Title Does Matter: Are Constructive Trust Remedies Available for Married Couples?
By Ken Nathens[1]

The unjust enrichment/constructive trust remedy has proven to be the go to remedy for parties seeking the division of property at the end of a common law relationship. This is because Ontario has yet to create legislation that specifies property rights for common law couples as exists for married couples. The Supreme Court of Canada case of *Kerr v. Baranow*[2] sets out the criteria for when a « joint family venture » may be said to exist that would result in the division of property between common law couples at the termination of a relationship.

Generally, when it is determined that a non-titled common law spouse contributed, financially or otherwise, to the value of property held in the name of the other spouse, the non titled spouse will be entitled to financial compensation by way of monetary payment or by a court granting a share in property equal to the value of the contribution (which is referred to as a "constructive trust") if a monetary award would not be sufficient. If the titled spouse is permitted to keep all the benefit conferred by the non-titled spouse he or she would be "unjustly enriched"

Ontario courts are reluctant to permit married parties to make use of the unjust enrichment/constructive trust principles in order to obtain an award different than what they would otherwise be entitled to under the equalization of net family property scheme set out in the *Family Law Act* (*FLA*); the Act which governs property division for married parties in Ontario.

In the Court of Appeal case of *Martin v. Sansome*[3], the Court determined that the Husband was unjustly enriched by the Wife's contributions during the marriage by way of homemaking, child-care and other support services for the duration of the marriage. The Wife worked with the Husband on the family farm during the relationship, and helped to improve the farmhouse. The Wife claimed that she was entitled to a 50% interest in the farm by way of a constructive trust interest. The Husband claimed that the Wife was entitled to not more than the equalization of net family property under the *FLA*, which in this case was a lesser amount than 50% of the value of the farm.

The Court held that the Wife was entitled to an equalization payment, and not 50% of the value of the family farm. According to the Court "if unjust enrichment as a result of the marriage has been found, and it is determined that monetary damages can suffice, the aggrieved party's entitlement under the equalization provisions of the FLA should first be calculated. Where appropriate, s. 5(6) of the *FLA* which

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[2] Kerr v. Baranow [2011] 1 S.C.R. 269
[3] Martin v. Sansome 2014 ONCA 14.

provides for an unequal division of net family properties where equalization would be *unconscionable*, should be invoked."

The Court's reference to section 5(6) of the *FLA* (which permits the Court to award an amount different than the equal division of net family property in exceptional cases) and its use of the high threshold of "unconscionability" sends a clear message to married litigants that courts are not likely to stray from the equalization of net family property scheme set out in the *FLA* when deciding property division for married parties. Notwithstanding any unjust enrichment that may have occurred during the marriage or that may result from separation, courts will not award an amount that is more or less than the calculated equalization payment under the *FLA* in the vast majority of cases.

The practical impact of *Martin v. Sansome* is apparent when considering the current Toronto real estate market where prices seem to trend forever upward. It is not uncommon for matrimonial proceedings to take upward of two or three years until final resolution, particularly if there are complex property or support issues. Under the *FLA*, the value of property for the purpose of equalization of net family property is determined as of the date of separation. Thus, using the principles set out in *Martin v. Sansome*, any increase in the value of the matrimonial home post separation will be to the benefit of the titled married spouse alone. The non-titled spouse's argument that the titled spouse would be unjustly enriched if permitted to maintain all of the post separation increase in value of the matrimonial home is not likely to meet the high threshold of "unconscionability".

In contrast, and perhaps ironically, a common law spouse is not limited by the equalization scheme set out in the *FLA* and may claim 50% of the value of property held by the other spouse calculated at the time of the final settlement of property issues.

Thus *Martin v. Sansome* reminds us that title does matter when dividing up matrimonial property and that it should not be assumed that the matrimonial home is always to be divided "50-50" as many believe is the case.