



What You Don't Know Can Hurt You: Unmarried Couples and Ownership Assumptions

Rosemarie Bell

Just as Canada's landscape varies from coast to coast, so do unmarried couples' property rights – and most people don't know what they are. Many people assume they are the same as if they were married. Not so. Fortunately, in February 2011, the Supreme Court of Canada released the long-awaited decision in *Kerr v. Baranow*,¹ which issued a new roadmap to help common-law couples in most provinces understand their property rights.

Historically, there were two main ways to make a property claim after a common-law relationship ended. The first, called a 'resulting trust,' involved proving a 'common intention' about the property. This meant the couple *intended* that they would both have an interest in the property, even if it was in the name of only one of them. In the *Kerr* case, the Supreme Court did away with this type of "common intention" resulting trust.

The second way was the unjust enrichment/constructive trust remedy. Although it has existed for many years, the *Kerr* case clarified its application in common-law relationships.

1 *Kerr v. Baranow* [2011] S.C.J. No. 10 This article is a simplified summary of several complex legal issues.

A successful unjust enrichment claim requires the plaintiff to prove three things:

1. That the defendant was ‘enriched’ (made wealthier) by something the plaintiff contributed or made possible. Contributions can be money, assets, or services. Services can include labour, household chores, child care, and so on.
2. The plaintiff gave up something, or went without something, which could be specifically linked to those contributions or services, and
3. both these things happened without a valid legal reason. Examples of valid legal reasons are: the plaintiff intended to give the defendant a gift, the plaintiff was required by a contract (such as a cohabitation agreement) to do something, or the plaintiff was required by common-law or statute to do something. By recognizing these valid legal reasons, courts show respect for the freedom of the parties to order their own affairs.

The defendant can oppose the claim, by saying:

- there was no enrichment – for example, everything was lost when the parties went bankrupt, or
- the plaintiff wasn’t deprived of anything – for example, the relationship was short and both parties were in the same situations at the end as in the beginning, or their contributions to the relationship had been about equal,
- there was a recognized legal reason (a valid contract, a gift, and so on as above), or
- there was some other reason that made it fair:
 - both parties mutually benefitted, or
 - both parties reasonably or legitimately expected that the defendant would keep the enrichment.

The Court called this type of relationship a ‘joint family venture.’ There must be a clear link between the plaintiff’s contributions and the accumulation of wealth. This happens when the parties are working collaboratively toward common goals – sustaining their relationship, strengthening their well-being, and improving their family life. The wealth they create is the fruit of this domestic and financial relationship and should be shared (although not necessarily equally).

Whether or not the joint family venture exists is a question of fact, and the plaintiff must have enough evidence to prove it. The plaintiff can rely on evidence of:

Mutual Effort:

They pooled their effort and teamwork:

- they jointly contributed to a common pool;
- they used their funds entirely for family purposes;
- one partner took on all or a greater proportion of domestic labour; and
- together, they prioritized the overall welfare of the family over their individual interests.

Economic integration:

They were interdependent and integrated. They had:

- joint bank accounts, or
- a mutual savings pool.

Actual Intent (inferred by their conduct):

They conducted themselves like a joint family venture:

- they accepted their relationship as equivalent to married;
- they publicly held themselves out as married;
- they held property in joint tenancy;
- they both accepted the view that their wealth will be shared;
- there was little concern over accounting for the money spent for joint expenses: household expenses, renovations, taxes, insurance; and
- they had plans to distribute their property on death – for example, they had Wills naming each other as beneficiaries.

Priority of Family:

They had an understanding or assumption about a shared future:

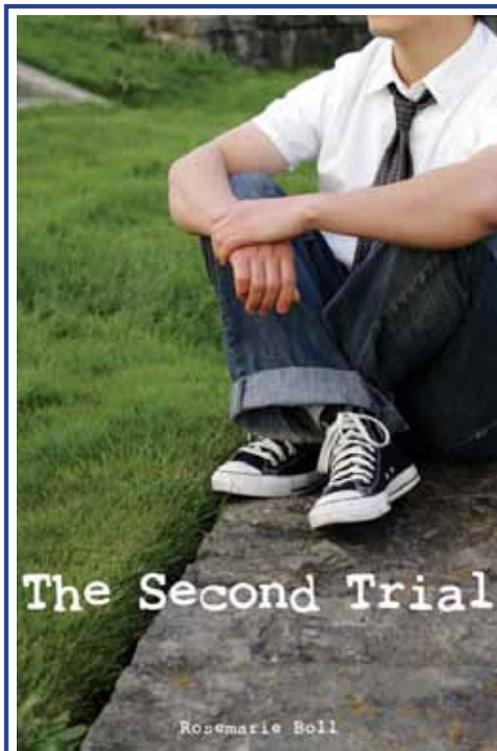
- one person left the workplace for a time to raise children;
- they relocated for the benefit of other partner's career;
- one person sacrificed career or educational advancement for the benefit of the family; and
- one person was under-employed in order to obtain or maintain family and financial balance.

If the plaintiff is successful in proving a joint family venture, then a court will usually give a money judgment – but how much? The Supreme Court made it clear that the plaintiff would *not* be treated like hired help, with a fee-for-services assessment of the claim. It was not to be just a payment back of the amount of money or value of labour the plaintiff put in. That type of minute-by-minute accounting would be impractical, demeaning, and inconsistent with the parties' reasonable expectations. Instead, the claim would be assessed on a 'value survived' approach – how much did the couple's wealth increase during the relationship? In the *Kerr* case, the plaintiff spent four years raising their children and running the household. During this time, their assets increased by \$1.3 million. The plaintiff received 50 percent.

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The *Kerr* case will benefit plaintiffs by clarifying the evidence they need to prove their cases, and by more fairly distributing the accumulated wealth. However, the only sure-fire way to ensure that both parties' intentions are clear and mutually understood is to have a cohabitation agreement. There is no better way to prove a joint family venture than a contract which says that's exactly what it is.

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Rosemarie Boll has been practicing family law for over 20 years and has written extensively on the legal system and how it affects families. She works for the Family Law Office of Legal Aid Alberta.

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