THE CONSTRUCTIVE TRUST: AN ALTERNATIVE TO SECTION 4 OF THE FAMILY LAW REFORM ACT?

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I. INTRODUCTION

The very essence of our legal system sometimes leads to certain social interests prevailing over others. Such was the case in the recent Supreme Court of Canada decision of *Maroukis v. Maroukis*[1] where spousal and creditor rights were in dispute. The interpretation that the Court gave to subsection 4(1) of the *Family Law Reform Act*[2] raises real questions as to whether a proper balance was attained between the rights of applicant spouses and those of general creditors.

Mr. and Mrs. Maroukis separated in October 1978, at which time they were joint tenants of the matrimonial home. In November 1978 the wife applied for a division of the family assets under subsection 4(1) of the *Family Law Reform Act*. A court order was granted that vested the matrimonial home in the wife to the exclusion of her husband. However, before the date of the court order, but after the date of separation, certain creditors filed writs of execution against the husband's interest in the home. The appellant wife consequently applied for clarification of the effective date of the vesting order. In January 1980 the trial judge declared that date to be the date of separation. He directed that the claims of any post-separation execution creditors were to be removed from the property.

The Ontario Court of Appeal[3] upheld the vesting order but found that it had no retroactive effect. When Mrs. Maroukis appealed to the Supreme Court of Canada that Court concurred with the Court of Appeal in holding that there was no authority under section 4 of the Act to vest any property before the issuing of a court order. Subsection 4(1) provided only a personal right to apply to the court for a division of family assets upon the occurrence of certain events such as a separation. Therefore, Mrs. Maroukis' interest was subject to the interests of those execution creditors who had filed prior to the date of the court order in October 1979.

It is unfortunate that no reasons were articulated as to how the Court

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[1] (not yet reported, S.C.C., 17 Sep. 1984).
[2] R.S.O. 1980, c. 152.
[3] 33 O.R. (2d) 661, 24 R.F.L. (2d) 113 (C.A. 1981).

arrived at its interpretation of subsection 4(1). Although the property in question was a matrimonial home, this did not have any impact on the decision. In fact, the Court held further that subsection 42(1), which does not allow one spouse to dispose of or encumber the matrimonial home without the consent of the other spouse, was not applicable because writs of execution were neither a disposition nor an encumbrance.

The Court's decision could seriously impede the settlement of family law matters concerning spousal property rights in an "orderly and equitable" manner as the Act intends. I can foresee situations in which the interest in family assets to which the non-titled spouse would otherwise be entitled under subsection 4(1) of the Act could be diminished through no fault of her own as a result of this decision. The following situation is just one illustration.

A couple separates, the husband having legal title to all the family assets, including the matrimonial home. The husband then obtains personal loans that he uses strictly for his own enjoyment. No other member of the family benefits from those loans. The husband then stops making payments on the loans and his general creditors obtain default judgments against him and file writs of execution with the sheriff that bind all his property[4] up to the amount of the debts. His wife, who had applied for a division of the family assets under subsection 4(1) before the writs were filed, now obtains a court order vesting her with equal property rights. But because her rights vested subsequent to those of the execution creditors, her share in the property is diminished by the amount that her husband's debts exceed the value of his share in the family assets. In an extreme case, a wife might ultimately receive nothing. Unfortunately, such a situation or a variation upon it is not that remote a possibility.[5]

Therefore, now that the holding in *Maroukis* makes it possible for a titled spouse to circumvent the provisions of the *Family Law Reform Act* in regard to both the division of matrimonial property and the protection of the matrimonial home, the family law practitioner should be prepared, more than ever, to claim family assets on behalf of the non-titled spouse under the remedial constructive trust where the constituent elements of such a trust are present.[6] The constructive trust might be used to give a

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[4] *Execution Act*, R.S.O. 1980, c. 146, sub. 10(1).

[5] *See* LAW REFORM COMMISSION OF ONTARIO, REPORT ON THE ENFORCEMENT OF JUDGMENT DEBTS AND RELATED MATTERS, PART III, at 56 & n. 203 (1981) where it was foreseen that the titled spouse might conspire with potential creditors in order to "do indirectly what the [Family Law Reform] Act prohibits him or her from doing directly, that is, disposing of the matrimonial home".

[6] Pettkus v. Becker, [1980] 2 S.C.R. 834, at 848, 19 R.F.L. (2d) 165, at 180. The constructive trust based upon the principle of unjust enrichment requires that there be "an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment"; Rathwell v. Rathwell, [1978] 2 S.C.R. 436, 1 R.F.L. (2d) 1; Murdoch v. Murdoch, [1975] 1 S.C.R. 423, 13 R.F.L. 185 (1973) (Laskin J. (as he then was) dissenting opinion).

non-titled spouse priority over execution creditors of a titled debtor spouse in appropriate circumstances.

Apart from any difficulties associated with establishing a claim in substance to such a remedy, there are three basic issues that must be resolved favourably before the constructive trust can provide a solution. First, it must be established that the doctrine of constructive trust as an alternative to subsection 4(1) has not been precluded by the Act itself. Second, it must be shown that the interest acquired under a constructive trust is proprietary in nature, rather than merely personal. Third, that proprietary interest must be shown to have vested in the non-titled spouse before any proprietary interest vested in the general creditors of the titled spouse. After addressing these issues, I will examine the underlying policy considerations in granting such a remedy in matrimonial property disputes.

II. The Constructive Trust

A. *Is the Constructive Trust Ousted by the Family Law Reform Act?*

The Act does not expressly purport to codify the general law regarding matrimonial property rights. Therefore, it will be up to the courts, and more particularly the Supreme Court of Canada, to determine whether or not the provisions of the Act are exhaustive insofar as such rights are concerned. As yet there is no case law directly on point, especially in regard to subsection 4(1), and any *obiter dicta* refer only to subsection 4(6) and section 8, which relate to non-family assets.

Unfortunately, these *dicta* provide little guidance on the issue because they have not exhibited a uniform approach to the problem. For example, in the Supreme Court of Ontario, Clements J. in *Ramboer v. Ramboer* stated unequivocally that with the enactment of the *Family Law Reform Act* "property law . . . as between spouses [was] completely codified",[7] while Holland J. in *Nuti v. Nuti* "did not read s. 8 as removing from consideration the common law. The plaintiff may avail herself of the common law relating to constructive trust or the rights granted under s. 8".[8] The same contradiction can be found in the decisions of the Ontario Court of Appeal. Zuber J.A. in *Babrociak v. Babrociak* said that the Act displaced "the law respecting property rights between married persons"[9] that had existed prior to March 31, 1978, while Lacourcière J.A. in *Couzens v. Couzens* confirmed that a claim could still be made today under either section 8 or a trust concept.[10]

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[7] 11 R.F.L. (2d) 320, at 333 (Ont. H.C. 1979).

[8] 28 O.R. (2d) 102, at 115, 108 D.L.R. (3d) 587, at 600 (H.C. 1980). *See also* Talarico v. Talarico, 38 R.F.L. (2d) 375 (Ont. H.C. 1984).

[9] 1 R.F.L. (2d) 95, at 96 (Ont. C.A. 1978).

[10] 34 O.R. (2d) 87, at 90, 24 R.F.L. (2d) 243, at 248 (C.A. 1981).

On other occasions the Ontario Court of Appeal[11] has deliberately left the matter open as indeed the Supreme Court of Canada appeared to do in *Leatherdale v. Leatherdale*. In his majority judgment, Laskin C.J.C. said:

> It remains to say that the disposition made here on the basis of specific statutory provisions of the only assets that were in issue leaves no room to consider the application of constructive . . . trusts. Whether these institutions survive *The Family Law Reform Act* in other circumstances need not be considered here.[12]

Consequently, since the matter has not yet been resolved, it is arguable that a claim under the doctrine of constructive trust remains an alternative to a claim under subsection 4(1).

In order to establish that, it must be proved that subsection 4(1) does not expressly or by necessary implication oust the common law right to a constructive trust. However, that cannot be done by studying one provision in isolation. In my view, subsection 4(1) does not place any obligation upon a spouse to apply for a division of family assets. Rather, it provides that spouse with a substantive right to claim an equal share in the division of family assets upon the occurrence of certain events. The subsection simply permits a spouse to make such a claim if she so chooses.[13] Subsection 7(a) provides a procedural mechanism for asserting common law rights with respect to ownership of matrimonial property.[14] It is necessary to establish the interrelation of these two provisions.

The appropriate rule of construction should be that articulated by the Supreme Court of Canada in *Spooner Oils Ltd. v. The Turner Valley Gas Conservation Bd.*:

> A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status", unless the language in which it is expressed requires such a construction. . . . [W]hen Parliament intends prejudicially to affect such rights or such status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.[15]

In addition, section 8 of the *Interpretation Act*[16] states that the "preamble

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[11] *Re* Young and Young, 32 O.R. (2d) 19, 21 R.F.L. (2d) 388 (C.A. 1981).

[12] [1982] 2 S.C.R. 743, at 760, 30 R.F.L. (2d) 225, at 240. *Cf.* the partial dissent of Estey J. where he claims to agree with the view of Laskin C.J.C. that "the statute law now prevails", *id.* at 772, 30 R.F.L. (2d) at 251. *See* Holland, *Ontario*, in MATRIMONIAL PROPERTY LAW IN CANADA O-1, at O-12 & n.42 (A. Bissett Johnson & W. Holland eds. 1984); Hovius, *Matrimonial Property; Settlements*, in PAYNE'S DIGEST ON DIVORCE IN CANADA 83-401, at 83-444 (1984); Youdan, *Developments in Property Law: The 1982-83 Term*, 6 SUP. CT. L. REV. 279, at 290 (1984).

[13] *See* Chalmers v. Copfer, 7 R.F.L. (2d) 393 (Ont. Cty. Ct. 1978).

[14] McLaren v. McLaren, 24 O.R. (2d) 481, 8 R.F.L. (2d) 301 (C.A. 1979); Hovius, *supra* note 12, at 83-440-41.

[15] [1933] S.C.R. 629, at 638, [1933] 4 D.L.R. 545, at 552.

[16] R.S.O. 1980, c. 219.

of [a statute] . . . is intended to assist in explaining [its] purport and object''. And section 10 deems every statute to be remedial and requires that it be given ''such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the [statute]''.

Thus, ''in the absence of express words or necessary inference''[17] and in order ''to provide . . . for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership'', as the preamble of the *Family Law Reform Act* envisages, it seems to me that the Act, and more particularly subsection 4(1), should not be construed to interfere with those common law rights developed under trust doctrines. Section 7 implicitly recognizes the continuing availability of common law doctrines in the spousal context with respect to any questions pertaining to ownership. Subsection 4(1) does not eliminate those rights, but merely provides an independent statutory cause of action. It neither modifies the common law rights, as does section 11, nor directly conflicts[18] with them. In other words, the substantive right created by subsection 4(1) supplements the rights already existing under the trust doctrines, which continue to exist except as modified by provisions in the Act such as section 11.

Where subsection 4(1) and section 7 refer to each other, they do so only to establish a priority between court orders. A section 4 order will override a prior section 7 court order, while a section 7 application will not be available where a section 4 application or order has been made. On a fair and liberal interpretation, such priorities do not oust the availability of the constructive trust. They simply establish that only one court order will be effective at a time and that a claim under a constructive trust must be made before a claim under section 4. Even ''where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed''.[19]

Further support for the view that the constructive trust continues to be available despite the Act can be found in the argument put forward by Professor Youdan, although admittedly he made it only in reference to section 8 and *Leatherdale*:[20]

> [S]ection 8 prevails over the general law in the obvious sense that the general law need not be considered or relied on where it will not affect the result that would otherwise be obtained under that section. Subject to this, the general law relating to . . . constructive trusts is unaffected by section 8, even in a case where the section also is applicable.[21]

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[17] *McLaren*, *supra* note 14, at 485, 8 R.F.L. (2d) at 306.

[18] *See generally* Cudmore, Annot., 19 R.F.L. (2d) 149, at 150 (1980).

[19] A.-G. Can. v. Hallet & Carey Ltd., [1952] A.C. 427, at 450, [1952] 3 D.L.R. 433, at 447 (P.C.).

[20] *Supra* note 12.

[21] Youdan, *supra* note 12, at 290.

Youdan went on to demonstrate that the general law and section 8 would lead to very different results in situations where third parties such as creditors were involved.[22] As I will later argue, the division of family assets under a section 4 court order rather than under a constructive trust could lead to very different results in those same situations. An interest acquired under section 4 could well be diminished where one acquired under a constructive trust might not be, as a result of the differences between the two with regard to the interest acquired by the non-titled spouse and the time at which it vested. Although the non-titled spouse would not be left entirely without a remedy in the absence of the right to a constructive trust, as would have been the case in *Pettkus v. Becker*,[23] I suggest that, because of its potentially different result, the claim under constructive trust is available as an alternative to a claim under subsection 4(1).

B. *Nature of the Interest Acquired Under the Constructive Trust*

In the United States the beneficiary of a contructive trust generally acquires an equitable interest in the trust property such that "he can recover the property in specie even though the constructive trustee is insolvent and even though he has transferred it to a third person who is not a bona fide purchaser".[24] Although the character of the interest may not be the same in all respects as the interest in an express trust, it is proprietary in nature. This is so despite the fact that the constructive trust is imposed as a remedial device. The "right to recover specific property owned by another" constitutes an equitable interest that "will be protected against creditors" since they are not *bona fide* purchasers.[25] In other words, the interest acquired under a constructive trust entails more than a mere personal obligation on the part of the person with legal title; equity compels him to surrender specific property.[26]

The issue has yet to be resolved in Canada since no case has yet dealt directly with the nature of the beneficial interest. In cases[27] where it approved the remedial constructive trust, the Supreme Court of Canada quite readily referred to the interest as "proprietary" in nature. Although it did not address either the scope of the term or the rights of third parties after the imposition of a constructive trust, the Court appeared to confirm the view that the beneficial interest acquired is more than personal. Nevertheless, the question of whether that interest is *in rem* or involves rights that are both *in rem* and *in personam* has yet to be contended with.

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[22] *Id.* at 291.
[23] *Supra* note 6.
[24] A. SCOTT, V THE LAW OF TRUSTS §462.4 (1967 & Supp. 1984).
[25] *Id.* at §462 (Supp. 1984).
[26] *Id.* at §461 (1967).
[27] *Supra* note 6.

I suggest that whether it is *in rem* or a hybrid the interest is proprietary in nature. That view has been asserted with respect to express trusts.[28] For example, the beneficiary of an express trust has no right to sue the trustee for conversion of the trust property unless he has a right to immediate possession of that property. Rather, he is limited to a personal action against the trustee for breach of trust. However, if the trustee cannot meet the beneficiary's claim, the beneficiary may trace the property into the hands of third parties. Therefore, the beneficiary's interest is not only personal but also *in rem*, that is, an interest of some kind in the property itself.

I suggest that the rights acquired under an express trust are not rigid or fixed in nature. Rather, those rights appear to be arranged on a sliding scale, from the one extreme of rights that are merely *in personam* to the other extreme of the full panoply of rights *in rem*. Just as the beneficiary under an express trust acquires rights that fall somewhere between the two extremes so should the beneficiary under a constructive trust. Although admittedly the rights acquired under an express trust are closer to being *in rem* than those acquired under a constructive trust, both interests are proprietary. That proprietary nature allows the beneficiary under an express trust to obtain priority over the general creditors of the trustee.[29] I suggest that applying the concept to the constructive trust doctrine would give the non-titled spouse, that is, the beneficiary under a constructive trust, priority over the execution creditors of the titled spouse, the trustee.[30]

C. *The Time at Which the Interest Vests*

Another issue not yet resolved by the Canadian courts, is the time when the interest acquired under a constructive trust vests in the beneficiary. In the context of a dispute between a non-titled spouse and the creditors of the titled spouse, it is obviously important to know if the interest of a general creditor is subordinate to a prior equitable interest of the non-titled spouse.

One possible point of vesting would be the date when the court imposes a constructive trust. Another possibility would be the date on which the circumstances arose that entitled the non-titled spouse to claim a constructive trust. According to Professor Scott, the latter is clearly the proper time of vesting because "there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by the court. It arises when the duty to make restitution arises, not when that

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[28] *See* D. WATERS, LAW OF TRUSTS IN CANADA 13-14 (2nd ed. 1984).

[29] *Id.* at 14.

[30] *See id.* at 391 where Professor Waters concludes that such interests "permit the claimant to gain priority over the title holder's general creditors" in most of the American states. *See generally* A. SCOTT, *supra* note 24, at §462.5 (1967).

duty is subsequently enforced.''[31] Youdan has stated that, even though the constructive trust is remedial, ''the beneficiary . . . has an equitable interest in the property from the time of the occurrence of the facts that give rise to it and that the decree of the court enforces, rather than creates, the duty of restitution on which the constructive trust is based''.[32]

Further support for the view that it is not the court order that creates the property rights, but rather the circumstances that give rise to the constructive trust itself,[33] can be found in the well-articulated argument of Scott on the derivation of the word ''constructive'':

> It is sometimes said that when there are sufficient grounds for imposing a constructive trust, the court ''constructs a trust''. The expression is, of course, absurd. The word ''constructive'' is derived from the verb ''construe'', not from the verb ''construct''. . . . The court construes the circumstances in the sense that it explains or interprets them; it does not construct them. So in the case of a constructive trust, the court finds from the circumstances that some of the consequences which would follow from the creation of an express trust should also follow.[34]

That kind of logical argument seems justifiable in light of the approach the Supreme Court of Canada has taken to the use of the constructive trust in the matrimonial context. The Court has used the constructive trust as a remedial device on the ground of unjust enrichment.[35] However, in its words, ''there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment''.[36] It must be proved that the enrichment would be '' 'unjust' in the circumstances''[37] because it is a situation

> where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation. . . .[38]

In addition, there must be ''some connection . . . between the acquisition of property and corresponding deprivation''.[39] This connection has been construed as a ''clear link''[40] between the acquired

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[31] *Supra* note 24, at §462.4 (1967).

[32] *Supra* note 12, at 291 & n. 62.

[33] *See generally* Holland, *supra* note 12, at O-12 & n.43; Hovius, *supra* note 12, at 83-444; McLeod, *Case Comment: Leatherdale v. Leatherdale*, 30 R.F.L. (2d) 251, at 253.

[34] *Supra* note 24, at §462.4 (1967).

[35] *Supra* note 6.

[36] Pettkus v. Becker, *id.* at 848, 19 R.F.L. (2d) at 180.

[37] *Id.*

[38] *Id.* at 849, 19 R.F.L. (2d) at 180.

[39] *Id.* at 852, 19 R.F.L. (2d) at 183.

[40] *Id.* at 852, 19 R.F.L. (2d) at 183.

property and the contribution made by the deprived party. Consequently, once such a connection is made the circumstances have occurred that give rise to a constructive trust, and it follows that the date of contribution[41] should be the date on which property rights under a constructive trust vest.

Such a view is consistent with my earlier suggestion that the interest acquired under a constructive trust is proprietary in nature, because the reference point it uses to establish the existence of a constructive trust is defined in terms of property. In other words, it is the connection with the *property*, together with the presence of the other requirements, that causes the constructive trust to arise. Without such a connection there would be no constructive trust.

The courts have not yet decided how to determine the actual date of contribution since so far the cases dealing with constructive trusts in the matrimonial context have only involved the spouses themselves. However, once third parties such as general creditors of the titled spouse file writs of execution against the matrimonial property, it will be necessary to pinpoint the precise time at which the non-titled spouse's property interest vests (in my view, the date of contribution), in order to determine whether creditors' rights are subject to those of the non-titled spouse. In the matrimonial context that will be difficult to do because the nature of a marriage is such that property is usually acquired through "joint and teamwork effort".[42] The contribution of each spouse tends to be made on an on-going basis and seldom takes the form of a financial outlay towards the acquisition of specific property. As was explained by Cory J.A. in *Murray v. Roty*,

> [i]t may well be necessary and appropriate to scrutinize closely the contributions of business partners to the acquisition of property. It is unnecessary and inappropriate to scrutinize the contributions of married couples . . . in the same way.
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> . . . .
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> In relationships such as this the contributions of one of the parties towards the acquisition of assets will frequently be indirect.[43]

Therefore, before the actual date of contribution can be determined, the different types of contribution must be considered. The following categories have been identified in the case law:

(i) direct and financial, such as a cash down payment;[44]
(ii) direct and non-financial, such as physical labour in building a house;[45]

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[41] *See id.*; Murray v. Roty, 41 O.R. (2d) 705, 147 D.L.R. (3d) 438 (C.A. 1983); *Babrociak*, *supra* note 9; *Talarico*, *supra* note 8. *See also supra* note 33.

[42] *Nuti*, *supra* note 8, at 118, 108 D.L.R. (3d) at 603. *See Rathwell*, *supra* note 6; Murray v. Roty, *id.*

[43] *Id.* at 711, 147 D.L.R. (3d) at 444.

[44] *E.g.*, *Rathwell*, *supra* note 6.

[45] *E.g.*, *Babrociak*, *supra* note 9.

(iii) indirect and financial, such as income earned by the non-titled spouse that is used to defer household expenses, groceries for example;[46] and
(iv) indirect and non-financial, such as home maintenance and general upkeep.[47]

As far as matrimonial property is concerned (that is, property that would constitute family assets under the *Family Law Reform Act* as opposed to non-family or business assets), each of the above categories has been recognized as a contribution that may give rise to a constructive trust. I would suggest that a constructive trust arises at the moment of the initial contribution, regardless of the extent of that contribution. To put it another way, the non-titled spouse has a vested equitable interest in the property from the date of the initial contribution. "The amount of the contribution of the parties may well vary. The disproportionate contribution should not operate as a bar to the recognition of the interest of the smaller contributor."[48]

Under the first category the date of vesting would be the moment that the money was contributed, whether that was the date of acquisition or later on.[49] If the contribution falls into the second category, the interest would vest as soon as the non-titled spouse began improving or enhancing the property. Under the third category the interest would vest as soon as the income of the non-titled spouse was used to defer expenses so as to allow the titled spouse to acquire matrimonial property, whether that occurred at the actual time of acquisition or later on. Finally, under the fourth category, if the non-titled spouse provided homemaking services that would otherwise have to be paid for directly or indirectly by the titled spouse, then the interest would vest at the time of acquisition.[50] However, if the property had already been acquired, the interest would vest once the non-titled spouse began to maintain it.[51]

Leatherdale made clear that an indirect and non-financial contribution cannot create property rights in non-family assets under section 8 of the *Family Law Reform Act*.[52] Under the doctrine of constructive trust, however, such a contribution may be considered in determining rights to business assets.[53] The courts appear to recognize a causal link between that kind of work and the acquisition of business property; they do not

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[46] *E.g.*, Murray v. Roty, *supra* note 41.
[47] *E.g.*, *id.*
[48] *Id.* at 711, 147 D.L.R. (3d) at 444.
[49] *See* Hussey v. Palmer, [1972] 1 W.L.R. 1286, [1972] 3 All E.R. 744 (C.A.).
[50] Murray v. Roty, *supra* note 41.
[51] *Id.*
[52] *Leatherdale*, *supra* note 12.
[53] *See Rathwell*, *supra* note 6; Murray v. Roty, *supra* note 41; *Talarico*, *supra* note 8; Schupbach v. Rambo, 26 B.C.L.R. 154 (S.C. 1981); *Nuti*, *supra* note 8.

treat *Leatherdale*[54] as establishing that section 8 codifies the common law doctrine of constructive trust. If a non-titled spouse whose contribution took the form of housework were asked whether she expected to receive an interest in the matrimonial home she maintained, it would be difficult to imagine her replying other than yes. Thus, since the courts are still recognizing such a contribution with respect to business assets,[55] it would seem all the more plausible for them to recognize its connection to family assets such as the matrimonial home.

Originally, a contribution had to be "substantial" in order to give rise to a constructive trust.[56] I suggest that where the term "substantial" is still used in regard to the constructive trust, it refers to the substance, that is the nature, of the contribution. In other words, the courts appear to be looking first for a reasonable correlation between the contribution made and the acquisition or enhancement of the property, or at least one that is "beyond *de minimis*".[57] Thus, I would suggest that it is only once a contribution has been recognized that the courts proceed to assess its extent. If the contribution is recognized, the property interest will vest at the date of the initial contribution, which could very well be the first day of the relationship. At any point after that date the courts can assess the contribution of each spouse on a *pro rata* basis. In making that assessment they need only use a reasonable, not an exact standard.[58] Consequently, the courts would be able to determine the *quantum* of the vested equitable interest of the non-titled spouse that is protected against writs of execution filed by the general creditors of the titled spouse.

III. Policy Considerations

A. *Spousal Interests*

1. *Insufficient Protection Under the Family Law Reform Act*

To recall the situation I described earlier, it is clear that the *Family Law Reform Act* does not provide a non-titled spouse with the necessary protection against execution creditors of a titled spouse who has incurred personal debts. Section 9, which allows the court to "make interim orders . . . for restraining the dissipation of the property", is unlikely to be of much help for two reasons. First, the titled spouse is not dealing with the property itself. By obtaining unsecured personal loans he is not selling, encumbering or dealing directly with the property in any manner.

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[54] *Supra* note 12.
[55] *Supra* note 53.
[56] Murdoch, *supra* note 6.
[57] *Leatherdale*, *supra* note 12, at 759, 30 R.F.L. (2d) at 238.
[58] McIntyre v. McIntyre, 9 R.F.L. (2d) 332 (Ont. H.C. 1979).

Since the Court in *Maroukis* gave the word "encumber" in section 42 a narrow reading[59] so as not to include writs of execution, it might well construe the word "dissipation" just as narrowly. Second, even if such debts were held to fall within the provision, a non-titled spouse would probably be unaware of them until the writs attached to the property, and thus would have no opportunity to obtain an injunction.

Paragraph 4(6)(a) would be no more helpful, even if the actions of the titled spouse were to fall within the phrase "unreasonably impoverished" in a situation where there were no non-family assets or where the personal debts exceeded the total value of the family and non-family assets. Finally, section 42, which protects the matrimonial home from being encumbered or disposed of without the consent of the other spouse, would offer no protection in this situation in the wake of *Maroukis*.[60]

2. *Section 4 versus the Constructive Trust*

By vesting property rights at the time of the initial contribution, the constructive trust would be more realistic than a court order under subsection 4(1) vesting those rights at a later time. Once the contribution has been made, it is reasonable for the non-titled spouse to expect to receive an interest in the property proportionate to the extent of her contribution. She certainly would not expect such an interest to be available to the execution creditors of her husband, especially if the couple have already separated.

Furthermore, because of the decision in *Maroukis*, in order for the non-titled spouse to prevent the titled spouse from indirectly "disposing" of the family assets in a manner analogous to the one I described above, she must not only apply for a division of family assets under subsection 4(1) on the day of separation, but must also convince the court to deal promptly with her application. She would be unlikely to do so for self-evident emotional and practical reasons. The constructive trust would not demand such unreasonable and unrealistic action on her part, since it is imposed as of the date when the circumstances occurred that gave rise to it, that is, the date of initial contribution.

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[59] *Supra* note 1, at 9.

[60] *Id.* *See* LAW REFORM COMMISSION OF ONTARIO, REPORT ON FAMILY LAW, PART IV, at 165-66 (1974) where it would appear that the word "encumber" was to have such limited scope from the outset. The Commission in making its recommendations for a statutory matrimonial property regime stated that in no way were third party creditors to be prejudiced by its enactment. It is difficult to imagine that the Commission had addressed any situation analogous to that found in *Maroukis* before it made such a blanket statement. Certainly, they were considering only property rights of general creditors that had vested by way of writs of execution before any triggering event had occurred to discontinue the separate property regime.

B. *Balance of Interests Between Spouse and Creditor*

By vesting property rights in a non-titled spouse at the time of initial contribution, the constructive trust would necessarily affect the rights of general creditors. Arguably, it would unduly prejudice those rights. However, the interests of creditors should not be viewed in isolation from those of the spouse and society as a whole, but rather balanced against them.

No one would question that general creditors are entitled to be repaid. Nevertheless, that entitlement is not absolute, even where a writ of execution has been filed, but relative. For example, the interest of an execution creditor is subject to the rights of secured creditors in specific property of the debtor, and in the case of bankruptcies to rights established through statutory trusts as well. Just as those priorities have been established in the law as a result of various policy considerations, so the priority of a non-titled spouse over execution creditors of the titled spouse should be established in the light of current social policies.

In operating a business a general creditor must assume a certain element of risk, such as the potential loss where a debt is neither repaid nor otherwise recovered. Even if a debtor has assets at the time he obtains credit, there is no obligation on his part not to dispose of or encumber them. Thus, by the time a writ is filed by the general creditor, there may be no assets that can be attached. However, since he does not secure any property and only obtains a personal obligation on the part of the debtor to repay, the general creditor may demand higher interest rates to compensate for his greater risk.

Marriage, on the other hand, is not entered into as a business venture. It does not involve the assumption of financial risk in return for profit. A spouse's beneficial interest in the matrimonial property should not be treated as if it arose out of a commercial undertaking. Such an interest should be recognized as having come of age and should be accorded its proper status in the realm of property law.

Where a non-titled spouse has a claim under a constructive trust, she should not have to yield any or all of her interest in the property to execution creditors because of the actions of the titled spouse. That is especially so where the spouse in question is a non-working wife who has retained responsibility for the children after separation. The loss suffered by that spouse could be devastating, while the same loss to general creditors could, in relative terms, be more easily sustained.

Clearly the recognition of a non-titled spouse's priority over general creditors could have a serious effect upon the availability and affordability of credit. In a society that relies upon a credit economy such effects should not be overlooked. Would general creditors have to start inquiring about more than the debtor's marital status, and consider the nature of each spouse's contribution? Would interest rates be increased? Or would the signatures of both spouses always be required to any loan agreements? There is no clear answer. However, these potential costs to

society as a whole must be weighed against the gains realized from giving the non-titled spouse a certain measure of security.

Nevertheless, since the constructive trust is an equitable remedy it is subject to the equitable maxims. Thus, if the court were to find that there was neither a genuine deprivation on the part of the non-titled spouse nor an element of injustice, but rather that the couple had conspired to defraud the general creditors, then the remedy would not be granted. In addition, the constructive trust would probably be subject to the *Limitations Act*[61] or the doctrine of *laches*,[62] although the issue has yet to be fully resolved.[63] These safeguards would probably not eliminate situations of abuse; nevertheless, on balance I suggest that the non-titled spouse's property interest should not be diminished and that she should be entitled to priority over execution creditors of her husband.

IV. CONCLUSION

Since the Supreme Court of Canada in *Maroukis* refused to recognize any inchoate property rights of the non-titled spouse with respect to family assets that would prevail over the rights of execution creditors of the titled spouse, the constructive trust affords an alternative remedy. I maintain that it vests property rights at the date of initial contribution and is not precluded by the *Family Law Reform Act*.

By vesting property rights at that date, such a remedy would recognize that the act of contribution, and not the decree of the court, is the point from which an interest in the matrimonial property should realistically arise. The intent of the *Family Law Reform Act*, according to its preamble, is "to encourage and strengthen the role of the family in society" while at the same time "to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership". That preamble would seem to accord far more with the results that I suggest would arise from applying the constructive trust than it does with those arising from the *Maroukis* decision.

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[61] R.S.O. 1980, c. 240.

[62] *See Talarico*, *supra* note 8; McIlroy v. Taylor, 32 O.R. (2d) 553, 22 R.F.L. (2d) 313 (H.C. 1981).

[63] D. WATERS, *supra* note 28, at 1018-25.