

**Resulting and Constructive Trust Claims Relating to the
Matrimonial Home Including Occupation Rent**

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In the context of property issues, the crown jewel of assets in family law in Ontario can be said to be the matrimonial home. The matrimonial home's sacrosanct and elevated stature is consistently reflected throughout numerous provisions within the *Family Law Act* including specific and detailed provisions relating to its disposition, relating to its deduction / inclusions within the NFP statement for purposes of equalization payments, occupation and exclusive possession and relating to its use and enforcement provisions as security and so forth.

This paper is directed to the following two specific areas interrelated with the matrimonial home: Occupation rent and determination of ownership of the matrimonial home through constructive or resulting trust.

OCCUPATION RENT

Background:

The remedy has its origins in commercial and agricultural disputes, arising out of contracts or disputes between landlords and tenants. Occupation rent has slowly found acceptance within the context of family law litigation as a remedy between spouses who are co-tenants or co-owners of a matrimonial home. Today, claimants and the courts recognize occupation rent as another avenue to achieving one of the core goals of the *Family Law Act*: financial fairness between parties.¹

¹ *Higgins v. Higgins*, [2001] O.J. No. 3011 at para. 55 (S.C.J.).

Section 24(1)(c) of the *Family Law Act* authorizes the court to order a spouse, granted exclusive possession of the matrimonial home, to make periodic payments to the other spouse. While there is no jurisdiction under the *Family Law Act* to make an order for occupation rent absent an order for exclusive possession,² the remedy is not restricted to these circumstances. At common law, an order providing exclusive possession is not a prerequisite.³ The occupation rent remedy is available to all litigants with an interest in the matrimonial home, where in the circumstances it would be just and equitable.

Who can seek the remedy: Spouses (under FLA) and Joint owners & Common law spouses under common law.

What: Occupation rent is a discretionary remedy that depends largely on the circumstances of each case. In dealing with claims for occupational rent, the courts attempt to achieve justice and financial fairness between the parties.⁴

When: The court has jurisdiction to grant occupation rent by statute or common law and awards it where it would be equitable and reasonable to do so.⁵

OTHER REMEDIES INSUFFICIENT TO ACHIEVE A JUST AND EQUITABLE RESULT

While occupation rent is a remedy available at common law, the claimant must be able to show that other available remedies are insufficient to render justice between the parties. In *Foffano v.*

² *McKinlay v. McKinlay* (1996), 22 R.F.L. (4th) 211 (Ont. Gen. Div.); *Jones v. Jones* (2000), 8 R.F.L. (5th) 107 (Ont. S.C.J.).

³ *Higgins v. Higgins*, supra note 1; *Johnston v. Johnston*, [1998] O.J. No. 5495 (Ont. Gen. Div.).

⁴ *Foffano v. Foffano* (1996), 24 R.F.L. (4th) 398 (Ont. Gen. Div.).

⁵ *McColl v. McColl* (1995), 13 R.F.L. (4th) 449 (Ont. Gen. Div.).

Foffano,⁶ Mr. Justice Steinberg held that the claimant must first show that remedies to gain possession of the property, to receive payments from the spouse in possession, or to receive support from the spouse in possession set out in the *Family Law Act* are either unavailable or insufficient to achieve an equitable result.

BALANCING EQUITIES

In the most often quoted decision on the issue of occupation rent, *Irrsack v. Irrsack*,⁷ Mr. Justice Lerner made an order for the payment of occupation rent, holding that “the equitable approach is to allow her one-half of the rent, to this date, that these premises would attract, less one-half of the taxes and insurance for the same period.”⁸

In *Higgins v. Higgins*, Mr. Justice Quinn stated as the governing rule relating to an awarding of occupation rent, that where an order for occupation rent is made against an occupying spouse, credit should be given for the expenses borne by that occupying spouse incurred in respect of the matrimonial home.⁹ Similarly, where a claim is made by the occupying spouse for contribution and participation towards such expenses by the non-occupying spouse, he or she must be prepared to submit to an allowance for occupation rent.¹⁰ “Any exception to this rule will arise only where justified in the particular circumstances of the case.”

⁶ *Foffano v. Foffano*, supra note 4.

⁷ *Irrsack v. Irrsack*, (1978), 22 O.R. (2d) 245 (H.C.) (affirmed (1979), 27 O.R. (2d) 478 (C.A.), leave to appeal to S.C.C. refused [1980] 1 S.C.R. vii (note)).

⁸ *Ibid* at page 249.

⁹ See also, *Gill v. Jhaji* (2003), 37 R.F.L. (5th) 338 (Ont. S.C.J.).

¹⁰ See also, *Erb v. Erb*, (2003), 41 R.F.L. (5th) 49 (Ont. S.C.J.).

In *Griffiths v. Zambosco*,¹¹ the Court of Appeal held that in circumstances where the parties owned the matrimonial home jointly, it was proper to reduce the rent obligation of the occupying spouse by 50%, and correspondingly to reduce the credits for the expenses in maintaining the matrimonial home by 50%.

Where payments for the maintenance of the matrimonial home are made by the occupying spouse, any claim for occupation rent must be scrutinized carefully. Except in the rare instances where the occupying spouse intended the benefit of these payments as a gift to the non-occupying spouse, the unconscionability provisions of the *Family Law Act* will come into play.¹²

CALCULATING OCCUPATION RENT

To achieve the overall aim of true financial fairness, an order for occupation rent should not simply offset the expenses of the occupying spouse against the non-occupying spouse's claim for occupation rent. Actual calculations ought to be undertaken in each case, which results the court has the discretion to adjust, after taking into consideration all of the circumstances.¹³

Therefore, in order to determine the amount of occupation rent that is reasonable in the circumstances, the court must be offered real and supported evidence relating to the amount of rent the premises would generate,¹⁴ and the expenses in maintaining the premises. Where there is

¹¹ *Griffiths v. Zambosco* (2001), 54 O.R. (3d) 397 (C.A.), add'l reasons at (2001), 23 R.F.L. (5th) 74 (Ont. C.A.)

¹² *Higgins v. Higgins*, supra note 1.

¹³ *Higgins v. Higgins*, supra note 1.

¹⁴ See *Szuflita v. Szuflita Estate*, [2000] O.J. No. 746 (S.C.J.).

a lack of evidence relating to the appropriate rent to be considered, the court may refuse to grant occupation rent.¹⁵

FACTORS GOVERNING AWARD OF OCCUPATION RENT

A number of factors have been considered by the court in determining when to exercise its discretion to award occupation rent. Mr. Justice Quinn set out in *Higgins v. Higgins*¹⁶ some of these considerations:

- a) the conduct of the non-occupying spouse, including failure to pay support;
- b) the conduct of the occupying spouse, including the failure to pay support;
- c) delay in making the claim;
- d) the extent to which the non-occupying spouse has been prevented from having access to his or her equity in the home;
- e) whether the non-occupying spouse moved for the sale of the home and, if not, why not;
- f) whether the occupying spouse paid the mortgage and other carrying charges of the home;
- g) whether children resided with the occupying spouse and, if so, whether the non-occupying spouse paid, or was able to pay, child support;
- h) whether the occupying spouse has increased the selling value of the property; and
- i) ouster is not required, as once was thought in some early decisions.

CONDUCT OF NON-OCCUPYING SPOUSE

¹⁵ *Armstrong v. Armstrong* (1979), 1 F.L.R.A.C. 478 (Ont. H.C.); *Bauer v. Bauer*, [2005] O.J. No. 2307 (S.C.J.).

¹⁶ *Higgins v. Higgins*, supra note 1 at para. 53.

In *Parlevliet v. Parlevliet*,¹⁷ the wife had been forced to leave the matrimonial home with four small children and take residence in a motel before securing other accommodation. The husband had been both physically and verbally abusive during long periods of excessive drinking. The court ordered occupation rent payable by the husband.

In *Erb v. Erb*,¹⁸ the court reduced the amount of the occupation rent payable by the wife immediately following separation, where the separation had come as a surprise. While the wife was on vacation visiting her family in Nova Scotia with the parties' seven year-old son, the husband left town with the neighbour's wife. The wife was granted a notional "grace" period of ten months, where her occupation rent obligations were halved. In the circumstances, Justice Glithero found that her continued occupancy of the matrimonial home during this period was attributed to "reality and necessity rather than reasoned choice."¹⁹

In *Airst v. Airst*,²⁰ the husband had delayed proceedings because it was more financially advantageous just to continue paying for the maintenance of matrimonial home than to submit to paying spousal support to his wife of 30 years. Fifteen years after separation when the matter was finally brought to trial, the husband made a claim for occupation rent. Justice Wein denied this claim.

CONDUCT OF OCCUPYING SPOUSE

¹⁷ *Parlevliet v. Parlevliet* (1984) 39 R.F.L. (2d) 260 (Ont. Co. Ct.).

¹⁸ *Erb v. Erb*, supra note 10.

¹⁹ *Ibid* at para. 76.

²⁰ *Airst v. Airst*, [1998] O.J. No 2629 (Ont. Gen. Div.); aff'd [1998] O.J. No. 5195 (C.A.).

In *Goeldner v. Goeldner*,²¹ the trial judge found that the wife's conduct contributed to a delay in selling the matrimonial home. As such, the judge ordered, and the Court of Appeal upheld, an award of occupation rent for approximately one-half of the period that the wife had exclusive possession. The wife had failed to make full financial disclosure at the outset of negotiations with respect to her income and her assets. While the parties were negotiating interim support, the wife failed to disclose a \$128,000.00 inheritance she had received post-separation.

DELAY IN MAKING CLAIM

In *Butsky-Plekan v. Plekan*,²² the husband had consented to an order granting the wife exclusive possession. The parties then entered into Minutes of Settlement, whereby the husband purchased the matrimonial home and the wife agreed to vacate the premises. Three months after the wife vacated, the husband made a claim for occupation rent for the period where the wife had exclusive possession. Justice Scime denied the husband's claim for occupation rent, stating, "rarely, if ever, should a spouse who has consented to exclusive possession, remain silent as to occupational rent while at the same time negotiating Minutes of Settlement in regard to spousal support, then bank a claim for occupational rent."²³

In *Szuflita v. Szuflita Estate*,²⁴ the wife continued to reside in the matrimonial home following the death of her husband. The wife was only one of the beneficiaries of the matrimonial home under her late husband's will, with the residue to go to other beneficiaries. During her occupancy, the wife paid for the heat and hydro. The wife initiated her claim for an equalization under s. 5(2) of the *Family Law Act* in November 1995. The estate did not make a claim for occupation rent until

²¹ *Goeldner v. Goeldner*, [2005] O.J. No. 86 (C.A.).

²² *Butsky-Plekan v. Plekan*, 2005 CanLII 11194 (ON S.C.).

²³ *Ibid* at para. 68.

²⁴ *Szuflita v. Szuflita Estate*, *supra* note 14.

it served and filed its amended defence in October 1998. The court found that while the estate may have been denied the opportunity to access the equity of the property, the estate did benefit from the increased equity in the home. The estate had not moved with alacrity in making its claim for occupation rent, so no rent was ordered payable to the time of the trial. The court did, however, order the wife to pay prospective occupational rent to the estate, until she terminated her tenancy on two months notice.

ACCESS TO EQUITY IN HOME

In *De Acetis v. De Acetis*,²⁵ an order was made directing the sale of the matrimonial home. By the May 1991 trial date no sale had taken place. The husband, who had exclusive possession of the matrimonial home during this period, thwarted the efforts of the realtor to sell the home, while enjoying the use of the home. He conducted his business from the home and shared the home with his live-in girlfriend, but failed to make payments on the mortgage. Justice Greer awarded the wife exclusive possession of the home to allow her to arrange for its marketing and sale. In the event that the husband refused to vacate the matrimonial home, the husband was ordered to pay \$500 per month in occupation rent from the date of the trial onwards.

In *Szuflita v. Szuflita Estate*,²⁶ the court held that while the estate could argue that the beneficiaries had been denied the opportunity to access the equity in the property, denied the claim for occupation rent for the period prior to the trial. The other beneficiaries had been denied their equity, but the wife as a beneficiary to the estate had also been denied her share of the equity, even though she had the use and benefit of the home.

²⁵ *De Acetis v. De Acetis* (1991), 33 R.F.L. (3d) 372 (Ont. Gen. Div.), aff'd (1992), 39 R.F.L. (3d) 327 (Ont. C.A.).

²⁶ *Szuflita v. Szuflita Estate*, supra note 14.

RESULTING AND CONSTRUCTIVE TRUSTS

Property, for the purposes of the *Family Law Act*, is broadly defined to include beneficial interests arising from express, resulting and constructive trusts.²⁷ These equitable remedies allow both married and unmarried non-titled spouses to share in the matrimonial home, where it would be equitable in the circumstances to do so.

Resulting and constructive trusts seek to address different situations leading to inequity. The following is a very brief overview of the two remedies and the elements necessary to make a successful claim for relief.

RESULTING TRUSTS

A resulting trust arises where one party transfers or contributes to the purchase of property taken in the name of another party, and where there is no evidence that the first party intended to make a gift of the entire beneficial interest in the property.

The presumption of advancement as between married parties has been replaced with the general presumption of resulting trust. Where both parties contribute to the purchase price but title is only placed in the name of one party, or where one party contributes the entire purchase price and places title in the name of the other party, the law presumes that the parties did not intend a gift, and instead presumes the parties intended that the property be shared.

²⁷ *Rawluk v. Rawluk* (1990), 23 R.F.L. (3d) 337 (S.C.C.).

The *Family Law Act* recognizes this presumption, but as an exception specifies that where the property is held by the parties in joint tenancy, the parties intended to own the property as joint tenants, without reference to the contributions of each party.²⁸ The court will not scrutinize the decision of married parties to take ownership of property in joint tenancy, unless there is evidence to contradict the presumed intention to hold the property in joint tenancy.

CONTRIBUTION TO PURCHASE OF PROPERTY

In *Pettkus v. Becker*,²⁹ the court held that for a resulting trust to be found, there must be a “common intention” that the party without legal title should receive an interest in the property. Very rarely will there be an express manifestation of this “common intention”, such as a written agreement. Instead, this intention must be established from the conduct of the parties. The most pertinent conduct surrounds the purchase of the property. Where the non-titled spouse made a direct financial contribution to the purchase of the property, there is evidence that the parties intended both parties to have an interest in the property. Where there is no direct contribution, courts will consider evidence of indirect benefits conferred to the titled spouse.

In *Hamilton v. Hamilton*,³⁰ the court held that the contribution in question is direct financial contribution to the acquisition of the property. The family cottage had been purchased with money gifted to the parties jointly by the husband’s mother, but title had been taken in the wife’s name alone. As the husband had contributed to the purchase price as a joint donee of his mother’s gift, the presumption of resulting trust conferred to him an equitable interest in the cottage to the extent of this contribution.

²⁸ *Family Law Act*, R.S.O. 1990 c. F.3, s. 14.

²⁹ *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257 (S.C.C.).

³⁰ *Hamilton v. Hamilton* (1996). 92 O.A.C. 103, [1996] O.J. No. 2634 (C.A.).

In *Dale v. Salvo*,³¹ the Applicant sold her house and moved in with the Respondent in his house. The Applicant financially committed herself to the relationship by opening up a joint bank account with the Respondent wherein she deposited her entire pay, paying some of the Respondent's tax arrears, signing as a guarantor on the Respondent's mortgage, and making mortgage payments. Justice Genesee denied the Applicant's resulting trust claim as the Applicant had not made any financial contribution to the actual purchase of the property. However, an unjust enrichment of the Respondent was found, and a constructive trust was ordered to remedy this enrichment.

In *Harris v. Harris*,³² the parties had dated for approximately two and one-half years before marriage. While the parties were dating, the husband purchased lands and constructed the home where they cohabited for a total of thirteen weeks, inclusive of pre-marital and marital cohabitation. The husband paid \$2.3 million for the lands and the construction of the house entirely with his own funds, and was listed as the sole owner on title. The wife claimed that the husband had both intended and indicated through his actions, that the house was to be jointly held property. The wife's evidence of the husband's intention was not strong, and her contribution to the property was restricted to the purchase of light fixtures, for which she was reimbursed, and choosing finishes for the home. Justice Scott found the wife's contributions to the property to be minimal and insufficient to establish a resulting trust.

REBUTTING PRESUMPTION

In *Launchbury v. Launchbury*,³³ the court held that the presumption of resulting trust is defeated where the purpose of the transfer is to defeat existing or "real" creditors. Where there are no

³¹ *Dale v. Salvo*, 2005 CanLII 25893 (ON S.C.).

³² *Harris v. Harris*, [2005] O.J. No. 3466 (S.C.J.).

³³ *Launchbury v. Launchbury*, [2001] O.J. No. 1516 (S.C.J.) aff'd 2005 CanLII 10640 (ON C.A.).

creditors or merely the uncertain spectre of creditors, the resulting trusts claim is allowed. In this case, the parties had agreed to place the matrimonial home in the wife's name alone because of the husband's dangerous job as an undercover police officer. He had charges laid against him in the past and had previously been named as a defendant in a civil suit. To avoid having the matrimonial home compromised in the event of future charges, the parties had mutually agreed to place title solely in the wife's name.

In *Perks v. Perks*,³⁴ the husband transferred interest in his house to the wife, and contemporaneously had the wife sign a trust declaration, stating that she had no beneficial interest in the property. A lawyer with his own practice, the husband explained this transaction as a protection against potential liability. The wife wished to maintain her ownership of the property. The presumption of resulting trust placed the onus on the wife to rebut this presumption and to prove that the transfer was a gift. She failed to discharge this onus, and was found to hold the property in trust for the husband.

CONSTRUCTIVE TRUSTS

Constructive trusts in the family law context are remedial in nature and seek to rectify an unjust enrichment between parties.³⁵

Unjust enrichment arises where three elements are satisfied: (1) there is an unjust enrichment by one party, (2) there is a corresponding deprivation by the other party, and (3) there is no juristic reason for the enrichment. Where these three pre-conditions are established, courts will consider reversing this unjust enrichment by imposing a constructive trust, with the titled party holding the

³⁴ *Perks v. Perks*, [2003] O.J. No. 125 (S.C.J.).

³⁵ *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436.

property for the benefit of the non-titled party. However, constructive trust is only one possible remedy to address unjust enrichment. The court must decide on an examination of all of the circumstances whether this is the appropriate remedy for the case, or whether a personal remedy would be better suited.³⁶

Where the unjust enrichment relates to property, such as the matrimonial home, there must be a causal connection, or “a clear link”, between the contributions of the untitled spouse and the property.³⁷ The extent of the contributing party’s interest will be in proportion to his or her contribution.³⁸

Unlike the resulting trust remedy, the constructive trust remedy is not confined to cases where the non-titled spouse provided contributions to the acquisition of the property. A contribution relating to the preservation, maintenance or improvement of property may also suffice.³⁹

CONSTRUCTIVE TRUST VS. PERSONAL REMEDY

Constructive trust is only one possible remedy to rectify an unjust enrichment. A monetary award should first be considered, and a constructive trust should only be imposed where a monetary remedy is insufficient in the circumstances.⁴⁰ The amount of the monetary award is calculated on a value received basis, rather than a value conferred basis.⁴¹ The value received represents the unjust enrichment, although the conferring party may have contributed an amount that is greater or lesser than the value received by titled party.

³⁶ *Peter v. Beblow*, [1993] 1 S.C.R. 980 44.

³⁷ *Pettkus v. Becker*, supra note 29.

³⁸ *Peter v. Beblow*, supra note 36.

³⁹ *Sorochan v. Sorochan* (1986), 29 D.L.R. (4th) 1 (S.C.C.).

⁴⁰ *Bell v. Bailey* (2001), 20 R.F.L. (5th) 272 (Ont. C.A.).

⁴¹ *Roseneck v. Gowling* (2002), 62 O.R. (3d) 789 (C.A.).

Where a constructive trust is imposed, the proprietary interests of the parties are affected. Such an order may require the partition and sale of land to give true proprietary relief. Wherever possible, the less intrusive *in personam* judgment should be granted.

CONSTRUCTIVE TRUST IMPOSED

After failing to find the necessary elements to impose a resulting trust, Justice Genesee considered the circumstances in *Dale v. Salvo*⁴² to find an unjust enrichment and granted the Applicant a constructive trust interest. The Applicant had sold her house upon entering into cohabitation with the Respondent, and applied the meagre proceeds of the sale to reduce the property taxes owing on the Respondent's house. Justice Genesee held that the parties "could not have done anything more consistent with joint ownership."⁴³ Further indicia, such as the parties' decision to set up a joint bank account out of which all bills, including the mortgage, were paid supported the decision to grant a constructive trust to remedy the unjust enrichment in this case.

In *Parnell v. Viger*,⁴⁴ the parties cohabited for thirteen years. The wife did the majority of the indoor housework and assisted the husband as much as possible outdoors. The wife raised the parties' two children, as well as spending significant amounts of time with the husband's older son. The parties also had a joint bank account into which they both contributed 75% of their respective income. The husband took out a mortgage on the home and used funds in part to purchase a boat. Although the wife had the benefit of a home in which to live, Justice Matheson found that the husband had been unjustly enriched. The Court of Appeal upheld his decision

⁴² *Dale v. Salvo*, supra note 31.

⁴³ *Ibid* at para. 55.

⁴⁴ *Parnell v. Viger* (2003), 41 R.F.L. (5th) 327 (Ont. S.C.J.).

granting a constructive trust in favour of the wife respecting the home and the boat based on the wife's direct and indirect contributions.⁴⁵

CONSTRUCTIVE TRUST REFUSED

In *Sanders v. Lacaille*,⁴⁶ the common law husband outright told his wife on several occasions throughout their relationship that he would not place her on title to his lakefront property, although they owned two other properties jointly. The husband owned the lakefront property before their relationship began, but undertook significant renovations during the relationship. Although the judge did not accept the wife's evidence of physical contributions to the renovations, Justice MacLeod did find that she had purchased some items for the home, including the dishwasher and tile, ran errands for the workers completing the renovations, and had contributed to the interior design and landscaping of the property. Furthermore, the wife signed as a guarantor on the second and third mortgages on the property. Without the wife's steady income and her guarantee, the husband would not have been able to refinance the property and pay for the renovations. Justice MacLeod found that the husband had been unjustly enriched by the wife, but held that the proper remedy in the circumstances was a monetary award. The wife knew from the outset that the husband had no intention of benefiting her with an interest in the home. The husband was entitled to a declaration that he was the sole owner of the property.

POST-VALUATION DATE INCREASE

Trust claims are often made by non-titled parties to take advantage of post-valuation date increases in equity. Under the *Family Law Act* property division provisions, equalization

⁴⁵ *Parnell v. Viger*, 2005 CanLII 8665 (ON C.A.).

⁴⁶ *Sanders v. Lacaille*, 2005 CanLII 18722 (ON S.C.).

payments are calculated based on valuation date values. Where only one party is the titled owner, any increase in value post-separation is enjoyed exclusively by that party.

As unmarried parties have no interest in one another's property, an *in personam* remedy will generally achieve the same result as an *in rem* remedy, if the value received method is applied. However, as married parties have an interest in equalization, granting a remedial constructive trust will allow the non-titled party to share in any increased equity in the property that has accrued post-valuation date, rather than limiting the remedy to a monetary award based on the value of the asset on the date of separation.⁴⁷

REVERSE CONSTRUCTIVE TRUST

Although it is more unusual, a reverse constructive trust can be claimed where there has been a severe decrease in the value of an asset post-separation. In these circumstances, the titled party seeks to share the decline in the value of the asset in any equalization calculation. The titled owner would have the onus of establishing unjust enrichment such that the non-titled spouse is unjustly enriched if the equalization is calculated based on the valuation date value, the titled owner is correspondingly deprived with no juristic reason for the enrichment.

In *McDonald v. McDonald*,⁴⁸ the husband raised a claim for a reverse constructive trust. The husband was the titled owner of tobacco farming properties which the parties together purchased and farmed. The properties decreased in value significantly from the date of separation to the date of the trial, and the husband sought to have the wife share equally in the decline in value.

Justice Forestell found all three factors for unjust enrichment to be present, with an unjust

⁴⁷ *Arndt v. Arndt* (1993), 15 O.R. (3d) 389 per Weiler J.A. at 391 (C.A.). See also McLeod & Mamo, *Matrimonial Property Law in Canada*.

⁴⁸ *McDonald v. McDonald* (1988), 11 R.F.L. (3d) 321 (Ont. H.C.J.).

enrichment of the wife if the separation date values were used to calculate the equalization payment owing by the husband. In the circumstances, the decrease in value did not result from the actions of either party, but instead from a significant decrease in the number of smokers in North America.

In *Arndt v. Arndt*,⁴⁹ the wife made a claim for a reverse constructive trust. Although the properties were jointly owned, the wife treated them as though she were the sole owner, encumbering the properties with additional debts post-separation. She sought to have the husband share in the loss of equity. The Court of Appeal upheld the trial judge's decision to refuse this claim as the wife had unilaterally decreased the value of the properties. The wife had treated these properties as hers solely, and had failed to provide full financial disclosure. The court treated these properties as though they were the wife's alone.

In her dissent, Justice Weiler noted that the reverse constructive trust "sits uneasily" with trust principles as the deprivation in question is not the result of the other spouse's actions but because of legislative action.⁵⁰ The titled owner of property is required to assume all the risk of any increase or decrease in value of the property for the benefit of the non-titled spouse from the break-up of the relationship to the settlement of the parties' affairs. Where the value of the property increases, the non-titled spouse can make a claim for a constructive trust; where the value of the property decreases through no fault of the parties, the titled spouse seeks relief from bearing this loss alone.⁵¹

In *Salib v. Cross*,⁵² the parties had purchased a previous matrimonial home in the name of the wife with a written trust declaration that she would transfer half-interest to the husband at his

⁴⁹ *Arndt v. Arndt*, supra note 47.

⁵⁰ *Ibid* at page 392.

⁵¹ *Ibid* at page 391.

⁵² *Salib v. Cross* (1993), 15 O.R. (3d) 521 (Ont. Gen. Div.).

request. Both parties had contributed to the purchase of this home, and the subsequent and final matrimonial home was purchased with the proceeds of this home. No trust declaration was signed when the final home was registered in the wife's name alone. The trial judge held that the trust declaration applied to the final home, and that the wife held half interest in trust for the husband.⁵³ The Court of Appeal upheld this decision, noting that both parties had relied on the trust declaration when it was to their economic advantage to do so. The parties were not permitted to resile from their position when for pure economic advantage.⁵⁴

Justice Blishen followed this reasoning in *Socan v. Socan*.⁵⁵ In this case, the parties had agreed to remove the wife from title to the matrimonial home so that the wife could apply for social assistance during the parties' first separation. After reconciliation, the parties continued to share expenses as they had prior to separation, but the title was never transferred back into joint ownership. When the parties decided to separate permanently, the husband's father demanded payment on a mortgage and foreclosed on the house. The husband claimed that the wife was a joint owner of the house. The wife had previously claimed to be entitled to a 50% share of the proceeds of the sale and acknowledged her joint obligation to pay the mortgage, but then resiled from her position, arguing that the husband was the sole owner and the sole debtor. Justice Blishen held that if the husband were found to be the sole owner, the division of property would be unjust and inequitable, with an unjust enrichment of the wife and a corresponding deprivation of the husband. The husband's claim for a reverse constructive trust was granted.

⁵³ Ibid at page 529.

⁵⁴ *Salib v. Cross* (1995), 18 R.F.L. (4th) 218 (Ont. C.A.).

⁵⁵ *Socan v. Socan*, 2005 CanLII 33545 (ON S.C.).