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DEADBEAT

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Case Comment: *Spencer v. Riesberry* (Ont. C.A.)[1]

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Spencer v. Riesberry[2] is an important case. Of relevance is the Court's discussion of "family trusts," and, more specifically, those that are deliberately devised in such a way so as to insulate the beneficiaries from claims made pursuant to the *Family Law Act* (the "*FLA*").[3] Also relevant is what, if any, trust assets the Court is prepared to deem a "matrimonial home" for the purpose of equalization of spouses' net family property.

The Facts

Linda Spencer ("Linda") had four children, one of whom is Sandra Lynn Spencer ("Sandra"), the respondent in the appeal. On March 18, 1993, Linda bought a property located at 14146 Riverside Drive in St. Claire Beach, Ontario ("Riverside Drive"). That day she executed a trust agreement (the "Trust Agreement") by which she settled the Spencer Family Realty Trust (the "SFRT" or the "Trust"). Linda was the named trustee and she and her four children were its beneficiaries.

Article 1.1 of the Trust provided that the "Trust Property" was to be comprised of Riverside Drive, as well as any additional property that might be added to the SFRT. It also contained a proviso that a beneficiary's interest in the Trust Property was not to form part of that beneficiary's "net family property," as that term is defined in the *FLA*. Article 3.1 of the Trust Agreement provided that the Trust Property was to be held in trust for the benefit of Linda and her four children, subject to a life interest in favour of Linda. On Linda's death, the Trust Property was to be divided such that each of her children alive on her death received an equal share. Article 6.1 made the Trust irrevocable.

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[1] Amy Cull, B.A. (Hons.), J.D., Minden Gross LLP

[2] 2012 CarswellOnt 7589 (Ont. C.A.).

[3] R.S.O. 1990, c. F.3.

A year after the Trust was settled, Sandra married the appellant, Derek Lawrence Riesberry (“Derek”). Two children were born of their marriage. Sandra and Derek lived at Riverside Drive continually, aside from a two-year period when a new house was being built on the property. Although the couple did not pay rent, they did pay various other household expenses, such as the property taxes, insurance, utilities, and maintenance.

On December 1, 2005, the Trust Agreement was amended such that Sandra and her sister, Lori Fisher, were appointed the trustees of the Trust. Three other properties were purchased by Linda and made part of the subject-matter of the Trust. Similar to the Riverside Drive property, these newly-acquired properties were occupied by Linda’s other children and their families.

In August of 2010, Sandra and Derek separated and subsequently commenced divorce proceedings. In the course of those proceedings, issues arose with respect to Sandra’s interest in Riverside Drive, which culminated in Derek adding Linda and the SFRT as respondents in the matrimonial proceedings.

The April 2011 Endorsements

In April of 2011, Justice Quinn provided two endorsements by which a trial of an issue was directed to resolve the question of whether the Trust Agreement excluded Riverside Drive from the provisions of the *FLA* and whether Sandra had a property interest in the SFRT that should be included in her net family property.

The May 2011 Trial

On May 24, 2011, a trial was held before Justice Scott K. Campbell. Justice Campbell held that Riverside Drive was not a matrimonial home within the meaning of the *FLA*. Justice Campbell further concluded that Sandra holds a contingent interest in the SFRT, in general, which is an asset within the meaning of the *FLA.* As such, evaluations of that interest were ordered as part of the equalization calculation. Lastly, Justice Campbell found that the proviso contained in Article 1.1 of the Trust Agreement was a condition subsequent and void for uncertainty.

The Court of Appeal

On Appeal, Derek challenged only the trial judge’s finding that Riverside Drive was not a matrimonial home within the meaning of subsection 18(1) of the *FLA*. Subsection 18(1) provides as follows:

> 18. (1) Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or

> her spouse as their family residence is their matrimonial home.

Derek took the position that the trial judge erred in finding that Sandra did not have a specific "interest" in Riverside Drive within the meaning of subsection 18(1) of the *FLA*. In support of his position, he made the following three arguments:

(1) Sandra's interest as a beneficiary of the SFRT was sufficient to establish an interest in Riverside Drive within the meaning of subsection 18(1);

(2) Sandra's role as a trustee of the SFRT, combined with her beneficial interest in the SFRT, was sufficient to establish an interest in Riverside Drive within the meaning of subsection 18(1); and

(3) enforcing the notion of the separate entities of trustee and beneficiary will defeat the desired effect of the *FLA* and the special treatment afforded a matrimonial home in that legislation.

With respect to Derek's first argument, the Court of Appeal was of the view that the trial judge was correct in finding that Sandra had a contingent beneficial interest in the SFRT Trust Property *as a whole*, and not Riverside Drive *in particular*. Sandra's interest was a contingent one, in that it depended upon Sandra surviving her mother. As such, Sandra did not have an interest in Riverside Drive, as is required pursuant to subsection 18(1) of the *FLA* for it to be considered a "matrimonial home."

In reaching its decision on this issue, the Court of Appeal cited *Gennaro v. Gennaro* (1994)[4] standing for the principle that, unless the terms of the trust expressly so provide, a beneficiary has no property interest in any specific trust asset, prior to or absent an appropriation of such asset to the beneficiary by the trustee. *Clarke v. Read Estate* (2000)[5] was also cited. In this case, a woman conveyed title of her personal residence to a trust, the beneficiaries of which were the woman and her daughter. The daughter and her husband occupied the residence and, after the mother passed away, the husband sought an equalization payment, alleging that the home was a matrimonial home within the meaning of subsection 18(1) of the *FLA*. The Court disagreed with this argument, holding that the property was an asset of the trust throughout the marriage and the wife did not have an "interest" in the home as required pursuant to subsection 18(1) of the *FLA*. The Court made its finding in spite of the fact that the trust provided that all of the trust property would go to the daughter (and no other siblings) on her mother's death.

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[4] 111 D.L.R. (4th) 379 (Ont. U.F.C.).

[5] 2000 CarswellOnt 4028 (Ont. S.C.J.).

The Court also noted that while the Trust Agreement gave the trustees broad powers to manage and administer the Trust Property, there was no provision in the Trust Agreement giving Sandra or any of her siblings the right to call for the transfer or delivery of any particular item of property held by the SFRT, either prior to or following the death of Linda. Moreover, the Trust Agreement placed no obligation on the trustees to transfer any asset *in specie*. As stated by the Court, "[i]ndeed, we cannot even know what the trust property will consist of at [Linda's] death. There will be no automatic conveyance of one property to each of the four children on the death of Linda Spencer, as the appellant contends."[6]

The Court of Appeal also disagreed with Derek's second and third arguments. According to the Court, as a co-trustee, Sandra obtained her authority over the Trust from the Trust Agreement and the governing legislation. Those powers and duties are a product of her fiduciary role as a trustee and did not result from any personal interest in the Trust. It is incumbent upon a fiduciary to act solely in the best interests of all of the beneficiaries of the trust.

The Court further noted that it could not "combine or conflate" Sandra's powers and duties as a trustee with her position as a contingent beneficiary under the Trust, to "create" an interest, as Derek would have.[7] Rather, "the roles of trustee and beneficiary are distinct and must be maintained as separate and distinct in order for the trust to be workable."[8] According to the Court, the very foundation of the trust relationship is the separation of the roles between the trustee, the legal owner of the trust property, and the beneficiary, the equitable owner of the trust property. Where there is no separation between legal and beneficial ownership, "there is no trust relationship and, therefore, no trust."[9]

The Court did not accept the analogy made by Derek between a matrimonial home which is owned by a corporation in which a spouse has an interest, and a home that is owned by a trust in which a spouse is a trustee and beneficiary. The Court of Appeal opined that the distinction is one specifically addressed by the legislation, and, in particular, subsection 18(2) of the *FLA*, which provides that the ownership of a share or shares, or of an interest in a share or shares, of a corporation entitling the owner to occupy a housing unit owned by the corporation shall be deemed to be an interest in the unit for the purposes of subsection 18(1) of the *FLA*.

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[6] *Supra* note 2 at para. 43.

[7] *Supra* note 2 at para. 46.

[8] *Ibid*.

[9] *Ibid*. at paras. 54 & 55.

Comment

The decision of the Court of Appeal in *Spencer v. Riesberry* is not one without controversy. On the one hand, it provides parents (or other benevolent benefactors) with a vehicle to gift property to their children during their lifetime, while, at the same time, sheltering that property from potential *FLA* claims should their children marry and later divorce.

Problematically, however, the net effect of the decision is that it provides an appellate-level green light to those spouses who wish to undermine a matrimonial property regime that deliberately accords special treatment to the matrimonial home on the breakdown of marriage. As a result of *Spencer v. Riesberry*, not only can the non-beneficiary spouse be denied rights of occupancy in the property and the right to be advised of or consent to the sale or mortgaging of the home (rights that they would have under the *FLA*), but the spouse that is the beneficiary of the trust can claim a deduction for the value of his or her beneficial interest in the trust as of the date of marriage or they can have the value of his or her beneficial interest excluded, even if the value of the family home constitutes a significant portion of the value of the trust.

In effect, as a result of *Spencer v. Riesberry*, a family trust can now effectively be used as a one-sided domestic contract to exempt the value of and rights associated with what is in essence a matrimonial home from the protections provided by the *FLA*, thus significantly disadvantaging those spouses who are not a beneficiary of the trust which owns the family home. While an ameliorating factor *may* be the requirement on the part of the beneficiary spouse to have his or her interest in the trust valued which, in turn (but subject to the deduction issues raised), might cause some value of the trust to be included in the net family property of that spouse, the issues raised by *Spencer v. Riesberry* suggest that it may be that the time has come for reform in this area of our family law legislation. One possible way to fill the gap would be to treat spousal interests in property held by family trusts in the same manner as interests held in corporately-owned property.

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