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COMMON LAW VS. MARRIED COUPLES: DO THEY HAVE THE SAME RIGHTS?

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A. INTRODUCTION

As the number of "common law spouses" or "cohabitating couples" in Canada continues to rise, so too does the misconception that common law spouses are entitled to the same property rights as married couples. On September 8, 2016, the New Brunswick Court of Appeal ("NBCA") addressed this very issue in *Noel v Butler*[1] ("Noel"), whereby the NBCA upheld the lower court's decision re-affirming the fact that common law partners do *not* have the same property rights as do married couples upon a breakdown of their relationship. This, however, does not mean that common law spouses do not have *any* rights when it comes to the division of property that they have accumulated over the course of a relationship.

B. FACTUAL BACKGROUND

The facts in *Noel* are as follows: the parties began cohabitating in 1998 and remained together for fourteen years before deciding to terminate their relationship in 2012. Over the course of their relationship the couple did not marry nor did they have any children. They did, however, purchase a home together as joint tenants in which they lived throughout their relationship. Upon the breakdown of their relationship, there were two issues put before the court: 1) the division of the proceeds from the sale of the home and 2) whether Ms. Butler's pension should be divided between the parties.

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[1] *Noel v Butler*, 2016 NBCA 49 (CanLII) ("Noel").

Upon review of the particular facts of the relationship, the application Judge determined that "the most just and equitable outcome required an equal division of the proceeds of the sale of the home."[2] However, with respect to Ms. Butler's pension, the Judge determined that the pension should not be divided between the parties. In this regard, the Judge had the following to say,

> "With respect to Ms. Butler's pension, I am unable to identify either a tangible benefit to Ms. Butler or a deprivation on the part of Mr. Noel. Ms. Butler was a well-established teacher, who has been contributing towards her pension since 1985, when she and Mr. Noel commenced their relationship in 1998. There was no evidence that Mr. Noel contributed in any meaningful way to Ms. Butler's ability to work as a teacher and accumulate her pension benefits during the course of their relationship. Indeed the evidence suggests that it would have been easier for Ms. Butler if she had been on her own during this period, given the reality:
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> (i) Mr. Noel did not contribute in a meaningful way to the performance of household tasks;
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> (ii) pre-2009 Mr. Noel's best case evidence is that his contribution to the payment of household expenses was at times approximately equivalent to Ms. Butler's; and
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> (iii) post-2009 the household operated principally on income earned by Ms. Butler."[3]

Upon appeal, the NBCA found the application Judge made "no reversible error," and therefore upheld the decision to order that the proceeds from the sale of the home be split between the parties, and further that Mr. Noel was not entitled to any of Ms. Butler's pension funds. In upholding the lower court's decision, the NBCA noted that the application Judge had correctly based his decision on the principles set out in the doctrine of unjust enrichment, which was discussed at length by the Supreme Court of Canada ("SCC") in *Kerr v Baranow* ("*Kerr*").[4]

The NBCA noted with respect to successfully recovering property in "which justice does not permit one to retain,"[5] that Canadian law permits recovery whenever the following three elements can be established: there is an enrichment of or a benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment,[6] and further that courts "should exercise flexibility and

[2] *Ibid* at para 8.
[3] *Ibid* at para 9.
[4] *Kerr v Baranow*, 2011 SCC 10 (CanLII).
[5] *Supra* note 1 at 13.
[6] *Pettkus v Becker*, 1980 CanLII 22 (SCC) at 848.

common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases."[7] The NBCA concluded by stating, "[a] common law relationship is not at law precisely the same as a marriage… [h]ad this couple been married, the outcome for Mr. Noel would unquestionably have been different, but they were not married. The rights and responsibilities of marriage are not duplicated for common law relationships."[8]

C. COMMON LAW RELATIONSHIPS AND THE USE OF CONSTRUCTIVE TRUSTS

While it has been the subject of much debate, many advocates support the position that common law couples should be treated as married couples for the purposes of property division upon the breakdown of a relationship. Many point to the fact that protection is required for dependency when cohabitation ends, that functionally similar relationships should be treated equally, that less confusion about the consequences of marriage versus cohabitation would result if each group were treated equally, and further that there is a need to protect vulnerable families,[9] as support for this position. These points are even more prevalent when coupled with the fact that cohabitation has more than doubled over the past couple of decades, and further that common law relationships are most common amongst young couples and older people whose first marriage ended in divorce.[10] Others argue that autonomy and the fact that cohabitants should have a choice of whether to marry or not, and should not, by default, be subject to the duties and obligations married couples are faced with under the statutory marital property regimes, as support for the position that common law couples should not be treated as married couples for the purposes of property division. However, in light of arguments on both ends of the spectrum, it still remains the case that common law spouses are not equal to married couples when it comes to property division.

The SCC has recognized the use of equitable doctrines for the division of family property as early as 1975 in *Murdoch v Murdoch* [*Murdoch*],[11] where in a strong dissent, the SCC suggested that Mrs. Murdoch's contributions towards the acquisition of land were sufficient to warrant a declaration of constructive trust based on the principles of unjust enrichment, even though she had not established the necessary elements for a resulting trust.[12] Although the importance of *Murdoch* was merely in its dissent, in *Rathwell v*

[7] *Peter v Beblow*, 1993 CanLII 126 (SCC) at 997.
[8] *Supra note 1* at 20.
[9] Mary Jane Mossman, *Families and the Law: Cases and Commentary*, First Captus Edition (Concrd, ON: Captus Press Inc., 2012) at 55.
[10] *Ibid* a 53.
[11] *Murdoch v Murdoch*, 1973 CanLII 193 (SCC).
[12] *Supra* note 9 at 546.

Rathwell,[13] the SCC again acknowledged and accepted the legitimacy of constructive trusts in family law matters. Furthermore, in 1980 in *Pettkus v Becker* [*Pettkus*][14] the SCC recognized the use of constructive trusts for family law matters and in doing so noted, "[t]he principle of unjust enrichment lies at the heart of the constructive trust," and that "[t]he purpose of constructive trust is to redress situations which would otherwise denote unjust enrichment. In principle, there is no reason not to apply the doctrine to common law relationships."[15] The court in *Pettkus* further stated:

> "[a]lthough equity is said to favour equality, as stated in *Rathwell,* it is not every contribution which will entitle a spouse to a one-half interest in property. *The extent of the interest must be proportionate to the contribution, direct or indirect, of the claimant. Where the contributions are unequal, the shares will be unequal.*"[16] [emphasis added]

In *Peter v Beblow* [*Beblow*],*[17]* the court noted that "where a monetary award is sufficient, there is no need for a constructive trust."[18] With respect to determining the correct remedy for an unjust enrichment claim, the court in *Beblow* stated that the first step would be to determine if a monetary award would be insufficient to rectify the claim, and also if there was a nexus between the contributions made to the property that is the subject of the claim. If so, then according to the court in *Beblow*, the plaintiff would be entitled to a constructive trust remedy. Some of the things courts will consider in determining if a monetary award is insufficient include the likelihood of the award being paid and any special interest in the property.[19]

D. CONCLUSION

In light of the above, and while it does remain the case that many obligations imposed upon married couples also equally apply to cohabitating couples (e.g., spousal support and child support), the same is untrue when it comes to property right matters. When faced with the determination of property rights for common law spouses, courts will determine the issue on the basis of equity and the use of constructive trusts. In this regard, cohabitating couples must be aware that the same rights do not apply to them as they

[13] *Rathwell v Rathwell*, 1978 CanLII 3 (SCC).
[14] *Supra* note 6.
[15] *Supra* note 9 at 551.
[16] *Ibid* at 564.
[17] *Supra* note 7.
[18] *Supra* note 9 at 564.
[19] Ibid at 565.

do to married couples, and also of the consequences that could result should they decide not to marry. An alternative option that cohabitating couples could consider rather than getting married, would be to sign a domestic contract, called a cohabitation agreement, with their partner stating how they propose their property to be dealt with should their relationship breakdown. Couples would be well advised to speak with a lawyer to gain a full understanding of their legal rights and obligations that are unique to their own particular circumstances. It is important to note that the use of constructive trusts for family matters and property division may vary depending on the province the common law couple resides in, as they have been treated differently from province to province.