

Family Law Act Modernization Project

Phase 1 Property Division and Spousal Support

What We Heard

Project Overview

When the *Family Law Act* (FLA) became law almost ten years ago, its primary goal was to update family law in B.C. Many societal changes have happened since then and it is important that the law reflects those changes. It's also important for the FLA to remain up to date with the development of case law.

The B.C. Ministry of Attorney General is modernizing the FLA to ensure people in B.C. have access to fair and equitable justice. The FLA Modernization Project is happening in phases to make sure those with interests and the public have the time and ability to participate, including allowing the Ministry time to engage with Indigenous governments and organizations.

The first phase of the project is about property division, spousal support, and pension division under the FLA.

Public Engagement Summary

Public engagement on property division and spousal support took place from July 26 to September 9, 2022. During the engagement, a [background paper](#) and detailed [discussion paper](#) were posted on the govTogetherBC website for the public to learn about specific issues being considered. The public was invited to provide feedback by completing a survey or by sending a written response.

A public consultation on the division of pensions under the FLA was conducted through the British Columbia Law Institute and the resulting report is published on their website at <https://www.bcli.org/project/pension-division-review-project/>.

We would like to thank everyone who participated in our engagement process. Each response provides valuable insight on how these issues are experienced. The feedback received has helped expand our understanding of the issues and will contribute to further analysis and policy development.

Public Engagement Responses

The ministry received 92 survey submissions and 16 written responses.

The survey respondents included 39 interested members of the public, 15 lawyers, 13 legal professionals, and 25 other individuals many of which identified themselves as support workers. 74% of respondents identified themselves as a woman and 70% described their cultural background as European.

Most respondents live in B.C., with 71% living in an urban area and 29% living in a rural area.

86% have had at least one spouse. Almost 60% have separated or are currently separating from a spouse.

The written responses were submitted by lawyers, professional legal organizations, advocacy groups, a First Nation, a public organization, and a not-for-profit society.

Feedback on the Issues

The following sections summarize the survey and written feedback the ministry received about property division and spousal support issues. Please refer to the [background paper](#) and detailed [discussion paper](#) for more information.

[Property Division](#)

Pets

Most respondents felt that the FLA does not adequately address who should care for family pets when spouses separate. The respondents felt that the FLA should clarify the types of court orders and agreements that can be made in relation to family pets when spouses separate. Many suggested that the most appropriate court for such cases would be the B.C. Provincial Court and emphasis should be made on resolving family pet issues outside of court through agreements, arbitration, or collaborative law.

41% of survey respondents who had separated or were separating from a spouse reported that determining who would care for the family pet was an issue in their separation. Five of these respondents reported that the family pet was the biggest issue in their separation.

The survey respondents felt that the court should have the following options when resolving issues related to family pets:

- Determine if a family pet is jointly owned (58%)
- Decide who the family pet will live with (59%)
- Make care and time arrangements for the family pet (60%)
- Decide who will pay the costs of the family pet (62%)
- Uphold or replace any agreements made by separated spouses about the family pet (54%)

67% of respondents felt that the court should be able to consider the best interests of a family pet in its decisions.

When considering the best interests of a family pet, respondents felt that the most important factors were whether there was any history of animal abuse or unsafe conditions for the family pet (86%), which spouse takes care of the family pet's basic daily needs (86%), and the ability of each spouse to continue to care for the family pet (80%).

86% of respondents felt that special consideration should be given to the best interests of a child who has a strong emotional bond with the family pet. This feedback highlighted that:

- A child's relationship with a family pet can be therapeutic, especially during a separation
- The child might view the pet as belonging to them
- The best interests of the child should be more important than anything else when making decisions about the family pet

In terms of defining what a family pet is, 57% of the respondents thought the court should be able to make decisions about a family pet no matter what type of animal it is.

Some respondents warned that amendments related to pets should not lengthen or intensify conflict between separating spouses and the issue should not use significant court resources. Concern was also raised that a

family pet should not be used as a tool in family violence or in coercive or controlling behaviour between spouses.

Gifts Between Spouses

A gift between spouses is made when property is transferred from one spouse to the other for free without payment or exchange. Most respondents felt that the FLA should be updated to clarify how gifts between spouses should be handled when spouses separate and when the gift was one spouse's excluded property (for example, property one spouse brought into the relationship). Most respondents felt the FLA should put an end to the common law principle of the presumption of advancement, whereas there were mixed views on whether the presumption of resulting trust should also end. Most respondents thought that the list of factors the court can consider when dividing excluded property should be expanded, particularly to ensure fairness and predictability.

The survey presented respondents with a fictional scenario where a husband owned a house before the relationship began (i.e., the husband's excluded property). The husband then transferred it to his wife during the relationship. Respondents were asked what they thought should happen to the house when the parties separate.

When the house was transferred into both of their names jointly, 47% of respondents felt the value of the house should be divided equally. When the house was instead transferred into the wife's name only, 65% felt the value should be divided equally.

61% of respondents felt that the length of the marriage should be a factor in deciding how excluded property that is transferred between spouses is divided. However, respondents were evenly split on whether the type of property that was transferred (for example, if it was the family home or money in a bank account) should be a factor.

When asked whether there were any other factors that should be considered when dividing excluded property transferred between separated spouses, debt was the biggest factor respondents felt would be relevant. Other factors that were identified, that are not currently in the FLA, were evidence of family violence and considering what is in the best interests of a child of the relationship.

Unequal Division of Family Property

The written responses supported the current way family property is divided under the FLA and suggested it does not need to be changed. Most who commented on the list of factors the court may consider in unequally dividing family property felt that the list was adequate and that the catch-all provision should be kept to continue giving the court discretion.

Some individual responses provided the following suggestions:

- The court's discretion to determine significant unfairness should be limited
- More weight should be given to the duration of the spousal relationship over the other factors when deciding whether to unequally divide family property
- Any Indigenous cultural value or significance attached to property should be considered when dividing family property or excluded property between spouses. An example was provided where if one spouse is a member of an Indigenous community and the other spouse is not, then the court should be able to consider whether property with Indigenous cultural value should remain with the spouse who has a connection to that community.

- The list of types of property should be modernized to include software, apps, new financial instruments, and cryptocurrencies
- Property should be valued from the date the parties became spouses as defined in the FLA rather than the date on which cohabitation began

Intergenerational Issues

Respondents support the importance of intergenerational aspects of property division. Some responses suggested that the FLA be amended to address property division issues that occur when multiple generations of a family are involved. For example, adult children may be given an interest in property by their parents. Some respondents suggested that spouses of the adult children should share in any increase in value of that interest.

Some responses cautioned that these intergenerational issues are complex and estate and trust experts need to be consulted about any proposed amendments.

A response suggested that the FLA should provide direction on how to divide property between spouses involving multigenerational businesses.

Some survey respondents who have been through a separation identified that gifts from their parents or their spouse's parents either given to them personally, or to them as a couple, were the biggest property division issues in their separation.

Tracing Methods

Some responses supported amending the FLA to clarify how excluded property should be traced from one form of property to another. For example, using inheritance funds to buy a house, then selling the house to buy a smaller property and RRSPs. This is all property that is changing form but can be traced back to the original excluded property.

These respondents felt that clarifying tracing in the FLA would increase predictability and fairness because the current lack of guidance makes it difficult for lawyers to give legal advice about possible outcomes and affects the ability of parties (especially self-represented litigants) to reach settlements. However, there was no consensus on the type of tracing methods that should be used in different situations.

In contrast, other respondents did not think the FLA should specify tracing methods and thought that the court's discretion to use different tracing methods for different types of assets should be maintained.

Trusts

A couple responses suggested that the FLA should clarify when a spouse's interest held in a trust should be valued for the purpose of property division. One respondent noted this is complex and would need further consideration.

An example was provided of a spouse who is also a trustee and beneficiary of a discretionary trust intentionally delaying the distribution of the trust property to frustrate their spouse's interest in it. This could be abusing the current FLA provisions.

Another suggestion was to clarify that family property doesn't include beneficial interests in property that a spouse may have but has no control over. For example, a spouse may have beneficial interests in property held in a trust set up by their living parents for estate planning purposes.

Spousal Support

35% of survey respondents who have separated or were going through a separation indicated that spousal support was or is an issue in their separation. The most common issues for them were determining entitlement, amount, and duration of spousal support (75%), followed by reviews and variations of spousal support (38%), and retroactive changes to spousal support (25%).

A few respondents reported that spousal support claims were waived or abandoned because pursuing spousal support created a risk of family violence or escalating conflict over children. One respondent suggested that spousal support should be pegged to a Child Support Calculator, and that legal professionals should be barred from advising women to waive spousal support claims as a strategy to reduce the risk of family violence.

79% of survey respondents and many written responses suggested that the FLA should be clarified to make a review or a variation of spousal support easier to understand and get, especially for self-represented litigants. One response suggested that the FLA could require agreements and orders to specify the factors that were considered at the time they were made.

For retroactive spousal support, the responses included the following suggestions:

- The FLA should clarify what concepts of retroactive child support also apply to retroactive spousal support. However, exceptions should be allowed, for example, for time limits in cases of family violence.
- Retroactive spousal support claims should be capped at 3 years after effective notice has been given
- All spousal support provisions in the FLA should be clarified, especially for self-represented litigants, including interim spousal support applications, entitlement, duration, amount, income determination, reviews and variations
- The FLA should provide clear direction on how spousal support should be addressed once the obligation to pay child support ends. For example, there may be situations where financial resources are limited and spousal support is paid at a lower rate while child support is being paid even though a higher spousal support amount would be appropriate. However, when the obligation to pay child support ends, the FLA should clarify how the amount of spousal support may be adjusted.
- The FLA should allow for more lump-sum spousal support orders
- The FLA should be amended to allow judges to address a litigant's failure to provide financial disclosure at the earliest stages of a family law proceeding
- The FLA should specifically require consideration of family violence in spousal support claims

Issues with Specific Spousal Relationships

Blended Families

For blended families or spouses who have been through multiple separations, a suggestion was made that the FLA could require spousal support be revisited if there are financial obligations to children from another relationship.

Another suggestion was that not every cohabitation relationship should result in child support obligations in relation to stepchildren.

Predatory Relationships

The written responses included feedback on predatory relationships. Most supported the FLA addressing predatory relationships, but in different ways. For example, evidence of a predatory relationship could be added:

- As a factor in dividing family property under section 95
- As a restriction to spousal support claims
- Into the definition of family violence

Several responses suggested that the FLA could establish presumptions that would assist the court in determining whether a relationship is predatory or not. For example:

- A presumption of vulnerability if at any time before the marriage, or within one year after the marriage, a spouse was declared incapable by the Supreme Court or by a Certificate of Incapability under the *Adult Guardianship Act*
- A presumption of a predatory relationship if the relationship began as one spouse being the other's caregiver

Other suggestions about predatory relationships included:

- Adding a definition of a predatory relationship to the FLA that could refer to other legislation dealing with predatory relationships
- Giving other individuals the ability to participate in court hearings in these cases, including a lawyer, a committee,¹ a statutory property guardian, and a child of a vulnerable person
- Establishing a test for a marriage-like relationship to address issues with predatory relationships in the FLA

One respondent was against predatory relationships being addressed in the FLA because it could lead to gender stereotypes in court decisions and assumptions being made about people entering relationships.

Other

Other suggestions that were made in the public consultation related to property division and spousal support under the FLA:

- The FLA should be amended to address property division in polyamorous relationships
- The FLA should consider what happens when a spouse transitions to another gender
- Section 210 of the FLA should be amended to remove the requirement for specific treaty language to allow a Treaty First Nation to have standing in land cases under Part 5
- The FLA should specify how occupational rent should be treated in a separation
- Considering the high costs of living in some areas of British Columbia and couples beginning cohabitation early in relationships, the definition of "marriage-like relationships" should be increased from two years of cohabitation.

Acknowledgements

Thank you again to everyone who provided feedback in this public consultation.

We invite you to continue to check for consultation updates on the FLA Modernization Project that will be posted on the [govTogetherBC website](#).

¹ A committee is a person appointed under the [Patients Property Act](#) to make decisions for adults who are not capable of doing so on their own behalf.