Date: 2014 02 20
Docket: S-1-CV-2012000001

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ROBERT PARSONS ENGLE

Applicant

- and -

MARGARET LUCILLE CARSWELL

Respondent

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] This application arises from the divorce of the parties which was granted over 20 years ago. Despite the passage of time, there are issues that are unresolved. The most recent history of this matter is set out in the Memorandum of Judgment dated February 29, 2012, Supplementary Memorandum dated March 8, 2012, Supplementary Memorandum #2 dated March 28, 2012, and Supplementary Memorandum dated April 25, 2012. In this application, Robert Parsons Engle ("Engle") seeks to have funds that were ordered paid into court paid out to himself.

[2] Previously, I ordered that one-half of the proceeds of the sale of the Principal Residence of the marriage be paid into court by Engle pending determination of whether Margaret Lucille Carswell ("Carswell") is entitled to a share of the proceeds of the sale.

BACKGROUND

[3] Prior to their marriage, the parties signed a Pre-Nuptial Agreement (the "Agreement") which detailed, among other things, what would happen to their Principal Residence if the parties were to "permanently cease to live together."

[4] The parties divorced and the validity of the Agreement was unsuccessfully challenged by Carswell. The Principal Residence was one of the issues in the matrimonial dispute. Pursuant to the Agreement, the parties were to share equally in the value of the Principal Residence and the furnishings. The Agreement provided that Engle would be entitled to exclusive possession of the Principal Residence and could decide whether to sell the home. If Engle elected to sell the Principal Residence, the proceeds would be divided equally between the parties. If Engle elected not to sell the Principal Residence, he was required to pay Carswell one-half of the total of the values of the property and the furnishings.

[5] On two occasions, Engle offered to pay Carswell an amount which he asserted represented one-half the value of the Principal Residence and furnishings. Carswell did not accept either of these offers.

[6] In 2011, Carswell registered a caveat against title to the Principal Residence as a beneficial co-owner pursuant to the Agreement. Later that year, Engle entered into a purchase and sale agreement for the sale of the Principal Residence. Engle brought an application for the removal of the caveat so as to permit the sale of the property. After an earlier hearing, I ordered that the caveat be removed and the sale completed but I ordered that one-half of the proceeds of the sale be paid into court pending determination of whether Carswell was entitled to any of the proceeds of the sale.

POSITIONS OF THE PARTIES

[7] Engle's position is that Carswell's claim to any share of the proceeds of the sale of the Principal Residence is barred by the *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8 (the "*Act*"). Alternatively, Engle claims that Carswell repudiated the Agreement by her rejection of Engle's previous tenders of funds.

[8] Carswell's position is that she is a beneficial co-owner of the property pursuant to trust principles. Further, she has been unable to pursue her claims

arising from the divorce because of a lack of funds, emotional stamina and health issues.

[9] At the hearing on this issue, I provided both parties with an opportunity to file additional written submissions on the issues of unjust enrichment, constructive trust and whether the *Act* was applicable in those situations. Both parties subsequently filed additional materials. Neither party requested the opportunity to file additional materials in response to the other party's written submissions.

[10] Engle's position is that statutory limitations periods apply to constructive trust claims and that the limitation period would have commenced when the parties separated in 1990.

[11] Carswell's position is that a resulting trust was created by the Agreement and that section 15(2) of the *Act* is applicable which she argues exempts the claims of a beneficiary against a trustee for property held on an express trust from the limitation periods in the *Act.* Alternatively, she claims that she was under a disability within the meaning of the *Act.*

IS THE RESPONDENT'S CLAIM BARRED BY THE EXPIRY OF A LIMITATION PERIOD?

[12] The *Act* contains several limitation periods ranging from one year to ten years with an ultimate limitation period of thirty years, in certain circumstances for those operating under a disability. The issue is what limitation period, if any, is applicable to the Respondent's claim.

[13] The first step in determining if Carswell's claim is barred by a limitation period is to determine the nature of her claim. The next step is to determine what, if any, limitation period is applicable.

<u>What is the nature of Carswell's claim?</u>

[14] Carswell has variously referred to her claim as being pursuant to a constructive trust, a resulting trust and an express trust (impliedly through her reference to section 15(2) of the *Act).* These three types of trusts differ from each other and have different requirements.

[15] Generally, a trust exists where "one person in whom property is vested is compelled in equity to hold the property for the benefit of another person, or for some purposes other than his own." *Snell's Principles of Equity,* (28th ed. 1982) at p. 90.

[16] Courts dealing with matrimonial property disputes have dealt with the issues of resulting trusts, constructive trusts and unjust enrichment over the past 30 years or so. The Supreme Court of Canada, in several decisions such as *Petkus* v. *Becker* [1980] 2 S.C.R. 834, *Sorochan* v. *Sorochan* [1986] 2 S.C.R. 38, *Rawluk* v. *Rawluk* [1990] 1 S.C.R. 70, *Peter* v. *Beblow* [1993] 1 S.C.R. 980, and most recently, in *Kerr* v. *Baranow,* 2011 SCC 10, has stated and refined the law in this area. In contrast, there has been little commentary regarding express trusts in matrimonial property disputes.

[17] In *Rathwell* v. *Rathwell,* [1978] 2 S.C.R. 436 at pp. 449 and 451, Dickson J. (as he then was) referred to the creation of express and resulting trusts. Express trusts are created intentionally by the settlor and resulting trusts are also established by intent but the intent is inferred or presumed based upon the circumstances of the case. A problem that courts faced in determining whether the requisite intent could be found was stated as follows (at p. 451):

> If at the dissolution of a marriage one spouse alone holds title to property, it is relevant for the court to ask whether or not there was a common intention, or agreement, that the other spouse was to take a beneficial interest in the property and, if so, what interest? Such agreements, as I have indicated, can rarely be evidenced concretely. It is relevant and necessary for the courts to look to the facts and circumstances surrounding the acquisition, or improvement, of the property. (Emphasis added)

[18] The attempt to find a common intention was viewed as problematic as the common intention was rarely, if ever, expressly stated: *Petkus, supra* at p. 843. Similarly in *Rawluk, supra* at p. 81, Cory J. noted:

> Prior to *Murdoch* v. *Murdoch, supra,* Canadian trust law offered few avenues for a non-titled spouse to gain an interest in matrimonial property held in the name of the other spouse. In the absence of an express trust or a contract a spouse had to establish the existence of a resulting trust.

[19] The Supreme Court of Canada has continued to develop the law surrounding resulting trust, constructive trusts and unjust enrichment. However, very little has

been said in the case law about express trusts in matrimonial property disputes. This is perhaps not surprising as many people do not enter into a relationship or marriage with a clearly stated intention regarding their matrimonial property which has been reduced to writing. What seems clear from the above is that the Supreme Court of Canada has not precluded an express trust from being found in the context of the dissolution of a marriage or common-law relationship.

[20] There have been cases where a trust has been found in the context of the division of matrimonial property. In *Thiessen* v. *Hurd*, [1999] O.J. No. 1854 (S.C.J.), the parties entered into a separation agreement which provided that the husband would pay the wife $16,846.56 which represented the value of her entitlement to the husband's pension plan. The husband did not pay the wife and the court found that the applicant wife had an interest in the pension and her interest was held in trust for the applicant by the respondent.

[21] As well, in *Rombaugh* v. *Rombaugh,* [1993] M.J. No. 375 (Q.B.), the court had ordered that the petitioner receive a percentage of payments of the respondent's pension plan. The respondent failed to make payments and the petitioner applied to the court to vary the order and require the pension administrator to make the payments directly to the petitioner. The court found that while there was no express language creating a trust, the intent and effect of the order was to create a trust for the benefit of the petitioner for her share of the pension payments.

[22] An express trust can arise "when there is actual express agreement that the title-holder will hold the property for the beneficial use of someone else, in whole or in part." *Matrimonial Property Law in Canada,* (2006 – Rel 3) at p. I-40.33.

[23] In this case, the parties entered into an Agreement which stated how they wished to deal with their Principal Residence in the event that their relationship ended. It is this written agreement which forms the basis of Carswell's claim that a trust was created.

[24] To determine whether a trust exists and whether it is an express trust or another form of trust, it is necessary to consider the acts and intention of the settlor. As set out in *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC 60 at para. 83, an express trust is created when there is certainty of intention, subject matter and object. An express trust arises from the acts and intentions of the settlor and is distinguishable from other trusts which arise by operation of law.

[25] In addition, there must also be capacity to create the trust, the trust must be constituted in that the property is transferred to the trustee, and the requisite formalities must be met: *Lupul* v. *Carlson*, 2005 ABQB 418; see also *Oosterhoff on Trusts: Text, Commentary and Materials* (7th ed. 2009) at p. 183.

[26] In this case, the subject matter and object are certain. The subject of the Agreement between Engle and Carswell, in this specific instance, was the Principal Residence and that is clearly stated in the Agreement. It is also clear that the object of, or person to benefit from, the Agreement with respect to the Principal Residence was Carswell. In addition, there are no apparent issues with respect to capacity.

[27] The requisite formalities involve compliance with the *Statute of Frauds,* 1677, (29 Car. 2) c.3 because, as stated in *MacNeil* v. *McLeod-Norris*, 2004 NWTSC 81 at para. 45, the *Statute of Frauds* is applicable in the Northwest Territories and requires that "any contract for the disposition of interests in land must be in writing." The Agreement involves the disposition of an interest in land and is in writing.

[28] The constitution of a trust is typically complete when the title to the property is transferred to the trustee. If, as in this case, the settlor is dealing with property they already own, "then it is merely necessary to identify that property and self-declare a trust": *Oosterhoff, supra* at p. 238. Whether there has been a declaration of trust requires consideration of the intention of the settlor.

[29] The remaining requirement of an express trust is certainty of intention by the settlor to create a trust. There is no requirement for technical words or the word "trust" to be used provided that the intention of the settlor to create a trust can be determined with certainty from the language used in the Agreement. *Oosterhoff, supra* at p. 187; *Waters' Law of Trusts in Canada* (4th ed. 2012) at p. 141.

[30] In considering whether the settlor's intention was to create an express trust, the language used by the settlor will be significant. As stated in *Waters' Law of Trusts in Canada, supra* at p. 20:

> In the common usage of today, the terms "express" and "implied" refer to the intention of the alleged settlor. If he clearly and specifically says that certain property is to be held in trust, then he has created an express trust. Similarly, if his language has to be construed in order for its legal meaning to be discovered, and it is found that the maker of the statement intended a trust, then he has created a trust arising by implied intent.

[31] Determining certainty of intention requires an examination of the obligations of the trustee. A trust exists if a trustee must hold or deal with property for the benefit of or on behalf of the beneficiary. A court may find a trust if satisfied that the person possessed of the property is obliged to hold it for another's benefit. *Oosterhoff, supra* at pp. 187-188.

[32] In considering whether a person is obliged to hold it for another's benefit when there is no use of the term "trust" or trust documentation, certainty of intention can be determined from the surrounding circumstances and evidence:

> In the absence of formal trust documentation, the court must look at the surrounding circumstances and the evidence as to what the parties intended, as to what was actually agreed and as to how the parties conducted themselves to determine whether there was "certainty of intention."
>
> *Byers* v. *Foley* (1994) 16 O.R. (3d) 641 (Ct. (Gen. Div.)) cited in *Elliott (Litigation Guardian of)* v. *Elliott Estate*, [2008] O.J. 4941 (S.C.J.) at para. 26.

[33] In determining whether there was certainty of intention to create a trust, the relevant portions of the Agreement state:

> 2.(3) (a) Robert and Margaret acknowledge that their present principal residence is that property consisting of two lots municipally known as 5 Albatross Court, Yellowknife, Northwest Territories (the "Principal Residence"), which Principal Residence is registered in the name of Robert.
>
> (b) Robert and Margaret agree that in the event that they permanently cease to live together then it is their intention that each of them shall share equally in the then value of the Principal Residence and the furnishings then contained therein.
>
> (c) Robert and Margaret further agree that in the event that they cease to live together Robert shall be entitled to exclusive possession of the Principal Residence and furnishings then contained therein and may elect to sell or not sell that property and furnishings as he may decide.
>
> (d) In the event that Robert elects to sell the Principal Residence and the furnishings contained therein in accordance with the

> preceding paragraph, the proceeds of disposition after deduction of all reasonable expenses shall be divided equally between the parties.
>
> (e) In the event that Robert and Margaret cease to live together and Robert elects not to sell the Principal Residence and the furnishings contained therein as contemplated by the preceding paragraph then Robert shall obtain an appraisal of the current market value of the said property from a qualified real estate appraiser and an appraisal of the current market value of the furnishings from a qualified appraiser.
>
> Thereafter, Robert shall pay to Margaret one half of the total of the said appraised values of the property and the furnishings within ninety (90) days of the receipt of such appraisals. Robert and Margaret agree that the receipt by Margaret of that sum of money shall operate to release any interest which Margaret might have had up to that time in the Principal Residence and the furnishings contained therein whether pursuant to this agreement or otherwise.

[34] There has been no other evidence presented which would indicate what the parties intended. Since the parties' marriage ended, it has been Engle's consistent assertion that the Agreement entitled Carswell to one-half of the appraised value of the Principal Residence and furnishings and nothing more. Carswell has claimed that she is entitled to more than what the Agreement provides. She has consistently challenged the validity of the Agreement but has argued, for the purposes of this application, that the Agreement, though she may not like it, entitles her to at least one-half of the appraised value of the Principal Residence and furnishings.

[35] The Agreement acknowledged that the Principal Residence was registered solely in the name of Engle. It was the clearly stated intention of Engle and Carswell that they would share equally in the value of the Principal Residence and furnishings should they permanently cease to live together. It was Engle's sole option to elect whether he wished to sell the Principal Residence or keep it. Once his election was made, his obligation to Carswell was also clear. If he elected to sell the property, the proceeds of disposition after deduction of all reasonable expenses was to be divided equally between the parties. If Engle elected to keep the property, his obligation was to pay Carswell one-half of the total of the appraised values of the property and the furnishings.

[36] In my view, the Agreement clearly establishes an obligation that requires Engle to hold the Principal Residence for the benefit of Carswell. While it was

within Engle's sole discretion to determine whether the Principal Residence would be sold, this does not change Engle's obligations with respect to Carswell. It was always the intention in the Agreement that Carswell would share equally in the value of the Principal Residence and its furnishings regardless of what election Engle made.

[37] In the circumstances, I am satisfied that the Agreement is sufficiently clear to conclude that there was certainty of intention to create a trust. Therefore, I am satisfied that there was certainty of intention, subject matter and object and the other requisite formalities were met so that the Agreement created an express trust which required Engle as trustee to hold or deal with the Principal Residence for the benefit of Carswell.

What limitation period, if any, is applicable to Carswell's claim?

[38] Carswell has argued that section 15(2) of the *Act* is applicable in this situation and that, as a result, there is no limitation period.

[39] Section 15 of the *Act* provides:

> (1) No action shall be brought to recover a sum of money or legacy charged on or payable out of any land or rent charge, though secured by an express trust, or to recover any arrears of rent or of interest in respect of a sum of money or legacy so charged or payable or so secured, or any damages in respect of those arrears, except within the time within which it would be recoverable if there were no such trust.
>
> (2) Subsection (1) does not operate so as to affect any claim of a *cestui que trust* against his or her trustee for property held on an express trust.

The *Act* is an old one, originating in the 1870's in the United Kingdom. The *Real Property Limitation Act*, 1874, 37 & 38 Vict., c. 57 was incorporated into the law of the Northwest Territories by the Ordinance of the Northwest Territories, No. 28 of 1893, *An Ordinance respecting the Limitation of Actions Relating to Real Property*. Section 10 of the *Real Property Limitation Act* was similar in wording to section 15(1) of the *Act.*

[40] Similarly, section 34 of the *Judicature Act,* R.S.N.W.T. 1988, c. J-1, is also an old provision which is analogous to section 25(2) of the *Supreme Court of Judicature Act,* 1873, 36 & 37 Vict. c. 66 and provides for the rights of a *cestui que*

trust (i.e. a beneficiary with an equitable right in property) against his or her express trustee:

> 34. No claim of a beneficiary against his or her trustee for any property held on an express trust or in respect of any breach of trust shall be held to be barred by any Act limiting the time within which any cause or matter may be commenced.

[41] In the United Kingdom in the 1870's, a series of Acts were passed which imposed or amended limitations periods in regards to trusts, including express trusts. However, none of the changes were intended to interfere with the long-standing principle of equity that no limitation period was applicable as between a claim by a *cestui que trust* against his or her express trustee. The limitations that were imposed were in relation to claims by a beneficiary in situations where there was an allegation of fraud or the trust property had been sold to a purchaser for value. George Spence, esq., *The Equitable Jurisdiction of the Court of Chancery*, Vol. 2 (1850), p. 47; William Brown, *The Law of Limitation as to Real Property* (1869), p. 499; Louis Arthur Goodeve, *The Modern Law of Real Property,* (1883), p. 379; Harry Greenwood, *Recent Real Property Statutes, Comprising Those Passed During the Years 1874-1877 Inclusive,* (1878), p. 58.

[42] It appears that there have been few, if any, substantive changes to the *Act* with respect to trusts in the 120 years since it was first adopted. This is the case for other jurisdictions in Canada as well. The legislation as it exists in the Northwest Territories does not exactly mirror the Acts as they existed in 1870's United Kingdom. This results in some uncertainty regarding the limitations surrounding trusts in general, as stated in *Waters' Law of Trusts in Canada, supra* at p. 1321:

> The Territories also have old-model limitation statutes, but the part concerning trusts and trustees has in each case been omitted, and the territorial law in each jurisdiction appears to be silent on the subject. The consequence in these jurisdictions is that it is not clear which periods of limitation govern the various actions arising out of trusts, or indeed whether the only relevant principles are those of acquiescence and *laches*. Nor is it clear when the constructive trustee, not deemed an "express trustee", has the benefit of a limitation period.

[43] Despite the general uncertainty with respect to the application of limitation periods to trust situations, the effect of section 15 of the *Act* and section 34 of the *Judicature Act* appears to preserve the principle in equity that there is no limitation period applicable to a claim by a beneficiary against a trustee for property held on an express trust or a breach of that trust.

[44] This conclusion is supported by various court decisions in Canada and the United Kingdom which have confirmed that an express trustee could not rely upon a limitation period vis-à-vis the beneficiary of the trust in certain situations. The situations where a limitation period may be applicable vary as a result of the differences in the legislation, as noted above. *Soar* v. *Ashwell*, [1893] 2 Q.B. 390 (Eng. C.A.); *Taylor* v. Davies (1919), [1920] A.C. 636 (Ontario P.C.); *Paragon Finance PLC* v. *D.B. Thakerar & Co.* (1998), [1999] 1 All E.R. 400 (Eng. C.A.); *Central Bank of Nigeria* v. *Williams*, 2012 EWCA Civ 415 (Eng. C.A.).

[45] The conclusions that can be drawn from the cases are as stated by Lord Esher, MR, in *Soar* v. *Ashwell*, *supra* at p. 394:

> The cases seem to me to decide that, where a person has assumed, either with or without consent, to act as a trustee of money or other property, i.e., to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge himself by accounting to his *cestui que trusts* for all such money or property without regard to lapse of time.

[46] Engle has provided the cases of *Angeletakis* v. *Thymaras*, 1989 CarswellAlta 38 (Q.B.) and *Johansson* v. *Fevang,* 2009 CarswellAlta 1542 (Q.B.) as authority for the proposition that statutory limitations periods are applicable to a claim of constructive trust. I do not disagree with the reasoning in *Angeletakis* or *Johansson* however, I am of the view that they are not applicable in the case at bar for two reasons.

[47] First, the bases of the claims are different; the claims in *Angeletakis* and *Johansson* were made pursuant to constructive trust and unjust enrichment principles. While Carswell has variously referred to her claim as arising in constructive trust, resulting trust and by implication express trust, for the reasons stated above, I have concluded that her claim is one of an express trust. The Agreement which establishes Carswell's claim to an express trust is clear regarding the obligations of Engle as the trustee and the intent of the parties with respect to the Principal Residence. In *Angeletakis* and *Johansson*, the claims were not based upon a written agreement and there was no clear evidence that the parties had agreed about the ownership of the properties which were registered in the sole name of one

of the parties or that they had a common intention regarding the properties in question.

[48] Second, the *Limitations of Actions Act*, R.S.A. 1980, c. L-15, and the subsequent *Limitations Act*, R.S.A. 2000, c. L-12, which were applicable in Alberta in *Angeletakis* and *Johansson*, respectively, differ significantly from the *Act* in this jurisdiction.

[49] The *Limitations of Actions Act* had a specific section relating to trusts and trustees. The analysis in *Angeletakis* considered the applicability of section 41(2) of the *Limitations of Actions Act* which provided that a limitation period could be raised except when the claim was founded on fraud or a fraudulent breach of trust or to recover trust property or proceeds still in the possession of the trustee. The court concluded that the exception created in section 41(2) was not applicable to constructive trust claims. Section 41 does not have an equivalent section in our *Act* (as noted in paragraph 42 above). The issue of whether a claim in constructive trust is subject to a limitation period in the Northwest Territories is uncertain and an issue to be decided on another day.

[50] The *Limitations Act*, which was considered in *Johansson*, also differs significantly from our *Act* and from its predecessor, the *Limitations of Actions Act*, and there is no provision in the *Limitations Act* that specifically deals with trusts, express or otherwise.

[51] In the circumstances, I am satisfied that Carswell's claim against Engle as a beneficiary against an express trustee is not subject to a limitation period pursuant to section 34 of the *Judicature Act* and section 15(2) of the *Act.*

Does *Laches* or Acquiescence bar Carswell's claim?

[52] While there is no applicable limitation period, section 49 of the *Act* permits a court to refuse relief due to acquiescence or another ground of equitable relief. *Laches* and acquiescence are defences to claims in equity and have been found applicable in family cases: *Wilson* v. *Fotsch*, 2010 BCCA 226; *Lawrence* v. *Lindsay*, [1982] A.J. No. 33 (Q.B.).

[53] If a beneficiary acquiesces in some way to a breach of trust, it may bar that beneficiary from pursuing a claim against the trustee. Similarly, *laches* is an

unreasonable delay which can also bar a beneficiary from pursuing a claim. *Waters' Law of Trusts in Canada, supra* at pp. 1303, 1321.

[54] Determining whether *laches* or acquiescence have been established will depend on the circumstances in each case:

> What the defending party must prove in order to establish *laches* and acquiescence is very much a question of fact in the circumstances of each case. It is very difficult to lay down rules on this, and the courts have refrained from doing so. By and large, when delay is in question the court is concerned with the justice of giving the remedy sought as between the parties.
>
> *Waters' Law of Trusts in Canada, supra* at p. 1323.

[55] The parties signed the Agreement on June 22, 1987, shortly before they married. Engle states that the parties separated in 1990 whereas Carswell has referred to a later date in some of her documents. In any event, Engle filed for divorce on February 18, 1992 and a divorce was granted on August 17, 1993.

[56] Pursuant to the Agreement, when the parties permanently ceased to live together, Engle was required to make an election. Engle could elect to keep the Principal Residence. If he did so, then he was required to obtain an appraisal of the current market value of the property and furnishings from a qualified real estate appraiser. Within 90 days of receiving the appraisal, Engle was required to pay Carswell one-half of the appraised value of the property and furnishings. Engle's other option was to sell the property in which case, the proceeds of sale after the deduction of expenses would be shared equally between Engle and Carswell.

[57] There was no timeframe included in the Agreement by which Engle was to make his election. After the parties separated, Engle apparently elected not to sell the Principal Residence, although there is no evidence regarding when he made this election or the circumstances in which this may have been communicated to Carswell.

[58] On June 3, 1992, Engle received an appraisal from Jerry O'Donoghue, President of Igloo Real Estate, which referred to an earlier appraisal completed on March 31, 1992. The appraised value of the Principal Residence was estimated, as of March 31, 1992, as $350,000 and the value of the furnishings at $35,000 for a total value of $385,000.

[59] Following the filing of the Petition for Divorce, Carswell challenged the Agreement and following a hearing, the Agreement was found to be a valid agreement on February 9, 1995. Carswell appealed the decision to the Northwest Territories Court of Appeal which dismissed her appeal on December 19, 1997. The Judgment was entered on May 12, 1998.

[60] During this time, Carswell had also commenced legal proceedings in California for child support and spousal support. According to Carswell, a ruling on child support was made in 1996. In May 2002, Carswell had filed an application for spousal support in California. The court in California apparently made a decision on that application in September 2005.

[61] Some ten years following the receipt of the appraisal, on July 8, 2002, counsel for Engle wrote to Carswell offering her US$125,000 which he asserted represented one-half the value of the Principal Residence and furnishings. The letter alluded to a previous offer which had apparently been made on March 8, 1999. No evidence has been presented regarding this offer or the terms upon which it was made. On June 30, 2005, counsel for Engle wrote to Carswell's counsel offering Carswell $192,500. Carswell did not accept any of these offers.

[62] In 2006, Engle applied to have the divorce action dismissed for want of prosecution. By then, the only remaining issues were the matrimonial property issues. After a hearing, the action was dismissed: *Engle* v. *Carswell*, 2006 NWTSC 03. In doing so, Foisy J. noted at p. 4:

> In granting the application to dismiss, I am mindful of Mr. Kenny's representation to the Court that the Respondent is not statute-barred from proceeding against the Applicant for her share of the Yellowknife residence. The offer of payment of $197,000 more or less by the Applicant to the Respondent still stands. The Respondent may want to litigate the value given in the appraisal or other relevant or pertinent matters relating to the Yellowknife residence.

[63] On July 28, 2011, Carswell registered a caveat against title to the Principal Residence as a beneficial co-owner pursuant to the Agreement.

[64] It is clear from a review of the Affidavit evidence filed on these applications that a significant period of time has passed since the parties permanently separated. However, it is not merely the passage of time that the court must consider. The

litigation between the parties has been lengthy and complicated and spanned different jurisdictions.

[65] Following the separation of the parties, Carswell pursued her claim to the Principal Residence at various times. However, there have also been periods, significant periods, where Carswell has not been diligent in pursuing her claim. She has attributed these delays to a lack of funds, lack of emotional stamina and health issues that she has suffered. Despite the delays, Carswell has consistently stated that she wished to have the matrimonial property issues resolved. Her position has been that she is entitled to more than what the Agreement provides.

[66] The actions of Engle must also be considered and balanced against the delays and passage of time. There is no evidence that Engle made any attempt to pay Carswell within 90 days of the receipt of the appraisal as required by the Agreement. The first clear evidence of an offer to pay Carswell what she was owed under the Agreement occurs in 2002, some 10 years following the appraisal. No explanation is offered for this delay.

[67] In addition, the offer made in 2002 required Carswell to sign a release, the terms of which are not in evidence. The 2005 offer, however, clearly required Carswell to sign a release which relinquished her claim to not just the Principal Residence but any other property owned by Engle, directly or indirectly through any corporation. This is contrary to the terms of the Agreement which provided that the receipt by Carswell of one-half of the value of the Principal Residence and furnishings would operate as a release for Carswell's interest in the Principal Residence and furnishings. The Agreement did not require Carswell to release any claim she might have had to Engle's other properties.

[68] In the circumstances, I find it difficult to conclude that Engle as a trustee has met his obligation to Carswell as required by the Agreement. To bar Carswell's claim due to acquiescence or *laches* in these circumstances would be fundamentally unfair and would reward Engle for his own failure to live up to his agreed upon obligations. Justice requires that Engle do what he agreed to do: pay Carswell one-half of the value of the Principal Residence and furnishings.

[69] Engle has also argued that Carswell has repudiated the Agreement through her refusal to accept the tenders of payment made to her by Engle which she was required to accept as stipulated in the Agreement.

[70] Repudiation is a term applicable to the law of contract and I am not aware of any authority that it is applicable in the case of an express trust. A beneficiary can terminate a trust pursuant to the rule in *Saunders* v. *Vautier* (1841), 4 Beav. 115, 49 E.R. 282, affirmed (1841), 1 Cr. & Ph. 240, 51 E.R. 482 referred to in *Oosterhoff on Trusts*, *supra* at pp. 332-335; see also *Waters Law of Trusts in Canada*, *supra* at p. 1235-1240. This rule, stated simply, permits a beneficiary to modify or extinguish the trust and compel the trustee to transfer the trust property to him. The rule, as I understand it, is not applicable because Carswell has not expressly sought the modification or extinguishment of the trust.

[71] Further, as stated above, while Carswell did not accept the offers as she was obliged to do, Engle has himself not complied with the requirements of the Agreement. There is no evidence that he attempted to comply with the requirement that he pay Carswell within 90 days of the receipt of the appraisals and at least one of the offers to pay Carswell was made contrary to the terms of the Agreement.

[72] In the circumstances, assuming repudiation might be applicable to a trust situation, I do not find Engle's argument that Carswell has repudiated the trust agreement convincing given Engle's own behavior.

[73] With respect to what Carswell's share of the value of the Principal Residence should be, no evidence has been provided with respect to the appraisal that was completed on March 31, 1992. The appraisal of June 3, 1992 refers to the earlier appraisal and appears to consist of a one page letter, with several pages of handwritten notes appended which apparently state the estimated value of furnishings in the Principal Residence.

[74] Carswell has claimed that Mr. O'Donoghue was not a qualified appraiser based upon her personal knowledge of him. Neither party has presented any evidence regarding the qualifications or lack thereof of Mr. O'Donoghue or any alternate means of assessing the then value of the Principal Residence and its furnishings. In the circumstances, there is no basis to conclude that the appraisal conducted by Mr. O'Donoghue was not a valid appraisal or was not conducted by a qualified appraiser.

[75] Therefore, I conclude that the value of the Principal Residence and its furnishings was $385,000 as stated in Mr. O'Donoghue's appraisal of June 3, 1992. The entitlement of Carswell is to one-half of the appraised value of the Principal Residence and furnishings at the time of separation.

[76] I have also considered how to assess Carswell's entitlement given the passage of time and the apparent increase in value of the Principal Residence. No evidence has been presented regarding the accuracy of the appraised value of the Principal Residence and furnishings in 1992. The offer in the purchase and sale agreement for the property and furnishings was $685,000 in 2011. That is the only evidence of the value of the Principal Residence today. As well, no evidence has been presented regarding any improvements that Engle might have made to the Principal Residence in the intervening years or otherwise accounting for the increase in value of the Principal Residence. There has also been no evidence presented about the effects of inflation: what $192,500 in 1992 would equate to in 2014. Given the lack of evidence in these areas, the passage of time, and not wishing to further prolong the proceedings, I have concluded that there should be no adjustment for the increase of value of the Principal Residence in the intervening years. As such, Carswell is entitled to one-half of the value of the Principal Residence and furnishings at the time of separation which is approximately $192,500.

[77] In the circumstances, there will be an Order directing:

1) The Clerk of the Court to pay to the Respondent the sum of $192,500 from the amount paid into court from the sale of the Principal Residence;
2) The Clerk of the Court to pay the balance of the amount paid into court from the sale of the Principal Residence to the Applicant.

[82] There will be no order as to costs.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
20th day of February 2014

Counsel for the Applicant: James Thorlakson
The Respondent represented herself

S-1-CV-2012000001

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ROBERT PARSONS ENGLE

Applicant

- and -

MARGARET LUCILLE CARSWELL

Respondent

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE S.H. SMALLWOOD
