

## FAMILY LAW

# COMMENTARY: Unwed partners need new property division scheme

By Kevin Hannah

Unmarried domestic partnerships (UDPs) are on the rise; marriage partnerships are on the decline. Nevertheless, the availability of a straightforward equal division of property for unmarried cohabitants, where there is no governing legislation, remains problematic.

However, despite the differences between the two relationships, a fundamental principle underlying most provincial matrimonial property regimes offers guidance — the “product” of the marriage partnership.

In *Walsh v. Bona* [2002] 4 S.C.R. 325, the court made some interesting comments on the differences between marriage and unmarried cohabitation in determining that the equality rights of Susan Walsh and Wayne Bona had not been infringed. It distinguished them primarily on the basis that a marriage is a “permanent and reciprocal life commitment” and an “economic partnership” with sharing of economic product following its breakdown.

Supreme Court decisions involving spousal support as well (e.g., *Bracklow v. Bracklow* [1999] 1 S.C.J. No. 14). While many unmarried cohabitants have a relationship characterized by convenience, the absence of any long-term commitment and any significant interdependence, many have what amounts to a marriage partnership without the license.

The connection between marriage as a social and economic partnership and the equal division of property following its breakdown is this: most marriage partnerships involve a high degree of interdependence with many pecuniary and non-pecuniary contributions from each spouse which, though different, are equally important and valuable.

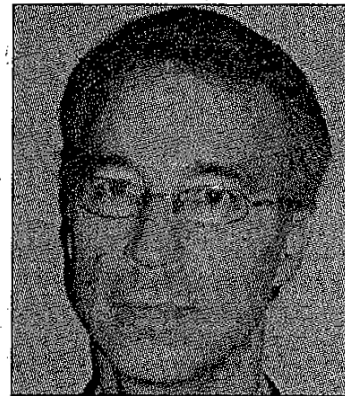
Following such a partnership it seems fair and reasonable — almost obvious — that the material product of that partnership would be shared equally. This is the justification for the presumption of equal division that is common to all provincial matrimonial property regimes. The measuring or com-

specifically rejected in most cases.

The concept of product of the marriage partnership, though itself not a phrase found in matrimonial property statutes, is so fundamental to the concept of equal sharing that it can be used to explain the exceptions or exemptions to sharing found in most of them.

For example, gifts from third parties, inheritance and property acquired before the marriage are almost uniformly treated as not shareable. What do they have in common? They are not product of the marriage partnership: they are inserted from the *outside*. The very justification for sharing in the first place is absent for assets that are not product of the marriage partnership. But can the partnership product concept be applied to unmarried partners and would it be an improvement on the traditional unjust enrichment approach?

In *Peter v. Beblow* [1993] 1 S.C.R. 980, the court addressed the division of the property of a



Kevin Hannah

common law couple following 12 years of unmarried cohabitation. The now standard three-part unjust enrichment analysis of an enrichment, a deprivation and the absence of a juristic reason was discussed at length.

Although the court established that unjust enrichment was present on this test, it also noted that there will almost always be unjust enrichment present in domestic relationships with children and a more or less traditional division of labour.

In other words, the artificiality of the exercise of applying the unjust enrichment test (created in a commercial, not a domestic context) to a relationship that is a marriage partnership without the legal

trappings was tacitly acknowledged. Not only was it acknowledged, when it came to determining the remedy for the unjust enrichment, the court preferred a “value survived” approach to the more traditional unjust enrichment remedies that focus on the value of specific contributions in relation to specific assets (constructive trust), or to quantifying the value of the service rendered (*quantum meruit*).

In the result, if not consistently in the legal analysis, Peter and Beblow’s relationship was treated as the kind of domestic partnership whose product should be shared equally, like a marriage.

The problem with applying the three-part test to UDPs is that it is unhelpful in practice. In the trenches, this test leads lawyers, judges and clients in circles, focusing on whether the claimant (usually the “wife”) has been adequately compensated for her domestic contributions, whether her contributions are sufficiently linked to a particular asset and the extent of the contribution (the interest and contribution must be proportional).

This approach, while having

see PROPERTY p. 15

# Standard unjust enrichment test doesn't work

PROPERTY

—continued from p. 11—

some potential in more temporary relationships without children and without significant interdependence, should be abandoned in relation to lasting UDPs of interdependence, for the same reason it has been almost uniformly rejected for marriage partnerships. The traditional unjust enrichment test doesn't work well and never has. It promotes an adversarial contest focused on who has contributed more, or who has benefited most.

On the other hand, the partnership product approach suggests that if an asset is product of a UDP like a marriage, the same justification exists for sharing equally as in a marriage partnership. A presumption of equal sharing would and should apply.

The first and most critical issue, therefore, would become whether a UDP crosses this threshold. Factors in the analysis would undoubtedly include duration, dependent children, the degree of interdependence, mutual support, intentions, etc. Cohabitants who do *not* cross this threshold may be most fairly treated in the more traditional unjust enrichment approach (value of contribution to specific assets or value of services).

Abandoning the traditional unjust enrichment approach in favour of a presumption of equally sharing the product of a UDP with the hallmarks of a marriage would accord more closely with the expectations of parties (recognized by the court in *Peter*) and avoid the unhelpful contribution/deprivation contest.

*Kevin Hannah has been a partner at a family law firm in Calgary. Moe Hannah McNeill, for over ten years and has practiced family law almost exclusively for 18 years.*