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## The Division of Professional Degrees and Licences Upon Marital Breakdown: A Commentary on *Caratun v. Caratun*

Joan E. Hatch\*

The question of how to deal with professional degrees upon marital breakdown is an interesting one, yet there is a relative paucity of Canadian cases on the subject. In the United States, where the issue has been considered much more frequently, there are conflicting opinions as to the proper approach. Often, degrees acquired during marriage are not explicitly dealt with on their own; they are used as factors to be considered in awarding maintenance payments or an unequal division of other marital assets.<sup>1</sup> Rarely has it been argued that the value of the degrees themselves be divided as part of the matrimonial property; rarer still has such an argument met with much success.<sup>2</sup> Courts have focussed on the question of whether degrees can be considered property and rejected the claim on that basis. Underlying these decisions is a concern for where a division of a degree as property might lead.

This paper addresses these policy concerns and examines arguments in favour of dividing degrees acquired during the marriage as matrimonial property. Given the limitations of using existing matrimonial property legislation to do this, it is suggested that this is most effectively accomplished through a remedial constructive trust. These principles will then be applied to an analysis of the Ontario Court of Appeal's recent decision in *Caratun v. Caratun*.<sup>3</sup>

The first issue to consider is why degrees should be treated as matrimonial assets for division purposes. Most provinces explicitly consider a spouse's

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<sup>1</sup> See, eg. *Family Law Act*, R.S.O. 1990, c. F-3, ss. 33(9)(b), 33 (9)(j); *Family Maintenance Act*, R.S.N.S. 1989, c.160, s.4(h); *Matrimonial Property Act*, R.S.N.S. 1989, c.275, s.13(g).

<sup>2</sup> See, eg. *Cole v. Cole* (1989), 88 N.S.R.(2d) 432 (N.S.S.C., T.D.); *McGuigan v. McGuigan* (1991), 33 R.F.L.(3d) 183 (N.S.S.C., T.D.).

<sup>3</sup> (1992), 42 R.F.L.(3d) 113 (Ont. C.A.); rev'g (1987), 9 R.F.L.(3d) 337 (Ont. H.C.) [hereinafter *Caratun*].

contribution to a degree in awarding maintenance.<sup>4</sup> The problem with a maintenance award is that it is given on the basis of need on the part of the receiving spouse; no compensation is awarded purely as recognition for significant contribution. In *Clarke v. Clarke*,<sup>5</sup> the Supreme Court of Canada examined this problem with respect to the treatment of pensions. Wilson, J. (as she then was) adopted the reasoning of Cameron, J.A. in *Tataryn v. Tataryn*:<sup>6</sup>

A matrimonial property right is not to be confused with a right to alimony or maintenance. The two differ fundamentally. Not only do they depend for their existence on different enactments and spring from different assumptions, their legal character is wholly dissimilar; the first is proprietary in nature, and concerns capital and its division: the other is personal and involves income and the support of one spouse by the other.

The statutory right of a married woman to share in the property accumulated during her marriage is rooted in the modern view of marriage as a partnership, and derives from the presumption of the *Matrimonial Property Act* that each of the partners contributed equally and independently to the acquisition of the marital property. Neither the conduct or condition, nor the needs or means, of either of the partners to the marriage have anything to do with the earned right of each of them to share in the property of the marriage.<sup>7</sup>

This analysis raises the possibility of whether degrees would qualify as property under provincial matrimonial property legislation. As stated earlier, arguments in support of this approach have rarely been successful. For instance, it has often been held that a degree cannot be considered “property” because it is intangible and non-transferrable. The right to receive a pension, however, is also intangible and non-transferrable yet it has been found to fall within the ambit of matrimonial property legislation.<sup>8</sup> It is important to remember that one of the policies behind matrimonial property legislation is the recognition of marriage as a partnership and the consequent equal sharing of *wealth* accumulated during the relationship.

Courts, including the Ontario Court of Appeal in *Caratun*,<sup>9</sup> have also had

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> [1990] 2 S.C.R. 795 [hereinafter *Clarke*].

<sup>6</sup> (1984), 38 R.F.L.(2d) 272 (Sask. C.A.).

<sup>7</sup> *Ibid.* at 285–286; cited in *Clarke*, *supra* note 5 at 810.

<sup>8</sup> *Clarke v. Clarke*, *supra* note 5.

<sup>9</sup> *Supra* note 3.

trouble with the valuation of a degree. Admittedly, the value of degrees is difficult to determine. The Supreme Court of Canada, however, stated in relation to pensions:

Without in any way minimizing the difficulties that may arise when courts are faced with the valuation problem, it is my view that such difficulty is not a bar to concluding that pensions are property for the purposes of equal division. Courts are frequently required to put a value on items that have no readily ascertainable value such as pain and suffering or the goodwill of a business.... The task is not an impossible one and the difficulty of placing a current value on pension rights is not, in my view, a good enough reason for refusing to characterize pensions as matrimonial property.<sup>10</sup>

The courts have raised other concerns in denying a division of degrees under matrimonial property legislation. These deal mainly with the effect the inflexibility of a property award would have on the degreed spouse's ability to change occupations or even survive economic hard times. Unlike a support award, matrimonial property divisions cannot later be revisited. This problem is, however, more a failing of the legislative regime than of the concept of a proprietary award *per se*.

It is submitted that the use of equitable principles of unjust enrichment and constructive trust will alleviate many of the above noted concerns yet still retain the benefits of proprietary compensation for contributions to a degree. A further benefit is that use of unjust enrichment and constructive trust shifts the analysis properly away from focussing on whether the degree is or is not "property." Ultimately, this is not the issue that needs to be decided. The real focus of the analysis should be on whether a proprietary as opposed to a personal remedy is justified in the circumstances. The constructive trust approach does exactly that.

It is now well established in Canada that a trust action can proceed independently of provincial matrimonial property legislation.<sup>11</sup> In *Sorochan v. Sorochan*,<sup>12</sup> the Supreme Court of Canada enunciated a clear two-step analysis to the equitable approach. First, a claim in unjust enrichment must be established, according to the criteria set out in *Pettkus v. Becker*:<sup>13</sup> (a) an

<sup>10</sup> *Clarke, supra* note 5 at 826. For a discussion of different valuation methods, see C. Welsh, "Apportioning Degrees Earned During Marriage: An Equitable Justification" (1987) 45 U.T. Fac. L. Rev. 272 at 288-292; L. Mullenix, "The Valuation of an Education Degree at Divorce" (1983) 16 Loyola L.A.L. Rev. 227.

<sup>11</sup> *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70; 23 R.F.L.(3d) 337 at 361 [hereinafter *Rawluk*; cited to R.F.L.(3d)].

<sup>12</sup> [1986] 2 S.C.R. 38 [hereinafter *Sorochan*].

<sup>13</sup> [1980] 2 S.C.R. 834.

enrichment of one spouse; (b) a corresponding deprivation of the other; and (c) an absence of a juristic reason for the enrichment. Once this has occurred, the court then considers what the appropriate remedy would be. A constructive trust will be awarded only if the circumstances warrant the granting of a proprietary remedy. Factors to consider in making this decision are the causal connection of the contributions connected to the property, the reasonable expectations of the parties, and the longevity of the relationship.<sup>14</sup>

In the abstract, a spouse's contribution towards the degree of the other would seem capable of meeting the criteria for unjust enrichment. Similarly, there is certainly a case to be made for a proprietary remedy of constructive trust. The important point to remember is that a finding of unjust enrichment and award of constructive trust is discretionary. This leads to much more flexibility than is available under a legislative regime. With matrimonial property statutes, family property is divided equally as of right. With equitable principles, the claiming party must prove entitlement. This will safeguard against spurious claims that courts, such as the Ontario Court of Appeal in *Caratun*, were concerned would arise. For example, where a pre-marital contract stipulates that one spouse will contribute to the education of the other, an unjust enrichment claim will be unsuccessful. Similarly, an established businessman who supports his wife in getting a degree that she is pursuing for personal development only will not receive a proprietary award because there is no reasonable expectation by both parties that the degree is for the mutual benefit of the family.

Where the *Sorochan* guidelines may break down is in the area of longevity of marriage. There is less of a case to be made for imposing a constructive trust on a degree in marriages that have continued long after the degree's acquisition. In these cases, there has been sufficient time for the family to reap the benefits of the improved standard of living that the degree promised to provide. The contributing spouse has already been at least partially compensated by enjoying that standard of living during the marriage. Further compensation can be effected by a regular division of assets, acquired as a result of the increase in wealth leading from the degree, or, in some cases, a maintenance payment. The approach outlined in this paper, however, more readily applies to marriages that dissolve soon after the degree has been acquired, that is, before its benefits have accrued: there has been no sharing of an improved standard of living and what's more, at this stage in their lives, the degree is often the most valuable asset the couple has.

The facts of the *Caratun* case can be briefly stated. The couple was married

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<sup>14</sup> *Sorochan*, *supra* note 12 at 47–53.

in Romania in 1976 after trying to acquire the required state permission for at least three years. The trial judge found as a fact that Mr. Caratun's marriage and subsequent fathering of children was for the purpose of emigrating to North America to practise dentistry.<sup>15</sup> From the time they arrived in Toronto in 1978 until Mr. Caratun finally received his licence to practice in 1981, both parties worked very hard, taking multiple jobs to make ends meet. Two days after Mr. Caratun was notified that he had passed his final exam and was qualified to practise dentistry, he told his wife that he wanted a divorce.

The trial judge found that a degree or licence was property under the *Family Law Act*<sup>16</sup> and could be valued and divided under that legislation. She also indicated that a constructive trust could be used to divide the property as well.

The Court of Appeal of Ontario did not follow Van Camp, J.'s reasoning although the quantum of her award was unchanged. The court rejected the contention that a licence or degree could be considered property under the *Family Law Act*. It did not believe that a dental licence was a form of property that was recognized by the common law and therefore within the statutory definition.<sup>17</sup> The court dismissed the constructive trust argument on the grounds that such a remedy could only be given where there is a traditional property right at stake. McKinlay, J.A. stated:

I agree that if the licence constituted "property" then there is no reason why, in a proper case, that property could not be subject to a constructive trust. However, if the licence does not constitute property, then there is nothing to which the constructive trust could attach.<sup>18</sup>

That there is unjust enrichment in the Caratun case is quite clear on the facts. In assessing the appropriate remedy in this case, a personal remedy such as damages would be inadequate. The couple had worked together for many years to achieve this goal of being able to practise in Canada and attaining a better standard of living than that available to them in Romania. Before any benefits from obtaining this goal could begin to accrue, the marriage dissolved. The non-owning spouse must be given a proprietary remedy to obtain an interest in the asset's growth. In *Rawluk*, Cory, J. recognized the special benefits consequent with a proprietary award:

Ownership encompasses far more than a mere share in the value of property. It includes additional legal rights, elements

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<sup>15</sup> (Ont. H.C.), *supra* note 3 at 343.

<sup>16</sup> *Supra* note 1.

<sup>17</sup> *Family Law Act*, *ibid.* at s.4.

<sup>18</sup> *Caratun* (Ont. C.A.), *supra* note 3 at 125.

of control and increased legal responsibilities. In addition, it may well provide psychological benefits derived from pride of ownership.<sup>19</sup>

With respect to the Court of Appeal's contention that a constructive trust can only be imposed on a traditional form of property, it is respectfully submitted that it does not accord with the development of the remedial constructive trust. As LaForest, J. stated in a case considering constructive trusts in a commercial context:

[I]t is not the case that a constructive trust should be reserved for situations where a right of property is recognized. That would limit the constructive trust to its institutional function, and deny to it the status of a remedy, its more important role. Thus, it is not in all cases that a pre-existing right of property will exist when a constructive trust is ordered. The imposition of a constructive trust can both recognize and create a right of property.

...It is not the recognition of a right of property that leads to a constructive trust. It is not necessary, therefore, to determine whether confidential information is property.<sup>20</sup>

Clearly, "professional degrees and licences" can be substituted for "confidential information" in the last sentence of the passage quoted.

In conclusion, there is a strong case to be made for considering professional degrees and licences as part of the accumulated wealth during marriage that is divisible upon breakdown. The use of unjust enrichment and constructive trust correctly focusses the analysis on whether any given case justifies a proprietary award; therefore, it is more flexible and sensitive to individual circumstances than matrimonial property legislation. In dismissing Mrs. Caratun's claim for an interest in her husband's dental practice, the Ontario Court of Appeal did not thoroughly analyze the constructive trust issue. Perhaps the Supreme Court of Canada will have occasion to do so.<sup>21</sup>

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<sup>19</sup> *Supra* note 11 at 365.

<sup>20</sup> *LAC Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 676-677.

<sup>21</sup> Leave to Appeal to Supreme Court of Canada filed 25 November 1992, *Bulletin of Proceedings Taken in the Supreme Court of Canada*, (27 November 1992) at 2622; application submitted to Court 29 January 1993, *Bulletin of Proceedings Taken in the Supreme Court of Canada*, (12 February 1993) at 267.