

# CED: An Overview of the Law

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## Family Law – Property – Unjust Enrichment and the Presumptions of Advancement and Resulting Trust

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III.1: Unjust Enrichment and the Presumptions of Advancement and Resulting Trust

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### VIII.1: Introduction

**See** Canadian Abridgment: FAM.III.4.a.i Family law — Division of family property — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts; FAM.III.8.a.vi Family law — Division of family property — Factors affecting equal or unequal division — Effect of conduct of spouses during marriage — Unpaid work in spouse's business; RST.I Restitution and unjust enrichment — General principles; RST.V.5 Restitution and unjust enrichment — Benefits conferred in anticipation of reward — Family

In addition to the provincial statutes governing the division of family property on breakdown of marriage, equitable trust principles continue to apply in family law cases. Unmarried spouses typically allege a trust to obtain an interest in property standing in the name of his or her partner to which he or she may have no rights under provincial property legislation. A married spouse will allege a trust to avoid the implications of property legislation and gain monetary relief or a proprietary interest with respect to a particular asset.

### VIII.2: Presumption of Resulting Trust and Presumption of Advancement

**See** Canadian Abridgment: FAM.III.4.a.i.A Family law — Division of family property — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Resulting trusts generally; EST.II.4 Estates and trusts — Trusts — Resulting trust

The presumption of a resulting trust applies when a transfer of property into the name of another is made for no consideration and the onus is placed on the transferee to demonstrate that a gift was intended. If the transferee cannot meet the onus and rebut the presumption, they will be found to hold the property in trust for the transferor. The presumption of advancement (the presumption that a gift was intended), in contrast, historically applied to transfers from husband to wife or from father to child. No presumption of a gift from a wife to her husband arises from a transfer by the wife into his name or into their joint names; it is a question of fact as to whether an advance by a wife to a husband is made as a gift or a loan. The

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presumption of advancement applies only to married spouses.

In Alberta, Ontario and Saskatchewan, the presumption of advancement has been abolished insofar as proceedings under family property legislation are concerned and replaced with the presumption of resulting trust and where property is held in joint names, by a presumption of joint tenancy. Absent legislative intervention, the presumptions of resulting trust and advancement both continue to apply today to gratuitous transfers. However, the strength of the presumption of advancement varies according to the circumstances and typically very little evidence is required to overcome the presumption of advancement in a marital dispute where there is an overriding legislative scheme for the division of assets and where the parties are available to testify to their intentions when the transaction took place. The presumption of advancement assumes real significance if the litigation does not arise from the separation of the spouses and they are not available to testify. This is especially so in the context of a traditional marriage.

The Supreme Court of Canada has recently held that a resulting trust arising solely from the common intention of the parties has no role to play in the resolution of property and financial disputes in domestic cases, as it is doctrinally unsound and inconsistent with the underlying principles of trust law. The principles of unjust enrichment, with the possible remedy of a constructive trust, provide a much less artificial and more comprehensive basis for addressing claims arising from domestic partnerships. However, the traditional resulting trust is still available where one common law partner makes direct financial contributions to the purchase price of property held by the other or where there are gratuitous transfers between common law partners.

In British Columbia, the doctrine of presumption of advancement remains a part of the law of the province but it is no longer confined to those who are formally married to each other. It may be applied in appropriate circumstances to common law relationships or to “marriage-like relationships”.

Apart from legislative intervention, the presumption of advancement between husband and wife continues to exist in the common law provinces of Canada. The presumption of advancement must be rebutted by providing evidence that title was placed in the wife’s name for some legitimate purpose.

When a husband transfers property to his wife for the purpose of defeating the claims of his creditors, he cannot rebut the presumption of advancement by relying on his own illegal act. Similarly, as a general rule, the spouse who has the onus of proof will not be able to rebut the presumption (of resulting trust or of advancement) by proof of illegal actions or intentions.

The presumption of advancement can apply more narrowly when a future husband or wife makes a gift to his or her future spouse. In such a case, it is the nature of the relationship

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between the future spouses which makes the presumption of advancement applicable. Usually, in such a case, the presumption of advancement will only apply to the transfer if the marriage takes place.

## VIII.3: Unjust Enrichment: Imposition of Constructive Trust and Other Remedies

**See** Canadian Abridgment: FAM.III.4.a Family law — Division of family property — Determination of ownership of property — Application of trust principles

The remedial constructive trust is an available remedy typically applied to prevent unjust enrichment and provide relief where informal or formal spousal relationships end. It is available to married and unmarried people. To warrant the imposition of a remedial constructive trust, a plaintiff must prove unjust enrichment.

To establish unjust enrichment a plaintiff must show the following: a valuable contribution (benefit), a corresponding deprivation and no juridical right to retain the benefit. The usual type of “juridical” reasons, which would justify the defendant keeping the benefit, include gift and contract.

The preferred remedy for unjust enrichment is monetary compensation. A monetary award is not restricted to an award based on a “fee-for-services” or “value received” basis. Where the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of a joint family venture to which both partners have contributed, the monetary remedy should reflect that fact and be assessed by determining the proportionate contribution of the claimant to the accumulation of the wealth. Whether the parties have been engaged in a joint family venture is a question of fact determined by assessing all of the relevant circumstances, including (a) mutual effort, (b) economic integration, (c) actual intent, and (d) priority of the family.

When a monetary award is inappropriate or insufficient, a proprietary remedy may be required. A remedial constructive trust may be found where the claimant can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property.