# *Family Law Act* Modernization Project:

# Division of Property and Spousal Support

# Discussion Paper

July 2022

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This paper addresses the issues of Division of Property and Spousal Support and was created by the BC Ministry of Attorney General's Family Policy, Legislation, and Transformation Division as part of an on-going project to review and modernize the *Family Law Act*.

The ministry invites you to participate in the project by reviewing this paper and providing feedback. Your feedback will be used in the development of recommendations for changes. The ministry will assume that comments received are not confidential and that respondents consent to the ministry attributing their comments to them and to the release or publication of their submissions. Any requests for confidentiality or anonymity, must be clearly marked and will be respected to the extent permitted by freedom of information legislation.

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# *Family Law Act* Modernization Project:

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# Discussion Paper

When the *Family Law Act* (FLA) came into force nine years ago, its primary objective was to modernize family law. Since then, case law has developed, and many societal changes have occurred. It is important that the FLA keeps pace. To ensure that it does, the Ministry of Attorney General is undertaking a project to modernize the Act. The project is being conducted in phases over a number of years to allow government, stakeholders, and the public adequate time to address various issues.

This paper focuses on property division and spousal support. The FLA introduced a host of changes to family law and a new way of dividing property was one of its biggest. Since enactment, the courts of British Columbia have grappled with how to interpret the new provisions. This has led to the emergence of issues that the Ministry believes may benefit from examination. In addition, although the FLA made few changes to spousal support law, there are areas that may benefit from clarity. The important link between property division and spousal support led to the inclusion of both topics in this paper. Specific issues and questions are raised in the discussion below for your review and feedback.

## Division of Property

### Introduction

Part 5 of the FLA[1] replaced the approach to property division under the former *Family Relations Act* (FRA)[2] of generally dividing property based on whether it was ordinarily used for a family purpose with an excluded property division regime that categorizes property as either divisible family property or non-divisible excluded property. There were several reasons for the change, but the primary one was to increase predictability by reducing the need for the broad judicial discretion that was used under the FRA. Also, it was hoped that the new model would be more understandable and better align with people's expectations of fairness.[3]

[1] Part 5 of the *Family Law Act*, [SBC 2011, c. 25] [Family Law Act].
[2] *Family Relations Act*, [RSBC 1996] c. 128 (repealed).
[3] *White Paper on* Family Relations Act *Reform: Proposals for a new Family Law Act*, Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislation Office, July 2010, page 81 [White Paper on Family Relations Act Reform].



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Part 5's basic structure is relatively straight-forward. Section 81 provides that on separation each spouse is presumptively entitled to a one-half interest in family property and responsible for one-half of family debt. Family property is described by a non-exhaustive list in section 84 and excluded property is described in an exhaustive list in section 85. The FLA indicates that spouses can make their own agreements about property division within certain parameters, and gives judges the discretion to divide family property unequally in specified circumstances under section 95, and to divide excluded property in more limited circumstances under section 96.

No major amendments have been made to Part 5 of the Act since 2013. A few clarifying amendments were made in 2014[4] related to gifts, property held in trust, and conflict of laws terminology.

## Division of Property Issues

### Identification and Treatment of Excluded Property

Family property is presumed to be divided equally between separating spouses while excluded property is generally not divided at all. How to determine what is excluded property is an important question and two specific issues have emerged from the case law:

- how to "trace" excluded property through various transactions and forms, and
- the applicability of common law evidentiary presumptions to the transfer of excluded property between spouses.

#### *Tracing Methods*

The need to trace property from one form to another when dividing property became an issue in British Columbia with the introduction of the FLA. Prior to that, little importance was placed on the details of how property came to be owned by one of the parties or whether that property changed form during the relationship. The focus was on how it was used during the relationship.

Sections 84 and 85 each contain a direction to trace property. Section 84 (2) (b) requires a determination about whether property acquired after separation is nevertheless family property because it was derived from family property. Section 85 (1) (g) states that property derived from excluded property, or the disposition of excluded property is also excluded property. However, despite the need to trace, the FLA does not provide any guidance about how to trace.

Although case law has assisted with some aspects of tracing excluded property, there remains some lack of clarity in other areas. For example, cases have held that "mathematical certainty" is not needed, as trial judges are able to draw reasonable inferences from the evidence to determine whether an excluded property claim has been established.[5] Also, case law suggests that courts are not held to the formal common law rules for asset tracing that govern other areas of law and can use a "flexible approach" to ensure fairness:[6]

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[4] BC Reg 96/2014

[5] *Shih v. Shih*, 2017 BCCA 37, paras. 40 to 44.

[6] *Ernst v. Carmichael*, 2019 BCSC 68; *Liapis v. Keshow*, 2021 BCSC 502, para. 273

> [26] …The central theme I draw from the case law is that while the onus rests on the party seeking to prove the existence of excluded property, the court is not required to apply formal common law "rules for asset tracing". Rather, the *FLA* contemplates a "more flexible approach" to the following of excluded property into derivative property. This approach is justified by the objectives of the excluded property regime under which parties should generally be allowed to keep what was theirs going into the relationship, and the reality that parties will often "co-mingle excluded property with family property over time, including using excluded property to purchase other property or refinancing excluded property to purchase other property": *C.P. v. K.W.A.* at para. 93.[7]

With regard to methodology, several tracing methods have been considered by the courts, including the following:

- *Lowest intermediate balance rule*: A formal tracing principle which suggests that the spouse seeking to separate an excluded contribution cannot assert an interest in excess of the smallest balance in the fund during the interval between the contribution and the date of division (trial).[8]
- *"Link" method*: A common sense determination of whether there is a sufficient link between the excluded property and the derived property.[9] For example, in *Price v Price*, the British Columbia Supreme Court (BCSC) found a "clear link" between a spouse's investment account that held his excluded property and the family home. The court noted the amounts involved, the timing of deposits and withdrawals, and the lack of another source for the funds to establish that there was a link even though the funds were briefly in a joint investment account just prior to the home purchase.[10] As the asset had appreciated in value, the full amount of the husband's excluded assets was traced into the home.
- *Pro rata approach*: An approach often used with investment accounts. The ratio of excluded to non-excluded funds deposited into an account is applied to the amount of the account at the date of separation.[11] In *Liapis v Keshow*, the BCSC suggested that this method is most likely to create fairness with regard to accounts into which excluded and non-excluded funds are deposited over time.[12] The method has been described as the "usual approach" in Ontario with regard to investment accounts. However, Ontario courts, which are faced with a similar property division regime to BC's, have also noted a need for flexibility when "common sense and a reasonable balance of probabilities calls for a different result."[13] In *Henderson v Casson*, the Ontario Supreme Court (ONSC)

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[7] *Ernst v. Carmichael*, para. 26.
[8] *Liapis v. Keshow*, para. 258; *Zellweger v Zellweger*, 2018 BCSC 1227.
[9] *Liapis v. Keshow*, para. 260; *C.M. v. N.L.*, 2020 BCSC 3, paras. 173.
[10] *Price v. Price*, 2020 BCSC 1558, paras. 110 to 111.
[11] *Wolfe v. Wolfe*, 2003 CanLII 18219 (ONSC), para. 54; *Liapis v. Keshow*, para. 260; *C.M. v. N.L.*, 2020 BCSC 3, para. 173.
[12] *Liapis v Keshow*, para 276 and 277.
[13] *Finch v. Finch*, 2018 ONSC 5575 (ONSC), para. 36.

found that the close proximity of when a spouse received an inheritance and when she loaned money to her spouse led to the common-sense conclusion that the monies should be traced in full. Her spouse's position was that a *pro rata* basis should be used because the inherited funds were briefly deposited into an existing account that contained non-excluded funds at the time of the inheritance deposit.[14]

- *First in, first out approach*: Presumes that funds in an account exit the account in the order in which they were deposited. If the excluded funds were first in an account, the first funds paid out of the account would be the excluded funds. The sole determining factor is the timing of the deposits.[15] The recent BCSC case of *KLB v SWB*,[16] illustrates the different results that can occur based upon the choice of tracing method. In *KLB*, a spouse sold a pre-relationship house and put the realized equity towards the purchase of another property jointly held with her spouse and towards paying debt. The first in, first out approach would mean that her excluded property went towards paying off debt first, and only the leftover amount (approximately $35,000) would be traced into the real estate purchase. However, a *pro rata* approach meant that 60% (approximately $68,000) of the excluded property could be traced into the purchase of the residence. The trial judge held that the *pro rata* approach created the fairer result in this case.
- *Last in, first out approach*: Opposite of the first in, first out approach. Presumes that the last funds deposited into an account are the first funds disposed of.[17]

Also, courts note that tracing excluded property into other co-mingled property is a relatively straightforward exercise if it is traced into an asset that has appreciated in value. Tracing excluded property into co-mingled property that has decreased in value adds complexity. A decrease in value requires a determination about how much of the reduced asset should be designated as being the remnants of the excluded property and how much is the remains of other co-mingled assets.[18]

Unsurprisingly, parties advocate for the tracing method that results in the most advantageous outcome for them. Case law appears to favour no one method for all cases, and suggests that the choice of approach should be based on the facts and the evidence available. As indicated, courts have used the *pro rata* approach in many cases but have also decided that it does not work well in others.[19]

In the 2020 case of *C.M. v. N.L.*, the BCSC noted that the methodology to be applied to tracing excluded property is under debate and observed that the exercise of tracing should not be overly onerous:[20]

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[14] *Henderson v. Casson*, 2014 ONSC 720, para 90 and 91.
[15] *Wolfe v. Wolfe*, para. 50; *Liapsis v. Keshow*, para. 261.
[16] *K.L.B. v. S.W.B.*, 2021 BCSC 1437, paras. 263 to 278.
[17] *Liapis v. Keshow*, para. 261.
[18] *Liapis v Keshow*, para. 257*; C.P. v K.W.A.*, 2018 BCSC 332, para. 99.
[19] *C.P. v K.W.A.*, 2018 BCSC 332; *C.M. v. N.L.*, para. 173.
[20] *C.M. v. N.L.*, paras. 172-174.

> [174] Overall, the object of the tracing exercise is to balance ease, clarity and simplicity with fairness (*C.P. v. K.W.A.*, at para.97). While the onus is on the party seeking exclusion to prove with clear and cogent evidence that property is excluded, the tracing exercise is not meant to be overly complicated or burdensome (*C.P. v. K.W.A.*, at para. 93).

Recent legal commentary has observed that case law on tracing excluded property under the FLA is still evolving.[21] Having the flexibility to use different methods in different situations could allow the court to adapt to different scenarios and result in fairer decisions. However, as is often the case, allowing flexibility raises the question of whether the lack of a single approach negatively affects the predictability of outcomes such that the negotiation of agreements could be adversely impacted.

**Discussion Questions:**

1) **Should the FLA provide more direction on tracing excluded property or leave it up to courts to decide the appropriate method on a case-by-case basis?**

2) **Are there certain tracing methods that are more appropriate for certain types of excluded property? For example, real property, investments, or property traced into appreciating assets versus depreciating assets? If so, which methods work best for what types of property?**

3) **Could a list of indicators be developed for when different methods are appropriate? If so, what should those indicators be?**

### *Evidentiary Presumptions*

The Part 5 issue that has likely received the most judicial comment is the applicability of the common law evidentiary presumptions of advancement and resulting trust to excluded property claims. Unlike legislation in other provinces, the FLA does not explicitly address whether these evidentiary presumptions apply. This has led to an ongoing divergence in British Columbia case law.

The presumption of advancement operates in several areas of the law including trust, contract and family law. In family law, the principle suggests that a transfer of property between married spouses (specifically transfers from husband to wife) constitutes a gift absent sufficient evidence to the contrary. The application of the presumption can have significant implications in excluded property claims if a spouse has transferred otherwise excluded property into their spouse's name or into both spouses' joint names. If the transfer is determined to be a gift, then it arguably becomes family property and subject to a presumed equal division at separation. Section 85 (1) (b.1) of the FLA refers explicitly to gifts received by a spouse from a third party but makes no mention of gifts received from their spouse. Alternatively, if a spousal transfer of

[21] McCutcheon, Beatrice C. and Christine Murray, *Excluded Property: Case Law Updates* (Presentation), CBABC Family Law Conference, March 4, 2022.

property is determined not to be a gift, then the property remains the excluded property of the transferring spouse at separation.

The British Columbia Court of Appeal (BCCA) first addressed this issue in the 2016 case of *V.J.F.* v *S.K.W.*.[22] In *V.J.F.*, the court reviewed the two streams of case law that had developed in the BCSC and sided with those that held the presumption of advancement exists and applies under the FLA. In *V.J.F.,* a third party gave property (worth $2 million) to the husband who then transferred it into his wife's sole name for the admitted purpose of avoiding creditors. The BCCA found that because the legislature did not specifically abolish the presumption of advancement in Part 5 as had been done in other jurisdictions (see page 8 of this Discussion Paper below) and, likewise, did not explicitly abolish gifts between spouses, that as a result gifts between spouses of excluded property are possible and the presumption of advancement should be used in assessing whether a gift was made.

In August 2016, after the BCCA's *V.J.F.* decision, the Ministry issued a discussion paper specifically seeking feedback on the presumption of advancement issue.[23] The responses reflected an almost even split of opinion between explicitly removing the application of the presumption of advancement and allowing the presumption to apply in some cases. Most agreed that legislative amendments were necessary either way.

Despite *V.J.F.*'s pronouncement, the BC courts continue to be divided on whether the presumption of advancement applies when dividing property under the FLA. Some cases follow *V.J.F.* and apply the presumption,[24] while others distinguish *V.J.F.* and hold that the presumption does not apply.[25] One of the most well-reasoned rejections of the presumption of advancement is the 2017 BCSC decision of *H.C.F. v. D.T.F.*.[26] In *H.C.F.*, Mr. Justice Voith reviewed the historic origins of the presumption and held that it is outdated and inconsistent with the FLA's new excluded property regime.[27]

Although the BCCA has not endorsed the *H.C.F.* decision and continues to hold that the presumption of advancement applies, recently the court's decisions appear to try and minimize the presumption's reach. In two 2019 cases, the appeal court highlighted that the presumption of advancement is only relevant if a trial judge is unable to determine whether the transferring spouse intended a make a gift or not.[28] In *Venables v Venables*, the trial judge offered the proposition that if the transferring spouse obtains some kind of benefit from the transfer (e.g., creditor protection or tax reduction), then that is evidence of a gift because the transferring party

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[22] *V.J.F.* v *S.K.W.*, 2016 BCCA 186.

[23] Discussion Paper: The Presumption of Advancement and Property division under the *Family Law Act*, CPLO, JSB, Ministry of Justice, August 2016.

[24] Examples of post-*V.J.F.* cases where the court has applied the presumption of advancement include: *Wickstrom v Ng,* 2019 BCSC 1685; *Greenwood v Greenwood,* 2019 BCSC 382; *Pisarski v Piesik,* 2019 BCCA 129; *Yerbury v Yerbury*, 2019 BCSC 271.

[25] Examples of post-*V.J.F.* cases where the court has not applied the presumption of advancement include: *H.C.F. v. D.T.F.*, 2017 BCSC 1226; *Sophonow v. Sophonow*, 2021 BCSC 1863.

[26] *H.C.F. v. D.T.F.,* 2017 BCSC 1226.

[27] *H.C.F. v. D.T.F.*, paras. 130-134, 156-174.

[28] *Namdarpour v Vahman,* 2019 BCCA 153; *Venables v. Venables*, 2019 BCCA 281.

"cannot have it both ways."[29] On appeal, the BCCA confirmed that the intention of the transferring spouse is the key to determining whether transferred excluded property remains excluded or becomes family property. If the transferring spouse intended a gift and there is no agreement that the property should remain excluded, then it becomes family property.[30] In the subsequent decision of *Namdarpour v Vahman*, the court confirmed the importance of intention and offered a list of principles that to be used by courts in its determination.[31]

Some recent BCSC decisions have continued to turn away from applying the presumption of advancement becoming more overt in their criticism of its discriminatory origins and the difficulty it causes within the context of a modern statute like the FLA.[32] However, despite not applying the presumption of advancement, they continue with an analysis to determine the intention behind the transfer. In the 2021 case of *Sophonow v Sophonow,* after finding that the presumption of advancement could not apply, the court held that in its absence, the opposite presumption of resulting trust applied. The court reviewed the evidence, found that the wife failed to rebut the presumption of resulting trust, and granted the exclusion.[33] Also in 2021, the court in *Andersen v Andersen* followed the guidance in *Namdarpour* and concluded that no gift was intended and the exclusion was retained.[34]

While this focus on intention may avoid the need to apply a principle that the BCCA noted in *Namdarpour* has origins in "sometimes anachronistic notions of economic dependence,"[35] it has its own issues. Often the circumstances of a case do not provide for a clear-cut understanding of the intention of the parties at the time of transfer. A 2019 Continuing Legal Education (CLE) paper[36] suggested that requiring a trial judge to determine the intent of the transferor potentially draws us back to similar issues encountered with the old "ordinary use test" when deciding property division under the FRA. A significant concern with that test was its dependence on the facts of a case. Although basing a decision on the particular circumstances of a case has its benefits, because few cases have the same facts, it creates challenges for lawyers advising their clients about how judges would divide their property. As noted, the primary objective in moving to an excluded property regime was to move away from the often unpredictable, highly discretionary FRA approach. The BCSC has also raised concern that determining the intention of a transferring spouse earlier in a relationship is "somewhat artificial," as spouses at that time expect the relationship to last.[37]

At common law, the presumption of resulting trust is the general evidentiary presumption applied to gratuitous property transfers, other than those from a married husband to his wife.

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[29] *Venables v. Venables*, 2018 BCSC 1736, paras. 53-74.
[30] *Venables v. Venables*, 2019 BCCA 281, para. 95.
[31] *Namdarpour*, para. 40.
[32] *Sophonow*; *Andersen v. Andersen*, 2021 BCSC 2598.
[33] *Sophonow,* paras. 107-115, 122-124.
[34] *Andersen*, paras. 58-82.
[35] *Namdarpour*, para. 33.
[36] Booth, Scott L. and Beatrice C. McCutcheon, *Excluded Property: a More Predictable Regime?*, Continuing Legal Education Society of British Columbia, July 2019.
[37] *Price v. Price*, 2020 BCSC 1558, para. 117.

While the presumption of advancement places the burden on the transferor to prove that a gift was not intended, the presumption of resulting trust places the burden on the transferee to prove that a gift was intended.[38] In *Sophonow*, the BCSC held that the presumption of advancement does not apply under the FLA, and in its absence, the presumption of resulting trust applies to transfers between spouses.[39] Although the use of the presumption of resulting trust may be less objectionable, the outcomes from applying that presumption to transfers between married spouses, may be the opposite of the outcome if the presumption of advancement applied (i.e., absent sufficient evidence to the contrary, property that is transferred from one spouse to another would not constitute a gift and would remain the property of the transferor.)[40] Is this opposite result fairer?

With regard to the legislation of other provinces, Alberta, Saskatchewan and Ontario all address evidentiary presumptions explicitly in their division of property legislation:

- In Alberta, the presumption of advancement is abolished for property transfers between spouses but is effectively reinstated for property or money that is transferred into the spouses' joint names.[41]
- In Saskatchewan,[42] the legislation abolishes the presumption of advancement and replaces it with the presumption of resulting trust, which applies to all spouses whether married or not. Saskatchewan's legislation also operates similar to Alberta's with a presumption that each spouse owns one-half beneficial interest in property that is placed in the joint names of the spouses.
- In Ontario,[43] the legislation similarly applies the presumption of resulting trust to questions of ownership of property between married spouses, except that property and money held in the joint names of the spouses is proof that property is owned by both spouses as joint tenants, absent evidence to the contrary. In other words, the presumption of advancement applies to transfers of property into the spouses' joint names.

### *Possible Use of Sections 95 or 96 to address transfers of excluded property between spouses*

*Section 95:*

The application of the presumption of advancement to the transfer of excluded property between spouses effectively creates a presumption in favour of the division of excluded property in those cases. At the very least, this development suggests that courts believe there are situations in which this type of excluded property should be divided.

Currently, section 96 of the FLA provides the statutory justification for the division of excluded property. However, case law has offered another option. In the 2018 case of *Venables*, the BCSC held that the husband's property lost its excluded character and became family property

[38] *Pecore v. Pecore*, 2017 SCC 17, paras. 27-28.
[39] *Sophonow*, paras. 103-105, 122.
[40] For example, *Korman v. Korman*, 2015 ONCA 578.
[41] *Matrimonial Property Act*, RSA 2000, c M-8, s.36 (Alberta Matrimonial Property Act).
[42] *The Family Property Act*, SS 1997, c F-6.3, s. 50 (Saskatchewan The Family Property Act).
[43] *Family Law Act*, RSO 1990, C F.3, s. 14 (Ontario Family Law Act).

that was subject to the presumptive equal division of section 81. In its section 95 unequal division analysis, the court used the fact that the husband lost his exclusion as a reason to unequally divide the family property in his favour. The court found that "any other factor" in section 95 (2) (i) of the Act could include the existence of the formerly excluded property.[44] The BCCA upheld the decision, indicating that if the family property was originally one spouse's formerly excluded property, it may be significantly unfair to divide it equally depending on the circumstances.[45]

Even as early as 2016, the BCCA in *V.J.F.* pondered whether an equal division of family property would be significantly unfair considering the origins of the property.[46] As described above, the BCCA in *V.J.F.* applied the presumption of advancement and held that the husband lost the exclusion of his $2 million property when he transferred it into his wife's name. In dividing the family property, the BCCA considered that the $2 million was originally given to the husband for the specific purpose of creditor protection. The court said that it might have considered these facts as supporting unequal division of family property, except that they did not meet the high threshold of "significantly unfair."

In a recent 2021 case, the BCCA cautioned that financial disparity alone resulting from the fact that one spouse had significant excluded property (for example, one spouse receiving inheritances) did not meet the threshold for significant unfairness.[47] The BCCA held that "financial advantage alone, unrelated to the *economic characteristics of a spousal relationship*" [emphasis in original] did not warrant an unequal division of family property under section 95 (2).[48] The court pointed out that "an unequal starting point suggests that an unequal end point is similarly contemplated by the statutory regime." [49]

*Section 96:*

As noted, the statutory basis for a division of excluded property is found in section 96 of the Act. Rather than (or in addition to) explicitly addressing whether evidentiary presumptions apply to Part 5 of the Act, perhaps an expansion of the limited factors in section 96 that capture some or all of these transactions would be a more direct and effective way to address the issue.

Currently, section 96 allows the court to divide excluded property in only two circumstances:

- Subsection (a) allows excluded property to be divided if family property or debt that located outside British Columbia "cannot practically be divided."

- Subsection (b) allows excluded property to be divided if it would be significantly unfair not to divide it considering only the length of the spouses' relationship and a spouse's direct contribution to the excluded property.

[44] *Venables*, 2018 BCSC.
[45] *Venables*, 2019 BCCA, para. 112.
[46] *V.J.F*, paras. 80-82.
[47] *Cook v. Cook*, 2021 BCCA 194.
[48] *Cook*, paras. 48-50.
[49] *Cook*, para. 48.

This closed, small list of circumstances justifying division is intended to reinforce the idea that generally excluded property should not be divided and should remain with the spouse with whom it is associated. A legislative amendment expanding the courts authority to consider other reasons to divide excluded property could be another way to address gifts between spouses when dividing property.

**Discussion Questions:**

4) **In your opinion, what should be the outcome in the following scenarios:**

   **a. If a spouse transfers excluded property into their spouse's sole name, should that property be presumed to be the excluded property of the transferring spouse or divisible family property upon separation?**
   **b. Would the situation change if the excluded property was transferred into the spouses' joint names?**
   **c. Should it matter whether the transferring spouse obtains a benefit from the transfer (for example: a tax benefit, creditor protection)?**

5) **Would expressly applying or abolishing the presumption of advancement to transfers between spouses under the FLA increase certainty and clarity in the law? Which of these options would better align with your general expectation of fairness?**

6) **If an evidentiary presumption applies to transfers between spouses, are there certain types of evidence that the court should or should not consider when deciding whether the presumption has been rebutted?**

7) **If the evidentiary presumptions are expressly abolished, should concerns about unfairness be addressed through changes to section 95 or section 96 of the FLA? For example, what factors could be added to ensure fairness when the court considers whether to divide gifts between spouses that occur during their relationship, such as: duration of the relationship, any agreements between the spouses, whether the transferring spouse received a benefit from the transfer?**

8) **A related question arises if an adult child receives a gratuitous transfer of an interest in a property from their parents, the case law says the presumption of resulting trust applies and no gift is presumed. If, for example, the adult child receives a joint interest in real property in which they live with their spouse, should the increase in value of the joint interest in the property be considered divisible family property? If so, at what time should that increase be valued?**

## Unequal Division of Family Property

Under section 81 of the FLA, on separation each spouse is presumptively entitled to half of the family property and is responsible for half of the family debt. However, under section 95 (1) of the Act the court is allowed to vary from this if equally dividing family property would be "significantly unfair" after considering a number of factors listed in section 95 (2). Notable

among the factors is section 95 (2) (i) which allows a court to consider, in addition to those listed before it, "any other factor" that may result in significant unfairness. The "significantly unfair" threshold was a new and unique feature introduced under the FLA. The meaning of significant unfairness and the type of other factors that may be considered have been the subjects of discussion.

The BCCA has interpreted significant unfairness to be a higher threshold than the "unfairness" test to reapportion family property under the FRA. In the 2016 case of *Jaszczewska v. Kostanski*,[50] the BCCA held that the new standard was meant to narrow the court's previous broad discretion under the FRA to depart from an equal division of family property:

> [41] …Clearly, the statutory intent is to constrain the exercise of judicial discretion. The test of "significant unfairness" imposes a more stringent threshold than the mere "unfairness" test of the *FRA* to allow unequal division by a court. As Mr. Justice Butler observed in *Remmem v. Remmem*, 2014 BCSC 1552, "significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is "weighty, meaningful or compelling." He concluded that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95 (2)" : *Remmem* at para. 44. As the judge here noted at para. 162 of her reasons, the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result. I agree.
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> The BCCA has maintained a high threshold for the "significant unfairness" test and has restricted consideration of "other factors" in subsequent decisions. For example, in the 2019 case of *Khan v. Gilbert*, the BCCA held that spouses' unequal contribution to the family's finances and burdens such as housekeeping would have to involve "marked, prolonged, and intentional or unexplained disparities" to be significantly unfair. [51]

Despite the BCCA's cautions, several BCSC decisions have found justifications for the unequal division of family property. In 2018, a CLE paper summarized unequal division of family property cases decided to date.[52] That review found that the most common factors considered in unequal division cases were the duration of the relationship and contributions to a spouse's career. The review also concluded that the issue is often very dependent on the particular facts of the case and that old considerations under the FRA, notably contributions to the acquisition, maintenance, and preservation of property, continue to appear in court decisions favouring unequal division.

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[50] *Jaszczewska v. Kostanski*, 2016 BCCA 286.

[51] *Khan v. Gilbert*, 2019 BCCA 80, para. 32.

[52] Silver, Anna and Alisa Maegawa (Articling Student), *The Application of ss. 87 and 95 of the FLA to Achieve Fairness: Recent Developme*nts – The Continuing Legal Education Society of British Columbia, June 2018.

A subsequent 2019 CLE paper[53] reviewed 121 BCSC unequal division decisions between 2015 and 2019.[54] The review determined that the duration of the relationship was the most compelling factor in unequal division cases. The shorter the relationship, the more likely and more significant the unequal division. Despite *Jaszczewska*, the paper found that courts continue to consider spousal contribution as a factor in unequal division, as well as conduct such as laziness, inactivity and broken commitments. Perhaps most noticeable, the review found that the court was "overwhelmingly likely to order reapportionment when multiple factors favouring unequal division are 'stacked' together." The paper concluded that "[r]eapportionment is open for business on facts less extraordinary than you might think."[55]

In the recent 2021 case of *Cook v. Cook*,[56] the BCCA cautioned that in determining significant unfairness, the court must not apply "abstract concepts of fairness," but rather consider factors similar to those listed in section 95 (2):

> [48] … We ought not to find unfairness in the outcome contemplated by the legislation and that is, therefore, presumptively fair. Under the current *Family Law Act* regime, "[t]he starting point in the division of property analysis already applies significant exclusions": *V.J.F.* at para. 10, citing *Slavenova v. Ranguelov*, 2015 BCSC 79 at para. 60. An unequal starting point suggests that an unequal end point is similarly contemplated by the statutory regime.
>
> [49] As noted above, the factors that may be considered in order to identify "significant unfairness" in an equal division of property include "any other factor … that may lead to significant unfairness", other than insufficient compensatory spousal support, which is specifically addressed in s. 95(3). While this confers considerable discretion on a trial judge, the discretion must be exercised judicially, and it has been narrowly defined by this Court. In *Singh v. Singh*, 2020 BCCA 21, Justice Garson observed, at para. 136, that the general provision referring to "any other factor" was preceded by a list of specific items, and applied the rule of statutory construction that limits the general term "to the genus of the narrow enumeration that precedes it". She held:
>
> > [138] … [If] the rule applies, the class cannot be *any* factor "that may lead to significant unfairness" as this would violate the second requirement as set out by Sullivan. The other factors enumerated in s. 95(2) suggest consideration of aspects of the relationship between the spouses, including its duration, the terms of any agreement, as well as the characteristics of family assets and debt and how the spouses have influenced their value. One of the considerations in s. 95(2)(g) includes an analysis of a spouse's good faith or motive. These factors are broad.

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[53] Bell, Todd R., *Reapportionment: Slowly but Surely the Door Creeps Open*, 12th Biennial Family Law Conference 2019, The Continuing Legal Education Society of British Columbia, July 2019.

[54] Bell, July 2019, pages 8.1.6 to 8.1.28.

[55] Bell, July 2019, page 8.1.29.

[56] *Cook v. Cook*, 2021 BCCA 194.

> Nevertheless, in my view, they all relate to a limited class, namely, the *economic characteristics of a spousal relationship*.
>
> [Emphasis in original.]

**Discussion Questions:**

9) **Are the factors to be considered in assessing whether an equal division of family property is significantly unfair under section 95 of the FLA adequate? If not, are there factors that should be clarified, removed from or added to the list to account for any recent societal changes or to address issues arising from court decisions? Should any factors be given more or less weight, for example, the duration of the relationship?**

10) **Does the catch-all provision in paragraph 95 (2) (i) allowing the court to consider "any other factor" create too much uncertainty about what constitutes "significant unfairness?" Would limiting or removing paragraph 95 (2) (i) negatively affect the court's ability to create fairness?**

## Addressing Unique Types of Property

Under the FLA, all property is characterized as excluded or family property. However, some types of property, because of their legal implications, unique features, or sentimental value, may not easily fit into the current division of property scheme. The following analysis specifically canvasses property held in trust and pets.

### *Trusts*

Part 5 of the FLA begins with the assertion in section 84 (1) (a) (ii) that family property includes a "beneficial interest of at least one spouse in property" as of the date of separation. That reference appears to include an interest that a spouse may have as a beneficiary of a trust. Correspondingly, Part 5 also recognizes that otherwise excluded property held in a trust for the benefit of a spouse remains that spouse's excluded property (section 85 (1) (e)), and that a spouse's beneficial interest in property held in a discretionary trust is also considered excluded property as long as the spouse did not settle or contribute to the trust (section 85 (1) (f)).

The valuation of property is an obviously important issue. When discussing the interest of a spouse in a discretionary trust, the issue is complicated by the discretionary nature of the spouse's interest. While the spouse's interest in the trust property may be excluded property once it is acquired, the increase in value of that property is family property under section 84 (2) (g). If the beneficiary spouse is also a trustee, there is motivation for that spouse to consider intentionally delaying the distribution of the trust property to prevent their spouse from sharing the increase in property value. If the property is, for example, real estate in a high demand market, that increase in value could be significant and the delay could be prejudicial to the other spouse.

In the 2020 case of *Chapman v. Chapman*,[57]the BCSC considered several complex, highly contested division of property claims, including shares in the husband's family's corporations which he inherited after the death of his grandparents. Those shares were held in trust for the beneficiary husband until the trust property was distributed to the beneficiaries three years later. Although the shares were inheritance and therefore excluded property, the question was at what point in time should the shares be valued so that the increase in their value would become divisible family property?

In *Chapman*, Madam Justice Jackson followed the reasoning of Mr. Justice Butler in the BCSC case of *Parton v. Parton*,[58] who held that "excluded inheritances are to be valued as of the date a spouse receives the inheritance."[59]

> [258] In my view, the reasoning underpinning Butler J.'s conclusion in *Parton* is sound:
>
> > [51] … Before an inheritance can be excluded property, it must be received by the beneficiary. If that were not the case, the court would have to explore the administration of the estate to value the assets and liabilities as of the date of death and consider the likely estate expenses. This would prolong and complicate property division claims and would produce an illusory value for the exclusion. …

In *Chapman*, the court acknowledged that there could be cases where a spouse/beneficiary is also a trustee, and they may delay distribution of a trust's assets to the beneficiaries to frustrate their spouse's claim. She also noted that there could be questions about the fiduciary duty of a trustee to a beneficiary's spouse, if any, and suggested there may be a remedy in equity for spouses in that situation.[60]

**Discussion Questions:**

11) **Should the FLA clarify when property held in trust should be valued?**

12) **Do you believe it is appropriate that property held in trust is not valued until it is distributed to the beneficiaries? What if distribution does not occur prior to separation or the division of other property? What if there is evidence of distribution being intentionally delayed to frustrate a spouse's claim? Is there an alternative valuation method that should be considered?**

### *Pets*

A pet can hold an important place in a family. Despite the love and affection many people have for their pets, animals are considered personal property under the law. This means that when

[57] *Chapman v. Chapman*, 2020 BCSC 1029.
[58] *Parton v. Parton*, 2016 BCSC 1528; *Parton v. Parton*, 2018 BCCA 273.
[59] *Chapman v. Chapman*, para. 253.
[60] *Chapman v. Chapman*, para. 257.

spouses separate, the same division of property rules that apply to their furniture, clothes, and vehicles, apply to their pets.

Several recent articles and court decisions have articulated sympathy for pets and their owners and a degree of dissatisfaction with the current state of things in the family law context.[61] Although the FLA provides parties with significant latitude in making agreements, if spouses attempt to make an agreement that addresses aspects of pets, other than strict ownership, it is unclear what role the court can play if they are unable to reach an agreement or the agreement fails.[62]

Six American states – Alaska,[63] Illinois,[64] California,[65] New Hampshire,[66] Maine[67] and New York[68] – have legislation that specifically addresses what happens to family pets upon the dissolution of a relationship. In a seventh state – New Jersey – common law has developed to fill this gap. The laws in these states vary. Each feature one or more of the following: authorizing courts to grant joint ownership of pets, authorizing courts to uphold agreements that address time with and care for a pet, including pets and the cost of their care in domestic violence protection orders.

The FLA has no provisions related to pets specifically. Section 84 (1) (a) states that family property includes all property that is owned by one of the spouses on the date of separation and section 84 (2) has a non-exhaustive list of types of family property. Section 92 allows spouses to make agreements respecting the division of property and section 94 authorizes a court to make "an order under this Division." Section 97 (1) of the FLA also gives the Supreme Court broad authority to determine the division of property, including authority to "make any order that is necessary, reasonable or ancillary to give effect to the division." Section 97 (2) then provides an inclusive list of the types of orders the Supreme Court may make. If an agreement included, for example, pet "custody" clauses, it is questionable whether a court would have the authority to replace them with an order or to make or enforce an order with similar clauses.

Outside of family law, the BC Provincial Court and Civil Resolution Tribunal have held that pets should be treated as personal property rather than as family members.[69] The BCSC has

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[61] For example, Shroff, Victoria, *Creativity called for in dog, cat custody battles*, The Lawyer's Daily, May 27, 2020 [The Lawyer's Daily]; Breder, Rebeka, *Who Gets the Dog or Cat Upon Break Up?*, Breder Law Website, April 2, 2020 [brederlaw.com]; Shroff, Victoria, *Animals: Family at home, property at court*, The Lawyer's Daily, July 5, 2019 [The Lawyer's Daily].

[62] Millner, Jennifer Weisberg, *Puppynup – It's a Thing, and If You Are an Animal Lover, You Need It*, The National Law Review, August 12, 2019 [National Law Review].

[63] Alaska Pet Legislation (akleg.gov).

[64] Illinois Pet Legislation (ilga.gov).

[65] California Pet Legislation (ca.gov).

[66] New Hampshire Pet Legislation (state.nh.us).

[67] Maine Pet Legislation (maine.gov).

[68] New York Pet Legislation (nysenate.gov).

[69] For example, *Brown v. Larochelle,* [2017] B.C.J. No. 758. Recent Civil Resolution Tribunal cases include *Poole v. Ramsey-Wall*, 2021 BCCRT 789, *Johnston v. Arnott*, 2019 BCCRT 748, and *Austin v. Birnie*, 2019 BCCRT 1238.

addressed pets in family and non-family civil contexts and has also treated pets as property. If one party brings a pet into a relationship or is gifted a pet during the relationship, then the pet will remain that party's excluded property when the relationship ends irrespective of other factors related to the care or well-being of the pet.[70]

The highest level of court in Canada to recently address "pet custody" is the Newfoundland Court of Appeal in the 2018 case of *Baker v. Harmina.*[71] That case involved a dog who, on the evidence, was treated as a family member by the spouses until their two-year relationship ended. The parties tried to jointly care for the dog after separation, but their arrangement broke down. The Newfoundland small claims court held that one spouse owned the dog. That decision was appealed and overturned by the Supreme Court Trial Division which held that the spouses jointly owned the dog and set a "custody" schedule.

At the Court of Appeal, the issue was framed according to which party owned the dog as personal property. White J.A., writing for the majority, stated that

> [t]he Court should be open to modifying legal doctrines to reflect social realities, but it should not do so without considering the practical implications of the change.[72]

White J.A. cautioned that while joint ownership of pets may seem an ideal solution, the legal system is not well equipped to deal with it (e.g., a dog is "indivisible").[73] White J.A. also questioned whether the court had authority to order a "custody" schedule for a pet and if that would create more opportunity for conflict.[74]

In dissent, Hoegg J.A. concurred that the court did not have jurisdiction to make orders for sharing "custody" of the dog but agreed with the Supreme Court Trial Division judge that the dog was jointly owned by the parties. In assessing joint ownership, Hoegg J.A. considered factors beyond who bought the dog. The Justice included who the dog resided with and who paid for the expenses of the dog's upkeep. Hoegg J.A. also opined that the court should be an appropriate venue for parties to resolve ownership and possession disputes over their pets:

> [59] I must say something more. I am disturbed by the notion that courts should not spend their precious time and resources determining the ownership of dogs. Litigation over the ownership and possession of dogs is far from unknown to the courts, which is an indicator that the ownership and possession of dogs is very meaningful to people. In this regard, I emphasize the emotional bonds between people and their dogs, and say that fair decisions respecting the ownership and possession of dogs can be much more important to litigants and to society than decisions respecting the ownership of a piece of furniture or a few dollars. Our civil and family courts are routinely engaged in cases of

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[70] *F.K.L. v. D.M.A.T.*, 2020 BCSC 1296, paras. 141-145; *Brown v. Larochelle*, para. 16; *Thompson v. Thompson*, 2005 BCSC 1604.

[71] *Baker v. Harmina*, 2018 NLCA 15.

[72] *Baker v. Harmina*, paras. 12, 17-18.

[73] *Baker v. Harmina*, paras. 19-20.

[74] *Baker v. Harmina,* paras. 22-24.

> which the spoils are a whole lot less than a family dog. As a society we accept without question that our courts exist to resolve disputes that parties cannot resolve themselves. That is a hallmark of a just society and a justice system where the rule of law governs. While I do not wish my remarks to be interpreted as advocating or encouraging parties to litigate the ownership and possession of their dogs, I say there is no principled reason why people in a dispute over a dog cannot avail of the courts for assistance in resolving such a dispute.

Other decisions have made similar observations. In *Gardiner-Simpson v. Cross* the Nova Scotia Small Claims Court commented that assessing which party may have a greater property claim to a pet may be distasteful:

> [3] The love that humans can develop for their pets is no trivial matter, and the loss of a pet can be as heartbreaking as the loss of any loved one.
>
> [4] Emotion notwithstanding, the law continues to regard animals as personal property. There are no special laws governing pet ownership that would compare to the way that children and their care are treated by statutes such as the Custody and Maintenance Act or the Divorce Act. Obviously, there are laws that prohibit cruelty to animals, but there are no laws that dictate that an animal should be raised by the person who loves it more or would provide a better home environment.
>
> [5] As such, slightly distasteful as it may be in the case of two loving and devoted pet owners, I must consider which one has the better property claim.[75]

The BC Civil Resolution Tribunal has also made similar comments:

> …. although it may seem harsh, disputes about what happens to pets after breakups are about ownership, rather than "custody."[76]

Although the majority of decisions assess pets as personal property, the best interest of animals has been considered in some cases. The Provincial Court of British Columbia considered the best interest of a dog in ordering specific performance of an agreement between a former couple to "share time" with the pet, as authorized under the *Small Claims Act*.[77] The court found that it was in the dog's "best interest to be with both of her mothers," and set conditions upon which the dog would live with each party.[78]

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[75] *Gardiner-Simpson v. Cross,* 2008 NSSM 78, paras. 4-5.
[76] *Johnston v. Arnott*, para. 9; *Austin v. Birnie*, para. 13.
[77] *Small Claims Act*, [RSBC 1996] c. 430.
[78] *O'Donoghue v. Walker*, 2019 BCPC 257, paras. 14-21.

Although not in a family law context, the Provincial Court of British Columbia has also considered the best interest of a pet when deciding interim custody of pets, pending the outcome of the ownership decisions at trial.[79]

**Discussion Questions:**

13) **Considering the changing social realities of people's relationships with their pets and decision-makers' acknowledgements that the law may not fulfill people's needs, do you think Part 5 of the FLA currently allows for the appropriate treatment of pets upon separation? If not, what types of provisions should be considered and is the FLA the appropriate legislation to contain such provisions?**

14) **If the court had explicit authority to deal with family pets separate from other types of property in the FLA, what type of orders do you believe the court should be able to make? For example: orders to uphold, enforce, or replace agreements about time with and care of a pet; joint ownership of a family pet; orders about time with and care of a family pet; and costs associated with care including: food, grooming and health related costs.**

15) **Should the court be required to consider certain factors when making property division decisions about pets in family law disputes (for example: the best interest of the pet, who cared for the pet, costs of the pet, the best interest of a child who has an emotional bond with the pet, etc.)?**

16) **Considering that many families have pets, what level of court do you think would be in the best position to respond to their legal needs and ensure access to justice on pet related issues in family law?**

17) **Generally, do you believe that providing special treatment for certain types of property under Part 5 aligns with the goals of the FLA (e.g., predictable outcomes, easy to use, consistent with fairness)?**

## Summary of Division of Property

The property division issues discussed in this paper have been raised in family law court decisions and literature. There may be other issues that you have encountered in your practice or experience that could be resolved or improved by modernizing Part 5 of the FLA. For example, as technology rapidly evolves, it is possible that the lists of property in sections 84 and 85 of the FLA (family property and excluded property, respectively) may not capture new types of property that have emerged (e.g., cryptocurrency, new types of investments, etc.).

**Discussion Questions:**

[79] *Sagoo v. Murray*, 2016 BCPC 376 (CanLII); *Haywood v. Carrasco*, 2016 BCPC 0071; and *Watson v. Hayward*, 2002 BCPC 259 (CanLII).

18) **Is the illustrative list of types of family property in section 84 (2) of the FLA adequate or should additions or clarifications be made to address new types of property?**

19) **Is the list of types of excluded property in section 85 (1) of the FLA adequate?**

20) **If you have not done so already, please share any further thoughts, concerns, or ideas about how to improve the division of property provisions under Part 5 of the FLA.**

# Spousal Support

## Introduction

Issues of property division and spousal support are often linked or considered at the same time in family law disputes. There is a natural connection between the issues because property and property division can play such a large part in the economic and financial circumstances of the parties. As well, there is a statutory link in section 95 (3) of the FLA that allows the court to order an unequal division of property to address a spousal support claim that cannot be satisfied through an order for support.[80]

Spousal support is dealt with in both the FLA and the *Divorce Act*. In the FLA the issue is addressed in Division 4 of Part 7.[81] Those provisions address duty to pay, objectives, amount and duration, arrears, and reviews, as well as the use of agreements and orders. Some provisions in the FLA and the *Divorce Act*[82] are similar. Both acts include the same objectives of spousal support[83] and factors the court must consider when determining its amount and duration.

The Spousal Support Advisory Guidelines (SSAGs) assist with amount and duration of spousal support. The SSAGs include two sets of guidelines – with child support, used when child support is also an issue and without child support, used when child support is not also an issue. The SSAGs use formulas to calculate a range of recommended amounts of support leaving it to parties to agree, or the courts to determine, whether support should be in the low, mid, or high portion of the range in the particular circumstances.

Although spousal support is relatively common when a relationship ends, the interpretation of the FLA spousal support provisions has raised very few issues in case law. Court decisions suggest that spousal support claims are often highly contextual and based on the particular facts of each case. This paper offers for discussion an analysis of spousal support reviews and variations, and the issue of retroactivity. The Ministry is also interested to hear whether you have encountered issues with spousal support in your work.

### Reviews and Variations

One of the new reforms introduced by the FLA regarding spousal support was the statutory authority to conduct a review to account for future contemplated events. Section 168 (1) of the Act indicates that an agreement or order may provide for a review of spousal support to occur on a specified date, after a specified period of time has elapsed, or after a specified event has occurred. Additionally, section 169 (1) of the Act allows for a review to be conducted when the

[80] Recent BCSC examples include *Sophonow v. Sophonow*, 2021 BCSC 1863, *Kim v. Sharp*, 2021 BCSC 1428, *Cook v. Cook*, 2020 BCSC 389, and *Greenwood v. Greenwood*, 2019 BCSC 382

[81] Division 4, Part 7 FLA [BC Family Law Act].

[82] *Divorce Act* (R.S.C., 1985 c. 3) [Divorce Act].

[83] Section 161 FLA; Section 15.2 (6) *Divorce Act*.

paying spouse starts receiving pension benefits or when the receiving spouse becomes entitled to receive them.

In contrast to the occurrence of contemplated events justifying a review, the FLA provides authority for a court to vary spousal support in cases where events were not contemplated. Section 167 of the FLA allows the court to vary (i.e., change, suspend or terminate) a spousal support order if it is satisfied that:

- a change in the conditions, means, needs or other circumstances of either spouse has occurred since the order was made;
- evidence of a substantial nature was not available when the order was made; or
- evidence of a lack of financial disclosure was discovered after the order was made.

If one of those conditions are established, then the court will decide whether a variation is appropriate in the circumstances.[84] The FLA also allows the court to set aside or replace a written agreement respecting spousal support in certain enumerated circumstances or if the agreement is significantly unfair based on considerations including any changes in the condition, means, needs or other circumstances of a spouse (section 164 (5) (b)).

It has been suggested that variations and reviews of spousal support can be confused; and that the law is sometimes misapplied. [85] According to the SSAG User's Guide, "foreseeability" has sometimes mistakenly been transposed onto the material change test in spousal support variation claims by even higher level courts.[86] The SSAG User's Guide gives the example of the 2015 case of *Morigeau v. Moorey*, in which the BCCA held that the wife's re-partnering (either with the person she was seeing at the time or with someone else) was "foreseeable" at the time of the initial order.[87] The SSAG User's Guide suggests that the better approach is to consider what was "contemplated" or "taken into account" at the time the initial order was made.[88]

**Discussion Question:**

**21) Is there a benefit in clarifying the differences between variations and reviews in the FLA?**

### Retroactive Spousal Support

Section 167 of the FLA not only allows the court to change, suspend or terminate a spousal support order, but allows the court to do so prospectively or retroactively. Recipients may apply for a retroactive increase, and payors may apply for a retroactive decrease. Payors can also

[84] For example, *Sekhon v. Sekhon,* 2021 BCSC 630, paras. 37-38.
[85] *Spousal Support Advisory Guidelines: The Revised User's Guide,* September 6, 2016, page 73 [Table of Contents - Spousal Support Advisory Guidelines: The Revised User's Guide (justice.gc.ca)].
[86] SSAG User's Guide, page 73.
[87] *Morigeau v. Moorey*, 2015 BCCA 160. The BCCA's analysis of repartnering in a spousal support variation claim was also more recently followed by the BCSC in *Neuman v. Neuman*, 2021 BCSC 873 (paras. 48-52).
[88] SSAG User's Guide, page 73.

apply to have arrears in spousal support reduced or cancelled.[89] Although retroactive decrease in spousal support and arrear reduction or cancellation applications may be sought at the same time, they have different tests.

The SCC considered retroactive spousal support in the 2011 case of *Kerr v. Baranow*.[90] In that case, the SCC held that similar considerations for retroactive child support claims are relevant to retroactive spousal support claims,[91] but that these considerations must be weighed based on the different legal principles and objectives of spousal support:[92]

> [208] … there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: see, e.g., M. L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (2004-2005), 23 C.F.L.Q. 243, at pp. 281 and 291-92.

The BCCA recently considered retroactive spousal support in the 2021 decision of *Legge v. Legge.*[93] In that case, the trial judge denied the wife's application for retroactive spousal support because of an almost 10-year delay in pursuing the application. The BCCA overturned the trial judge's decision, holding that the trial judge gave insufficient weight to the wife's needs and hardships in determining that the delay was unreasonable.[94] The BCCA relied on the 2020 SCC child support case of *Michel v. Graydon*[95] in its analysis of the delay for retroactive spousal support.

In the 2021 case of *Colucci v. Colucci,* [96] the SCC addresses "confusion that has persisted" since *D.B.S. v S.R.G.*[97] which had previously set out the "principles and competing interests" involved in retroactive child support.[98] In *Colucci*, the court considered a retroactive child support application and stressed that effective notice is not present unless there has been adequate and timely disclosure. In applications to retroactively decrease child support, the "reasonable proof" accompanying notice must be sufficient to allow the recipient to assess the

[89] FLA, section 174.
[90] *Kerr v. Baranow*, 2011 SCC 10.
[91] The factors to be considered in retroactive support claims are "the needs of the recipient, the conduct of the payor, the reasons for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse" (*Kerr v. Baranow*, para. 207).
[92] *Kerr v. Baranow*, para. 207
[93] *Legge v. Legge*, 2021 BCCA 365.
[94] *Legge v. Legge*, para. 29.
[95] *Michel v. Graydon*, 2020 SCC 24.
[96] *Colucci v. Colucci,* 2021 SCC 24.
[97] *D.B.S. v. S.R.G.,* 2006 SCC 37.
[98] *Colucci v. Colucci,* para 3.

claim and respond appropriately.[99] Although the *Colucci* decision involves retroactive child support, it has also been applied in the analysis of retroactive spousal support claims. [100]

Legal commentary[101] questions whether retroactive child support considerations are being appropriately applied to retroactive spousal support claims, despite the SCC differentiating the two types of support.[102] It has been suggested that "claims for retroactive spousal support and retroactive child support are far more similar than we might have thought after *Kerr v. Baranow*."[103]

Legal commentary has also suggested that there is some imbalance between retroactive claims to increase support versus claims to decrease support.[104] For example, a retroactive spousal support claim with a 10-year delay was granted in *Legge v. Legge*,[105] whereas in *Jonas v Akwiwu*, a payor's claim for a retroactive reduction in child support was rejected despite only an 11-month delay.[106]

**Discussion Question:**

22) **In your opinion, is the analysis of retroactive spousal support and child support claims becoming blurred? Is it clear if, when, and how concepts of retroactive child support claims should be applied to retroactive spousal support claims?**

23) **Have you observed an imbalance between retroactive spousal support claims by payors and recipients? If so, is this something that should be addressed in the FLA?**

24) **Please share any further thoughts, concerns, or ideas about modernizing the spousal support provisions under Division 4 of Part 7 of the FLA.**

# Issues with Specific Spousal Relationships

## Introduction

The nature and composition of families have continued to evolve and the FLA's division of property and spousal support provisions must continue to meet the needs of all family types.

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[99] *Colucci v. Colucci,* para. 88.

[100]For example, *Namdarpour v. Vahman*, 2021 BCSC 1561; *D.K.D.S. v. M.S.S.*, 2021 BCSC 2084 (a claim under the *Divorce Act*); Thompson, Rollie, Q.C., *Nagging Spousal Support Issues*, Powerpoint Slides, July 8-9, 2021, pages 14-17.

[101] 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.

[102] *Kerr v. Baranow*, 2011 SCC 10.

[103]Franks, ,2022, page 17.

[104] Franks, 2022, pages 12-18.

[105] *Legge v. Legge*, 2021 BCCA 365.

[106] *Jonas v. Akwiwu*, 2021 ONCA 641.

Other parts of the FLA may also need to be modernized to reflect all family types, and they will be explored in subsequent phases of this project.

In this section, the paper explores two particular types of family relationships (multiple separations and blended families, and predatory relationships), but this paper also seeks your views on other types of family relationships.

### Multiple Separations and Blended Families

Blended families are a common family type with unique characteristics. Individuals who are on their second, third or fourth marriage or marriage-like relationship may or may not have divided their family property or started paying or receiving spousal support before entering into subsequent spousal relationships.

A review of the BC case law shows that courts have considered blended family situations,[107] but have yet to identify problems in applying the FLA*'s* property division scheme to their situations.

**Discussion Questions:**

**25) In your practice, have you come across any spousal support or division of property issues specifically related to multiple separations or blended families? If so, is there a way the FLA could be modernized or clarified to address those issues?**

### Predatory Relationships

Predatory relationships are ones that are entered into by one party for the sole purpose of exploiting another for personal gain. Some people may be especially vulnerable to these relationships, such as the elderly or people with certain disabilities.[108] Predatory relationships can raise serious concerns in many areas of law, including family law.

The FLA does not explicitly deal with predatory relationships. Under section 3 (1) of the FLA, individuals are considered spouses if they are married or if they have lived together in a marriage-like relationship for two years. The common law test for mental capacity to enter into a marriage is very low and requires a person to understand the nature of the marriage contract and the duties and responsibilities it creates.[109]

Although spouses generally keep the property they bring into a relationship, a spouse may benefit from any increase in value of that excluded property during the relationship under Part 5 of the FLA. For example, if a person had real property in a market where prices rapidly increase, a predator may enter into a relationship with that person for the sole purpose of financially gaining on the increase in value of that property. Section 95 of the FLA allows the court to deviate from the equal division of family property if it would result in significant unfairness considering a list of factors, including the duration of the relationship, but does not

[107] For example, *Hamil v. Dunlop*, 2016 BCSC 1337.
[108] Todd, Deborah, *Elder Abuse and Predatory Marriages – Wills and Estates – Victoria BC*, Deborah Todd Law Website, January 11, 2019. [Deborah Todd Law]
[109] *Scott v. Potvin*, 2014 BCSC 435, para. 177.

speak to other characteristics of the relationship that might allow for a more direct consideration of a predatory spouse.

Predatory relationships that have been considered by the courts tend to be decided on the individual's lack of capacity to marry, which is a difficult test to meet. [110] Short of declaring the marriage void due to a lack of capacity, there is no remedy in BC's legislation to prevent a predator from making property division or spousal support claims if they meet the FLA's definition of "spouse."

As the population ages, predatory relationships on the elderly could be on the rise. One British Columbia lawyer also suggested that the COVID-19 pandemic may increase the risk of predatory marriages, especially for the elderly who found themselves in isolation.[111]

The issue of predatory relationships arises in several other areas of law, notably in wills and succession. Issues with predatory relationships have also arisen under the *Land (Spouse Protection) Act* (LPSA).[112] Consider the following scenario that describes a way that someone may take advantage of the LPSA for gain:

> A caregiver takes advantage of a senior in palliative care by secretly marrying them under suspicious circumstances. The senior owns their home worth over $1 million, but the caregiver (now spouse) uses the LPSA to create a life estate for themselves by filing a charge against the property. By doing so, the caregiver now has the right to live rent-free in the home until their death. The LPSA permits this transaction by simply completing and filing a form through a lawyer, notary, or paralegal. The senior and their family have few options for recourse once the transaction is complete –they can begin the expensive and onerous process of contesting the validity of the marriage in court, or they can negotiate a settlement with the caregiver. Either way, the caregiver has manufactured a financial windfall far in excess of what would have been available to them under the FLA or the *Wills, Estates and Succession Act*.[113]

Current legal tools in British Columbia to protect individuals with diminished capacity and their assets include powers of attorney, representation agreements, certificates of incapability under the *Adult Guardianship Act*,[114] and committees under the *Patients Property Act*.[115] Civil and criminal remedies may also be available to victims of predatory relationships outside of the family law context.[116]

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[110] For example, *Devore-Thompson v. Poulain*, 2017 BCSC 1289, and *Hunt v. Worrod,* 2017 ONSC 7397.

[111] Ko, Janis, *Increased Risk of Predatory Marriage During the COVID-19 Pandemic?*, Onyx Law Group Website, May 1, 2020. [Increased Risk of Predatory Marriage During the COVID-19 Pandemic? - Onyx Law Group]

[112] *Land (Spouse Protection) Act*, [RSBC 1996] c. 246.

[113] *Wills, Estates and Succession Act*, [SBC 2009] c. 13.

[114] *Adult Guardianship Act*, [RSBC 1996] c. 6.

[115] *Patients Property Act*, [RSBC 1996] c. 349.

[116] 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.

**Discussion Question:**

26) **In your opinion, is there currently a gap in family law to protect vulnerable people and their property from predatory relationships? If so, in your opinion, what greater protections do you think the FLA could provide against predatory relationships?**

27) **If you have not done so already, please share any further thoughts, concerns, or ideas about how to modernize the FLA to be more reflective of specific spousal relationships.**

## Appendix: List of Discussion Questions

# Division of Property Issues

### Identification and Treatment of Excluded Property

*Tracing Methods*

1) **Should the FLA provide more direction on tracing excluded property or leave it up to courts to decide the appropriate method on a case-by-case basis?**

2) **Are there certain tracing methods that are more appropriate for certain types of excluded property? For example, real property, investments, or property traced into appreciating assets versus depreciating assets? If so, which methods work best for what types of property?**

3) **Could a list of indicators be developed for when different methods are appropriate? If so, what should those indicators be?**

*Evidentiary Presumptions*

4) **In your opinion, what should be the outcome in the following scenarios:**

   **a. If a spouse transfers excluded property into their spouse's sole name, should that property be presumed to be the excluded property of the transferring spouse or divisible family property upon separation?**

   **b. Would the situation change if the excluded property was transferred into the spouses' joint names?**

   **c. Should it matter whether the transferring spouse obtains a benefit from the transfer (for example: a tax benefit, creditor protection)?**

5) **Would expressly applying or abolishing the presumption of advancement to transfers between spouses under the FLA increase certainty and clarity in the law? Which of these options would better align with your general expectation of fairness?**

6) **If an evidentiary presumption applies to transfers between spouses, are there certain types of evidence that the court should or should not consider when deciding whether the presumption has been rebutted?**

7) **If the evidentiary presumptions are expressly abolished, should concerns about unfairness be addressed through changes to section 95 or section 96 of the FLA? For example, what factors could be added to ensure fairness when the court considers whether to divide gifts between spouses that occur during their**

**relationship, such as: duration of the relationship, any agreements between the spouses, whether the transferring spouse received a benefit from the transfer?**

8) **A related question arises if an adult child receives a gratuitous transfer of an interest in a property from their parents, the case law says the presumption of resulting trust applies and no gift is presumed. If, for example, the adult child receives a joint interest in real property in which they live with their spouse, should the increase in value of the joint interest in the property be considered divisible family property? If so, at what time should that increase be valued?**

## Unequal Division of Family Property

9) **Are the factors to be considered in assessing whether an equal division of family property is significantly unfair under section 95 of the FLA adequate? If not, are there factors that should be clarified, removed from or added to the list to account for any recent societal changes or to address issues arising from court decisions? Should any factors be given more or less weight, for example, the duration of the relationship?**

10) **Does the catch-all provision in paragraph 95 (2) (i) allowing the court to consider "any other factor" create too much uncertainty about what constitutes "significant unfairness?" Would limiting or removing paragraph 95 (2) (i) negatively affect the court's ability to create fairness?**

## Addressing Unique Types of Property

### *Trusts*

11) **Should the FLA clarify when property held in trust should be valued?**

12) **Do you believe it is appropriate that property held in trust is not valued until it is distributed to the beneficiaries? What if distribution does not occur prior to separation or the division of other property? What if there is evidence of distribution being intentionally delayed to frustrate a spouse's claim? Is there an alternative valuation method that should be considered?**

### *Pets*

13) **Considering the changing social realities of people's relationships with their pets and decision-makers' acknowledgements that the law may not fulfill people's needs, do you think Part 5 of the FLA currently allows for the appropriate treatment of pets upon separation? If not, what types of provisions should be considered and is the FLA the appropriate legislation to contain such provisions?**

14) **If the court had explicit authority to deal with family pets separate from other types of property in the FLA, what type of orders do you believe the court should**

**be able to make? For example: orders to uphold, enforce, or replace agreements about time with and care of a pet; joint ownership of a family pet; orders about time with and care of a family pet; and costs associated with care including: food, grooming and health related costs.**

15) **Should the court be required to consider certain factors when making property division decisions about pets in family law disputes (for example: the best interest of the pet, who cared for the pet, costs of the pet, the best interest of a child who has an emotional bond with the pet, etc.)?**

16) **Considering that many families have pets, what level of court do you think would be in the best position to respond to their legal needs and ensure access to justice on pet related issues in family law?**

17) **Generally, do you think that providing special treatment for certain types of property under Part 5 aligns with the goals of the FLA (e.g., predictable outcomes, easy to use, consistent with fairness)?**

### Summary of Division of Property

18) **Is the illustrative list of types of family property in section 84 (2) of the FLA adequate or should additions or clarifications be made to address new types of property?**

19) **Is the list of types of excluded property in section 85 (1) of the FLA adequate?**

20) **If you have not done so already, please share any further thoughts, concerns, or ideas about how to improve the division of property provisions under Part 5 of the FLA.**

## Spousal Support

### Reviews and Variations

21) **Is there be a benefit in clarifying the differences between variations and reviews in the FLA?**

### Retroactive Spousal Support

22) **In your opinion, is the analysis of retroactive spousal support and child support claims becoming blurred? Is it clear if, when, and how concepts of retroactive child support claims should be applied to retroactive spousal support claims?**

23) **Have you observed an imbalance between retroactive spousal support claims by payors and recipients? If so, is this something that should be addressed in the FLA?**

24) **Please share any further thoughts, concerns, or ideas about modernizing the spousal support provisions under Division 4 of Part 7 of the FLA.**

## Issues with Specific Spousal Relationships

### Multiple Separations and Blended Families

25) **In your practice, have you come across any spousal support or division of property issues specifically related to multiple separations or blended families? If so, is there a way the FLA could be modernized or clarified to address those issues?**

### Predatory Relationships

26) **In your opinion, is there currently a gap in family law to protect vulnerable people and their property from predatory relationships? If so, in your opinion, what greater protections do you believe the FLA could provide against predatory relationships?**

27) **If you have not done so already, please share any further thoughts, concerns, or ideas about how to modernize the FLA to be more reflective of specific spousal relationships.**