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Spencer v. Riesberry: Trusts Trump Family

Can a family home escape the designation of matrimonial home under s. 18 of the Family Law Act[1], with all the implications that flow from that, simply because it is held through the structure of a trust? The Ontario Court of Appeal has held in Spencer v. Riesberry (2012) CarswellOnt 7589 that it can. This is not the first court to reach such a conclusion.

In Clarke v. Read Estate[2] Justice Panet ruled that a home held through a trust was not a matrimonial home. The result in Clarke v. Read Estate did not attract a great deal of attention. As a Court of Appeal decision, Spencer v. Riesberry has attracted much attention and clearly determines the question. Gillese J. gave reasons for a unanimous bench grounded in well-accepted trust principles. The foundation of trust law is the separation of legal and beneficial ownership. Sandra Spencer (Spencer) was a trustee of a trust settled by her mother which owned four homes. Ms. Spencer was also one of the beneficiaries of the trust and she lived with her husband and their children in one of the homes. The other properties were occupied by other beneficiaries of the trust. Under trust principles, a beneficiary does not have an ownership interest in any particular asset of the trust. As such, Spencer did not own the family home which was held within the trust and, consequently, Spencer did not have an interest in the home within the meaning of s. 18(1) of the Family Law Act. As trustee, Spencer had legal title to the property, however, Gillese J. observed that in Spencer's capacity as trustee she owed fiduciary duties to the beneficiaries. Spencer's powers and duties as trustee did not qualify as an interest in the home within the meaning of s. 18(1) of the Family Law Act.

S.18(2) of the Family Law Act expressly includes homes held through a corporation within the definition of matrimonial homes. The courts have applied s. 18(2) quite broadly to pierce the corporate veil and draw corporately owned family homes into the protections of Parts I and II of the Family Law Act, as discussed in Debora v. Debora. This broad definition has the benefit of being rooted in the express language of the statute. The Court of Appeal in Debora emphasized the necessity of looking through the formal separate legal entities of corporation and shareholder as otherwise the very purpose of the Family Law Act would be circumvented. Permitting spouses to hold family homes through a trust similarly permits spouses to avoid the policy of the Family Law Act, which is to grant special safeguards and protections to matrimonial homes. Absent a statutory amendment to the Family Law Act, that gap in the legislation has now been exposed.

While there is nothing exceptional from a trusts law point of view about the Court of Appeal decision in Spencer v. Riesberry it has very significant and, I would say, negative implications for family law. Spencer's mother had settled the trust for her children with one of its express purposes being to prevent any distribution from the trust to a beneficiary from being included in the beneficiaries' net family property. This provision was struck by the trial judge as a condition subsequent, void for uncertainty. This part of the decision was not appealed. Gillese J. noted that fact and took care to comment that nothing in the Court of Appeal's reasons should be taken as approving of the trial decision on this point. That reservation suggests that the issue of how such a trust term should be interpreted remains open for another day. Whether or not the provision was struck, it certainly gives a flavour to the planning and intent behind the Spencer trust. The settlor, quite openly, wished to avoid her children from having to pay an equalization payment to a current or future spouse arising from their beneficial interest in the trust. It is hard to imagine a case with clearer evidence that a trust has been designed for the purpose of circumventing the Family Law Act.

Holding a family home through a trust is an obvious alternative to negotiating a marriage contract to address ownership or equalization rights with respect to a property that would otherwise be a

matrimonial home. The trust vehicle allows a spouse and her family to avoid the consequences without need to obtain the agreement or even inform the other spouse. The other spouse might not know about how the family home is held and would have no means to negotiate any consideration for the loss of the legislative rights related to a matrimonial home. There are a number of matrimonial home rights under Part I of the Family Law Act that may lead to unfairness in some cases, such as the loss of ability to claim a deduction for bringing a matrimonial home into a marriage and the loss of an exclusion for a gift or inheritance traced into a matrimonial home. To permit some, presumably more sophisticated, parties to avoid these rules by using trusts while leaving the special rights in the legislation for everyone else does not remedy these concerns but simply creates a new unfairness.

The Family Law Act Part II rights which ensure that a non-titled spouse must have notice of and consent to the encumbrance or sale of a matrimonial home as well as rights to possession in the home will also be circumvented if a family home is held through a trust. That must be cause for concern.

Reform to the legislation to permit courts to deem a property to be a matrimonial home even if held by a trust seems called for to resolve this issue. The legislation would need to be well thought out and possibly include some discretion so that courts could look to the purpose of the trust and the control of the trust. In the absence of legislative change, some parties may choose to take advantage of the trust structure to avoid a family home from falling within the matrimonial home designation. I would hope some caution will be exercised in an area which may well see further law reform or jurisprudential development. Counsel may wish to warn parties that a fairly negotiated marriage contract is still advisable as insurance against future governments or courts plugging the gap.

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[1] R.S.O. 1990, c. F.3, as am. [2] (2000), 12 R.F.L. (5th) 305 (Ont.S.C.) [3] (2006) 33 R.F.L (6th) 252 (Ont.C.A.)