

The Family Trust – It could be Matrimonial Property

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Constructive Trust Claims

Presented by:
Karen Platten QC (Edmonton Only)
and Kate Faught (Calgary Only)
McLennan Ross LLP
Edmonton, Alberta

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INTRODUCTION

Imagine that you are a knight in the Middle Ages. Your conscience calls you to go off and fight for your church and for the Holy Land. You affix a cross to your garments and you are ready to go. But first, you must get someone to tend your land. Your neighbour is not going off to the Crusades so you transfer your land to him to enable him to deal with the land in your absence and off you go, content that all is in order.

Four years later you return, older, wiser and needing to get back to the life you knew before continuous, bloody war. You go to your neighbour and ask for your land back but he refuses. You are enraged but powerless so you go to your King, who now owes you because you have been crusading for four years while he has been sitting at home on his throne. The King demands that your neighbour to return your land to you and you are once more content.

In effect, for the first time in law, legal title and beneficial ownership were split to allow for justice to be served.¹ Therefore, the modern trust has been more than 900 years in the making. A long time to hone the concept. Of course, trusts have been used for many purposes throughout the years with protection of assets as the primary goal.

Trusts are a creature of equity, created to rectify an unjust situation. Where a trust is properly created and used to protect assets, it is generally thought to be unassailable. However, where it is created to defeat someone with a legitimate claim on the assets in the trust, the Court of Equity will step in to rectify the situation. There are many examples of this in trust law, the trust used to hide wealth from a creditor for one.

And this brings us to the matrimonial claims against family trusts.

¹ Richard Edwards, *Trusts and Equity*, 6th edition, (Pension Education Limited, 2004) at page 5