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Phone: (800) 668-6481 | Fax: (905) 479-3758 | John.Carson@lexisnexis.ca

Family

Property rights and married versus unmarried relationships | John-Paul Boyd

By **John-Paul Boyd**

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(November 28, 2018, 10:42 AM EST) -- Alberta received some pretty big news on Nov. 22 when the provincial government announced some reforms to its family law legislation. Amendments scheduled to take effect on Jan. 1, 2020, will extend the current matrimonial property regime to include unmarried partners.

In slightly more than a year, Alberta will join British Columbia, Manitoba and Saskatchewan in providing people in long-term cohabiting relationships with property rights equivalent to those enjoyed by married spouses. This is an important change in the law because at present unmarried partners have no presumptive property rights except to jointly owned property, whether their relationship lasted for five years or 50. To get an interest in property owned by the other partner, individuals in unmarried relationships must make a claim under the law of trusts, usually the constructive trust.

The constructive trust was developed by the Supreme Court in cases like *Pettkus v. Becker* [1980] S.C.J. No. 103 and *Peter v. Beblow* [1993] S.C.J. No. 36 — and most recently in last week's decision, *Moore v. Sweet* 2018 SCC 52 — as an equitable remedy in cases where a person has made substantial contributions to the value of property owned solely by their partner.

Such claims are difficult to prove, provide compensation ranging from the trivial to the truly substantial, and are often offset by counterclaims for whatever contributions were received by the claimant. It is extremely challenging to predict the likely result of constructive trust claims with any accuracy, and they are notoriously difficult for counsel to settle as a result.

Extending matrimonial property rights to unmarried partners provides a degree of certainty that is desperately needed. It gives these couples rights most of them think they already have and, by implementing a well-understood scheme for the division of property, provides sufficient predictability upon relationship breakdown that the cost and time of litigation can hopefully be avoided more often than not.

I was practising in British Columbia when the new *Family Law Act* became law, and had the opportunity to reflect on the impact of a similar legislative development. Among other things, it occurred to me that the extension of property rights to unmarried partners effectively reduced the difference between married and unmarried relationships to the expense of the marriage ceremony and the cost of the divorce order. I suppose that marriage implies a greater degree of commitment on the part of the celebrants, but, other than that, the duties and entitlements of married couples and unmarried couples were pretty much identical.

This thought has occurred to others. I recently wrote about the changes pending in Alberta, and one reader offered the comment that the amendments mean that: "… according to this government, marriage is no longer a social good that is to be encouraged. Two people who make a solemn, legal, lifetime commitment to each other

are to have the same legal rights as people who simply share a residence and property. There are far reaching implications for our society that come along with this legislation, which is a transparent concession to a certain lobby group that leads the NDP around by the ear."

Now, while I have no idea to which lobby group the reader was referring — although I'm certainly curious — the reader makes the point about the distinction between married and unmarried relationships in an interesting way.

In Canada, the number of divorces levelled off after the passage of the 1985 *Divorce Act*, and the 25-year divorce rate has remained in the 40-41 per cent range for the last 10 or 15 years. (In Alberta, the divorce rate is a fair bit higher; it sits in the 46-47 per cent range.)

The boomers are the first generation of Canadians to have lived the whole of their adult lives with federal divorce legislation in place, and divorce is now a normal life event that no longer carries any social stigma at all and is often planned for. We now have more people who have divorced and remarried or repartnered than at any time before in Canadian history.

On the other hand, between 2006 and 2011 the number of unmarried long-term cohabiting relationships increased by 13.9 per cent, more than four times the increase in the number of married relationships. In fact, the number of marriages has been steadily decreasing since 1971, despite the overall growth of the Canadian population and the legalization of marriage for same-sex couples. And, like divorce, "living in sin" also no longer carries a social stigma.

Unmarried committed relationships have become commonplace in Canadian society, and to describe such couples as merely "sharing a residence and property" unfairly trivializes the social, economic and emotional importance of their relationships. These relationships certainly involve living together, and often include the ownership of property, as well as having children, investing in the future, making plans together and sacrifices for each other and a high degree of mutual interdependence.

It was for these reasons that governments across Canada began to recognize the significant economic consequences long-term unmarried relationships entail in the 1970s, and extended the right to apply for spousal support to individuals leaving such relationships. Most provinces now allow unmarried couples to adopt children and receive the family rate for health insurance, and unmarried couples qualify as spouses for the purposes of Employment Insurance, the Canada Pension Plan and Old Age Security.

The extension of matrimonial property rights to individuals in unmarried relationships is a small but important continuation of this trend, and has the collateral impact of significantly improving their ability to access justice when their relationships end. As I wrote in my reply to the reader, it seems odd to say that marriage is a social good for which the reward is a sensible property regime when a marriage falls apart.

I applaud the government of Alberta for taking this step. To Canada's other provinces and territories, I say: what on earth is taking you so long?

John-Paul E. Boyd is a family law arbitrator and mediator, working in Alberta and British Columbia and the former executive director of the Canadian Research Institute for Law and the Family. *Learn more at www.boydarbitration.ca.*

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