

## Focus FAMILY LAW

# Using joint family venture to divide unmarried assets



**Lisa Gelman**

When unmarried or common-law couples separate in Canada, an important issue that generally needs to be addressed is how the property and assets that have accumulated during the relationship will get divided.

A number of provinces have enacted legislation to deal with this issue; however, the ones that have not, including Ontario, require using the legal concept of unjust enrichment. In addition to this legal principle, the Supreme Court case of *Kerr v. Baranow* 2011 SCC 10 added the concept of the joint family venture to the legal mix.

The joint family venture is used to describe the joint efforts of parties during their relationship that are linked to the accumulation of wealth. Accordingly, the challenge is how do we as lawyers translate the principles into day-to-day reality when advising our clients?

In addition to the regular unjust enrichment analysis of whether there exists an enrichment, a deprivation and a juristic reason for the enrichment, the joint family venture continues to be an integral component of the total analysis for common-law spouses and property division. Therefore, unmarried spouses must take into consideration the four headings of the family venture: (1) mutual effort, (2) economic integration, (3) actual intent, and (4) priority of the family.

To assist lawyers in navigating the joint family venture concept, an associate in my firm, David Frenkel, designed a checklist that provides a useful review of the extent to which an argument may be made as to the existence of a joint family venture

For the purposes of this article, I will highlight 20 common questions that can be asked on a preliminary basis to assess the likelihood of a joint family venture being present in the context of a property division claim.

### Mutual effort

- Did the parties pay proportionately for expenses such as the mortgage, property taxes, and utilities relating to the family home, cottage or a business?
- Were significant financial contributions made by the parties (e.g. renovation costs) proportionate to their means



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Gelman & Associates

toward the family home, cottage, or business?

- Was there a level of teamwork displayed by the parties and did the parties play different roles in the division of labour relating to the household?
- Did the domestic labour of a claimant party free the other spouse from responsibilities at home, and/or enable the other spouse to devote more time for education, work or business?

- Did the parties consider the overall welfare of the family at the forefront of important and joint decisions (e.g. moving to a different city or deciding whether one party returns to work or not)?

### Economic integration

- Did the parties have a joint bank account (e.g. chequing, savings, RRSP, etc.)?
- Did the parties have unlimited authority with respect to each other's bank accounts?
- Did one party pay for or was responsible for the other party's debts in addition to one's own?
- Did the parties jointly select, purchase and/or hold title of other property or assets?
- Did the parties structure aspects of their tax identities as an integrated unit (e.g. filing tax returns as a couple and identifying themselves as common-law on the tax returns)?

### Actual intent

- Did the non-claimant party assure the other of future financial stability or security?
- Did the parties name each other as beneficiaries in any coverages obtained through their respective employers?
- Did the parties work together to accrue assets for retirement?
- Was the relationship held out to the public by the parties as "equivalent to marriage"?
- Did the parties place property in each other spouse's name for family estate planning purposes?

ority to the welfare of the family over and above any personal and employment ambitions?

- Did the claimant party rely on the success and stability of the relationship for one's future economic security?
- Did the parties show dedication to each other and to the children in a commonly supportive relationship and/or an integrated unit?
- Were children from previous relationships considered by the parties as part of the family?
- Did the parties proceed in a manner with an understanding that they are pursuing a shared future?

The above questions will generally serve as a good primer in the assessment stage of a matter with potential property division issues of common-law spouses in addition to the unjust enrichment principles. Ideally, counsel should also carry out such an assessment early on in the retainer to ensure that there is at least some foundation to base a property claim on. Consequently, being informed and properly prepared, at least on a preliminary level, will hopefully pave the way to more favourable and well-informed negotiations.

*Lisa Gelman is the principal of Gelman & Associates.*

### Family priority

- Was the relationship placed in priority to the claimant party's own detriment and/or given pri-

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