

CLAIMS OF CONSTRUCTIVE TRUSTS

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Blended families are a fertile ground for claims of a constructive trust against a family home.

It is common for a person to take a house from a first relationship into a second relationship and the house becomes the family home for the parties to the second relationship.

The house is typically owned by a man and at the end of the second relationship, the woman partner is left with few assets, causing her to make a claim that she is entitled to a constructive trust in relation to the home.

Claims of this nature were considered by a five Judge Court of Appeal in the leading case of *Lankow v Rose* [1995] 1 NZLR 277. The Court held that claimants for a constructive trust have to prove that he or she had contributed in more than a minor way to the acquisition, preservation or enhancement of the other's assets, whether directly or indirectly and that in all the circumstances the parties must be taken reasonably to have expected that the claimant would share in them as a result.

The contributions need not have been in money but there must have been a causal relationship between the contributions and the acquisition, preservation or enhancement of the owner's assets.

Tipping J said that a claimant must show:

1. Contributions, direct or indirect, to the property in question.
2. The expectation of an interest therein.
3. That the expectation was a reasonable one.
4. That the defendant should reasonably expect to yield an interest in the asset to the claimant [p. 294].

He said that a "*contribution*" could be either:

1. Any payment or service which of itself assists in the acquisition, improvement or maintenance of the property or its value, or
2. Any payment or service which helps the other party acquire, improve or maintain the property or its value. [295]

Lankow v Rose was decided at a time when co-habitees had no statutory entitlement to any property relief. At that time "*matrimonial property*" was confined to people

who were married. The amendments to the Matrimonial Property Act to extend its operations to de facto couples did not take place until 2002.

I will illustrate the contemporary approach of the Courts to these claims by referring to three cases.

***Judd v Hawkes Bay Trustee Co Ltd* [2014] NZHC 3298, Williams J, 17 December 2014 and *Hawkes Bay v Judd* [2016] NZCA 397**

In this case a wife sued her husband's Trust for 40% of the value of a property in which they lived. They each brought children to the relationship. It was his third marriage and he had five children. His three youngest sons lived with them during the course the marriage. The wife had had earlier relationships and brought two children to the marriage. Both lived full-time in the home although one child moved to live with her father in Wellington during the course of the marriage.

The husband established a Trust for the house to preserve his separate property.

The wife had a house with a mortgage which she sold during the marriage.

The husband's property was a 1.5 hectare lifestyle block with a good house and substantial gardens. The property had been bought before the marriage. Renovations during the marriage cost between \$200,000 and \$250,000.

During the course of the relationship the house did not increase in value.

The marriage lasted about 6.5 years.

The wife claimed to have made the following contributions:

- She said that she had given up her house in Hastings and the regular income from her job because the husband promised that she would never have to work again.
- She said that she cooked for the family.
- She said that she had cleaned and cared for her children and the husband's children when they were in the house.
- She said that she helped look after the gardens and the house maintenance.
- She said that she had spent a small amount of her own money on the house.
- She said that she had "*bought things*" for the house but she gave no details of them.
- She said that she had cleared the gutters at least twice during the 6.5 years.
- She said that she had cleaned the decks at the house.

- She said that she had planted gardens.
- She said that she had given the husband \$50,000 to spend on the house and he had paid her back (ie she had assisted with the funding of some domestic expenses).
- She said that she had worked 20-40 hours a week as a housekeeper and gardener despite the fact that the husband had employed a housekeeper and a gardener for part of their time together. The cleaner was not retained after three years.
- She said that she had cared for the husband when he was ill; she had entertained his friends; and helped to some extent with the upkeep and renovation of the Trust's rental properties.
- She said that once she was married to him, she gave up the opportunity to establish her own full-time career.

The husband said that:

- The wife had always known that the house belonged to his Trust and that she would not be sharing in it.
- He said that he had advised her to keep her own house and rent it but the Judge said she could not afford the mortgage repayments when she was no longer working.
- He said that the wife knew that she was not a beneficiary of the Trust.

The Judge held that the wife had performed services which improved or maintained the property, or freed the husband up to improve or maintain the property. This included work on the gardening and landscaping and on maintenance of the house to a minor degree.

The wife had also cared for the man's sons during the course of the marriage, in a way that freed him up to pursue his business interests and make his own contributions to the property.

She had also cared for his sons during the course of the marriage in a way that freed him up to pursue his business interests and make his own contributions to the property.

On the other hand, the wife and her children had lived rent-free "*in a beautiful home for the 6.5 years of marriage. She had free use of the studio above the garage to [run her own] business and she was able to utilise the gardens to earn a hobby income selling her preserves.*"

Although the wife knew of the Trust and why it was established, "*the couple nevertheless worked together to improve [the house] and their work in this regard*

was a significant aspect of the relationship itself.” Having said that, the house was said not to have increased in value during the 6.5 years.

The outcome was that the wife was awarded \$10,000 pa for each year of the marriage, ie \$65,000 in all.

***Blumenthal v Stewart* [2017] NZCA 181, 15 May 2017**

In this case a stepson claimed a constructive trust.

The stepson had helped his stepfather (the deceased) with his house by spraying weeds, cutting some firewood, maintaining a water pump, maintaining and checking electric fences, keeping the property pest free, tidying up the grounds around a tenanted property, and looking after the property while the stepfather was away.

On the other hand, the stepson obtained material benefits by using some sheds for more than two years to store chemicals; to fatten cattle on the property; and to base his business on it.

He visited the stepfather daily when the stepfather was in hospital and took food and other items to him for which he did not receive reimbursement.

He organised the stepfather’s funeral and notified friends of the man’s death.

The Court of Appeal held that the stepson got more out of the relationship than the father did. Most of the stepson’s actions were held to be “*relatively mundane*” and the stepson’s actions “*were cosmetic and did not add to the value of the property.*” [40]

The Court held that the stepson had looked after the stepfather for about ten weeks – not four months as he had claimed – and that his contributions “*could be seen as qualifying services, but given their nature and short duration, they would be unlikely to merit anything other than minimal recognition. In the particular case, we do not see them as off-setting the overall benefits received by the stepson.*” [42]

So far as the constructive trust claim was concerned, the Court of Appeal had held in *Lankow v Rose* that the contributions of the claimant must “*manifestly exceed*” the benefits that the owner of the property received [53] and it was held that the stepson’s contributions had not done this. It was held that there had not been the necessary level of uncompensated effort for the claim to succeed.

***J Wakenshaw v Wakenshaw* [2017] NZCA 252, 14 June 2017**

Mrs Wakenshaw had two sons, Donald and Norman. She owned a property at Bethels Beach which she allowed Norman to live in. Norman and his wife Jan lived in it for more than 20 years.

When Norman died, the mother left the property to her son Donald.

As a result of this bequest Jan was no longer able to live in the property. She claimed a constructive trust and an entitlement to caveat the property to support her alleged interest in it.

The application before the Court of Appeal was Jan's application to sustain the caveat.

The Court of Appeal refused to sustain the caveat. It said that Jan had not given any substantial evidence to support a claim for a constructive trust. Jan did not say how much money had been spent on the property or give details of an arrangement that she said had existed.

No details were given of the source of moneys that Norman had allegedly provided.

Although Jan said that she and Norman had paid all outgoings relating to the property over the years – including rates and various improvements to the property – there was a factual dispute as to whether they had paid rates.

The Court thought that there was “*little doubt*” that Jan and her husband had made some payments with regard to the property but these would have been running costs that any person occupying the property rent-free might reasonably be expected to make and Jan had lived rent-free in the property for more than 20 years.

“It could not be said that the contributions made by [Jan] and Norman manifestly exceeded the benefits that they derived from the arrangement.” [27]

The Court of Appeal said that Jan's claim was “*vague and lacks detail. Almost no supporting documentation has been provided ...*” [37]

Jan had given “*little or no evidence regarding how much money she and Norman put into the development of the property.*” [38]

“Further, and perhaps more significantly, Jan has not discharged the burden on her of satisfying us that it is reasonably arguable that she and [her mother-in-law] had expected that Jan would share in the property as a result of Jan's contributions to the acquisition, preservation or enhancement of it.” [42]

The lawyer who had assisted the mother to transfer the property was clear that the mother “*had no expectation or understanding that Jan had acquired an equitable interest in the property, arising out of her own contributions or otherwise.*” [44]

The Court held that “*it is not reasonably arguable on the evidence before us that Donald received the property with notice that it was subject to a constructive trust in Jan's favour.*” [46]

How to defeat claims of a constructive trust

The case of *M v H* shows how easy it is for a person to claim that a constructive trust should be declared in their favour. Cooking food, looking after children, and other mundane domestic activities can be used successfully for this purpose.

Any person who is contemplating entering into a marriage or de facto relationship in which the separate property of one party is to be used by both, should require the other party to enter into a s. 21A Agreement in which the other person will declare that he or she will not at any time either during or after the relationship contend that any actions or inactions that he or she has made entitle him/her to an interest in the property by way of a constructive trust or by way of any other legal doctrine.

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