Estates and Trusts News

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To Trust or Not to Trust:

Proving Beneficial Ownership when a Trust is Not Documented

Looks can be deceiving. In *Andrade v Andrade*,[1] a somewhat typical immigrant story played out at the Court of Appeal. After the death of her husband, Luisa immigrated to Canada with her eldest daughter in 1969. By 1972, she had earned enough money cleaning houses to arrange for her remaining five children to join her. In 1974, Luisa hired a real estate agent and purchased a home in Canada. For the down payment, Luisa borrowed $1,000.00 from a member of the community. Other than a small sum due on closing, two mortgages on the property secured payment for the rest of the purchase.

Luisa's name did not go on title. Not at the time of purchase and at no point before she died in 2014. Legal title was initially held as joint tenants in the name of one son and one daughter who were 19 and 18 years old at the time. The son and daughter were the only ones in the family who could qualify for a mortgage. So, the mortgages were in their names as well. When the daughter married years later, her name was removed from title. A second son was placed on title as a tenant in common with the first son. When the second son died in 2007, his wife transferred title to herself. In 2009 the daughter-in-law brought an action seeking a declaration that she was a beneficial owner of one-half of the interest in the house. She also sought a partition and sale. Luisa and her five children opposed the claim and Luisa counterclaimed that she was the sole beneficial owner.

Like some immigrant families, Luisa's children contributed financially to the household. All of Luisa's children provided their mother with a portion of their pay cheques. Sometimes they gave their mother their entire pay cheque. From 1972 onward, Luisa did not have paid employment. Until the children moved out and married, they continued to contribute to supporting the family. Once the children moved out, their contributions to their mother ceased.

Luisa rented out the two units. She chose the tenants, negotiated the rental agreements, and managed the rental income. The rental cheques were paid to Luisa and deposited in her bank account. The money in Luisa's bank account consisted of her childrens' earnings, the rental income and, when Luisa was older, her old age security benefits. Luisa paid the mortgage, property taxes, insurance and utilities with the money in her bank account. Luisa also paid for all repairs to the property. Luisa paid back the $1,000.00 loan.

To the outside world and "on paper," Luisa was not the owner. She was never on title. The mortgages were not in her name. The legal title holders claimed the rental income on their taxes. Luisa did not. Though she never paid rent, Luisa claimed a rental tax credit. In 1981, Luisa's two sons signed agreements of purchase and sale for the sale of the house and the purchase of a second property. The sons did not sign as trustees for Luisa.

There was no written agreement documenting a trust in favour of Luisa. The only document referring to a trust was a short, undated note by Luisa's lawyer. The lawyer's evidence and that of the accountant was rejected by the trial judge. The rest of the evidence came from Luisa and her five children. Luisa had sworn affidavits and been examined prior to the trial. Her evidence was admitted at the trial following her death.

The trial judge allowed the daughter-in-law's action and dismissed Luisa's counterclaim. The trial judge found that Luisa was not a beneficial owner because there was insufficient evidence of a common intention to create a trust for Luisa's benefit. There was, therefore, no resulting trust in favour of Luisa. Luisa's children, though they supported their mother's counterclaim, could not recall any discussions about a trust. As the one son testified, the conversation with his mother in 1974 was simple. Luisa could not qualify for a mortgage and could not pay for the house outright. The son and daughter could, and so they went on title and held the mortgages in their names.

Relying upon *Rosenthal v Rosenthal,*[2] the trial judge also found that it would be contrary to public policy to allow

Luisa's ownership claim because of the way the property was treated for tax purposes.

Luisa's Estate appealed.

The Court of Appeal overturned the trial judge's decision, including the costs award of more than $237,000.00.

On appeal, it was found that there was a resulting trust in favour of Luisa. The Court of Appeal emphasized that, while the treatment of the property was inconsistent with beneficial ownership, "Luisa's actual intention in relation to the property was a question of fact to be determined based on the whole of the evidence." The Court of Appeal found that the "way the property was dealt with for tax purposes was consistent with legal title, but did not reflect what was actually occurring." *Rosenthal*, a matrimonial case, was distinguished from the present case. (The Court of Appeal stated that *Rosenthal* does not stand for any general public policy principle that would prevent a party from taking one position for tax purposes and another in respect of a claim in litigation).

Andrade confirms, and perhaps clarifies, that a resulting trust is not dependent on the common intention of the parties to create a trust. Rather, it is the intention of the grantor at the time of the legal transfer which is integral to the analysis. The question was whether Luisa, at the time of purchasing the property, "intended to confer beneficial ownership to the legal title holders, to the exclusion of herself and her other children." The Court of Appeal found that there was no reason for Luisa to exclude the rest of her children and treat the other two differently. In fact, the younger children carried on the "family pattern of pooling" their resources when their older siblings moved out and married.

Andrade is a good review of the doctrine of resulting trust with references to seminal cases such as *Pecore v Pecore,*[3] *Schwartz v Schwartz*[4] and *Kerr v Baranow*.[5] With the doctrine of resulting trust comes certain legal presumptions. These were argued in *Andrade*, but as the Court of Appeal noted, a "presumption is of greatest value in cases where evidence concerning the transferor's intention may be lacking (for example where the transferor is deceased)."

Litigators will appreciate that Luisa's evidence was obtained prior to her death and admitted at trial. Affidavits sworn by Luisa and her evidence on examination were no doubt invaluable in establishing Luisa's intention. For those practising in estates, we know that this is not always possible. Families make decisions without first receiving legal advice. Regrettably, claims of resulting trusts are often made after the grantor has died and cannot provide direct evidence. Competing evidence is given by the remaining family members, friends, and/or beneficiaries. There is often no written trust document to rely upon, and evidence from those surviving can seem self-serving.

There may be reasons why a trust arrangement is not documented. This may be on the advice of a lawyer. Regardless, *Andrade* tells us that the intentions of the grantor are central to any future determination of a resulting trust. At the very least, the grantor's intentions at the time of the transfer should be ascertained and documented whenever possible. ■

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Endnotes

[1] *Andrade v Andrade,* 2016 ONCA 368 ("*Andrade*")
[2] *Rosenthal v Rosenthal* (1986), 3 R.F.L. (3d) 126 (Ont. H.C.)
[3] *Pecore v Pecore*, 2007 SCC 17
[4] *Schwartz v Schwartz*, [1970] 2 O.R. 61 (Ont. C.A.)
[5] *Kerr v Baranow*, 2011 SCC 10