Date: 1998 04 01
Docket: 6101-02508/CV 06668

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**MARCELLA MAY COWGER**

Petitioner

- and -

**THOMAS JAMES COWGER**

Respondent

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Action for divorce and orders respecting child custody and support, spousal support, and a division of matrimonial property.

Heard at Hay River, NT on March 25, 1998

Judgment filed: April 3, 1998

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REASONS FOR JUDGMENT OF THE HONOURABLE J.Z. VERTES

Counsel for the Petitioner: James D. Brydon
No one appearing for the Respondent
Counsel for the Trustee in Bankruptcy for the Respondent: Douglas G. McNiven

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**REASONS FOR JUDGMENT**

[1] This is an action for a divorce judgment and orders relating to child custody, child and spousal support, and a division of matrimonial property. The issues are complicated by the respondent husband's assignment into bankruptcy.

[2] At the trial of this action the respondent's trustee in bankruptcy, Murray Faber & Associates Inc., appeared by counsel who participated in the proceedings with respect to certain aspects of the matrimonial property claim. The respondent did not appear either in person or by counsel. At the conclusion of the hearing I granted a divorce judgment in the usual terms and reserved my decision on all other issues.

**FACTS:**

[3] The parties were married in Alberta on June 19, 1976. There are four children of the marriage: Eric (14 years old), Heather (13 years old), Sandy (12 years old), and James (10 years old). The petitioner, at the time of her marriage, had a grade 10 education and worked as a medical laboratory assistant. She worked while the

respondent took training at the Northern Alberta Institute of Technology. She continued to work until 1985, when the third child was born. After that she did not work again in the wage economy until after the family's move to Hay River in 1990. The respondent received several promotions over the years with his employer, Alberta Power Limited, requiring the family to move to different communities in Alberta and eventually to Hay River.

[4] After coming to Hay River the petitioner worked on a casual basis. The parties maintained a joint account into which all earnings went and out of which all expenses were paid. They bought a home in Hay River.

[5] The parties were separated in August of 1994. Prior to that, in July, the respondent's employment was terminated. He moved shortly after the separation to Alberta where he obtained work with a construction company. The petitioner has remained in Hay River with the children. Further facts will be reviewed in my discussion of the specific issues. A chronology of pertinent events will also assist in understanding the issues:

1. October 1994 - Petition for Divorce filed seeking child custody and support.
2. May 1995 - Matrimonial home sold with proceeds divided equally between the parties (save $10,000.00 still retained in trust by the parties' solicitors on the sale).
3. April 1996 - Amended Petition filed adding claim for spousal support.
4. June 1996 - Answer and Counter-Petition filed on behalf of the respondent seeking child custody and support.
5. July 1996 - Interim Order issued providing for custody to the petitioner, access to the respondent, and child support of $1,200.00 per month and spousal support of $300.00 per month to be paid by the respondent.
6. October 1996 - Statement of Claim filed on behalf of the petitioner seeking a declaration of a constructive trust, division of matrimonial property and prejudgment interest.
7. December 1996 - Respondent noted in default for failing to file a defence in response to the Statement of Claim.
8. January 1997 - Respondent's solicitors filed a Notice of Ceasing to Act.
9. June 1997 - Respondent filed an assignment into bankruptcy.
10. October 1997 - Order made consolidating the divorce and matrimonial property actions and setting down for trial.

[6] The respondent's bankruptcy has an effect on some of the claims in these proceedings but not others. For example, child and spousal support are untouched by the bankruptcy while certain aspects of the property claim may be depending on the circumstances. For that reason my discussion of the claims and the result reached with respect to each must be kept distinct.

**CHILD CUSTODY:**

[7] The children have been in the continuous care of the petitioner since the parties separated in 1994. There is no question in my mind that it would be in their best interests for that arrangement to continue. There is nothing in the evidence that would suggest otherwise.

[8] There will therefore be an order granting permanent custody of the children to the petitioner. The respondent will have reasonable access upon such terms and conditions as the parties may agree, failing which, upon such terms as this court may direct upon the application of either party. It goes without saying that the Counter-Petition is dismissed.

**CHILD SUPPORT:**

[9] The question of child support is problematic only because of the lack of information from the respondent. He was served with a formal Notice to Disclose financial information in August 1997. There has been no response. The petitioner's counsel therefore asks me to impute income to the respondent, something I am entitled to do when the respondent to a child support application fails to provide income information: *Federal Child Support Guidelines*, s.19(1)(f).

[10] Petitioner's counsel suggests that income should be imputed at $53,000.00 per year. That was the last known gross annual income reported for the respondent as taken from his 1995 tax return. In July 1996, however, in response to the motion for interim support, the respondent filed an affidavit setting out monthly income and expenses. In that document he claimed an income of $3,500 per month. This would work out to $42,000.00 per year.

[11] The only current information is that provided by the respondent's trustee in bankruptcy. The trustee's counsel filed an affidavit from the respondent in which he makes the following statement:

> "I was laid off in January 22, 1998 and am unsure as to when I will be able to return to work. I am training to be an electrician."

There are no other details given in support of these assertions.

[12] I am somewhat uncertain as to the point of including this statement in an affidavit filed on behalf of the trustee. The trustee has no interest in the support proceedings. It is also inherently unfair to present evidence from a party by way of affidavit (an affidavit that was sworn only two days before the trial) when that party does not appear in person and therefore cannot be cross-examined. The statement is also dubious on its face in that the respondent asserts he is "training" to be an electrician while I heard evidence from the petitioner that the respondent, during his employment with Alberta Power, worked as a journeyman electrician. I give the respondent's statement no weight.

[13] The Statement of Affairs executed by the respondent on June 23, 1997, as part of his assignment into bankruptcy, also raises more questions than provides answers. The respondent lists his monthly "take-home" pay as $1,000.00 and an additional $600.00 as "contributions from dependents". Not surprisingly perhaps, he also lists his fixed monthly expenses as $1,600.00. He identifies himself as "separated" yet also lists a "spouse" as an adult dependent as well as one dependent under 16 years of age. He also says he cashed in an R.R.S.P. worth $10,000.00 in February 1997. I note this only because I also had evidence that as of December 1997, the respondent owed $16,800.00 in child support arrears as well as approximately $4,500.00 in spousal support arrears.

[14] The *Guidelines*, in s.19(1), state that a court "may impute such amount of income to a spouse as it considers appropriate in the circumstances". Based on all of the evidence I consider such amount to be $42,000.00 per year. Since the respondent lives in Alberta, the basic amount of child support for the four children, based on the applicable *Guidelines* schedule, is $937.00 per month.

[15] The petitioner also seeks the payment of "special or extraordinary expenses" as referred to in subsections 7(1)(a) and (b) of the *Guidelines*. These involve expenditures for the children's extracurricular activities (primarily hockey and figure skating) as well as for orthodontic treatment. The evidence satisfies me that these expenses meet the criteria of the *Guidelines*. This court may designate a portion of those expenses to be paid by the respondent bearing in mind that the expenses are to be shared by the parents in proportion to their respective incomes as well as taking into account any income tax deductions or credits relating to those expenses. I therefore direct a further payment of $100.00 per month to cover these expenses.

[16] There will therefore be an order providing for payment by the respondent of child support in the total sum of $1,037.00 per month . Such payments will commence as of the 1st day of April 1998, and continue on the first day of each month thereafter.

**SPOUSAL SUPPORT:**

[17] The *Divorce Act* provides, in s.15.2(4), that in making a spousal support order the court must take into consideration the condition, means, needs and other circumstances of each spouse, including the length of the parties' cohabitation, the functions performed by each spouse, and any order or arrangement relating to the support of either spouse. The objectives of a spousal support order are noted in s.15.2(6) of the Act:

> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) insofar as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[18] In this case the parties cohabited for 18 years. The petitioner contributed to the marriage, first, by working in the early years, including during the years when the

respondent upgraded his education, and, second, by being the primary homemaker and child care provider. She followed the respondent through various relocations for the sake of his employment advancement. What employment prospects the petitioner had were and continue to be sporadic. She has not been able to secure any financial future because of a lack of continuous employment. She is currently employed on a part-time basis as a secretary earning $10.41 per hour. Her 1997 income tax return showed a gross annual income of $21,000.00.

[19] The situation of the petitioner is of course not unusual. The law recognizes that it is precisely this history that leads to the economic disadvantage of women upon marriage breakdown. As noted by L'Heureux-Dubé J. in *Moge v. Moge*, [1992] 3 S.C.R. 813 (at page 861):

> Women have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution. Historically, or at least in recent history, the contributions made by women to the marital partnership were non-monetary and came in the form of work at home, such as taking care of the household, raising children, and so on. Today, though more and more women are working outside the home, such employment continues to play a secondary role and sacrifices continue to be made for the sake of domestic considerations. These sacrifices often impair the ability of the partner who makes them (usually the wife) to maximize her earning potential because she may tend to forego educational and career advancement opportunities. These same sacrifices may also enhance the earning potential of the other spouse (usually the husband) who, because his wife is tending to such matters, is free to pursue economic goals.

[20] The petitioner's counsel submits, and I agree, that given the limited education of the petitioner, her prospect of obtaining merely entry-level or temporary employment, and the economic insecurity of those positions, there is no foreseeable expectation that she will become self-sufficient in the near future. She must also bear the ongoing and daily financial consequences of the support of the children. The respondent, meanwhile, is capable of earning a reasonable income and, as will be seen, managed to accumulate assets during the marriage.

[21] Petitioner's counsel seeks an order continuing the spousal support of $300.00. There will therefore be an order requiring the respondent to pay on an indefinite basis spousal support of $300.00 per month.

**PROPERTY DIVISION:**

[22] The claim for a division of matrimonial property has to be divided into three categories. That is because the potential impact of the respondent's bankruptcy differs with respect to each category. First, there is a pension from the respondent's employment. Both the petitioner and the trustee agree that this asset is exempt from the bankruptcy although neither counsel could explain precisely why. Second, there is an accounting for assets already divided as between the parties. This may or may not be affected by the bankruptcy. And, third, there is the sum of $10,000.00, still held in trust, left over from the sale of the matrimonial home. Both the petitioner and the trustee claim these funds. The second and third categories not only raise points of bankruptcy law but also the issue of constructive trusts (since the petitioner argues that all matrimonial property retained by the respondent after separation is subject to a trust in her favour and therefore outside of the scope of the bankruptcy).

[23] Before addressing each category, it is helpful to set out the operative statutory provisions. Unlike many jurisdictions the Northwest Territories has not enacted a comprehensive family property statute. Instead the *Matrimonial Property Act*, R.S.N.W.T. 1988, c.M-6, gives a very wide discretion to a judge to do that which the judge considers fair and equitable:

> 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 the 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 consequences 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.

[24] As has often been noted in the jurisprudence, this statute embodies the general scope of the law of restitution so as to prevent unjust enrichment. And, while there is no statutory presumption of an equal distribution of either the title to matrimonial property or its value, the jurisprudence has followed the philosophy that there should be equal sharing between the spouses of assets acquired during the marriage: *Slocki v. Slocki* (1981), 25 R.F.L. (2d) 366 (N.W.T.S.C.); *Kucey v. Kucey*, [1990] N.W.T.R. 234 (S.C.).

**1. Pension:**

[25] The pension referred to in this category is one accumulated during the respondent's employment with Alberta Power from April 1980 to July 1994. It therefore comes wholly within the years of cohabitation of the parties. Upon the termination of the respondent's employment, it was rolled into a locked-in registered retirement savings plan with the Royal Bank of Canada. The value at time of roll-over, in October 1994, was $44,389.56; the current value is approximately $50,000.00. The evidence shows that the petitioner is designated as the beneficiary under the plan.

[26] Pensions earned during the course of marriage have been recognized as "matrimonial property" subject to division since such cases as *Rutherford v. Rutherford*, [1981] 6 W.W.R. 485 (B.C.C.A.), and *McAlister v. McAlister*, [1983] 2 W.W.R. 8 (Alta.Q.B.). Much of the current debate with respect to pensions deals with valuation for division purposes since in many cases the employment is ongoing both at the time of separation and trial. The questions are usually what value to ascribe to the other spouse's entitlement and how to access or secure it. That is not a problem in this

case because, while the asset is one that represents a pension, it is a distinct, identifiable asset with a known value.

[27] As I noted above, counsel for the petitioner and for the trustee assume that this asset is excluded from the bankruptcy but they could not explain why. The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (as renamed by S.C. 1995, c.27, s.2) in s.67(1)(b), exempts from the bankruptcy any property that is exempt from execution or seizure under any laws applicable in the province (or territory) within which the property is situated and within which the bankrupt resides. There is no law in the Northwest Territories exempting pensions per se from execution or seizure. The *Exemptions Act*, R.S.N.W.T. 1988, c.E-9, makes no reference to pensions. The *Retirement Plan Beneficiaries Act*, R.S.N.W.T. 1988, c.R-6, deals with the designation of beneficiaries in such plans but contains no reference to seizures. This can be contrasted with the *Insurance Act*, R.S.N.W.T. 1988, c.I-4, which makes specific provision, in section 94(2), for the exemption from execution or seizure of any insurance contract where a beneficiary is designated.

[28] With respect to the criterion of the bankrupt's residence, a pension is expressly excluded from execution or seizure by the laws of Alberta, that being the residence of the respondent: see s.59 of the *Employment Pension Plans Act*, S.A. 1987, c.E-10.05. But where is the asset situated? It seems to me that Alberta, since it is a place where the Royal Bank has offices so as to access the plan, can also be considered to be the situs of the asset. But what of the "origin" of those funds, i.e., the pension accumulated as a result of employment in the Northwest Territories?

[29] There is no pension legislation in this jurisdiction other than, as previously noted, with respect to the designation of beneficiaries. The federal *Pension Benefits Standards Act*, R.S.C. 1985, c.32 (2nd Supp.), however, may have some application. It applies primarily to pensions in industries under federal jurisdiction but also seems to include employers in any industry in the Northwest Territories by its reference, in s.4(4)(i), to employees of "any work, undertaking or business of a local or private nature" in the Territories. The funds in these pension plans are deemed to be held in trust and not capable of assignment or commutation. Hence they would not, in any event, vest in a trustee in bankruptcy.

[30] Generally speaking, when the debtor invests in an R.R.S.P. which is not exempt from execution, the R.R.S.P. is "property" within the scope of the *Bankruptcy and*

*Insolvency Act* and therefore vests in the trustee: *Re Lifshen* (1977), 25 C.B.R. (N.S.) 232 (Sask.C.A.). But, if pension benefits which are exempt from execution are transferred on termination of employment into a locked-in R.R.S.P., the R.R.S.P. is also exempt from execution and therefore is not "property" of the bankrupt that vests in the trustee: *Re Moysey* (1977), 80 D.L.R. (3d) 152 (Sask.Q.B.); *Re Pawlowcki* (1985), 55 C.B.R. (N.S.) 285 (Ont.S.C.). So, in any scenario, the Royal Bank retirement savings plan asset is excluded from the bankruptcy.

[31] The reference previously to the federal legislation may be helpful in terms of how the pension asset is to be divided. Section 25 of the federal statute provides for the distribution of pension benefits on divorce. They are subject to the applicable provincial or territorial property law and they may be redistributed in accordance with the directions of a court order. If the benefits can be redistributed while still in the plan, it seems to me they can also be redistributed if they are now in a separate plan as the result of a roll-over on termination.

[32] In my opinion, this asset should be divided equally as between the spouses. It was one accumulated as the result of the respondent's employment during the marriage. The respondent was assisted throughout that employment by the petitioner. There will therefore be an order directing the division of the Royal Bank retirement savings plan in half with one-half to be paid to the petitioner, either rolled into a savings plan in her name or in some other manner as directed by the petitioner. If need be there will be a declaration to the effect that the petitioner has a beneficial interest in one-half of the proceeds in the plan. I refer to one-half of the value of the plan as it exists today. If the asset had been divided at the time of separation, the petitioner's half would have accrued interest. Therefore she should receive one-half of the capital and accrued interest as of the date of redistribution.

**2. Division of Assets at Separation:**

[33] Shortly after separation the parties divided various chattels, vehicles and personal effects. This was pursuant to an oral agreement to divide their assets equally. In the petitioner's Statement of Claim she alleges that the value of the assets retained by her was approximately $10,000.00 less than the value of those retained by the respondent. At trial she testified that the difference in value was more like $20,000.00. In the affidavit filed at trial by the trustee's counsel, the respondent itemizes those assets retained by each of them and assigns a more or less equal value. He also says,

however, that he offered to transfer to the petitioner the $10,000.00 held in trust from the sale of their home. He says this offer was made "as an equalization to the division of the matrimonial property".

[34] Having considered all of the evidence on this issue I accept the petitioner's evidence as to a disparity in the value of the assets divided. I set that value at $10,000.00 (notwithstanding the petitioner's testimony at trial). That seems to be the recurring amount mentioned by both parties since the start of these proceedings. I note as well that the respondent lists the petitioner as an unsecured creditor to the sum of $10,000.00 in his Statement of Affairs.

[35] In addition to this, however, there was evidence of an R.R.S.P. retained by the respondent and apparently cashed in by him. The petitioner testified that $17,000.00 was added to the mortgage of the matrimonial home for the purchase of an R.R.S.P. in the respondent's name. The only evidence on this point is a receipt from the Royal Bank for a $10,000.00 investment in an R.R.S.P. in 1993. It seems to me that this is clearly matrimonial property and should be divided equally between the parties. I therefore set the sum of $15,000.00 as the amount due to the petitioner by the respondent as an equalization payment with respect to the matrimonial property division ($10,000.00 as the disparity in value between the assets retained by he parties plus $5,000.00 as one-half of the R.R.S.P. investment in 1993). Prejudgment interest will apply to this award at the applicable statutory rates from the date of service of the Statement of Claim.

[36] The contentious point about this aspect of the claim is its inclusion as part of the bankruptcy. As I understand the current state of the law, a matrimonial property claim is not a "claim provable in bankruptcy" at the time of the assignment into bankruptcy and therefore it is not a claim from which the debtor is released when he is discharged from bankruptcy. This is the import of the ruling in *Lacroix v. Valois*, [1990] 2 S.C.R. 1259, and the effect of sections 121(1) and 178(2) of the *Bankruptcy and Insolvency Act*. Furthermore, the matrimonial property claim is nothing but an inchoate and indeterminable right until a court judgment "creates" or "quantifies" it. Since there is no automatic vesting of an interest by one spouse in the property of the other, a spouse's matrimonial property interest arises only upon a judgment. Until then the right to claim an ownership interest or an interest in the value of property is merely a personal right to a determination of those interests: *Maroukis v. Maroukis*, [1984] 2 S.C.R. 137.

[37] Therefore, a claim that has not yet gone to judgment, even if commenced prior to the assignment in bankruptcy, is not released by the discharge of the bankrupt. That was the decision in *Walton v. Walton* (1993), 1 R.F.L. (4th) 93 (Sask.C.A.). On the other hand, if judgment is rendered prior to the discharge, it is then a certain and quantified debt and thus a "claim provable in bankruptcy". The claimant is then merely another unsecured creditor with a debt. A subsequent discharge releases the debtor from that debt. That was the result in *McJannet v. McJannet* (1988), 72 C.B.R. 184 (Sask.Q.B.). In the case before me counsel did not allude to the timing of the respondent's discharge and I can only assume that it has been considered. I note only, in passing, that s.168.1(1)(f) of the statute would seem to entitle the respondent to an automatic discharge nine months after the assignment (which, ironic as it may seem, I calculate as falling on the day this trial was held).

[38] The petitioner's counsel, in an effort to avoid the effect of the bankruptcy completely, argued that all of the assets held by the respondent were impressed with a constructive trust in favour of the petitioner. The focus of the trust, it was submitted, is the respondent's obligation to satisfy any equalization of the value of the matrimonial property division. Any property held by a bankrupt in trust for another person is excluded from the bankrupt's estate pursuant to s.67(1)(a) of the Act.

[39] In my respectful view, the petitioner's counsel mistakes a cause of action for a remedy. As I noted above, the *Matrimonial Property Act* embodies the principles of restitution so as to prevent unjust enrichment. To say that the elements necessary to constitute unjust enrichment could arise in a marital relationship is to state the obvious. This was noted by McLachlin J. in *Peter v. Beblow* (1993), 44 R.F.L.(3d) 329 (S.C.C.), at page 337:

> I share the view of Cory J. that the three elements necessary to establish a claim for unjust enrichment -- an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment -- are made out in this case. The appellant's housekeeping and child-care services constituted a benefit to the respondent (1st element) in that he received household services without compensation, which, in turn, enhanced his ability to pay off his mortgage and other assets. These services also constituted a corresponding detriment to the appellant (2nd element) in that she provided services without compensation. Finally, since there was no obligation existing between the parties which would justify the unjust enrichment and no other arguments under this broad heading were met, there is no juristic reason for the

> enrichment (3rd element). Having met the three criteria, the plaintiff has established an unjust enrichment giving rise to restitution.

These comments were made in the context of a common-law relationship but they apply equally to many marital relationships, including this one.

[40] In this case, the petitioner provided, for some years, income for the support and education of the respondent and, throughout the marriage, housekeeping and child care services. These were a benefit to the respondent since they obviously enhanced his employment career, living arrangements, and ability to accumulate assets. The petitioner was not adequately compensated for these services, and now has very few assets, so there is a detriment. And, there is no juristic reason why one spouse should be enriched at the expense, in money or money's worth, of the other. Hence, I conclude that there has been an unjust enrichment.

[41] In *Peter*, however, McLachlin J. points out that a finding that a party is entitled to a remedy for unjust enrichment does not necessarily imply that there is a constructive trust. For a constructive trust to arise a party must establish a direct link to the property that is the subject of the trust by reason of that party's contribution. That is because a constructive trust is primarily a proprietary concept. This was explained by the judgment at page 336:

> The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment, (2) a corresponding deprivation, and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out. At this point, a second doctrinal concern arises: the nature of the remedy. "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of quantum meruit or quantum valebat. Another equitable remedy, available traditionally where one person was possessed of legal title to property in which another had an interest, was the constructive trust. While the first remedy to be considered was a monetary award, the Canadian jurisprudence recognized that in some cases it might be insufficient. This may occur, to quote Justice La Forest in *International Corona Resources ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, at page 678, "if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property." Or to quote Dickson J., as he then was, in *Becker v. Pettkus*, [1980] 2 S.C.R. 834, at p.852, where there is a "contribution [to the property] sufficiently substantial and direct as to entitle [the plaintiff] to a portion of the profits realized upon the sale of [the property]." In other words, the remedy of constructive trust arises where monetary damages are

> inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed.

[42] In this case the constructive trust is said to apply on all the property of the respondent. But, on this aspect of the claim, there is no specific asset in which the petitioner claims a proprietary interest. These assets were pooled by the parties and divided at the time of separation. The petitioner's claim is essentially that the assets she kept were worth less than one-half of the combined value of all the assets. In this case there is a distinction that must be drawn as between a share in ownership (a proprietary claim) and a share in property value through an equalizing transfer of money (a monetary claim). This distinction was identified in *Rawluk v. Rawluk* (1990), 23 R.F.L. (3d) 337 (S.C.C.), at page 365:

> The imposition of a constructive trust recognizes that the titled spouse is holding property that has been acquired, at least in part, through the money or effort of another. The non-titled spouse and constructive trust interest in this property is distinct from the right to an equalizing share of property value that is derived not from an independent property right but from the status as a married person.

[43] What is missing on this aspect of the petitioner's claim is an identifiable link or causal nexus between her contributions and any specific property against which she asserts a constructive trust. This would be the case even if one could impose a constructive trust retroactively (a highly dubious proposition) so as to avoid the vesting of the respondent's assets in the trustee upon the respondent's assignment in bankruptcy. The claim for a declaration of a constructive trust is therefore dismissed.

**3. Balance of Funds from Sale of Home:**

[44] My discussion with respect to constructive trust applies to this asset as well, although with a different result.

[45] The former matrimonial home was sold in 1995 with the net proceeds to be divided in equal shares. The parties retained the law firm of MacDonald & Associates to act for them on the sale. This was the firm that represented the respondent in these proceedings until ceasing to act in early 1997.

[46] On April 25, 1995, prior to closing, the firm forwarded a "Direction to Pay" for the petitioner to sign. The respondent had already signed it. The direction authorized

the solicitors to pay out the proceeds of sale as follows: firstly, to the realtor for the commission; secondly, to pay off the mortgage; thirdly, to pay the solicitors' account; fourthly, the sum of $10,000.00 to the petitioner; and, then, the balance to be divided equally as between the two parties. The petitioner refused to sign this document worried that she would then be acknowledging release of all claims in exchange for this payment. The respondent states in his affidavit that he instructed "his" solicitors to offer the $10,000.00 in exchange for just such a release. In addition, the petitioner testified that when they divided up their other assets, the respondent came up with a $10,000.00 difference in the respective values and he therefore proposed to satisfy the difference by this payment. That sum has stayed in the solicitors' trust account to this date.

[47] A number of inferences can be drawn from this evidence. First, and most obviously, the full $10,000.00 does not belong to the respondent. They are proceeds from the sale of the matrimonial home. If the respondent can claim any portion of it then it is at most $5,000.00, representing his one-half share. There can be no doubt that the parties intended that the proceeds be divided equally.

[48] The trustee's counsel attempted to argue at first that all $10,000.00 was property of the respondent and therefore should vest in the trustee. There seems to me no basis for such an argument. The solicitors were acting for both parties on the sale. The funds they hold in trust they hold for the benefit of both clients. The respondent could no more access those funds unilaterally as could the petitioner. I reject this argument.

[49] The second inference is that the respondent intended these funds to satisfy any equalization obligation to the petitioner. The "Direction to Pay" intended that the $10,000.00 payment come "off the top"; that is, before any equal division of the net proceeds of sale. The respondent clearly identified these funds as an obligation. He identified a $10,000.00 debt to the petitioner in his Statement of Affairs on the bankruptcy. I note that there is no entry for a claimed "asset" of $5,000.00 to represent his share of the funds in trust so evidently the respondent did not consider any portion of those funds to be his. And if these funds are not his property at all then there is no reason why all of it should not go to the petitioner.

[50] The trustee's counsel submitted that all that can be said is that the fund represents monies set aside to pay a future debt which was never more than a contingency. The funds were offered as settlement of a disputed claim, an offer that

was never accepted, and therefore the respondent maintains a beneficial interest to his share ($5,000.00) of the trust funds. This was the case in *Burson v. Burson* (1990), 4 C.B.R.(3d) 1 (Ont.Ct.Gen.Div.), referred to by counsel.

[51] In my opinion the funds held in trust are directly linked, not just to the petitioner's interest in the matrimonial home, but also to her contributions to the accumulation of the family assets. The funds held in trust are a distinct asset for which a property interest can be claimed. The funds were clearly ear-marked by the respondent for the payment of property claims and thus are impressed with a constructive trust. As trust property they are excluded from the bankruptcy. This distinguishes this situation from that in *Re Allan Realty* (1979), 24 O.R.(2d) 21 (S.C.), another case referred to by counsel, where the proceeds in trust were held to be a mere debt. It is a trust within the terms of the Act because there was unequivocal recognition by the respondent, prior to his assignment, that these funds would go to the petitioner. The only real question was whether there would be any more money required. The fact that the claim was not pursued prior to the assignment is immaterial.

[52] Accordingly, there will be a declaration that the funds held in trust by MacDonald & Associates are held in trust for the benefit of the petitioner (one-half directly and one-half by way of constructive trust). There will be a direction to MacDonald & Associates to disburse the funds held in trust as follows:

(a) one-half (capital and accrued interest) to be paid in trust to the solicitors for the petitioner;
(b) one-half (capital and accrued interest) to be paid into court to the credit of this action (which funds are to be released to the petitioner's solicitors at the expiry of the appeal period upon confirmation that no appeal has been taken).

As one-half of the proceeds represent funds impressed with the trust (the other half being the petitioner's direct interest in the home sale proceeds), the amount representing that half is to be applied in reduction of the petitioner's money judgment on the property division as ordered above

[53] To make a final point with respect to the funds in trust, I wish to refer to an issue of public policy. The trustee's counsel referred to the unfairness of disentitling all of the respondent's creditors from sharing in these proceeds through the bankruptcy. I

note that, except for the petitioner and the respondent's former lawyers, the only creditors listed on the Statement of Affairs are banks. In the case of *Marzetti v. Marzetti* (1994), 4 R.F.L. (4th) 1 (S.C.C.), Iacobucci J. states (at page 31):

> In section 68 of the Bankruptcy Act, Parliament has indicated that, before wages become divisible among creditors, it is appropriate to have "regard to the family responsibilities and personal situation of the bankrupt". This demonstrates, to my mind, an overriding concern for the support of families. . .
>
> Moreover, there are related public policy goals to consider. As recently recognized by L'Heureux-Dubé in *Moge v. Moge*, [1992] 3 S.C.R. 813, "there is no doubt that divorce and its economic effects" (p.854) are playing a role in the "feminization of poverty" (p.853). A statutory interpretation which might help defeat this role is to be preferred over one which does not.

These comments were made in the context of the wage seizure provisions of the statute but the public policy goals are applicable generally. It seems to me that the funds in trust could be far more appropriately used by the respondent's ex-spouse and children than in the partial satisfaction of credit card debts and vehicle loans. To repeat something Iacobucci J. also said in *Marzetti*, when family needs are at issue, I prefer to err on the side of caution.

[54] There is a subsidiary issue with respect to the funds in trust. The firm of Macdonald & Associates wanted to exert a solicitor's lien on any portion of the funds held to be the respondent's property. This is for unpaid fees, not with respect to the house sale, but with respect to work performed on the respondent's behalf in this litigation. Since I have held that all of the funds held in trust are beneficially owned by the petitioner, the issue of a possible solicitor's lien does not arise.

**COSTS:**

[55] The petitioner seeks costs of these proceedings both against the respondent and against the trustee in bankruptcy. The trustee's counsel seeks an opportunity to make submissions on this issue. I will therefore give directions.

[56] Within 21 days of the date of these reasons, the petitioner's counsel will file and serve a draft bill of costs on a party-and-party basis (Column 2). The bill is to include an itemization of all steps in these proceedings plus all taxable disbursements

(including the costs related to the attendance in Hay River for trial). In addition, counsel is to provide a succinct memorandum outlining what part of the costs may be applicable to the separate claims in this action. I note only at this point that such a differentiation may assist the petitioner since costs awarded in support actions are generally considered to be part of the judgment and therefore a discharge from bankruptcy would not release the bankrupt from a claim for such costs: *Re Dimitroff* (1966), 8 C.B.R.(N.S.) 253 (Ont.S.C.). Counsel is also to set out what part of the costs are sought from the trustee directly and the reasons in support of such an award.

[57] Within 14 days of being served, counsel for the trustee is to file and serve a succinct memorandum in response. I will then issue my decision. If further directions are required with respect to any aspect of this judgment, counsel may speak to me in Chambers.

J.Z.. Vertes,
J.S.C.

Dated at Yellowknife, NT, this
3rd day of April 1998

Counsel for the Petitioner: James D. Brydon
No appearing for the Respondent
Counsel for the Trustee in
Bankruptcy for the Respondent: Douglas G. McNiven

6101-02508 / CV 06668

IN THE SUPREME COURT
OF THE NORTHWEST TERRITORIES

BETWEEN:

**MARCELLA MAY COWGER**

Petitioner

- and -

**THOMAS JAMES COWGER**

Respondent

REASONS FOR JUDGMENT OF
THE HONOURABLE J.Z. VERTES