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Neither ‘Institutional’ nor ‘Remedial’: Court-Ordered Trusts in English and Canadian Private Law

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Abstract : The major claim of this paper is that both the English and Canadian branches of the common law have been ill-served by the 'institutional'/'remedial' taxonomy of constructive trusts; what shall be termed the 'orthodox taxonomy'. The orthodox taxonomy is found both within the case law and the attendant academic commentary. In truth, the orthodox taxonomy is especially dangerous because it contains a kernel of truth together with a misconception; the interplay of both has caused more harm than the misconception alone would have managed. The kernel of truth is that some trusts arise automatically when the necessary facts occur ('institutional') and other trusts arise only by way of court order ('remedial'). The misconception is that these two labels represent an exhaustive nomenclature of two distinct 'kinds' of constructive trust such that any particular constructive trust must necessarily be 'institutional' if it is not 'remedial' and vice versa. The central difficulty is that our understanding of 'remedial' trusts is relatively poor, with the result that anyone using the orthodox taxonomy shall be led astray in one of three ways: (i) by rejecting it wholesale; (ii) by adopting one ‘type’ of trust to the exclusion of the other (as in English law); or (iii) by applying it as an analytical device with sub-optimal results which are difficult to defend. This paper shall seek to resolve these difficulties by clarifying the criteria for identifying and distinguishing true 'remedial' constructive trusts. It shall then provide some working examples of how English and Canadian private law at present misunderstand constructive trusts and how that misunderstanding might be resolved once we distinguish the orthodox taxonomy's kernel of truth from the misconception outlined above.

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