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**** HIGHLIGHTS ****

* A Justice of the Alberta Court of Queen's Bench has awarded a common law spouse a quantum meruit judgment equivalent to 35% of the increase in value of a dairy farm during the period of cohabitation, for farming and domestic services provided during this period. The judgment contains a good summary of the law with respect to unjust enrichment, as applied to common law spouses involved in farming operations. Judgment was awarded against both the common law husband (who owned the farm land) and the farming corporation (in which the farmer's sons had an interest) which held livestock and a dairy quota. The award included a percentage increase in the value of the dairy quota held during the period of cohabitation. (Desimone v. Straub, CALN/2010-020, [2010] A.J. No. 801, Alberta Court of Queen's Bench)

** NEW CASE LAW **

Desimone v. Straub; CALN/2010-020, Full text: [2010] A.J. No. 801; Alberta Court of Queen's Bench, B.E. Mahoney J., July 9, 2010.

Matrimonial Property -- Common Law Relationship -- Unjust Enrichment Claim for Increase in Value of Dairy Farm and Quota.

Restitution -- Unjust Enrichment -- Contribution of a Common Law Spouse to Increase in Value of a Dairy Farm and Quota.

The Plaintiff, Doreen Desimone ("Ms. Desimone") and the Defendant, Douglas Straub ("Mr. Straub") lived together from about 1985 to 2005 on a dairy farm owned by Mr. Straub. They never married.

Ms. Desimone brought an action against Mr. Straub, Straub & Sons Dairy Ltd. ("Straub & Sons") and Shane Straub and Rhonda Straub ("Shane" and "Rhonda").

Ms. Desimone sought an Order declaring a constructive trust in her favour in a trust equivalent to one half of the increase of the value in all of the Defendants' assets and land during the date cohabitation to the date of trial, and one third of the increase in value of additional milk quota purchased by the Defendants in 2008. Alternatively, she sought quantum meruit damages for the value of the contributions made by her either in the form of monetary damages or the transfer of specific lands and assets.

Ms. Desimone also made other claims, including claims for lump sum or periodic partner support.

Ms. Desimone and Mr. Straub started living together in 1985. She was then working as an order desk clerk in Calgary. He had two sons, Sheldon and Shane, from a previous marriage and a dairy farm which he had inherited from his parents.

In 1985, Mr. Straub rolled the dairy farm into a corporate entity -- Straub & Sons. The cattle and the dairy quota were then respectively valued at $247,700.00 and $164,373.00. In 1986, Mr. Straub rolled farm equipment, machinery and automobiles into Straub & Sons valued at $69,250.00.

In 1996, Shane purchased additional milk quota and cattle. Thereafter he assumed full responsibility for the dairy operation. Shane had also purchased an additional farm property owned by his grandmother in 1995 and in 2006 they sold this farm and acquired a new dairy operation.

Ms. Desimone provided a number of contributions to the dairy farm operation and Mr. Straub did not deny she made some contributions but disputed the extent of the contributions.

Generally the contributions involved:

- Contribution of labour to operate the dairy farm, including milking and feeding the cattle;

- Bookkeeping with respect to the farm operations;

- Maintaining a large vegetable garden and preparing and freezing vegetables;

- Feeding and watering beef cows, horses, pigs and chickens;

- Driving tractors, spreading manure and driving a grain truck during harvest time;

- General housekeeping services.

Decision: B.E. Mahoney, J. [at para. 124] dismissed Ms. Desimone's claim for an interest in the dairy farm pursuant to a constructive trust, but granted judgment for a 35% increase in the value of the farm land and buildings, the milk quota, the livestock and

semen, livestock feed and farm equipment between December 1, 1985 and June 1, 2005, excluding the milk quota purchased by Shane. The claim for unjust enrichment against Shane and Rhonda were dismissed. Mr. Straub and Straub & Sons were held jointly liable for the unjust enrichment award. Other relief was also granted.

Mahoney, J. summarized the current law concerning unjust enrichment and constructive trust in a common-law relationship as follows [at para. 40 to 42]:

> 40 There is no presumed entitlement to property sharing in a common law relationship. In Nova Scotia (Attorney General) v. Walsh, 2002 SCC 83, S.C.R. 325, the Supreme Court of Canada dealt with the question of whether the exclusion of unmarried cohabiting opposite sex couples from the definition of "spouse" in the Nova Scotia Matrimonial Property Act R.S.N.S. 1989, c. 275 violated s. 15(1) of the Charter of Rights and Freedoms. The Court held that it did not, finding that the distinction between marriage and common law relationships, for purposes of legislation dealing with the division of property, was not discriminatory.
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> 41 In Swaren v. Swaren, 2007 ABQB 193, 74 Alta. L.R. (4th), varied, 2007 ABCA 339, 440 A.R. 27, Justice Germain summarized the legal status of non-married couples in Alberta at paras. 35-37:
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> > The Matrimonial Property Act, R.S.A. 2000, c. M-8 of Alberta presumes an equal division of matrimonial property between spouses. However, the definition of "spouse" in the Matrimonial Property Act does not extend to non-married parties in common law relationships: see for example Hughes v. Hughes, [2006] A.J. No. 1347, 2006 ABQB 468 at para. 6; Panara v. Di Ascenzo, [2005] A.J. No. 95, 2005 ABCA 47 at para. 22. The Supreme Court of Canada has made it clear that statutes that exclude non-married individuals from this presumption of equal division of assets do not infringe s. 15(1) of the Charter: Nova Scotia (Attorney General) v. Walsh, [2002] 4 S.C.R. 325. Therefore, the presumption of equal division of assets does not apply to non-married couples.
> >
> > Courts address the inequity that would result from allowing one common law partner to assume all the benefit of the increase in value of family assets upon separation through the equitable doctrine of unjust enrichment. The application of equitable principles to common law partners follows the fundamental principles established in the jurisprudence relating to unjust enrichment generally: Peter v. Beblow, [1993] 1 S.C.R. 980 at para. 2.
> >
> > In order to establish that Mr. Swaren has been unjustly enriched, Ms. Gorgichuk must show (1) that Mr. Swaren was enriched, (2) that Ms. Gorgichuk suffered a corresponding deprivation, and (3) that there

> was no juristic reason for Mr. Swaren's enrichment: Pettkus v. Becker, [1980] 2 S.C.R. 834 at 848; Sorochan v. Sorochan, [1986] 2 S.C.R. 38 at 44. Although easy to articulate, the test enunciated in Pettkus, supra is factually driven and the cases are not all reconcilable.

42 In a recent British Columbia Court of Appeal decision, Wilson v. Fotsch, 2008 BCSC 548, varied, 2010 BCCA 226, Justice Huddart reviewed, in detail, the principles of unjust enrichment and the relationship with reciprocal benefits within a common law relationship. Justice Huddart, speaking for the majority stated at paras. 7-9:

> In a marriage-like relationship, it will be more difficult to say that a plaintiff has not received something in return for the defendant's enrichment. The mutuality of the relationship may mean that benefits conferred by one party on the other are compensated in some way -- by the reciprocal receipt of shelter, food, or other things of value. The nature of the relationship is not as narrowly circumscribed and more things of value pass between the parties, meaning the injury must be about the totality of the value passing back and forth, and not focus solely on the defendant's benefit to the detriment of the plaintiff. In other words, regard must be had for reciprocal benefits.
>
> But that regard must respect the nature of the particular relationship. Express agreements must be respected (Rathwell; Hartshorne v. Hartshorne, 2004 SCC 22, [2004] 1 S.C.R. 550) and so must be the decision to remain unmarried, by the courts as by the parties (Nova Scotia (Attorney General) v. Walsh, 2002 SCC 83, [2002] 4 S.C.R. 325). A marriage-like arrangement is not tantamount to marriage, particularly where the parties have deliberately imposed limits on their respective contributions to the relationship.
>
> My review of the authorities persuades me that courts have found ways to off-set reciprocal enrichments for many years with unpredictable and at times inconsistent results. In my view, the proper approach to reciprocal benefits can be found in Garland v. Consumers' Gas Co., 2004 SCC 25, [2004] 1 S.C.R. 629, where the Supreme Court explained that mutual enrichments should be considered at the juristic reason stage for the limited purpose of assessing the parties' legitimate expectations; otherwise, they should be considered at the remedy stage. Jurisprudence predating Garland, including past decisions of this Court such as Toth v. de Frias (1996), 78 B.C.A.C. 34 (C.A.), must be approached cautiously in view of its conclusions.

> Since Pettkus v. Becker, [1980] 2 S.C.R. 834, Canadian authorities have treated unjust enrichment as an equitable cause of action for which constructive trust is one potential remedy. Restitution by way of a monetary award is another. The entitlement to either remedy arises on the date the duty to make restitution arose: Clarkson v. McCrossen Estate (1995), 3 B.C.L.R. (3d) 80 (C.A.) at paras. 75-76. In matrimonial or quasi-matrimonial actions, this will usually be no later than when the parties separate, divorce or when a plaintiff has reasonable grounds to believe that the relationship has become permanently dissolved: P.D. Maddaught & J.D. McCamus, The Law of Restitution (Aurora, Ont.: Canada Law Book, 2009) at 3:500.30. Thus, unjust enrichment analysis focuses on the end of a relationship, not the beginning: Roseneck v. Gowling (2002), 62 O.R. (3d) 789 (C.A.) at para. 29.

Mahoney, J. considered the following issues:

(a) Was there an Enrichment?

Mahoney, J. concluded [at para. 45 and 46] that the domestic and farm services contributed by Ms. Desimone did result in an enrichment and a contribution to the growth and maintenance of the farm. Mahoney, J. also concluded that the company, Straub & Sons, could not be meaningfully separated from Mr. Straub, stating at para. 52:

> 52 In my view, the company, Straub & Sons, cannot meaningfully be separated from Mr. Straub. Even if Ms. Desimone's services of signing cheques and gathering information for accountants saved Mr. Straub time, her actions still benefited the corporation as he was able to spend more time doing other jobs for the dairy farm. The hired men were fully compensated for their work. Furthermore, prior to Shane's full involvement in the dairy farm, Mr. Straub's son's involvement was not as significant as Ms. Desimone's. The company realized an unjust enrichment by the contribution of Ms. Desimone. Most of the assets were held in the corporation and the corporation increased in value over time.

Mahoney, J. found that there was no evidence to support an unjust enrichment claim against Shane or Rhonda [at para. 53-55].

(b) Was there a Corresponding Deprivation?

Mahoney, J. concluded that there was a deprivation. Although Ms. Desimone was paid a salary for income splitting and tax purposes, the amounts paid were minimal and she contributed most of that salary back to the family unit putting it into a joint account used for family purposes [at para. 59].

(c) Was there a Juristic Reason for Ms. Desimone's Work Effort?

Mahoney, J. summarized the two part analysis for the absence of a juristic reason at para. 60, stating:

> "The third part of the test is whether there exists some juristic reason for the enrichment. In Garland v. Consumers' Gas Co, 2004 SCC 25, 1 S.C.R. 629, the Court outlined the two-part analysis for determining whether there is the absence of a juristic reason for the enrichment. First, the plaintiff must demonstrate that the enrichment did not occur as a result of four established categories: a contract, a disposition of law, a donative intent (a donation) or statutory obligations. If this is demonstrated, then the onus falls on the defendant to show some other reason why the enrichment should be retained."

Mahoney, J. observed that the juristic reason for unjust enrichment does not arise as a result of the relationship itself [at para. 60]. The payment of a competitive wage may provide juristic reason, but that the wage in this case was not adequate to do so [at para. 61]. There was a reasonable expectation of the parties that Ms. Desimone would be compensated as indicated in Mr. Straub's will (which he did not change until they separated) and the joint signing authorities with Alberta Milk and the corporate joint bank account [at para. 62 and 63].

Mahoney, J. concluded at para. 64:

> 64 Based on the Garland test, Ms. Desimone has demonstrated that the enrichment did not occur as a result of either a contract, a disposition of law, a donative intent or statutory obligation. Both parties spent many hours working on the old farm. It therefore falls to Mr. Straub to show why the enrichment should be retained. He has not shown any policy reasons to permit the enrichment or any other justification for the enrichment. A juristic reason is not established here to allow Mr. Straub to retain all the accumulated net asset gain.

(d) Remedy

Mahoney, J. summarized the law as to whether proprietary or a quantum meruit award should be made at para. 65 to 70:

> 65 A finding of unjust enrichment does not automatically mean that the accumulated wealth is equally shared: Peter v. Beblow, [1993] 1 S.C.R. 980 at 1014. In determining the remedy the court must consider the value of the contribution: Panara at para. 42, Peter at 1014, Pickelein v. Gillmore (1997), 30 B.C.L.R. (3d) 44 (C.A.) at 53. The two remedies that can be awarded by a Court when a party has succeeded in a claim for unjust enrichment are quantum meruit (reasonable value for services) and title to the property based on constructive trust: Peter at 995. An award of quantum meruit is calculated based on the value received by the party who has been unjustly enriched. In Lac Minerals v. International Corona

Resources, [1989] 2 S.C.R. 574 at 674, La Forest J. for the majority held: "[t]he Court can award either a proprietary remedy . or award a personal remedy, namely a monetary award".

66 A constructive trust giving a proprietary interest in the property, will be imposed by a Court only if the party asking for it can show: (a) that monetary damage would be inadequate; and (b) that his or her contribution is substantially connected to the property in which he or she is seeking the trust: Peter at 995.

67 In Peter, the Court said the following with respect to factors to consider when considering the appropriateness of a monetary award:

> There will of course be situations where an award for a monetary sum may be the most appropriate remedy. For example where the relationship is of short duration or where there are no assets surviving its dissolution, a monetary award should be made. Professors Berend Hovius and Timothy G. Youdan (The Law of Family Property, supra, at p. 147) provide the following list of factors which I think are helpful in determining that a monetary distribution may be more appropriate than a constructive trust:
>
> (a) is the "plaintiff's entitlement . relatively small compared to the value of the whole property in question""; [page 1024]
>
> (b) is the "defendant . able to satisfy the plaintiff's claim without a sale of the property" in question;
>
> (c) does "the plaintiff [have any] special attachment to the property in question";
>
> (d) what "hardship might be caused to the defendant if the plaintiff obtained the rights flowing from [the award] of an interest in the property".
>
> In this case, the appellant contributed to the maintenance and the preservation of the home. She painted the fence, planted the cedar hedge, installed the rock garden and built the chicken coop. Nevertheless, her principal contribution was made through the provision of domestic services. Her work around the house and in caring for the children saved the respondent the expense of hiring a housekeeper and someone to care for the children. As a result he was able to use the money which he had saved to purchase other property and to pay-off the mortgage on the Sicamous property.

68 If a monetary award is deemed to be appropriate there are two approaches to determine the amount of the award: the "value received" approach, which looks at the value of the claimant's services, and the "value survived" approach, which looks at the portion of the increase in property value that is attributable to the claimant's contribution. In Kopr v. Kopr 2009 ABQB 93, 465 A.R. 300, Justice Thomas described when to use the approaches, at para. 76:

> "In Peter, McLachlin J., wrote at 999 that whereas the value received approach is appropriate to calculate the value of a monetary award, the value survived approach is preferable when quantifying a constructive trust. This follows from the proprietary nature of constructive trusts. Furthermore:
>
> .a "value survived" approach arguably accords best with the expectations of most parties; it is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship.

69 Cases have illustrated that the value survived approach can be used to determine the quantum of a monetary award in appropriate cases despite the fact that there is no constructive trust. For example, in Pickelien at paras. 42-43, the Court stated that the value survived approach is generally used in the context of "[l]ong term marriage -- like -- relationships" due to difficulties in valuing each party's contributions". Where the parties' respective contributions are calculable, the value received approach is appropriate.

70 This was recently confirmed in Wilson, by Justice Huddart at para. 49:

> Since Harrison v. Kalinocha (1994), 90 B.C.L.R. (2d) 273 (C.A.), Crick, and Pickelein, this Court has recognized that the consideration of the adequacy of a monetary award must include not only an award assessed on the basis of value received, but also one assessed on the basis of value survived at the date of separation. It has also recognized that a monetary award can be secured and that an award of interest can compensate for the effects of the delay in payment of a monetary restitutionary award. Unless there is a reason for a continued sharing of the rights, obligations and risks of ownership, there is no practical benefit to a proprietary award and there is a downside, not least of which is the need for an accounting between the owners on a continuing basis. Given that a restitutionary remedy speaks from the date the right to restitution arose, any proprietary

> award implies an accounting for the use, maintenance and improvement of the property as tenants in common from the date of separation until the date when the property is sold and the proceeds divided.

After reviewing the evidence, Mahoney, J. concluded that supporting a proprietary interest in the property would not be an appropriate remedy for the following reasons [at para. 80 to 82]:

> 80 In order for me to reach the conclusion that a constructive trust is the appropriate remedy I must first conclude that there is a link between the services rendered and the particular property in question. Second, I must conclude that a monetary award would be insufficient. I find that there is a link between the services rendered by Ms. Desimone and the old farm, which supports her claim for a constructive trust, at least from 1986 to 1996. The evidence supported the fact that she gardened, landscaped, milked cows and assisted with baling and, to a lesser extent, combining. She also did all of the cooking and the bulk of the housework. She improved the property by occasionally painting and decorating. She met with the accountants and wrote cheques for the business and to pay the hired hands.
>
> 81 I also take into consideration other factors which militate against her claim to a proprietary interest in the old farm. I find that generally the hired men did the chores and it was only on their weekends off that Ms. Desimone assisted. She helped with baling but that ended when Mr. Straub acquired a round baler, which according to her testimony, was quite a number of years ago. The size of the garden was reduced on at least two occasions so it required less maintenance. Her involvement with the boys was limited and unaffectionate and both moved off the old farm at a relatively young age. After 1996 her participation in the dairy operation largely ended due to Shane's increased involvement. Furthermore, in 2001 she obtained work off the farm and continued working until their separation in 2005. I was provided with no evidence that she made any direct financial contribution to the business of the old farm.
>
> 82 After reviewing the case law and the facts of this case, I find that this is a case where a monetary award would be adequate and I decline to award Ms. Desimone a proprietary interest in the property. I am persuaded by the evidence of Mr. Straub and Shane Straub that the old and new farm operate together as one integrated entity and it would be unjust to split up the farms and the dairy business. The old farm has been in the family for more than three generations. Although Ms. Desimone submitted that she has an emotional link to the old farm, in my opinion, the emotional ties are linked more with a place for her horses than the actual land. She fears that she will lose the horses if she moves off the old farm. However, she should be able to provide for herself and her horses with a monetary award, even if it

means moving the horses to another property.

Mahoney, J. rejected Ms. Desimone's claim for a 50% increase in value and concluded that a 35% increase, for the period December 1, 1985 to June 1, 2005 would be appropriate, based on the fact that her contribution had diminished after Shane had substantially took over the dairy operation in 1996. Mahoney, J. directed that the amount of the increase in value be determined by the appraisers for the parties on a joint basis, failing which the Court would make a ruling.

** CREDITS **

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