

SHARED OR SHARING RIGHTS? A NEW PARADIGM FOR MATRIMONIAL PROPERTY RIGHTS FROM LAW OF TRUSTS: A COMPARATIVE STUDY

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Introduction

The current tendency, in the process of the development of the law of property, is the willingness of the courts to consider awarding proprietary remedies in a wide set of circumstances. This propensity has been recognized in many common law jurisdictions. The development of the proprietary remedies affect reassignment of property rights in numerous ways. The Remedial Constructive Trust (RCT), is a novel proprietary remedy that go beyond its traditional institutional role, and can be recognized as a remedial device coming from the law of trusts to diminish the rigidity in issuing remedies under private laws.

In the opinion of the Institutional Constructive Trust (ICT), the trust is recognized as a substantive institution where the facts of the dispute fall within an existing category, and where a constructive trust has previously been recognized by the law. RCT is recognized through the exercise of judicial discretion. It gives rise to an enforceable equitable obligation and operates, retrospectively. RCT as a proprietary remedy is available to the plaintiff in a situation where the defendant has obtained an advantage by acting fraudulently, unconscionably or unjustly without having any fiduciary obligation and when the damages or compensation to the plaintiff is not adequate. The most important indication is that the RCT is recognized as a remedy for financial and non-financial contributions in property matters of married, unmarried as well as same-sex couples. This form of RCT is practiced in Canada and Australia, and in England, where the concept of trust originated, it is recognized in their legal context.

In Sri Lanka, constructive trusts are merely institutional in nature and the Trusts Ordinance of No.09 of 1917 has not been used to meet current legal needs. Hence, the objective of this research is to discuss the developments of RCT as one of the remedies in matters relating to matrimonial property rights in selected countries and evaluate the possibilities of introducing RCT in Sri Lanka. The purpose of this

research is to identify the law relating to RCT focusing specifically on matrimonial property rights, especially considering their non-financial contribution to the matrimonial property.

Methodology

The research is a case analysis of selected countries such as Canada, Australia and England. The paper will evaluate the effectiveness of RCT in promoting matrimonial property rights and will recommend possible reforms that introduce RCT to the Sri Lankan Trusts Ordinance of 1917. The research is conducted as a comparative study using a comprehensive literature review and an analysis of relevant case law on trusts law with a case analysis of selected jurisdictions.

Results and Discussion

RCT has a wider remedial function and many jurisdictions have offered comprehensive rationales for laws of constructive trusts; neither, with the intention to restrict its role to protect fiduciary relationships, nor to limit it to an incremental adhoc growth. Though the RCT is available in most of the Common law countries (Gardner, 2011), the author designated Canada and Australia specifically for the purpose of this research as it is practiced definitely in these countries. Trust originated in England, and therefore English trusts law has had a significant influence, on common law legal systems in the United States and the countries of the Commonwealth, such as Sri Lanka.

RCT as a proprietary remedy, will give a right to the beneficiary or proprietor in specifically identifiable property; that is, a right in the property held by the constructive trustee, which is enforceable against him or any other person. In recent years, RCT has been used in matrimonial property disputes. By applying the proper characterization of the theoretical foundation of the RCT in a resolution of a claim of one spouse to a share of a property acquired during the marriage, and where the legal title had been vested absolutely in the other spouse, the property divisible in two, regardless of financial or non-financial contribution. [*Pettkus v. Becker*, (1980); *Eves v. Eves*,(1975); *Cox v. Jones*, (2004)]

The rationale behind the Canadian RCT was established under the broad umbrella of good conscience, wrongful acts like fraud and breach of duty, of loyalty, unjust enrichment and corresponding deprivation (*Soulos v.*

Korkontzilas,1997). Canadian RCT is considered a direct, equitable remedy and the courts award the remedy at its discretion i.e. when it considers the person affected by the wrongdoing, or of unfair retention, would not be adequately compensated with a monetary award. Australian courts considered the RCT in two major cases in 1985, that involved property division consequent to the breakdown of intimate personal relationships (*Muschinski v. Dodds*, 1985; *Baumgartner v. Baumgartner*, 1987). In the case of *Barthurst City Council v. P.W.C. Properties* (1998) the High Court of Australia recognized RCT.

Chapter IX of the Trusts Ordinance of 1917 of Sri Lanka, only describes the specific situations that the constructive trusts can be arisen, i.e. the institutional or substantive nature (Cooray, 1971). Nevertheless, RCT is not recognized yet in the recent judicial decisions of Sri Lanka (*Piyasena v. Hathurusinghe* S.C. (Appeal) 41/2013; *Saroja Nisansala V. Dubai Cable Company Pvt. Ltd*, S.C. (Appeal) 82/2009; *Francis Samarwickrama v. Hilda Jayasinghe* S.C. (Appeal) 07/2004).

Conclusion

The position of trusts law in many countries may serve to perpetuate rather than redress injustice. With RCT, the victim can achieve the beneficial interest of the property rather than monetary award and would enhance the women's property rights as they are often the disadvantaged partners, since they make no financial contribution to the acquisition of property. The constructive trusts law of Sri Lanka should be developed in order to include RCT. Therefore, RCT should be introduced to the Sri Lankan law by making suitable amendments to the Trusts Ordinance of Sri Lanka.

References

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