

Herring et al. v. Worobel et al.

Indexed as: Worobel Estate v. Worobel  
(H.C.J.)

67 O.R. (2d) 151  
[1988] O.J. No. 2066  
Action No. 14/85

ONTARIO  
High Court of Justice  
Yates J.  
December 22, 1988.

Restitution -- Wrongful acts -- Husband killing wife and pleading guilty to manslaughter -- Husband not entitled to right of survivorship respecting property held jointly.

Family law -- Property -- Constructive trusts -- Wife contributing by work and economical life-style to husband's acquisition of property -- One-half of property held on constructive trust for wife.

The defendant was convicted of manslaughter in causing the death of his wife and was sentenced to prison. Actions were brought by the wife's estate claiming a share of the defendant's property and by her relatives claiming damages under s. 60 of the Family Law Reform Act, R.S.O. 1980, c. 152. The evidence established that she had contributed by hard work and by an economical style of life to the defendant's acquisition of property.

Held, judgment should be awarded to the plaintiffs.

The defendant held all his property on a constructive trust in which his wife was entitled to a half-interest. The defendant could not benefit by his own wrongful act and accordingly, the half-interest vested in the wife's estate. The children and grandchildren were entitled to awards for loss of care, guidance and companionship under the Family Law Reform Act.

Damages -- Exemplary damages -- Exemplary damages not available for breach of fiduciary duty or under Family Law Reform Act -- Family Law Reform Act, R.S.O. 1980, c. 152, s. 60.

#### Cases referred to

Pettkus v. Becker (1980), 117 D.L.R. (3d) 257, [1980] 2 S.C.R. 834, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 34 N.R. 384; Baumann v. Nordstrom (1961), 31 D.L.R. (2d) 255, [1962] S.C.R. 147, 37 W.W.R. 16; Demeter v. British Pacific Life Ins. Co. (1983), 43 O.R. (2d) 33, 150 D.L.R. (3d) 249, 2 C.C.L.I. 246, [1983] I.L.R. Paragraph1-689 [affd 48 O.R. (2d) 266, 13 D.L.R. (4th) 318, 8 C.C.L.I. 286, [1985] I.L.R. Paragraph1-1862]; Schobelt v. Barber, [1967] 1 O.R. 349, 60 D.L.R. (2d) 519; Re Gore, [1972] 1 O.R. 550, 23 D.L.R. (3d) 534, [1972] I.L.R. Paragraph1-448; Fern Brand Waxes Ltd. v. Pearl, [1972] 3 O.R. 829, 29 D.L.R. (3d) 662; Guertin v. Royal Bank of Canada (1983), 43 O.R. (2d) 363, 1 D.L.R. (4th) 68, 23 B.L.R. 189 [affd 47 O.R. (2d) 799n, 12 D.L.R. (4th) 640n]; Thornborrow v. MacKinnon (1981), 32 O.R. (2d) 740, 123 D.L.R. (3d) 124, 16 C.C.L.T. 198 sub nom. Re Schmidt; Baker v. Bolton (1808), 1 Camp. 493, 170 E.R. 1033; Mason v. Peters (1982), 39 O.R. (2d) 27, 139 D.L.R. (3d) 104, 22 C.C.L.T. 21 [leave to appeal to S.C.C. refused 46 N.R. 538n]; Re Charlton, [1969] 1 O.R. 706, 3 D.L.R. (3d) 623

#### Statutes referred to

Family Law Reform Act, R.S.O. 1980, c. 152 (repealed by s. 71(1) of, and replaced by the Family Law Act, 1986, S.O. 1986, c. 4), s. 60

Rules and regulations referred to

Rules of Civil Procedure, O.Reg. 560/84, rule 51.03(2)

ACTIONS for a declaration and for damages under the Family Law Reform Act.

Stanley M. Tick, Q.C., and Robert H.C. Barrett, for plaintiffs.

No one appearing on behalf of defendants.

YATES J.:--

(a) The parties

On January 2, 1985, the defendant in this action, Ivan John Worobel (husband) killed his wife, Elizabeth Worobel (wife). Subsequently, the husband was charged with first degree murder and eventually pleaded guilty to manslaughter and was sentenced to a term of imprisonment.

An action has been brought against the husband by the son and daughter, by a previous marriage, of the wife. The son, Barry Alexander Herring, and his sister, Merry Melanie Victoria Toole, have sued on behalf of the estate of the wife. In addition, Barry Alexander Herring sues personally on behalf of himself and all others entitled to assert a claim for pecuniary loss under the Family Law Reform Act, R.S.O. 1980, c. 152. Those persons entitled are:

Alexander Stewart -- brother

James Stewart -- brother

Agnes Venturelli -- sister

May Hartsburg -- sister

Barry Alexander Herring -- son

Merry Melanie Victoria Toole -- daughter

John Fitzgerald Herring -- grandson  
Paul Robert Herring -- grandson  
Cheryl Ann Herring -- granddaughter  
Kristian James Toole -- grandson

Only the children and the four grandchildren of the wife advance such claims.

The action against the defendant Annie Opalka was discontinued prior to the date of the trial.

The husband, although duly served, did not attend and was not represented at trial.

The husband was served with a request to admit certain facts in this case. As he did not respond to this request, although duly served, he is deemed, pursuant to rule 51.03(2) of the Rules of Civil Procedure, to have admitted the truth of those facts.

(b) The relief sought

The plaintiffs seek a declaration that property held by the husband in his name alone is the subject of a constructive trust, of which the beneficiaries are the husband and the estate of the wife. Further, they seek a declaration that property held by the husband and the wife jointly is the subject of a resulting trust. The plaintiffs seek to have the respective interests of the beneficiaries determined and divided.

Barry Alexander Herring, on his own behalf and on behalf of others, seeks damages pursuant to the Family Law Reform Act.

The plaintiffs also claim punitive damages.

(c) Property held by the husband alone

There are four properties held by the husband in his name. These are as follows: 99 Adeline Ave., Hamilton; 103 Adeline Ave., Hamilton; 1032 Beach Blvd., Hamilton, and a cottage on

Lake Erie. In addition there are funds from various accounts in the name of the husband and certain other personal property. Uncontradicted evidence was led that throughout the duration of her relationship with the husband, the wife worked extremely hard in assisting the husband to acquire and dispose of various properties. She deprived herself of many of the ordinary pleasures of life which most people in her circumstances would consider normal. There was considerable evidence as to the manner in which she conducted her life in order to make certain economies which made possible the saving of moneys in order to purchase real estate properties for improvement and subsequent resale. There is no doubt that she contributed a great deal of hard physical labour in improving the properties which were bought and subsequently resold.

The facts of this case fall squarely within the principles articulated by the Supreme Court of Canada in *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257, [1980] 2 S.C.R. 834, 8 E.T.R. 143. There is evidence of enrichment on the part of the husband, brought about by a corresponding deprivation on the part of the wife with no juristic reason for such enrichment. Accordingly, all the property held by the defendant in his name is held by him on a constructive trust. By virtue of the work done by the wife, her estate, as a beneficiary, is entitled to a one-half interest in the trust property.

(d) Property held jointly

In normal circumstances the right of survivorship dictates that a joint tenant acquires the interest of another joint tenant upon the death of that joint tenant. However, this principle is subject to an overriding public policy concern that wrongdoers are not permitted to profit from their actions. To give effect to this principle it has been held that a civil court may determine the question of whether or not the conduct of an individual amounts to a crime. See for example the decision of the Supreme Court of Canada in *Baumann v. Nordstrom* (1961), 31 D.L.R. (2d) 255, [1962] S.C.R. 147, 37 W.W.R. 16, and of Osler J. in *Demeter v. British Pacific Life Ins. Co.* (1983), 43 O.R. (2d) 33, 150 D.L.R. (3d) 249, 2 C.C.L.I. 246 (H.C.J.). In the instant case it is clear that the acts of

the husband were those of a wrongdoer. He committed a brutal attack upon his wife which resulted in her death and subsequently pleaded guilty to manslaughter. In such a situation the right of survivorship is qualified by the imposition of a constructive trust upon the survivor. The survivor holds for the benefit of the estate of the deceased. In *Schobelt v. Barber*, [1967] 1 O.R. 349, 60 D.L.R. (2d) 519 (H.C.J.), Moorhouse J. imposed a constructive trust. He held that the wrongdoer held as a trustee for the benefit of himself and the estate of the deceased wife in equal shares. This case was followed by Osler J. in *Re Gore*, [1972] 1 O.R. 550, 23 D.L.R. (3d) 534, [1972] I.L.R. Paragraph 1-448 (H.C.J.), in relation to a similar set of facts. In light of the admission of the husband of his guilt for the manslaughter of the wife, a constructive trust will be imposed in respect of all property held by the husband and the wife jointly. The estate of the wife shall have a one-half interest in this trust property.

(e) Division of trust property

The trust property shall be divided in accordance with the shares as declared above. Any real property will be sold and divided in accordance with the above interests.

(f) Punitive damages

The statement of claim seeks an order of punitive damages, presumably based upon the manner in which the husband came to acquire property (through violence) and the effect that this had on the relatives of the wife. The issue of punitive damages in relation to the effect of the actions of the husband on the relatives of the deceased as claimants under the Family Law Reform Act, s. 60 will be dealt with below.

It is not clear from the statement of claim or the evidence whether the plaintiffs seek punitive damages in relation to the manner in which the survivorship rights of the husband arose or in relation to the manner in which the husband eventually became a constructive trustee. In any event, no such claim for punitive damages lies. Traditionally, punitive damages have only been available in relation to tortious acts. They have not

historically been available for breaches of contract. There is some indication in the authorities that this position may change with respect to certain instances of breach of contract. However, there is no indication whatsoever that any breach of fiduciary duty will give rise to a claim for punitive damages. In *Fern Brand Waxes Ltd. v. Pearl*, [1972] 3 O.R. 829, 29 D.L.R. (3d) 662, the Ontario Court of Appeal held that punitive damages could not be recovered for breach of a fiduciary duty. This case was applied by Cromarty J. of this court in *Guertin v. Royal Bank of Canada* (1983), 43 O.R. (2d) 363, 1 D.L.R. (4th) 68, 23 B.L.R. 189 (H.C.J.). Accordingly, there can be no award of punitive damages in relation to the claims for a declaration of trust.

(g) Family law reform claim

Although in this case the persons entitled to assert a claim under s. 60(2) of the Family Law Reform Act were two brothers of the deceased, two sisters, two children and four grandchildren, such claims were advanced only on behalf of the two children and the four grandchildren. The claims advanced were for loss of care, guidance and companionship. In *Thornborrow v. MacKinnon* (1981), 32 O.R. 740, 123 D.L.R. (3d) 124, 16 C.C.L.T. 198 sub nom. *Re Schmidt* (H.C.J.), Linden J. of this court outlined some basic concepts in the section. He stated at p. 748:

Thus, loss of guidance, care and companionship can be suffered by each member of a family as a result of the death or injury of any other member of that family. Age is irrelevant. It is always an individual matter that must be established on the evidence in each case. This may differ in every family and with each individual in the family. It may be that a parent may consider one of his children a "pain in the neck" and will avoid its company. If that is the case, then there would not be very much evidence of loss. The figure awarded would be low. But in most cases, I would expect that the evidence would show that parents do receive much in the way of guidance, care and companionship from their children, as well as the other way around. There is still no compensation allowed, however, for grief or

solatium. The compensation awarded is for the heads enumerated, and anything in addition to that which would have been permitted under the common law.

The reported cases on damages under s. 60(2) indicate that higher amounts are awarded where a parent dies when the children are infants. This is particularly the case when the parent was widowed or a single parent. These principles are applicable in respect of the components of care and guidance under that section. No such rule applies in respect of companionship, as that element really depends upon the nature of the relationship between the two individuals, regardless of age.

All the evidence suggests that the deceased was a very kind and caring parent and grandparent. It is clear that she made personal sacrifices on behalf of her family and was close to those members advancing claims under the Family Law Reform Act.

The deceased was a focal point and an element of stability, especially in the lives of the daughter and the grandchildren. In other words, she was very special to them.

For loss of companionship the children are awarded amounts as follows:

Barry Alexander Herring

\$1,000.00

Merry Melanie Victoria Toole

\$3,000.00

For loss of care, guidance and companionship the grandchildren are awarded amounts as follows:

John Fitzgerald Herring

\$5,000.00

Paul Robert Herring

\$5,000.00

Cheryl Ann Herring

\$5,000.00

Kristian James Toole

\$5,000.00

(h) Punitive damages (Family Law Reform Act)

The plaintiffs advance a claim for punitive damages in relation to the damages recoverable under the Family Law Reform Act. No such award can be made in respect of a claim arising out of a statutory right where the statute does not expressly provide for such a claim. It is clear that the history of this section of the Family Law Reform Act is one of a gradual evolution of a right to recovery for loss of care, guidance and companionship. At common law, there was no right of action for the negligently caused death of a human being: see *Baker v. Bolton* (1808), 1 Camp. 493, 170 E.R. 1033. That is to say, neither the estate of the victim nor the surviving members of his family could recover for such death. Changes to the common law position came about incrementally through fatal accident statutes which provided specifically designated surviving relatives with the right to recover damages only if the deceased, had he lived, would have had a cause of action for the injury. The recoverable loss was only for expected loss of monetary benefits arising from the relationship between the deceased and his relatives, had the deceased continued to live. There was no recovery for loss of care, guidance or companionship until the passage of s. 60 of the Family Law Reform Act. The statutory language extending the scope of recovery is specific and thus must be treated as limited to the enumerated heads of recovery under the statute. This is made clear in the judgment of the Ontario Court of Appeal in *Mason v. Peters* (1982), 39 O.R. (2d) 27, 139 D.L.R. (3d) 104, 22 C.C.L.T. 21, in which the history of the legislation is succinctly reviewed. The court stated at p. 39:

The award properly excludes grief, sorrow and mental anguish suffered by reason of the death as compensable items of damage. Non-pecuniary losses of this kind, unlike guidance, care and companionship, are not provided for in the Act and under its terms remain non-recoverable.

Aggravated or pecuniary damages are defined as a form of non-pecuniary damages whose purpose is to soothe the feelings of the plaintiffs due to the conduct of the defendant. Accordingly, any such claim for aggravated damages in this case

cannot be sustained. The punitive damages are non-pecuniary in that their purpose is to punish and deter. For this reason the plaintiffs' claim in this regard must fail. In all of the cases cited by the plaintiffs in support of aggravated and punitive damages, the plaintiff is a living victim of injuries and thus can maintain an action in his or her own right. The relationship between such a plaintiff and a defendant is quite different from that between surviving relatives of a victim and the defendant. The latter relationship is defined by s. 60 of the Family Law Reform Act and thus the cases cited by the plaintiff are of no application.

(i) Intestacy of the wife

The wife died intestate. As a matter of public policy her husband, being the author of her death, cannot benefit from that intestacy. In *Re Charlton*, [1969] 1 O.R. 706 at p. 708, 3 D.L.R. (3d) 623, Jessup J.A. of the Court of Appeal stated:

It is well settled law that one who has killed another by a criminal act cannot succeed to that other's property either under a will or under an intestacy. Accordingly, the husband is prohibited from taking any property on the intestacy of his wife.

Costs are available on a solicitor-client basis at the discretion of the trial judge, but the exercise of discretion must be in relation to relevant factors. What is relevant is the conduct of the litigation and not otherwise unrelated conduct. Accordingly, here solicitor-client costs cannot be awarded on the simple basis that the husband engaged in past criminal conduct. This is not, of itself, relevant to the conduct of the litigation. However a solicitor-client award of costs might be made on the grounds that the husband refused to dispose of the matter otherwise. He put in a statement of defence, did not settle or abandon his defence and thereby forced the matter to go to trial, yet did not appear at the trial. In light of his conduct, the plaintiffs shall have their costs on a solicitor-and-client basis (including any costs arising out of action No. 2748/86), and prejudgment interest.

Any matters arising out of the receivership, accounting, or disposition of property in this action may be referred to a local judge of the Supreme Court of Ontario at Hamilton.

Judgment for plaintiffs.

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