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What happens to property when common-law couples separate?

Bryce Dillon, Family Law Lawyer

In Ontario, the property rights of married or formerly married spouses are governed by the *Family Law Act* ("*FLA*"). As a general rule, the *FLA* calculates the growth in net worth of each spouse during the marriage and splits the difference equally between them.

However, property division for unmarried common-law spouses is governed by the judge-invented concept of *unjust enrichment*. This applies where one party is enriched, the other is correspondingly deprived, and there is no juristic reason for the enrichment and deprivation.[i]

A successful claim of unjust enrichment can give rise to two remedies, as set out below.

1. **Monetary Remedy:**

A monetary remedy can be awarded where a common-law couple has engaged in a joint family venture ("JFV").[ii]

Under this approach, first the Court must find a JFV by considering evidence under four main headings: (1) mutual effort, (2) economic integration, (3) actual intent, and (4) prioritization of the family. Courts consider many factors—for example, whether the parties shared expenses, had joint bank accounts and investments, held themselves out to others as being married, or treated the other spouse's children from a former relationship as their own.

Second, there must be a link between the spouse's contributions and the accumulation of wealth. The respective contributions of each spouse are taken into account to determine their proportionate shares. There is no presumption of equal sharing. When the spouses have made unequal contributions, their shares will be unequal.[iii]

Courts recognize the importance of indirect contributions, such as domestic services.[iv] However, in some cases, Courts favour the spouse with the greater income who makes most of the financial contributions.[v]

Normally, the remedy is calculated on a "value survived" basis.[vi] In other words, the spouse who is successful in making his or her claim will be compensated for his or her proportionate share of the family wealth, rather than based on the value of services provided (e.g. domestic labour).

Generally, Courts determine each spouse's share of *all* family assets.[vii] Specific properties are only excluded from the calculation if the parties can show that they intended to place those properties outside the JFV.

However, case law is unclear as to the appropriate date to value the family wealth for the purposes of calculating the remedy. Some judges use the date of separation,[viii] while others use the date of trial, which could be months or years after separation.[ix] For couples with assets that fluctuate in value (e.g. business interests), the valuation date could be critical.

2. Constructive Trust:

A common-law spouse may also be entitled to a constructive trust, giving them an interest in property held in the other spouse's name. However, constructive trusts are only available if a spouse proves that a monetary remedy is inappropriate.[x]

It is difficult to meet the test for constructive trust: a spouse must establish a "sufficiently substantial and direct" link or causal connection between their contributions and the acquisition, preservation, maintenance, or improvement of the disputed property.[xi] Domestic labour, such as housekeeping or property maintenance, may give rise to a constructive trust.[xii]

Entitlement to a constructive trust does not guarantee equal sharing, and unlike monetary remedies, constructive trusts are granted asset-by-asset. For example, a spouse may get a 50% share of asset X and 40% share of asset Y, leading to fairly uncertain results.[xiii]

Conclusion:

A well-drafted cohabitation agreement can mitigate many of the risks associated with an unjust enrichment claim. The Family Law Group at Perley-Robertson, Hill & McDougall LLP/s.r.l. can assist individuals in common-law relationships navigate their rights and obligations with respect to property division.

Bryce is a Family Law Lawyer in the Litigation Group at Perley-Robertson, Hill & McDougall LLP/s.r.l. He can be reached at 613.566.2852 or bdillon@perlaw.ca.

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[i] *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 SCR 269 ["*Kerr*"] at paras 30 to 45.
[ii] *Kerr, ibid* at para 47.
[iii] *Kerr, ibid* at para 53.
[iv] *Kerr, ibid* at paras 42, 48, and 68; *Peter v. Beblow*, 1993 CarswellBC 44 (S.C.C.) ["*Peter*"] at paras 19, 30.
[v] *Herb v. Stevens*, 2014 BCSC 670 at para 72.
[vi] *Wawzonek v. Page*, 2015 ONSC 4374 at para 131.
[vii] *Lemoine v. Griffith*, 2014 ABCA 46 at paras 35-36.
[viii] *Wood v. Davis*, 2014 BCSC 1513 at para 81.
[ix] *Jackson v. McNee*, 2011 ONSC 4651 at para 67; *Jones v. Durston*, 2012 ONSC 3073 at para 70; *Ostere v. Harding*, 2016 BCSC 819 at para 105.
[x] *Kerr, supra* note 1 at paras 50-52.
[xi] *Kerr, supra* note 1 at para 51.
[xii] *Peter, supra* note 4.
[xiii] *Darlington v. Moore*, 2015 NSSC 124 at paras 167-210.