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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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Equalization Works Perfectly . . . Except When It Doesn't

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Issues: Ontario — Interplay Between the Equalization Regime and Unjust Enrichment Claims

In *Martin v. Sansome* (2014), 43 R.F.L. (7th) 306 (Ont. C.A.) ("*Martin*"), the Ontario Court of Appeal was clear that in most cases involving married spouses, any unjust enrichment will be resolved through the equalization provisions of the *Family Law Act*. The court acknowledged that there *could* be exceptions, but left "open for another day the question of what should be done in those rare cases where monetary damages for unjust enrichment arising out of marriage cannot be adequately addressed by the equalization provisions."

Since *Martin*, courts have *almost* invariably treated equalization as a complete answer to the division of property problem on marriage breakdown. As Justice Wilson warned in *Ryan v. Ryan*, 2017 CarswellOnt 7819 (S.C.J.):

> [181] Caution should be exercised in advancing trust claims when the parties are married. The costs and complexity of such claims flies in the face of the purpose of the FLA to provide clear, predictable rules for the division of property after married parties separate.

There have been extremely limited exceptions:

1. In *Kofman v. Melfi* (2018), 11 R.F.L. (8th) 382 (Ont. S.C.J.), Justice DiTomaso concluded that equalization would amount to nothing because the husband had failed to disclose, his business had collapsed, and the matrimonial home was so encumbered that a monetary award would have been meaningless. In those circumstances, he was satisfied that the equities required a constructive trust giving the wife a 50% interest in the matrimonial home.

2. *Martin* does not apply to claims for a resulting trust: *Korman v. Korman* (2015), 63 R.F.L. (7th) 1 (Ont. C.A.); *Manchanda v. Thethi*, 2019 CarswellOnt 4341 (S.C.J.) — and this is not so much an exception as a clarification.

3. A claim that a party had a beneficial interest in a property on the date of marriage based on unjust enrichment arising prior to marriage requires an unjust enrichment analysis: *Lesko v. Lesko* (2021), 57 R.F.L. (8th) 305 (Ont. C.A.).

4. A claim to a beneficial interest in an Ontario property may be claimed where a foreign court does not deal with the Ontario property: *Bakhsh v. Merdad* (2022), 70 R.F.L. (8th) 33 (Ont. C.A.).

5. Shares purchased using a joint line of credit in a "joint family venture" are subject to a claim for unjust enrichment: *Horch v. Horch* (2012), 31 R.F.L. (7th) 220 (Man. Q.B.) — we don't count this as an "exception" because it predates *Martin* and because it is from Manitoba (not that there is anything wrong with Manitoba).

For over a decade, the "another day" referenced in *Martin* never came. However, that changed in 2025, when the Ontario Court of Appeal delivered two significant decisions about *Martin*'s boundaries. In *Iredale v. Dougall*, following *Martin*, the Court of Appeal confirmed that equalization was sufficient, even where the husband's extensive labour on the wife's family farm left him with far less wealth after separation. But in *Mullin v. Sherlock*, the Court of Appeal recognized an exception, upholding a substantial unjust enrichment award where equalization could not begin to capture the wife's years of unpaid contributions to a thriving business built during a long cohabitation but a very short marriage.

Together, the cases highlight both the strength of equalization as the presumptive remedy and its very limited exceptions, which remain rare and heavily dependent on the equities of the case. *Iredale* also offers useful guidance on spousal support, particularly the operation of the so-called "Rule of 65."

A Brief Reminder About Equalization

Before turning to the recent cases, it is worth recalling how the equalization regime interacts with unjust enrichment for those provinces that divide property by way of equalization. Unless one spouse has negative net family property, a **monetary award for unjust enrichment does not change the bottom line.** The reason is simple: the award creates an asset for one spouse and a matching debt for the other, both as of the date of separation, which difference the equalization calculation then offsets.

Take a simple example. Suppose the only asset at separation is a house worth $500,000 in the husband's sole name. With no marriage-date assets, his net family property is $500,000, the wife's is $0, and he owes her an equalization payment of $250,000. Now imagine the wife proves unjust enrichment and is entitled to a monetary award of $100,000. On paper, the husband's net family property falls to $400,000, hers rises to $100,000, and the equalization payment drops to $150,000. But he also owes her the $100,000 enrichment award. So the result is unchanged: each leaves with $250,000. It's equalization magic.

Unjust enrichment only matters if the court goes further and grants a remedial constructive trust, as this then gives the claimant an ownership interest in the property and the right to share in post-separation growth. Returning to the example, if the house rises in value to $600,000 after separation, without a constructive trust the husband would keep the entire $100,000 increase, ending up with $350,000 to the wife's $250,000. But if the wife is awarded a 50% interest in the home, she shares in the increase, leaving each spouse with $300,000.

Iredale v. Dougall

The husband and wife married in 1992 and separated in 2016. They raised two children, both adults by trial. Early in the marriage, the husband operated a home-inspection business and the wife worked in sales and later retail.

In 2008, the wife's father became ill and could no longer manage the family's 99-acre farm. The parents moved to town and rented the farm to the husband and wife through their family corporation. Starting with only four acres under cultivation, the parties converted the farm to organic production. The husband did most of the physical labour: repairing equipment, planting and harvesting crops, clearing rocks and weeds, caring for hens, building grain bins and silos, and installing solar panels. By the time of separation, the cultivated acreage had expanded substantially.

In 2013, the wife's parents transferred their shares in the farm corporation to the wife as an early inheritance, making her the sole owner. After separation in 2016, the husband stopped farming due to a shoulder injury and moved away. The wife finished one growing season and then leased the land for organic farming, earning rental income.

The Trial

The husband accepted that, as a gift, the wife's ownership of the farm was excluded from net family property, but he advanced an unjust enrichment claim and sought a constructive trust, aiming to secure a share in the farm's current value.

The trial judge agreed that the husband's work provided a tangible benefit and spared the wife the cost of hiring help. However, because the farm had long been in her family, he had no ongoing interest in farming, and the venture had ended, the court held that a monetary award was sufficient. The claim for a beneficial interest in the land was rejected.

Following *Martin v. Sansome*, the judge explained that once unjust enrichment is established and where a monetary remedy is adequate, the court must first calculate equalization and consider an unequal division only if equalization would be unconscionable. Applying this framework, the wife was ordered to pay the husband $80,476.76 in equalization, which included the farmhouse and two surrounding acres valued at $110,500 under s. 18(3) of the *Family Law Act*, R.S.O. 1990, c. F.3. That provision clarifies that where a property serves both residential and non-residential purposes, the matrimonial home — which cannot be excluded even if acquired by gift or inheritance — includes only the portion of the property that is reasonably necessary for the use and enjoyment of the residence. In addition, the wife was ordered to pay $61,172.49 to purchase the husband's interest in jointly owned assets.

The trial judge further ordered the wife to pay spousal support of $350 per month for five years on a needs basis, while rejecting the husband's compensatory claim.

The Appeal

The husband appealed, arguing that the equalization payment failed to capture the value of his years of labour, and that he was entitled to indefinite spousal support under the "Rule of 65" in the *Spousal Support Advisory Guidelines*.

The Court of Appeal dismissed the appeal.

On unjust enrichment, the court reaffirmed that the *Family Law Act* equalization provisions are designed to address any enrichment arising on marriage breakdown. Subsection 5(7) confirms that equalization reflects the spouses' equal contributions, financial and otherwise, to their shared responsibilities.

Relying on *McNamee v. McNamee* (2011), 4 R.F.L. (7th) 13 (Ont. C.A.), *Martin v. Sansome* (2014), 43 R.F.L. (7th) 306 (Ont. C.A.), and *Korman v. Korman* (2015), 63 R.F.L. (7th) 1 (Ont. C.A.), the Court of Appeal held that the trial judge was correct to resolve ownership and constructive-trust issues before calculating net family property, and that a monetary award was an adequate remedy.

The wife properly included the farmhouse and two acres in her net family property, increasing the equalization owed, while her gifted shares in the farm corporation were rightly excluded. The record showed no intention to jointly own the farm or corporation.

Contrary to the husband's argument, the trial judge was not required to conduct a separate assessment of the farming business under a "joint family venture" or "value survived" approach. By the time of separation, the business had ended, and any value it produced had already been shared between the parties in a manner consistent with their contributions. The court described the appeal as an effort to re-litigate matters already determined, and found no legal or factual error.

On spousal support, the husband argued that his unjust enrichment claim should have also produced a compensatory spousal support award, and that the Rule of 65 mandated indefinite support. The court rejected both arguments, emphasizing the deference owed to trial judges on support determinations: *Hickey v. Hickey* (1999), 46 R.F.L. (4th) 1 (S.C.C.) and *Cronier v. Cusack*, 2023 CarswellOnt 3480 (C.A.).

Here, the husband did not garner a lot of support for support. The trial judge found that he had a weak compensatory claim measured against the wife's compensatory claim, and he had been voluntarily unemployed for nine years since the separation in 2016 — as a result of which he had income of $35,000 imputed to him — and he likely could have earned more, with a bit

of effort. The wife only made $45,000. Both were in their early 60's. And including the retroactive support award, he actually got support for seven years, not just five.

According to the Court of Appeal, the trial judge had reasonably rejected the compensatory claim. As for the Rule of 65, the court stressed that "indefinite" does not mean "permanent." While the *SSAGs* suggest indefinite support where the recipient's age at separation plus the years of cohabitation total 65 or more, judges retain discretion to impose time limits. As the *SSAG* Revised User's Guide explains, the Rule is a guideline, not a guarantee. On these facts, a five-year award of modest support was upheld as striking the right balance, since both parties would enter their mid-sixties with similar resources and the ability to support themselves.

Two things to note. First, a lot of ink was spilled considering the Rule of 65 here. Remember: the *SSAGs* recommend indefinite support (or more properly stated, "support with unknown time duration") in two situations: where the Rule of 65 is met **or** *where the total cohabitation is more than 20 years*. Here the parties cohabited for 24-years. No need to rely on the Rule of 65 here.

Mullin v. Sherlock

The parties began living together in 2000. At the time, the husband was the sole shareholder of GS Medical Packaging, a company that manufactured and supplied sterilization packaging for the health-care sector. The wife quickly became very involved in both the home and the business.

Over 12-years of cohabitation, the wife performed extensive unpaid and underpaid work in the company: bookkeeping, administration, sales, client development, trade shows, and shipping logistics. She also assumed significant domestic responsibilities and supported the husband's children from a prior relationship. The parties refinanced their home, gave personal guarantees, and tied family assets to the business.

They parties married in 2012, but they separated less than a year later. By then, GS Medical was worth millions of dollars. Because equalization measures only the change in net family property between the dates of marriage and separation, the wife stood to receive almost nothing despite her years of contributions during cohabitation.

The wife began litigation in 2013. She claimed spousal support, equalization, and a proprietary award of a constructive trust over GS Medical. What followed were years of disclosure battles. Despite multiple court orders requiring extensive personal and corporate records, the husband failed to comply. In November 2017, a motion judge found that the husband had deliberately frustrated the process, withheld critical disclosure, and breached his obligations. His pleadings were struck, and the wife was allowed to proceed to an uncontested hearing.

The husband appealed. In what is now one of the leading authorities on striking pleadings for non-disclosure, *Mullin v. Sherlock* (2018), 19 R.F.L. (8th) 1 (Ont. C.A.), the Court of Appeal dismissed the appeal but varied the order to give the husband limited participatory rights at trial.

At some point after the appeal, the wife withdrew her equalization claim. She strategically chose to pursue only her claims for a joint family venture/constructive trust, and for spousal support. This reflected the reality that equalization, tied only to the brief marriage, would have provided little to no compensation for her 12 years of contributions to the household and the business.

The Trial

Although equalization usually addresses unjust enrichment in marriage cases, the trial judge found this to be one of the rare situations where equalization would not provide an adequate remedy. The marriage was short compared to the long cohabitation, and no equalization claim was before the court.

The wife established all three elements of unjust enrichment. Her years of unpaid and underpaid work in the company gave the husband direct economic benefits. She suffered a corresponding deprivation by sacrificing income, career opportunities, and financial independence. And there was no juristic reason for him to retain those benefits.

The trial judge characterized the relationship as a joint family venture: *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.). The couple's shared efforts, financial risks, and integration of domestic and economic contributions showed a common goal of building GS Medical into a successful business.

On remedy, the trial judge found that an equalization award — had one been claimed — would have been wholly inadequate to address the unjust enrichment on the circumstances of this relationship. He found that a monetary award, valued on the principles of "value survived" (given the joint family venture) would be appropriate. The court awarded the wife $3 million, representing half of the $6 million valuation that the husband had attributed to the company on two mortgage applications he filed with his bank.

The trial judge also ordered $365,624 in lump-sum spousal support on both compensatory and non-compensatory grounds, and awarded $475,000 in costs against the husband.

The Appeal

The husband appealed, challenging almost every aspect of the trial decision: the unjust enrichment finding, the valuation of the company, the constructive trust award, the spousal support order, and the costs ruling.

The Court of Appeal resoundingly dismissed the appeal. It reaffirmed that successful unjust enrichment claims between married spouses will be rare, but that this case was an exception. The lengthy period of cohabitation, followed by a very short marriage, meant that equalization would have failed to capture the wife's contributions.

As the court explained: this was "an appropriate case for the application of the principles of unjust enrichment, despite the fact that the parties were married." That approach was exceptional, because in the vast majority of cases the *Family Law Act* equalization regime "fully addresses and remedies any unjust enrichment" that arises on marriage breakdown. Unlike *Iredale*, however, this was a case where equalization simply could not achieve its fundamental goal under s. 5(7) of the *Family Law Act*. If equalization alone applied, the outcome would have been based only on the change in the parties' assets between their 2012 marriage and 2013 separation without accounting for the reality that GS Medical's major growth occurred during their years of cohabitation.

It was also relevant that neither party pursued an equalization claim at trial. (But this does seem to be an artificial construct given that the wife withdrew her equalization claim.)

The court upheld the trial judge's reliance on the joint family venture framework and confirmed that the "value survived" approach was the proper method of assessing the claim because the wife's efforts were bound up with the husband's continued ownership of the company. The court also accepted the trial judge's use of the husband's own mortgage documents to value the business. Parties who fail to disclose cannot complain when courts later rely on their own admissions.

On spousal support, the court deferred to the trial judge's findings. The lump-sum award reflected the wife's lost earning capacity, the privileged lifestyle she enjoyed during the relationship, and her need for certainty given the husband's litigation conduct.

Finally, the court upheld the significant costs award, emphasizing that parties who obstruct disclosure and frustrate the truth-seeking function of a family trial should expect to bear serious cost consequences.

Conclusion

Martin v. Sansome set the framework. In most marriage breakdowns, equalization under the *Family Law Act* will be enough to address unjust enrichment. *Iredale v. Dougall* illustrates the rule. *Mullin v. Sherlock* illustrates the exception. Together, they show both the reach and the limits of the statutory regime.

One notable feature of *Mullin* was the wife's decision to withdraw her claim for equalization. That strategy helped prevent the court from defaulting to equalization, but it carried the risk that, without a constructive trust or unjust enrichment award, she would be left with nothing. Counsel must carefully weigh this strategy. It could be risky.

The cases also underscore that outcomes will often turn on the equities. In *Iredale*, the trial judge viewed the result as fair because most of the wife's wealth was inherited and not created by the parties, the business no longer existed, the husband had not led evidence to provide that his contributions increased the value of the gifted assets, and the husband was still able to share indirectly in some of the value of the gifted assets it through the matrimonial home.

In *Mullin*, by contrast, the trial judge found that the wife had contributed significantly to the success of the husband's business over more than a decade, equalization would not have recognized those contributions, and the husband's obstructive conduct tipped the equities strongly in her favour. The appeal outcomes flowed from those findings — and might well have been different had the trial judges assessed the equities differently.

For most spouses, equalization does the work. But where it falls short, as *Mullin* shows, the facts are decisive. It is not enough to show that an award for unjust enrichment would yield more for your client than equalization. Far more is required. Success depends on marshalling the evidence to demonstrate that the equities favour your client, and that the case is one of the "rare cases" where a claim for unjust enrichment is justified.

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