Constructive trusts to reward housekeeping, Part 2

By Anthony Grant, Trusts & Estates Litigator

***The Property (Relationships) Act 1976* (PRA) was intended to provide a comprehensive set of rules for the division of relationship property. To achieve this, Parliament said in section 4 that "the rules and presumptions of the common law and of equity" were to be ousted from consideration.**

Many judges are not satisfied with the rules that Parliament gave them in the PRA. They think the rules are inadequate to achieve what they believe to be fair and they have as a consequence been imposing constructive trusts over various assets.

I have not researched whether the notion of a construction trust is a "rule" of equity that is to be ousted from consideration, but I am sure that Parliament never contemplated that constructive trusts would intrude into the large number of relationship disputes in which they will soon be appearing.

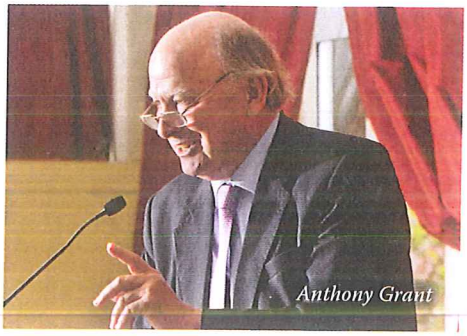
The most popular subject of constructive trust claims is currently property that is owned by a spouse's pre-relationship trust. According to *Lankow v Rose* [1995] 1 NZLR 277 (CA), one of the factors that is necessary to establish a constructive trust is that there should have been a "direct or indirect contribution" to "property".

Family lawyers will know the power of the word "indirect" in this context from the way the Supreme Court interpreted that word in section 9A(2) of the PRA in *Rose v Rose* [2009] 3 NZLR 1. There, a wife's housekeeping and other actions assisted her husband to establish a vineyard that was owned by a pre-relationship trust and she was able, by such "indirect" contributions, to intercept a large part of the vineyard's value.

A similar regime is now being implemented in respect of pre-relationship trusts and other assets. The Court of Appeal gave its stamp of approval to this form of reasoning in *Horsfield v Giltrap* (CA 207/00, 28.5.01). Blanchard J held in that case that where a woman did housework that freed a man to work longer hours, it was reasonable for the Court to impose a constructive trust over his superannuation fund, since she had "made an indirect contribution towards the earning of the property in question" [para 24].

The recent decision of the Court of Appeal in *Hodgkinson v Judd* [2016] NZCA 397 is to a similar effect. It was held that the housework that a wife did, in a house that was owned by a trust the husband had established before he met her, should entitle her to a constructive trust over the asset of the trust, even though the property of the trust had *shrunk* in value while the work was being performed. This was said to conform with the mandate of *Lankow v Rose* that the wife's work must have made a "direct or indirect contribution" to the property in question, notwithstanding that the property in question had actually fallen in value.

Remarkably, in the *Judd* case, it seems likely that neither the High Court judge nor any of the judges of the Court of Appeal had considered the status of the money that was captured by the constructive trust. Section 8(1)(e) of the PRA says that "all property acquired by [a spouse]" is relationship property and it is obviously arguable that the money that was captured by the constructive trust in *Judd* fell within this definition. That being so, the money that was captured by the constructive trust probably became relationship property to which the wife had only a 50% entitlement.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A woman in the position of Mrs Judd would be disappointed by this outcome. One way to assist her would be to recommend that she should follow the path of judicial reasoning in *Clark v Clark* [2013] NZFLR 534. That case taught that a spouse can make a claim of a constructive trust on the other spouse's behalf and against the other spouse's will, and take a substantial proportion of the trust's assets (Mrs Clark intercepted about $900,000 of the constructive trust that she asserted on her husband's behalf.)

A woman in the position of Mrs Judd might therefore think it appropriate not only to assert that she is entitled to a constructive trust because of the housework she has performed, but also to assert that the man with whom she has been living is entitled to a constructive trust. If section 8(1)(e) of the PRA requires that the property that is captured by the constructive trust is relationship property, the woman will end up with 50% of "her" constructive trust and 50% of "his" constructive trust.

It is foreseeable that the Court of Appeal's willingness to impose constructive trusts for housekeeping may therefore transform relationship property litigation. What spouse would not want to boost an award by claiming a constructive trust for domestic services?

A reader of my last article on this theme (see *Law News* Issue 36, 14 October 2016), Andrew Steele, has referred me to *Buysers v Dean* (2001) 21 FRNZ 431. Judges in Canada have felt much the same about domestic services as judges in New Zealand, but instead of going down the constructive trust route, they have gone down the *quantum meruit* route. In doing this, the courts in Canada have held that housekeeping actions should be listed and quantified and an order made for compensation accordingly. Smellie J followed this line of reasoning in *Buysers v Dean* and made an order for a monetary payment to a woman for such actions as cleaning basins, "discussing stories" with children, bathing a baby, playing with a child in a park and helping a child to decorate a Christmas tree. If actions such as these justify a constructive trust, no domestic action is presumably too trivial to be deprived of that outcome.

Although the *Judd* and *Buysers* decisions are focussed on the rewarding of domestic services, there is no reason in principle why domestic services should be singled out for special treatment. If the PRA does not provide sufficient recompense, then a constructive trust and/or a *quantum meruit* claim may come to a litigant's aid for other services. In saying this, the position may not be quite so clear-cut. If the principle of *quantum meruit* is a "rule of the common law", no relief should be granted, since section 4 of the PRA is supposed to prevent the court from applying a "rule of the common law" to the division of property.

The laws concerning trusts in New Zealand are beginning to diverge markedly from similar laws in other jurisdictions. "Effective control" is now to be seen as a sign of trust validity rather than invalidity; helping a child to decorate a Christmas tree now appears to give an automatic entitlement to a constructive trust over the assets of an express trust and other property; a person can assert a constructive trust on behalf of another and against that person's will and take half the moneys that are awarded; and trusts that ought to be declared invalid are to be treated as valid.

These rulings do nothing to give offshore litigants a belief that our courts can be relied upon to give decisions that will command international respect. Readers of major equity texts may be reminded of the contemptuous dismissal that Meagher, Gummow & Lehane made of the Court of Appeal's statements concerning equitable damages in *Aquaculture Corporation v NZ Green Mussel Company Limited* [1990] 3 NZLR 299, namely that it reflected "a state of affairs which throws into doubt the claim of its decisions in this area to serious consideration". LN