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Can a Court of Queen's Bench judgment that contains no law be considered law itself?

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Cases Considered:

B.H. v. E.J., 2008 ABQB 650

Title to a residential property in Edmonton was registered in the names of the plaintiff, B.H., and the defendant, E.J., as to each an undivided one-half interest as tenants in common. The property seemed to be up for sale and the question before the court was whether or not B.H. was entitled to any of the proceeds of sale. Her name was on the title, but did that mean B.H. had an interest in the Edmonton house which would entitle her to one-half of the sale proceeds? E.J. alleged that B.H.'s name was only placed on the title because she agreed to co-sign a mortgage for E.J. and that B.H. had no right to a portion of the sale proceeds. Mr. Justice James Langston agreed with the defendant, E.J., and ordered that all of the net proceeds of the sale of the property be paid to the defendant or, in the alternative, that the plaintiff transfer her undivided one-half interest to the defendant for $1.00. Remarkably, Justice Langston did so without referring to any legal authority whatsoever.

As 33 of the 35 paragraphs that make up this judgment are devoted to the facts (with the remaining two devoted to an order resolving the parties' dispute), this comment will first summarize those facts and Justice Langston's holdings with respect to the consequences of those facts. It will then discuss what law was relevant to the facts and issues and what differences a consideration of relevant legal authority might have made to the result in this case.

The Facts

B.H. and E.J. were not only co-owners on the title to a house in Edmonton; they were also, for a time, close friends. They seemed to be an unlikely pair, at least as they were portrayed by Justice Langston. B.H. was described as a lawyer with 30 years experience in a general practice. E.J. was said to be an unsophisticated Grade 9 drop out, divorced and with three children. The two of them met when B.H. acted as E.J.'s lawyer on E.J.'s divorce.

Before the residential property in question in this case was purchased, E.J. lived in a small community outside of Edmonton and commuted each day to her work at a modular home factory. Due to the long commute, E.J. was considering a move to Edmonton. Coincidentally a house - the house that became the property at stake in this case - located behind B.H.'s residence

came on the market in 1998 when its owner died. B.H. had been a friend of the deceased owner of the house and Ms. Benson, the daughter of the deceased, asked B.H. to handle the estate, including the sale of the house. B.H. thought of her close friend, E.J., her long commute, and the rental suites in the house which might make E.J.'s purchase of the Edmonton house possible.

E.J. wanted to buy the Edmonton house that B.J. told her about and she made an offer to do so on January 13, 1999. However, E.J. admitted she had difficulty arranging financing for her purchase, even though it was estimated that she had about $24,000 in equity in the out-of-town house she owned. She was only earning $9.00 per hour at the modular home factory. B.H. took the lead in arranging the mortgage financing E.J. needed to buy the Edmonton house. In March 1999, B.H. wrote to Ms. Benson to advise her that Canada Trust required another borrower/purchaser before they would lend money to buy the Edmonton house. Canada Trust also required that the second borrower/purchaser appear as a registered owner on title. The Canada Trust mortgage was a CMHC mortgage, meaning that those who obtained the mortgage were personally liable to make up any deficiency if the mortgage was not paid. B.H. advised Ms. Benson that she had agreed to be that co-borrower/co-purchaser. Because the letter from B.H. to Ms. Benson is one of the two pieces of evidence that Justice Langston put the most weight on when determining that B.H. had no beneficial interest in the Edmonton house, it is important to quote the relevant portions of the letter:

> [E.J.] has arranged for the financing to complete this transaction and I understand that there is no difficulty anticipated in closing on time. However, she would prefer to refinance the first mortgage through Canada Trust and accordingly applied for a new first mortgage with that institution. Canada Trust has advised her that she will require another borrower/purchaser, who must also appear as a registered owner on title. I have agreed to be a co-purchaser <u>for that purpose</u>, and Canada Trust has approved the mortgage on that basis. (emphasis added)

As a result of Canada Trust's position and E.J.'s inability to finance the purchase on her own, an amended offer to buy the Edmonton house was prepared and it showed B.H. as a co-purchaser with E.J. Ms. Benson accepted this amended offer. The purchase price was $132,500. There was a deposit of $1,000, the new Canada Trust first mortgage of $107,000 and a balance owing of $24,500. E.J.'s equity in her out-of-town house was to make up the balance owing. There is no indication of who paid the $1,000 deposit, but it apparently was not B.H.

E.J.'s out-of-town house did not sell until July of 2000. She was able to move into the Edmonton house before then, with her daughter and grandson, because B.H. approached one of her relatives to advance the $24,000 balance owning. This loan was made in April 1999. E.J. was solely responsible for the repayment of this loan.

There was almost no written evidence setting out the legal relationship between B.H. and E.J. or the nature of their co-ownership of the Edmonton property. There was one piece of paper, which Justice Langston described (at para. 6) as "handwritten, cryptic, undated and unsigned," that recorded some notes made by B.H. at about the time the Edmonton house was purchased. Her

notes made reference to a tenancy in common, to rental income being applied to the mortgage, to E.J. paying for utilities, to B.H. paying the rental amount for 3 months if the suites were vacant, and to listing the property for sale if the suites were vacant for more than 3 months. There was no mention of what was to happen to the money E.J. put into the Edmonton house from the sale of her out-of-town house and her repayment of the loan for B.H.'s relative if the property had to be sold.

B.H. and E.J. opened a joint account at Canada Trust in April 1999. The rental income was to be deposited into that account and the expenses were to be paid out of it. Both B.H. and E.J. had signing authority on the account.

Although E.J.'s financial situation appeared to be at least somewhat precarious, by the middle of 1999 she had a home in Edmonton for herself and family members that was located close to her friend B.H. and closer to her job. However, two set-backs occurred shortly thereafter.

The first set back was a serious one to E.J.'s health. By 2000, she was unable to work. In February 2000, she applied for benefits from the provincial Assured Income for the Severely Handicapped (AISH) program. Her friend, B.H., helped her complete the application forms. The AISH program provides financial and health-related assistance to eligible adults with a permanent disability that severely limits a person's ability to earn a living.

The second, less serious, set-back related to the sale of E.J.'s out-of-town house. When it was finally sold in July 2000, E.J. only realized $14,000 in equity on the sale. B.H. approached her relatives and arranged for this loan to be extended for one year. The remaining $10,000 was secured by a second mortgage on the Edmonton house and monthly payments were to be made by E.J. toward the interest owing. The principle amount was to be paid by E.J. by August 2000.

When August 2000 came around, there was no money in the joint account to repay the $10,000 remaining on the loan made by B.H.'s relative. B.H. had to work hard to obtain a new mortgage, approaching several financial institutions in vain, but Canadian Western Bank finally came through. Canadian Western Bank advanced enough money to pay the Canada Trust first mortgage, just under $7,000 to B.H.'s relative on the second mortgage and $5,000 for the repair of the roof of the Edmonton house. The joint account was moved to Canadian Western Bank. It seems it was about this time that the close friendship between B.H. and E.J. came to an end, unable to survive the financial issues.

Nevertheless, in 2001, E.J. sought B.H.'s help with another problem. There was an issue about her AISH benefits. Justice Langston does not tell us what the issue was, but it might have arisen because of B.H.'s co-ownership of the Edmonton house. Eligibility for the AISH program is affected by a number of factors, including assets of the recipient and their spouse or cohabiting partner, which must not exceed the limits allowed under the program. The limit on assets is $100,000, but some assets do not count as part of the limit. Exempt assets include the home the recipient lives in. (See the *Assured Income for the Severely Handicapped Act*, R.S.A. 2000, c. A-45, sections 7 and 8, the version of the act that was in force at the relevant time, although a new

Act was proclaimed in force in May 2007.) The AISH Regulation states that "[i]f an asset is jointly or communally owned, the value of the asset attributed to any owner is the amount calculated by dividing the value of the asset equally among all the owners."

B.H. talked to and wrote to the AISH program administrators, explaining why her name was on the title to the Edmonton house and explaining her role in that property. This letter is the second of the two pieces of evidence that Justice Langston seized upon to find that B.H. could receive no benefit from the Edmonton house. B.H. wrote to the AISH program as follows:

> [A]lthough my name appears on the title for [the Edmonton house], with that of [E.J.], <u>I receive no benefit whatsoever from the rental income</u>. <u>My [sic] reason my name appears on title was to facilitate mortgage financing</u> and if for any reason, [E.] was unable to meet the mortgage payments, the house would have to be sold. <u>I do not contribute to the household expenses nor do I receive any of the rental income</u>. (emphasis added)

Despite this letter to AISH, B.H. denied that she was merely a guarantor of the mortgage. She denied that her role was limited to merely helping E.J. secure financing to purchase the Edmonton house. For her part, E.J. admitted that she was unable to finance the house purchase and B.H. had decided to assist her. She maintained this assistance fell short of co-ownership.

The Analysis of Those Facts

In a short two paragraphs, Justice Langston found B.H.'s name on the title to the Edmonton house and on the mortgage to Canadian Western Bank was not an accurate depiction of the nature of the relationship between the two friends that existed at the time of the purchase. He found that E.J. and B.H. fully intended that rental income and contribution from E.J. would satisfy the mortgage payments. He found it defied reason to suggest that E.J. would invest all of her money and move her family to the Edmonton house but be willing to be removed from that house if the rental suites were vacant for more than three months. He further found that B.H. contributed nothing financial to the venture, apart from her business acumen. Justice Langston stated (at para. 32) that the clearest indication of the parties' intent was in the letters B.H. sent to Ms. Benson and to the AISH administration:

> A review of that correspondence clearly speaks of the Plaintiff [B.H.] accommodating the Defendant [E.J.] financially. I accept what the Plaintiff says in that correspondence. It is clear that the Plaintiff, out of friendship, was prepared to financially assist the Defendant in her acquisition of a new residence. The actions of the Plaintiff and Defendant are consistent with that view. The correspondence authored by the Plaintiff is consistent with that view. <u>Reliance by the Plaintiff on title and mortgage documents is a convenient sophistry</u>. (emphasis added)

The Results Based on Those Facts and Analysis

Justice Langston therefore ordered that, upon the sale or disposition of the Edmonton house, all

net proceeds were to be paid to E.J. He further ordered, in the alternative, that if E.J. kept the Edmonton house, B.H. had to transfer her undivided one-half interest in this property to E.J. for $1.00.

The Law?

As I indicated at the beginning of this post, Justice Langston's judgment is highly unusual because it refers to no law whatever. It does not cite any source or authority for the court's jurisdiction in this matter. It does not state what the cause of action was. It does not mention who had the burden of proof, nor what evidence they needed to produce to prove their claim. It does not refer to a trust, let alone a specific type of trust. It does not mention the difference between a legal and an equitable title. It does not note the evidentiary requirements of the *Statute of Frauds 1677*. It does not mention the *Land Titles Act*. It does not state any rules or guidelines for determining when a person's name can be removed from a Certificate of Title, thereby depriving them of any type of interest in real property. There is no appeal to general rules or principles of law, but merely recitations of the very specific facts of this one particular case. The judgment, on the face of it, therefore appears arbitrary.

It is not clear exactly how this action came about. B.H. was the plaintiff, but Justice Langston merely indicates that the parties were seeking to define their respective interests in the Edmonton house. In concluding that whatever interest B.H. had in the Edmonton house, it was one that she held for the benefit of E.J., Justice Langston was presumably finding that B.H. held legal title to an undivided one-half interest in the Edmonton house in trust and for the benefit of E.J.

I say "presumably" because there is no mention of a trust in the judgment. Instead, while summarizing the facts, Justice Langston makes a few references to the concepts of "accommodation" and "guarantee":

- E.J. says that B.H. "was only placed on title because she agreed to co-sign a mortgage which was done as an <u>accommodation</u>" to E.H. (para. 1, emphasis added)
- B.H. "points to the potential for this ongoing obligation as being an indication of her intention to own this property rather than simply be an <u>accommodation borrower</u> for the benefit of the Defendant." (para. 16, emphasis added)
- "The Plaintiff says that the Defendant never suggested, until litigation began, that the Plaintiff was merely a <u>guarantor</u> of the mortgage." (para. 24, emphasis added)
- "[T]he Plaintiff denies that she was merely an <u>'accommodation maker'.</u>" (para. 26, emphasis added)
- The lawyer acting for B.H. and E.J,. on their purchase of the Edmonton house "has no recollection of any discussion suggesting that the Plaintiff was merely a <u>guarantor</u> of the mortgage." (para. 28, emphasis added)

This language is the language of negotiable instruments. Perhaps counsel argued the matter in these terms. Because there was borrowing, there were promissory notes to repay debts. A person who is not the debtor can guarantee payment of a loan by signing a promissory note as an

"accommodation maker," thereby making themselves liable to pay the debt. That does not affect title to real property, however.

B.H. was shown in a Certificate of Title as the registered owner of an undivided one-half interest in land and, under our land titles system, that fact is significant in law. If someone is holding title to real property in Alberta for the benefit of someone else, that fact is never acknowledged on the title. Under section 47 of the *Land Titles Act*, R.S.A. 2000, c. L-4:

> No memorandum or entry shall be made, on a certificate of title, of any notice of trusts, whether expressed, implied or constructive, but the Registrar shall treat any instrument containing any such notice as if there were no trust, and the trustee or trustees named in the instrument are deemed to be the absolute and beneficial owners of the land for the purposes of this Act.

Furthermore, section 62(1) of the *Land Titles Act* provides:

> 62(1) Every certificate of title granted under this Act, . . . so long as it remains in force and uncancelled under this Act, is conclusive proof in all courts as against Her Majesty and all persons whomsoever that the person named in the certificate is entitled to the land included in the certificate for the estate or interest specified in the certificate, subject to [exceptions that were not at issue in this case]. (emphasis added)

Based on the *Land Titles Act*, the starting point would then be that B.H. was deemed to be a beneficial, as well as legal, owner of an undivided one-half interest in the Edmonton house. The burden of proving B.H. did not hold the beneficial title would then be on E.J. What would she have had to prove? She would have had to prove that B.H. held her title to the undivided one-half interest in trust for the benefit of E.J. If she could prove this, then the court could declare the existence of the trust and require that it be taken account of on sale of the Edmonton house.

The Court of Queen's Bench has authority to hear this sort of claim. The court has a very broad general jurisdiction, both at common law and in equity. The *Judicature Act*, R.S.A. 2000, c. J-2, confirms the jurisdiction of a superior court in many of its provisions. Of special relevance to the case before Justice Langston is section 16(2) which states:

> 16(2). If a defendant claims to be entitled
>
> (a) to an equitable estate or right, or
>
> (b) to relief on an equitable ground . . .
>
> (ii) against a right, title or claim asserted by a plaintiff in the proceeding,

> the Court shall give to each equitable defence so alleged the same effect by way of defence against the claim of the plaintiff that the High Court of Justice in England would give if the same or like matters had been relied on by way of defence in a proceeding for the same or like purpose.

What did B.H. have to prove to show that she had the beneficial interest in the undivided one-half interest in the Edmonton house that was registered in B.H.'s name? She had to prove, on the balance of probabilities, that B.H. held her interest in trust for E.J. This case had to be about a trust. After all, what is a trust but "the relationship which arises whenever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons . . . in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries. . .": G.WQ. Keeton and L.A. Sheridan, *The Law of Trust*, 10th ed. (1974) at 5, as quoted in D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at 5.

There are four types of trusts: express, implied, resulting and constructive. Either people create a trust by their words or actions (express or implied) or the law imposes one (resulting or constructive): Waters at 17. The discussion in the judgment was all about what the parties *intended* when they bought the Edmonton house, and so it would seem that the court was not concerned with the resulting or constructive trusts, both of which are deemed to arise by the law in order to achieve what the law considers to be an equitable result. Neither were there clear oral or written words stating that B.H. and E.J. were making the Edmonton house subject to a trust, ruling out the possibility of an express trust. If the parties created a trust, the type of trust that E.J. had to prove might have been an implied trust.

Perhaps the references to the parties' intentions by Justice Langston were misplaced. Perhaps the relevant trust was a resulting trust. A resulting trust does not allude to intentions; it merely describes what happens to the property: Waters at 300. Perhaps this was a case in which the law would deem a trust to have arisen in order to secure a result the court considered fair and just? What are the circumstances under which the law will impose a resulting trust then? Do B.H. and E.J. come within those circumstances? As Waters summarizes:

> Broadly speaking, a resulting trust arises whenever legal or equitable title to property is in one party's name but that party, because [she] … gave no value for the property, is under an obligation to return it to the . . . person who *did* give value for it. (Waters at 299, emphasis in original)

If Justice Langston was finding a resulting trust, this might explain his emphasis on the fact B.H. put no money into the Edmonton house (although she did contribute in other ways). A common type of resulting trust is one that the law deems arises when property is purchased by A and the transfer is taken in the name of A and B, with B becoming a resulting trustee for her interest for A (Waters at 301).

What would E.J. have to prove in order for the court to find a trust imposed upon B.H.'s undivided one-half interest in the property? For any trust to come into existence, it is essential that it have three characteristics:

> [F]irst, the language of the alleged settler [the creator of the trust] must be imperative; second, the subject matter or trust property must be certain; third, the objects of the trust [the beneficiaries] must be certain. (Waters at 107, citing *Knight v. Knight* (1840), 3 Beav. 148, 49 E.R. 58 and *Renehan v. Malone* (1897), 1 N.B. Eq. 506.)

Essentially, to establish a valid trust there must be the three certainties: certainty of intention, certainty of subject matter, and certainty of objects. For a recent Alberta case considering the certainties required to create a trust, see *Brookfield Bridge Lending Fund Inc. v. Vanquish Oil and Gas Corporation*, 2008 ABQB 444, commented upon by my colleague, Nigel Bankes, in "When is a non-operator entitled to a constructive trust over the operator's own assets?"

In this case, while the Edmonton house was certainly the subject matter of the trust and E.J. would have been the object of a trust, it is extremely difficult to discern any certainty of intention to create a trust by E.J. and B.H. based on the facts that were set out. If a test against which to measure and apply the facts had been set out by the court, it might have become more or less obvious whether there was certainty of intention.

There are other relevant legal issues, however. As a matter of evidence law, the *Statute of Frauds 1677* requires that all trusts of land be evidenced in writing. There is no discussion of this requirement or of whether the handwritten, cryptic, undated and unsigned notes made by B.H. and/or the letter B.H. wrote to Ms. Benson qualified. The statements in the letter B.H. wrote to the AISH administration came too late to create the trust.

Resulting trusts raise other, broader issues in the context of a land titles system. Recall section 62(1) of the *Land Titles Act* and its conclusive presumption. The Alberta land titles system depends upon this conclusive presumption which helps to establish the principle of indefeasibility of title. A land titles or Torrens system is an uneasy fit with the body of law known as equity. The question of whether a Torrens transfer trumps the application of resulting trust has been raised in Alberta but not dealt with decisively. There are three recent Saskatchewan Queen's Bench cases - *Podboy v. Bale*, [2001] S.J. No. 13, 201 Sask. R. 306; *Lafaver v. Lafaver*, [2003] 6 W.W.R. 698, 229 Sask. R. 296; and *Winisky v. Krivuzoff*, [2004] 1 W.W.R. 639, 237 Sask. R. 213 - holding that a common law trust is inconsistent with a Torrens system. None of these Saskatchewan cases has been followed in Alberta yet. For example, a recent Alberta Court of Queen's Bench decision declined to follow them on the basis that *Kaup v. Imperial Oil Ltd.*, [1962] S.C.R. 170 at 182-83 decided that an interest in land under the Land Titles Act "may exist independent of the register between the 'immediate parties' or volunteers claiming through the immediate parties": see *Re Passburg Petroleums Ltd. and Landstrom Developments Ltd.* (1984), 8 D.L.R. (4th) 363 at 367 and *Bezuko v. Supruniuk*, 2007 ABQB 204 at paras. 26-33.

I could go on, but hopefully these brief comments about possible legal issues demonstrate that the law is relevant to the resolution of the dispute between B.H. and E.J. It affects the starting position of the parties. It affects what has to be proven. It affects the evidence that has to be presented and who has to present that evidence. Would it affect the outcome? Perhaps not.

The value of this case as a legal precedent is nil because it contains no law. Indeed, it is difficult to guess why this judgment was posted on the Alberta Courts web site. Judgments such as this one are the type that typically attract the epithet "palm tree justice." See, for example, the comments of O'Sullivan J.A., in *Re Chupryk* (1980), 110 D.L.R. (3d) 108 (Man. C.A.), about a different Court of Queen's Bench order that turned a legal interest into a trust interest.

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