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SHARE THE WEALTH? *KERR V BARANOW* AND THE “JOINT FAMILY VENTURE”

Jennifer Flood*

INTRODUCTION

The Supreme Court of Canada has issued an important decision in *Kerr v. Baranow*¹ regarding property claims between unmarried partners upon separation. The most notable aspect of the decision is a change to the available remedies for a successful unjust enrichment claim. The Court confirmed that a monetary award need not be calculated on a fee-for-services basis, but may reflect a share of the wealth acquired during the relationship proportionate to the claimant's contributions. This remedy is available only upon proof that the partners were engaged in a “joint family venture”. I will assess this development in the law in terms of the likely effect of the definition of the joint family venture on women's inequality, the Court's conception of the family with an underpinning focus on individual choice in relationships, and the capacity of the new framework to adequately recognize women's contributions to the wealth acquired during a relationship.

LEGAL BACKGROUND

In order to assess the changes made in *Kerr v. Baranow*, I will provide a brief overview of the development of the law of unjust enrichment in the family law context, which originated from trust principles developed in English law. The use of

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¹ *Kerr v Baranow*, 2011 SCC 10, [2011] 1 SCR 269 [*Kerr*, SCC].

resulting and constructive trust remedies in property claims by spouses dates back prior to matrimonial property legislation. While the distinction between resulting and constructive trusts was sometimes blurred in the context of marital relationships, the two trusts have different historical origins. Resulting trusts arose based on the presumed intention of the parties where one person held title to property for which another person provided consideration, while constructive trusts arose by operation of law on grounds of fairness.²

In the 1950s and 1960s, courts in England and Canada struggled with how to deal with the division of assets upon marriage breakdown. The application of traditional trust presumptions, including the resulting trust, in the context of marital relationships was criticised as being artificial and unhelpful.³ In *Rimmer v. Rimmer*,⁴ a 1952 decision of the English Court of Appeal, it was decided for the first time that an equal division of property between two spouses was appropriate, applying the maxim “equality is equity”. The facts were that one spouse had contributed financially and substantially, but in an unquantifiable amount, to an asset acquired in the other’s name, and there was no evidence as to their intentions. Two schools of thought emerged on the interpretation of this case: those who thought that the Court divided property equally in the absence of any intent to share, and those who thought that the Court found an “implied intent” to share equally.⁵

² Simone Wong, “Constructive trusts over the family home: lessons to be learned from other commonwealth jurisdictions?” (1998) 18 LS 369 at 370.

³ Donovan WM Waters, Mark R Gillen & Lionel D Smith, eds, *Waters’ Law of Trusts in Canada*, 3d ed (Toronto: Thomson, 2005) at 418-419.

⁴ *Rimmer v Rimmer*, [1952] 2 All ER 863, [1953] 1 QB 63 [*Rimmer*].

⁵ Waters, Gillen, & Smith, *supra* note 3 at 419.

Share the Wealth?

In *Gissing v. Gissing*⁶ and *Pettitt v. Pettitt*,⁷ the House of Lords confirmed that intent was required for a trust to exist, referring to “resulting, implied or constructive trusts” without distinction. Courts could not impose or ascribe an intent in order to get to a fair solution such as an equal division, and the “equality is equity” approach was restricted to the particular circumstances of the *Rimmer* case. A claimant’s success thus turned on the willingness of a court to find an implied common intention to share property.⁸

The Supreme Court of Canada initially followed the English approach taken in *Gissing* and *Pettitt*. A resulting trust was a difficult remedy to obtain since the claimant had to prove that she made a direct financial contribution to the acquisition of property held by her spouse,⁹ or that there was a common intention that a beneficial interest in the property was held for her. For example, in *Murdoch v. Murdoch*,¹⁰ the majority declined to award Ms. Murdoch a share of the farm property held by her husband on the basis that she had not contributed financially to the acquisition of the property, and there was no common intention that she would get a share. Laskin J., in dissent, would have held that her contributions in labour on the farm were sufficient to make out a claim in unjust enrichment for which she could be awarded a constructive trust remedy.

⁶ *Gissing v Gissing*, [1970] 2 All ER 780, [1970] 3 WLR 255 [*Gissing*].

⁷ *Pettitt v Pettitt*, [1969] 2 All ER 385, [1969] 2 WLR 966 [*Pettitt*].

⁸ *Waters*, *supra* note 3 at 420-421.

⁹ *Thompson v Thompson*, [1961] SCR 3, (1960) 26 DLR (2d) 1.

¹⁰ *Murdoch v Murdoch*, [1975] 1 SCR 423, (1973) 41 DLR (3d) 367 [*Murdoch* cited to SCR].

In *Rathwell v. Rathwell*,¹¹ the Supreme Court of Canada departed from the English authorities and developed a unique approach using the law of unjust enrichment as a basis for the imposition of a constructive trust, building on Laskin J.'s dissent in *Murdoch*. The facts in *Rathwell* were similar to those in *Murdoch*, but the majority held that Ms. Rathwell's claim succeeded both on the basis of a resulting trust due to her direct contribution to the acquisition of the property, and on the basis that her contributions in labour on the farm made out a claim in unjust enrichment. In order to make a successful unjust enrichment claim, the claimant must show that the defendant was enriched, that she suffered a corresponding deprivation, and that there was no juristic reason for the enrichment.¹² The acquisition of property by the husband, which he would not have acquired if not for the wife's labour, constituted an unjust enrichment. A remedial constructive trust was imposed on the basis that he could not in good conscience retain the beneficial interest in the property.¹³

Although provincial matrimonial property legislation was enacted in the 1970s and introduced a regime in which property or the value thereof is presumptively divided equally between spouses upon divorce, it did not apply to unmarried couples. Therefore, unmarried partners continued to claim trust remedies to get a share of property. The majority in *Pettkus v. Becker* held that there was "no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period."¹⁴ In *Sorochan v. Sorochan*, the Court held that a

¹¹ *Rathwell v Rathwell*, [1978] 2 SCR 436, (1977) 83 DLR (3d) 289 [*Rathwell* cited to SCR].

¹² *Ibid* at 455.

¹³ *Ibid* at 461.

¹⁴ *Pettkus v Becker*, [1980] 2 SCR 834 at 850, (1980) 117 DLR (3d) 257 [*Pettkus*].

Share the Wealth?

claimant's contributions need not relate to the acquisition of property. A contribution to the preservation, maintenance and improvement of property is sufficient for a constructive trust.¹⁵ Finally, in *Peter v. Beblow*, the Court held that domestic services were sufficient to make out a claim in unjust enrichment. However, the Court limited the remedial constructive trust by holding that it is only available if a monetary award would be inadequate and there is a link between the claimant's contributions and the specific property.¹⁶

The above line of cases from the Supreme Court of Canada represents an incremental recognition that women's contributions to a spousal relationship should be recognized as economic contributions, and that this should not depend on whether she is married. This progress came to somewhat of a halt when the constitutional challenge in *Nova Scotia (Attorney General) v. Walsh*¹⁷ failed. Walsh argued that the exclusion of unmarried spouses from the provincial matrimonial property regime was a violation of the equality rights of unmarried spouses under section 15 of the *Canadian Charter of Rights and Freedoms*.¹⁸ The majority held that marriage is a relevant difference upon which distinctions may be drawn. A major consideration in the judgment was that it is an individual choice whether to marry, and that autonomy should be

¹⁵ *Sorochan v Sorochan*, [1986] 2 SCR 38 at 50, (1986) 29 DLR (4th) 1 [Sorochan].

¹⁶ *Peter v Beblow*, [1993] 1 SCR 980 at 997, (1992) 101 DLR (4th) 621 [Peter].

¹⁷ *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325 [Walsh].

¹⁸ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), 1982, c 11 [Charter].

respected by not imposing the marital property regime on those who did not choose it.¹⁹

Some Canadian provinces and territories have chosen to include unmarried couples in their family property regimes. Manitoba, Saskatchewan, Nunavut and Northwest Territories have extended their definition of “spouse” to include unmarried persons who have cohabited for a certain period, including for the purposes of family property division. Nova Scotia allows unmarried couples to opt into the property regime through registration. The law of Quebec only recognizes marriages and registered civil unions.²⁰ British Columbia’s new *Family Law Act*²¹ will for the first time include unmarried persons who have lived in a “marriage-like relationship” for at least 2 years in the family property regime, which I will discuss further below. In the jurisdictions where they are still excluded, unmarried cohabitants must continue to rely on resulting trust and the law of unjust enrichment.

FACTS AND PROCEDURAL HISTORY

Ms. Kerr and Mr. Baranow began their relationship in 1981 and lived together for 25 years, during which time they built their “dream home” on property owned by Mr. Baranow known

¹⁹ *Walsh, supra* note 19 at para 43.

²⁰ However, at the time of writing, a constitutional equality rights challenge to the exclusion of unregistered relationships in Quebec from all family law protections in the Quebec Civil Code, including spousal support and property division, is pending before the Supreme Court of Canada. The challenge was successful at the Quebec Court of Appeal on the spousal support issue, but not the property issue in light of *Walsh (Droit de la famille — 102866*, 2010 QCCA 1978, (2010) 89 RFL (6th) 1, leave to appeal to SCC granted, *Québec (PG) c A*, [2011] 1 SCR ix).

²¹ Bill C-16, *Family Law Act*, 4th Sess, 39th Leg, British Columbia, 2011 (as passed 23 November 2011).

Share the Wealth?

as the Wall Street property. He paid for the construction, while she was involved with planning, interior decorating and cleaning. The property increased in value over the course of the relationship from \$205,000 to \$942,500²² and Ms. Kerr claimed a share of the property based on resulting trust and unjust enrichment.

Mr. Baranow came into the relationship wealthier than Ms. Kerr, who was in financial trouble after her divorce due to having guaranteed some of her former husband's debt. She had a home known as the Coleman property, which was subject to foreclosure. Because she could not afford to save the property, Mr. Baranow paid to acquire it and guaranteed a new mortgage. During the relationship, the couple kept separate finances. Mr. Baranow was responsible for the mortgage payments on both properties, while Ms. Kerr paid other household expenses. The Coleman property was eventually sold. The couple did not have any children together, but Ms. Kerr had children from her previous marriage. She suffered a stroke in 1991, which left her in need of care and unable to return to work. The relationship deteriorated and in 2006 Mr. Baranow decided he did not want her to return home after a hospital stay for surgery.²³

The trial judge awarded Ms. Kerr a monetary award of \$315,000, which represented a one-third interest in the Wall Street property, on the basis of resulting trust.²⁴ The trial judge also held that Ms. Kerr was entitled to the \$315,000 as compensation for unjust enrichment.²⁵ Her claim for unjust enrichment was based on gratuitous transfers of property to Mr.

²² *Kerr*, SCC, *supra* note 1 at para 174.

²³ *Ibid* at paras 170, 172, 175.

²⁴ *Ibid* at para 84.

²⁵ *Kerr v Baranow*, 2007 BCSC 1863 at para 100, (2007) 47 RFL (6th) 103 [*Kerr*, BCSC].

Baranow and her equity in the Coleman property, in addition to a number of benefits provided by her including household expenses, spousal services, and assistance with planning and purchase of chattels for the new home.²⁶ The trial judge rejected Mr. Baranow's claim for unjust enrichment because Ms. Kerr did most housework and paid household expenses over the course of the relationship, except for a short one-and-a-half year period at the end of the relationship when he cared for her.²⁷

The resulting trust was overturned by the BC Court of Appeal due to the trial judge's factual errors in finding that Ms. Kerr had gratuitously transferred property to Mr. Baranow and that she had equity in the Coleman property which, when sold, was contributed to the new home.²⁸ The Court of Appeal also overturned Ms. Kerr's unjust enrichment claim on the basis that Mr. Baranow's contributions constituted a juristic reason for the enrichment. His contributions included paying the mortgage and other expenses, taking early retirement, and caring for Ms. Kerr after her stroke.²⁹ The Court of Appeal ordered a re-hearing of Mr. Baranow's unjust enrichment claim, and Ms. Kerr's claim was dismissed.

While this comment will focus on the unjust enrichment claim in *Kerr v. Baranow*, the facts and result of the companion case *Vanasse v. Seguin* are useful for the purpose of comparison. Ms. Vanasse and Mr. Seguin were in a relationship for 12 years and had two children together. She left her job to take on most domestic responsibilities, while he worked to develop a company that was eventually sold for \$11

²⁶ *Kerr*, SCC, *supra* note 1 at para 186.

²⁷ *Kerr*, BCSC, *supra* note 27 at para 87.

²⁸ *Ibid* at para 182.

²⁹ *Kerr*, SCC *supra* note 1 at para 188.

Share the Wealth?

million. Ms. Vanasse received a monetary award representing a portion of the increase in the value of the business based on unjust enrichment.³⁰ The trial judge divided the relationship into three distinct periods. Unjust enrichment was established during the second period when Ms. Vanasse stayed home with the children and Mr. Seguin worked long hours up until the time his company was sold. There was no unjust enrichment during the first period and third periods of the relationship. The first period took place before they had children and both worked full time and kept separate finances. During the third period, after the company was sold, Ms. Vanasse continued with the household responsibilities and Mr. Seguin worked mostly from home and was more available to the family. During the first and third periods, their contributions were described as “proportionate”.³¹

The contributions of Ms. Vanasse during the period of unjust enrichment were directly linked to Mr. Seguin’s business success, as he could not have put all of his energy into the company without Ms. Vanasse assuming all of the household responsibilities. A monetary award was appropriate given Mr. Seguin’s ability to pay and the lack of a sufficiently direct and substantial link between her contributions and the company to warrant a constructive trust. The monetary award was based on the pro-rated amount of the \$8.4 million increase in Mr. Seguin’s net worth for the three-and-a-half year period of unjust enrichment. Although the most significant increase in fact took place during the unjust enrichment period, the judge prorated the increase over the entire twelve-year relationship and deducted Ms. Vanasse’s interest in the home and RRSPs, yielding an award of just under \$1 million.³² The Court of Appeal held that the award should have been calculated on a

³⁰ *Ibid* at para 140.

³¹ *Ibid* at para 136.

³² *Ibid* at para 140.

fee-for-services basis, and that the trial judge failed to consider Mr. Seguin's contributions.³³

HOLDING

Cromwell J. wrote the judgment of the Supreme Court of Canada. The three issues related to the law of unjust enrichment, which will be the focus of this comment, were the nature of the monetary remedy for a successful unjust enrichment claim, the role of mutual benefit conferral, and the role of the parties' legitimate expectations in the unjust enrichment analysis. The Court also dealt with the status of the "common intention resulting trust", and decided that it is doctrinally unsound and has no further role to play in the resolution of domestic cases. Unjust enrichment provides a less artificial and more principled basis for recovery.³⁴

The Court confirmed that the elements of an unjust enrichment claim are an enrichment, a corresponding deprivation, and the absence of a juristic reason for the enrichment. The remedy is for the defendant to reverse the unjust enrichment.³⁵ *Peter v. Beblow* established that a monetary award is the preferred remedy. Where a monetary award is insufficient, a constructive trust may be imposed if the claimant can show a nexus between her contributions and the specific property.³⁶ The Court noted that there has been a widespread view that the only two remedial options are a constructive trust or a monetary award calculated on a "value-received" basis (also referred to as fee-for-services or *quantum meruit*). It has been unclear whether it is possible to calculate

³³ *Ibid* at para 127.

³⁴ *Ibid* at para 28.

³⁵ *Ibid* at para 46.

³⁶ *Ibid* at para 50.

the award on a “value-survived” basis; giving the claimant a share of the increase in wealth over the course of the relationship.³⁷

Monetary Remedy for Unjust Enrichment

The Court held that a monetary remedy for unjust enrichment need not be calculated on a fee-for-services basis. The remedial dichotomy between value received and constructive trust is based on the view that there are only two types of claims: a claim for the provision of unpaid services, and a claim for contribution to the acquisition, improvement, maintenance or preservation of a specific property. However, the Court identified a third basis for recovery: a situation where the parties were engaged in a joint family venture (“JFV”) and both parties made contributions linked to the generation of wealth, but one party retained a disproportionate share of the assets. In such a case, the monetary award should reflect the share of the wealth proportionate to the claimant's contributions,³⁸ which corresponds to the value-survived method.

Thus, in order for a claimant to get a monetary award for unjust enrichment based on value survived, she must show first that the couple was engaged in a JFV, and second that her contributions were linked to the accumulation of wealth. Upon proof of these two elements, the wealth will not necessarily be split equally between the parties but will be proportional to each person's contributions. The Court stated that this approach is consistent with *Walsh*, which emphasized the importance of autonomy but approved of the use of unjust enrichment “to

³⁷ *Ibid* at para 49, 57.

³⁸ *Ibid* at paras 59-60, 87.

respond to the plethora of forms and functions of common law relationships.”³⁹

Cohabitation with a partner does not raise a presumption of a JFV.⁴⁰ The Court provided relevant factors to analyze the relationship under four headings: mutual effort, economic integration, actual intent, and priority of the family. None of the factors are required for a finding of a JFV, and the list of factors is not closed. The factors are taken from several prior cases of unjust enrichment. Although the Court refers to prior cases such as *Pettkus* and *Peter* as examples of a JFV, the requirement that a JFV be shown as a separate test for the value-survived remedy is new.

“Mutual effort” concerns whether the parties worked toward common goals, and includes factors such as the pooling of effort and resources including domestic labour, the decision to have children, and the length of the relationship. “Economic integration” relates to how financially interdependent the parties were and includes factors such as a joint bank account, the sharing of expenses, and common savings. Under the heading of “actual intent”, the Court emphasized the importance of autonomy in domestic relationships. Since partners may make a deliberate choice not to marry, their actual intent whether to be economically intertwined must be given considerable weight. Relevant factors include acceptance that the relationship is equivalent to marriage, conduct that indicates an intent to share wealth, and plans for distribution of property on death. Title to property may also reflect an intent to share wealth. Interestingly, although the common intention resulting trust approach was rejected, intent is an important factor in the unjust enrichment analysis. The final heading is “priority of the family” which includes detrimental reliance on

³⁹ *Ibid* at paras 81-82.

⁴⁰ *Ibid* at paras 84-85.

Share the Wealth?

the relationship such as leaving the workforce, relocating or foregoing career or educational advancement.⁴¹

Role of Mutual Benefit Conferral

When an unjust enrichment claim is based on a JFV, the fact that both parties conferred benefits on one another is implicitly taken into account in determining the share of wealth proportionate to each person's contributions. The approach is different on a fee-for-services claim, in which case mutual benefits should generally be considered at the defence and remedy stage, with the effect of reducing the claimant's recovery by the amount of the countervailing benefit provided.⁴² Mutual benefit may also play a limited role at the juristic reason stage if it provides evidence that the enrichment was just.⁴³

Role of the Parties' Legitimate Expectations

In the earlier unjust enrichment cases such as *Pettkus* and *Sorochan*, the claimant's legitimate expectations that she would get a share of property and the defendant's knowledge of those expectations were taken into account as part of the juristic reason analysis. The principle was that it would be unjust for the defendant to retain benefits that he accepted with the knowledge that the claimant expected to be compensated. The Court decided that this analysis should no longer be undertaken.⁴⁴

⁴¹ *Ibid* at paras 91-99.

⁴² *Ibid* at paras 110-111.

⁴³ *Ibid* at para 116.

⁴⁴ *Ibid* at para 121.

*Garland v. Consumers' Gas Co*⁴⁵ set out a two-step test for juristic reason. The first step is to determine whether there is a juristic reason in established categories such as a contract or gift. If not, in the second step the defendant can establish a new juristic reason. The new approach is that the legitimate expectations of *both* parties can be considered at the second stage where the defendant seeks to establish a new juristic reason. For example, reasonable expectations can establish that there was a “bargain” between the parties as to whether the defendant would retain the benefits.⁴⁶

Disposition of the *Kerr v Baranow* Appeal

While the Court of Appeal was correct to dismiss Ms. Kerr's resulting trust claim, it should not have dismissed her unjust enrichment claim. Instead, a new trial was ordered to re-hear both Ms. Kerr's and Mr. Baranow's unjust enrichment claims. The trial judge's error regarding Ms. Kerr's equity in the Coleman property significantly undermined the trial judgment. While the trial judge referred to various other benefits provided by Ms. Kerr, he did not make specific findings as to their value, and did not evaluate Mr. Baranow's contributions.⁴⁷

Even if Ms. Kerr's unjust enrichment claim had been made out, the Court also decided that the factual record was insufficient to determine whether there was a JFV, because “[t]here are few findings of fact relevant to the key question of whether the parties' relationship constituted a joint family venture.” Further, the Court suggested that “the findings made do not appear to demonstrate a joint family venture,” but that it

⁴⁵ *Garland v Consumers' Gas Co*, 2004 SCC 25, [2004] 1 SCR 629.

⁴⁶ *Kerr*, SCC, *supra* note 1 at paras 123-124.

⁴⁷ *Ibid* at para 196.

would be unfair to reach that conclusion without a full hearing.⁴⁸

Disposition of the *Vanasse v. Seguin* Appeal

By contrast, the Court found that the trial record in *Vanasse v. Seguin* did provide sufficient evidence to analyze the facts under the four headings and to find a JFV. Key factors were the fact that Ms. Vanasse gave up her career to run the home and care for the children while Mr. Seguin worked long hours, that she was financially dependent upon him, and that they intended to marry and viewed themselves as the equivalent of a married couple. Mr. Seguin's sacrifices made for the family also supported the finding of a JFV. There was a clear link between the contributions of Ms. Vanasse and the accumulation of wealth, since Mr. Seguin was free from household and child-rearing responsibilities to focus his efforts on the company.⁴⁹ The Court did not comment on the trial judge's method of dividing up the relationship into segments, but held that the approach was reasonable in the circumstances and, while it should not be used as a template for future cases, it was entitled to deference on appeal as an assessment of damages.⁵⁰

CASE ANALYSIS

The Court confirmed that a monetary award for unjust enrichment may be calculated on a value-survived basis, but only upon proof that the parties were engaged in a JFV. The Court referred to earlier cases in which the terms "pooling of effort", "common enterprise", "joint effort", "teamwork", and even "joint family venture" were used.⁵¹ However, the

⁴⁸ *Ibid* at paras 197-198.

⁴⁹ *Ibid* at paras 145-157.

⁵⁰ *Ibid* at para 158.

⁵¹ *Ibid* at paras 63-67.

characterization of the JFV as a distinct test which must be proven in accordance with the factors set out by the Court in order to get the value-survived monetary remedy is a new development.

I start from the proposition that the concept of a venture between unmarried partners, in which the products of their joint efforts are to be shared between them, is a positive one. It is an approach that does not require the calculation of the value of services provided by each person over the course of the relationship, nor a proven contribution to a particular property; approaches that can be artificial and difficult from an evidentiary perspective. Rather, the overall wealth generated by the couple is divided between them such that mutual benefit conferral is recognized and one person does not unjustly retain the benefits of the other person's contributions.

Despite this positive change, I will identify three main problems with the Court's approach. First, the Court's restrictive definition of the JFV may make the value-survived remedy difficult to access for women in relationships that do not conform to the Court's particular conception of the family. Making remedies difficult to access contributes to women's inequality. Second, the Court's focus on free choice and autonomy and continued insistence that there is a fundamental difference between married and unmarried spouses furthers the neo-liberal trend in Canadian law. Finally, judges must still determine each person's contributions to the venture; an exercise fraught with value judgments, which leaves open the possibility of women's contributions being de-valued.

The Joint Family Venture: A High Threshold

The Court stressed that unmarried couples are not a homogeneous group and stated that “the goal is for the law of unjust enrichment to attach consequences to the way the parties have lived their lives, not to treat them as if they ought to have

Share the Wealth?

lived some other way.”⁵² While the Court purports to objectively evaluate how the parties have actually lived, the favourable consequence of characterizing a relationship as a JFV only attaches to a particular type of relationship that fits the mold provided by the Court in terms of mutual effort, economic integration, actual intent and priority of the family.

In light of the facts in the *Kerr v. Baranow* case, it is quite shocking that the Court suggested that the relationship might not qualify as a JFV. The two were together for twenty-five years, planned and built their “dream home” together and each paid different expenses. It was found at trial that Ms. Kerr did all housework including after her stroke. There were discussions that Ms. Kerr would continue to live in the house after Mr. Baranow died, after which the house would go to Mr. Baranow's siblings and Ms. Kerr's two sons.⁵³ Mr. Baranow made sacrifices for the family including taking an early retirement, in part to care for Ms. Kerr.⁵⁴

That the facts in *Kerr v. Baranow* do not necessarily result in a JFV may point to the importance of certain factors which were not present: having children together, having one spouse give up paid labour to act exclusively as a homemaker, and explicitly considering the relationship to be equivalent to marriage. In the absence of these factors, autonomy may be an overriding concern. By contrast, these factors were present in *Vanasse v. Seguin* and the Court easily found a JFV. Yet, even though it was found that Ms. Vanasse was an equal contributor in the relationship and that her efforts were linked to Mr. Seguin's business success, she was only entitled to an unjust enrichment award for the period in which she took on mostly domestic activities. This result suggests that the Court is more

⁵² *Ibid* at para 88.

⁵³ *Kerr*, BCSC, *supra* note 27 at paras 23, 24, 29.

⁵⁴ *Kerr*, SCC, *supra* note 1 at para 175.

willing to find a JFV where one spouse works in the paid labour force, while the other stays home with children and the partners accept that the relationship is similar to a traditional marriage. The Court in fact noted that the notion of the JFV is similar to the rationale for matrimonial property legislation.⁵⁵

In British Columbia, unmarried couples are entitled to apply for spousal support if they have lived in a “marriage-like relationship”,⁵⁶ and Ms. Kerr was in fact awarded spousal support from Mr. Baranow. Not recognizing a JFV in these circumstances would lead to the result that their relationship is “marriage-like” within the meaning of the *Family Relations Act* but does not qualify as a JFV. It is not necessarily problematic that the criteria for spousal support and a value-survived unjust enrichment award differ. Spousal support serves various objectives including the relief of economic hardship arising from the relationship, while unjust enrichment is concerned with the unjust retention of benefits. However, the fact that the JFV is a higher threshold than “marriage-like” illustrates how difficult a test it is to meet.

The Court presented the analysis in a formalistic manner. The identification of a JFV is an exercise in discerning the facts, “tak[ing] into account the particular circumstances of the particular relationship” and discovering “how the parties actually lived their lives, not . . . the court's view of how they ought to have done so.”⁵⁷ This system of legal reasoning which attempts to be impartial, neutral and objective is similar to what Ngaire Naffine has referred to as “blind justice”.⁵⁸ At the same time, the Court is comparing the relationship to factors it has

⁵⁵ *Ibid* at para 61.

⁵⁶ *Family Relations Act*, RSBC 1996, c 128, s (1)(b).

⁵⁷ *Kerr*, SCC, *supra* note 1 at para 88.

⁵⁸ Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen & Unwin, 1990) at 24.

Share the Wealth?

set out as the “hallmarks” of the JFV,⁵⁹ many of which, I argue, represent the traditional conservative view of what a marriage between a man and a woman should look like.

Critical Legal Theorists have argued that formalistic legal reasoning “helps to shore up and entrench the existing, inequitable social order by representing it as inevitable and natural.”⁶⁰ Indeed, the Court in *Kerr v. Baranow*, while discussing numerous precedents in which women have struggled to use trust remedies to get a share of property held by their husbands, made no mention of women's inequality. The law of unjust enrichment was presented as a gender-neutral legal doctrine of general application, rather than as a strategy, which, in the family law context, has been used to remedy the unfairness experienced by women at the end of relationships with men. Catharine MacKinnon has argued that the objective, neutral perspective taken in formal legal reasoning is in fact the male perspective, which advances male interests.⁶¹ However, the development of the JFV is better viewed as a doctrine fraught with contradictions. As T.B. Dawson has observed, some laws will work for some women while oppressing others.⁶² The recognition of a JFV for a woman who has lived in a traditional relationship caring for children is no doubt a good result, since single mothers face one of the highest levels of poverty in Canada.⁶³ By shifting wealth into the hands of

⁵⁹ *Kerr*, SCC, *supra* note 1 at para 87.

⁶⁰ Naffine, *supra* note 58 at 28.

⁶¹ Catharine A MacKinnon, “Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence” (1983) 8:4 *Signs* 635.

⁶² T Brettel Dawson, “Law: A Primer” in T Brettel Dawson, ed, *Women, Law and Social Change: Core Readings and Current Issues*, 5th ed (Concord, ON: Captus Press, 2009) 65 at 71.

⁶³ Statistics Canada, *Income in Canada* (Ottawa: Statistics Canada, 2007) at 15-16.

(some) women, the JFV can be used to further (some) women's equality.

However, due to the high threshold for the JFV, more women are left with the status quo. This result reflects the limitations of formal equality arguments that have been made in the development of the law of unjust enrichment. Many of the arguments related to common-law partners have rested on the idea that they are exactly the same as married couples. For example, Ms. Becker and Mr. Pettkus were described as living together “as husband and wife, although unmarried.”⁶⁴ Although the formal equality challenge in *Walsh* failed, the definition of the JFV illustrates how formal equality ideas about common-law partners still underpin the unjust enrichment analysis. Unfortunately, the Court did not accept L'Heureux-Dubé J.'s argument in *Walsh* that it is the consequences of relationship breakdown – and not necessarily the relationships themselves – that are the same in both cases.⁶⁵

In the absence of a JFV, a woman may still have a claim in unjust enrichment but the award must be based on a fee-for-services calculation or on a contribution to a specific property. The effect of non-recognition of a JFV is thus biased towards allowing the partner who holds title to more assets in his name to keep them and to enjoy the benefits of any increase in their value. Since, in a heterosexual relationship, the person with more assets is likely to be the male partner, while the negative impacts of forgone economic opportunities are likely to be suffered by the female partner,⁶⁶ the result is to perpetuate women's inequality.

⁶⁴ *Pettkus*, *supra* note 16 at 849.

⁶⁵ *Walsh*, *supra* note at 19 para 182.

⁶⁶ See e.g. *Moge v Moge*, [1992] 3 SCR 813, (1992) 99 DLR (4th) 456, L'Heureux-Dubé J.

Share the Wealth?

Autonomy

Under the heading of “actual intent”, the Court asserted that “[u]nderpinning the law of unjust enrichment is an appropriate concern for the autonomy of the parties, and this is a particularly important consideration in relation to domestic partnerships.”⁶⁷ Given that the word “autonomy” did not appear in any of the earlier cases on unjust enrichment, such as *Rathwell*, *Pettkus*, *Sorochan* and *Peter*, it is unclear how autonomy could be said to underpin the law of unjust enrichment. Rather, the focus on autonomy is more in line with the view of domestic relationships taken recently by the Court in *Walsh*.

Hester Lessard has explained the re-invigoration of traditional marriage and the focus on choice in *Walsh* in terms of the neo-liberal shift in Canadian law.⁶⁸ The neo-liberal movement has been marked by government efforts to shift its responsibility for social welfare to the private sector. One way to cause this shift between public and private is through policies of familialization, which involve increased reliance on families “to perform the work of social reproduction and to care for those in need.”⁶⁹ Thus, for example, the liberalization of marriage to include same-sex couples is consistent with this trend because it increases the number of “insiders” to the marriage regime who can be relied on for private support.⁷⁰

By endorsing the traditional account of marriage, which excludes common-law partners, *Walsh* would seem to be at odds with the neo-liberal agenda because the socially

⁶⁷ *Kerr*, SCC, *supra* note 1 at para 94.

⁶⁸ Hester Lessard, "Charter Gridlock: Equality Formalism and Marriage Fundamentalism" (2006) 33 Sup Ct L Rev (2d) 291.

⁶⁹ *Ibid* at 298.

⁷⁰ *Ibid* at 296.

conservative, exclusionary view of marriage denies private benefits to unmarried partners who may then look to the state for social assistance. Lessard argues that the neo-liberal logic is restored, however, when one considers that *Walsh* does not only revive the importance of marriage but, crucially, characterizes it as one among many lifestyle choices that people make.⁷¹ The broader impacts of this characterization of marriage as a choice are evident in *Hodge v. Canada (Minister of Human Resources Development)*⁷² which denied public benefits under a survivor's pension to an unmarried woman that would have been available to her had she been married.

Whereas *Walsh* constructed choice in the liberal sense of freedom from state power exemplified by the choice not to marry, *Hodge* constructed choice in the neo-liberal sense as the marker of the responsible individual. For women, the underlying assumption is that material security is achieved through marriage to a man. Thus, women who do not make the choice to marry have not acted responsibly and should not expect to get the benefits.⁷³

The Court's focus on choice and autonomy in *Kerr v. Baranow* is consistent with the neo-liberal logic identified by Lessard. The definition of the JFV is part of the project of revalorizing the socially conservative family. Partners whose relationship rises to the level of the JFV display sufficient "actual intent" to have a relationship equivalent to marriage to justify a property division similar to that available to married partners. A woman whose relationship does not qualify as a JFV has made a life choice not only not to marry, but not to structure her relationship so that it closely resembles a

⁷¹ *Ibid* at 305-307.

⁷² *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 SCR 357 [*Hodge*].

⁷³ Lessard, *supra* note 70 at 312-314.

Share the Wealth?

traditional marriage. She cannot expect the law of unjust enrichment to undo her free choice, just as the women in *Walsh* and *Hodge* could not expect *Charter* rights to undo their free choices.⁷⁴

Sherene Razack has identified problems with the liberal rights discourse that constructs people as independent, decontextualized individuals. The notion of free choice makes oppression invisible; each individual woman chooses her own fate.⁷⁵ However, Razack does not discount arguments based on women's oppression in terms of their lack of choice and autonomy. Given the established importance of these concepts in our legal system, using them may be an important strategic direction.⁷⁶ An argument based on lack of choice can be made with regard to domestic partnerships, since the terms of a relationship cannot be chosen by each individual. As L'Heureux-Dubé J. argued in her dissenting reasons in *Walsh*, for many unmarried cohabitants, the choice of one to marry is denied by the wishes of the other, which can result in an exploitative situation.⁷⁷ Further, to the extent that a woman does have a choice as to the terms of her relationship, it is arguably constrained by the fact that she cannot have both an unmarried “non-traditional” relationship characterized by a degree of economic independence from her partner, and expect to have a fair division of property when the relationship ends.

The shift in the law made by the Court with respect to legitimate expectations is consistent with the characterization of the relationship as a choice. Rather than focusing on the

⁷⁴ *Ibid* at 312.

⁷⁵ Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: Toronto University Press, 1998) at 23-27.

⁷⁶ *Ibid* at 33-35.

⁷⁷ *Walsh*, *supra* note 17 at 152, 171.

legitimate expectations of the woman who has provided services with a view to being fairly compensated, the person receiving the benefits now has the opportunity to argue that he deliberately chose not to marry and expected her not to be compensated. This analysis would seem to reinforce rather than prevent the exploitative situation identified by L'Heureux-Dubé J., in which one partner refuses to marry in order to avoid the legal consequences.

Women's Work

Simone Wong has identified gender bias in the English approach to constructive trusts. Today in England, common intention to share property is understood to give rise to a constructive trust rather than a resulting trust.⁷⁸ A constructive trust can be imposed if the defendant promised or acknowledged an intention to share property and the claimant acted to her detriment in reliance on the promise. Wong argues that this approach fails to take into account the economic inequality of women and the effects of the sexual division of labour.⁷⁹ While the focus is on finding a common intention to share property, the cases illustrate that much turns on the existence of a sufficient financial contribution by the claimant, and indirect contributions such as domestic services have not been adequately recognized.⁸⁰ She suggests that the unjust enrichment approach in Canada may be less susceptible to gender bias due to the flexibility of considering indirect contributions.⁸¹ Of course, the effectiveness of reducing gender bias by taking into account domestic work depends on the value courts are willing to place on those contributions relative to workforce participation and financial contributions.

⁷⁸ Waters, Gillen, & Smith, *supra* note 3 at 421.

⁷⁹ Wong, *supra* note 2 at 370-371.

⁸⁰ *Ibid* at 377.

⁸¹ *Ibid* at 383-386.

Share the Wealth?

The Court in *Kerr v. Baranow* emphasized that the result of an unjust enrichment claim based on a JFV is that each partner receives a share of the wealth proportionate to their contributions. There is no presumption of equal sharing.⁸² Despite this clear direction from the Supreme Court of Canada, Berend Hovius has predicted that the natural tendency will be for courts to split the gain attributable to the JFV equally between the partners. Noting that the exercise is one of “making value-laden and politically charged assessments,” Hovius asks “[w]hat judge . . . is going to find that having the primary responsibility for child-care and the household is not equal to financial provision?”⁸³

Historically, women's unpaid work in the home has not been treated as economically valuable. In *Murdoch*, one of the reasons for denying a share of property to Ms. Murdoch was that her labour “was not beyond what is normally expected of a wife.”⁸⁴ Even Laskin J., who would have allowed her claim, recognized the value of her labour by reference to how far beyond “normal” it was. Over time, courts began to recognize that ordinary domestic services have economic value. In the unjust enrichment context, this recognition culminated in the *Peter* decision. However, the value of women's unpaid work has been understated due to the historic disadvantage of women in the workplace.⁸⁵ Calculating the value of a woman's services results in a small fee since such services are not highly valued in the market.

⁸² *Kerr*, SCC, *supra* note 1 at 63.

⁸³ Berend Hovius, "Property Disputes Between Common-Law Partners: The Supreme Court of Canada's Decisions in *Vanasse v Seguin* and *Kerr v Baranow*" (2011) 30 Can Fam LQ 129 at 153-154.

⁸⁴ *Murdoch*, *supra* note 10 at 439-441.

⁸⁵ Kim Brooks, “Valuing Women's Work in the Home: A Defining Moment” (2005) 17 CJWL 177 at 186.

Given the history of the judicial treatment of women's work in the home, Hovius's prediction that courts will almost always value women's contributions equally is rather optimistic. While progress continues to be made in the recognition of the economic value of women's unpaid work,⁸⁶ myths and stereotypes about women's work in the home continue to play a role. Where both partners work outside the home, some courts have been under the misperception that this translates into both partners putting in equal amounts of work in the home.⁸⁷ In fact, most unpaid work in the home is still done by women.⁸⁸

Thus, even if Hovius's prediction holds true in a traditional relationship where one partner works inside the home and one undertakes paid work outside the home, women in relationships which differ from this model, because both partners undertake paid work or do not have children, may find their contributions de-valued or ignored. While both Ms. Kerr and Mr. Baranow worked outside the home until Ms. Kerr's stroke, it was a finding of fact at trial that Ms. Kerr did all of the housework prior to and after the stroke,⁸⁹ a fact that was not mentioned in the Supreme Court of Canada's decision. Likewise, Ms. Vanasse received no compensation for the time

⁸⁶ For example, in the context of tort damages for loss of ability to perform unpaid work, *Fobel v Dean* represented a defining moment for the fair compensation of women's loss of ability to perform household services (*ibid*).

⁸⁷ Regina Graycar, "Hoovering as a Hobby and Other Stories: Gendered Assessments of Personal Injury Damages" (1997) 31 UBC L Rev 17 at 28-29.

⁸⁸ Anne Milan, Leslie-Anne Keown & Covadonga Robles Urquijo, "Families, Living Arrangements and Unpaid Work" in *Women in Canada: A Gender-Based Statistical Report* (Ottawa: Statistics Canada, 2011) at 20-22.

⁸⁹ *Kerr*, BCSC, *supra* note 27 at 24, 29.

Share the Wealth?

where both she and Mr. Seguin worked, nor after Mr. Seguin sold his company even though she continued to be primarily responsible for the household and childcare.

Further, since women continue to earn less than men in the paid work force,⁹⁰ women generally have less capacity to make financial contributions to the JFV in a heterosexual relationship. Assuming that both partners work full time outside the home and share the housework equally, the woman is likely to make a smaller salary and have less money to contribute to the purchase of assets. An unequal sharing of the wealth generated by the JFV in such a situation thus perpetuates the inequality, whereas an equal sharing such as that mandated by matrimonial property legislation serves a distributive justice function.

CONCLUSION

The concept of a joint family venture between domestic partners in which they share the wealth generated during the relationship is a useful concept that reflects the reality that partners' lives are economically intertwined, both confer various benefits on one another and both contribute to the acquisition of wealth, regardless of who holds legal title to property. A fair property division at the end of a domestic relationship recognizes that the consequences of relationship breakdown do not depend on marital status. Unfortunately, the Supreme Court of Canada has given the JFV a limited scope by defining the JFV narrowly and by reference to factors present in a traditional marriage. The Court introduced into the doctrine of unjust enrichment a focus on choice and autonomy in domestic relationships consistent with the neo-liberal agenda

⁹⁰ Cara Williams, "Economic Well-being" in *Women in Canada: A Gender-Based Statistical Report* (Ottawa: Statistics Canada, 2010), online: Statistics Canada <<http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11388-eng.pdf>> at 6.

and the reassertion of the fundamental importance of marriage. A JFV is still a second-class citizen to marriage, since the Court has mandated that sharing should not be equal but should be proportional, which means it is left to the discretion of courts to value women's contributions.

The British Columbia Supreme Court, on re-hearing the unjust enrichment claims of Ms. Kerr and Mr. Baranow, determined that they were in fact engaged in a JFV. Mr. Baranow was unjustly enriched by Ms. Kerr's contributions linked to the Wall Street property, but his contributions to her welfare and care reduced the amount she was entitled to. In the result, she received a monetary award of \$240,000, equivalent to 25% of the value of the Wall Street property, and both parties were entitled to keep their personal savings, of which Mr. Baranow had significantly more. The Court emphasized that the couple kept their finances separate during the relationship,⁹¹ consistent with the focus on autonomy and intent.

In British Columbia, this decision will have limited ongoing significance when the new *Family Law Act*⁹² comes into force. Persons who have lived in a marriage-like relationship for at least 2 years will be subject to the same property division as married spouses. In general, spouses will have a right to an undivided half interest in all "family property", defined as property owned by at least one spouse at the date of separation, unless defined as "excluded property".⁹³ Property acquired by a spouse prior to the relationship is excluded, but any increase in its value over the course of the relationship is not.

⁹¹ *Kerr v Baranow*, 2012 BCSC 1222 at paras 70, 106.

⁹² *Family Law Act*, *supra* note 23.

⁹³ *Ibid*, ss 81, 84-85.

Share the Wealth?

If the *Family Law Act* had been in force, Ms. Kerr would have been presumptively entitled to half of the increase in the Wall Street property's value, around \$370,000, in addition to half of all other family property owned by the couple including Mr. Baranow's substantial savings. Ms. Vanasse would have been entitled to half of the increase in the wealth generated by Mr. Seguin's company over the course of the entire relationship, rather than a limited time period. Both women would have been entitled to significantly more than they received due to unjust enrichment, without the need to prove the existence of a JFV and to rely on the complex and uncertain unjust enrichment and trust principles.⁹⁴ This will continue to be the reality for unmarried cohabitants in the Canadian jurisdictions that have not chosen to include unmarried couples in their family property regimes.

⁹⁴ See e.g. the dissenting reasons of L'Heureux-Dubé J. in *Walsh, supra* note 19 at paras 164-169, where she discusses the significant difficulties facing litigants in unjust enrichment actions as compared with the simpler alternative of the presumed entitlement to 50 percent for married spouses.