

More Issues for Common Law Spouses

The 2011 Supreme Court of Canada decision in *Kerr v Baranow* (Kerr) introduced significant changes with respect to the division of assets upon the separation of common law spouses. The court introduced the new concept of Joint Family Venture (JFV) and found that if that definition was met, one common law spouse could share in assets of the other common law spouse.

Although the parties in Kerr had resided as common law spouses for more than 25 years, the concepts identified by the court opened the door for lawyers to argue their use in many different situations including much shorter common law relationships.

Since the release of the Kerr decision there have been dozens of cases decided by the courts attempting to interpret Kerr and how it would apply to other situations.

As the concept of JFV is relatively new and is very flexible, many of the cases are decided based on the specific facts of each situation. However there is at least one recent decision in which a JFV was found in a common law relationship of less than three years. There are numerous other decisions finding JFV in common law relationships of 5, 6 and 7 years.

Surprisingly, one area in which there have not been many decisions is that of a relatively short period of common law relationship but the parties having had a child or children together in that relationship. I fully expect that upcoming decisions will find that the addition of children to the equation will make it much more likely that the courts will find a JFV in common law relationships of just a few years where the couple have had a child.

Once a JFV relationship is found by the court then one common law spouse has the ability to claim assets, money, pensions and other assets owned by the other common law spouse.

If a court does find a JFV then the next tricky step is to determine the value of that share of the common law spouse. The cases are all over the map however the high end seems to be up to 50% sharing of the increase in the assets during the period of the relationship.

It is interesting to note that even if a court does not find a JFV, common law spouses are still able to claim a share in the assets of the other common law spouse, although potentially not as great as they would have in the event of a JFV. The concept the courts are struggling with is how to recognize the contribution of a spouse who has worked around the home, and helped and encouraged the other spouse develop his or her career.

Therefore common-law spouses are presently in the situation where the rules are changing during the relationship. The common law spouse with the assets is now at risk of having to share those assets with his common law spouse when that was never the intention when the parties commenced cohabitation.

At present the best way to try to deal with this problem is by way of a legally enforceable written agreement between the parties identifying how assets will be divided in the event of separation.

This article is not legal advice.