

Cohabitation Agreements

In Real Estate Transactions



CONRAD  CONNORS

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October 1st, 2018

The Scope of the Presentation

- Unmarried couples with at least one of those parties buying or selling a property.
- The purchase and sale of homes that the parties intend to live in or did live in. It is not intended to deal with income properties or business assets.
- We will not be dealing with estate issues.
- We will not be dealing with other issues commonly found in cohabitation agreements. I.e. support, custody, parenting, procedural issues.

What is a Cohabitation Agreement?

An agreement between:

- Romantic partners that are not married.

Note: The parties may be married to other people or divorced or widowed.

- Romantic partners that live together or intend to live together.

Note: You do not have to have the agreement executed prior to the parties moving in together, though there are instances where it is advisable.

What is a Cohabitation Agreement?

An agreement that governs (generally):

- How the parties will arrange their financial and/or parenting affairs during their relationship.
- How the parties will divide their assets upon the dissolution of their relationship.
- How the parties will provide support and parenting upon the dissolution of their relationship.
- Other things incidental to property, support and parenting. I.e. Life insurance, procedural issues.

Warning!

Support and Parenting are difficult to set out in a cohabitation agreement. Whereas an agreement may be binding with respect to property, it is not binding with respect to support or parenting/custody. Under the *Parenting and Support Act* an agreement is relevant to a spousal support determination, but not determinative. Custody/parenting is always the best interests of the child and child support belongs to the child, so you can't contract out of future child support.

Where do cohabitation agreements fit into a real estate transaction?

The Matrimonial Property Act applies only to married couples, couples in a registered domestic partnership, widows, widowers, and those in good faith marriages that are void and are living together or lived together in the past year.

The MPA creates a presumption that assets owned by either spouse are owned equally by both spouses.

The MPA does not apply to unmarried couples, and therefore there is no presumption of any ownership in property for which a party is not an owner.

Where do cohabitation agreements fit into a real estate transaction?

If parties do not have a cohabitation agreement, then the court presumes that the party on title to the property is the legal owner entitled to the equity (and subject to the encumbrances) related to such property.

We can use a cohabitation agreement to rebut this presumption by creating an interest in property that does not exist on the property's title. NOTE: there are situations when you should consider whether to register these interests.

Where do cohabitation agreements fit into a real estate transaction?

Ok, so what if my client doesn't want to create an interest that isn't on title?

Shouldn't we just avoid a cohabitation agreement?

The Law of Equity

Those presumptions we just spoke about regarding title to property - those are rebuttable. How? Equitable interest.

While cohabitation agreements may create an interest in property that did not otherwise exist, in my experience they are used more often to defeat a claim in equity. Specifically, a claim for unjust enrichment.

Kerr v. Baranow, 2011 SCC 10

- Sets out the law of unjust enrichment in the context of unmarried couples.
- Rejected the “dichotomy of remedial choice” ie. Constructive Trust or a Monetary Award.
- Added a category for a Joint Family Venture

Kerr v. Baranow, 2011 SCC 10

Unjust Enrichment may be established upon proving the following three elements:

- (1) An enrichment or benefit to the defendant;
- (2) A corresponding deprivation to the plaintiff; and
- (3) Absence of a juristic reason.

Kerr v. Baranow, 2011 SCC 10

The Honourable Justice Cromwell, as he then was, described a **Joint Family Venture** as:

It consists of cases in which the contributions of both parties over time have resulted in an accumulation of wealth. The unjust enrichment occurs following the breakdown of their relationship when one party retains a disproportionate share of the assets which are the product of their joint efforts. The required link between the contributions and a specific property may not exist, making it inappropriate to confer a proprietary remedy. However, there may clearly be a link between the joint efforts of the parties and the accumulation of wealth; in other words, a link between the “value received” and the “value surviving”. as McLachlin J. put it in *Peter*, at pp. 1000-1001. Thus, where there is a relationship that can be described as a “joint family venture” and the joint efforts of the parties are linked to the accumulation of wealth, the unjust enrichment should be thought of as leaving one party with a disproportionate share of the jointly earned assets.

Kerr v. Baranow, 2011 SCC 10

Proving a joint family venture is a complex global analysis which is usually decided having regard to the following headings:

- (1) Mutual Effort
- (2) Economic Integration
- (3) Actual Intent; and
- (4) Priority of the Family

What did all that just mean?

It means that any situation wherein romantic couples are living together has the potential to create a joint family venture. Furthermore, while one party may view the situation as a joint family venture, the other party may not.

This issue of a joint family venture is creating a lot of litigation. Hard to say if it has created more litigation than was already out there, but for family lawyers it meant going from having to prove or disprove some monetary service that was provided or some direct contribution to the acquisition, maintenance, or preservation of a particular asset to taking a global look at the parties' relationship as a whole.

What does Kerr v. Baranow have to do with cohabitation agreements and real estate transactions?

Previously, we discussed that cohabitation agreements can create an interest in property where none is presumed. Such agreements can also be used to stop an interest from being created.

In order to establish an unjust enrichment, whether under the traditional method or as a joint family venture, a party must establish an absence of juristic reason.

A cohabitation agreement can be used to create a juristic reason and defeat an unjust enrichment claim.

This would be a top reason a party would want a cohabitation agreement. We will discuss these ahead in the scenarios.

Scenario 1

Two Parties Jointly Purchase a property. Any issues?

1. Did you determine if they are romantically involved?
2. Did you determine if the parties intend to reside together in this property?
3. Did you find out if there is a cohabitation agreement?
4. Have you had a discussion about their actual intent with respect to this house?
5. Is it any of your business to ask in the first place? I.e. Is this your role as a real estate lawyer?
6. What about potential conflicts of interest?

Scenario 2

Two Parties are purchasing a property, but only one party is going to be on title?

Why might this occur?

- Bad credit.
- Avoid Creditors.
- Avoid raising issues with former spouses.
- Privacy
- many other reasons ...

Issue:

Protecting the interest of the party that will not be in title.

Scenario 3

The funds provided to purchase the property is coming from one side or disproportionately from one side.

What if the parties are purchasing a property, but the down payment is coming from just one party, or from a party's parent, or inheritance?

Unless this is documented or an agreement is reached, tracing those funds at a later time and also rebutting the presumption of a joint tenancy will be expensive and an uphill legal battle.

Consider a cohabitation agreement to deal with the inequitable start to this purchase.

Also consider a formal loan agreement to ensure that if a party is obtaining these funds from a third party that the third party is protected, if necessary.

Careful of the conflict here. For example, let's say one party is your long time client, but the other is the one providing the funds. Will you speak up?

Scenario 4

One party is purchasing the property, but plans to allow their partner to move in.

UH OH!

Err, I mean congrats on the big step in your relationship!

You've just walked into what could be the beginning of a long joint family venture.

Final Thoughts

- Spot the issue.
- Earlier is generally better.
- It is fair game to ask clients if they have a cohabitation agreement.
- Be very clear as to what you are retained to do (ie. convey property, advise on legal title - not to advise on rights between parties.
- Be very clear as to who you are representing. This is especially true where only one party is on title and the other party is involved one way or another in the transaction.