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WHOSE PROPERTY? CHANGES TO THE LAW IN RELATION TO PROPERTY OWNED BY UNMARRIED SPOUSES

Proposals for a New Family Law Act

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Colin Millar

In July 2010, The Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office released a white paper on *Family Relations Act* reform. This paper proposes radical changes to British Columbia's *Family Relations Act* which had not been comprehensively reviewed since its introduction in the late 1970s. One of the major proposed changes is with respect to the division of family property. Under British Columbia's current *Family Relations Act* whether or not property was divisible between married spouses was determined by whether or not the property was "ordinarily used for a family purpose". It is important to note that the current Act, with respect to division of property, only applies to married spouses. Under the proposed amendments, British Columbia will move to an excluded property model. Family property will include all real and personal property owned by one or both spouses at the date of separation unless the specific asset in question is excluded. Excluded property is defined as:

- (a) a property acquired by a spouse before the spousal relationship started;
- (b) gifts or inheritances to a spouse;
- (c) an award or settlement for damages in tort in favour of the spouse except for that part of the award or settlement that is compensation for loss to both spouses or lost wages of the spouse;
- (d) money paid or payable under an insurance policy that is not paid or payable with respect to property, except that part of the proceeds that is compensation for a loss to both spouses or lost wages of the spouse;
and
- (e) property held in trust for the benefit of a spouse, unless the spouse has an immediate and absolute interest in the trust property or has the power to terminate the trust.



The person claiming the exclusion will bear the burden of proving a particular property is to be excluded. The interest of a non-owning spouse to excluded property is limited to the increase in the value of the property during the relationship. All other property will be divided. The new scheme will presume a 50/50 division of all family property and will also presume family debts are to be divided equally. The proposed Act continues to provide for a reapportionment of the family property or family debt if it would be “clearly unfair” to equally divide the property or debt. The proposed Act lists a number of factors that must be considered when determining whether or not to divide the property other than equally.

A second major change to the proposed Act is that the property division provisions will also apply to unmarried spouses who have cohabited in a marriage-like relationship for at least two years, or less if they have a child together.

Property will be valued as at the date of an agreement or the date of a court order dividing the property. Common-law spouses will have two years from the date of separation to make a claim for the division of property. Married spouses will have two years from the date of the divorce to make a claim for division of property.

Given that it is the increase in value of excluded property that is divided between the spouses, it will be important for parties entering into a marriage or common-law relationship to have some evidence of the value of their already-owned property as at the date of the commencement of the relationship.

It is important to note that the above refers only to proposals for changes to the law and they are not, as yet, in force.

A Recent Change in the Law Arising From a Decision of The Supreme Court of Canada Released February 18, 2011

As noted above, persons living in a common-law relationship cannot make a claim against the other spouse’s property under the *Family Relations Act*. The Courts have generally used the law of unjust enrichment to provide a basis for the distribution of assets on the breakdown of common-law relationships. In order to claim an interest in property, the claimant has to establish an enrichment of the other party by the claimant, a corresponding deprivation of the claimant and the absence of a juristic reason for the enrichment. The claimant has to show that he or she has given a tangible benefit to the other party that the other party received and retained. There has to be a correspondence between the enrichment given and the deprivation suffered. The absence of a juristic reason for the enrichment means that there is no reason in law or justice for the other party to retain the benefit conferred on them by the claimant. If successful, the claimant is granted either a personal restitutionary award (money) or a restitutionary proprietary award



(an interest in the property). In most cases a monetary award was held to be sufficient to remedy the unjust enrichment. Previously, the law required that there be a demonstrable link between the benefit conferred and some specific property to be shared. In a recent Supreme Court of Canada case, the Court was of the view that when parties have been engaged in a joint family venture, and the claimant's contributions to the venture are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated. The share of the accumulated wealth to be shared is to be proportionate to the claimant's contributions. It is not limited to a monetary award based on a fee for service. The Court was careful to note, however, that there should be no presumption of a joint family venture. It held that a joint family venture could only be identified by the Court when its existence, in fact, is well-grounded in the evidence. The emphasis is on how the parties lived their lives, not on their later assertions or the Court's view of how they ought to have done so. The Court looked at a number of factors to be considered in determining whether or not the parties' relationship amounted to a joint family venture. This, however, is not an all-inclusive list. The factors identified by the Court are as follows:

(a) Mutual Effort

(i) Did the parties work collaboratively towards common goals?

(ii) Did they pool their efforts and work as a team?

(iii) Did they make a decision to have and raise children together?

(iv) The length of their relationship was also to be considered in determining whether or not the parties formed a true partnership and jointly worked towards important mutual goals.

(b) Economic Integration

(i) To what degree was there economic interdependence and integration between the parties?

(ii) How extensive was the integration of their finances, economic interests and economic well-being?

(iii) To what extent was one party financially dependent on the other?

(c) Actual Intent

The Court was aware of the fact that some parties wish to remain autonomous. The decision not to marry may well have been a deliberate choice not to have their lives economically intertwined. They may have consciously elected not to marry in order that the property division provisions of the *Family Relations Act* not apply to them. The actual intentions of the parties must be given considerable weight. Title to property



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may also reflect an intent to share wealth. Plans for property distribution on death whether in a Will or in conversation may indicate that the parties saw one another as domestic and economic partners.

(d) Priority of the Family

A further category of factors to consider is the extent to which the parties gave priority to the family in their decision making. Did one party make financial sacrifices for the welfare of the collective family unit?

This may amount to an important change in the law in that previously the contribution of a benefit had to be associated with a particular piece of property. It appears that a nexus is no longer required and all of one party's property may now be subject to a claim for compensation in cases where a joint family venture is found to exist.

If you have any questions regarding your rights and obligations arising out of your current relationship or its breakdown, please contact Colin A. Millar directly at 604-661-9237 or email.



700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA

TELEPHONE
604 682 3664

FAX
604 688 3830

RBS.CA