2010 CarswellBC 1158

Wilson v. Fotsch

Leigh Richard Wilson (Respondent / Plaintiff) And Patricia Dale Elizabeth Fotsch (Appellant / Defendant)

British Columbia Court of Appeal

Bennett J.A., Chiasson J.A., and Huddart J.A.

Heard: November 17-18, 2009
Judgment: May 10, 2010
Docket: Vancouver CA036138

Proceedings: varying *Wilson v. Fotsch* (2008), 2008 BCSC 548, 2008 CarswellBC 962 (B.C. S.C.)

Counsel: J.G. Dubas for Appellant

R.A. Anderson for Respondent

Subject: Restitution; Family; Estates and Trusts; Civil Practice and Procedure

Restitution and unjust enrichment --- Benefits conferred in anticipation of reward — Family — **Common law spouses**

Plaintiff W and defendant F met in 1995 and began common-law relationship — F was divorced woman with three children and lived in mobile home with them and her own mother — F had janitorial company with annual income of about $10,000 and she worked as teacher's aide, making $22,000 per year, and had received $125,000 from recent divorce and property damage settlements — W had previous cocaine addiction, had lost his job for cultivating marijuana and had recent criminal charge for sexual assault — W moved in with F and F purchased her mother's interest in property, after which both parties spent many hours developing property by placing trailer home on it and building roof, porch and greenhouses — W began to work for F's company for limited salary and also did cooking, but F made all mortgage payments on property; purchased all food, liquor, household supplies and gasoline; and paid vehicle leasing costs and all other costs of home and business — F also paid W's legal fees in fighting sexual assault charge as well as amounts to bring W's mortgage on his property into good standing — In 2001 F sold original property for $129,900 and bought new property for $219,900 using some funds from equity in original property plus mortgage and loans from her family — W started own janitorial business without telling F, did some work but of poor quality on new property and started using cocaine again — Parties separated and W brought successful action claiming monetary award on basis that F had been unjustly enriched by his contributions to acquisition, improvement and maintenance of her property — F appealed — Appeal allowed and judgment varied — F was not unjustly enriched by W's receipt of reduced wages — Minim-

al contribution off-set by value of lawyers' fees loan, stolen equipment and stolen contracts which F was entitled to recover.

Cases considered by *Huddart J.A.*:

Angeletakis v. Thymaras (1989), 65 Alta. L.R. (2d) 345, 19 R.F.L. (3d) 296, 32 E.T.R. 300, 95 A.R. 81, 1989 CarswellAlta 38 (Alta. Q.B.) — referred to

Beard v. Beard (1980), 41 N.R. 106, 35 A.R. 448, 1980 CarswellAlta 459 (Alta. C.A.) — referred to

Beard v. Beard (1982), [1982] 1 S.C.R. 282, 1982 CarswellAlta 216, 23 Alta. L.R. (2d) 97, 41 N.R. 105, 35 A.R. 447, 1982 CarswellAlta 548 (S.C.C.) — referred to

Becker v. Pettkus (1980), 1980 CarswellOnt 299, 1980 CarswellOnt 644, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165 (S.C.C.) — followed

Bell v. Bailey (2001), 2001 CarswellOnt 2914, 148 O.A.C. 333, 203 D.L.R. (4th) 589, 20 R.F.L. (5th) 272 (Ont. C.A.) — referred to

Boucher v. Koch (1988), 87 A.R. 78, 14 R.F.L. (3d) 443, 1988 CarswellAlta 333 (Alta. C.A.) — referred to

Bruyninckx v. Bruyninckx (1995), 1995 CarswellBC 194, 4 B.C.L.R. (3d) 341, [1995] 5 W.W.R. 683, 13 R.F.L. (4th) 199, 7 E.T.R. (2d) 1, 57 B.C.A.C. 1, 94 W.A.C. 1 (B.C. C.A.) — referred to

Cam-Net Communications v. Vancouver Telephone Co. (1999), 1999 BCCA 751, 1999 CarswellBC 2808, 17 C.B.R. (4th) 26, 182 D.L.R. (4th) 436, 71 B.C.L.R. (3d) 226, 132 B.C.A.C. 52, 215 W.A.C. 52, 2 B.L.R. (3d) 118 (B.C. C.A.) — considered

Clarkson v. McCrossen Estate (1995), 3 B.C.L.R. (3d) 80, 1995 CarswellBC 39, [1995] 6 W.W.R. 28, 122 D.L.R. (4th) 239, 57 B.C.A.C. 101, 94 W.A.C. 101, 13 R.F.L. (4th) 237, 7 E.T.R. (2d) 125 (B.C. C.A.) — referred to

Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd. (1985), 36 R.P.R. 259, 20 D.L.R. (4th) 689, 65 B.C.L.R. 31, [1985] 6 W.W.R. 14, 1985 CarswellBC 214 (B.C. C.A.) — followed

Crick v. Ludwig (1994), 95 B.C.L.R. (2d) 72, [1994] 9 W.W.R. 754, 4 E.T.R. (2d) 213, 117 D.L.R. (4th) 228, 9 R.F.L. (4th) 114, 49 B.C.A.C. 209, 80 W.A.C. 209, 1994 CarswellBC 357 (B.C. C.A.) — considered

Crick v. Ludwig (1995), 1 B.C.L.R. (3d) xxxvi, 10 R.F.L. (4th) 192n, 63 B.C.A.C. 159 (note), 104 W.A.C. 159 (note), 6 E.T.R. (2d) 159 (note) (S.C.C.) — referred to

Ford v. Werden (1996), 78 B.C.A.C. 126, 128 W.A.C. 126, 27 B.C.L.R. (3d) 169, [1997] 2 W.W.R. 245, 25 R.F.L. (4th) 372, 1996 CarswellBC 1550 (B.C. C.A.) — considered

Garland v. Consumers' Gas Co. (2001), 2001 CarswellOnt 4244, 19 B.L.R. (3d) 10, 152 O.A.C. 244, 57 O.R. (3d) 127, 208 D.L.R. (4th) 494 (Ont. C.A.) — considered

Garland v. Consumers' Gas Co. (2004), 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 72 O.R. (3d) 80 (note), 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 42 Alta. L.

Rev. 399, 186 O.A.C. 128, [2004] 1 S.C.R. 629 (S.C.C.) — followed

Harrison v. Kalinocha (1994), 1994 CarswellBC 177, 1 R.F.L. (4th) 313, 112 D.L.R. (4th) 43, 90 B.C.L.R. (2d) 273 (B.C. C.A.) — considered

Hartshorne v. Hartshorne (2004), 236 D.L.R. (4th) 193, 47 R.F.L. (5th) 5, 25 B.C.L.R. (4th) 1, 318 N.R. 1, 2004 SCC 22, 2004 CarswellBC 603, 2004 CarswellBC 604, [2004] 6 W.W.R. 1, 194 B.C.A.C. 161, 317 W.A.C. 161, [2004] 1 S.C.R. 550 (S.C.C.) — referred to

Herman v. Smith (1984), 1984 CarswellAlta 142, 18 E.T.R. 169, 56 A.R. 74, 34 Alta. L.R. (2d) 90, 42 R.F.L. (2d) 154 (Alta. Q.B.) — considered

Hubar v. Jobling (2000), 146 B.C.A.C. 64, 239 W.A.C. 64, 2000 BCCA 661, 82 B.C.L.R. (3d) 341, 2000 CarswellBC 2510, 10 R.F.L. (5th) 295, 195 D.L.R. (4th) 123 (B.C. C.A.) — referred to

International Corona Resources Ltd. v. LAC Minerals Ltd. (1989), 44 B.L.R. 1, 35 E.T.R. 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 69 O.R. (2d) 287, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.)* 26 C.P.R. (3d) 97, 1989 CarswellOnt 126, 1989 CarswellOnt 965 (S.C.C.) — considered

Irving Oil Ltd. v. Blanchard (2002), 217 Nfld. & P.E.I.R. 74, 651 A.P.R. 74, 2002 PESCTD 52, 2002 CarswellPEI 66 (P.E.I. T.D.) — considered

Jamieson v. Loureiro (2010), 1 B.C.L.R. (5th) 312, 2010 BCCA 52, 2010 CarswellBC 229 (B.C. C.A.) — considered

Kerr v. Baranow (2009), 2009 CarswellBC 642, 2009 BCCA 111, 266 B.C.A.C. 298, 449 W.A.C. 298, [2009] 9 W.W.R. 285, 93 B.C.L.R. (4th) 201, 66 R.F.L. (6th) 1 (B.C. C.A.) — considered

Lawrence v. Lindsey (1982), 28 R.F.L. (2d) 356, 21 Alta. L.R. (2d) 141, 38 A.R. 462, 14 E.T.R. 194, 1982 CarswellAlta 137 (Alta. Q.B.) — referred to

MacFarlane v. Smith (2003), 49 E.T.R. (2d) 52, 2003 NBCA 6, 2003 CarswellNB 31, 2003 CarswellNB 32, 224 D.L.R. (4th) 127, 35 R.F.L. (5th) 112, 256 N.B.R. (2d) 108, 670 A.P.R. 108 (N.B. C.A.) — considered

Nasser v. Mayer-Nasser (2000), 32 E.T.R. (2d) 230, 2000 CarswellOnt 530, 5 R.F.L. (5th) 100, 130 O.A.C. 52 (Ont. C.A.) — considered

Nasser v. Mayer-Nasser (2000), 260 N.R. 395 (note), 2000 CarswellOnt 2985, 2000 CarswellOnt 2986, 141 O.A.C. 200 (note) (S.C.C.) — referred to

Panara v. Di Ascenzo (2005), 2005 CarswellAlta 135, 2005 ABCA 47, 42 Alta. L.R. (4th) 1, 361 A.R. 382, 339 W.A.C. 382, 16 R.F.L. (6th) 177, 13 E.T.R. (3d) 159, 250 D.L.R. (4th) 620, [2005] 9 W.W.R. 282 (Alta. C.A.) — referred to

Peel (Regional Municipality) v. Canada (1992), (sub nom. *Peel (Regional Municipality) v. Ontario)* 144

N.R. 1, 1992 CarswellNat 15, 55 F.T.R. 277 (note), 12 M.P.L.R. (2d) 229, 98 D.L.R. (4th) 140, [1992] 3 S.C.R. 762, 59 O.A.C. 81, 1992 CarswellNat 659 (S.C.C.) — considered

Pegler v. Avio (2008), 2008 CarswellBC 169, 2008 BCSC 128, 49 R.F.L. (6th) 145 (B.C. S.C.) — con- sidered

Peter v. Beblow (1990), 50 B.C.L.R. (2d) 266, 29 R.F.L. (3d) 268, 39 E.T.R. 113, [1991] 1 W.W.R. 419, 1990 CarswellBC 237 (B.C. C.A.) — considered

Peter v. Beblow (1993), [1993] 3 W.W.R. 337, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, 150 N.R. 1, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, [1993] R.D.F. 369, 1993 CarswellBC 44, 1993 CarswellBC 1258 (S.C.C.) — followed

Pickelein v. Gillmore (1997), 87 B.C.A.C. 193, 143 W.A.C. 193, 30 B.C.L.R. (3d) 44, 16 E.T.R. (2d) 1, [1997] 5 W.W.R. 595, 1997 CarswellBC 307, 27 R.F.L. (4th) 51 (B.C. C.A.) — considered

Rathwell v. Rathwell (1978), 1978 CarswellSask 36, 1978 CarswellSask 129, [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 83 D.L.R. (3d) 289, 19 N.R. 91, 1 E.T.R. 307, 1 R.F.L. (2d) 1 (S.C.C.) — considered

Rawluk v. Rawluk (1990), 1990 CarswellOnt 217, 1990 CarswellOnt 987, 23 R.F.L. (3d) 337, [1990] 1 S.C.R. 70, 65 D.L.R. (4th) 161, 36 E.T.R. 1, 103 N.R. 321, 71 O.R. (2d) 480, 38 O.A.C. 81 (S.C.C.) — referred to

Roseneck v. Gowling (2002), 62 O.R. (3d) 789, 167 O.A.C. 203, 2002 CarswellOnt 4396, 223 D.L.R. (4th) 210, 35 R.F.L. (5th) 177 (Ont. C.A.) — referred to

Royal Trust v. Holden (1915), 22 D.L.R. 660, 21 B.C.R. 185, 8 W.W.R. 500, 1915 CarswellBC 122 (B.C. C.A.) — considered

Semelhago v. Paramadevan (1996), 1996 CarswellOnt 2737, 1996 CarswellOnt 2738, 197 N.R. 379, 3 R.P.R. (3d) 1, 28 O.R. (3d) 639 (note), 136 D.L.R. (4th) 1, 91 O.A.C. 379, [1996] 2 S.C.R. 415 (S.C.C.) — considered

Shannon v. Gidden (1999), 178 D.L.R. (4th) 395, 1 R.F.L. (5th) 105, 71 B.C.L.R. (3d) 40, 129 B.C.A.C. 257, 210 W.A.C. 257, 1999 CarswellBC 2049, 1999 BCCA 539 (B.C. C.A.) — referred to

Sorochan v. Sorochan (1986), 1986 CarswellAlta 714, [1986] 2 S.C.R. 38, [1986] 5 W.W.R. 289, 29 D.L.R. (4th) 1, 69 N.R. 81, 46 Alta. L.R. (2d) 97, 74 A.R. 67, 23 E.T.R. 143, 2 R.F.L. (3d) 225, [1986] R.D.I. 448, [1986] R.D.F. 501, 1986 CarswellAlta 143 (S.C.C.) — referred to

Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd. (1975), 1975 CarswellSask 56, [1975] 4 W.W.R. 591, 5 N.R. 23, 55 D.L.R. (3d) 1, [1976] 2 S.C.R. 147, 1975 CarswellSask 97 (S.C.C.) — considered

Telford v. Holt (1987), 1987 CarswellAlta 188, 1987 CarswellAlta 583, 21 C.P.C. (2d) 1, [1987] 2 S.C.R. 193, 41 D.L.R. (4th) 385, 78 N.R. 321, (sub nom. *Holt v. Telford)* [1987] 6 W.W.R. 385, 54 Alta. L.R. (2d) 193, 81 A.R. 385, 37 B.L.R. 241, 46 R.P.R. 234 (S.C.C.) — considered

Thomas v. Fenton (2006), 2006 BCCA 299, 2006 CarswellBC 1465, 228 B.C.A.C. 82, 376 W.A.C. 82, 269

D.L.R. (4th) 376, 29 R.F.L. (6th) 229, 27 E.T.R. (3d) 7, 57 B.C.L.R. (4th) 204 (B.C. C.A.) — considered

Toth v. de Frias (1996), 13 E.T.R. (2d) 121, 78 B.C.A.C. 34, 128 W.A.C. 34, 1996 CarswellBC 1565 (B.C. C.A.) — considered

Treanor v. Smith (1992), 44 R.F.L. (3d) 165, 1992 CarswellOnt 316 (Ont. Gen. Div.) — referred to

Vanasse v. Seguin (2009), 2009 ONCA 595, 2009 CarswellOnt 4407, 96 O.R. (3d) 321, 252 O.A.C. 218 (Ont. C.A.) — considered

Walsh v. Bona (2002), 211 N.S.R. (2d) 273, 659 A.P.R. 273, 2002 SCC 83, 2002 CarswellNS 511, 2002 CarswellNS 512, 102 C.R.R. (2d) 1, 32 R.F.L. (5th) 81, (sub nom. *Nova Scotia (Attorney General) v. Walsh)* 221 D.L.R. (4th) 1, 297 N.R. 203, (sub nom. *Nova Scotia (Attorney General) v. Walsh)* [2002] 4 S.C.R. 325 (S.C.C.) — followed

Waters v. Conrod (2007), 398 W.A.C. 208, 240 B.C.A.C. 208, 2007 CarswellBC 832, 2007 BCCA 230, 66 B.C.L.R. (4th) 181, 37 R.F.L. (6th) 315, 282 D.L.R. (4th) 525 (B.C. C.A.) — referred to

Cases considered by *Chiasson J.A.*:

Blake v. Wells Estate (2007), 75 B.C.L.R. (4th) 45, 414 W.A.C. 177, 249 B.C.A.C. 177, [2008] 3 W.W.R. 454, 2007 BCCA 617, 2007 CarswellBC 2983, (sub nom. *Blake v. Ross)* 36 E.T.R. (3d) 191, 288 D.L.R. (4th) 712 (B.C. C.A.) — referred to

Peter v. Beblow (1993), [1993] 3 W.W.R. 337, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, 150 N.R. 1, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, [1993] R.D.F. 369, 1993 CarswellBC 44, 1993 CarswellBC 1258 (S.C.C.) — considered

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Generally — referred to

Family Relations Act, R.S.B.C. 1996, c. 128

Generally — referred to

Pt. 5 — referred to

s. 65 — referred to

s. 69(2) — referred to

APPEAL by common-law spouse from judgment reported at *Wilson v. Fotsch* (2008), 2008 BCSC 548, 2008 CarswellBC 962 (B.C. S.C.).

Huddart J.A.:

1 This appeal from an order to pay damages for unjust enrichment requires this Court to address a fundamental issue about the application of that doctrine to a common law relationship - how account is to be taken of benefits received by the claimant. The appellant alleges error in the trial judge's finding that she had been unjustly enriched by the respondent and in the assessment of damages for that enrichment: 2008 BCSC 548 (B.C. S.C.) . The underlying issue derives from the mutuality implicit in a marriage-like relationship.

2 This feature of mutuality suggests reciprocal claims for unjust enrichment will commonly follow the termination of a marriage-like relationship as they do the end of a marital relationship. Where such a claim is pleaded expressly, either as a cross-claim or by way of set-off, account will be taken of mutual enrichments. See, for example, *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (B.C. C.A.) at paras. 2, 6-7, 10-12; *Nasser v. Mayer-Nasser* (2000), 5 R.F.L. (5th) 100 (Ont. C.A.), leave to appeal ref'd, (S.C.C.); and *Kerr v. Baranow*, 2009 BCCA 111 (B.C. C.A.) at paras. 64-79.

3 Such pleading, however, is the exception rather than the rule. Where a cross-claim for unjust enrichment is not specifically pleaded, such a claim may be implicit, as this Court recognized in *Ford v. Werden* (1996), 27 B.C.L.R. (3d) 169 (B.C. C.A.) at para. 13:

> [13] It is not clear to me whether the majority of the Court intended to endorse this approach and to lay down as a rule that spousal services must generally be *assumed* to have benefitted one party to the deprivation of the other. Taken to its logical conclusion, this would mean that in a relationship between two adults each of whom has provided spousal services to the other, each must be assumed to have benefitted and to have suffered a deprivation at the same time. The first to sue will have an obvious advantage in that he or she will be assumed to have suffered a deprivation, and the defendant will be compelled to make a counterclaim on exactly the same basis. (This in fact is what one commentator assumes was intended: see K. Farquhar, "Unjust Enrichment - Special Relationship - Domestic Services - Remedial Constructive Trusts: *Peter v. Beblow*" (1993) 72 Can. Bar. Rev. 538 at 541.)
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> [Italic emphasis in original; underline emphasis added.]

Although this Court identified the potential importance of implicit reciprocal claims in marriage-like relationships in *Ford*, it did not discuss how they might or should be considered.

4 These claims derive from characteristics common to family relationships identified in the authorities in various terms, all reflective of an on-going partnership in which each partner benefits the other: sharing of love and mutual trust, sharing of expenses, reasonable expectation of sharing in the economic fruits of a union (*Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at 1013-16, 1018 (Cory J.)), and looking towards the long term (*Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.)). Although the specifics will vary from relationship to relationship and from individual to individual, a marriage-like relationship is infused with mutuality.

5 This quality inherent in marriage-like relationships must inform the application of the unjust enrichment analysis. Nevertheless, "the basic principles governing the rights and remedies for unjust enrichment remain the same" in commercial and family cases, as "the concern for clarity and doctrinal integrity" requires: *Peter* at 996-97.

6 In a commercial case, unjust enrichment is usually the result of a one-way transfer of wealth from plaintiff to defendant. Their larger relationship will be bounded by contract and purely commercial considerations. While parties enter into a relationship from which both anticipate profit, they do so without any underlying expectation that the profits each creates in the conduct of their own affairs will be for the benefit of both. The limits of their relationship are tightly drawn. The qualities of love, sharing, and selfless reciprocity fall outside the defined scope of the relationship. The focus of the inquiry is on whether the defendant has been enriched at the expense of the plaintiff.

7 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 inquiry 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.

8 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 (S.C.C.)) and so must be the decision to remain unmarried, by the courts as by the parties (*Walsh v. Bona*, 2002 SCC 83, [2002] 4 S.C.R. 325 (S.C.C.)). A marriage-like arrangement is not tantamount to marriage, particularly where the parties have deliberately imposed limits on their respective contributions to the relationship.

9 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 (S.C.C.), 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 (B.C. C.A.), must be approached cautiously in view of its conclusions.

10 Since *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), 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 (B.C. 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. Maddaugh & 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 (Ont. C.A.) at para. 29.

11 The basic outline for that analysis can be summarized this way:

1. Benefit/Enrichment

2. Detriment

3. Absence of a juristic reason for the enrichment

a. Established categories

i. Contract

ii. Disposition of law

iii. Donative intent

iv. Other valid common law, equitable, or statutory obligations

b. Reason to deny recovery

i. Public policy considerations

ii. Legitimate expectations

iii. Potential new category

Defences

Change of position; estoppel; statutory defences; laches and acquiescence; limitation periods; counter-restitution not possible

Choice of Remedy

a. Is a monetary remedy sufficient?

b. Is a constructive trust required (or equitable damages for the value of the trust interest)?

Quantification of the Remedy

a. Value received (*quantum meruit* basis)

b. Value survived (proportionate share basis) Set-Off (equitable and legal) Pre-judgment interest

I. Benefit/Enrichment

12 A court must define the benefit at the outset because the definition informs each stage of the unjust enrichment analysis and is particularly relevant to the determination of the appropriate remedy. A benefit may be positive (the payment of money or delivery of services to or for the benefit of the defendant) or negative (like the saving of an inevitable expense by the defendant): *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.), at 44-45; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at 790; *Garland* at para. 31. To both, a court should take a "straightforward economic approach." Non-economic considerations belong at the juristic reason stage: *Peter* at 990; *Garland* at para. 31. An incidental collateral benefit will not support an unjust enrichment claim - the benefit must be "conferred directly and specifically on the defendant": *Peel* at 797.

13 It will be unusual for a court to find that a defendant has not received some benefit in a marriage-like relationship. Given the breadth of the definition of "benefit" and the sharing inherent in such a relationship, even one where the parties have carefully limited their contribution to joint expenses, something of value will usually

have been received and retained not only by the defendant, but also by the plaintiff. This being so, courts must resist the urge to examine the flow of reciprocal benefits between the plaintiff and the defendant at this stage. The collapse of the three stages of analysis into one may result in an erroneous conclusion there has been no enrichment, as McLachlin J. suggested when she wrote in *Peter* at 988:

> ... There is a tendency on the part of some to view the action for unjust enrichment as a device for doing whatever may seem fair between the parties. In the rush to substantive justice, the principles are sometimes forgotten. Policy issues often assume a large role, infusing such straightforward discussions as whether there was a 'benefit' to the defendant or a 'detriment' to the plaintiff.

14 Courts should not focus on the fact that, while the defendant may have received *some* benefit from the plaintiff, the defendant suffered a net loss because he or she provided the plaintiff with *more* benefits in return. This kind of set-off or balancing of mutual enrichments is not appropriate at this stage. That is the error the Supreme Court identified in *Garland v. Consumers' Gas Co.*, at paras. 33-36, as having been made by the majority of the Ontario Court of Appeal in their reasons for judgment: (2001), 57 O.R. (3d) 127 (Ont. C.A.) at paras. 62-66. *Garland* was a commercial class action in which the plaintiff class alleged that certain late payment penalties collected by the defendant utility were the result of unjust enrichment. The defendant argued that the fees were passed back to consumers in the form of lower rates overall, and not collected to profit the utility. The Supreme Court found that attempting to "set-off" or balance reciprocal or mutual contributions between plaintiff and defendant so as to wipe out any net benefit to the plaintiff is not appropriate at the benefit inquiry. So did the court in *Panara v. Di Ascenzo*, 2005 ABCA 47 (Alta. C.A.) at para. 28.

15 In *Garland*, at para. 37, the Supreme Court also rejected an argument that funds received but not retained permanently do not constitute a "benefit". In the Supreme Court's view, such an argument ought to be considered under a change of position defence.

16 If a benefit is found, then it is appropriate to proceed to the second stage of the unjust enrichment analys- is.

II. Detriment

17 It will be unusual to find a plaintiff has not suffered a deprivation if the defendant has received a benefit, so long as the plaintiff can establish a causal link between the contribution and the enrichment: *Pettkus* at 852; *Peter* at 1012-13 (Cory J.). Deprivation may derive from a transfer of wealth by the plaintiff to the defendant or from an infringement of an interest of the plaintiff.

18 In a marriage-like relationship, the full-time devotion of one's labour and earnings without compensation or with less than complete remuneration can be viewed as a deprivation: *Sorochan* at 45-46, 50; *Panara* at para. 34. Where the benefits received by the defendant are unpaid household or domestic services, the deprivation is the fact that those services were uncompensated. Where the benefits received by the defendant are money or its equivalent, the deprivation is the transfer of that value from the plaintiff to the defendant. The precise *quantum* of the deprivation is not the focus; that is left for the assessment phase. But the identification and definition of the detriment corresponding to the enrichment is essential to this stage.

19 As during the benefit analysis, courts must resist the temptation to evaluate the reciprocal exchange of benefits. Attempting to set-off or account for reciprocal benefits to show that the plaintiff has not suffered any detriment and is, in fact, better off than before, is not appropriate. That is the error this Court made in *Peter v.*

Beblow (1990), 50 B.C.L.R. (2d) 266 (B.C. C.A.), at 270-72 when the majority accepted the argument that the plaintiff had lived rent-free and at the defendant's expense over the course of their relationship, despite the fact that she also provided uncompensated domestic services. Such arguments belong at the third stage of the unjust enrichment analysis: *Peter* at 990 (McLachlin J., as she was then) and 1009 (Cory J.); or at the remedy stage: *Hubar v. Jobling*, 2000 BCCA 661 (B.C. C.A.)at para. 22. In *Peter*, at 1012-13, Justice Cory went so far as to say that a finding of deprivation is "virtually automatic" if there is enrichment in a matrimonial or long-term common law relationship.

20 If a detriment is found at the second stage, the analysis will move to the question of juristic reason.

III. Absence of Juristic Reason

21 In *Garland*, the Supreme Court reformulated the approach to be taken to this requirement for unjust enrichment by setting down a two-step categorical approach. At the first step, the plaintiff must show that no juristic reason from an established category exists to deny recovery. If the plaintiff establishes the absence of a juristic reason from the established categories, a *prima facie* case under this component is made out: *Garland* at para. 44. The established categories include a contract (*Pettkus*), a disposition of law (*Pettkus*), a donative intent (*Peter*), and other valid common law, equitable or statutory obligations (*Peter*).

22 At the second step of the juristic reason analysis, the defendant may rebut this *prima facie* case by establishing "another reason to deny recovery": *Garland* at para. 45. Under this "category of residual defence," the defendant has the *de facto* burden of showing why the enrichment should be retained: *Garland* at para. 45. Two factors should be considered: the "reasonable" (*Garland* ; *Sorochan*) or "legitimate" (*Pettkus* ; *Peter*) expectations of the parties, and "public policy considerations".

23 I note that *Garland* does not appear to have been put before the trial judge; she made no reference to it. It was not included in the authorities provided to this Court. Nevertheless, all the authorities preceding *Garland* must be read in the context of the approach it prescribes. *Garland* is clear that the only onus on the plaintiff at the juristic reason stage of the analysis is to show the absence of juristic reason within the established categories. It is for the defendant to rebut the presumption of an unjust enrichment by reference to public policy or legitimate expectations. To the extent a court has placed an onus on the plaintiff to show that enrichment was unjust without reference to the test in *Garland*, its analysis must be read with caution.

24 In view of this analysis, caution must also be used when considering a line of cases of this Court including *Ford*, *Thomas v. Fenton*, 2006 BCCA 299 (B.C. C.A.), and, most recently, *Kerr* (currently on reserve at the Supreme Court of Canada with the appeal from *Vanasse v. Seguin* (2009), 96 O.R. (3d) 321 (Ont. C.A.)). These cases have suggested that, in relationships where there are reciprocal contributions, benefits received by the plaintiff from the defendant can constitute a juristic reason for the defendant to retain his or her enrichment.

25 Reciprocal benefits do not fit easily within any of the established categories enumerated in *Garland*.

26 In *Peter* at 991-95, McLachlin J., as she was then, explained why natural love and affection do not provide a juristic reason for enrichment flowing from domestic services. In *Garland* terms, love and affection do not ground a "donative intent". Nor, I am persuaded, do casual family arrangements between spouses or extended family members provide a contractual reason to retain an enrichment: *Bruyninckx v. Bruyninckx* (1995), 4 B.C.L.R. (3d) 341 (B.C. C.A.)(Lambert J.A.) at paras. 87-89, 92. On the other hand, a written contract may: *Rathwell*; *Hartshorne*; *Waters v. Conrod*, 2007 BCCA 230 (B.C. C.A.).

27 It may be that the statutory obligation of parents to support their children under the *Divorce Act*, R.S.C.1985, c. 3 (2nd supp.), the *Family Relations Act*, R.S.B.C.1996, c. 128, and the *Criminal Code* could provide a juristic reason, if the transfer of wealth from plaintiff to defendant is determined to be entirely or partly to provide for a child of their relationship, but that issue has not been considered in any authority of which I am aware and has not been suggested as applicable in this case.

28 In this case, the suggestion is made that reciprocal benefits received by the plaintiff come within the fourth established category (other valid obligations). This comes to a submission that "equitable set-off" is a juristic reason for a defendant to retain enrichment. Because the necessity to off-set reciprocal benefits arises out of the inherent nature of a marriage-like relationship, receipt of those benefits is not suited to constitute a juristic reason for enrichment. The receipt of reciprocal benefits does not have the same juridical force as a contract, a disposition of law or a donative intent. In most family cases reciprocal benefits will not be specifically pleaded, either by way of a counterclaim or as a defence (they were not in this case). Technically, equitable set-off (when not pleaded as a counterclaim) is a defence. Any reciprocal benefit qualifying for the application of equitable set-off should be treated as such in an unjust enrichment analysis and brought into account after the enrichment has been valued.

29 Nor do attempts to balance benefits passing between the parties fit easily into the second step of the juristic reason analysis where the relevant factors are the parties' expectations and public policy considerations. In *Garland*, Iacobucci J. commented about this residual category at para. 46:

> [46] ... It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

30 Whether seen as a proposed new category of juristic reason or as flowing from legitimate expectations of the parties, too narrow a focus on reciprocal benefits in the juristic reason analysis has the potential to blend the existence of enrichment with the question of its extent. While a court should be justifiably concerned with protecting a defendant from an excessive award where he or she has provided the plaintiff with benefits over the course of the relationship, that is not the question being asked at the juristic reason stage. The juristic reason analysis is intended to establish whether there is a reason for the defendant to *retain* a proven enrichment, not to determine its value or off-set reciprocal enrichment by the plaintiff. The issues of *quantum* and set-off are for the quantification of the award following a finding of unjust enrichment. By interposing the issue of extent into the juristic reason stage, the full unjust enrichment analysis is short-circuited.

31 The result of finding that the defendant had a juristic reason for the enrichment is a declaration that any enrichment was not unjust. To permit such a result at the second step of the juristic reason analysis where the other preconditions are present is to deny the existence of an unjust transfer of wealth which, from the perspective of the plaintiff, is patently unfair because it does not recognize his or her contributions. The receipt of benefits by a plaintiff from a defendant does not mean *ipso facto* that the defendant has not been unjustly enriched. That is the point the Supreme Court made in *Peter* .

32 A defendant can be preserved from any unfair effect of an unjust enrichment award by careful consideration of the value of the enrichment at the assessment phase, with appropriate deductions made for the benefits the defendant provided to the plaintiff. The finding of unjust enrichment itself does not need to be disturbed.

33 This reasoning also applies to the consideration of reciprocal benefits within the inquiry into the parties' "reasonable" or "legitimate" expectations. This inquiry is noted in *Sorochan* (at 46, 52-53), *Pettkus* (at 848-49), *Peter* (at 990-91), and *Garland* (at paras. 55-56). It is not to be confused with the search for "phantom intent" necessary for a resulting trust that Dickson J. decried in *Rathwell* (at 442-44). This inquiry at the second step of the juristic reason analysis risks a focus on the defendant's expectations which all too easily may avoid the Supreme Court's instruction in *Garland* to look at the legitimate expectations of *both* parties. If the value of reciprocal benefits is considered in that inquiry, that risk is amplified.

34 It is at this point of the unjust enrichment analysis that the Supreme Court of Canada's decision in *Walsh*, and this Court's decision in *Crick v. Ludwig* (1994), 117 D.L.R. (4th) 228 (B.C. C.A.), leave to appeal to S.C.C. ref'd, (S.C.C.), matter. In *Walsh*, the Supreme Court concluded that the decision to marry or not to marry is a choice deserving of respect. Each choice carries with it consequences. If the decision to remain unmarried is to be respected, courts should be mindful of the limits parties place on their relationship when looking at whether their expectations provide a residual reason for a defendant to retain an enrichment. This point was made in *Kerr* (at para. 50):

> [50] The distinction between claims arising from the breakdown of a marriage and claims arising from the breakdown of a marriage-like or common law relationship is essential. Its importance was reiterated in *Walsh v. Bona*, 2002 SCC 83, [2002] 4 S.C.R. 325, where the Court noted that unmarried partners may choose to cohabit outside of a community of property regime and courts should not infer an intention to share in one another's assets simply by reason of their cohabitation.

35 On an inquiry into the reasonable or legitimate expectations of parties in a marriage-like relationship, there are neither presumptions nor a default position. Although it is unlikely the absence of a legitimate expectation of a share in the value created during a relationship would be sufficient reason to deny recovery, regard must be had to the evidence of the nature of the particular relationship. The proper approach is to find the parties' expectations from the evidence of their particular relationship and evaluate this aspect of the juristic reason analysis in light of those findings. Reciprocal benefits may be relevant to that analysis, but they cannot be decisive. The questions at this step are those set down by Dickson J. (as he was then) in *Pettkus* at 848-49 and discussed in *Bruyninckx* at para. 86: Did the plaintiff suffer prejudice in the expectation of an interest in property or a monetary reward? Did the defendant accept the benefit in circumstances where its retention would be unfair given his or her knowledge of that expectation?

36 Little has been said in the authorities about public policy considerations. They will, however, include not allowing a wrongdoer to profit from their wrongdoing: *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), at 631-32; *Garland* at para. 57.

37 For these reasons, the question of whether set-off (either legal or equitable) of mutual debts and mutual benefits is appropriate is better left for either the defence stage or the remedy stage. It makes the most sense to account for benefits received by the party claiming unjust enrichment only after an unjust enrichment has been established and that enrichment valued.

Conclusions on Juristic Reason Analysis

38 If the defendant shows a juristic reason for the enrichment at this second step of the analysis, there is no unjust enrichment. This is not the same as a finding of unjust enrichment for which the defendant has a defence. If the defendant fails to rebut a *prima facie* finding of unjust enrichment established at the first step, the enrichment can be said to be unjust. The question of whether any defence may defeat in whole or in part the finding of unjust enrichment is the next stage in the required analysis: *Garland* at para. 62.

Defences

39 None of the potential defences to an unjust enrichment claim have been put forward in his case. I mention them only to complete the analysis and explain why I have concluded reciprocal benefits should be considered at the remedy stage, even where, arguably, some might come within a defence.

Change of Position

40 While a change of position is a defence to claims of unjust enrichment generally, it is difficult to conceive of a situation where it could apply in a family action. To successfully make out this defence, a defendant must establish it had "materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned" (*Garland* at para. 63). In *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975), [1976] 2 S.C.R. 147 (S.C.C.), at 164, the Court suggested this can be established by "evidence of any special projects being undertaken or special financial commitments made because of the receipt" of the enrichment. However, "[t]he mere fact that the moneys were spent does not, by itself, furnish an answer to the claim for repayment" (*Storthoaks* at 164). The increased spending must be directly attributable to the receipt of the enrichment. The mutuality of enrichment and deprivation in the family context will preclude that proof in practice.

Estoppel

41 Estoppel is a defence to unjust enrichment generally: *Storthoaks* at 166-67, which may apply in family situations of unjust enrichment: *Pettkus* at 851-52.

Laches & Acquiescence

42 Laches and acquiescence are defences to unjust enrichment: George B. Klippert, *Unjust Enrichment* (Toronto: Butterworths, 1983) at 242-44; and G.H.L. Fridman, *Restitution*, 2d ed. (Toronto: Carswell, 1992) at 469. Trial courts have found extraordinary delay and applied it to claims for unjust enrichment in family cases: *Lawrence v. Lindsey* (1982), 28 R.F.L. (2d) 356 (Alta. Q.B.); *Angeletakis v. Thymaras* (1989), 95 A.R. 81 (Alta. Q.B.).

Statutory Defences

43 Statutory defences may relieve a defendant of the consequences of a finding of unjust enrichment: *Garland* at paras. 67-69. However, it is not clear what statutory defences, if any, might be available in the family context. Trust claims are preserved under Part 5 of the *Family Relations Act*, s. 69(2). However, in most circumstances, the provisions of that Part will pre-empt an unjust enrichment claim unless the claim is for unjust enrichment prior to the s. 65 triggering event not adequately recognized by the statutory division.

Equitable Considerations

44 Peter Birks in *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989) discusses (at 415) one further equitable defence: counter-restitution not possible. This term refers to the giving up which a plaintiff must do in order to qualify for restitution from the defendant. It is clear that in normal circumstances a plaintiff cannot expect both to get back something given to the defendant and at the same time retain something received from him: if there is to be a taking back there must also be a giving back. Hence, the impossibility of counter-restitution is a defence to restitution.

45 Courts appear to have glossed over this defence in family proceedings. Whether they have done so for want of pleading, on the assumption many benefits are not capable of restitution, either in specie or monetarily, or because services and intangibles, while compensable, should not bar recovery, the result seems sensible. The mutuality inherent in a family relationship puts beyond the scope of an unjust enrichment analysis that which has no retained value to be "given up".

Choice of Remedy

46 After unjust enrichment has been established and any defences have been addressed, a court's next task is to determine whether a monetary award is adequate or whether a proprietary interest is merited. Only if a monetary award is inadequate and there is a "sufficiently substantial and direct" contribution to the acquisition, preservation, maintenance or improvement of the property in which the trust is claimed, may a proprietary interest be considered: *Pettkus* at 852. A minor or indirect contribution is insufficient: *Peter* at 997.

47 In considering whether a monetary award is adequate, the question of whether a monetary award will be paid is relevant: *Peter* at 999-1000; and *Pickelein* at para. 27. The court may also take into account any special interest in the property acquired as a result of the plaintiff's contributions: *Peter* at 999-1000. The minority reasons in *Peter* suggest some situations in which a monetary award may be the most appropriate remedy (at 1023-24):

> a) is the "plaintiff's entitlement ... relatively small compared to the value of the whole property in question";
>
> 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"?

48 "[A] constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right to property": *Lac Minerals* (La Forest J.) at 678. A constructive trust requires "a link between the contribution that founds the action and the property in which the constructive trust is claimed": *Peter* at 988. If, however, the nexus is not made out, but a monetary award will not suffice (usually because of an inability to pay), a proprietary remedy may nevertheless be ordered.

49 Since *Harrison v. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (B.C. 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 as-

sessed 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 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.

50 Because the sharing of the benefits and risks of ownership proportionate to the owners' contributions is implicit in the grant of a constructive trust, the finding of entitlement to a proprietary remedy is usually only notional in family cases. Most plaintiffs in family cases claim a constructive trust, and then ask for an award of damages on a value survived basis as at the date of trial. While this may occasionally result from the difficulty of proof on a *quantum meruit* basis, more often it is seen as necessary to provide a meaningful remedy, whether to allow increases (or losses) in property value to accrue to the true title holder, to permit the plaintiff to receive priority in a bankruptcy, or to permit access to consequential remedies such as tracing and following. Not all of these factors can be satisfied by a monetary award. To the extent they can be, a monetary award will be appropriate and there will be no need for a declaration of trust.

Quantification of the Remedy

51 In practice, the real issue in most family cases is the choice of a "value received" or a "value survived" approach to the quantification of an award. Commonly, factors that would permit the imposition of a constructive trust, were it appropriate for the parties to share continuing ownership, will support the value survived approach to quantification of the alternative monetary award: See the discussions in *Beard v. Beard* (1980), 35 A.R. 448 (Alta. C.A.), aff'd [1982] 1 S.C.R. 282 (S.C.C.); *Sorochan* at 51-52; and *Pickelein* at paras. 30-43. Otherwise, a value received approach is taken.

52 The value received approach looks for the value of the benefits determined by their cost on the open market. In his reasons for the dissenting minority in *Peter* at 1025, Cory J. approved the *quantum meruit* approach adopted by Waite J. in *Herman v. Smith* (1984), 34 Alta. L.R. (2d) 90 (Alta. Q.B.), at 93-94. Waite J. suggested a choice between two calculations:

> i. the annual earnings of equivalent occupations (housekeeper, servants, and related occupations) based on available data over the term of the relationship, or
>
> ii. the number of hours worked over the term of the relationship multiplied by
>
> (a) wages earned per hour by equivalent workers, or
>
> (b) the minimum wage.

Justice Cory preferred the annualized approach Justice Waite had applied. So do I.

53 In contrast, the value survived approach looks for the value created in an asset by the plaintiff's contributions. Although the lines can get blurred between the two where cohabitation is long and the parties' contributions are difficult to identify (*Nasser* at para. 44), a court must identify which approach it is taking, explain why,

and not confuse the two methods.

54 Where equitable damages are being awarded to compensate for a constructive trust interest, the proper approach is value survived, as McLachlin J. stated (*Peter* at 999-1000):

> The value of that trust is to be determined on the basis of the actual value of the matrimonial property - the "value survived" approach. It reflects the court's best estimate of what is fair having regard to the contribution which the claimant's services have made to the value surviving, bearing in mind the practical difficulty of calculating with mathematical precision the value of particular contributions to the family property.

55 Awarding equitable damages in lieu of a proprietary remedy is not a practice limited to unjust enrichment claims. In *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.), the Supreme Court recognized that a monetary award made in place of specific performance may be valued on the date of trial so as to take into account any change in value. This is analogous to valuing a monetary award for unjust enrichment on the value survived approach, instead of ordering a constructive trust.

56 The jurisprudential difficulty is that few plaintiffs in a marriage-like relationship want a proprietary remedy. They want a monetary award determined by the value survived approach so they may share in the current value of the property to the acquisition, preservation and improvement of which they contributed. This difficulty is exemplified by two decisions of the Ontario Court of Appeal: *Bell v. Bailey* (2001), 203 D.L.R. (4th) 589 (Ont. C.A.) at paras. 32-38; and *Vanasse* .

57 While this Court takes the view either value received or value survived can be used to quantify a monetary award (*Pickelein* at paras. 30-44; and see also *MacFarlane v. Smith*, 2003 NBCA 6 (N.B. C.A.)at para. 34), the Ontario Court of Appeal has taken the view that a monetary remedy should be calculated on the basis of value received: *Bell* at paras. 32-38, esp. 34. The difference may be less significant than it appears because, in most cases, the primary reason for using the value survived approach will be an inflationary increase in the value of the property to which neither contributed. At para. 40 in *Bell*, the court noted that account should be taken for the "probability" that the property may have increased in value "quite apart from anything either party did to enhance its value."

58 Elsewhere, it appears, only the value survived approach to valuation takes account of inflationary increases in value. Where the plaintiff has contributed directly to the property and a proprietary award is ordered, inflation will be taken into account because the benefit accrues to both owners: *Hubar* at paras. 19-21; *Treanor v. Smith* (1992), 44 R.F.L. (3d) 165 (Ont. Gen. Div.)); and *Boucher v. Koch* (1988), 87 A.R. 78 (Alta. C.A.). So, where damages are awarded as an alternative to a proprietary award, inflation or deflation should be taken into account. However, where a *quantum meruit* award is found to be appropriate, it would be more consistent logically to compensate for the delay in receipt of restitution by an award of interest.

Value Received Approach

59 When an award is made on a value received basis, it should be equal to the benefit received by the defendant. "In order to determine the value of the services rendered ... it is necessary first to determine which of the services provided ... are compensable": *Clarkson* at para. 69. To this inquiry, any agreement of the parties will be relevant, as will be the *Walsh* factors. If the parties had a *de facto* agreement on the amount of their individual contributions to their relationship, or about which services each was to provide for the benefit of both or to the property of one, the court should be careful not to compensate out of proportion to their agreed roles. This

factor is not intended to wipe out an award, where unjust enrichment has been found, but to ensure that the amount of the award is congruent with the parties' circumstances and expectations. Although there may be additional discounts to factor in (such as equitable set-off, discussed below), there is no assessment of a plaintiff's proportionate share in an asset, or of the increase in value of an asset. Those issues are specific to awards assessed on the value survived approach.

Value Survived Approach

60 On the valued survived approach, there is no requirement to determine the precise value of the services and other benefits received by the defendant. As a general rule, a party's proportionate contribution to the value of an asset will entitle that party to a comparable share in its value. A ten percent contribution will yield a value equivalent to 10% of the asset; likewise a 50% contribution will yield a half-share. Once the proportionate share has been determined, it need only be assessed against the value of the asset to determine the *quantum* of the award. If equitable damages are to be awarded in lieu of a proprietary remedy, the value of the property at the date of trial will determine the *quantum* of the award, subject to any adjustments as between tenants in common for use and maintenance of the property following separation.

61 The key features of the assessment on the value survived approach are the identification of the value available for apportionment and the parties' proportionate contributions to that value. There is no presumption of equality: *Rathwell* at 447-49.

62 The first step is to determine the value of the asset at the outset of the relationship or on its later acquisition, as the case may be, and at the relationship's end. Courts should be chary of making this assessment, discovering there has been a decrease in the asset's value, and then going back and changing the remedy from the proprietary to the personal or the approach from value survived to value received. That an asset has lost value may militate in favour of a *quantum meruit* award, but that is not the object of the inquiry at this stage. Generally speaking, the increase in the value of the asset during the relationship will be the value available for apportionment, although in a long relationship contributions to the preservation of the capital brought to the relationship may suggest that value also be apportioned.

63 Once the value available for apportionment has been ascertained, the second step is to analyze the parties' respective contributions to determine the share to which the plaintiff is entitled. As I noted in *Pickelein*, at para. 44, in some circumstances, this may require a preliminary determination of the net appreciation of value during the relationship attributable to the contribution of the parties, for example where third parties also contributed to that value.

64 At this point again, the Supreme Court's decision in *Walsh* should be borne in mind. If the relationship was one in which the parties strictly defined their roles, a plaintiff's claim should be closely scrutinized to ensure it accords with the expectations they created in each other: *Hartshorne* ; *Waters*. As it is in the choice of remedy, the length of a relationship will also be a factor at the apportionment stage. Although the significance of the length of the relationship depends to some extent on the age of the parties at its beginning, my review of the case law suggests that marriages can be categorized for this purpose into at least three groups: long (12 or more years); medium (6 to 11 years); and short (5 or fewer years). Long marriages are more likely to suggest a family venture and equality of sharing of all the family's assets. The same can be said of marriage-like relationships.

Set-Off

65 Only after a remedy has been chosen and the value of the claim quantified can account properly be taken of reciprocal claims pleaded or of evidence of mutual benefits conferred. Reciprocal claims of unjust enrichment arise where each party claims to have been deprived to the benefit of the other as a result of the relationship. When reciprocal claims are made, both parties are usually seeking damages, whether on a *quantum meruit* basis or in lieu of a proprietary remedy to which entitlement is established. These specifically pleaded reciprocal claims present an easy case. Both parties have claimed that, as a result of their relationship, the other party has been unjustly enriched. That claims are reciprocal does not negate their simultaneous enrichment. The claims can be set off one against the other at this quantification stage of the analysis: *Pickelein* at paras. 14-15.

66 However, set-off for a reciprocal benefit is also being applied at this quantification stage in family cases where a claim for unjust enrichment is not specifically pleaded as a counter-claim or by way of set-off: *Peter* at 1025 (Cory J.); *Shannon v. Gidden*, 1999 BCCA 539 (B.C. C.A.)at para. 38; *Harrison* at paras. 24-25. Given that the quality of mutuality informs all aspects of marriage-like relationships, it seems to be thought unjust to penalize one partner (the defendant) for failing to bring a separate claim for unjust enrichment. Consequently, the exchange of value as a result of the sharing is being accounted for in the quantification of the remedy even in cases where mutual claims of unjust enrichment are not pleaded, with little principled discussion.

67 A brief review of legal and equitable set-off will help to ground this discussion of what courts have been doing.

68 True legal set-off is unproblematic. It has two principal requirements - both obligations must be debts and both debts must be mutual cross obligations: see *Telford v. Holt*, [1987] 2 S.C.R. 193 (S.C.C.), at 205 where the court cites from *Royal Trust v. Holden* (1915), 22 D.L.R. 660 (B.C. C.A.), at 662-63:

> ... "mutual debts" mean practically debts due from either party to the other for liquidated sums, or money demands which can be ascertained with certainty at the time of pleading.

69 Where both are established, the amount due will be deducted from the award for unjust enrichment.

70 Where one or both of these requirements cannot be established, legal set-off is not available. Equitable set-off may be: *Holt* at 205-206. By its nature, equitable set-off is more difficult in application. In *Irving Oil Ltd. v. Blanchard*, 2002 PESCTD 52 (P.E.I. T.D.), DesRoches C.J.T.D. helpfully explained its essence at para. 9:

> [9] Equitable set-off arises where there are certain equitable circumstances which give a right to a person who sets them up against an opposing party to an action. It is a doctrine based on fairness. Equitable set-off is available provided there is a relationship between the cross-obligations such that it would be unfair or inequitable to permit one to proceed without taking the opposing claim into account.

71 The authorities "are clear that a defendant's claim will not be viewed as an equitable set-off ... unless it is closely or intimately connected with, or directly impeaches, the plaintiff's claim": *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751 (B.C. C.A.) at para. 44.

72 The leading modern statement on the application of equitable set-off is a judgment of Macfarlane J.A. for this Court in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 65 B.C.L.R. 31 (B.C. C.A.). It was adopted by Wilson J. in *Holt*, and most recently cited by this Court in *Jamieson v. Loureiro*, 2010 BCCA 52 (B.C. C.A.) at para. 35.

73 *Coba Industries* sets out the requirements for a claim of equitable set-off (at 38):

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: [*Rawson v. Samuel* (1841), Cr. & Ph. 161, 41 E.R. 451 (L.C.)].
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: [*Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt. (U.K.) Ltd.*, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: [*Fed. Commerce & Navigation Co. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: [*Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani*].
>
> 5. Unliquidated claims are on the same footing as liquidated claims: [*Nfld. Govt. v. Nfld. Ry. Co.* (1888), 13 App. Cas. 199 (P.C.)].
>
> [Citations added.]

74 The nature of the set-off taking place in unjust enrichment cases has never been defined as either legal or equitable. It is unlikely that it is true legal set-off, because the requirements of legal debt and liquidated sums are not features of a marriage-like relationship: Mutual sharing of all or many of life's expenses, and contributions to property over the course of a relationship of five, ten, or twenty years are not readily reducible to certainties, nor are they true debts created by formal agreement. It would be a fiction to qualify the set-off being applied in such circumstances as legal set-off.

75 Equitable set-off is the mechanism that more accurately describes (and justifies) the off-setting of mutual enrichments in family cases. Equitable set-off makes sense within the family context because of the reciprocal enrichment: While no legal debts subsist between the parties (as a result of the enrichment), it would be inequitable not to allow the defendant to reduce the amount he or she owes to the plaintiff as a result of the enrichment by any corresponding gain to the plaintiff as a result of the relationship.

76 The *Coba* requirements will be met in family situations where mutual unjust enrichment is found, even if only the plaintiff pleaded the cause of action. It would be inequitable to allow the plaintiff to recover in full for any unjust enrichment of the defendant, without considering whether the plaintiff has him- or herself been unjustly enriched. The failure to discount the plaintiff's award by his or her corresponding enrichment would amount to more than perfect compensation at the expense of the defendant.

77 If a contract is relevant to the proceeding, it will have been considered at the juristic reason stage and, where necessary, at the apportionment stage. More often, in family proceedings, there is no relevant contract.

78 In a family context, the *quantum* of the damages is not defined at the outset of the action. As a result, the claim will always be for an unliquidated sum. (In fact, the claims will be for mutual unliquidated sums, a situation described in Kelly Palmer, *The Law of Set-off in Canada* (Aurora, Ont.: Canada Law Book, 1993) at

73-74.)

79 Equitable set-off provides the doctrinal and juridical basis for what has proven to be a necessary exercise in family cases. The application of this recognized doctrine at the assessment of damages stage avoids "up in the air" analyses at earlier stages of an unjust enrichment analysis and permits full consideration to be given to all the factors the Supreme Court has been at pains to set out as it developed the Canadian approach to unjust enrichment.

Equitable Set-off

80 Whether mutual claims of unjust enrichment are pleaded, equitable set-off is pleaded as a defence, or evidence of a reciprocal enrichment is led but not pleaded, they should all be treated in the same fashion. In principle, the amount of the set-off should be determined by the same analysis that would be applied to a counterclaim for unjust enrichment.

81 In examining the contributions to property, only those contributions that allowed the other party to acquire, increase, or maintain the value of an asset will be considered. For example, with a vehicle, payment by the defendant to the plaintiff to buy the car in the first place would be a set-off. Payment by the defendant of the costs of maintenance (brake re-alignment) or new parts (carburetor; tires) that preserve or enhance the value of the vehicle would be set-off. Payment of the ordinary operating expenses (gas; AirCare; insurance) would not be set-off, because they do not enhance or maintain any value that is capable of surviving the end of the relationship. This will be a question to be determined on the evidence.

82 The property must be assessed using its value at the end of the relationship. In this way, any decline or increase in value will be properly taken into account.

83 Only if the property survives the relationship will set-off be permissible. If a plaintiff's car is written off, for example, contributions to its preservation or maintenance by the defendant will not be set-off because the property no longer exists in the hands of the plaintiff. Where property has been sold prior to the end of the relationship, contributions to that property may properly be set-off to the extent the residual value existed as liquidity at the end of the relationship. Thus, where the proceeds of sale were spent during the relationship on living expenses, a deduction would not be appropriate. Where they were spent after the end of the relationship, a deduction would be appropriate.

84 Relieving the other party of a liability (such as the payment of a debt to a third party) should also be set- off.

85 To give a global example, if a plaintiff (Mr. "Y") entered the relationship with a speedboat, a truck, a small cottage, and nothing else, and he contributed to the relationship by renovating the defendant partner's (Ms. "X") house (to which she held sole title), the court could well find that Ms. X was unjustly enriched. However, when it comes time to quantify the value of the enrichment, the court must account for the fact that Ms. X paid for maintenance, a new motor and winter storage costs for the boat, new tires and a carburetor for his truck, and a roof for the cottage. All of those contributions to the improvement and preservation of the plaintiff's assets must be off-set against the defendant's unjust enrichment to determine the final award.

86 In determining what, if any, equitable set-off against an award is appropriate, care must be taken not to set-off contributions that have already been included at the quantification stage. This will be particularly import-

ant where a set-off is claimed for the other party's reciprocal contribution of domestic services or payment for the ordinary incidents of family life not specifically referable to property.

87 This does not mean the provision of food and shelter or domestic services are not to be considered in an unjust enrichment analysis. Where the contributions of one have enabled the other to acquire property, that contribution will have been measured at the valuation stage on both the value received and the value survived approach. On the value received approach, the provision of food and accommodation or uncompensated domestic services will be included in the determination of the monetary value of unremunerated domestic services. On the value survived approach, they will be included in the determination of the parties' contributions and thus the appropriate apportionment.

88 Once the value to be set-off has been quantified, on the value received approach, that amount will be deducted from the plaintiff's award as a dollar figure. On the value survived approach, the set-off amount may be deducted as a percentage from the plaintiff's proportionate share. While it would be possible to allow for the set-off amount when initially determining the proportionate share that calculation unnecessarily combines two distinct steps in the analysis - the determination of proportionate share based on contribution, and set-off based on a reciprocal benefit to property. Transparency values support an independent analysis.

89 In circumstances where the plaintiff's benefits outweigh the defendant's, a plaintiff might well have established unjust enrichment, but would not receive an award: *Harrison* at para. 15.

Legal Set-off

90 There may be cases in which legal, as opposed to equitable, debts exist between the parties within the family relationship. No such case was brought to our attention although a legal debt is admitted by the respondent in this case and acknowledged to be payable, at least in its original amount, without interest or gross-up, by way of deduction from any award.

91 It seems logical, if not self-evident, that a court which identifies legal debts between the parties in the course of finding unjust enrichment in the family context should adjust the amount of the final judgment to take that debt into account, whether or not set-off is pleaded as a defence or by way of counterclaim. For example, if a judge finds a debt for a specific amount of money owing from the plaintiff to the defendant as a result of a promissory note, then the value of that note could be set-off against any award for damages for unjust enrich- ment.

92 While legal set-off is a defence, in family proceedings for unjust enrichment, it will usually be practical to deal with legal set-off at the damages assessment stage. Only if a debt is larger than the total value of the claim and legal set-off would provide a complete defence to a claim for unjust enrichment would it be practical to deal with legal set-off at the defence stage. Where the legal debt is worth less than the total value of the claim, legal set-off is probably best incorporated into the determination of the final award.

Pre-judgment interest

93 This is a narrow point, but one worth emphasizing. For monetary awards, prejudgment interest runs from the date the duty to make restitution arose: see *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70 (S.C.C.), at 91-92 (Cory J.); and *Clarkson* at paras. 75-78 (McEachern C.J.B.C.). For an award of damages in lieu of a proprietary award, risk is shared by the parties and should be reflected by valuation at the date of trial with adjustments as between

tenants-in-common from the date of separation until the date when the property is sold and the proceeds divided.

Application to this case

Background facts

94 In September 1995, about two months after they met, the respondent moved into a small travel trailer located on the appellant's mother's property on Gimse Road (the "Gimse Road property"), where the appellant was living with her three children, sharing meals and family time with her mother in her mother's mobile home.

95 The appellant had separated from her ex-husband a year or two earlier. She was employed as a teacher's assistant at a school in the Pemberton area, where she also operated a sole proprietorship, Valley Maintenance Janitorial. It held contracts for janitorial services in the Pemberton Valley. Her annual income was about $32,000. She had just settled matrimonial property and personal injury actions, from which settlements she had received about $125,000 in the previous four months. From those proceeds, she had used $25,000 to purchase a half interest in the Gimse Road property. In September 1995, she bought her mother's remaining interest in the Gimse Road property for a further $25,000.

96 The respondent was unemployed, having recently lost a well-paying job as a result of criminal charges for cultivating marijuana and his addiction to cocaine. He was convicted of possession for the purposes of trafficking and told the appellant he had resolved his addiction. He had a significant debt to the Canada Revenue Agency, was involved in a foreclosure proceeding regarding property at Nanoose Bay, and was facing charges for sexual assault. He told the appellant those charges were baseless allegations fabricated by a drug dealer. His only assets were a 1986 Ford pickup truck, a Bobcat 825 tractor worth about $5,000 and a trailer worth about $2,500.

97 In October, the appellant began to loan the respondent monies to make the payments required to keep the mortgage on the Nanoose Bay property in good standing. That same month, she paid $13,000 for an old trailer the respondent had located and promised to set up on the Gimse Road property. Subsequently, the respondent obtained the necessary permit and moved the trailer there.

98 In February 1996, the respondent offered to help out with the Valley Maintenance Janitorial work for "no more than $600-$800 per month in order to avoid any liability to file a tax return" (at para. 20 of the trial judge's reasons). With the appellant's agreement, he began that work. In March 1996, he began to work on the installation of the trailer on the Gimse Road property with the pouring of trailer pads. Subsequently, he installed electricity, a sewer system, and a water pump. The appellant paid for the materials and about $3,000 for the work of others, taking out a construction loan in May. After they moved into the trailer that year, work continued slowly until 1998. The appellant was heavily involved in this project, but was not as active physically because of her other work obligations.

99 In December 1996, the respondent repaid most of the Nanoose Bay loan with the proceeds from the sale of that property.

100 In February 1997, the respondent hired a Vancouver law firm to deal with his sexual assault charges. The trial judge found the appellant had paid the firm $5,000 "mistakenly characterized as Wilson's contract wages" (at para. 27) and mortgaged the Gimse Road property to consolidate the construction loan and obtain funds, characterized as "Fotsch's own proprietor's drawings on her Valley Maintenance account" (at para. 27),

which she loaned to the respondent to pay the balance of $14,649.60. The charges were ultimately stayed by reason of prosecutorial delay. The respondent acknowledges a debt in the amount of $14,649.60 remains unpaid.

101 Between 1997 and 2001, as the respondent's duties for Valley Maintenance came to include more managerial duties, his janitorial labour hours dropped off. He never sought or suggested an increase in his wages. Nor did he find alternate or additional employment as the appellant had anticipated he would. He contributed only a "small minority" of his income to family expenses (at para. 21). He did not have a bank account. Throughout the relationship, he was the main cook and did laundry. As well, he continued to develop the Gimse Road property, erecting side buildings, developing a garden, and building a fence with the help of transient labour for which the respondent paid in cash or kind.

102 The appellant performed all other household chores, much of the garden work and the RCMP janitorial contract at Whistler (for which the respondent did not have the requisite security clearance) and provided the majority of the care for her son with special needs, aided by her two older children. She made all mortgage payments, purchased all food, liquor, household and building supplies, covered all gasoline and vehicle leasing costs, and paid any miscellaneous home and business expenses. As well, she paid the monthly fees for the respondent's storage locker in Nanaimo. The respondent used the Valley Maintenance leased vehicle for his personal transportation, including trips to Nanaimo and Vancouver.

103 In April 2001, the appellant purchased vacant land on Portage Road (the "Portage Road property") for $219,000, using the proceeds of a mortgage on that property ($189,000) and loans from her family ($30,000). When she sold the Gimse Road property in May for $129,900, she used some of the net proceeds (about $90,000 after deduction of the mortgage of $25,284, a loan of $13,077, and legal fees of $458) to reduce the mortgage by $77,000.

104 Almost immediately, she took out a further mortgage of $49,000 to cover anticipated costs to improve the Portage Road property, and in June 2002 another mortgage of $48,448 to cover costs of the proposed subdivision into two lots. After a refinancing in June 2002, the registered mortgages totalled $192,574.00.

105 The appellant bought an old trailer for $250.00 the respondent had located and claimed he could fix. Damaged on its move to the property, the trailer proved uninhabitable and in need of significant rebuilding. While that work was being done, the family lived in a trailer on a neighbour's property, without adequate heat or hot water. The trial judge concluded the respondent's efforts added nothing of value to the Portage Road property. His work was shoddy and not of workmanlike quality. It was unlikely the Home Depot prefabricated garage the respondent installed on the property (for which the appellant paid) would pass building inspection; it would probably have to be torn down and rebuilt.

106 By September 2002, the appellant learned the respondent was again using cocaine, and left him. She moved her mother's trailer onto the Portage Road property. The respondent tried to block her access to the property by putting a chain on the driveway. She was able to overcome that obstacle, and then, with the help of her family, she worked in earnest on the property to make it liveable for her and the children by October. Throughout November and December, the parties saw each other occasionally, including overnight visits, until one evening the respondent arrived, unexpected and uninvited, impaired and hostile, at the Portage Road property while she was entertaining her mother and stepfather. When he refused to leave, he was taken into custody and ordered not to return to the property. The trial judge rejected the respondent's evidence there had been a reconciliation after September.

107 Meanwhile, throughout 2001, as the parties' relationship was deteriorating, the respondent had established his own janitorial business, and named it Valley Maintenance 2001, without the appellant's knowledge or consent. In September 2002, he unilaterally began working on two of the appellant's most profitable janitorial contracts, keeping the gross monthly revenue of about $2,000 for himself. The appellant first learned of this misappropriation from documents she found in the company truck when she reclaimed possession of it in December 2002. At some point after that month, the respondent, or someone else at his direction, removed a Stealth carpet cleaner (valued by the trial judge at $2,300) from the appellant's property without her permission and did not return it after Master Bishop ordered its return on 5 October 2006.

108 After the separation, the respondent gained access to the appellant's documents and added his signature as "owner" to a contract only she had made with the Resort Municipality of Whistler to provide cleaning services. By the time of the trial, he had lost the contracts he had misappropriated "due to complaints regarding quality of work" and had given the carpet cleaner to a girlfriend who used it as collateral for a loan to start a limousine business in Whistler. His net revenue from the contracts between 30 September 2002 and 30 September 2004 would have been about $24,000, according to the appellant.

109 The parties' experts valued the Portage Road property at separation at $709,000 (the respondent) and $560,000 (the appellant). In addition to the two janitorial contracts, the respondent retained the proceeds from the sale of his Ford truck ($1,200) and the Bobcat and trailer. The appellant retained a boat she had purchased in 2001 and her motor vehicle.

110 The respondent started his action claiming spousal support and unjust enrichment on 23 December 2002 and filed a Certificate of Pending Litigation against the title to the Portage Road property on 8 January 2003. By a consent order made 12 June 2003, the respondent obtained possession of the carpet cleaner and a floor polishing machine and delivery of the personal possessions he had left on the Portage Road property. After Justice Preston made two orders relating to the respondent's tractor and trailer in July, the action proceeded slowly. Some orders for disclosure were made in 2005. Then, on 29 July 2006, the appellant applied for an order to strike the respondent's pleadings. When that application was heard on 7 November 2006, Master Bishop dismissed all the respondent's claims on the basis of excessive delay in their prosecution and ordered the removal of the Certificate of Pending Litigation. Mr. Justice Rice set aside the orders dismissing the claim for unjust enrichment and removing the Certificate of Pending Litigation on 12 March 2007. The trial began on 9 October 2007 before Boyd J. and continued over 19 days until 7 March 2008. Reasons for judgment were released on 1 May 2008. The trial judge valued the Portage Road property at $770,000 on the basis of a two-lot subdivision.

111 The respondent did not impress the trial judge as a truthful witness. Nevertheless, in a blended discussion of benefit, detriment, absence of juristic reason and the respondent's reciprocal benefits, the trial judge found the respondent had contributed to the increase of the appellant's equity in the Gimse Road property and thus, indirectly to her acquisition of the Portage Road property. His contribution was in the work he did to improve the Gimse Road property and the benefit the appellant received from her underpayment for the work he did for Valley Maintenance Janitorial. At para. 71, she found that, had the money from the Gimse Road property sale not been used to obtain the Portage Road property, there would have been a notional equity of $20,000 following the sale that could have been shared between the parties.

112 The trial judge had earlier found, at para. 59, that the respondent chose to live as the appellant's part-time employee, and that the appellant had paid for the respondent's food and shelter, liquor, vehicle maintenance, holidays, storage locker and legal fees. At para. 60, she found the respondent had spent the vast majority

of the wages he received on himself. At para. 65, she found his effort had not appreciably increased the appellant's business income. The trial judge also noted that the appellant and respondent had discussed a division of the janitorial contracts after the separation in September 2002, because "she believed the [respondent] was entitled to some of the contracts as a means of making a living." (at para. 46) However, before an agreement was reached, she withdrew her offer (of the Home Hardware and Credit Union contracts) when the December 2002 incident occurred. Finally, at para. 77, the trial judge concluded that the respondent had gained more than he had contributed to the relationship.

113 Ultimately, the trial judge found (at para. 76) that despite the respondent's receipt of numerous benefits from the appellant, she had been "minimally" enriched by his contributions (reduced wages, labour on and use of his Bobcat, its trailer and his truck for the development of the Gimse Road property); he had suffered "minimal" detriment, by reason of those contributions (at para. 77); and there was no juristic reason explaining the enrichment (at para. 78). At para. 77, she re-iterated that the respondent had "given up nothing and lost no career, education or financial opportunities."

114 After determining that a monetary award was the appropriate remedy, taking guidance from *Peter*, she determined it should be assessed on the value survived approach, appropriate to a long-term marriage-like relationship where property had appreciated in value. On that approach she decided the respondent was entitled to 20% of the net value of the Portage Road property at its current value of $770,000. After accounting for the outstanding debts on the property and the appellant's expenses incurred to preserve the property since December 2002, she awarded the respondent 20% of the appellant's net equity in the property of $495,457 for an award of $99,091.14.

115 She explained her reasoning at paras. 83 to 85:

> [83] In *Peter* at [1014 per Cory J. for the minority] the Supreme Court of Canada noted that in the case of a long common-law relationship, "[b]oth the reasonable expectations of the parties and equity will require that upon termination of the relationship, the parties will receive an appropriate compensation based on the contribution each has made to the relationship." The "value survived" approach to valuation is particularly appropriate where there has been a long-term marriage-like relationship in which the property at issue has appreciated in value: see *Pegler* at para. 57.
>
> [84] Under the value survived approach, a plaintiff may be awarded a percentage of the net increase in value of property based on a mathematical approach, or a dollar figure which reflects the court's view of the parties' relative contributions to the property's increase in value: see *Pegler* at para. 58.
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> [85] On a review of the whole of the evidence, in terms of the assessing the parties' proportional contributions, I find that Wilson's contributions entitle him to a 20% interest in the increased net value of the Portage Road property.
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> [Emphasis added.]

116 The appellant raises three issues:

a. Did the trial judge err in finding that the defendant had been unjustly enriched by the plaintiff?

b. Did the trial judge err in her valuation of the Portage Road property? (As to the date? The value?)

c. Did the trial judge err in failing to reduce the award to account for certain amounts owed to the appellant by the respondent? [Value of the carpet cleaner ($2,300); balance of debt owing for legal fees ($14,649.60); value of misappropriated contracts ($14,000)]

117 I find no error in the trial judge's valuation of the Portage Road property on the basis of a two-lot subdivision as at the date of trial, once she determined a value survived monetary award was appropriate, nor in her choice of that remedy. The respondent did not seriously dispute the reduction of the award by the amount of the loan or the value of the carpet cleaner. The real issue on this appeal is whether the trial judge erred in finding the respondent had unjustly enriched the appellant. No claim was made, nor could the evidence support a claim, that the appellant unjustly enriched the respondent. None of his property gained value during the relationship to which the appellant could have made a contribution, although it appears she assisted him to maintain what value they had upon separation.

118 The essence of the appellant's submission on this ground of appeal is that the trial judge effectively awarded spousal support to the respondent in circumstances where his claim for spousal support had been dismissed, notwithstanding her finding that he had received more from the relationship than he contributed to it and, in particular, parted with two contracts that would produce at least $43,000 income to him. There is much in the reasons for judgment to support that reading. However, the record does support the findings of fact of the trial judge and her finding that the respondent had established both benefit to the appellant and detriment to the respondent, primarily by way of his contribution of labour and services to the improvement of the Gimse Road property, and the absence of a juristic reason for that enrichment. Where the trial judge fell into error was in her apportionment of the increased net value of the Portage Road property.

119 This error began with the trial judge's approach to determining the value of the respondent's contribution to the Gimse Road property. At para. 71 she explained:

> [71] The Gimse Road property was sold in May 200[1] for $129,900, of which $100,000 was allocated to the land and $29,900 to the mobile home. Deducting the first mortgage of $25,284, the personal loan of $13,077, and legal fees of $458, there was remaining equity of some $90,000. Deducting Fotsch's initial investment of $50,000 and the trailer purchase of $13,000, there was a small notional equity of under $20,000 which might have been shared by the parties had the second property not been acquired.

120 Neither counsel was able to explain how the trial judge arrived at the notional equity. Both suggested an arithmetical error and that the correct figure would be $27,000. Although the trial judge did not apportion that notional equity between the parties, it is reasonable to assume she meant they should share equally in the increase in value to which both had contributed; the respondent's share would flow through as a contribution to the investment of $77,000 she found the appellant had made in the Portage Road property with some of the equity from the sale of the Gimse Road property. The trial judge did not make a finding as to what the appellant did with the remaining $13,000 she received from the sale proceeds, and I decline to speculate.

121 The trial judge's error is in her disregard of the effect of the legal fees loan on the notional equity and its apportionment. The property was bought for $50,000 and the trailer for $13,000, and they were sold for $129,900. When the effect of the $14,645.60 legal fees loan is extracted from the $25,284 mortgage valuation, the value of the gross equity becomes $129,900 minus [$10,634 (mortgage minus legal fees loan) + $13,077 (personal loan) + $458 (legal fees on sale)], equalling $105,731. The notional net appreciation during the relationship was about $40,000, or $20,000 each. Taking into account the effect of the legal fees loan whose cost the

appellant was still carrying, the notional apportionment of the gross equity would have been about $35,000 (plus $63,000 in equity and $3,000 on account of the money paid for work on Gimse Road) to the appellant and $5,000 to the respondent. That apportionment would have recognized the respondent's total contribution to Gimse Road, whether by way of labour and services to its development or indirectly by underpayment for his services to the appellant's company. Had the parties separated in May 2001, the respondent would have been entitled to receive $5,000.

122 That notional division of the net appreciation of the value of the Gimse Road property would establish the parties' proportional contributions to the Portage Road property at 93.5% by the appellant and 6.5% by the respondent.

123 That leaves for consideration the proper apportionment of the increase in value of the Portage Road property during the remaining 18 months of the parties' relationship. At paras. 70 and 76, the trial judge ex- plained:

> [70] As I have already noted, Wilson's description of the nature and extent of his contributions, both in terms of domestic services and construction labour, is much exaggerated. However, it remains that he did make some positive contributions to the Gimse Road project and that his efforts did indeed assist Fotsch in creating some equity which she was able to lever so as to acquire Portage Road.
>
> . . . . .
>
> [76] Despite the plaintiff's receipt of the many benefits financed by Fotsch over the seven-year period, I find that the defendant has been enriched by the plaintiff's contributions, albeit minimally. The plaintiff's reduced wage draws enabled her, at least to at certain extent, to free up the money necessary to both purchase and carry the mortgages for the Gimse Road and Portage Road properties. The plaintiff also made positive contributions to the Gimse Road project that assisted Fotsch in creating some equity which she was able to use to acquire Portage Road. In the same vein, I find that the plaintiff has suffered a detriment, although also minimal, by way of his work at a reduced wage, his labour toward the Gimse Road property, and his initial contributions to the relationship in terms of the use of his Bobcat, trailer, and truck.

124 The question is what additional value the respondent created in the Portage Road property by his "work at a reduced" wage for the appellant's company between May 2001 and the separation in September 2002, after which time he worked on the two contracts he had misappropriated, keeping the entire proceeds for himself while the respondent paid the expenses attributable to those contracts until December. The trial judge called this contribution "minimal" and incapable of precise valuation. Minimal usually means insufficiently significant to require restitution. Nevertheless, she found this contribution to require restitution. Having found no other contribution to the Portage Road property and much done to the detriment of the appellant's equity, it behoved the trial judge to explain how she was quantifying that contribution in her apportionment analysis.

125 Between May 2001 and September 2002, the appellant's monthly net income from Valley Janitorial averaged about $1,000. The most generous estimate of the respondent's contribution by way of reduced wage to the appellant's capacity to make mortgage payments would be $400 monthly for 16 months or $6,400. The mortgage payments would have totalled at least $19,000. While the payments preserved the appellant's ownership of the Portage Road property, they did not increase her equity. If the entire $400 were treated as a notional contribution to the value survived and added to the $5,000 he would have notionally contributed following the sale of

Gimse Road in May 2001, the monetary value of his contribution to the value survived in Portage Road as at the separation would total $11,400. On the same basis, the appellant's contribution would total $84,600. In the circumstances of this case, that assessment would fix his maximum possible share at 11.9%. Clearly, the trial judge erred in assessing his proportionate contribution at 20%.

126 The appellant asks this Court to take into account an allowance of "at least" $25,200 for room and board received during the relationship in quantifying the parties' proportionate contributions to the value survived. During the trial, at the trial judge's invitation, respondent's counsel estimated that to be the value of the room and board the respondent received during the relationship, about $300.00 monthly. At trial, he acknowledged that amount would be an appropriate deduction from any award, presumably on the basis of the comments about the trial judge's quantification of a value received award in *Peter* by McLachlin J. at 1000-1001 and Cory J. at 1025. On appeal, he took the position the trial judge had factored that allowance into her assessment of the respondent's contribution to the Portage Road property.

127 However, the trial judge rejected the value received approach in favour of a value survived approach based on her reading of Justice Cory's reasons in *Peter*, as discussed in *Pegler v. Avio*, 2008 BCSC 128 (B.C. S.C.). While I consider she erred in determining the appropriate proportion on her findings of fact, as I indicated earlier, I see no error in her choice of approach to quantification of the remedy.

128 In the circumstances, the most the evidence and the trial judge's findings of fact with regard to the unjust enrichment could support is an award of 7.5%. Such an award would generously recognize the respondent's contributions to the value survived in the Portage Road property, while also acknowledging the parties' legitimate expectations, as the trial judge described them in her juristic reason analysis at paras. 78-80:

> [78] Was there any juristic reason for such deprivation? In determining whether there is an absence of juristic reason for an enrichment, the court will consider whether the enrichment is "unjust", whether the expectation to share in the property is legitimate, and whether there is a contractual, statutory or other legal obligation for the enrichment: *Massincaud v. Logie*, 2005 BCSC 1665at para. 48, 144 A.C.W.S. (3d) 683.
>
> [79] Fotsch insisted Wilson was never more than her "boyfriend" and that there was no plan for any long-term relationship. She said that the relationship could not be considered a marriage since there was no sharing of any expenses.
>
> [80] While I find that the defendant did indeed carry the vast majority of the financial load, this alone does not negate the fact the parties lived in a "marriage-like" relationship for 7 $^{1}/_{2}$ years. That said, while the relationship featured some of the indicia of marriage, (such as her naming him as a beneficiary on her health care insurance plan; his liberal access to her ATM and Visa cards; the joint assumption of the management of the household; and sharing of family holidays), I find, as Wilson well realized, that Fotsch clearly drew a line concerning the limits of the relationship. She deliberately chose not to name him as a beneficiary of her estate or any School District life insurance plan, instead naming her eldest daughter as beneficiary. None of the vehicles were registered in Wilson's name or the parties' joint names. None of the properties were ever registered in joint names. None of the bank accounts were in their joint names. For all intents and purposes, while Wilson had generous access to the accounts, albeit subject to an expectation of current reporting for accounting purposes, he never had any control over the parties' finances. I am satisfied that there was no juristic reason for the defendant's enrichment,

and accordingly find that the plaintiff has proved the necessary elements of unjust enrichment.

[Emphasis added.]

129 While the appellant was generous with her income and understood that, given the nature of their relationship, the respondent would require some support to become independent as he had during the seven years they lived together, she drew the line at her property and the respondent knew that. She did so to protect her children. The parties chose not to marry. The appellant defined herself throughout the relationship as a single parent. They incurred no joint debts. When she made the respondent's mortgage payments and paid his legal fees, she required repayment. The length of the relationship was in the low medium range for a couple in their late thirties and forties. On these findings, the parties' relationship cannot be characterized as a "joint venture" or "family enterprise" as McLachlin J. characterized the long term relationships in *Pettkus* and *Peter*, at 1001 of the latter. It was a relationship better characterized as a loving and supportive medium-term partnership between two people who sought to give primacy to their own personal and economic interests throughout. In the appellant's case, her personal interests included the well-being of her children, in the future as well as the present.

130 An award of 7.5% would accord more appropriately with the arrangement the parties made early in their relationship and with which both lived, without serious complaint, throughout their relationship. They agreed he would receive $600 to $800 monthly for his work with Valley Janitorial, look for another job to supplement his income, share the household duties, and contribute to the household expenses. In fact he did not find another job or contribute significantly to the household expenses. While his T4 returns showed a monthly income from Valley Janitorial of $600, his drawings averaged $765 monthly. While the appellant did not seek interest on the legal fees loan taken out for the respondent's benefit during the relationship, interest on the proceeds of that loan was included in the mortgage payments she made.

131 If the trial judge's valuation of the equity to be apportioned is adjusted by adding back the portion of the mortgage debt attributable to the legal fees loan, the equity to be divided is $510,107, of which $38,260 is attributable to the unjust enrichment.

132 It is not disputed that the legal fees loan ($14,650) and the value of the carpet cleaner at $2,300 should be deducted from the award, the former as a legal debt and the latter as an equitable set-off. Because the trial judge's valuation of the equity to be apportioned took into account the mortgage payments made since December 2002, I would not add an amount for interest with regard to the legal fees loan. However, the appellant is entitled to set off interest on $2,300 at the Registrar's rate from 25 October 2006, the date by which Master Bishop ordered him to return the carpet cleaner, to the date of trial.

133 The appellant asks this Court to deduct at least $25,200 from the award for household expenses. On the analysis I set out earlier in these reasons at paras. 86-87, a set-off for household expenses is not warranted. To the extent the respondent's failure to contribute to household expenses is relevant, they, along with the interest payments she made on the legal fees loan, are taken into account in determining the respondent's contribution to the appellant's capacity to make the mortgage payments on the Portage Road property.

134 The appellant also asks this Court, as she did the trial court, to set off, if not the gross income in the amount of $43,000.00 she would have received had the respondent not misappropriated the two cleaning contracts, then the $24,000 he did receive. The respondent acknowledges a net profit from the contracts of $14,000. While the figures are not readily reconcilable, that seems a reasonable amount to set off against the respondent's

award. By his misappropriation of the contracts, he deprived the appellant of an income stream that was rightfully hers. Disgorgement of his profit after an allowance for the work he performed is a reasonable set-off. In these circumstances, I would set off that amount from the award.

135 It follows I would allow the appeal, set aside the order of the trial judge and substitute an award of $7,310 less interest on $2,300 from 25 October 2006 to 1 May 2008, the date as of which the trial judge made her award and on which she released her reasons for judgment.

136 The appellant has been successful in very substantially varying the order of the trial judge and in my view should receive 90% of her costs of this appeal.

***Bennett J.A.*:**

I agree.

***Chiasson J.A.*:**

Introduction

137 I have had the privilege of reading a draft of the reasons for judgment of Madam Justice Huddart, in which she provides an extensive review of the law of unjust enrichment. I agree with much of her analysis, but do not consider it necessary for the disposition of this appeal.

138 I also do not agree that the appellant was unjustly enriched with respect to the so-called underpayment of wages. With respect to the modest contribution the respondent made to the Gimse property, it is my view that, after adjusting for the appellant's set-off claims, the respondent is not entitled to compensation from the appel- lant.

139 In the result, I would allow the appeal and dismiss the respondent's action.

Discussion

140 I agree with my colleague that reciprocal benefits should form no part of the benefit, detriment analysis and should be considered only at the juristic reason or quantification stages. I also agree that in this case, household expenses should not be taken into account, but I would not foreclose the possibility that in some cases it may be appropriate to do so (*Blake v. Wells Estate*, 2007 BCCA 617 (B.C. C.A.)).

141 I part company with my colleague at the juristic reason stage of the analysis, although I also question the trial judge's conclusion the respondent suffered detriment as a result of the reduced wages.

142 In this case, the trial judge found that the respondent minimally had enriched the appellant by being paid less than a market wage and by his work on the Gimse property. The corollary of this was the conclusion that the respondent thereby minimally suffered detriment. I shall address the work on the Gimse property in the context of remedy and I shall return to comment on detriment as it relates to the wages, but in my view there was a juristic reason for the wage enrichment.

143 A benefit or enrichment that derives from a contract is not unjust. The contract is a juristic reason for

the benefit. Employment for wages is a contract. In a family relationship, the contractual arrangements may reflect that context and lead to the conclusion that notwithstanding the contractually based enrichment, the contract does not provide a juristic reason for the enrichment and it is unjust. In this case, there was no such analysis and no such finding of fact.

144 In the evidence the respondent's remuneration is referred to as "contract wages". There is no suggestion in the judge's reasons the respondent's arrangement with the company was anything other than contractual. The judge accepted the appellant's evidence that the appellant offered the respondent "employment" and describes the payments to him as "paycheques" or "salary" (paras. 21-23).

145 The respondent was paid what he asked to be paid. The judge found that the appellant set the amount "to avoid any liability to file a tax return" (para. 20). She also found that the respondent "neither discussed nor suggested to [the appellant] that he be paid any greater salary since he was aware of the many benefits beyond his monthly salary which [the appellant] was financing on his behalf" (para. 23).

146 These benefits were placed into the employment relationship by the judge in para. 59: "while [the respondent] was not paid a regular hourly wage in compensation for all his labour, unlike a regular employee he was the recipient of a number of other benefits apart from wages". I shall have more to say about this in the context of detriment, but refer to the judge's comment in this context as illustrative of her findings of fact that support the contractual foundation for the so-called enrichment as a result of the respondent's reduced wages.

147 In my view, any such enrichment flowed from the contract of employment and payment of the wages in an amount requested by the respondent. There is no finding of fact to support the suggestion that the employment contract was tempered by the family-like relationship between the parties. To the contrary, the judge found that the appellant "clearly drew a line concerning the limits of the relationship", that the respondent knew this and that "he never had any control over the parties' finances" (para. 80).

148 There is nothing to suggest the employment arrangement was designed in any way to benefit the appellant other than by the provision of services. The respondent stipulated what he was to be paid to suit his objectives. The judge found that the appellant considered she was assisting the respondent by employing him "while he sorted out his legal issues and ultimately sought some permanent employment" (para. 20).

149 I also consider the reduced wages in the context of the reasonable expectation of the parties.

150 My colleague notes in para. 22 that a defendant may address the absence of an established category of juristic reason, "by establishing 'another reason to deny recovery'". This includes the reasonable expectations of the parties. I agree with my colleague's observation in para. 9 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".

151 There is no finding of fact that the parties had an expectation that the respondent would be entitled to compensation from the appellant as a result of being paid reduced wages. As noted, he was paid the amount he requested. He never suggested he should get more. He well knew he was the recipient of additional benefits. These benefits were above and beyond what another employee would receive. The appellant considered she was assisting by employing him.

152 The business was that of the appellant. As noted, the judge found she drew a line in the relationship

concerning her financial affairs. The respondent's lack of any interest in the business is evidenced by the fact he felt obliged secretly to establish a competing company and to steal contracts from the appellant.

153 In my view, the judge's findings of fact, which are supported by the evidence, establish that the appellant was entitled to retain any benefit she derived from the reduced wages because neither party had an expectation that the respondent would be compensated further as a result of the payment to him of the wage he reques- ted.

154 As noted, I also question whether the receipt of reduced wages was a detriment to the respondent. Although Cory J. stated in *Peter v. Beblow* [1993 CarswellBC 44 (S.C.C.)] that detriment likely invariably follows benefit, I do not take that to be absolutely the case.

155 In this case, the amount of the reduced wage was requested by the respondent. He obviously felt that receiving a reduced wage and not having to file a tax return was of more benefit to him than receiving a higher wage and being required to do so. Where is the detriment in that?

156 In addition, the judge's conclusion the respondent recognized he received benefits additional to those available to other employees suggests no detriment. This is not a matter of inserting reciprocal benefits into the benefit, detriment analysis, but of determining the substance of the respondent's remuneration.

157 I conclude the appellant was not enriched unjustly by the respondent's receipt of reduced wages.

158 The judge described the benefit of the lower wages and the respondent's work on the Gimse property as minimal. On the basis that the lower wages were not an unjust enrichment, the value of the respondent's contribution to the Gimse property clearly approaches *de minimus*.

159 My colleague has undertaken a thorough analysis of the value of the respondent's contribution as a percentage of the values of the properties. She concludes the respondent is entitled to 7.5% of the value of the Portage Road Property. After appropriate deductions, the trial judgment is varied to "$7,310 less interest on $2,300 from 25 October 2006 to 1 May 2008, the date as of which the trial judge made her award and on which she released her reasons for judgment".

160 If half of the unjust enrichment figure arrived at by my colleague were attributable to the minimal work on the Gimse property, an attribution I consider to be generous, the value of the unjust enrichment would be $19,130. Deducting the value of the legal fees loan, stolen equipment and stolen contracts eliminates any right of recovery the respondent might have.

Conclusion

161 In my view, the appellant was not enriched unjustly by the payment of reduced wages to the respond- ent.

162 The minimal contribution of the respondent to the Gimse property might better have been recognized as value received, but I am content to proceed on the basis of value survived. On either approach, his minimal contribution is off-set by the value of the lawyers' fees loan, stolen equipment and stolen contracts which the appellant was entitled to recover.

163 As a general observation, whether one focuses on the juristic reason or quantum stages of the analysis,

it is difficult to see how a claimant who is found to have gained more from a relationship than he contributed to it is entitled to an equitable remedy based on unjust enrichment. In this case, I see no findings of fact that would support such a result.

164 I would allow this appeal and dismiss the respondent's action.

Appeal allowed.

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