

Family Law Act Modernization Project:

Property Division and Spousal Support

Backgrounder

Property division and spousal support are issues people might face when they go through a separation. The *Family Law Act* (FLA) provides the provincial set of property division and spousal support laws that apply in British Columbia to spouses, married or unmarried, when they separate. Under the FLA, a “spouse” refers to people who are married or have lived together in a marriage-like relationship for at least two years. The spousal support laws (but not the property division laws) also apply to people who have lived together for less than two years, but have a child together.

We would like to hear your feedback on whether the FLA laws on property division and spousal support need to be updated. We invite you to fill out a survey to share your thoughts and experiences (if any) on these topics. Before you get started with the survey, we’ve prepared a background paper to introduce you to some specific issues the Ministry of Attorney General is reviewing for updates:

- Family pets,
- Gifts between spouses, and
- Spousal support.

To skip ahead to the survey, click here:

<https://survey.jag.gov.bc.ca/snapwebhost/s.asp?k=165817175096>

If you are interested in reading more technical information about all the property division and spousal support issues that we are looking at in this project, you can read the full technical paper here: https://engage.gov.bc.ca/app/uploads/sites/121/2022/07/FLA-Modernization_Public-Discussion-Paper_July-2022.pdf

This paper is for general information only and is not legal advice. We recommend that you get legal advice before you make any final decisions about your family law dispute.

Property Division

Have you ever wondered what happens to people’s property at the end of a relationship? The FLA sets out the laws for how property is divided when spouses separate in British Columbia – this includes their house, their investments, their cars, and yes, even their pets!

The FLA creates two categories of property that spouses may have in a relationship: family property and excluded property.



“Family property” is all property that spouses own at the time they separate. It also includes all the debt the spouses have at that time. Family property is generally divided equally between the spouses. Family property can be divided unequally in certain situations if equally dividing the property will lead to significant unfairness.

“Excluded property” is property that one spouse gets to keep as their own after the couple separates. Excluded property includes property that one spouse had before the relationship started or after the relationship ended, gifts and inheritances one spouse received from other people (other than their spouse), some settlement or damage awards, some insurance payments, and some kinds of trust property. Excluded property can only be divided between the spouses in a few situations if not dividing the property will lead to significant unfairness.

Determining whether property is family property or excluded property plays a big part in deciding who gets to keep what at the end of a relationship.

It might not always be clear what is excluded property. For example, excluded property also includes property “derived from excluded property”. What does that mean? Imagine if you received some inheritance money (excluded property) and you put it in a bank account. Then you use the money in the bank account to buy a new car. That new car then also becomes your excluded property because it was “derived from” your original excluded property.

Did you know?

A spouse’s excluded property may still be excluded, even if it changes forms or is mixed with other property during the relationship.

Another tricky part is that if the excluded property increases in value during the relationship, then that increase becomes family property. So, imagine if you just left your inheritance money in the bank account and did not buy a new car. Over time, the amount in the bank account would grow with interest. That growth is family property. If you and your spouse separate, then you would get to keep the original amount of inheritance (excluded property), but you and your spouse would split the amount of the earned interest (family property).

Separated spouses are allowed to make agreements about how they are going to divide their property without having to go to court. If they cannot agree, they might choose to go to court where a judge will decide how to divide their property for them.

Unlike some other family law issues, property division questions can only be decided in the Supreme Court of British Columbia. The Provincial Court of British Columbia cannot decide these issues. Going to Supreme Court costs more money and involves more complex rules that may make it harder for some people without a lawyer’s help.

It is important that the FLA includes the property division issues that British Columbia families may have and gives clear guidelines for resolving them to encourage out-of-court agreements as much as possible.

Pets

If spouses cannot agree on what happens with their pet when they separate, then they might choose to go to court to resolve the dispute.

Under the FLA, pets are treated as property, and all types of property are treated the same. Other than dividing property based on whether it is “family property” or “excluded property,” there are no special rules for unique types of property.

When spouses separate, the same property division rules that apply to their furniture, clothes, and cars, also apply to their pets. If pet owners are not married and have been together for less than two years (meaning they’re not “spouses”), the FLA does not apply to them and they can instead go to the Civil Resolution Tribunal to decide who has the better property claim to their pet.



Did you know?

In BC, the laws treat a family pet like a piece of personal property. When a relationship ends and there’s a dispute over the family pet, the court is limited to deciding which spouse owns and gets to keep the pet.

Generally, judges decide which spouse owns and keeps the pet. Many have said that separating spouses cannot be “joint owners” of their pets because, for example, a pet is not divisible and spouses are not interested in selling it to split the proceeds. Judges also do not have the power under the FLA to make arrangements for the time spouses can spend with a pet or how they will each care for it.

Many decisions acknowledge that treating pets like property may not be satisfying to the parties. For example, it has been said that this “may seem harsh,”¹ it may be “slightly distasteful...in the case of two loving and devoted pet owners,”² and it “is unsatisfying to many people who keep dogs as pets.”³

For many spouses, a pet is more like a beloved family member than property. In addition to adults in a family, children may also have strong emotional bonds with their pets.

Some British Columbia judges have considered the best interests of animals in ownership disputes that are not between spouses.⁴ The FLA does not include any rules about the best interests of a pet when spouses separate, but it does have rules about the best interests of children. For example, parenting arrangements must only be made in the best interest of the child. Parenting arrangements include who is



¹ Civil Resolution Tribunal cases: *Johnston v. Arnott*, 2019 BCCRT 748, para. 9, and *Austin v. Birnie*, 2019 BCCRT 1238, para. 13.

² *Gardiner-Simpson v. Cross*, 2008 NSSM 78, paras. 4-5

³ *Baker v. Harmina*, 2018 NLCA 15.

⁴ *O'Donoghue v. Walker*, 2019 BCPC 257, paras. 14-21; *Sagoo v. Murray*, 2016 BCPC 376 (CanLII); *Haywood v. Carrasco*, 2016 BCPC 0071; and *Watson v. Hayward*, 2002 BCPC 259 (CanLII).

responsible for caring for the child and who spends time with the child. Parenting arrangements for a child can be shared jointly, exercised by only one guardian or divided between the child's guardians. They can be set out in an agreement between the guardians or in an order from the BC Provincial Court or the BC Supreme Court.

Do you think the FLA needs to be updated with laws specific to pets when spouses separate?

There is a range of options for changes that would allow the FLA to deal with pets when spouses separate. Here are a few examples of what the FLA could allow judges to do:



- Allow judges to recognize, change, or enforce agreements that former spouses have made about their time with and care for pets.
- Allow judges to decide that separating spouses jointly own pets.
- Allow judges to make orders about former spouses' time and care for pets.
- Require parties and judges to consider the best interests of a pet when making any decisions.

Each option could help B.C. families better resolve their issues with pets, but may also have implications, like increasing the number of disputes that come to court about pets.

Gifts between Spouses

Can spouses give each other gifts? The answer may seem obvious, but what happens to the gift when the spouses separate? The FLA says that a gift from someone outside of the relationship to one spouse is excluded property, but it doesn't say what happens when spouses give each other gifts. Remember that the FLA says that spouses generally get to keep their excluded property but equally divide family property.



Is a transfer of property between spouses a gift? What if the spouse did not "intend" to give a gift when they transferred the property but was motivated by a different reason? What if the property was originally one spouse's excluded property? Should the property go back to the transferring spouse as excluded property or be treated as family property and be divided between the spouses when they separate?

Gifts or "transfers of property" between spouses during their relationship has probably been the most difficult property division issue that lawyers and judges have grappled with under the FLA.

Here's why...

There is an old common law (which means it was created by court decisions not legislation) that says if a married husband gives property to his wife, then it is presumed that he gave her a gift. It is so old that it only applies to married spouses (not to unmarried spouses), and only to

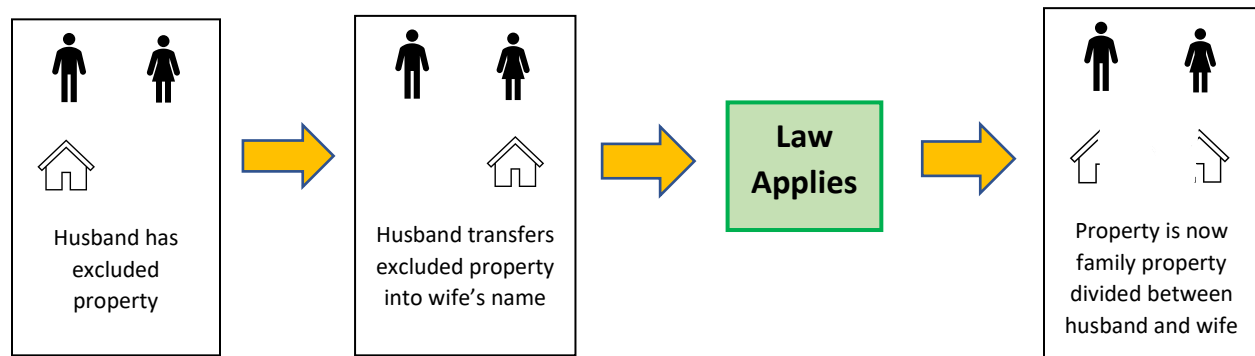
transfers from a husband to his wife (not to transfers from a wife to her husband or to transfers between same-sex spouses).

The legal name for this old law is the “**presumption of advancement.**”

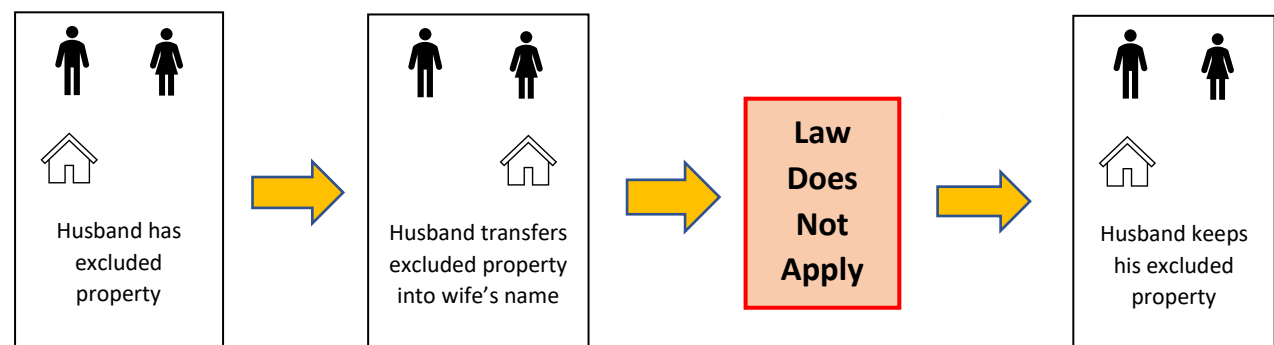
The problem is that the FLA does not specifically say whether the old presumption law still applies in British Columbia or not. This has left BC judges trying to decide if the old law applies to property transfers between spouses, and the judges do not all agree. This makes it hard for separating spouses to reach agreements about dividing their property outside of court because each party will often argue for whichever option gives them the best result. It is also hard to predict how property will be divided if separating spouses go to court because some judges may apply the old presumption law, and others will not.

Whether the old law applies or not can be important if property division is an issue between separating spouses. For example, imagine if a husband owned a house before he entered a relationship with his wife (the house would be his excluded property). During the relationship, the husband transferred the house into his wife’s name. When they separate, who should get the house? Under the FLA, the answer will change based on whether the old presumption law applies or not.

If the presumption law applies:



If the presumption law does not apply:

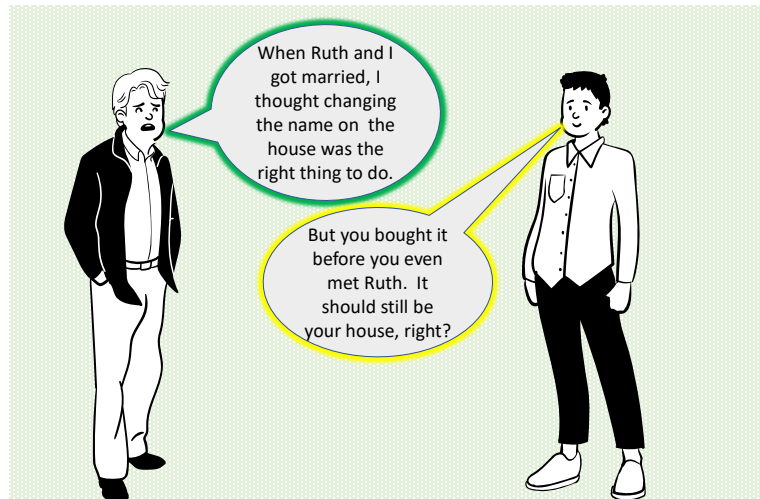
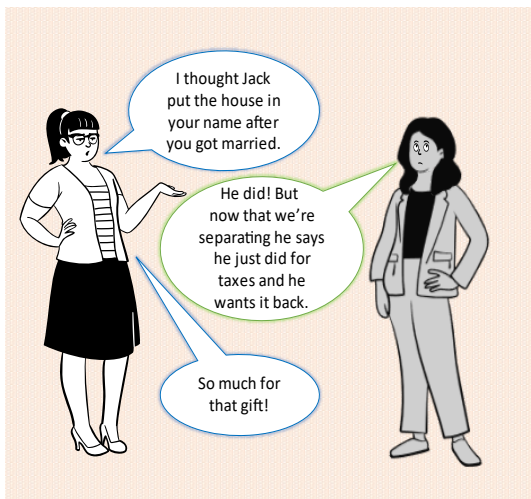


Court decisions have recently tried to get around the old law by focusing on the husband's “intentions” at the time that he transferred the property to the wife. What did the husband mean to do?

- Did the husband intend to give a gift to his wife when he transferred his excluded property? For example, did it come with a card and was it wrapped with a bow?
- Did the husband make the transfer for other reasons? For example, did he get a tax benefit or protection from creditors by transferring the property into his wife's name?
- What if the husband did not have any intentions when he transferred the property? For example, what if the husband received an inheritance and just put the money into a joint bank account he shared with his wife without giving any thought to whether he was giving her a gift or how the money would be divided if they ever separated?

It can be hard to tell what someone's actual intentions were especially when the transfer often happened many years ago when the spouses did not think they would separate.

Some judges have also tried to reach a fair outcome for the parties whether the rule applies or not. For example, even if the husband intended to make a gift and his excluded property becomes family property, the court may decide to give the husband more than half of the family property because it would be significantly unfair to divide it equally.⁵



How do you think the FLA should be updated to deal with property transfers between spouses?

There is a range of options for changes that would allow the FLA to deal with property transfers between spouses. The most obvious change is to specifically state whether the old presumption law applies to transfers between spouses or not. If it applies, the law would be that if any spouse transfers property to their spouse, the court will presume that the transfer was a gift. Any changes also need to make sure that the law leads to predictable and fair outcomes for the parties.

⁵ *Venables v. Venables*, 2019 BCCA 281.

Here are a few examples of changes that could be made to the FLA about property transfers between spouses:

- Specifically say in the FLA if the presumption of advancement applies to property transfers between spouses or not.
- Identify any specific situations or types of property that should be treated differently when property has been transferred between spouses.
- Give a list of factors that judges can consider to make sure that there is a fair result when the property is divided.

Spousal Support

When spouses separate, one spouse may be entitled to receive financial support from the other. This is called spousal support. Unlike child support, a spouse is only entitled to spousal support in certain situations. Spousal support is not an automatic right.

If a spouse is entitled to spousal support, the Spousal Support Advisory Guidelines help with calculating the amount and duration of spousal support.

The FLA sets out laws for spousal support about the duty to pay, objectives of support, determining amount and duration, and spousal support agreements, orders, and reviews.

Spousal support and property division are often linked to each other because both affect the financial position of spouses after separation. Unlike property division though, spousal support can be decided by both the B.C. Provincial Court and the B.C. Supreme Court.

There are two areas of spousal support that may cause some confusion and may need to be clearer in the FLA – reviews and changes, and retroactive spousal support.

Reviews and Changes

One of the new provisions that the FLA introduced was the option of including a **review** of a spousal support agreement or court order. An agreement or order can say that a review will happen at a specific time, after a specific amount of time has passed, or after a specific event has happened. A review can also happen when the paying spouse starts receiving pension benefits or becomes entitled to receive them.

Different from a review, the court is also allowed to **change, suspend, or end** a spousal support order on application by a spouse if:

- There has been a change in the conditions, means, needs or other circumstances of either spouse since the order was made,
- Evidence of a substantial nature has become available that was not available when the order was made, or
- Evidence of a lack of financial disclosure was discovered after the order was made.

Although both reviews and applications to change, suspend or end spousal support may result in a change in the amount and duration of spousal support being paid, they are different

Did you know?

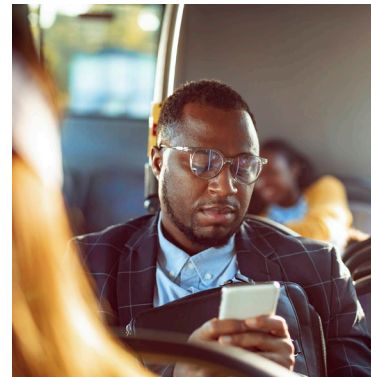
Spousal support reviews are based on contemplated events, whereas variations are based on unanticipated factors listed in the FLA.

processes and can only be used in the situations described above. In some situations, it may not always be clear which process should be used.

Retroactive Spousal Support

The FLA not only allows a court to change, suspend or end a spousal support order, but it can do it prospectively (going forward for a future amount of time) or retroactively (going backwards starting at a specific time in the past). Spouses receiving support (recipients) may want to apply for a retroactive increase in spousal support, and payors may want to apply for a retroactive decrease.

Even though the FLA says that the court must consider the same factors when a recipient applies to retroactively increase spousal support and when a payor applies to retroactively decrease spousal support, some lawyers think there might be an imbalance in how the courts treat the two.⁶ Should it be harder, easier, or the same for recipients and payors get retroactive changes to their spousal support?



Another area of possible confusion is the difference between a retroactive decrease in spousal support and the reduction or cancellation of arrears. If money that is owed from past spousal support payments was due but was not paid, the unpaid amount is called “**arrears**.” A payor can ask for a retroactive decrease in spousal support and a reduction or cancellation of arrears at the same time, but judges must consider different factors when deciding these two things, so they might not always agree to both. Arrears can only be reduced or cancelled if the judge is satisfied it would be grossly unfair for the court not to reduce or cancel them. The judge may consider the payor’s efforts to pay spousal support, the reasons why the payor cannot pay the arrears owing and any other circumstance the court thinks is important.

Time to Modernize?

The current property division and spousal support laws started to apply in BC when the FLA was introduced in 2013. Think of all the changes that have happened in society since 2013...

- the ways we communicate with each other (FaceTime, DMs, emojis 😊),
- the use of cryptocurrencies like Bitcoin,
- new social media platforms and the emergence of “influencers,”
- advancements in human reproductive technologies,
- the expanded recognition of 2SLGBTQ+ rights and how we self-identify,
- the impacts of the COVID-19 global pandemic, like on how and where we work,
- and the list goes on...

Did you know?

In 2013, an audio version of FaceTime was released, Instagram introduced DMs, and the word “selfie” was added to the dictionary.

⁶ Franks, Aaron and Adam Prewer of Epstein Cole LLP, *Colucci*, Covid and Courts of Appeal, CBA BC Family Law Conference 2022, March 3-4, 2022, page 12-18.

A meaningful change is B.C.'s *Declaration on the Rights of Indigenous Peoples Act*. It is important that the FLA reflects Indigenous views and does not create barriers to Indigenous traditions and culture when it comes to resolving family issues.

What changes have there been to property types or ownership models and family relationships?

Given the evolution of society and some recent court decisions, maybe it's time for some of these laws to be modernized.

Since 2013, have we changed the way that we interact with certain types of property? Have we changed our views about spousal support? What about the types of relationships we have?

We know that it is common for people to remarry or re-partner more than once. As a result, people may be on their second, third or fourth spousal relationship when they divide property or pay spousal support.

Another type of relationship is a “**predatory relationship**.” Predatory relationships are when one person enters the relationship for the sole purpose of exploiting another for personal or financial gain. Some people may be especially vulnerable to these relationships, such as the elderly or people with certain disabilities.⁷ Although other laws in BC give some tools to protect people and their property from predatory relationships,⁸ the FLA currently does not. Should the FLA also provide specific protection for vulnerable spouses?

How to participate

To share your thoughts on property division and spousal support under the FLA, we invite you to take our survey here: <https://survey.jag.gov.bc.ca/snapwebhost/s.asp?k=165817175096>

For more information on these and other topics related to property division and spousal support, you can read our technical paper here:

https://engage.gov.bc.ca/app/uploads/sites/121/2022/07/FLA-Modernization_Public-Discussion-Paper_July-2022.pdf

You can send any additional comments about property division and spousal support under the FLA to the ministry by regular mail or email to the following addresses:

By regular mail:

Family Policy, Legislation, and Transformation Division
Justice Services Branch
Ministry of Attorney General
PO Box 9222, Stn Prov Govt
Victoria, BC V8W 9J1

By email:

JSB.FPLT@gov.bc.ca

⁷ Todd, Deborah, *Elder Abuse and Predatory Marriages – Wills and Estates – Victoria BC*, Deborah Todd Law Website, January 11, 2019. [[Deborah Todd Law](#)]

⁸ For example, powers of attorney, representation agreements, certificates of incapability under the *Adult Guardianship Act*, and committees under the *Patients Property Act*. There are also civil and criminal remedies that may be available to victims of predatory relationships. See for example, Whaley, Kimberly A., *Elder Abuse: Civil and Criminal Remedies*, Canadian Centre for Elder Law Bridging the Gap: Elder Law for Everyone, CLE Elder Law Update 2022 Paper 3.1, April 2022.