The onus is on the defendant to establish that there is not. He must satisfy the Chambers judge that his case is manifestly clear, beyond doubt. *Pacific Western Airlines Ltd. v Gauthier* (1977) 2 Alta.L.R.(2d) 52 (Alta.C.A.); *Progressive Construction Ltd. v Newton* [1981] 2 W.W.R. 741 (B.C.S.C.).

10 In the present case, is there a triable issue as to the existence of a prior matrimonial property settlement? Conflicting affidavits placed before me, the one indicating there was a final settlement, the other saying there was not, compel me to answer that question in the affirmative. The defendant has not on this application satisfied me, beyond doubt, that there is no merit in the plaintiff's claim.

Standing of "former" spouses as applicants under *Matrimonial Property Act*

11 Although the Act was enacted in 1974, only s.1 (the interpretation section) and sections 26-29 have been proclaimed in force. There is no statutory definition of "spouse", "husband" or "wife".

12 Sections 1, 28, and 29 have no relevance to the present application or the within action. Sections 26 and 27 provide as follows:

"26. This Act applies to all married persons whether or not they have attained the age of 19 years, and for the purposes of this Act and every matter or thing done under or by virtue of its provisions, a married person of whatever age shall be deemed to be *sui juris*.

DISPUTES BETWEEN SPOUSES

27.(1) In any question between a husband and wife as to the title to or possession, ownership or disposition of all property real and personal, the husband or wife or any person on whom conflicting claims are made by the husband and wife may apply in a summary way to a judge.

(2) Subject to any written agreement to the contrary, in an application under subsection (1) the judge is empowered to make any order with respect to the property in dispute that the judge considers fair and equitable including an order for one or more of the following, namely,

- (a) the sale of the property or any part of it and the division or settlement of the proceeds,
- (b) the partition or division of the property,
- (c) the vesting of property owned by one spouse in both spouses in common in shares that the judge thinks fit,
- (d) the conversion of joint ownership into ownership in common in the shares that the judge thinks fit, and
- (e) the transfer from one party to the other party or to a child of either or both parties of the property that the judge may specify

and may direct any inquiry or issue touching the matters in question to be made in the manner that the judge thinks fit and may make an order as to the costs of and consequent on the application that the judge thinks fit.

(3) Subject to subsection (4), the judge may make any order under this section, whether affecting the title to property or otherwise, that the judge considers fair and equitable, notwithstanding that the legal or equitable interest of the husband and wife in the property is in any other way defined.

(4) In considering an application under this section, the judge shall take into account the respective contributions of the husband and wife whether in the form of money, services, prudent management, caring for the home and family or in any other form.

(5) A judge making an order under this section may direct the Registrar of Land Titles to cancel, correct, substitute or issue any certificate of title or make any memorandum or entry on it and otherwise to do every act necessary to give effect to the order.

(6) An order made under this section is subject to appeal in the same way as an order made by a judge in an action."

13 The legislature has thus given to the presiding judge a wide discretion in arriving at a fair and equitable disposition of property that is in dispute. The purpose of these statutory provisions is to provide a mechanism to resolve proprietary disputes arising from a marriage. The statute does not state that this mechanism must necessarily be invoked during the currency of the marriage.

14 In my view, the words "spouse", "husband" and "wife" in s.27 should be given a wide meaning so as to include former spouses, former husbands and former wives. This approach gives the meaning that best fits the object of those statutory provisions, whose focus is disputes arising from a marriage. Such approach is also in accordance with the direction of the legislature in s.10 of the *Interpretation Act* R.S.N.W.T. 1988, ch.1-8:

"s.10. Every enactment shall be construed as being remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

15 If the legislature had intended that a person's right to invoke the s.27 remedy was to be extinguished by a divorce judgment under the *Divorce Act* of Canada, the statute would have so provided. It is not unusual for a matrimonial property dispute to survive the dissolution of a marriage. As noted by Dickson, J. in *Rathwell v Rathwell*

[1978] 2 S.C.R. 436, matrimonial property, although acquired during a period of matrimonial harmony, is usually the subject of dispute once the marriage is over.

16 In support of his position, the defendant here cites judicial decisions in *Paradis v Paradis* (1996) 143 Sask.R. 278 (Q.B.), *Brown v Brown* (1988) 71 Sask.R.221 (Q.B.), and *Lawrence v Lawrence* (1995) 17 R.F.L.(4th) 198 (N.S.C.A.). These cases are distinguishable, of course, as the Saskatchewan and Nova Scotia statutes referenced therein contain a specific definition of spouse, and other express provisions, that clearly indicate the legislators' intention that the application is to be made during the currency of the marriage.

17 Contrary to the clear stipulation of the Saskatchewan and Nova Scotia statutes that denies this remedy to former spouses is the equally clear stipulation in the Alberta statute that extends this remedy to former spouses. In the *Matrimonial Property Act* R.S.A. 1980, ch.M-9, there is a statutory definition of "spouse" which expressly includes "former spouse".

18 Our statute is not so clear, and requires interpretation as above. In my respectful opinion, the meaning which I have attributed to the words "spouse", "husband", and "wife" is in accord with the intention of the legislators and the object or purpose of s.27 of the act.

Limitation period for a constructive trust remedy

19 The defendant submits that the plaintiff's alternate claim under the constructive trust doctrine is statute-barred by the *Limitation of Actions Act* R.S.N.W.T. 1988, ch.L-8.

20 Plaintiff's counsel agrees that his client is bound by that statute, and that the applicable limitation period is six years from the date the cause of action arose.

21 The issue thus becomes: when did the cause of action arise?

22 The defendant says that it arose on the date of separation, i.e., no later than January 1987.

23 The plaintiff's position is that the cause of this action arose, at the earliest, in 1990 when she ceased working in the family business, i.e., ceased contributing to the matrimonial asset, or, *a fortiori*, in 1995 when she learned for the first time that the shares she held in her name were non-voting and, in themselves, of limited monetary value. The defendant in his own affidavit acknowledges that the plaintiff continued to work for the company until 1990 as a person "involved with operating a company for herself".

24 A cause of action arises for purposes of a limitation period when the material

facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. *City of Kamloops v Nielsen* [1984] 2 S.C.R.2; *Central Trust Co. v Rafuse* [1986] 2 S.C.R. 147. I have read carefully the contents of the two affidavits filed on this application. On that evidence there is sufficient conflict, uncertainty, and doubt in my mind that I am unable to determine when the plaintiff gained knowledge of the material facts giving rise to a cause of action, or when those facts should have been discovered by her by the exercise of reasonable diligence.

25 The principle underlying a constructive trust is unjust enrichment. When did the unjust enrichment first arise? Was it at the time of separation of the spouses? Was it on the date that the defendant first refused to acknowledge that he was holding the property in trust for the plaintiff? Was it when the plaintiff first realized she was in the position of holding shares with no voting rights?

26 I conclude that a determination of the commencement of the limitation period depends on the facts and the law. In all of the circumstances, on the material before me, I am unable to make the necessary findings of fact. I am unable to consider the law in a factual vacuum.

27 It is not clear, on the evidence presented, when the six-year limitation period commenced to run against the plaintiff. It is a *bona fide* issue to be tried.

28 The defendant has not discharged the onus on him under Rule 175 to establish that there is no *bona fide* triable issue.

29 There are genuine issues for trial. The application for summary judgment is dismissed. The plaintiff shall be entitled to party and party costs taxed in column 5.

J.E. Richard,

J.S.C.