Property Claims and Unmarried Spouses: Unjust Enrichment, Joint Family Ventures and Common Law Trust Claims

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Introduction

Marriage is, among other things, an economic partnership. The breakdown of that relationship accordingly requires a determination of the economic rights and responsibilities of both spouses. For the purposes of this determination, the Family Law Act assumes that both parties made equal contributions, whether financial or otherwise, to the responsibilities which arise during a marriage. This assumption of equal contribution is reflected in the Act's equalization scheme, which, according to the Ontario Court of Appeal in Martin v. Sansome, is meant “to address the unjust enrichment that would otherwise arise upon marriage breakdown.”

However, a marriage is not the only form of domestic partnership that carries economic consequences. Unmarried spouses may divide responsibilities in precisely the same manner as married couples and the frequency of such relationships are on the rise. In fact, recent research suggests that marriage is steeply in decline. In the United States, the data suggests that the number of people living with an unmarried partner has risen by 29% since 2007.

As far back as 1980, Justice Dickson, while writing for the majority in Pettkus v. Becker, observed as follows:

I see no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy

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period. This was not an economic partnership, nor a mere business relationship, nor a casual encounter. Mr. Pettkus and Miss Becker lived as man and wife for almost 20 years. Their lives and their economic well-being were fully integrated.\(^6\)

In any event, the *Family Law Act* continues to make a stark distinction between married and unmarried couples in the determination of property issues.\(^7\) This distinction has withstood Charter scrutiny.\(^8\)

Section 1(1) of the *Family Law Act* defines a “spouse” as follows:

> “spouse” means either of two persons who,

(a) are married to each other, or

(b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.

Those who make a conscious decision to remain unmarried do not fit within this definition. Part III of the *Family Law Act*, which deals with support, expands the definition of a “spouse” to include unmarried partners who (1) have cohabited for no less than three years, or (2) have a “relationship of some permanence” and have a child together. However, Part I of the *Family Law Act*, which deals with the equalization of property, does not expand the definition of a spouse beyond married partners. As a result, and contrary to the popular assumption that ‘common law’ spouses acquire property rights by virtue of their cohabitation, unmarried spouses cannot seek an equalization of property, regardless of how long they have cohabited. As such, upon the breakdown of their relationship, unmarried spouses are restricted to the property claims permitted under other Acts or the common law. The importance of these remedies was emphasized by the Supreme Court of Canada in *Walsh v. Bona*, where the Court held that a provincial statute dealing with the division of family property did not violate the *Charter* simply because it distinguished between married and unmarried spouses:

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\(^7\) By contrast, several other provinces and territories have extended their family property scheme to unmarried spouses, including B.C., Manitoba, Saskatchewan, Nunavut, and the Northwest Territories.

For those couples who have not made arrangements regarding their property at the outset of their relationship, the law of constructive trust remains available to address inequities that may arise at the time of the dissolution. The law of constructive trust developed as a means of recognizing the contributions, both pecuniary and non-pecuniary, of one spouse to the family assets the title of which was vested wholly in the other spouse. After the enactment of the MPA, the law of constructive trust remained and remains as a recourse for unmarried partners who find themselves unfairly disadvantaged vis-à-vis their former partner. Those situations where the fact of economic interdependence of the couple arises over time are best addressed through the remedies like constructive trust as they are tailored to the parties’ specific situation and grievances. In my view, where the multiplicity of benefits and protections are tailored to the particular needs and circumstances of the individuals, the essential human dignity of unmarried persons is not violated.9

This paper focuses on constructive trust and resulting trust claims, which have collectively become the defining features of litigation regarding the property rights of unmarried spouses. While routinely brought, these claims are often misunderstood and incorrectly framed.10 As a result, these concepts remain difficult to grasp. However, given the increasing frequency of common law relationships, the decline in the popularity of marriage, and the absence of any legislative response to these developments to date, it is more important than ever to obtain a firm understanding of these concepts.

**Constructive Trusts – The Theoretical Framework**

The doctrine of constructive trust was described by Justice Cardozo, writing from the New York Court of appeals, as follows:

A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.11

In other words, constructive trusts may be imposed “to hold persons in different situations to high standards of trust and probity and prevent them from retaining

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10 See, for example, Philip Epstein’s commentary on Justice Trimble’s decision in *Barrett v. Barrett*, 2014 ONSC 857.
property which in “good conscience” they should not be permitted to retain.”12 In such circumstances, the person holding the property is deemed to hold it solely for the wronged person’s benefit, as if there had been an express trust created by intention.

Critically, a constructive trust is “understood primarily as a remedy, which may be imposed at a court’s discretion where good conscience so requires.”13 [Emphasis in original.] It is not, on its own, a basis for relief. Rather, it is a means by which a cause of action may be remedied if “a proper equitable basis” exists.14

The case law recognizes several claims which may give rise to a remedial constructive trust. While much of the recent case law focuses on the constructive trust as a remedy for unjust enrichment, it is historically rooted in claims relating to the breach of fiduciary relationships.15 However, the presence or absence of a fiduciary relationship is not itself determinative as to the availability of a remedial constructive trust.

In the context of matrimonial disputes, the modern understanding of the constructive trust is derived from the Supreme Court of Canada’s judgment in Becker v. Pettkus.16 In that case, the Court confirmed that there was no reason that the equitable remedy of constructive trust would not apply to unmarried spouses. Although the husband took the position that the imposition of constructive trusts between unmarried spouses would run contrary to the legislative distinction made between married and unmarried spouses, the Court concluded that it was unnecessary for the legislature to address remedies which were “always available in equity for property division between unmarried individuals”.17 As such, the Court upheld the Ontario Court of Appeal’s decision, wherein it was held that Mr. Pettkus held 50% of his bee-keeping business and real property in trust for Ms. Becker, owing to the 19 years of unpaid labour she contributed to that property. Specifically, the Court found that Mr. Pettkus had been

14 *Moore v. Sweet*, *supra*, para. 33.
16 *Becker v. Pettkus*, *supra*.
17 *Becker v. Pettkus*, *supra*, para. 47.
enriched by her contributions, that Ms. Becker had been correspondingly deprived, and that there was no juristic reason for the enrichment and corresponding deprivation.

In *Pettkus*, the Court emphasized that “[t]he principle of unjust enrichment lies at the heart of the constructive trust.”\textsuperscript{18} However, the Court also recognized that it “would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise.”\textsuperscript{19} In *Soulos v. Korkontzilas*, the Supreme Court confirmed that unjust enrichment is not the only claim that may be remedied by way of constructive trust. Rather, constructive trusts are recognized as potential remedies for “wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment”.\textsuperscript{20} That said, the case law applying these principles to subsequent matrimonial disputes has primarily focused on the constructive trust as a remedy for unjust enrichment. Given that the obligations between spouses are not generally considered to be fiduciary in nature,\textsuperscript{21} absent claims of fraud, unjust enrichment will likely be the only possible basis for a remedial constructive trust in most matrimonial cases.\textsuperscript{22}

**Unjust Enrichment**

The principle of unjust enrichment is not specific to family law. It “applies when a defendant receives a benefit from a plaintiff in circumstances where it would be “against all conscience” for him or her to retain that benefit.”\textsuperscript{23}

As set out in *Moore v. Sweet*, unjust enrichment was historically limited to specific “categories of recovery”, such as where a benefit was conferred on the defendant by mistake, under compulsion, out of necessity, as part of a failed or ineffective transaction, or at the defendant’s request. However, the Supreme Court began to

\textsuperscript{18} Becker v. Pettkus, supra, para. 37.
\textsuperscript{19} Ibid.
\textsuperscript{20} Soulos v. Korkontzilas, supra, para. 43.
\textsuperscript{21} Leopold v. Leopold, 2000 CarswellOnt 4707 (S.C.), paras. 134-137.
\textsuperscript{22} However, see Manufacturers Life Insurance Co. v. Senesouma, 2016 ABQB 495, where the Court found that the breach of a contractual obligation to maintain life insurance pursuant to a Separation Agreement could give rise to a constructive trust, even if a claim of unjust enrichment has not been made out. But see Moore v. Sweet, where the Supreme Court held that the breach of such obligations did result in unjust enrichment.
\textsuperscript{23} Moore v. Sweet, supra, para. 36.
deviate from that categorical approach in the 1970s, favouring a principled approach which unified the existing categories of recovery. Under this principled framework, the plaintiff must establish:

(a) that the defendant was enriched,

(b) that the defendant had been correspondingly deprived, and

(c) that there is no juristic reason for that enrichment and deprivation.

While the previously existing categories of relief remain, this principled approach allows claimants to obtain relief outside the strict parameters of those traditional categories, “allowing the law to develop in a flexible way as required to meet changing perceptions of justice”.24

**Enrichment and Deprivation**

With respect to the first two criteria under the principled approach to unjust enrichment, “a straightforward economic approach is taken to both of them, with moral and policy considerations instead coming into play at the juristic reason stage of the analysis.”25

To satisfy these criteria, it must simply be shown that a tangible benefit passed from the plaintiff to the defendant. Enrichment and deprivation are thus two sides of the same coin.26

Deprivation is therefore characterized as a question of standing. That is, even “if a defendant’s retention of a benefit can be said to be unjust, a plaintiff has no right to recover against that defendant if he or she suffered no loss at all, or suffered a loss wholly unrelated to the defendant’s gain.”27 Simply put, the defendant must have been enriched at the plaintiff’s expense; the deprivation must correspond with the enrichment.

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26 Peter v. Beblow, 1993 CarswellBC 44 (S.C.C.), para. 79
27 Moore v. Sweet, *supra*, para. 43.
In the matrimonial context, the Courts have recognized that, as “a general rule, if it is found that the defendant has been enriched by the efforts of the plaintiff there will, almost as a matter of course, be deprivation suffered by the plaintiff.”28 In the absence of clear evidence to the contrary, the enrichment of one party will likely be considered to have resulted in a deprivation of the other.29

However, it must be remembered that this presumption will not apply to married spouses. In Martin v. Sansome, the Ontario Court of Appeal confirmed that “the express purpose of the equalization provisions of the FLA is to address the unjust enrichment that would otherwise arise upon marriage breakdown”.30 As such, in the “vast majority of 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.”31 Even where married spouses work “shoulder to shoulder” in establishing a family business and/or home, the Courts will not presume that the enrichment of one spouse though those efforts results in the deprivation of the other given that their property will be equalized pursuant to the FLA.32

When dealing with constructive trust claims between unmarried spouses, a precise accounting of the alleged enrichment and deprivation is not necessary. Rather, it is recognized that “fairness requires that the constructive trust remedy be available to them and applied on an equitable basis without a minute scrutiny of their respective financial contributions.”33 That said, the case law recognizes that not all contributions are equally entitled to relief. Specifically, while in business relationships, the provision of services from one party to another will usually be expected to result in some form of compensation, compensation may not be expected for services provided in the context of a spousal relationship. By the very nature of such relationships, services may be routinely provided without any expectation of compensation. Furthermore, while the receipt of money is always a benefit to the defendant, “[t]he receipt of services may not
be a benefit because the defendant may not have wanted the services or may not have wanted them if it had to pay for them."³⁴ In *Hodgins v. Grover*, the Ontario Court of Appeal accordingly held that the provision of services will constitute a benefit in two situations: (a) where they were performed at the request of the defendant, or (b) where the defendant has been “incontrovertibly benefitted”.³⁵

As set out by the Supreme Court in *Peel (Regional Municipality v. Canada*, an “incontrovertible benefit” is “an unquestionable benefit, a benefit which is demonstrably apparent and not subject to debate and conjecture.” As such, a claim of unjust enrichment between unmarried spouses must involve a careful consideration of the benefits allegedly provided and, if they were services, whether those services were requested or resulted in an “incontrovertible benefit” to the defendant.³⁶ However, in *Peter v. Beblow*, the Supreme Court of Canada made clear that there is no reason to distinguish between “domestic services and other contributions” for the purposes of determining a claim of unjust enrichment:

...I share the view of Professors Hovius and Youdan [*The Law of Family Property*] that “there is no logical reason to distinguish domestic services from other contributions” (at p. 146). The notion that household and childcare services are not worthy of recognition by the court fails to recognize the fact that these services are of great value, not only to the family, but to the other spouse. As Lord Simon observed nearly thirty years ago: “The cock-bird can feather his nest precisely because he is not required to spend most of his time sitting on it” (“With All My Worldly Goods,” Holdsworth Lecture (University of Birmingham, 20th March 1964), at p. 32). The notion, moreover, is a pernicious one that systematically devalues the contributions which women tend to make to the family economy. It has contributed to the phenomenon of the feminization of poverty which this Court identified in *Moge v. Moge*, [1992] 3 S.C.R. 813 [[1993] 1 W.W.R. 481], per L'Heureux-Dubé J., at pp. 853-54.

Moreover, the argument cannot stand with the jurisprudence which this and other courts have laid down. Today courts regularly recognize the value of domestic services. This became clear with the Court’s holding in *Sorochan*, leading one author to comment that “the Canadian Supreme court has finally recognized that domestic contribution is of equal value as financial contribution in trusts of


³⁵ *Hodgins v. Grover*, supra, para. 57.

³⁶ *Peel (Regional Municipality) v. Canada*, supra, paras. 42-43.
property in the familial context” (Mary Welstead, “Domestic Contribution and Constructive Trusts: The Canadian Perspective,” [1987] Denning L.J. 151, at p. 161). If there could be any doubt about the need for the law to honestly recognize the value of domestic services, it must be considered to have been banished by Moge v. Moge, supra…

**The Absence of a Juristic Reason**

Even where a corresponding enrichment and deprivation have been made out, in order to recover by way of unjust enrichment, the plaintiff must also establish “that there is no justification in law or equity” for that enrichment and deprivation. As set out by the Supreme Court of Canada in Garland v. Consumers’ Gas Co., the analysis of this issue proceeds in two stages.

First, the plaintiff is required to demonstrate that the defendant’s retention of the benefit at the plaintiff’s expenses cannot be justified on the basis of any established categories of juristic reasons, which include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If the enrichment can be justified under any of these established categories, the plaintiff’s claim must fail. For example, there is nothing unjust about a defendant retaining money or property that was gifted to them or validly contracted for. Similarly, it is well settled that a claim of unjust enrichment must fail where the enrichment and corresponding deprivation are required by law; in such circumstances, subjective considerations of fairness are not relevant to the analysis. Importantly, both the enrichment and corresponding deprivation must be justified by a juristic reason.

If the plaintiff demonstrates that none of the established categories of juristic reasons apply, then they will have established a *prima facie* case and the Court will proceed to the second stage of the analysis. At this point, the defendant will have an opportunity to rebut the plaintiff’s *prima facie* case by showing “that there is some residual reason to deny recovery”. At this stage of the analysis, the defendant bears the burden of proof

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40 Moore v. Sweet, supra, para. 62.
41 Moore v. Sweet, supra, para. 58.
and must show why the enrichment should be retained. Two considerations will drive
the Court’s analysis at this stage: (1) the parties’ reasonable expectations, and (2) moral
and policy-based considerations. While the focus will be on these two considerations,
the Court may “look to all of the circumstances of the transaction in order to determine
whether there is another reason to deny recovery.” At this stage, the Court may
determine that a “new category” of juristic reason has been established. Alternatively, it
may find that a consideration of these factors creates a juristic reason in that particular
case, but not a new category of juristic reason that may be applied in other cases.

In Kerr v. Baranow, the Supreme Court of Canada confirmed that the conferral of
mutual benefits between the parties should be considered in determining whether there
is a juristic reason for the enrichment and corresponding deprivation. Specifically, the
“fact that the parties have conferred benefits on each other may provide relevant
evidence of their reasonable expectations.” As such, the conferral of mutual benefits,
along with the parties’ reasonable or legitimate expectations generally, are more
germane to the second stage of the juristic reason analysis.

Not every financial benefit conferred between unmarried spouses will withstand this
stage of the analysis. In Cline v. Moran, Lococo J. found that although the respondent
had been enriched and the applicant had been correspondingly deprived, juristic
reasons for that enrichment and deprivation were present. In that case, the applicant
claimed that he had made financial contributions of more than $45,000 to the
respondent, with whom he had cohabited and who solely own the home in which they
resided during their relationship. He alleged that his financial contributions led to the
growth of that property and that the respondent was thereby unjustly enriched. In
dismissing this claim, Lococo J. held that the payment of rent or contribution to shared
grocery expenses “overwhelmingly fall within established juridical categories”. He
further found that, where established juristic reasons were less obvious, immaterial
contributions, such as “the purchase of blinds, payments for painting and decorating,

44 Cline v. Moran, 2016 ONSC 4490, paras. 32-33.
45 Ibid.
and the occasional payment of household expenses”, were not sufficient when the “burden of such expenses fell overwhelmingly” on the respondent.\textsuperscript{46} In such circumstances, it was not within the reasonable expectations of the parties for the applicant’s contributions to result in a monetary award for unjust enrichment.\textsuperscript{47}

Similarly, in \textit{Wood v. David}, a case heard by the Supreme Court of British Columbia, a common law spouse sought an interest, by way of constructive trust, in a home that they had “helped, in various ways, to renovate and maintain.”\textsuperscript{48} While Voith J. found that there had been an enrichment and a corresponding deprivation, the unjust enrichment claim failed at the juristic reason stage. In making this determination, Voith J. noted that, during argument, the question was raised as to what each party would have said if, during their relationship, they were asked whether the claimant was acquiring an interest in the home by virtue of her contributions; Voith J. found that, if so asked, “neither party would have agreed that that was so” and that “[e]ach party would have been satisfied that the various benefits they were respectively receiving from their “bargain” were, broadly speaking, similar and that the ensuing result was fair.”\textsuperscript{49} Voith J. specifically emphasized that the claimant had never indicated previously that she had any interest in the home and that she relocated when asked to do so by the titled spouse. This conduct spoke to the reasonable expectations of the parties and the fairness of the bargain.

The fairness of the unspoken bargain between the parties was also emphasized in \textit{Delorme v. Normand}, where Fenlon J.A., writing from the British Columbia Court of Appeal, upheld the trial judge’s dismissal of Ms. Normand’s proprietary claim to an interest in a condominium the parties lived in together for many years. The relationship between the parties was 17 years in duration and they lived in the subject condo for seven years. Ms. Normand continued to live at the condo until trial. Ms. Normand’s claim was grounded upon “contributions she made over the years by paying expenses

\textsuperscript{46} \textit{Ibid}.
\textsuperscript{47} \textit{Ibid}.
\textsuperscript{48} \textit{Wood v. Davis}, 2014 CarswellBC 2376 (S.C.), paras. 1, 5, 8, 65, 66, 70-71, 75-78
\textsuperscript{49} \textit{Ibid}.
and paying for renovations.”50 However, the trial judge found payments to be “equivalent to two people sharing rent for an apartment they are living in. Neither is enriching the other.” At the juristic reason stage of the analysis, the trial judge considered the mutual conferral of benefits between the parties and found that the benefits visited upon Mr. Delorme “were offset by benefits Mr. Delorme had provided to Ms. Normand through painting and renovation work on other properties she owned.”52 Fenlon J.A. dismissed the appeal noting that “Ms. Normand and Mr. Delorme had a long relationship. But there is no presumption of a joint family venture simply because two people live together.”53

These cases are instructive given that a mutual conferral of benefits is commonly found between unmarried spouses. While one spouse may be on title to the home and the other spouse may make contributions to the carrying costs of that property, they also save the cost of rental accommodations elsewhere. This point should be highlighted in response to claims of unjust enrichment whenever applicable, as it may inform both the reasonable expectations of the parties and the moral fairness of the financial arrangements between the parties.

**Monetary vs. Proprietary Remedies**

Not every unjust enrichment claim will justify a proprietary remedy. As confirmed by the Ontario Court of Appeal in *Martin v. Sansome*, the following questions must be considered in the following order:

1) Have the elements of unjust enrichment – enrichment and a corresponding deprivation in the absence of a juristic reason – been made out?;

2) If so, will monetary damages suffice to address the unjust enrichment, keeping in mind bars to recovery and special ties to the property that cannot be remedied by money?;

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50 *Delorme v. Normand*, 2016 CarswellBC 253 (C.A.), paras. 2, 6, 7, 8, 18.
51 Ibid.
52 Ibid.
53 Ibid.
3) If the answer to question 2 is yes, should the monetary damages be quantified on a fee-for services basis or a joint family venture basis?; and

4) If, and only if monetary damages are insufficient, is there a sufficient nexus to a property that warrants impressing it with a constructive trust interest?54

The Court must consider the sufficiency of a monetary award before a proprietary remedy can be considered. The failure to do so amounts to an error of law.55

In Martin v. Sansome, the Court held that “[i]n most cases, money will be sufficient”.56 It is only where (1) a monetary award is not sufficient, and (2) the plaintiff can demonstrate “a sufficiently substantial and direct link or causal connection between her contributions and the acquisition, preservation, maintenance or improvement of the property”, that a constructive trust can be imposed.57

Calculating Monetary Awards – Value Received vs. Value Survived

While the Courts have held that monetary awards will in most cases suffice to remedy unjust enrichment, the calculation of monetary awards is often difficult. First, as noted above, there is often a mutual conferral of benefits between unmarried spouses and “it is unjust to pay attention only to the contributions of one party in assessing an appropriate remedy.” Adding to this difficulty is the fact that it is generally not practical or possible to account for “every service rendered by each party to the other”.58 In Kerr v. Baranow, Cromwell J. noted that this problem has been referred to by some as “duelling quantum meruit”.59

54 Martin v. Sansome, supra, para. 52.
55 Martin v. Sansome, supra, para. 57.
56 Martin v. Sansome, supra, para. 58.
57 Ibid. See also, Kerr v. Baranow, supra, para. 47.
59 Ibid.
The *quantum meruit* approach (duelling or not) endeavours to determine the monetary value of the unpaid services of the plaintiff.\(^{60}\) It has also been characterized as the “value received” or “fee-for-services” approach.

The measure of the plaintiff’s deprivation is not limited to their out-of-pocket expenses or the benefit taken directly from them. Rather, it includes those benefits that were “never in the plaintiff’s possession but that the court finds *would* have accrued for his or her benefit had it not been received by the defendant instead”.\(^{61}\) In this way, the calculation of the monetary remedy aims to put the plaintiff in the position they would otherwise be in, were it not for the unjust enrichment of the defendant.

In *Kerr v. Baranow*, Cromwell J. confirmed that, when dealing with a claim of unjust enrichment based on services provided in a domestic relationship, the calculation of a monetary remedy need not be restricted to the value received approach. Instead, in appropriate circumstances, the accumulated wealth surviving at the termination of the relationship should be considered. This has been referred to as the “value survived” approach. Such an approach is warranted where,

1. an analysis of the parties’ relationship leads to the conclusion that they functioned as a “joint family venture”;
2. at the end of the relationship, the defendant is retaining a disproportionate share of assets resulting from that joint family venture; and
3. there is a “clear link between the claimant’s contributions to the joint family venture and the accumulation of wealth.”\(^{62}\)

In such circumstances, the parties will be viewed as having created wealth through “a common enterprise” and the wealth created during their “cohabitation will be treated as the fruit of their domestic and financial relationship”; however, that does not mean that

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\(^{60}\) *Kerr v. Baranow*, supra, para. 49.

\(^{61}\) *Moore v. Sweet*, supra, para. 44.

\(^{62}\) *Kerr v. Baranow*, supra, para. 81.
the spouses are entitled to share in the fruits of their relationship equally.63 Rather, the monetary award should reflect the claimant’s proportionate contribution to the accumulation of wealth.64 This avoids the duelling quantum meruits problem noted above.

A joint family venture will not be presumed. Rather, it must be proven as a matter of fact. In order to determine whether the parties had engaged in a joint family venture, such that the monetary award should be calculated on a value survived basis, the following factors should be considered:

(1) **Mutual Effort**: whether the parties worked collaboratively towards common goals. For instance, did they work as a team? Did they raise children together? The length of the relationship may also assist in determining whether the parties formed a “true partnership. Pooling resources, for the purposes of this consideration, will include situations where one spouse took on a greater share of domestic tasks to allow the other spouse to follow more lucrative pursuits.65

(2) **Economic Integration**: the degree of economic interdependence and integration in the relationship. The existence of joint bank accounts and the treatment of family resources as a “common purse” will point to a higher degree of economic integration.

(3) **Actual Intent**: the parties’ express or implied intention. It may be inferred from the parties’ conduct. The parties’ intent may also negate the existence of a joint family venture in appropriate cases.66

(4) **Priority of the Family**: whether and to what extent the parties gave priority to the family in their decision making. An important question to ask is whether the parties relied on the relationship, to their detriment, for the sake of the family.

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64 *Ibid.*
The sacrifices made by each spouse to benefit the other, or the family generally, will also be instructive.67

**Proprietary Remedies**

Only where monetary damages, under the value received or value survived approach, as appropriate, are insufficient should a constructive trust be considered. Furthermore, as confirmed in *Martin v. Sansome*, the claimant must also demonstrate “a sufficiently substantial and direct link or causal connection between her contributions and the acquisition, preservation, maintenance or improvement of the property”.68

Importantly, even where a constructive trust is determined to be the appropriate remedy, there is no presumption of equal ownership. Rather, the extent of the constructive trust interest granted ought to be proportionate to the claimant’s contributions to the property (or the joint family venture, if one is found).69

**Resulting Trust**

Constructive trust claims and resulting trust claims are frequently pleaded together and are often confused.70 Understanding the differences between the two is critical. Both deal with the determination of ownership and/or title. However, only the constructive trust is contingent on a finding of unjust enrichment, or some other equitable basis; while the constructive trust is primarily thought of as a remedy, the same cannot be said of the resulting trust. Instead, the resulting trust is a legal presumption which allocates the burden of proof when determining the impact of gratuitous transfers between spouses or other parties. Furthermore, while claims of unjust enrichment and remedial constructive trusts will generally be of less importance when dealing with married spouses, resulting trust claims remain an important feature of property claims between married spouses. This is because questions of title need to be determined before the

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68 Martin v. Sansome, supra, para. 58.
equalization of net family property can be calculated. Furthermore, pursuant to section 14 of the *Family Law Act*, the presumption of resulting trust is preserved when determining questions of title between spouses for equalization purposes.

As set out by the Ontario Court of Appeal in *Foley (Re)*, “[e]quity presumes bargains, not gifts.” As such, where a gratuitous transfer takes place, the Court will assume that the transferee holds the property in trust for the transferor unless there is evidence that the parties intended a gift. This is what is referred to as the presumption of resulting trust.

As noted above, resulting trusts are frequently pleaded alongside remedial constructive trusts. For example, a claimant may allege that the very same gratuitous transfer which raises the presumption of resulting trust will, if not remedied, result in the unjust enrichment of the transferee at the expense of the transferor. However, this level of overlap is unlikely to take place with a claim of unjust enrichment based on services provided; in those circumstances, there has been no transfer of property between spouses to raise the presumption of resulting trust.

**Rebutting the Presumption of Resulting Trust**

Resulting trust claims are determined based on the intentions of the parties, which is a question of fact to be determined from the evidence. However, the evidence needed to rebut the presumption of resulting trust and establish donative intent will depend on the circumstances.

In most cases, the Court will look to the following factors to determine whether there is sufficient evidence of donative intent to rebut the presumption of resulting trust:

a) Whether there were any contemporaneous documents evidencing a loan;

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75 *Holtby v. Draper*, 2017 ONCA 932, para. 53.
b) Whether the manner for repayment is specified;

c) Whether there is security held for the loan;

d) Whether there are advances to one child and not others or advances on equal amounts to various children;

e) Whether there has been any demand for payment before the separation of the parties;

f) Whether there has been any partial repayment; and,

g) Whether there was an expectation or likelihood of repayment.\textsuperscript{76}

In some circumstances, what will be determinative is the lack of evidence in support of the presumption. In \textit{Barber v. Magee}, upheld by the Ontario Court of Appeal, Justice Fitzpatrick considered the case law in support of this approach:

I acknowledge that the analysis prescribed by the caselaw is perplexing. The approach taken by the courts allows the Applicant to rebut the presumption of resulting trust by demonstrating the absence of evidence supporting the presumption. This seems contrary to the concept of a presumption. However, the caselaw seems to have endorsed this approach in order to alleviate the fact that it will often be impossible for a party who opposes a resulting trust to bring affirmative evidence that the impugned transaction was a gift rather than a loan.

Requiring the Applicant to rebut the presumption with affirmative evidence would be untenable, and would result in many gifts being unjustly characterized as loans after the parties separate. To borrow from the words of Justice Heeney in \textit{Poole}, this would simply be unfair. Although somewhat counterintuitive, allowing the presumption of resulting trust to be rebutted by the factors identified in \textit{Klimm} and \textit{Byrne} is more likely to facilitate justice than requiring affirmative evidence of donative intent. To require more from the party challenging the presumption would induce the mischaracterization of gifts.\textsuperscript{77}

\textbf{Defeating Creditors}

Much of the case law dealing with the presumption of resulting trust between spouses addresses situations where title to a significant asset is held in the sole name of one

\textsuperscript{76} \textit{Barber v. Magee}, 2015 ONSC 8054, para. 42.

\textsuperscript{77} \textit{Barber v. Magee}, supra, paras. 70-71.
spouse in order to shield it from the creditors of the other spouse. For example, where one spouse is engaged in a field of work which commonly attracts litigation, title to the family home is often in the sole name of the other spouse. When the spouse left off title later asserts a resulting trust interest in the home, they are directly contradicting the message sent to their creditors; they tell their creditors that the asset is not theirs and then later assert, between spouses, an ownership interest in the very same property.

In Launchbury v. Launchbury, Justice Van Melle of the Ontario Superior Court of Justice explained the impact of an intention to defeat creditors (which decision was upheld by the Ontario Court of Appeal):

When I looked at the cases dealing with resulting trust, it seemed to me that where the purpose was to defeat existing or "real" creditors the presumption of resulting trust was rebutted and where there were no creditors, just the uncertain specter of creditors, the resulting trust claim was allowed.78

In Nussbaum v. Nussbaum, Karakatsanis J. (as she then was), explained that the actual intention of the parties remained the determinative factor:

Even following the amendment of the Family Law Act to provide for a presumption of resulting trust between spouses, there is a line of cases...where the court has found that the specific intention to evade creditors means an implied intention to deprive oneself of beneficial ownership. …The intent to gift defeats the presumption of resulting trust. In my view these cases do not undermine the principle that an illegal purpose is not a bar where the claimant may rely upon the resulting trust to establish his claim. As well these cases do not override the principle that the parties' intentions at the time of the conveyance are a question of fact to be determined upon the evidence. The cases do not purport to impose a 'constructive' intention of gift where there is an illegal purpose to defraud creditors. While evidence that someone intended to fully evade creditors can be evidence that they intended to gift their entire interest in the property, the intention of the parties is a question of fact to be determined from all of the evidence.79

In Holtby v. Draper80, the Ontario Court of Appeal upheld a trial judge's determination that the presumption had not been rebutted, notwithstanding the fact that the property was transferred with the intention of defeating actual, specific creditors. The Court held

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80 2017 ONCA 932 (OCA), para. 7
that the “motive to shield property from creditors does not itself rebut the resulting trust presumption.” While an intention to defeat creditors, whether actual or potential, “can be evidence of a gift, it is not conclusive.” As such, the Court declined to interfere with the trial judge’s findings of fact in this regard.

**Conclusion**

The complexity of property claims between unmarried spouses has led many to call for legislative reform. In his commentary on the Court of Appeal’s decision in *Holtby v. Draper*, Philip Epstein emphasized the impact of these claims on access to justice and judicial economy:

> The courts are inundated with property trust claims by common law spouses particularly in those jurisdictions where there is no statutory scheme for a division of property. As a result, the common law spouses rely on *Kerr v. Baranow*, 93 R.F.L. (6th) 1 (S.C.C.) and *Vanasse v. Seguin*, 2009 CarswellOnt 7970 (S.C.C.), in order to determine their property rights. These claims are based on a constructive or resulting trust argument that results in lengthy trials and a requirement that the trial judge examine in detail the history of the relationship between the parties. The parties cannot afford this process. The courts do not have the resources to process all of these claims, and it seems inequitable to treat unmarried spouses differently than married spouses when it comes to property claims. A number of provinces have already enacted legislation that bring common law spouses into the fold and the time has come for the rest of Canada to follow suit.

To date, these calls for reform remain unanswered. In the interim, confusion over how to properly plead and argue claims of this nature furthers the strain on the resources of litigants and the Court through longer trials and frequent appeals. Only by better understanding these issues can counsel serve themselves and their clients. Given the appellate authority which confirms that the *Family Law Act’s* equalization scheme does not dispense with constructive trusts or resulting trusts, a firm grasp of these concepts will remain invaluable in any event.

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81 *Holtby v. Draper*, supra, para. 55.
82 *Holtby v. Draper*, supra, para. 53.
83 Epstein’s This Week in Family Law, December 2, 2017, Fam. L. Nws. 2017-49.