

**RECENT JURISPRUDENCE POST-KERR V. BARANOW/**

**10-YEAR LIMITATION PERIOD FOR UNJUST ENRICHMENT CLAIMS IN FAMILY  
LAW CASES**

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**Introduction**

Many claim that *Kerr v. Baranow*<sup>1</sup> invented a new claim and established the “joint family venture” as a way of proving unjust enrichment. There is nothing new about the notion of a joint family venture in which both parties contribute to their overall accumulation of wealth.<sup>2</sup> Courts have recognized joint family ventures in many cases preceding *Kerr* and in many contexts. The Court’s recognition of joint family ventures is evident in *Murdoch v. Murdoch*<sup>3</sup> which emphasized the “pooling of effort by spouses,” in *Petkus v. Becker*<sup>4</sup> that noted the “joint effort” and “team work” of the parties and in *Peter v. Beblow*<sup>5</sup>, where the court recognized that the parties were engaged in a “common venture” and Justice McLachlin stated that the appropriate approach was to consider the Applicant’s share in all the family assets.<sup>6</sup>

The reasons of Mr. Justice Cromwell in *Kerr* are an assimilation, restatement and modernization of the law of unjust enrichment. The test for proving unjust enrichment has not changed. The four factors described by Justice Cromwell under which to consider evidence of a joint family venture are an elaboration and a summary of the key elements to consider when fashioning a global remedy for unjust enrichment. Nonetheless, the unjust enrichment and joint family venture analyses are often confused and uncertainty surrounds the assessment of

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<sup>1</sup> [2011] S.C.J. No. 10.

<sup>2</sup> *Ibid* at para. 61

<sup>3</sup> [1975] 1 S.C.R. 423

<sup>4</sup> [1980] 2 S.C.R. 834

<sup>5</sup> [1993] 1 S.C.R. 980

<sup>6</sup> *Ibid* at para. 34

applications for unjust enrichment based on the particular factual context out of which the claim arises.

This paper will examine recent cases applying *Kerr* highlighting the difficulty in predicting and quantifying the remedy for unjust enrichment. Secondly, this paper will address the recently defined 10-year statutory limitation period for unjust enrichment claims in family law cases in Ontario.

### **The Current Law of Unjust Enrichment**

*Kerr* reiterated that the test for unjust enrichment remains the same: 1) an enrichment or benefit to the defendant; 2) a corresponding deprivation suffered by the plaintiff; and 3) the absence of a juristic reason for the enrichment.<sup>7</sup>

If the court finds that unjust enrichment has occurred, the next step is to determine the remedy. In *Kerr*, the Court reinforced the concept that the purpose of an unjust enrichment remedy is to require the defendant to repay or reverse the unjustified enrichment, either by reimbursing the other party with money or an interest in property.

The first remedy to consider is always a monetary award, which in most cases, will be sufficient to remedy the unjust enrichment. If a monetary award is sufficient, an interest in property will not be granted. There are two approaches to valuing a monetary award.<sup>28</sup> The "value survived" approach considers the value of the property in light of the claimant's contributions whereas the "value received" or *quantum meruit* approach considers the value of the services provided by the claimant.

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<sup>7</sup> *Supra*, note 1 at para. 32

The “value survived” approach was endorsed in *Kerr* as a more accurate reflection of the nature of the relationship of unmarried persons where there is a link between the joint efforts of the parties and the accumulation of wealth. In the appropriate case, where the unjust enrichment is most realistically characterized as a party retaining a disproportionate share of assets resulting from a joint family venture, the monetary remedy should be calculated on the basis of the share of those assets which is proportionate to the plaintiff’s contributions. The key features to the value survived approach are the assessment of the value available for apportionment and the parties’ proportionate contributions to the value.

A proprietary award by way of a constructive trust may be awarded where a monetary award is “inappropriate or insufficient”<sup>8</sup> and where the claimant can demonstrate a causal connection between his or her contributions and the acquisition, preservation, maintenance, or improvement of specific property.<sup>9</sup>

### ***A New Approach to the Monetary Remedy: Joint Family Ventures***

A joint family venture is characterized by a relationship in which the contributions of both parties have resulted in an accumulation of wealth. The four headings to consider in determining whether the parties have engaged in a joint family venture include: (i) the mutual effort of the parties; (ii) their degree of economic integration; (iii) their actual intent during the relationship; and (iv) the prioritization of the family unit in decision-making.<sup>10</sup> The list of relevant factors, however, is not closed.<sup>11</sup>

There is no presumption of a joint family venture and it can only be identified when its existence is well grounded in evidence. The emphasis should be on how the parties actually lived

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<sup>8</sup> *Ibid* at paras. 46 & 47

<sup>9</sup> *Ibid* at paras. 50 – 51.

<sup>10</sup> *Ibid* at paras. 87-99

<sup>11</sup> *Ibid* at para. 89

their lives. Once the Court has found that a joint family venture existed, in order to justify a remedy in unjust enrichment, the court must find that wealth was created and one party ended up with a disproportionate share of that wealth, which was the product of the parties' joint efforts. The remedy is proportionate to the contribution of the parties. The mutual conferral of benefits will automatically be taken into account in determining the claimant's proportionate share of wealth. It is important to note that this sharing of wealth may now apply to all of the assets accumulated during the relationship rather than only specific assets.

### **Case Summaries**

There have been a significant number of cases that have applied *Kerr* and the unjust enrichment and joint family venture framework. The courts have shown that domestic relationships where couples have engaged in joint family ventures are common and that family members who are not domestic partners can also participate in joint family ventures.

Philip Epstein's paper entitled, "Houston, We have a Problem, Constructive Trust and Unjust Enrichment" summarizes the jurisprudence decided across Canada since *Kerr* up to March 2012. The following is a short summary of some of the jurisprudence since *Kerr* post-March 2012.

#### ***Kerr v. Baranow*<sup>12</sup>**

The British Columbia Supreme Court recently released a new trial decision after its decision was appealed to the Supreme Court of Canada, where a new trial was ordered. This case involved a common law couple in their 60's who had cohabited for 25 years. Justice Gerow applied the principals enunciated by Justice Cromwell and found that unjust enrichment had

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<sup>12</sup> 2012 BCSC 1222

occurred. The Respondent was enriched from the domestic and financial contributions of the Applicant. Justice Gerow found that the Respondent could not have paid the mortgage without the contributions from the Applicant. A corresponding deprivation had occurred because the Applicant did not use her income to purchase her own real estate or apply her housekeeping efforts or the time she spent during the construction of the parties' home solely for her own benefit.

The couple worked as a team to plan, build and maintain their home. Although they did not have joint bank accounts, economic integration had occurred by entering joint mortgages, having joint powers of attorney, shared health and dental plans and the tax savings they utilized as a couple. Further, the Applicant's children, who at times lived with the couple, and the family vacations the parties took led to the conclusion that the family was a priority. Justice Gerow concluded that the couple had engaged in a joint family venture. In all of the circumstances and after taking into account the Respondent's significant contributions to the Applicant's care following her stroke (which reduced the amount the Applicant would otherwise be entitled to), a monetary award of \$240,000 was awarded to the Applicant for unjust enrichment.

*Symmons v. Symmons*<sup>13</sup>

The Ontario Court of Appeal applied *Kerr* to a pension accumulated prior to marriage. The Appellant appealed the trial judge's decision to not grant her a share in her husband's pension interest that accumulated during pre-marriage cohabitation on the basis of unjust enrichment. The Court cited its decision in *McNamee v. McNamee* that "in the vast majority of

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<sup>13</sup> [2012] O.J. No. 5191

cases, any unjust enrichment that arises as the result of a marriage will be fully addressed through the operation of the equalization provisions under the *Family Law Act*...”<sup>14</sup>

The Court of Appeal upheld the trial judge’s finding that there was no unjust enrichment. The parties cohabited for a relatively short period prior to marriage (5.5 years) and had no child together at the time. The Court recognized that for the purposes of an unjust enrichment claim, the Applicant must demonstrate that one party retained a disproportionate share of the economic fruits of their joint efforts. The Applicant’s net worth had increased by almost two times compared to that of the Respondent during their marriage, which significantly undermined her claim for unjust enrichment.

The Court found that the pre-marriage relationship was not a joint family venture and even if it was, there was insufficient evidence that the Respondent retained a disproportionate share of the assets accrued as a result of the parties’ joint efforts.

***J.J.S. v. M.S.W.***<sup>15</sup>

The parties had two children and cohabited for 13 years. The Applicant was a stay-at-home mother and the Respondent owned his own business. The Respondent controlled the family finances and the Applicant was financially dependent on the Respondent who would provide her with money to run the household. Title to the family’s home was in the name of the Respondent alone and the Applicant did not financially contribute to the purchase of the home. The parties kept their financial affairs separate and never had a joint bank account during their relationship. The Respondent had argued that the parties had only a “business relationship” rather than a marriage-like relationship, which was not accepted by the Court.

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<sup>14</sup> 2011 ONCA 533 at para. 66

<sup>15</sup> [2013] B.C.J. No. 323

Justice Adair adopted *Kerr*'s straightforward economic approach to the enrichment and corresponding detriment aspects of the unjust enrichment test, which does not distinguish domestic services from other contributions. The Court found that from the time the parties' first child was born until separation, the Respondent was enriched by the Applicant's assumption of the vast majority of the burden of caring for and raising the parties' children as otherwise the Respondent would not have been able to devote himself to his business and earning an income. Although the parties never shared a joint bank account, this was a function of the Respondent's need for control and the Applicant was financially dependent on the Respondent. Justice Adair adopted Justice McLachlin's statement in *Peter v. Beblow* quoting Lord Simon's observation that: "The cock-bird can feather his nest precisely because he is not required to spend most of his time sitting on it."<sup>16</sup> Justice Adair concluded that the parties were engaged in a joint family venture.

Once the Court made a finding of unjust enrichment, the next question was remedy. In light of the finding of joint family venture, the remedy was measured on the basis of a share in the accumulated wealth proportionate to the Applicant's contributions. Justice Adair relied on *Kerr* for the proposition that in the case of a joint family venture, determining the proportionate contributions of the parties does not call for a minute examination of the give and take of daily life. It calls, rather for the reasoned exercise of judgment in light of all the evidence.<sup>17</sup>

The Court went on to analyze which assets accumulated during the relationship and thus the pool of assets that should be valued or divided in order to address the unjust enrichment claim. A proprietary remedy in the Respondent's RRSP was appropriate and 50% of the value of

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<sup>16</sup> *Ibid* at para. 78

<sup>17</sup> *Supra*, note 1 at para. 102

the RRSP was directed to the Applicant. The RRSP was funded by a bonus paid to the Respondent. Without the Applicant taking on responsibility for the home and children, the Respondent would have been unable to devote the time and effort resulting in the bonus. The trial judge fixed the Applicant's share in the family home at 40% as there was a nexus between the Applicant's contributions and the source of the down payment. Further, the money to purchase the family home came from the business and therefore could be said to have been generated as a result of the parties' joint efforts. The Applicant was not found to have a proprietary remedy in a second family property as the market value had increased not because of any effort of the parties and the Applicant had made no monetary contribution to its purchase. Nonetheless, her contributions to the joint family venture permitted the Respondent to pay down the initial debt on the property and she was therefore awarded a monetary award of \$165,000.

The Court declined to make an award specific to the Respondent's business as a value could not be attached to the business and the total remedy would compensate the Applicant for her share of the accumulated wealth proportionate to her contributions to the joint family venture.

***Horch v. Horch***<sup>18</sup>

This case applied the principles of a joint family venture to a married couple post-separation. The husband acquired shares during the marriage registered in his name alone. Since the date of separation, the value of his shares had increased and since shortly after separation, he had received all monthly dividends. It was found that there was no juristic reason for the husband's receipt of the unequal distribution of dividends or receipt of the entire benefit of the

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<sup>18</sup> [2012] M.J. No. 431

appreciation in value of the shares post-separation, which were acquired as a result of the joint family venture during marriage. The Court characterized the married relationship as a joint family venture after taking into account the four headings described by Justice Cromwell in *Kerr*. A constructive trust in this case was not awarded as a monetary award was sufficient. A monetary award equal to 50% of the total-after tax value of the dividends that had been received by the husband to the date of the trial was ordered (the wife failed to make a claim for a share of the increase in value of the shares post-separation).

***Meeser v. Meeser***<sup>19</sup>

Joint family ventures have applied outside of marriage-like relationships. Justice Eberhard applied the joint family venture analysis in this case to the husband and his parents. The parents owned the matrimonial home and the farm where the husband worked. The wife had claimed a constructive trust interest in the home and farm against the husband's parents; however, it was found that the wife's claim was derivative. The husband had not made a constructive trust claim against his parents. Justice Eberhard found that the parents were unjustly enriched by the efforts of their son and a constructive trust was appropriate in favour of the son.

The court commented that it was rare to find the main headings of joint family venture, that is, mutual effort, economic integration, actual intent and priority of the family as strongly present as they were in this family. The court fixed a value for the husband's beneficial interest in the matrimonial home, acre of farm and family business which would appear on his Net Family Property Statement so that the wife would receive the benefit through the equalization

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<sup>19</sup> [2012] O.J. No. 5939

process. The Court factored in the reciprocal benefit the parties received in living rent-free in valuing the beneficial interest in the home and land.

***Topper v. Topper***<sup>20</sup>

This is another case where non-domestic partners were found to participate in a joint family venture.<sup>21</sup> In this case, the matrimonial home was owned by the husband's brother. The wife claimed unjust enrichment against the brother-in-law. The wife had contributed her labour and a \$25,000 inheritance in relation to the matrimonial home. Justice Wildman held that awarding a proprietary interest was impractical because it was unrealistic for the wife to have a continued relationship with the brother and husband. Therefore, a monetary award was held to be appropriate.

Justice Wildman found that the wife had contributed two benefits in relation to the matrimonial home; first, in reducing the mortgage principal and secondly, increasing the property value due to her efforts. The Court awarded the wife \$11,973.63 for her unjust enrichment claim.

In commenting on the difficulty in valuing the unjust enrichment claim, Justice Wildman stated as follows:

I have gone through every possible mental gymnastic I can think of to try to come up with a better way to value Viktorija's unjust enrichment claim on the flawed evidentiary record before me. However, I have failed. It seems to me that the \$6,000 figure that I started with is better than any other alternative, and I am going to use that number in exercising my discretion to fashion the award that I feel best "repays or reverses" the unjust enrichment.<sup>22</sup>

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<sup>20</sup> [2012] O.J. No. 2720

<sup>21</sup> *Ibid* at para. 22.

<sup>22</sup> *Ibid* at para. 362

The above comments demonstrate the necessity of carefully putting forward an evidentiary record to either support or defend unjust enrichment claims.

*Hannigan v. Yee*<sup>23</sup>

This is a case where a finding of joint family venture was not made as the parties who had cohabited together for 14 years were financially independent of each other and divided the household expenses equally. The Court dismissed the unjust enrichment claim and made the following comments in describing the absence of a joint family venture:

There is no evidence of "mutual effort". There were no joint contributions to a common pool for family purposes. Neither had a greater proportion of domestic responsibility thus freeing the other to pursue a career. Neither was forced to forego career advancement or otherwise act to their economic detriment for the sake of the relationship. There was no "economic integration" There was no integration of financial interests. Both perceived their money as they own to spend as they saw fit for their own purposes and not for a family purpose. There was no "actual intent". There is no evidence of "priority of family". There is overwhelming evidence these parties made a deliberate choice "not to have their lives economically intertwined" . They did not share their wealth, they did not create joint wealth. They kept their finances separate and distinct. There is no evidence of a plan for a shared future. They displayed themselves as a couple, but the relationship was not always stable, as evidenced in 2003. Neither party was on title to any property in the name of the other. The only evidence of a plan for distribution on death was an unsigned will where the best Mr. Hannigan could expect at the time was a life interest in Ms. Yee's property. There is no evidence they were working together to accrue assets for retirement. There is no evidence Mr. Hannigan ever once offered to make a mortgage payment or advance capital to reduce the mortgage. He considered his money his. She considered her money hers.<sup>24</sup>

The Court referenced the principal in *Kerr* that where the wealth has been accumulated as a result of a joint family venture, then benefits conferred on the plaintiff by the defendant should be taken into account when establishing the claimant's proportionate share of the accumulated

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<sup>23</sup> [2013] B.C.J. No. 77

<sup>24</sup> *Ibid* at para. 111

wealth.<sup>25</sup> *Kerr* held that a reduction of the plaintiff's award due to reciprocal benefits should be discussed whether or not it is claimed by the defendant.

***Lambert v. Edwards***<sup>26</sup>

This case involved a claim for an interest in the family property on the basis of a constructive test. After a careful review of the four elements of a joint family venture, Justice Moor found that the relationship was characterized as a joint family venture and the Applicant had not received any compensation for giving up her career to manage the home, taking care of the special needs of the children, and maintaining and renovating the home.

The notable part of *Lambert* was that it did not determine the proportion of the claimant's contributions but rather awarded an equal share of the assets without further analysis. The evidence relating to the actual contribution of the parties time, talent and efforts was imprecise. Justice Moore stated "[u]pon the evidence available, I cannot attempt to detail financial and other contributions nor account for the value added by their respective contributions. In these circumstances, I allocate equally between Buffy and David." In essence, the Court awarded what would amount to an equalization payment if the parties had been married. This certainly should not be the default position in the absence of evidence of the parties' contributions.

***S. C. v. D.A.***<sup>27</sup>

This case is helpful in its analysis of the absence of a juristic reason branch to the unjust enrichment test as outlined in *Kerr*. The first step of the juristic reason analysis applies the established categories of juristic reasons. In their absence, the second step permits consideration

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<sup>25</sup> *Ibid* at para. 88

<sup>26</sup> [2012] O.J. No. 2832

<sup>27</sup> [2012] B.C.J. No. 1494

of the reasonable expectations of the parties and public policy considerations to assess whether particular enrichments are unjust.

Justice Armstrong found that a juristic reason existed for any enrichment by one party to the other. Both parties worked full-time and shared in the child-rearing responsibilities. The parties maintained separate finances and did not have an intention to share all of their assets. The parties rather intended to treat their relationship as a non-traditional marriage-like household. The unjust enrichment claim was dismissed.

***Montgomery v. Schlender***<sup>28</sup>

Living in an interdependent relationship and performing some household services does not, in and of itself, constitute the grounds for a claim of unjust enrichment. The Court found that the relationship between the parties was in the “context of cohabiting housemates” which constituted a juristic reason thereby depriving the claimant of an unjust enrichment claim. It was the Applicant’s position that her contributions should have entitled her to a share of the increase in equity in the family home during cohabitation. The Court found that according to *Kerr*, for the Applicant’s position to be correct, it must have been established that she and the Respondent were engaged in a joint family venture. However, the Applicant did not establish unjust enrichment, nor a joint family venture and her claim was dismissed.

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<sup>28</sup> [2012] A.J. No. 543

***Penny v. Rode***<sup>29</sup>

The court found that a monetary award was sufficient to remedy the unjust enrichment in this case. This is a noteworthy case because the court concluded that the evidence did not establish an accumulation of assets or a significant increase in wealth from the time the relationship began until it ended as a result of a joint family venture. The Court made the following comments in this regard:

If the claimant can demonstrate that there has been an increase in the value of assets during the relationship, then it would seem that the claimant is entitled to a share in the increase in wealth proportionate to her contributions relative to those of the respondent. But what if there has been no increase in wealth as a result of the joint family venture? In that event, it seems to me, the second essential element for a monetary award based on a sharing of wealth is absent. There has still been an unjust enrichment and the claimant is still entitled to a monetary award but the appropriate award, in my view, will be on a fee-for-services basis.<sup>30</sup>

The mutual conferral of benefits was considered at the remedy stage and a \$25,000 monetary award for unjust enrichment was granted based on the parties' 10 year relationship. The Court found that the joint family venture did not enable or assist the Respondent in any material way towards the acquisition or maintenance of his business.

***Pellerin v. Ostermann***<sup>31</sup>

The parties cohabited in a domestic relationship for 6 years with one child. Title to the family home was held solely by the Respondent. The Applicant contributed only 2% to the purchase of the family home. The parties shared the household and child related duties and the Applicant assisted in renovations to the home. The Respondent paid the mortgage and most household expenses. Justice Savage made a finding of unjust enrichment as a result of title being

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<sup>29</sup> [2012] B.C.J. No. 1213

<sup>30</sup> *Ibid* at paras. 56 – 58

<sup>31</sup> [2012] B.C.J. No. 1839

held only in the Respondent's name. There was no analysis of the absence of a juristic reason and the effects of mutual benefits conferred. There was also no discussion of joint family venture. There was a significant increase in the value of the home due largely to market forces and the Applicant was awarded \$15,000 for unjust enrichment without analysis as to how the award was quantified.

***Lemoine v. Griffith***<sup>32</sup>

In this case, the parties cohabited for 14 years and had a child. The parties were engaged for most of their relationship, yet never married. The Applicant's role was described by Justice Hunt McDonald as that of a "farm wife" who was not "just a live-in nanny/housekeeper; she was an equal partner in the family." Justice Hunt McDonald summarizes the pronouncements of law from *Kerr* and provides the following comments about analyzing the assets of a joint family venture (which also relates to whether a monetary award is adequate):

Each individual asset does not have to be assessed separately, such that any one property to which both parties have contributed is, in some way, sacrosanct. Thus, for example, in this case the court should not look at the parties' home, the farmed land and the retail business condominium that houses Giddy-Up separately, then split them somewhere in the middle. The overall domestic and economic activity engaged in by the family unit can be assessed as a form of "joint family venture" and dealt with in a fashion that will try to take practical realities into account...<sup>33</sup>

The Court found that the Applicant by staying home to raise the child and assisting in renovations and contributing to farming undertakings had conferred a benefit on the Respondent. The Respondent's net worth, which had increased by about \$3.7 million, would not have increased without the Applicant's contributions. The Applicant suffered a corresponding detriment in being unable to pursue her own career. The Court discussed the central issue in the trial which was the presence or absence of a juristic reason for the enrichment. The parties had

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<sup>32</sup> [2012] A.J. No. 1224

<sup>33</sup> *Ibid.* at para. 113

entered into a domestic contract which barred any claims by the Applicant to a share in the accretion of the Respondent's property. The Agreement was the focus of whether or not a juristic reason existed. The Court determined that that the Agreement was invalid on the grounds of undue influence and thus, the Agreement did not constitute a juristic reason for the enrichment.

The Court held that the Applicant was entitled to a share in the amount of 30% of the Respondent's increase in net worth (once tax implications were considered) due to the Applicant's significant contributions to the joint family venture. The monetary award totalled \$915,440. A monetary award was the appropriate remedy as a propriety interest in the farm would adversely impact the Respondent's income. The Court did not take into account the reciprocal benefit accrued to the Applicant as *Kerr* dictates. Instead, the Court stated that the Applicant was entitled to the increase in the net value of her assets (about \$98,500) without any claim by the Respondent.

There was lack of evidence about the tax implications and as a result, the Court set a notional tax value at 15%, which may or may not have been the accurate. The Court acknowledged that it did not have before it any evidence of the net worth of the parties at the beginning of the relationship and instead relied on the list of assets annexed to the Agreement.

The court, without any analysis, declined to make a finding of spousal support in view of the monetary award for unjust enrichment.

***C.P. v. B.W.***<sup>34</sup>

The Court found that the parties were engaged throughout their 20 year relationship with three children in a joint family venture as explained in *Kerr*. The credibility of the parties was critical to Justice Butler's conclusions. It was recognized that the Respondent's primary

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<sup>34</sup> [2012] B.C.J. No. 896

contribution was monetary and the Applicant primarily contributed domestic labour. Justice Butler cites the principal in *Kerr* that domestic labour constitutes a valuable contribution to the household in the unjust enrichment analysis. Allowing the Respondent to retain the full value of the property would devalue the Applicant's contribution and exclude her from sharing the family home's worth.

A monetary remedy for unjust enrichment was found to be inadequate as it would force the Applicant and the children out of the home which was contrary to the best interests of the children. The domestic services provided by the Applicant, as well as the work she undertook for renovations could not be separated from the financial contributions the Respondent made to the acquisition and renovation of the family home. The Applicant was entitled to an equal interest in the family home as there was "no reason for their interests to be divided other than equally."<sup>35</sup>

***Toquero v. Ramirez***<sup>36</sup>

This case supports the proposition that debts should be taken into account in an unjust enrichment analysis. Justice Gower stated: "I see no reason why the requirement to consider both assets and debts should not also apply to the dissolution of a common-law relationship in order to achieve equality and fairness for the former common-law spouses."<sup>37</sup> The "value survived" approach adopted in *Kerr* presumably involves a division of the net value of the assets that accumulated during the relationship by the parties' respective contributions.

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<sup>35</sup> *Ibid* at para. 26

<sup>36</sup> [2013] Y.J. No. 8

<sup>37</sup> *Ibid* at para. 15

## **Applicable Limitation Period for Unjust Enrichment Claims in Family Law**

The defence of an expired limitation period can be relied on to defeat an unjust enrichment claim. Unjust enrichment is an equitable cause of action for which constructive trust and monetary restitution are remedies. Equitable claims in general are covered by the *Limitations Act, 2002* unless some other statute such as, the *Real Property Limitations Act* applies. What, if any, statutory limitation period applies to a constructive trust claim in the family law context?

The recent decision of *McConnell v. Hustable*<sup>38</sup> addressed this issue. This case was based on a summary judgment motion brought under Rule 16 of the *Family Law Rules* by the common-law husband. The common-law wife served an Application where she made a constructive trust claim for an ownership interest in the husband's house, arising from a 13-year common law relationship. The husband moved for dismissal of the wife's claim on the ground that her claim was barred by a limitation period.

Justice Perkins undertook a careful analysis, mindful of the fact that there had been no prior rulings on the issue since the *Limitations Act, 2002* came into effect. The two issues raised on the motion, were as follows:

1. Is a claim in a family law case in which the claimant pleads facts to establish a constructive trust and asks the court to award an ownership interest in land, with an alternative claim for monetary compensation, governed by the ten year limitation period set out in section 4 of the *Real Property Limitations Act* or by the two year limitation period set out in section 4 of the *Limitations Act, 2002*?
2. Is there a gap in the limitations legislation such that there is no applicable statutory limitation period for a constructive trust claim in a family law case, leaving scope for the court to devise a time limit using its equitable jurisdiction?

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<sup>38</sup> [2013] O.J. No. 612

In regards to the first issue, Justice Perkins characterized the constructive trust claim as “an action to recover land” governed by Section 4 of the *Real Property Limitations Act* with a 10 year limitation period after the date the constructive trust claim arose. Justice Perkins held that “[o]ther than section 4 of the *Real Property Limitations Act*, there is no applicable statutory limitation period for a constructive trust claim in a family law case.<sup>39</sup> It was further held that the 10 year limitation period also applies to an alternative claim for monetary compensation, for the following reasons:

To interpret the section as not protecting an alternative damage award would mean that a claimant would never be able to rely on the section in determining when to launch a court case involving land and would always have to meet the limitation period for a damages claim, for fear of being locked out at the end of the case.<sup>40</sup>

In regards to the second question, Justice Perkins stated that if his conclusion in regards to the first issue was not correct, then the Applicant’s claim was one to which no statutory limitation period applied. He concluded that it was impossible to apply Sections 4 and 5 of the *Limitations Act*, 2002 to constructive trust claims in family law, as follows:

It seems to me a claimant would often be aware of making a contribution and might, but would not necessarily, know that that he or she has suffered a deprivation or enriched the other party. While a couple live together and get along reasonably well, there would likely not be any thought of deprivation or loss. Does that knowledge reasonably or actually arise when the couple are no longer getting along? When one of them thinks of separating? When one of them tries to raise the issue of the title to a particular piece of property? Is every case dependent on what the mythical reasonable person would have known at a particular time?<sup>41</sup>

In making the above statements, Justice Perkins recognized that the Supreme Court of Canada stated in *Kerr* that there is no separate line of authority for family cases applying the law

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<sup>39</sup> *Ibid* at para. 153

<sup>40</sup> *Ibid* at para. 88

<sup>41</sup> *Ibid* at para. 112

of unjust enrichment, although they must be applied in ways that respond to the particular context in which they are to operate.<sup>42</sup>

Justice Perkins provided the following comments concerning his conclusion that if the *Real Property Limitations Act* did not apply, a statutory gap existed:

Though I could not accept the applicant's argument about the "absurdity" of having a two year limitation period for constructive trusts in family law cases, when I set about to review and apply the provisions of sections 4 and 5 of the *Limitations Act, 2002*, I simply could not find a way to read them so that they could work for constructive trusts – not without doing violence both to the words of the two sections and to the elements of a claim for constructive trust as laid down in the Supreme Court cases cited at paragraphs [48]-[50] above. In other words, while I can not find that a legislative policy of a two year limitation period for family law constructive trust claims is "absurd", I find there is no coherent, sensible or reasonable way to apply sections 4 and 5 of the *Limitations Act, 2002* to such claims.

I am therefore driven to conclude that, aside from section 4 of the *Real Property Limitations Act* (see above), there is no applicable statutory limitation period for constructive trust claims in family law cases and that there is a legislative gap, as submitted by the applicant. If I had not reached the conclusion that section 4 of the *Real Property Limitations Act* applied to family law constructive trust claims seeking an interest in land, my conclusion that there is a legislative gap would have applied to those claims as well.<sup>43</sup>

In light of an apprehended statutory gap, Justice Perkins stated that the court can devise an appropriate time limit using its equitable jurisdiction for claims to which Section 4 of the *Real Property Limitations Act* does not apply.

Justice Perkins urged in his decision for legislative reform in light of the potential statutory gap to ensure that the *Limitations Act, 2002* and the *Real Property Limitations Act* operate as intended for equitable claims. Further, Justice Perkins acknowledged that his decision may well receive attention in an appellate court, which may or may not agree with his

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<sup>42</sup> *Supra*, note 1 at para. 34

<sup>43</sup> *Supra*, note 8 at paras. 144 & 145

conclusions about Section 4 of the *Real Property Limitations Act*. A Notice of Appeal in that matter has been filed and we now await appellate determination of that issue.

## **Conclusion**

The law of unjust enrichment is the primary vehicle to address claims of inequitable distribution of assets on the breakdown of a domestic relationship.<sup>44</sup> The Supreme Court of Canada has recently reviewed and attempted to clarify the law relating to unjust enrichment, which does not mandate a presumption of equal sharing, nor does the mere fact of cohabitation entitle one spouse to share in the other's property. Justice Cromwell in *Kerr* emphasized that the exercise of judicial discretion requires a flexible and holistic view of each case on its merits. While *Kerr* clarifies many issues, unjust enrichment claims remain difficult to predict and quantify.

The difficulty lies in applying the law to the facts of a specific case and arriving at an appropriate remedy and quantifying that remedy. The cases are all fact specific as spouses are not a homogeneous group. The cases turn on the length of the relationship, the nature of the contributions made by each partner, the value of the assets at the beginning of the relationship and the end, the quality of the evidence, and the credibility of the parties.

In light of the number of cases where courts have found that common law spouses were engaged in a joint family venture, the prevalence of cohabitation agreements will likely increase to provide a juristic reason for an enrichment and to reflect the actual intention of the parties there by negating a finding of a joint family venture.

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<sup>44</sup> *Supra*, note 1 at para. 23

In proving a claimant's entitlement to a share in the other spouse's accumulation of wealth during the relationship, it is essential that there must be a link between the claimant's contribution and that accumulation of wealth. Proffering evidence of the increase in value of the parties' financial assets and their respective contributions is crucial in quantifying the remedy. The determination of when a joint family venture begins and/or ends is also crucial in the joint family venture analysis.

The confusion in the application of the concept of a joint family venture to trust claims, the issues concerning the limitation period that may or may not apply in these cases, together with the absence of a proper or complete evidentiary record in cases are leading to one clear conclusion. While the Supreme Court of Canada in *Kerr* had hoped to clarify the issues, the waters remain muddy.