Kerr v. Baranow – The Wages of Sin Revisited

Prepared For: Legal Education Society of Alberta
Matrimonial Property Division

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For Presentation in:
Edmonton – January 20, 2015
Calgary – February 3, 2015

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By now almost everyone is familiar with *Kerr v. Baranow*, the 2011 Supreme Court Decision (SCJ No. 10) focussing on unjust enrichment. You may be less aware of how that decision has been applied within Alberta since 2011. The discussion below will briefly revisit *Kerr*. Following that discussion, a selection of Alberta Queen's Bench and Court of Appeal decisions have been briefed from a cohabitation and unjust enrichment perspective to develop a view of how *Kerr* is being applied in this province.

When *Kerr* was delivered, there was an immediate discussion that the decision created a new claim involving a "joint family venture". By now a number of academics and practitioners alike have come to the conclusion that there is nothing particularly new about this approach. A good short discussion on this point can be found in the publication by George Karahotzitis and Melanie A. Larock titled Recent Jurisprudence Post Kerr v. Baranow/10-Year Limitation Period For Unjust Enrichment Claims in Family Law Cases (Thomson, Rogers). The authors argue that

> "there is nothing new about the notion of a joint family venture in which both
>
> contribute to their overall accumulation of wealth. Courts have recognized joint family ventures in many cases preceding *Kerr* and in many contexts. The reasons of Mr. Justice Cromwell in *Kerr* are an assimilation, restatement and modernization of the law of unjust enrichment. The test for proving unjust enrichment has not changed. The four factors described by Justice Cromwell under which to consider evidence of a joint family venture are an elaboration and a summary of the key elements to consider when fashioning a global remedy for unjust enrichment."

In addition, the actual test for unjust enrichment also remains the same: 1) an enrichment or benefit to the defendant; 2) a corresponding deprivation suffered by the plaintiff; and 3) the absence of a juristic reason for the enrichment.

Assuming there is an enrichment that is unjustly kept, the next step is to determine the appropriate remedy. The first remedy considered by the courts is to be a monetary award, which in most cases will be sufficient remedy to reverse the unjust enrichment. If the unjust enrichment can properly be remedied with cash, no interest in property will be awarded. In fact, from a review of the relevant jurisprudence, it is likely only in rare circumstances that a court will order an interest in property.

In determining a monetary award, it appears from *Kerr* and the cases that rely on it, that a "value survived" approach is generally to be preferred to a "value received" calculation. What that really seems to mean is the court will normally look at the efforts of the family in the joint venture and determine globally what interest each party may have. The preferred method looks less at a fee per hour of service and more at how much those efforts helped bring value into the family.

But before going further, let's look at the above noted restatement and modernization of the key factors of a joint family venture. In *Kerr*, Justice Cromwell noted at paragraph 85 that:

> "Cohabitation does not, in itself, under the common law of unjust enrichment, entitle one party to a share of the other's property or any other relief. However, where wealth is accumulated as a result of joint effort, as evidenced by the nature of the parties' relationship and their dealings with each other, the law of unjust enrichment should reflect that reality."

THE FOUR FACTORS

In *Kerr* (and as followed by numerous Alberta decisions) the Court outlined that a joint family venture will not be presumed. Rather, its existence must be based upon the evidence, which may be considered under four main headings:

(a) Mutual Effort;

(b) Economic Integration;

(c) Actual Intent; and,

(d) Priority of the Family.

Once the four factors are applied, if the court finds a joint family venture exists, any party leaving the relationship with an unfair portion of the joint family wealth will be required to transfer some back to the complaining party (absent a juristic reason to deny this).

It is very important to note two significant points at this juncture. 1) All assets are potentially up for grabs, not just those where a connection can be made directly between the contribution and the wealth generated (although there must still be some link between the contribution and a general generation of wealth); and 2) there is absolutely no presumption that the sharing in all these assets will be done 50-50.