

## **COMMON LAW & SAME SEX COUPLES**

One of the most interesting and oft quoted cases dealing with the sharing of assets on the breakdown of a common law relationship is the case of *Becker v. Pettkus*<sup>1</sup>.

The breakdown happened in 1974 after a relationship of almost 20 years. The final decision by the Supreme Court of Canada was rendered in 1980. Mr. Pettkus and Miss Becker came to Canada from central Europe separately, as immigrants, in 1954. He had \$17.00 upon arrival. They met in Montreal in 1955. Shortly thereafter, Mr. Pettkus moved in with Miss Becker, on her invitation. She was 30 years old and he was 25. He was earning \$75 per week; she was earning \$25 - \$28 per week, later increased to \$67 per week.

A short time after they began living together, Miss Becker expressed the desire that they be married. Mr. Pettkus replied that he might consider marriage after they knew each other better. Thereafter, the question of marriage was not raised, though within a few years Mr. Pettkus began to introduce Miss Becker as his wife and to claim her as such for income tax purposes.

From 1955 to 1960 both parties worked for others. Mr. Pettkus supplemented his income by repairing and restoring motor vehicles. Throughout the period Ms. Becker paid the rent. She bought the food and clothing and looked after other living expenses. This enabled Mr. Pettkus to save his entire income, which he regularly deposited in a bank account in his name. There was no agreement at any time to share either moneys or property placed in his name. The parties lived frugally. Due to their husbandry and parsimonious life-style, \$12,000 had been saved by 1960 and deposited in Mr. Pettkus' bank account.

The two traveled to western Canada in June 1960. Expenses were shared. One of the reasons for the trip was to locate a suitable farm at which to start a bee-keeping business. They spent some time working at a beekeeper's farm.

They returned to Montreal, however, in the early autumn of 1960. Miss Becker continued to pay the apartment rent out of her income until October 1960. From then until May 1961, Mr. Pettkus paid rent and household expenses, Miss Becker being jobless. In April 1961 she fell sick and required hospitalization.

In April 1961 they decided to buy a farm at Franklin Centre, Quebec, for \$5,000. The purchase money came out of the bank account of Mr. Pettkus. Title was taken in his name. The floor and roof of the farmhouse were in need of repair. Miss Becker used

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<sup>1</sup> (1978) 5 R.F.L. (ed) 344, 20 O.R. (2d) 105, 87 (3d) 101 and (1980) 19 R.F.L. (2d) 165, 2 S.C.R. 834, 117 D.L.R. (3d) 257.

her money to purchase flooring materials and she assisted in laying the floor and installing a bathroom.

For about six months during 1961, Miss Becker received unemployment insurance cheques, the proceeds of which were used to defray household expenses. Through two successive winters, she lived in Montreal and earned approximately \$100 per month as a baby-sitter. These earnings also went toward household expenses.

After purchasing the farm at Franklin Centre the parties established a bee-keeping business. Both worked in the business, making frames for the hives, moving the bees to the orchards of neighbouring farmers in the spring, checking the hives during the summer, bringing in the frames for honey extraction during July and August and the bees for winter storage in autumn. Mr. Pettkus handled receipts from sales of honey; payments for purchases of beehives and equipment were made from his bank account.

The physical participation by Miss Becker in the bee operation continued over a period of about 14 years. She ran the extracting process. She also, for a time, raised a few chickens, pheasants and geese. In 1968, and later, the parties hired others to assist in moving the bees and bringing in the honey. Most of the honey was sold to wholesalers, though Miss Becker sold some door to door.

In August 1971, with a view to expanding the business, a vacant property was purchased in East Hawkesbury, Ontario at a price of \$1,300. The purchase moneys were derived from the Franklin Centre honey operation. Funds to complete the purchase were withdrawn from the bank account of Mr. Pettkus. Title to the newly acquired property was taken in his name.

In 1973 a further property was purchased, in West Hawkesbury, Ontario, in the name of Mr. Pettkus. The price was \$5,500. The purchase moneys came from the Franklin Centre operation, together with a \$1,900 contribution made by Miss Becker, to which I will again later refer. 1973 was a prosperous year, yielding some 65,000 pounds of honey, producing net revenues in excess of \$30,000.

In the early 1970's the relationship between the parties began to deteriorate. In 1972 Miss Becker left Mr. Pettkus, allegedly because of mistreatment. She was away for three months. At her departure Mr. Pettkus threw \$3,000 on the floor; he told her to take the money, a 1966 Volkswagen, 40 beehives containing bees, and "get lost". The beehives represented less than ten per cent of the total number of hives then in the business.

Soon thereafter Mr. Pettkus asked Miss Becker to return. In January 1973 she agreed, on condition he see a marriage counselor, make a will in her favor and provide her with \$500 per year so long as she stayed with him. It was also agreed that Mr. Pettkus would establish a joint bank account for household expenses, in which receipts from retail sales of honey would be deposited. Miss Becker returned; she brought back the car and \$1,900 remaining out of the \$3,000 she had earlier received. The \$1,900 was

deposited in Mr. Pettkus' account. She also brought the 40 beehives, but the bees had died in the interim.

In February 1974 the parties moved into a house on the West Hawkesbury property, built in part by them and in part by contractors. The money needed for construction came from the honey business, with minimal purchases of materials by Miss Becker.

The relationship continued to deteriorate and on 4<sup>th</sup> October 1974 Miss Becker again left, this time permanently, after an incident in which she alleged that she had been beaten and otherwise abused. She took the car and approximately \$2,600 in cash, from honey sale.

At trial Miss Becker was awarded 40 beehives, without bees, together with \$1,500, representing earnings from those hives for 1973 and 1974.

The Ontario court of Appeal varied the judgment at trial by awarding Miss Becker a one-half interest in the lands owned by Mr. Pettkus and in the bee-keeping business. The Supreme Court of Canada upheld their decision.

Having won the judgment (worth about \$150,000) Miss Becker spent several years trying to collect, without much success. After years of delays and costs, Miss Becker gave up. On November 5, 1987 she put a rifle to her head and killed herself.

In making their decision in *Becker v. Pettkus* the Supreme Court of Canada solidified the theory of constructive trust. They determined that the contribution of money and labour by Ms. Becker to the beehive business allowed Mr. Pettkus to acquire the property that he held in his name. Therefore, based on this decision, the question will always be whether the contribution of one party was significant enough that it allowed the other party to acquire property. This is sometimes referred to as the principle of "unjust enrichment". McLachlin J. explained this principle well in *Peter v. Beblow*<sup>2</sup> when he said,

I share the view of Cory J., that the three elements necessary to establish a claim for unjust enrichment – an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment – are made out in this case. The appellant's housekeeping and child-care services constituted a benefit to the respondent (1<sup>st</sup> element), in that he received household services without compensation, which in turn enhanced his ability to pay off his mortgage and other assets. These services also constituted a corresponding detriment to the appellant (2<sup>nd</sup> element), in that she provided services without compensation. Finally, since there was no obligation existing between the parties which would justify the unjust enrichment and no other arguments under this broad heading were met, there is no juristic reason for the enrichment (3<sup>rd</sup> element). Having met the three criteria, the plaintiff has established an unjust enrichment giving rise to restitution.

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<sup>2</sup> (1993) 44 R.F.L. (3d) 329 (S.C.C.)

Of course establishing a constructive trust in the assets just means that one party is holding assets in trust for the two of them. This still leaves the second party with the problem of trying to realize on their share of the assets. The principles of unjust enrichment and constructive trust could also apply in the case of a same sex couple relationship breakdown.

There are, of course, many cases where a couple live together in a common law relationship, later marry and later again their marriage breaks down. The principles of unjust enrichment and constructive trust could also apply in this situation. However, unjust enrichment is not easy to prove, and therefore, some people have argued that the pre-marriage period should just be added to the marriage period in determining the value of the assets subject to equalization. The cases seem to be inconsistent with regards to this suggestion, and that is why some lawyers resort to the unjust enrichment and constructive trust argument in an attempt to include the pre-marriage period.

In the case of *Debora v. Debora*<sup>3</sup> the parties were married in a religious ceremony that did not comply with the formal requirements of the Marriage Act. They lived together from April 3, 1987 to July 20, 1994 and were then legally married. The Ontario Court of Appeal decided that based on the facts of this case the pre-marriage period should not be included.

In the case of *MacNeill v. Pope*<sup>4</sup> the parties lived together for 16 years but were legally married for less than five of those years. The Ontario Court of Appeal decided that on the facts of this case, the pre-marriage period should be included. It seems that the only way to be certain that assets acquired during a common law relationship will be shared on the breakdown of that relationship is to have a legal written agreement entered into before the relationship starts. However, all of this may change because of the decision in *Walsh v. Bona*<sup>5</sup>. Susan Walsh and Wayne Bona cohabitated in a common law relationship for approximately ten years. Upon separation Ms. Walsh applied for a division of the assets acquired during the marriage. Under the Nova Scotia Matrimonial Property Act the definition of spouse in the act did not include common law spouses, and Ms. Walsh argued that this constituted discrimination in violation of section 15(1) of the Charter of Rights. It was determined that Ms. Walsh was right and it was ordered that the Matrimonial Property Act be amended.

There are many other sad stories about common law relationships. In one case, after dating for a couple of years a woman and her boyfriend moved in together. They were both attending university and soon realized that their tuition fees and living expenses were more than they could handle. It was decided that the woman would cut back on her course load and work more hours, in order to support them both, while the man

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<sup>3</sup> (1999) CarswellOnt 5, 167 D.L.R. (4<sup>th</sup>) 759, 116 O.A.C. 196, 43 R.F.L. (4<sup>th</sup>) 179

<sup>4</sup> (1999) CarswellOnt 253, 43 R.F.L. (4<sup>th</sup>) 209, (sub nom. Pope v. Pope) 170 D.L.R. (4<sup>th</sup>) 89, (sub nom. Pope v. Pope) 117, O.A.C. 275, (sub nom Pope v. Pope) 42 O.R. (3d) 514

<sup>5</sup> (2000) CarswellNS 112, 2000NSCA 53, 5 R.F.L. (5<sup>th</sup>) 188, 186 D.L.R. (4<sup>th</sup>) 50, 183 N.S.R. (2d) 74, 568 A.P.R. 74

focused on his studies. The plan was that when he had completed university, he would get a full time job and the woman would quit her job and get a master's degree while the man supported them both. It didn't actually work out that way of course. By the time the man graduated, the woman had been supporting them for nearly two years. It was time to start planning her return to university. That was when the man told her he could not afford to return the favour. He was working full time but he was not going to pay for her living expenses while she got another degree.

Yolanda Ballard was another case involving common law spouses. She and Harold Ballard, the owner of the Toronto Maple Leafs and Maple Leaf Gardens, began living together in about 1984. They never married but she spent most of her time with him and eventually changed her last name to Ballard.

In April, 1990 Ballard died, leaving Yolanda \$50,000 a year for the rest of her life. This she considered inadequate given the fact that she was his common-law spouse and had become accustomed to a higher standard of living than could be attained on \$50,000 a year. She applied to the court for an interim support order of \$16,050 per month. Her projected expenses included such things as \$75,000 a year for clothes, \$15,000 for pet care and \$60,000 for vacations. Two questions arose: Was she a common-law spouse? And what did that entitle her to?

On October 2, 1990, the court awarded Yolanda Ballard interim support of \$7,000 per month retroactive to April 11, 1990 to run for 6 months. She received, therefore, approximately \$91,000 in support pending the final outcome of her case. She sought, incidentally, a final order of support in the amount of \$381,000 per year – 7 times what Harold Ballard had in mind.<sup>6</sup>

In spite of all of the sad stories involving the breakup of common law relationships (including same sex couples) there is still some hope for unmarried couples. This chapter will explain the possibilities under the headings: support, property, and pensions.

## **Support**

Seven Canadian jurisdictions have defined “spouse” in such a way as to extend an entitlement to or pay support at the end of a common-law union. Alberta, Quebec, P.E.I. and the Northwest Territories do not extend support rights and obligations to common-law spouses. All other Canadian jurisdictions do in one form or another. Briefly, the variations are as follows:

### **Jurisdiction**

### **Criteria for Common-Law Spouse**

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<sup>6</sup> *Surviving Your Divorce*, by Michael Cochrane, page 138

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|-----------------------------------|--|
| Alberta, Quebec<br>P.E.I., N.W.T. | no common-law spouse entitlement to support  |
| British Columbia                  | 2 years of cohabitation  |
| Manitoba                          | 5 years of cohabitation and substantial dependence between people involved, or, 1 year of cohabitation and a child |
| New Brunswick                     | 3 years of cohabitation and substantial dependence   |
| Newfoundland                      | 1 year of cohabitation and a child   |
| Nova Scotia                       | 1 year of cohabitation   |
| Ontario                           | 3 years of cohabitation, or child and a relationship of some permanence  |
| Saskatchewan                      | 3 years of cohabitation, or child and a relationship of some permanence  |
| Yukon                             | a relationship of some permanence  |

Judges consider a set of criteria built up from cases, which have gone to court when examining a common-law relationship. The court considers the following:

- Did the partners share accommodations?
- Did one render domestic services to the other?
- Was there a sharing of household expenses? (not necessarily equal sharing)
- Was there sexual intimacy between them?
- Are they of the opposite sex?
- What was the nature of their relationship?
- Were they husband and wife for all intents and purposes?

The courts have found that where there has been a relationship of such significance that it has led to the actual dependency of one party on another or the expectation that one will support the other in the event of financial crisis, an entitlement to support arises where there is a case of need.

Assuming the individual qualifies, the amount of the support and its duration is calculated in the same way that it is calculated for legally married spouses who have separated. Aspects that can make these cases different include the length of the relationship and the court's willingness to make support orders time limited, that is, not open-ended or indefinite for common-law spouses.

It should be noted that in many jurisdictions this obligation for support of a common-law spouse might also apply with respect to an estate. That is, if a person dies leaving a common-law spouse as his or her survivor, that person may be able to obtain an order of support from the estate. This was the case with Yolanda Ballard who wanted to be considered a spouse within the meaning of Ontario's *Succession Law Reform Act*.

## **Child Support**

Common Law couples are subject to the Child Support Guidelines when they separate.

## **Property**

In Nova Scotia in 2000, a woman who was entitled to nothing after years of cohabitation challenged the court decision. She argued that denying common-law partners the property rights available to married spouses was unconstitutional. The court agreed. So now common-law spouses in Nova Scotia have the same property rights as legally married spouses. This is the first and only province where that is true.

In all of the other provinces and territories the Matrimonial Property Laws deal only with married couples. Common-law spouses have no statutory property rights. It doesn't matter how long they have lived together, if they do not marry, the only property they are entitled to when they leave is their own property. This, of course, raises a problem. The courts have developed some general guidelines over the years to help couples sort out such property division matters:

- In the absence of an intention to the contrary, each person may leave the relationship with any assets they brought in and any acquired in their name alone during the relationship.
- The court will not allow one person to be "unjustly enriched" at the other person's expense.
- Where one of the persons confers a benefit on the other person and suffers a corresponding deprivation as a result and there is no other legal reason or justification for the enrichment, the court will "correct" the situation through the use of a device called the "constructive trust". A constructive trust is simply a fancy legal way of saying to the spouse who has the property in his or her own name (called having "title") – you are actually holding that property or part of its value in trust for your partner. The court then orders the part considered to be held in trust to be paid over to the other person. This is what happened in Rosa Becker's case. Mr. Pettkus was found to be holding part of his beekeeping operation's value in trust for Rosa. The value of the part held was the amount of the judgment.

- Each case is different. The size of an interest in a piece of property will depend on the facts of the particular case.
- A contribution does not automatically entitle a person to a half interest. The court will determine what is a fair return on the actual contribution.
- The court prefers a direct connection between the contribution and the property in question. It does not necessarily have to be a contribution directly to the acquisition of the property. It could be some act that preserved the property, maintained it or improved it.
- Merely being a supportive good partner or paying some household expenses will not necessarily entitle one to a share of a property. Remember, there must be the aspect of one being unjustly enriched at the other's expense. The case law is evolving on this point.
- There have been cases that found home, childcare and housekeeping services to have been a "contribution" since in such cases the spouse who cared for the child or did the house duties freed the other spouse to earn and acquire property.
- The court will consider the intention of each person but does not insist that both have the intention. It will consider what each person reasonably expected to happen or what interest in the property they reasonably expected.
- If the property in one spouse's name is there because it was a gift from the other spouse, then the court will not "correct" the situation. One cannot be "unjustly enriched" by a gift.

## **Pensions**

All pension plans provide a death benefit payable when the member dies before retiring. Many also provide a continuing lifetime pension to the non-member spouse who survives the retired member. Whether or not a common law spouse qualifies for these death and survivor benefits is discussed more fully in another chapter.

When it comes to the Old Age Security and Canada Pension Plan, you are entitled to survivor's benefits if your common law spouse dies, just as you are if your husband or wife dies, and you may have to split your CPP pension credits if you end a common law relationship, just as you would if you divorced.

Everyone acquires Canada Pension plan benefits over their working life. The Canada Pension Act provides that persons of the opposite sex who had been living together for at least one year and who have been separated for more than a year may apply to the Minister for a division of pension credits. So where a working spouse acquires credits, the other spouse may apply to share them. An

application must be accompanied by the “necessary papers” of course! Birth certificate, Social Insurance Number, addresses (current and at cohabitation), relevant dates of cohabitation and separation and, for some reason, the reason for the separation.<sup>7</sup>

## **Summary**

From the foregoing it can be seen that the rights of common law and same sex couples are not the same as married couples when the relationship breaks down. However, there still are rights, but it would be almost impossible for you to enforce these yourself. You must use the services of a lawyer.

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<sup>7</sup> *Surviving Your Divorce*, by Michael Cochrane, page 145