

Dividing Property and Allocating Debt under  
British Columbia's *Family Law Act*:  
The Case Law to Date

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# Dividing Property and Allocating Debt under British Columbia's *Family Law Act*: The Case Law to Date

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## I. Introduction

The division of property and allocation of debt between the parties to a domestic relationship in British Columbia is primarily accomplished through the provisions of Part 6 (pensions) and Part 5 (property other than pensions) of the new *Family Law Act*,<sup>1</sup> the common law of trusts and a miscellany of related legislation, such as the provincial *Partition of Property Act*<sup>2</sup> and *Pension Benefits Standards Act*<sup>3</sup> or the federal *Family Homes on Reserves Act*<sup>4</sup> and *Canada Pension Plan*,<sup>5</sup> that also come into play from time to time.

The *Family Law Act* takes an entirely different approach to property and debt than the former *Family Relations Act*.<sup>6</sup> Although the Supreme Court retains exclusive jurisdiction to hear and determine these disputes,<sup>7</sup> unmarried spouses have rights and entitlements equivalent to those enjoyed by married spouses,<sup>8</sup> divisible “family assets” are now known as “family property,” rules are provided for the allocation of responsibility for “family debt”<sup>9</sup> and the sole triggering event is the date of separation,<sup>10</sup> not the making of a declaration of irreconcilability, the execution of a separation agreement or the pronouncement of a divorce order.<sup>11</sup> Most

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<sup>1</sup> *Family Law Act*, SBC 2011, c. 25

<sup>2</sup> *Partition of Property Act*, RSBC 1996, c. 347

<sup>3</sup> *Pension Benefits Standards Act*, SBC 2012, c. 30

<sup>4</sup> *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c. 20

<sup>5</sup> *Canada Pension Plan*, RSC 1985, c. C-8

<sup>6</sup> *Family Relations Act*, RSBC 1996, c. 128

<sup>7</sup> *Family Law Act*, ss. 192(1) and 193(2)(b)

<sup>8</sup> *Ibid.*, ss. 3(1) and 81

<sup>9</sup> *Ibid.*, ss. 81, 86 and 87(b)

<sup>10</sup> *Ibid.*, s. 81(b)

<sup>11</sup> *Family Relations Act*, s. 56(2)

importantly, the new act adopts a partnership of acquests regime, in which spouses share in the property acquired after the commencement of their relationship, over the deferred community of property regime provided for in the *Family Relations Act*.

According to the white paper released by the Ministry of the Attorney General in 2010, the chief concerns about the property scheme under the *Family Relations Act* involved the high degree of discretion available to the court and the consequent uncertainty as to outcome in any given case:<sup>12</sup>

*British Columbia's current law relies heavily on judicial discretion to sort out property division disputes. The existing statute provides a general framework for dividing property but relatively few detailed rules. As well, in British Columbia, judges have significant discretion with regard to dividing property unequally at the distribution stage. While experienced family lawyers are familiar with the developments from the case law, the governing law is relatively inaccessible to spouses without lawyers. The broad discretion in the existing Act makes it harder to predict outcomes. This uncertainty, in turn, can fuel and prolong disputes.*

Accordingly, the Ministry's Civil Policy and Legislation Office proposed that any new legislation "move to an excluded property model that involves less judicial discretion, particularly at the initial stage of identifying which assets are subject to division."<sup>13</sup> The white paper further commented that:<sup>14</sup>

*The most compelling reasons for moving to an excluded property regime are to make the law simpler, clearer, easier to apply, and easier to understand for the people who are subject to it. The model seems to better fit with people's expectations about what is fair. They "keep what is theirs," (such as pre-relationship property and gifts and inheritances given to them as individuals) but share the property and debt that accrued during their relationship. Where one spouse enters the relationship with more assets than the other, providing that spouses share the increase in the value of the excluded property promotes a fair outcome. ...*

*Changing to an excluded property scheme removes the broad judicial discretion from the asset identification stage and leaves some discretion at the distribution stage. This change is designed to make it easier to identify property subject to division and, therefore, reduce the potential for disagreement.*

The Ministry's 2012 resource, "The Family Law Act Explained," published after the passage of the act on 23 November 2011, continued these themes, characterizing the scheme of Part 5 as

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<sup>12</sup> *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (Victoria, BC: Ministry of Attorney General, 2010) at pp. 79 and 80, available online at <http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/family-law-white-paper.pdf>.

<sup>13</sup> *Ibid.*, p. 80

<sup>14</sup> *Ibid.*, p. 81

“an excluded property model that involves less judicial discretion” and stating, rather optimistically, that:<sup>15</sup>

*These changes make the law simpler, clearer, easier to apply and easier to understand for the people who are subject to it. British Columbia historically had a higher than average level of property division disputes in court; the broad flexibility and discretion in this area created uncertainty and promoted litigation. As well, the excluded property division model is a better fit with people’s expectations about what is fair: they share the property and debt that they accrue together during their relationship.*

Despite government’s wish to simplify the law and make it easier to understand, and thereby increase both certainty of outcome and the number of family law disputes resolved other than by trial,<sup>16</sup> a number of controversies quickly emerged from the new legislation that have had a contrary effect:

- a) the provisions on the characterization of trusts as shareable family property at s. 84(3) failed to anticipate the problems posed by contingent entitlements and multiple beneficiaries;<sup>17</sup>
- b) the exclusion of gifts from family property at s. 85(1)(b) included gifts between spouses, raising the possibility of double recovery;<sup>18</sup>
- c) the definition of family debt at s. 86(a) includes debts incurred during the spousal relationship but paid out prior to separation;

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<sup>15</sup> “The Family Law Act Explained,” available online at <http://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/family-law-act/the-family-law-act-explained>. See also British Columbia, Legislative Assembly, *Official Report of the Debates of the Legislative Assembly*, Vol. 27 No. 9 (14 November 2011) at 8709.

<sup>16</sup> In the discussion of s. 84 on family property in “The Family Law Act Explained,” for example, the Ministry offers its opinion that:

*This section provides a clear and closed list of what is family property. This will promote settlement by making it easier to predict outcomes.*

See <http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/part5.pdf>. This view was previously stated by the Attorney General thusly:

*Judicial discretion around dividing family property will be reduced so that the law will be more certain and separated spouses will be better able to predict court outcomes.*

See British Columbia, Legislative Assembly, *Official Report of the Debates of the Legislative Assembly*, Vol. 28 No. 2 (17 November 2011) at 8845.

<sup>17</sup> These issues were partly addressed through the amendments introduced by s. 12 of the *Justice Statutes Amendment Act, 2014*, SBC 2014, c. 9.

<sup>18</sup> This issue was rectified by s. 13 of the *Justice Statutes Amendment Act, 2014* which amended the *Family Law Act* to specify that excluded gifts are gifts from third parties.

- d) the provisions for applications regarding extraprovincial property at Part 5, Division 6 are inscrutably complex;<sup>19</sup>
- e) the potential non-expiry of property interests vesting upon separation pursuant to s. 81(b), despite the limitation expressed at s. 198(2);<sup>20</sup> and, most significantly,
- f) the terms of s. 104(2), which carry forward the effect of s. 69(2) of the *Family Relations Act* and regrettably provide that the rights available to spouses under Part 5 “are in addition to and not in substitution for rights under equity or any other law.”

I suspect that most of these issues will be sorted out as the case law on Part 5 accumulates, however, s. 104(2), as this paper will describe, requires amendment, if not excision, if government’s intentions of simplifying the act and promoting settlement are to be realized.

In this paper, I will provide a digest of the overall scheme of Part 5, and address matters such as jurisdiction and time limits along with the mechanics of the division of property and debt. I will then review the key findings in the emerging case law, and conclude with a discussion of the Court of Appeal’s recent decision in *V.J.F. v S.K.W.*<sup>21</sup> An appendix listing the *Family Law Act* cases discussed, with hyperlinks to those decisions on CanLII, is provided.

## II. Scheme of Part 5

The differences in the approach to the division of property taken by the *Family Relations Act* and the *Family Law Act* are profound; no assumptions should be made that the terms of the new act bear any relation to those of the old without consulting the text of the legislation. In this section I will discuss the threshold prerequisites of all claims under Part 5 – standing, time limits and jurisdiction – before reviewing the act’s conceptual foundations, its definitions of family property, excluded property and family debt and the various interim and final orders it provides.

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<sup>19</sup> The division was broadly amended by ss. 14 to 17 of the *Justice Statutes Amendment Act, 2014*, although I don’t think that the amendments did much to clarify matters.

<sup>20</sup> See Boyd, J.-P., “Easter Eggs and Bad Eggs: Surprises in the Drafting and Subsequent Interpretation of the *Family Law Act*” (Calgary, AB: Canadian Research Institute for Law and the Family, 2015) at pp. 5 to 8, available online at [http://www.crilf.ca/Documents/Easter Eggs - May 2015.pdf](http://www.crilf.ca/Documents/Easter%20Eggs%20-%20May%202015.pdf).

<sup>21</sup> *V.J.F. v S.K.W.*, 2016 BCCA 186

## A. Standing

The rights and remedies available under Part 5 of the *Family Law Act* are available only to persons qualifying as spouses,<sup>22</sup> and the burden of establishing standing as a spouse lies on the party claiming that status.<sup>23</sup> Under s. 3, *spouse* for the purposes of Parts 5 and 6 includes:

- a) a person who is married to another person (s. 3(1)(a));
- b) a person who has lived with another person in a marriage-like relationship for a continuous period of at least two years (s. 3(1)(b)(i)); and,
- c) a former spouse (s. 3(2)).<sup>24</sup>

Treaty first nations, presently defined in the *Interpretation Act* as the Tsawwassen and Maa-Nulth First Nations,<sup>25</sup> may also have standing under s. 210(1) if: the first nation is entitled to make laws regarding the alienation of treaty lands; a parcel of its treaty lands is at issue in the proceeding; and, at least one party is a member of the first nation. In such cases, the first nation is entitled to participate in the proceeding and the court must additionally consider “any evidence or representations respecting the applicable treaty first nation's laws restricting alienation of its treaty lands.”<sup>26</sup>

## B. Time Limits

Applications for orders to divide property or allocate debts must be brought within a two-year period which, for *married* spouses, commences on the date of:

- a) the divorce order (s. 198(2)(a)(i)); or,
- b) the marriage being declared a nullity (s. 198(2)(a)(ii)).

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<sup>22</sup> Under s. 81(a), only spouses are presumptively entitled to family property and responsible for family debt. Only spouses may: apply for interim relief in relation to property under Part 5, Division 3, pursuant to s. 88; apply to set aside an agreement on property or debt under s. 93(3); apply for a final order in relation to property or debt under Division 4, pursuant to s. 94(1); take steps to enforce or protect property interests under Division 5, pursuant to ss. 99(1), 100(1) and 103(2); and, apply for an order respecting property located outside province under Division 6, pursuant to s. 109(2).

<sup>23</sup> *Khorramtash v Boroojeni*, 2015 BCSC 2275 at para. 27

<sup>24</sup> This is a slightly narrower definition of spouse than that which applies in the remainder of the act. Under that broader definition, “spouse” includes a person who has lived with another person in a marriage-like relationship for less than two years and has had a child with that person; see s. 3(1)(b)(ii).

<sup>25</sup> *Interpretation Act*, RSBC 1996, c. 238, s. 29.1(1). This section should be periodically reviewed for amendments in the event further treaties are made.

<sup>26</sup> *Family Law Act*, s. 210(2)

The limitation period for *unmarried* spouses begins to run somewhat earlier, on the date of separation, pursuant to s. 198(2)(9)(b).<sup>27</sup>

Note that provisions regarding the effect of attempts to reconcile on spouses' status as separated, approximating those of s. 8(3)(b) of the *Divorce Act*<sup>28</sup> on the subject, are made at s. 83 of the *Family Law Act*.

Note also that, pursuant to s. 198(5), the running of the basic time limit for married and unmarried spouses under s-s. (2) is suspended during "any period" that the spouses are "engaged in family dispute resolution with a family dispute resolution professional." *Family dispute resolution* is defined in s. 1 as including mediation, arbitration, collaborative settlement processes and parenting coordination. *Family dispute resolution professional* is defined as

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<sup>27</sup> The date of separation has a significance under the *Family Law Act* that it lacked under the former *Family Relations Act*. Under the new act, separation not only starts the running of the limitation period for unmarried spouses, it is, pursuant to s. 81(b), the triggering event which vests an undivided one-half interest in all family property in each spouse as tenants in common. Perhaps as a result, the indicia of separation are partially described at s. 3(4):

- (4) For the purposes of this Act,
  - (a) spouses may be separated despite continuing to live in the same residence, and
  - (b) the court may consider, as evidence of separation,
    - (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
    - (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

Case law accumulating under the *Divorce Act* suggests that other measures of separation include:

- a) a physical separation, although continued cohabitation by virtue of economic necessity does not mean that the parties are not separated, see *Oswell v Oswell* (1990), 74 OR (2d) 15 (OHC), *Dupere v Dupere* (1974) 19 RFL 270 (NBSC) and *Cooper v Cooper* (1972), 10 RFL 184 (OHCJ);
- b) a repudiation of the relationship resulting in its breakdown, see *Dupere, Oswell and Mayberry v Mayberry* (1971), 3 RFL 395 (OHCJ), the absence of joint social activities, see *Cooper, Oswell and Campbell v Campbell*, 2011 BCSC 1491, and the taking of meals separately, see *Cooper and Mayberry*;
- c) the cessation of domestic services for reciprocal benefit, see *Cooper and McKenna v McKenna* (1974), 19 RFL 357 (NSSC);
- d) the absence of a sexual relationship, although the absence of sexual relations is not conclusive on its own, see *Dupere, Cooper, Campbell, Oswell and Mayberry*; and,
- e) the commencement of divorce proceedings, see *Taylor v Taylor* (1999), 5 RFL (5th) 162 (ONSC) and *Czepa v Czepa* (1988), 16 RFL (3d) 91 (OHC).

However, as all relationships are unique unto themselves, there is no "checklist of characteristics that will invariably be found in all marriages," as Frankel J.A. observed in *Austin v Goerz*, 2007 BCCA 586 at para. 58; see also the comments of Whitten J. to a similar effect in *Taylor* at para. 13.

<sup>28</sup> *Divorce Act*, RSC 1985, c. 3 (2nd Supp.)

including lawyers, family law mediators qualifying under the regulations,<sup>29</sup> family law arbitrators qualifying under the regulations<sup>30</sup> and parenting coordinators.<sup>31</sup>

Under s. 198(3), the limitation period to apply to set aside an agreement on property under s. 93 commences on the date the applicant discovered, “or reasonably ought to have discovered,” the grounds for the application.

### C. Jurisdiction

The *Family Law Act* prescribes no particular conditions that must be met to establish jurisdiction in personam or in rem, other than in cases where an order about the division of property may be made in more than one jurisdiction. In such cases, the court must make a finding under s. 106(2) before making any other orders under Part 5; s. 106 provides that:

(2) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:

- (a) a spouse has started another proceeding in the Supreme Court, to which a proceeding under this Part is a counterclaim;
- (b) both spouses submit, either in an agreement or during the proceeding, to the Supreme Court’s jurisdiction under this Part;
- (c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started;
- (d) there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based.

(3) For the purposes of subsection (2)(d), a real and substantial connection is presumed to exist if one or more of the following apply:

- (a) property that is the subject of the proceeding is located in British Columbia;
- (b) the most recent common habitual residence of the spouses was in British Columbia;

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<sup>29</sup> Family Law Act Regulation, BC Reg. 347/2012, s. 4

<sup>30</sup> Family Law Act Regulation, s. 5

<sup>31</sup> No decisions considering s. 198(5) had been published at the time of writing. Issues to be addressed include: determining the point at which a process of family dispute resolution ends when the process is abandoned without express termination; the status of the time limit when the parties are working with a person who is not a qualified family dispute resolution professional, either by consent or by mutual mistake; the effect of delay occasioned by the family dispute resolution professional; and, the scope and nature of the “other processes” included in the definition of family dispute resolution. Case law will also be needed to address the effect of the lapses that are common in family law matters, in which lengthy periods of time pass with no steps taken by either party, usually as a result of the adequacy of the status quo rather than an effort to hinder or delay resolution or an intention to repudiate an out-of-court dispute resolution process.

(c) a notice of family claim with respect to the spouses has been issued under the *Divorce Act* (Canada) in British Columbia.

However, even if one or more of the s. 106(2) conditions are met, the court may decline jurisdiction under s-s. (4) if it is “more appropriate” for jurisdiction to be exercised by another court, having regard to the factors set out in s-s. (5). Those factors include: avoiding a multiplicity of proceedings; the convenience of the parties and witnesses; the law that is to be applied in determining the division of property; the extent to which an order made in one jurisdiction would be enforceable in the other; and, of course, “any other circumstances the court considers relevant.”<sup>32</sup>

Where no other jurisdiction may make an order dividing the parties’ property, jurisdiction in personam is exclusively established under Part 2 of the *Court Jurisdiction and Proceedings Transfer Act*,<sup>33</sup> which provides that “territorial competence” is established where:

- a) the party is ordinarily resident in British Columbia (s. 3(d));<sup>34</sup>
- b) the party has attorned to the jurisdiction (s. 3(b));
- c) the parties have a contract specifying jurisdiction (s. 3(c));
- d) there is a real and substantial connection between the province and the facts on which the proceeding against the party is based (s. 3(e));<sup>35</sup>
- e) there is no court outside the province in which the claimant could commence the proceeding (s. 6(a)); or,
- f) it would be unreasonable to require that proceedings be commenced in another jurisdiction (s. 6(b)).

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<sup>32</sup> Donegan J. provides a succinct description of s. 106, and the analysis required by the rest of Part 5, Division 6, in *Cockerham v Hanc*, 2014 BCSC 2432 beginning at para. 31.

<sup>33</sup> *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c. 28

<sup>34</sup> A useful discussion of “ordinary residence” in the context of a claim involving extraprovincial property is provided by Smith J. in *Parker v Mitchell*, 2016 BCSC 723 beginning at para. 13.

<sup>35</sup> Note that s. 10 of the *Court Jurisdiction and Proceedings Transfer Act* sets out a number of circumstances in which a real and substantial connection is presumed to exist, including where proceedings: are brought in relation to immovable and movable property located within British Columbia; are brought to enforce or set aside a contract relating to property located within the province; concern restitutionary obligations arising in the province; concern torts committed in the province; are brought against a trustee resident in the province or in relation to trust property located within the province; or, seek injunctions concerning the behaviour of a party in the province or in relation to property located within the province.

The court's jurisdiction in rem over property located in the province is a function of its territorial jurisdiction and, with respect to immovable property, the fact that no other court is able to make an enforceable order concerning such property.<sup>36</sup> The court may, however, make certain orders with respect to the ownership and division of extraprovincial property under s. 109, if it decides to assume jurisdiction pursuant to s. 106.

#### D. Conceptual Structure

The three presumptions on which Part 5 is founded are:

- a) that spouses are entitled to an equal share of all property qualifying as "family property" (s. 81(a));
- b) that spouses are equally responsible for debt qualifying as "family debt" (s. 81(a)); and,
- c) that spouses are entitled to separately retain that of their property which qualifies as "excluded property" and is exempt from division (s. 96).

Accordingly, once jurisdiction is established, the first step in a proceeding under Part 5 is to identify which of the spouses' property is family property and which of their debt is family debt.

Certain interim orders may be made, at any time prior to the making of an agreement or final order regarding the property in dispute, concerning advance distributions of family property, use of the residence qualifying as the "family residence" and the protection of "any property at issue" in the dispute.

Final orders may be made dividing family property and excluded property and allocating family debt. Family property may not be divided unequally unless an equal division would be "significantly unfair." Excluded property may not be divided at all, except in two circumstances: if family property and family debt located outside British Columbia cannot be divided; or, if it would be "significantly unfair" not to divide the excluded property. Final orders concerning property and debt that is the subject of a qualifying agreement between the spouses may not be made until the agreement is set aside.

A wide variety of orders and declarations are available under s. 97 to give effect to the determination and division of family property and excluded property and allocation of family debt. Further orders are available under s. 109 with respect to extraprovincial property and debt if the court has accepted jurisdiction over that property and debt.

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<sup>36</sup> See *Tezcan v Tezcan* (1987), 11 RFL (3d) 113 (BCCA).

## 1. Categorization of Property and Debt

The *Family Law Act* deals with the division of property in terms of “excluded property,” the property that is exempt from division and presumptively remains the property of its respective owners, and “family property,” the property that is shared between spouses. *Excluded property* is exhaustively defined in s. 85 as:

- a) property acquired before the spouses’ relationship began (s. 85(1)(a));<sup>37</sup>
- b) inheritances (s. 85(1)(b));
- c) gifts from third parties (s. 85(1)(b.1));
- d) settlements and awards of damages resulting from injury or loss, unless the settlement or award is given to both spouses or is made in respect of lost income (s. 85(1)(c));
- e) proceeds of insurance policies, other than policies respecting property, except any portion payable to both spouses or in respect of lost income (s. 85(1)(d))
- f) interests in discretionary trusts contributed to and settled by third parties (s. 85(1)(f));  
and,
- g) property derived from the disposition of excluded property (s. 85(1)(g)).

As one would expect, the burden of showing that property is excluded property lies on the party asserting the claim, pursuant to s. 85(2).

*Family property* is non-exhaustively defined in s. 84 as including:

- a) all property interests held by one or both spouses on the date of separation, less any excluded property (s. 84(1)(a));
- b) property interests acquired after separation from family property (s. 84(1)(b) and (2)(f));
- c) interests in corporations, partnerships, businesses and ventures (s. 84(2)(a) and (b));
- d) accounts receivable, including tax refunds (s. 84(2)(c));
- e) bank accounts, annuities, pension plans, RRSPs and income plans (s. 84(2)(d) and (e));

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<sup>37</sup> Under s. 3(3) of the *Family Law Act*, the date a spousal relationship begins is the earlier of:

- a) the date on which the parties begin to live together in a marriage-like relationship; or,
- b) the date of their marriage.

- f) any increase in value of excluded property occurring since the later of the commencement of the spouses' relationship or the acquisition of the excluded property (s. 84(2)(g));<sup>38</sup> and,
- g) property contributed to a trust controlled by the spouse or in which the spouse's interest is nondiscretionary (s. 84(3)).

The debt that may be allocated among spouses is "family debt." *Family debt* is exhaustively defined in s. 86 as:

- a) all financial obligations incurred by a spouse between the date when the spouses' relationship commences and the date of separation (s. 86(a)); and,
- b) all financial obligations incurred by a spouse to maintain family property after the date of separation (s. 86(b)).

Note that, pursuant to ss. 82 and 97(3), the provisions of Part 5 and any orders made under the part, do not affect the rights and interests of creditors with respect to family debt and are effective only as between the parties.

## 2. Entitlement to Property and Responsibility for Debt

The basic principles of Part 5 with respect to spouses' presumptive interests in property and obligations for debt are set out in s. 81:

Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6,

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

A spouse's entitlement to family property rests on the fact that the property is owned by one or both spouses on the date of separation, or is derived from property owned at the date of separation, pursuant to s. 81(1); it is no longer necessary to prove that the property was ordinarily used for a family purpose.<sup>39</sup>

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<sup>38</sup> Note that under s. 84(2)(g) it is only the *increase* in value of excluded property which is shared, not any *decrease* in value. As the Attorney General has described the section, a "relationship is not an indemnity against bad spending choices or poor investments of one's excluded property;" see British Columbia, Legislative Assembly, *Official Report of the Debates of the Legislative Assembly*, Vol. 28 No. 8 (23 November 2011) at 9033.

<sup>39</sup> See *Family Relations Act*, s. 58(2).

### 3. Interim Orders

Pursuant to s. 88 of the *Family Law Act*, a spouse may apply for an interim order under Part 5, Division 3, “at any time before a final agreement or final order is made.” The available interim orders include:

- a) orders for the distribution of family property to pay for family dispute resolution, all or part of the action or obtaining information or evidence for the purpose of family dispute resolution or an application (s. 89);
- b) orders for the exclusive occupancy of the family home, including orders for the exclusive possession or use of personal property at the home (s. 90(2));<sup>40</sup> and,
- c) restraining orders prohibiting the disposition of property at issue under Parts 5 and 6, and orders for the possession, safekeeping and preservation of property (s. 91(1) and (2)).<sup>41</sup>

With respect to orders regarding the family home, note that: pursuant to s. 90(3), orders for exclusive occupancy or use do not authorize the applicant to “materially alter the substance of the family residence or personal property;” and, protection orders to a similar effect as orders for exclusive occupancy may be made, by both the Provincial Court and the Supreme Court, under s. 183(3).

Note also that the court may make conduct orders under s. 226 requiring a party to make payments respecting “rent, mortgage, specified utilities, taxes, insurance and other expenses” related to a residence, and to refrain from terminating “specified utilities” for a residence.

### 4. Final Orders

The court’s general authority to make final orders dividing property and allocating debt is set out at s. 94(1), which provides that “the Supreme Court may make an order under this Division on application by a spouse.” This authority is limited by s-s. (2):

(2) The Supreme Court may not make an order respecting the division of property and family debt that is the subject of an agreement described in section 93(1), unless all or part of the agreement is set aside under that section.

The act contains no express provision to the effect that the court may make orders for the *equal* division of family property and family debt; this authority must be inferred from s. 81.

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<sup>40</sup> The provisions of s. 90 are substantially similar to those of s. 124 of the *Family Relations Act*, such that case law accumulating under the latter act may be applied to the interpretation of the former.

<sup>41</sup> The provisions of s. 91 are substantially similar to those of s. 67 of the *Family Relations Act*, such that case law accumulating under the latter act may be applied to the interpretation of the former.

Under s. 95(1), however, the court may make orders for the *unequal* division of property and debt if the equal division of family property or debt, or the division of a pension as required by Part 6, would be “significantly unfair.”<sup>42</sup> A non-exhaustive list of factors the court may consider in determining whether a division of property and debt would be significantly unfair, some of which are carried forward from the *Family Relations Act*,<sup>43</sup> is provided at s-ss. (2) and (3):

(2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

- (a) the duration of the relationship between the spouses;
- (b) the terms of any agreement between the spouses, other than an agreement described in section 93(1);
- (c) a spouse's contribution to the career or career potential of the other spouse;
- (d) whether family debt was incurred in the normal course of the relationship between the spouses;
- (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;

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<sup>42</sup> At the time of writing, the only other British Columbia legislation using the phrase “significantly unfair” is the *Strata Property Act*, SBC 1998, c. 43, which employs the term at s. 164 in respect of the actions of a strata council against an owner or tenant and the exercise of voting rights at a general meeting by a person holding more than 50% of the votes. The nature of the relationships and balance of power between the parties to an action under the *Family Law Act* and the parties to an action under the *Strata Property Act* strike me as sufficiently dissimilar that interpretation of the phrase “significantly unfair” by reference to case law accumulating under the *Strata Property Act* should perhaps be approached with caution.

Although the precise meaning of the phrase is somewhat ambiguous, government’s intention to reduce judicial discretion with respect to the reapportionment of property and debt is not. In its discussion of s. 95 in “The Family Law Act Explained,” the Ministry states that the language of the section is intended to create a “higher threshold and make the test for unequal division stricter.” The Ministry further writes that:

*Judges still have some flexibility to take into account a spouse’s unique circumstances and divide property unequally, but may only do so based on a more limited basis than under the Family Relations Act.*

<sup>43</sup> The test for the reapportionment of property under the *Family Relations Act* was unfairness simpliciter, determined in light of the factors set out at s. 65(1):

- (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
- (a) the duration of the marriage,
  - (b) the duration of the period during which the spouses have lived separate and apart,
  - (c) the date when property was acquired or disposed of,
  - (d) the extent to which property was acquired by one spouse through inheritance or gift,
  - (e) the needs of each spouse to become or remain economically independent and self sufficient, or
  - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
  - (g) the fact that a spouse, other than a spouse acting in good faith,
    - (i) substantially reduced the value of family property, or
    - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
  - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
  - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 have not been met.

Pursuant to s. 96, the court may not make orders dividing excluded property between spouses unless:

- a) extraprovincial family property and family debt “cannot practically be divided,” presumably through s. 109 or the court’s jurisdiction in personam; or,
- b) it would be “significantly unfair” not to divide the excluded property in light of the length of the spouses’ relationship and non-owning spouse’s direct contribution to the excluded property.

Pursuant to s. 94(2), the court may not make orders concerning property and family debt that is the subject of an agreement between spouses until the agreement is set aside following an application under s. 93.<sup>44</sup> Agreements may be set aside for one of three reasons: if there was a significant defect in the bargaining process of the sort seen in *Miglin*<sup>45</sup> and *Rick v Brandsema*;<sup>46</sup> if the agreement is “significantly unfair” in the circumstances of the relationship; or, if the court

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<sup>44</sup> The agreements covered by s. 94(2) must, under s. 93(1), be in writing and have the spouses’ signatures witnessed by at least one other person. The court may, however, waive the requirement that the spouses’ signatures be witnessed under s. 93(6).

Note that ss. 93 and 94 are only applicable to agreements between persons qualifying as “spouses” within the definition at s. 3(2); where the parties are not spouses, the usual law of contracts will apply.

<sup>45</sup> *Miglin v Miglin*, 2003 SCC 24

<sup>46</sup> *Rick v Brandsema*, 2009 SCC 10

would not make an order that is “substantially different” than the agreed division of property and debt:<sup>47</sup>

(3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement ... only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

- (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
- (b) a spouse took improper advantage of the other spouse’s vulnerability, including the other spouse’s ignorance, need or distress;
- (c) a spouse did not understand the nature or consequences of the agreement;
- (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

(4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.

(5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

- (a) the length of time that has passed since the agreement was made;
- (b) the intention of the spouses, in making the agreement, to achieve certainty;
- (c) the degree to which the spouses relied on the terms of the agreement.

A panoply of orders for determining property interests and giving effect to the division of property, pensions and debt, similar to those provided at s. 66 of the *Family Relations Act*, is provided at s. 97 of the new act. The orders and declarations available should suffice to address most issues arising from the division of property and debt in British Columbia, and include, in addition to the sort of orders one would reasonably expect, the following:

- a) orders granting a life estate, or title for a fixed number of years, in a property to a spouse (s. 97(2)(b));
- b) orders for the payment of compensation where a spouse has disposed of or converted property (s. 97(2)(c));

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<sup>47</sup> Harvey J. succinctly described the operation of s. 93 in *Asselin v Roy*, 2013 BCSC 1681 as follows:

*[125] Section 93 contemplates a two-pronged inquiry as to the enforceability of an agreement. The first inquiry is directed at the formation of the agreement; the second stage, its effect.*

- c) orders that all or some of the property to which one or both spouses are entitled be held in trust or vested in a child (s. 97(2)(e));
- d) declarations that a spouse is responsible for the payment of a particular family debt (s. 97(2)(h)); and,
- e) orders for the sale of property to pay a particular family debt (s. 97(2)(i)).

Further orders are available under s. 109 when the court has accepted jurisdiction over property located outside the province and makes an order “respecting the ownership and division of the extraprovincial property:”

(2) For the purposes of dividing extraprovincial property, the Supreme Court, on application by a spouse, may make an order to do one or more of the following:

- (a) instead of dividing the extraprovincial property,
  - (i) require property or family debt within British Columbia to be substituted for rights in the extraprovincial property, or
  - (ii) require a spouse who has legal title to the extraprovincial property to pay compensation to the other spouse;
- (b) if the court is satisfied that it would be enforceable against a spouse in the jurisdiction in which the extraprovincial property is located,
  - (i) preserve the extraprovincial property,
  - (ii) provide for the possession of the extraprovincial property,
  - (iii) require a spouse who has legal title to the extraprovincial property to transfer all or part of the spouse’s interest in the extraprovincial property to the other spouse, or
  - (iv) provide for any other matter in connection with the extraprovincial property;
- (c) if the court is satisfied that it would be enforceable in the jurisdiction in which the extraprovincial property is located, provide for non-monetary relief.

## E. Application of Other Law

Law other than the *Family Law Act* may be considered in a property dispute in British Columbia in four circumstances:

- a) when extraprovincial property is involved and the “proper law of the relationship,” as determined under ss. 107 and 108, is the law of another jurisdiction;

- b) when a party relies on legislation other than the *Family Law Act*, such as the *Partition of Property Act* or the *Business Corporations Act*;<sup>48</sup>
- c) when a party invokes one of the common law presumptions to promote or defend a claim to an interest in property, for example the presumptions of advancement, gift and loan; and,
- d) when a spouse invokes the principles of equity, usually unjust enrichment and constructive trust, and to the extent that it remains applicable in family law disputes, resulting trust.<sup>49</sup>

The applicability of other domestic legislation,<sup>50</sup> the common law and the law of equity results from s. 104(2), which provides that “the rights under this Part are in addition to and not in substitution for rights under equity or any other law,” contrary to government’s apparent intention of creating in Part 5 a complete code for the division of property between spouses.<sup>51</sup>

### III. Case Law Developing in the Supreme Court

In this section, I will canvass the highlights and areas of controversy in the jurisprudence developing under Part 5 of the *Family Law Act* in summary form. I will generally not review the facts of the cases discussed in much detail unless relevant to the legal principal or issue at hand; I have also omitted the citations for referenced cases, legislation and secondary materials. Links to the full text of the cases discussed are provided in the Appendix.

#### A. *Asselin v Roy*

The first judgment to be released on a Part 5 claim was the very early decision of Harvey J. in *Asselin*,<sup>52</sup> a case involving unmarried spouses separating after a 24-year relationship. Justice

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<sup>48</sup> *Business Corporations Act*, SBC 2002, c. 57

<sup>49</sup> See *Kerr v Baranow*, 2011 SCC 10 at para. 15.

<sup>50</sup> The application of other British Columbia legislation in the context of claims under Parts 5 and 6 of the *Family Law Act* will, however, be governed by the rule of statutory interpretation that a statute of specific application is to be preferred and applied over a statute of general application. See: *Ass. of Area #23 v Lafarge*, 2001 BCSC 596 at paras. 27 and 29; *Condominium Plan No. 762 1828 v Marusyn*, 2010 ABQB 523 at para. 19; and, *Madore-Ogilvie v Kulwartian* (2006), 34 RFL (6th) 138 (ONSCDC) at para. 24.

<sup>51</sup> Regardless of the authorization granted by s. 104(2), trust claims can be brought, and may be the only effective means by which a person may pursue an interest in property owned by another, when the claimant:

- a) does not qualify as a “spouse” under s. 3(1); or,
- b) is out of time under s. 198(2).

<sup>52</sup> *Supra*, fn 47

Harvey was doubly cursed, unfortunately, as he not only drew the first property case under the new act, with a trial that began the very day the *Family Law Act* came fully into force, but was required to reach a decision based on inadequate evidence that lacked critical details about important issues such as value. As Justice Harvey observed:

*[104] Future litigants referencing this decision would be well advised to avoid some of the problems encountered by the parties in this litigation by preparing a Scott Schedule detailing the assets and liabilities of each party as of the date of separation.*

*[105] One of the apparent objectives of the Act is to create more certainty for litigants in the division of their assets. The broad judicial discretion formerly available under the [Family Relations Act] has been replaced with a more formulaic approach to both the identification and division of family property.*

*[106] To implement the objectives, more mathematical certainty from a clear evidentiary record is required. Where inheritances are said to come into play, estate documents should be produced. Where exclusion of property is sought, on whatever basis, documents showing the value of property as at the time cohabitation commenced and at the date of separation will be critical in the assessment which the court is to perform. Where one party suggests, as is the case here, that excluded property has changed character into another asset, documents should be provided to allow the court to trace the transaction back to the property said to be excluded.*

Among other issues, *Asselin* involved property brought into the relationship; property bought during the relationship with inheritances, property bought during the relationship with the proceeds of property brought into the relationship, property bought during the relationship using money acquired during the relationship as well as property brought into the relationship, credit card debt and an impugned marriage agreement executed in 1990, giving Harvey J. the opportunity to address the key principles of Part 5.

## 1. Setting Agreements Aside

**Effect of unwitnessed agreements.** The act does not require that the spouses' signatures on an agreement be witnessed as a condition of its validity; even oral agreements, if proven, are valid. Although s. 93 requires that the spouses' signatures be witnessed for the section to apply, that requirement can be waived.

*[132] The fact the Agreement is unwitnessed is of no consequence to its validity. Section 92 does not require that the Agreement be in writing or witnessed. Presumably, oral agreements respecting the division of property are enforceable if properly proven on the evidence. The fact the Agreement was unwitnessed doesn't preclude the court's intervention; s. 93 (6).*

**Test to set aside agreements.** Agreements can be set aside for three reasons under s. 93: the formation of the agreement lacked procedural fairness; a fairly negotiated agreement has

become significantly unfair; or, the court would not make an order substantially different than the terms agreed to.

*[125] Section 93 contemplates a two-pronged inquiry as to the enforceability of an agreement. The first inquiry is directed at the formation of the agreement; the second stage, its effect.*

*[126] Even if the court determines the agreement was unfairly reached, there is still discretion to decline to set aside or vary the agreement if the result would not be substantially different from that which is contained in the agreement. s. 93(4)*

*[127] If an agreement was fairly reached, having regard the enumerated factors in s. 93 (3), the court must go on to consider whether the agreement is significantly unfair having regard to the enumerated criteria in s. 93(5).*

*[128] Judicial discretion has been modified, particularly as it relates to the assessment and enforceability of agreements. Under the previous legislation, a finding of unfairness based on one of [the] enumerated factors in s. 65(1) was sufficient to allow the court to, in effect, rewrite the parties' Agreement to achieve the fairness found lacking in the original version.*

**Procedural fairness.** The test to determine procedural fairness in agreements between spouses is different than the test applicable to commercial agreements and requires, among other things, legal information and financial disclosure sufficient for the parties to fully consider their positions in entering into the agreement.

*[137] Procedural fairness in family related matters is paramount. Different considerations apply in the negotiations of contracts between spouses, on the one hand, and commercial transactions, on the other. As was said in Rick v Brandsema ... :*

*[46] This contractual autonomy, however, depends on the integrity of the bargaining process. Decisions about what constitutes an acceptable bargain can only authoritatively be made if both parties come to the negotiating table with the information needed to consider what concessions to accept or offer. Informational asymmetry compromises a spouse's ability to do so.*

*[139] Ms. Asselin ... had been residing with Mr. Roy for a period in excess of two years and, as such, had at least the potential for a spousal support claim under existing legislation.*

*[140] Similarly, two of Ms. Asselin's children and been residing with her and Mr. Roy for a period in excess of one year... entitling her to a potential claim for child support for Mr. Roy in the event of separation.*

*[141] Each of these 'rights' was waived under the Agreement without her situation having been explained to her by someone safeguarding her interests ... absent Independent Legal*

*Advice, she likely would not be able to substantially understand the specific import of the Agreement.*

*[142] As to the submission that Ms. Asselin, by virtue of her education, understood the nature and consequences of the Agreement, I refer to the following passage in Gurney v Gurney ... where Pitfield, J. stated:*

*[29] In the family law context, providing independent legal advice must mean more than being satisfied that a party understands the nature and contents of the Agreement and consents to its terms. The solicitor should make inquiries of the party so as to be fully apprised of the circumstances surrounding the agreement. The party should be advised of his or her legal rights and obligations in relation to the subject matter of the Agreement and advised of the consequences associated with a refusal to sign. The solicitor should offer his or her opinion on the question of whether it is appropriate for the party to sign the Agreement in all the circumstances. It is only with that kind of advice that the party can make an informed decision about the advisability of entering into the Agreement as opposed to pursuing some other course.*

*[143] Nothing in the language in s. 93 (3) (c) ameliorates that statement of law.*

## 2. Dividing Property and Debt

**Identifying family property:** Property is divisible family property if it existed on the date of the spouses' separation and was owned by at least one spouse.

*[160] ... Unlike the former legislation governing property division, there is no requirement under the Act to establish entitlement to an asset before its characterization as 'family property'. There is no requirement of ordinary usage or contribution to the asset; rather the court merely has to determine that such property existed on the date of separation and at least one spouse owned it or had a beneficial interest in it.*

**Identifying excluded property:** The burden of establishing that property is excluded from division lies on the party asserting the exclusion.

*[195] Section 85(2) casts the onus of proof upon the spouse seeking to exclude property.*

A failure to prove the amount of excluded property contributed to the purchase of property may result in no part of the purchased property being excluded property.

*[209] In respect of the acreage on [Property A], acquired according to the respondent with partial proceeds from the inheritance from his mother, no documents have been provided which allow me to determine the extent of the respondent's down payment and positively identify the source of those funds as coming from the inheritance he received from his mother in 1998.*

*[210] While sympathetic to the respondent's plight, the absence of any evidence as to the amount of the down payment or any basis upon which to make an informed estimate of the amount precludes any finding that any portion of the [Property A] acreage is excluded property. The Act makes clear that it is the respondent who bears the onus of proof to demonstrate that property ought to be excluded.*

*[211] Here, he's failed to do so. I cannot specify, on the balance of probabilities, either the amount paid for the down payment in respect of the [Property A] acreage or the source of funds.*

*[212] In the result, I decline to find any portion of the [Property A] acreage is excluded property.*

**Dividing property and debt.** The excluded character of property can be traced into property bought with excluded property; the amount of the exclusion from the new property is the equity in the original property at the later of the purchase of the original property or the commencement of the spousal relationship. Any increases in the value of the exclusion are shared family property.

*[196] The equity in [Property B] as at [the date cohabitation commenced], is excluded property pursuant to s. 85(1)(a). ...*

*[197] [Property B] sold for \$175,000 in 1991. I accept as fact that substantially the whole of the net sale proceeds were applied to the acquisition of [Property C]. I do so based on a purchase price of \$289,000 together with closing costs including property purchase tax and legal fees.*

*[198] This invokes s. 85(1)(g), causing whatever portion of the \$175,000 which 'existed' as at [the date cohabitation commenced] to remain for the benefit of Mr. Roy in these proceedings as property excluded from division under Part V of the Act. ...*

*[200] ... The excluded portion of [Property C] based on the tracing of the excluded portion of [Property B] into the acquisition of [Property C] is \$150,000. That sum, together with what follows, is excluded from the division of [Property C] in favor of Mr. Roy.*

Where the value of a property purchased with excluded property has dropped below the amount of debt encumbering the property, there will be neither excluded property nor family property to distribute and both parties may be liable for the shortfall.

*[206] Both parties agree there is little, if any equity, in [Property D]. The assessed value is \$233,100; a realtor has opined the value may be as high as \$258,520. The mortgage and line of credit which encumbers this property has an outstanding balance of \$250,523.*

*[207] If sold, there will likely be nothing left to distribute, leaving both parties liable for any shortfall.*

*[208] In the result, I conclude there is nothing left of the ‘excluded portion’ of the property to maintain for the benefit of the respondent. More likely, there will be a shortfall between the selling price and the amount required to discharge the encumbrances leaving each party with the liability in respect of [Property D].*

Where excluded property is applied to improve family property, the enhanced value of the family property is excluded property.

*[223] The claimant testified that she spent over \$120,000 of her inheritance on improvements to the [Property C] home. Were those improvements demonstrated to have enhanced the value of the property, the enhanced value would be excluded property.*

### B. *Cabezas v Maxim*

The next decision under Part 5 was that of Hinkson C.J. in *Cabezas v Maxim*.<sup>53</sup> The parties to this case were unmarried spouses who had been involved in a relationship lasting some six years and owned a variety of assets bought before and during their cohabiting relationship.

Among the assets acquired during the relationship were the family home, a mobile home and lot. The home was jointly registered and was purchased with funds provided by the respondent and his company, of which the claimant agreed to repay half, and the proceeds of a mortgage. The mortgage was subsequently retired by a number of payments made by the respondent’s parents, raising the question of whether the payments were made as a loan, as a gift or as an advance on the respondent’s inheritance, and the applicability of the presumption of advancement to the division of property under Part 5.

**Identifying family property.** Gifts given to both spouses are family property. Gifts by a spouse’s parent to the spouse are subject to the presumption of advancement, which will normally result in the gift being characterized as excluded property. However, gifts given to purchase or maintain the parties’ home are presumed to be gifts given to both parties and as such are family property.

*[39] I find that the family property in this case consists of the [bank account] and the [property]. Both fall within the definition of family property found in s. 84 of the Act. ...*

*[67] I have already concluded that the [property] was a family asset. ... I am not persuaded that the funds used to pay off the mortgage were provided to the respondent either as a loan or as an advancement on his inheritance. Such a conclusion would be at odds with how the respondent’s parents treated all of their children. While I accept that the respondent’s mother has subsequently and sensibly chosen to treat the gifts to both of her sons and their partners as advancements against what the sons will inherit from her estate, I find that such an*

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<sup>53</sup> *Cabezas v Maxim*, 2014 BCSC 767

*intention was formed well after the gifts were given. I therefore find that the funds in question were given as a gift intended to benefit both the respondent and the claimant.*

*[68] Had Mrs. Maxim's intentions been unclear, I would nonetheless have found that ... the funds used to pay off the mortgage on the [property] were provided by the respondent's parents as a gift to avoid the foreclosure of the property, resulting in a presumption of advancement to the claimant. This presumption of advancement is limited in scope, and does not apply to all gifts or inheritances received by a spouse from his or her parents. Generally, such gifts are excluded property under s. 85(1)(b) of the Act, as was the [car] received by the respondent from his father in this case. However, where a parent chooses to provide funds to a child for the purchase or maintenance of the family residence (to use the language of the Act), those funds are presumed to be a gift to both the child and his or her spouse. Absent evidence rebutting that presumption, the funds and any proceeds derived from them are family property under s. 84 of the Act. None of the evidence presented is capable, in my view, of rebutting that presumption.*

### C. *Remmem v Remmem*

The decision of Butler J. in *Remmem v Remmem*<sup>54</sup> was given three months after *Cabezas* and concerned married spouses leaving a 22-year relationship, a commercial fishing boat brought into and depreciating during the relationship, property brought into the relationship and used to buy property in the parties' joint names, and property acquired during the relationship without the use of property brought into the relationship.

Like Harvey J. in *Asselin*, Butler J. concluded that the owner of excluded property depreciating during the relationship must bear the depreciation without compensation from other property. However, the primary significance of this case lies in the court's analysis of application of the presumption of advancement to the division of property under the *Family Law Act*; contrary to the conclusion reached in *Cabezas*, Butler J. concluded that Part 5 of the act operates as a complete code excluding the application of other legal principles.

#### 1. Application of Case Law from Other Jurisdictions

**Application of other case law.** Decisions made under foreign legislation may be instructive, however the court must be mindful of any differences between the foreign legislation and the domestic.

*[31] Mr. Remmem relies on the approach to this issue taken by Saskatchewan courts and both parties referred to decisions from Alberta and Saskatchewan. While the decisions are instructive, the legislation in those provinces differs from the FLA in important respects. ...*

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<sup>54</sup> *Remmem v Remmem*, 2014 BCSC 1552

[40] ... The language in the FLA requires a different approach from that taken in either Alberta or Saskatchewan. ...

**Differences in Alberta's *Matrimonial Property Act*.**<sup>55</sup> Alberta's legislation excludes the value of property at the time of marriage from division, not the property itself. It also gives the court a broad discretion to distribute divisible property in an equitable manner.

[33] There are two significant differences between these provisions and the FLA: the Alberta exemption applies to the "market value" of the exempt property at the time of the marriage. The property itself is not excluded from division. Second, the court is given a broad discretion under s. 7(3) to distribute in a just and equitable way, the difference between the exempted value and the market value of the property at trial. On a preliminary reading, s. 7(3) appears to allow the court to distribute between the parties the depreciation that has occurred in relation to exempted property. However, Alberta courts have decided that generally the only exemption available to the party who brought property into the relationship is the depreciated market value of that property at the date of trial.

[34] In *Lovich v Lovich* ... the court summarized the approach taken by the Alberta courts to depreciating property that is consumed over time:

*Where depreciable exempt property is consumed during the marriage, the following principles should apply:*

*(a) the initial exempt value is the fair market value of the depreciable property on the date of the marriage, or the date of the gift.*

*(b) the exemption can be carried forward if the property is traded in, or if the property is sold and replaced. The exempt value can be traced forward into new property so long as there is a reasonable nexus between the exempt property and the replacement property. No precise and exact tracing is required, and de minimus breaks in the chain of exempt property can be tolerated.*

*(c) the amount of the exemption is lost as the property is consumed up or depreciated. If, by the time of trial, the property has been totally consumed and depreciated, there is no remaining exempt value.*

*(d) if the property is partly consumed and depreciated, and then traded for other property, the value at the date of the trade-in is carried forward into the new property. If that new property is then consumed or depreciated, the exempt portion is deemed to be consumed pro rata with the non-exempt portion.*

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<sup>55</sup> *Matrimonial Property Act*, RSA 2000, c. M-8

**Differences in Saskatchewan's *Family Property Act*.**<sup>56</sup> The Saskatchewan legislation excludes the value of property at the time of marriage from division, not the property itself. It also gives the court a broad discretion to distribute excluded property and distributed divisible property in an equitable manner.

*[38] There are important differences between the Saskatchewan legislation and the FLA. The Saskatchewan exemption, like the Alberta exemption, applies to the value of the property and not the property itself. Second, and more significantly, the Saskatchewan legislation gives the court discretion at two separate stages of the property division exercise. Section 23(4) gives the court a specific discretion to consider the fairness of the exemption and to make any other order where it is fair and equitable to do so. Section 21(2) provides a broad discretion to make an order for other than equal distribution of family property. The FLA provides for a similar broad discretion by way of s. 95, but does not include a specific discretion to consider the fairness of an order exempting or excluding property. ...*

*[41] ... The Saskatchewan decisions are driven by the language in the Family Property Act, not simply by the type of property ... the Family Property Act requires the court to exempt the value of property brought into the relationship so long as the property is not the matrimonial home or household goods. It is only "when considering whether it would be unfair or inequitable to allow the exemption in whole or in part, is the court to have regard for such matters as the depreciating nature of the property." The effect of this legislative scheme is that the default position for such property is that its value as of the date of commencement of the relationship is excluded from division subject to the considerations in s. 23(4).*

## 2. Application of Other Legal Principles

**The presumption of advancement.** The act does not address the presumption of advancement, however applying the presumption would have a number of adverse effects, including undermining the simplicity of the act's scheme for the division of property and creating separate standards for married spouses and unmarried spouses. Accordingly, the presumption of advancement does not apply to the division of property under the act.

*[50] The FLA contains no provisions dealing with the presumption of advancement between spouses which would suggest that the presumption still applies. However, as noted by Mr. [Scott] Booth, the presumption would raise a number of problems when applied under the scheme of the FLA including:*

- a) The presumption only applies to married spouses and so gratuitous transfers between married and unmarried spouses would be treated differently.*
- b) The presumption is at odds with and would thus limit the utility of the tracing provisions. Property ... placed in joint names is clearly derived from excluded property and so it is easy to trace the full amount of the exclusion. Unlike the presumption of*

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<sup>56</sup> *Family Property Act*, SS 1997, c. F-6.3

*advancement, tracing does not depend on the parties' intentions. The application of the presumption of advancement and an examination of whether property was gifted is at odds with the simple concept of tracing.*

*c) When applied, the presumption of advancement would significantly reduce the value of the exclusion to the donor spouse.*

*d) Further, if half of the excluded property is a gift to the donee spouse, shouldn't he or she be able to claim that his or her half of the property is excluded?*

*[51] These issues would have two significant consequences. First, the apparent simplicity and certainty of the property division scheme would be lost. Exclusion would depend not only on whether property was owned prior to the commencement of the relationship or brought in by way of inheritance in the course of the relationship, but on other circumstances. The new scheme is easier to apply if subsequent transactions only have to be examined to see if property is derived from the excluded property. If the court also has to look at subsequent transactions to determine if property was gifted, it would have to consider the parties' intentions in transactions which may have taken place many years before trial. This would be a difficult exercise which would require considerably more court time. Further, the amount of the exclusion would be different for married and unmarried spouses, a result that does not appear to have been intended by the legislation. The amount of the exclusion might also be different for married spouses in similar situations, depending on the conclusions arrived at as to application of the presumption of advancement.*

*[52] When I consider these difficulties, I conclude that the tracing provisions in the FLA, at least when applied to the circumstances in this case, are to be applied without considering or applying the presumption of advancement between married spouses. ...*

### 3. Dividing Property and Debt

**The effect of triggering events on excluded property.** The ownership of excluded property is unaltered by the occurrence of the triggering event.

*[40] ... Section 85 excludes from the definition of family property, any property acquired by a spouse before a relationship began. Accordingly, any such property is not family property and the other spouse has no right to an undivided half interest in that property as a tenant in common. ...*

**Depreciated excluded property.** Excluded property is exempt from division, not the value of the excluded property. Where excluded property depreciates in value, none of the excluded property is divisible family property, and the depreciated value cannot be recovered from family property.

*[42] In British Columbia, the legislation provides that the property acquired by a spouse before the relationship began is excluded, not the value of the property. As a result, when property*

*depreciates, no part of the depreciated property is subject to division. The court has no discretion during the first stage of its analysis (i.e. when determining the property is subject to division) to include the original value of depreciated property in the division exercise. In the present case, this means the [fishing boat] is not and never was family property, and the \$100,000 value of the vessel [on the date cohabitation commenced] cannot be brought into the equation to apply against other family property.*

**Unequal division of family property.** To order an unequal division of family property, the court must first identify the family property and then undertake a notional equal division of that property. The court's discretion to order an unequal division is different under the *Family Law Act* than it was under the *Family Relations Act*. The court must find an equal division would be significantly unfair. The unfairness must be compelling or meaningful having regard to the factors set out in s. 95(2).

*[43] It is only at the very end of the [process of identifying the family property] that equitable considerations come into play pursuant to s. 95. After determining the full extent of the family property, the court must go through the notional exercise of dividing that property equally. The court must consider if equal division would be "significantly unfair". If it would, then it is possible to order an unequal division.*

*[44] The FLA provisions granting the court a discretion to order other than an equal division are very different from the provisions in the previous legislative scheme. Pursuant to s. 65(1) of the Family Relations Act ... courts had a discretion to divide family property in unequal shares if the court found that the division of property ... would be unfair having regard to the factors set out in that section. The first and obvious difference between the discretion given under the FRA and the discretion given in Part 5 of the FLA is that in order to exercise the discretion, it is no longer sufficient to find that a division of property is merely "unfair". There must be a finding that the division of property pursuant to the statutory scheme is "significantly" unfair. The Concise Oxford English Dictionary defines "significant" as "extensive or important enough to merit attention." Significantly is understood to mean more than a regular impact – something weighty, meaningful, or compelling. In other words, the legislature has raised the bar for a finding of unfairness to justify an unequal distribution. It is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2). ...*

*[47] In order to determine if it would be significantly unfair to divide the family property equally, the court must notionally divide the family property, taking into account the exclusions, in accordance with the provisions of the FLA. ...*

### *D. H.C. v H.P.C.*

The case of *H.C. v H.P.C.*,<sup>57</sup> a decision of Burke J., involved a claim for the unequal division of family property, the family home, on the grounds that: the claimant's income paid for the home; the claimant's parents had contributed a substantial sum toward the purchase price; and, the claimant "needs the value of the property" to raise the parties' child, who she would be primarily responsible for parenting.

Although Burke J. followed *Cabezas* in applying the common law presumption that funds advanced by a party's parent for the purchase of the family home is a gift to both parties and therefore family property, she reached outside the considerations listed in s. 95(2) to allow an unequal division of that property to reflect the parties' parenting roles and the respondent's limited contributions to the support of the child.

**Unequal division of family property.** Disproportionate child care responsibilities coupled with the underemployment of the payor may lead to an equal division of family property being significantly unfair.

*[64] As noted in L.G. v. R.G. ... the provision is different from the Family Relations Act in terms of the standards the judge must apply before exercising discretion to order the unequal division of family property. Brown J. then went on to note at para. 71:*

*[71] In my view, the term 'significantly unfair' in s. 95(1) of the FLA essentially is a caution against a departure from the default of equal division in an attempt to achieve 'perfect fairness'. Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart from the default equal division. ...*

*[66] The [property] is a family asset as per s. 84 of the FLA. The child, however, will be living full time with the claimant. The claimant will therefore bear the full burden of childcare. The respondent is not working and indeed appears to be having difficulty in this regard. I am also satisfied that during the marriage, the claimant was significantly responsible for the care and upbringing of the child ... since moving to Canada, the claimant clearly has primary responsibility for the care and upbringing of the child.*

*[67] ... I have a concern with the significant underemployment of the respondent and his inability to provide for the child. The child will now be definitively residing full-time with the claimant. This is a factor which could lead to significant unfairness if the property is divided equally. There is real doubt as to whether the respondent will be able to meaningfully contribute to the support of his daughter. The division of assets in this case should take that factor into account. The needs of the claimant as the primary caregiver for the child in the*

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<sup>57</sup> *H.C. v H.P.C.*, 2014 BCSC 1775

*circumstances must be taken into account. This ultimately favours an unequal division of family property.*

**Identifying family property.** The presumption of advancement may apply to claims for the division of property under Part 5. The presumption that funds advanced for the purchase of a family home by a party's parent is a gift to both parties may also apply.

*[68] ... The claimant has also argued the gift from her parents should be taken into account in providing for an unequal division. A question arises therefore as to whether the division of the family property should take into account an exclusion of \$95,000 – the gift to the claimant which was used as part of the purchase price of the home.*

*[69] Section 85(1)(b) excludes gifts or inheritance to a spouse from family property. As set out by Hinkson C.J. in *Cabezas v Maxim*, ... if the funds were a gift solely to the claimant, any property derived from those may be excluded property under the FLA. ...*

*[70] Ultimately, Hinkson C.J. in that case concluded at para. 68:*

*[68] ... This presumption of advancement is limited in scope, and does not apply to all gifts or inheritances received by a spouse from his or her parents. Generally, such gifts are excluded property under s. 85(1)(b) of the Act, as was the [car] received by the respondent from his father in this case. However, where a parent chooses to provide funds to a child for the purchase or maintenance of the family residence (to use the language of the Act), those funds are presumed to be a gift to both the child and his or her spouse. Absent evidence rebutting that presumption, the funds and any proceeds derived from them are family property under s. 84 of the Act. None of the evidence presented is capable, in my view, of rebutting that presumption.*

*[71] Even if I were to conclude in this case that the claimant's parents gifted the disputed amount to the claimant, the case law reflects a presumption of gift to both a child and his or her spouse to facilitate the purchase of a family home when a parent chooses to provide funds to the child for the purchase of a family residence.*

### *E. Williams v Killey*

The case of *Williams v Killey*<sup>58</sup> involved an unmarried relationship of less than four years' duration, during which time certain assets owned by the respondent, primarily his home and his RRSP savings, significantly increased in value, the home by about \$107,200 and the RRSPs by about \$96,700. Apart from a preliminary question as to whether the nature of the parties' relationship qualified them as spouses, the case primarily concerned the nature and extent of the claimant's property entitlement.

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<sup>58</sup> *Williams v Killey*, 2014 BCSC 1846

This decision is one which should perhaps be approached with a degree of caution as a result of the analysis undertaken,<sup>59</sup> and I include it in this paper for that reason, bearing in mind the very real possibility that I may have misunderstood the court's analysis.

Pursuant to ss. 81(b) and 84(2)(g)(i), the claimant in *Williams* was presumptively entitled to one-half of the increase in value of the respondent's home and RRSPs, both of which qualified as excluded property as property acquired before the parties' relationship began, pursuant to s. 85(1)(a). The respondent, however, argued that the "growth in value of his assets" should be divided entirely in his favour or that the claimant should receive, at most, 10% of growth in value of the home. Given the presumption of equal entitlement, the burden of showing that an equal division of the family property would be "significantly unfair" under s. 95(1), the sole ground for an unequal division of family property, lay on the respondent.

In this decision, however, the duration of the relationship was approached as an independent ground for an unequal division of property, without a prerequisite finding of significant unfairness, and the claimant's entitlement to a share of the family property appears to have rested on her contributions to that property rather than on the presumption of equal entitlement provided in s. 81:

*[67] Section 95 is the re-apportion section of the FLA. Here under s. (a), the duration of the common law relationship between the parties is to be considered, which was approximately three and one-half years. Under s. (i), the only other factor applicable would appear to be one that results in significant unfairness.*

*[68] The respondent's cases I consider to be a lot more helpful than the claimant's cases and they put the contribution of a spouse in a short term relationship as being valued at 10-15% of property.<sup>60</sup>*

*[69] The claimant here did contribute significantly to the household expenses and to the preservation and maintenance of the townhome. I consider it would be significantly unfair to her for her efforts to be denied any part of the increase in the townhome which was due only to market forces while she resided there.*

*[70] I award the claimant 15% of the \$107,173 increase in net value of the townhome during their relationship time. The amount awarded for the increase is \$16,075.95.*

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<sup>59</sup> However, see *Stanbridge v Stanbridge*, 2015 BCSC 1468 in which the analysis in *Williams* was applied.

<sup>60</sup> Given that no decisions arguing for an unequal division under the *Family Law Act* on the basis of brevity of relationship had been published as at the date of trial, I infer that the cases provided by counsel had been determined under the *Family Relations Act*. Apart from the difference between the "unfairness" required by s. 65 of the old legislation and the "significant unfairness" required by s. 95 of the new, the property being divided under the *Family Relations Act* was the *whole* of the property, not just the increase in the property's value since the beginning of the parties' relationship. See the comments of Sharma J. in *A.M.D. v K.R.J.*, 2015 BCSC 1539 at paras. 59 and 60 on the application of reapportionment case law under the *Family Relations Act* to unequal division claims under the *Family Law Act*.

*[71] RRSPs are family property by virtue of s. 84(2)(e). The respondent's RRSPs were acquired prior to the relationship so s. 85(1) is also applicable to the RRSPs as excluded property.*

*[72] However, again, s. 84(2)(g) takes into account any increase in excluded property during the relationship for the purpose of division and brings into play as well s. 95 for re-apportionment purposes.*

*[73] While the respondent's RRSPs increased in value by \$96,661 during the relationship, during that same period of time the evidence is that he contributed over \$85,000 to his RRSPs.*

*[74] In these circumstances, I apportion the RRSPs 100% to the respondent.*

With respect, I suggest that when addressing claims under Part 5:

- a) the starting point is the presumption of equal entitlement to family property, regardless of the brevity of the relationship or the spouses' relative contributions to that property during their relationship;
- b) spouses' entitlement to family property exists, pursuant to s. 81(a), "regardless of their respective use or contribution" to that property;
- c) the onus of demonstrating significant unfairness lies on the spouse resisting an equal division of family property; and,
- d) the duration of the spouses' relationship is one of the enumerated factors that the court may take into account in determining whether an equal division of family property would be significantly unfair but is not a ground for the unequal division of family property independent of a conclusion of significant unfairness.

#### *F. K.M.J. v J.H.D.N.*

The decision of Betton J. in *K.M.J. v J.H.D.N.*,<sup>61</sup> the sixth substantive trial judgement on Part 5, includes an important discussion on: spouses' responsibility for family debt; changes in the amount of debt owing following separation; and, the date on which the family debt should be valued. This judgment is especially valuable, not only for the court's analysis of s. 86, but for the principles Betton J. draws from that analysis.

At separation, the parties were in arrears of personal taxes in the approximate amount of \$43,700, owed sales tax payments of about \$6,400, owed about \$18,000 for a line of credit, and owed about \$9,600 on a credit card held by the respondent and about \$15,600 on a credit card held by the claimant; the amounts owing fluctuated significantly thereafter. At the date of trial, the personal tax debt had decreased to about \$22,300 as a result of the CRA's vigorous

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<sup>61</sup> *K.M.J. v J.H.D.N.*, 2014 BCSC 1895

enforcement, and the sales taxes owing had increased to about \$14,800. The balance owing on the claimant's credit card had decreased insignificantly. However, the respondent's credit card and line of credit had been paid off but new debt had accumulated, with \$18,000 owing on the line of credit and \$16,000 owing on the credit card. The claimant thus took the position that a significant portion of the debt owing at the date of trial was not family debt; the respondent, on the other hand, argued that the debts were all but unchanged since separation and that the fluctuations were irrelevant to the court's analysis.

## 1. Statutory Interpretation

**Interpretation of the *Family Law Act*.** The act is to be constructed in a holistic manner, with the text of the act being read in light of the overall scheme of the act and the intentions of government.

*[137] The well-established approach to statutory interpretation is summarized in Bell ExpressVu Limited Partnership v Rex ... as follows:*

*[26] In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2nd ed. 1983):*

*Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

*Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings ...*

## 2. Dividing Debt

**Identifying family debts.** Under the *Family Law Act*, the date of separation is the date on which family property and family debt are identified and the date on which they are valued is the date of trial. Changes in the value of property after separation resulting from market trends are shared by both spouses. The same principle should apply to changes in the value of debt, however, decreases in value rarely result from market trends. If the valuation of debt at trial results in significant unfairness to a party, s. 95 is available to address the issue and s. 87 allows the court to select a different valuation date.

*[140] The legislation sets the separation date as the date when property and debts are to be identified and, in the absence of an agreement, the date of hearing for valuation. Some of the challenges with interpretation seem to arise from the drafters' decision to deal with property and debts together.*

*[141] A simple review of s. 85 demonstrates that family property can take many forms. In that context, the importance of identifying valuation dates is obvious and the idea of fluctuating*

*values is easily understood. The value of a piece of real property, for example, might change dramatically between separation and hearing dates. It is entirely logical that, as a starting point, both spouses share in the positive or negative change brought on by market trends.*

*[142] The definition of debt in s. 86, on the other hand, is simple: “all financial obligations incurred by a spouse”. What makes it family debt is the time at which the debt was incurred or, in cases of it arising after separation, its purpose. Family debts are then, by definition, less variable in kind. ...*

*[143] The parties should generally still share in both the increases or decreases in value that may occur between separation and hearing (or agreement). However, in the case of debt, decrease in value, which is analogous to a positive change in the value of property, is almost never the result of passive market trends. ...*

*[145] ... The language of the Family Law Act is clear and unambiguous. It provides clarity and increased certainty to the process of identification and valuation. ...*

*[147] It is also important to observe that s. 95 is available to rectify such prejudice. However, it is apparent, first, that the legislation was intended to remove elements of judicial discretion in the first instance, but provide for the ability to avoid “significant unfairness”. Second, the language of s. 95 appears to focus on remedying the problem the claimant is complaining about: when one party significantly increases a debt ... between separation and hearing beyond that caused by market trends. ...*

*[153] The language of s. 86 is clear, as is the scheme of the legislation. There is no inconsistency between them. ...*

*[154] Section 87 also provides for a mechanism to use a different valuation date if necessary and where s. 95 is not applicable.*

**General principles governing the division of family debt.** Where a spouse retires family debt between the dates of separation and trial in good faith, the other spouse is not relieved of his or her obligation to share the debt. To ensure that spouses’ equal responsibility for family debt is realized, the valuation date of the family debt may be changed under s. 87 and family property may be unequally divided under s. 95.

*[155] The process outlined here will hopefully assist in ensuring that the process of valuing property and debts is clear and consistent and ultimately fair.<sup>62</sup> If family property is disposed of after separation but before the hearing date, not in good faith (s. 95(2)(g) specifies good faith as a relevant consideration), that cannot deprive the other spouse of the value of their interest in the property. If it were disposed of in good faith, presumably s. 87 would be used to select the disposition date as the valuation date. Similarly, the good faith retirement of all or*

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<sup>62</sup> This process was subsequently applied by Fenlon J., as she then was, in *Bilawchuk v Bilawchuk*, 2014 BCSC 2067, beginning at para. 59.

*some of a family debt post-separation but before hearing cannot relieve the other spouse of their obligation to share in that family debt. The Act specifies that we start with the value at hearing date, but provides tools in ss. 87 and 95 to adapt to the peculiar circumstances that might arise to achieve the intent of the legislation.*

*[156] Some examples may be useful. I will use a line of credit as the family debt throughout, for consistency. In these examples, I will assume that the starting debt meets the definition of family debt at the date of separation.*

- If the principle debt remained static post-separation but interest accumulated, then the value should be the new balance including accumulated interest at the date of hearing.*
- If the amount of the debt was identical at hearing date and separation date but one party had used the line of credit during the period, such that the amount of debt had been much higher and/or much lower between those dates, the value would still be the balance at hearing plus some interest adjustment. The interest would have to be adjusted using s. 95, taking into account the balance at separation and whether the use post-separation resulted in greater interest accumulation than would have otherwise occurred, and whether those charges or other charges have increased the debt “beyond market trends”.*
- If the debt was paid off entirely by one spouse post-separation but pre-hearing leaving nothing to divide at the hearing date, s. 87 allowing the court to set a different valuation date should be used or, perhaps, s. 95 would be used to correct what may be a significant unfairness through division of other property or debts. I would use s. 87. Interest accumulated to the date the debt was retired would need to be considered. The same process would be applied if the debt had been paid down but not retired entirely.*
- If the debt had been run up well above the separation date level, so that the value was significantly different at hearing, this significant unfairness could again be addressed through the application of ss. 87 or 95. The peculiar circumstances of each case may drive the selection of which section to use and the date to be selected.*

*[157] These examples involve variations in the debt related to payments or interest; true monetary influences. The respondent’s consumer proposal here reminds us that separate from market trends and such true monetary influences, there can be changes to debts for another reason – compromise. Whether through a statutory process such as the Bankruptcy and Insolvency Act or otherwise, creditors and debtors often negotiate reduced payment in exchange for either or both of prompt and certain payment.*

*[158] The timing of any negotiated compromise and its terms will have to be considered to assess its effect of the value of family debt. Obviously, if the compromise arrangement is concluded by the hearing date that is not a contingent arrangement, the value will be the compromise value. If it is contingent, the nature of the contingencies will have to be*

*considered. Full disclosure will be needed to avoid potential abuses and ensure there are true contingencies and what the consequences are.*

### G. *Wells v Campbell*

The parties in *Wells v Campbell*,<sup>63</sup> a decision of Masuhara J., entered into a 22-year relationship later in life and left it with no significant assets other than the family home, brought into the relationship by the claimant and subsequently transferred into joint tenancy, and income derived wholly from public retirement benefits. The primary issue concerned the effect of the gratuitous transfer of title to the family home on the determination of excluded property and family property under ss. 84 and 85.

**Property interests and the value of property.** Family property is defined as real and personal property and the increase in value of excluded property. Excluded property is defined as real and personal property and beneficial interests in property. With the sole exception of the increase in value of excluded property, the subject matter of Part 5 is property not value.

*[25] In s. 83(4) of the Act, “property” is defined as including “a beneficial interest in property unless a contrary intention appears.”*

*[26] In s. 84(1), “family property” is defined as “all real property and personal property.” It also includes the amount by which the value of excluded property has increased since the later of the date the relationship began or the excluded property was acquired.*

*[27] In s. 85, “excluded property” is stated to be property, inheritances, gifts to a spouse from a third party, an award of damages, money paid or payable under an insurance policy, property held in trust for the benefit of a spouse, a spouse’s beneficial interest in property held in a discretionary trust that is settled by a person other than the spouse.*

*[28] I note that the term “excluded property” ... describes itself as property and that “property” is described as real or personal property and includes a beneficial interest. It is questionable then as to whether a “value” in property falls within the definition of excluded property. Next, in respect to family and excluded property, the items described as such are things (e.g. gifts, inheritances, money) or recognized interests and not a value as argued by Mr. Wells. The only exception appears to be where there has been an appreciation in value of excluded property after the start of a relationship. In such a situation the appreciation is considered family property. Other than appreciation, it is apparent that property is viewed distinct from value. Interestingly, depreciation in value is not considered family property.*

*[29] As a result, it would seem that value appears to be different from property and does not constitute excluded property.*

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<sup>63</sup> *Wells v Campbell*, 2015 BCSC 3

**Effect of triggering event on property held in joint tenancy.** The occurrence of the triggering event severs joint tenancies and vests in each spouse an equal interest in the property as tenants in common.

*[30] ... As is well known, a joint tenant in a property holds an undivided equal share in all of that property. With a severance of the joint tenancy, which is the case here, each party retains a divided equal interest in the property as tenants in common.*

**Effect of gifts.** The act does not alter the law on inter vivos gifts; a perfected gift cannot be revoked by the donor. Excluded property gifted to a spouse becomes family property.

*[32] I find that Mr. Wells at the time he transferred the [property] into joint tenancy he did so as a gift to Ms. Campbell. At that time, the relationship was intact and there was no evidence to suggest that it was failing. The transfer of an interest in the [property] was a perfected inter vivos gift and the gift cannot be revoked ... Ms. Campbell as a result obtained legal and equitable interest in the property. I do not read the Act as altering the law of inter vivos gifts. Accordingly, I cannot see how Ms. Campbell can be denied the entirety of her interest in the property, subject to the division of family property under s. 95(1). ...*

*[41] Also, I note that the definition of excluded property includes gifts to a spouse from third party but does not include gifts between spouses.*

*[42] Further, intention has not been eliminated from the considerations, given that the definition of "property" in the Act includes a beneficial interest "unless a contrary intention appears."*

*[43] It seems that the excluded property relates to property which was held by a spouse prior to the relationship and in which an interest in title was not transferred to the other during the relationship.*

**Effect of the presumption of advancement.** Although applying the presumption of advancement to claims under Part 5 may result in the problems identified by Butler J. in *Remmem*, those problems do not lead to the conclusion that the act precludes the application of the presumption; the act does not explicitly extinguish the presumption.

*[36] In Remmem, excluded property and a joint tenancy are discussed and in that case the joint tenancy was held not to have reduced the value of the excluded property. It held that the property division provisions of the Act were "intended to be a complete code so that there is no need to examine the intentions of the parties at the time of the transfer of excluded property to joint tenancy. To come to the opposite conclusion would bring uncertainty and a level of inequality into a property division structure that was intended to treat married and unmarried spouses equally and to provide for a greater level of certainty".*

*[37] Certain problems if intention were relevant to the issue when applied under the scheme of the Act were identified. ... The actual finding however appears to have been limited to the*

*facts as the court concluded “that the tracing provisions in the FLA, at least when applied to the circumstances in this case, are to be applied without considering or applying the presumption of advancement between married spouses.”*

*[38] While I do not disagree certain problems can be presented; I am not persuaded that they lead to the conclusion that the Act displaces or extinguishes the presumption of advancement, or the effect of an inter vivos gift resulting in a joint tenancy. There is no explicit extinguishment in the Act, as has been done in other jurisdictions. See for example: Waters’ Law of Trust in Canada, 4<sup>th</sup> ed., at p. 414. In those other jurisdictions, the application of the presumption of resulting trust is required in questions of ownership of property between spouses. The legislation in those jurisdictions state where a property is held by the spouses as joint tenants, that fact is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants.*

*[39] In jurisdictions where the presumption is said to remain such as in this province, the authors of Waters’ state the presumption has arguably been reduced to no significance because of the comprehensiveness of the discretionary powers in the family property legislation to divide between married persons’ property owned by either or both of them. Significance is obviously not the same as extinguishment; and it is notable that the Act has narrowed the court’s discretion from its predecessor, the Family Relations Act.*

#### H. *Slavenova v Ranguelov*

The decision of Savage J. in *Slavenova v Ranguelov*<sup>64</sup> concerned an 8-year marriage – a second marriage for both parties – and a claim for the unequal division of property delightfully leavened by allegations that the parties’ marriage was a fraud. The main issues included valuing the family property and excluded property and a claim for an unequal division of the family property.

##### 1. Valuing Property and Debt

**Date of valuation of excluded property.** In the absence of conclusive evidence establishing the date the parties’ relationship began, and thus the date on which excluded property is valued, the court may use the date of marriage.

*[41] Although the respondent agrees that the property is excluded property he disagrees with the claimant’s valuation of the property. The respondent submits that ... the beginning of the parties’ relationship is the appropriate date to value the excluded property. I do not accept the respondent’s submission on this point.*

*[42] ... Although the parties commenced living together on the respondent’s arrival in Canada in December 2003, I am unable to say, on the evidence before me, that a marriage-like relationship commenced at that time, merely because the parties were living together and*

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<sup>64</sup> *Slavenova v Ranguelov*, 2015 BCSC 79

*had intimate relations. In the circumstances I would use the date of marriage to ascertain the value of the excluded property.*

**Date of valuation of family property and family debt.** Family property and family debt will be valued as at the date of the hearing dividing the property and debt, absent an order or agreement to the contrary.

*[34] Section 87 of the FLA provides that, unless an agreement or order provides otherwise, the value of family property or family debt must be determined as of the date of an agreement dividing family property and debt or as of the date of hearing before the court respecting the division of family property or debt. ...*

*[54] I have already determined that the parties do not have an existing agreement with respect to family property and debt. Similarly, I find that there is no agreement providing for an alternate valuation date than that contemplated by s. 87, which in the circumstances is the date of the hearing before the court. However, I find that in the circumstances it is appropriate for me to order under s. 87 that the parties' real property should be valued at the date of separation, rather than at the date of trial.*

## 2. Dividing Property and Debt

**The unequal division of family property.** The court should depart from the presumptive equal division of family property with caution. "Significant unfairness" must be established before family property can be divided equally. Significant unfairness is not proven merely by the parties' differing contributions during their relationship; unequal contributions are expected. However, the court may order the unequal division of property where the parties have made an agreement that a property will be unequally divided.

*[35] Section 95 of the FLA provides that the court may order an unequal division of family property or family debt or both if an equal division would be significantly unfair for the various reasons specified in s. 95(2) including "any other factor...that may lead to significant unfairness".*

*[36] The threshold of "significant unfairness" represents a change from the old Family Relations Act ... to the new FLA that has been held to signify a caution against departing from the default of equal division proscribed by the Act in an attempt to find "perfect fairness" ...*

*[60] The "significant unfairness" contemplated by s. 95 requires much more than differing financial contributions in a relationship. Exactly equal contribution is more likely exceptional than commonplace. The new regime under the FLA recognizes that partners will come to a relationship in differing circumstances and accounts for those in the concepts of "family property" and "excluded property". The starting point in the division of property analysis already applies significant exclusions.*

*[61] With one exception, there is nothing in the circumstance of this relationship that results in significant unfairness, so as to compel an unequal division of family assets or debt under s. 95, after taking into account the agreed excluded property, the alternate valuation date, and the agreed premarital debt compensation payment.*

*[62] [Property A was] acquired late in the relationship. The respondent executed a disclaimer deed dated June 6, 2011 with respect to [Property A] (the "Disclaimer Deed"). The Disclaimer Deed provides that "...[t]he property is the sole and separate property of the Spouse..." and the respondent "...has no past or present right, title, interest, claim or lien of any kind or nature whatsoever in, to or against the Property". The claimant purchased those properties with funds entirely borrowed from others. In the circumstances, I would exclude the value of these properties from division pursuant to s. 95(2)(b). Likewise, the respondent is not responsible for any of the debt associated with these properties.*

**Foreign property.** The court may make certain orders concerning the ownership of foreign property, enumerated in s. 109, where a party is habitually residence in the province at the time proceedings under Part 5 are commenced. However, before making those orders, the court must be satisfied that its orders will be enforceable in the foreign jurisdiction, and evidence must be provided to that effect. In lieu of making orders concerning the ownership of foreign property, the court may make an order requiring a party to compensate the other party for his or her interest in the foreign property.

*[77] Both parties sought orders affecting foreign properties. Orders respecting foreign property are addressed in ss. 105-109 of the FLA. Because the claimant is habitually resident in B.C. and was at the time these proceedings were started, s. 106 gives the Court the authority to make orders respecting property division that could be made in more than one jurisdiction (in this case being B.C., Texas and Arizona). However, s. 109 restricts the orders that may be made with respect to property located outside B.C.*

*[78] The respondent and the claimant both seek full title to [Property B]. The claimant also seeks a declaration that the respondent has no interest in [Property A]. Before making any such orders I must be satisfied that the orders would be enforceable in the jurisdictions in which the foreign properties are located: FLA ss. 109(2)(b)-(c). I do not have before me any evidence with respect to the enforceability of such orders in either Arizona or Texas. In the circumstances I find that I am unable to grant the orders sought.*

*[79] Nevertheless, under s. 109(2)(a) the Court may make an order requiring a spouse who has legal title to the foreign property to pay compensation to the other spouse instead of ordering the division of the foreign property. Therefore, should the equal division of the balance of the family property and debt determined as of the date of separation require the division of [Property B] and [Property A], this may be effected by way of a compensation payment.*

## I. *Walburger v Lindsay*

The next significant decision under Part 5 was that of Fitzpatrick J. in *Walburger v Lindsay*.<sup>65</sup> Although *Walburger* is helpful for its discussion of valuation in the face of conflicting appraisals and the test to determine whether something is a fixture as opposed to a chattel, I will review only the parts of the decision concerning debts between spouses and the unequal division of family property.

### 1. Agreements for the Division of Property and Debt

**Effect of oral agreements.** Spouses may make agreements to divide family property and family debt under s. 92; such agreements may be made orally or in writing. The court may set aside agreements to divide family property and family debt under s. 93, but only where those agreements are in writing. Oral agreements are not subject to the court's oversight under s. 93 but remain subject to the law of contracts.

*[78] The final debt issue arises from Mr. Lindsay's advance of \$12,798 to Ms. Walburger in December 2010 which was used by Ms. Walburger, in part, to repay her line of credit. Ms. Walburger agreed that she would repay Mr. Lindsay this amount with interest. ...*

*[80] Pursuant to the FLA, s. 92, spouses may make agreements respecting the division of property and debt, including the division of family debt, and may do so unequally or to exclude as family debt items of debt that would otherwise be included: see ss. 92(a) and (c), respectively.*

*[81] Ms. Walburger submits that this agreement to repay the debt should not be upheld or enforced. She cites s. 93 of the FLA in support, although that section only applies if there is a "written agreement", which by s. 1 of the FLA means an "agreement that is in writing and signed by all the parties". ...*

*[82] It is well-taken here that the agreement between Mr. Lindsay and Ms. Walburger to repay this debt was oral, not written. As such, s. 93 does not apply, although I acknowledge that such circumstances may well result in the unusual situation where an oral agreement under s. 92 may well be enforceable, if proven, without the court's oversight under the provisions of s. 93. It would, however, remain open to a spouse to assert that any oral agreement is unenforceable under common-law principles. ...*

*[84] I do not consider that there is any basis upon which Ms. Walburger can contend that the agreement is unenforceable under common-law principles. She argues that she did not have independent legal advice, but that is not an absolute requirement, and it is very apparent that she understood what Mr. Lindsay required in return for advancing the funds. She is a woman*

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<sup>65</sup> *Walburger v Lindsay*, 2015 BCSC 341

*of average intelligence and there is no suggestion that she did not know what she agreed to.*  
...

**Effect of agreements not made in anticipation of separation.** Agreements between spouses made during their relationship may not qualify as agreements to divide family property and family debt under s. 92 if they are not made in contemplation of separation or do not address the effect of separation.

*[83] In terms of s. 92, it is not entirely clear from the provisions of this fairly straightforward loan agreement that the parties intended that this was an “agreement respecting the division of... debt” in the sense of the parties turning their minds to the result upon a separation. In fact, I consider that the parties did not specifically intend that result, and only sought to delineate their responsibilities within their relationship which was ongoing at the time. However, I see nothing in this agreement to indicate that it would cease to apply upon separation, and the formality of this agreement between the couple would suggest that their intention was that it would survive any separation.*

## 2. Debts Between Spouses

**Accounts receivable are family property.** Debts between spouses outstanding at the date of separation may be construed as family property, being “property owing to a spouse” under s. 84(2)(c), or as family debt, being a “financial obligation incurred by a spouse” under s. 86(a).

*[85] [In the event the loan agreement survives separation,] the loan owing to Mr. Lindsay can be said to be “family property” shareable by the parties pursuant to the FLA, ss. 84(1)(a) and 84(2)(c). Conversely, the amount owing by Ms. Walburger to Mr. Lindsay can be said to be a “family debt” likewise shareable by the parties pursuant to the FLA, ss. 81 and 86. Viewed in this light, there is a circular analysis in determining where the final responsibility for this loan should lie.*

*[86] In my view, the fairest result in respect of this loan is to require each party be responsible for half of the balance outstanding. The same result arises from an application of the reapportionment provisions under s. 95 which results in each party being equally entitled to/responsible for this asset/debt. Accordingly, Mr. Lindsay is entitled to a credit from Ms. Walburger of \$6,257.*

## 3. Dividing Property

**Significant unfairness.** The court should not depart from an equal division of family property unless the consequences of an equal division would be weighty, or the unfairness would be compelling or meaningful.

*[100] In one of the first decisions of this Court to consider the meaning of “significant unfairness”, Mr. Justice N. Brown stated in L.G. v R.G. ... :*

[71] In my view, the term ‘significantly unfair’ in s. 95(1) of the FLA essentially is a caution against a departure from the default of equal division in an attempt to achieve ‘perfect fairness’. Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart from the default equal division.

[101] To similar effect, Mr. Justice Butler discussed the meaning of this new term in *Remmem v Remmem* ... :

[44] The FLA provisions granting the court a discretion to order other than an equal division are very different from the provisions in the previous legislative scheme. Pursuant to s. 65(1) of the Family Relations Act ... courts had a discretion to divide family property in unequal shares if the court found that the division of property (pursuant to agreement or the provisions of the FRA) would be unfair having regard to the factors set out in that section. The first and obvious difference between the discretion given under the FRA and the discretion given in Part 5 of the FLA is that in order to exercise the discretion, it is no longer sufficient to find that a division of property is merely “unfair”. There must be a finding that the division of property pursuant to the statutory scheme is “significantly” unfair. The Concise Oxford English Dictionary defines “significant” as “extensive or important enough to merit attention.” Significantly is understood to mean more than a regular impact – something weighty, meaningful, or compelling. In other words, the legislature has raised the bar for a finding of unfairness to justify an unequal distribution. It is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2).

**Unequal division of family property.** The court should consider claims for the unequal division of family property in a holistic, global manner, after undertaking a notional equal division of family property and family debt.

[113] ... I wish to make clear that my conclusions on the reapportionment issues discussed above have been considered by me on both an individual and on a global basis. In *Remmem* at para. 47, the court notes, I think correctly, that the court may only consider reapportionment after dividing up the family property and family debt.

[11] Just as the parties did not compartmentalize their lives together and their relationship, the court, in my view, must take a global approach to reapportioning all, some, or none of the family assets in terms of whether “significant unfairness” results, while taking into the account the factors in s. 95(2).

[J. V.J.F. v S.K.W.](#)

The court returned to the question of applicability of common law principles to claims under Part 5 in *V.J.F. v S.K.W.*,<sup>66</sup> a case decided by Walker J. in which the claimant, toward the tail end

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<sup>66</sup> *V.J.F. v S.K.W.*, 2015 BCSC 593

of the parties' marriage, applied a sizeable sum received as a gift to building a new family home registered in the sole name of the respondent and to paying off the mortgage on the old family home, also registered in the sole name of the respondent. After reviewing the judgments in *Remmem* and *Wells*, Walker J. ultimately followed the reasoning of Masuhara J. in *Wells*, relying additionally on the provisions of s. 104(2) of the *Family Law Act*. *V.J.F.* is also notable as the first case to consider the division of excluded property.

## 1. Gifts and the Presumption of Advancement

**The effect of the presumption of advancement.** The presumption of advancement deems property transferred by one spouse to the other to be a gift. This presumption provides certainty where there is weak or unpersuasive evidence as to the donor's intention. The *Family Law Act* precludes neither the making of gifts between spouses nor the application of the presumption of advancement. In fact, s. 104(2) of the act operates to preserve spouses' entitlements under the principles of equity and the common law.

*[57] ... In [Remmem], Mr. Justice Butler found the FLA to be a complete code where no regard should be paid to the intention of the parties, even where they agree to transfer excluded property into their joint names. In finding that cases decided under other legislative regimes are of diminished utility, he said at para. 48:*

*[48] This issue considers whether the transfer of excluded property into joint property reduces the value of the exclusion for the spouse that brought the property into the relationship. I have concluded that the purchase of property in joint names using the proceeds of excluded property does not reduce the value of the exclusion. The property provisions of the FLA are intended to be a complete code so that there is no need to examine the intention of the parties at the time of a transfer of excluded property to joint tenancy. To come to the opposite conclusion would bring uncertainty and a level of inequality into a property division structure that was intended to treat married and unmarried spouses equally and to provide for a greater level of certainty.*

*[58] Butler J. concluded at para. 50 that, "The FLA contains no provisions dealing with the presumption of advancement between spouses which would suggest that the presumption still applies."*

*[59] The law has historically found for the presumption of advancement to apply from husband to wife and from parents to children in cases of dependency. ...*

*[60] The common law presumes that a spouse who purchases property and puts it in the other spouse's name or voluntarily transfers property to the other spouse will be found to have made a gift. The presumption of advancement has been defended on the basis that it provides certainty, particularly where evidence concerning the transferor's intent is unavailable or unpersuasive. The presumption is rebuttable ...*

[62] In *[Wells]*, Mr. Justice Masuhara observed that although the presumption of advancement has been reduced in its significance in the new legislative regime, it has not been extinguished. He determined that the FLA did not exclude the possibility of inter vivos gifts being made from one spouse to the other during their marriage ...

[63] Indeed, in s. 104(2), the FLA provides that common law and equitable rights are retained. That section provides:

*Rights under this Part*

104 (2) The rights under this Part are in addition to and not in substitution for rights under equity or any other law.

[64] In looking through the reasons for judgment, I cannot find where s. 104(2) was raised before Justice Butler in *Remmem*.

[65] Masuhara J. ultimately concluded that excluded property is property held by a spouse prior to the relationship over which an interest in title was not transferred to the other spouse during the relationship:

[43] It seems that the excluded property relates to property which was held by a spouse prior to the relationship and in which an interest in title was not transferred to the other during the relationship.

[66] In making those remarks, Masuhara J. was dealing with the effect of transferring title to what was otherwise excluded property during the relationship and did not consider whether an inheritance or gift received by one spouse during the relationship could be subsequently gifted to the other.

[67] ... In view of [s. 104(2)] I am of the opinion that it cannot be said that the FLA does not contain any provision that permits for the presumption of advancement.

**Identifying gifts.** A gift is made out when property is transferred and accepted without consideration and cannot be revoked by the donor.

[75] The FLA does not define “gift”. It found it instructive to consider definitions in other cases where the statute is silent, such as *Neville v National Foundation for Christian Leadership* ... In that case, the Court of Appeal also considered definitions from other cases involving different subject matters. It considered a gift to be the act of unqualified giving accompanied by delivery and acceptance by the recipient where the gift cannot be revoked by the donor. I find that is what occurred in the present case. ... The interest he has in that property is what is afforded to him by statute only.

**Effect of gifts.** The *Family Law Act* does not prohibit gifts between spouses. When excluded property is gifted to a spouse, it loses its characterization as excluded property under s. 85 and becomes shareable family property.

*[69] I conclude that the FLA does not prohibit inter vivos gifts between spouses. In this case, when excluded property owned by one spouse was comingled with funds derived from family property to purchase an asset that is placed solely in the name of the other spouse in order to immunize it from potential creditors, the exclusion is lost because the disposing spouse gifted it to the other. It is not open for Mr. F., as the transferor, to say that Ms. F., the transferee, holds the property in trust for him because it is inconsistent with the purpose of the transfer ... In other circumstances, involving different purposes, the result may be different. The rebuttable aspect of the presumption of advancement allows for individual circumstances to be considered.*

*[71] I agree with Ms. W. that the character of the \$2 million payment changed almost immediately after Mr. F. received it. Mr. F. made a gift of the bulk of the funds to his wife to purchase the Vancouver property and to cover some of the preconstruction cost. He used the remainder to pay for debt on family property. ...*

*[77] Accordingly, the funds currently held in trust are family property and are to be paid out to the parties on an equal basis. There is no basis to rebut the presumption of equal division.*

## 2. Dividing Excluded Property

**Division of excluded property.** Case law interpreting “significantly unfair” with respect to the unequal division of family property under s. 95 assists in the interpretation of “significantly unfair” with respect to the division of excluded property under s. 96, even though the factors set out in s. 96(b) differ from those set out in s. 95(2).

*[80] In L.G. v R.G., ... Mr. Justice Brown described the phrase “significantly unfair” as found in s. 95(1) of the FLA as “essentially ... a caution against a departure from the default of equal division in an attempt to achieve ‘perfect fairness’”. It is, he said, “Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart [sic] from the default equal provision.”*

*[81] A determination of significant unfairness turns on the individual facts of each case. In the absence of a definition of the term in the FLA, I found it useful to draw on cases defining the phrase in other contexts where no specific definition is found in the applicable statute. In 459831 B.C. Ltd. v Strata Plan BCS 1589, ... in dealing with the Strata Property Act, ... the Court of Appeal said at para. 15 that the “characterization of an action as significantly unfair is not a matter of discretion but is an inquiry requiring consideration of the facts before the court and what legally constitutes unfair action.” The Court referred to the definitions given to the phrase in other strata property and unrelated oppression cases ... – “unfairly prejudicial”, “burdensome, harsh, wrongful,” and “lacking in probity and fair dealing” – and, as I read the*

*reasons for judgment, concluded that significantly unfair must be something more than “mere prejudice and trifling unfairness”.*

*[82] The Court adopted a two-part test that included an objective assessment of the reasonable expectations of the petitioner. That test was not advanced by the parties in this case. In my opinion, the factors set out in s. 96(b)(i) and (ii) of the FLA point to considerations that are different than reasonable expectations.*

*[83] The FLA has not set the bar so high that finding significant unfairness is next to impossible. ...*

### [K. A.A.P. v G.T.F.](#)

The decision of Ehrcke J. in *A.A.P. v G.T.F.*,<sup>67</sup> addressed a variety of issues arising from the dissolution of the parties’ 11-year unmarried relationship, including the division of family property and the claimant’s assertion that part of an insurance settlement could be traced into the proceeds of the sale of the current family home – about \$55,100 that had been applied to the mortgage on the former family home and \$88,000 that had been spent renovating that property – and should be excluded from division.

The claimant’s position raised two issues, determining the value of excluded property applied to improving family property and determining the portions of an insurance settlement attributable to compensation for injury or loss rather than lost income.

**Identifying excluded property applied to family property.** The amount by which family property increases in value as a result of the application of excluded property to improve the property is excluded from division, not the amount of the excluded property. The party claiming the exclusion bears the onus of proving the increase in value attributable to the use of the excluded property, failing which no exclusion should be ordered.

*[67] ... With respect to the money spent on renovations, there is no evidence that this increased the sale value of the 69th Avenue residence. It might have done so, but there is no evidence that it did, and s. 85(2) of the Act is very clear that a spouse claiming that property is excluded bears the onus of demonstrating this to be the case.*

**Identifying excluded property in insurance settlements.** The portion of insurance settlements allocated to injury or loss, but not the portion allocated to lost income, is excluded property under s. 85(1)(c). The party claiming the exclusion bears the onus of proving the portion of a settlement attributed to injury or loss, failing which no exclusion should be ordered.

*[68] ... The claimant has not demonstrated what portion, if any, of the settlement money she received from ICBC is excluded property. Although s. 85(1)(c) provides that excluded property*

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<sup>67</sup> *A.A.P. v G.T.F.*, 2015 BCSC 662

*includes a settlement or award of damages as compensation for injury or loss, it also provides that such a settlement is not excluded property if it represents compensation for lost income. On the evidence before me, it would appear highly probable that a very significant portion of the settlement from ICBC resulted from the fact that the claimant was let go from her job at City Xpress and did not work again outside the home up to the date of the settlement.*

*[69] It is not for the respondent to prove what portion of the settlement was in relation to lost income. The claimant is the spouse who is claiming that the settlement money is excluded property. Pursuant to s. 85(1)(c) of the Act, she bears the onus of proving that the portion of the settlement she says is excluded, was not paid as compensation for lost income. She has adduced no evidence on that point, and therefore, I must conclude that she has not proven that any portion of the equity in the current Family Home is excluded property.*

### *L. Jaszczewska v. Kostanski*

In the case of *Jaszczewska v Kostanski*,<sup>68</sup> Baker J. considered the division of family debt in the context of a 10-year unmarried relationship and significant controversy over the dates when the parties' relationship began and ended. This decision provides a helpful discussion of the identification and division of debt and the unequal division of family property.

#### 1. Dividing Debt

**Identifying family debt.** A party claiming that a debt is family debt bears the burden of proving that the debt exists and that it was incurred during the parties' relationship.

*[117] Mr. K had credit card debt in January 2013 of about \$33,000. He also owed Canada Revenue Agency \$33,677. He is also claiming to be indebted to his brother in the amount of \$23,000. ...*

*[119] Mr. K's testimony about non-arm's length transactions with his brother was also unconvincing. He testified, for example, that he owed his brother money but also testified that his brother owed him money. I am not persuaded, on the balance of probabilities, that Mr. K is indebted to his brother; and in any event, a set-off would be warranted. Mr. K shall be solely responsible for the payment of any debt owed to his brother.*

**Unequal division of family debt.** Family debt may be divided unequally where the indebted spouse fails to prove that the debt was incurred during the normal course of the parties' relationship pursuant to s. 92(2)(d).<sup>69</sup>

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<sup>68</sup> *Jaszczewska v Kostanski*, 2015 BCSC 727

<sup>69</sup> With respect, my reading of the interplay between the presumption of equal obligation for family debt at s. 81(a) and the provisions for the unequal division of family debt in s. 95 suggests that the onus does not lie on the party claiming that a debt is a family debt, but on the party resisting a requirement to contribute to the payment

*[118] Mr. K's testimony about the tax debt – said to be related to Goods and Services Tax - was confusing and less than convincing. I am not persuaded that this is a family debt. If am wrong, then I would reapportion the debt pursuant to s.95(2)(d) of the FLA as Mr. K has failed to prove that it was a debt incurred in the normal course of the relationship between the parties. If this debt exists, Mr. K shall be solely responsible to pay the debt.*

## 2. Dividing Property

**Length of relationship.** Relationships of medium duration militate neither in favour or against a finding of significant unfairness under s. 95(2)(a).<sup>70</sup>

*[143] I note that s. 95(2)(a) refers to the duration of the relationship as a factor to be considered. Mr. K and Ms. J lived together as spouses for 10 years and nine months. I would consider this to be a relationship of middle duration – neither a very short nor a very long relationship, and therefore a neutral factor.*

**Contribution to career or career potential.** Contributions by a spouse to advance the career of the other may militate in favour of a finding of significant unfairness under s. 95(2)(c); the absence of such contributions is not a factor relevant to determining the fairness of an equal division of family property.

*[154] I agree with Counsel for Mr. K that Ms. J cannot be said to have done much to advance Mr. K's career during the relationship. Section 95(2)(c) identifies a spouse's contribution to the other's spouse's career or career potential as a factor to be considered. ...*

*[156] While contributions by one spouse to advance the career of another might support reappropriation, I am not persuaded the Legislature intended that the absence of a contribution by one spouse to the advancement of the other spouse's career should weigh heavily against equal division of family property.*

**Disproportionate contributions made to the the family property.** A spouse's failure to contribute to the acquisition, maintenance and improvement of the family property may militate in favour of finding of significant unfairness under the catchall provision of s. 95(2)(i) when the disparity in contributions is considerable.

*[162] In enacting the Family Law Act and adopting a new regime for allocating family property, the Legislature, in my view, intended that the exceptions to equal division would not become the norm. In almost any spousal relationship the nature of the contributions made may be unequal in some sense, but in providing for the equal division of family property (after taking into account excluded property or a contribution to value derived from excluded*

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of that debt. Proof that a debt existed at the date of separation under s. 81(b) should suffice to prima facie qualify the debt as a family debt.

<sup>70</sup> In *Hoppen v Kravariotis*, 2015 BCSC 779 at para. 139, Hyslop J. observed that case law on the impact of the length of marriage developed under the *Family Relations Act* were “of no consequence” in the proceeding.

property), the Legislature intended the general rule to prevail unless very persuasive reasons can be shown for a different result.

[163] Had the Legislature intended unequal contribution to be a significant factor justifying unequal division of family property under s. 95, surely the Legislature would have specifically said so. Section 65(1) of the Family Relations Act ... specifically invited the court to consider circumstances relating to acquisition, preservation, maintenance or improvement of family assets in relation to an application for unequal division of family property. These factors are not included in the enumerated factors in section 95 of the FLA. ...

[171] In this case, there is considerable disparity between the respective direct contributions made by Mr. K and Ms. J to the accumulation of family property...

[172] Ms. J made only minor direct and indirect contributions to the acquisition, maintenance and enhancement of the family property. ... Ms. J was occupied with caring for [the child] in the early stages of the relationship ... but as time went on and [the child] became a teenager and then a young adult, Ms. J's responsibilities in relation to [the child's] care became less onerous in any event. Even then, Ms. J did not make any serious attempt to find more work; or to embark on a more remunerative career.

[174] Having considered all of the factors, I conclude that Mr. K has met the onus to show that equal division would be "significantly unfair" ...

**Disproportionate ownership of property at beginning of relationship.** The *Family Law Act* exempts property brought into the relationship from division between spouses. Accordingly, whether one spouse has brought more property into a relationship than the other is not a basis for the unequal division of family property under the catchall provision of s. 95(2)(i).

[144] I begin with the submission made by Counsel for Mr. K that equal division would be significantly unfair because Mr. K brought assets into the relationship while Ms. J did not. In my view, this factor can be given little or no weight in the circumstances of this case. ... The FLA established a new regime for identifying and valuing family assets. It contains provisions excluding from family property the assets each party brings into the relationship if those assets still exist when the relationship ends; or the value of the pre-relationship property can be traced into other family property. ... Given the new regime for excluded property, I do not think the Legislature intended that mere disparity in wealth at commencement of the relationship would generally justify unequal division of family property at the end of the relationship.

### *M. Blair v Johnson*

The primary issue in *Blair v Johnson*,<sup>71</sup> a decision of Fleming J., concerned the valuation and division of shares in a holding company which had skyrocketed in value between the date of

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<sup>71</sup> *Blair v Johnson*, 2015 BCSC 761

separation in 2012 and the date of trial in 2014, increasing from about \$630,000 to about \$5,075,000. The parties agreed that the shares themselves were excluded property, being derived from two companies owned by the claimant prior to the commencement of the parties' 9-year relationship.

This decision is especially helpful for the test proposed by Fleming J. to determine when a valuation date other than the date of trial, which s. 87(b)(ii) normally requires, should be used.

## 1. Valuation Date

**Principles guiding varying the date of valuation.** The *Family Law Act* provides no factors to guide the court's discretion in ordering that family property and family debt be valued other than at the date of trial pursuant to s. 87. The principle of statutory interpretation requiring legislation to be interpreted in its entire context allows consideration of government's intention. Government intended that s. 87 would codify the case law on valuation dates developed under the *Family Relations Act*. Accordingly, that case law may be applied to claims that a different valuation date be used.

*[60] The wording of s. 87 does not contain any criteria with which to guide the court's discretion to depart from the hearing date as the date of valuation. It appears to have attracted little judicial attention thus far in relation to family property. ...*

*[63] The well-established modern approach to statutory interpretation requires the words of an Act to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature ... The discussion found in Hansard ... offers limited assistance in understanding the legislator's purpose in enacting s. 87. The Minister described s. 87 as a "big step forward" because the Family Relations Act ... did not provide any guidance on setting a valuation date and there had been considerable criticism of the broad judicial discretion to determine the date ... In the Family Law Act Transition Guide, the Ministry of Justice provides the same explanation for s. 87 and the following commentary:*

*... It codifies how and when the value of family property and family debt is determined. Except in relation to benefits under a pension plan, the presumptive valuation date is the date of trial or the date of agreement, unless otherwise provided for in an agreement or order. The Family Relations Act did not provide any guidance on valuation date. However, s. 87 is consistent with the principles that have emerged in case law about valuation date of family assets (see, for example, Blackett v Blackett ...*

*[64] In other words, it seems the legislator intended for s. 87 to codify the common law developed under the FRA which provided the valuation date was, presumptively, the trial date.*

...

**Case law developed under the *Family Relations Act*.**<sup>72</sup> In general, the date of valuation should be the date of trial, unless there is reason to choose a different date, as spouses should share in the increase and decrease in value of property occurring after the triggering event.

*[64] ... In Blackett v Blackett, ... the Court of Appeal overturned the trial judge's decision that the husband should pay compensation to the wife using the date of separation to value shares in a company found to be a family asset. Madam Justice Southin ordered the trial date to be the date of valuation, stating at 103 - 104:*

*When an asset is determined to be a family asset, the Court must ask itself whether s. 51 should be invoked. For that purpose, it is often necessary to have some idea of the value of an asset as at the triggering event for whether or not there is to be a variation of the right given by s. 43 must be determined by the facts existing when that right came into existence. It is then, and then only, that the right can be unfair.*

*But when the Court considers what to do by way of a compensation order under s. 52, it is the value at date of trial which is significant for it is at that point that one spouse is having taken away a vested interest and the other spouse is paying for that vested interest.*

*The reason is simple. Section 43 gives the wife an undivided one-half interest in the shares - not an undivided one-half interest in the value of the shares at the date of the triggering event or at any other date. ...*

*[65] Not long after, in Gilpin v Gilpin, ... the Court of Appeal observed numerous authorities made it clear "having regard to the issue of fairness that unless there be reason to the contrary the valuation date for family assets including the matrimonial home should be chosen as of the date of trial".*

*[66] In N.M.M. v N.S.M., ... Mr. Justice Joyce summarized the relevant principles as follows:*

*[76] From my review of the forgoing authorities I distill the following principles:*

- 1. Because it was the triggering event that gave each spouse a prima facie equal interest as tenants in common in each family asset, the circumstances at that date should be considered to determine whether an equal division would be unfair.*
- 2. Generally the spouses share any increase or decrease in value of a family asset that occurred after the triggering event because their interests in the asset vested.*

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<sup>72</sup> A thorough discussion of the law on the valuation dates accumulating under the *Family Relations Act* can be found at §4.69 in pre-2013 updates of the third edition of the *Family Law Sourcebook for British Columbia* published by the Continuing Legal Education Society of British Columbia. The leading cases were: *N.M.M. v N.S.M.*, 2004 BCSC 346, *Blackett v Blackett* (1989), 22 RFL (3d) 337 (BCCA); *Gilpin v Gilpin* (1990), 29 RFL (3d) 250 (BCCA); and, *Stark v Stark* (1990), 26 RFL (3d) 425 (BCCA).

3. Valuation at the date of trial was generally appropriate when considering the mechanism under s. 66 to achieve the division of family assets, for example, by dividing the assets in specie by vesting the assets in the names of the parties or by vesting an asset in the name of one party in exchange for an order compensating the other for the divested interest.

4. Generally the appropriate date for valuing family assets was the trial date, however there was a discretion to fix another date, not earlier than the triggering event, if it was necessary to achieve fairness.

5. Discretion may have existed to reapportion assets or to vest title in one spouse while awarding the other compensation taking into account events following the triggering event where for example, the conduct of one party caused the asset to increase or decrease in value and it would have been unfair and unjust to ignore those events.

6. Where it was established that one spouse disposed of a family asset or caused it to decrease in value significantly, the court could order compensation for that loss. The compensation was based on the loss in value, which necessarily involved determining the value of the asset prior to the loss.

[67] In *Berg v Berg*, ... the Court of Appeal affirmed the trial date was the appropriate valuation date in cases where the court took away the interest of one spouse in a family asset and ordered the other spouse to pay compensation for it. In *N.A.J. v P.L.J.*, ... Mr. Justice Harvey expressed the view that while the court retained the discretion to determine the valuation date so as to achieve "substantial fairness", Blackett remained the "default position", particularly where reapportionment was being sought by one of the parties.

**Test to vary the date of valuation.** A party seeking a valuation date other than the date of trial must establish that it would be significantly unfair to use that default date before the court chooses another date for the valuation of family property and family debt.

[69] Section 95 of the FLA requires significant unfairness on specified grounds before the court may order an unequal division of family property. To the extent that s. 95 and s. 87 may provide alternate routes to address the substantial unfairness that would arise from awarding parties equal shares in family property valued at trial, it seems to me the significant unfairness threshold should also be met before the court departs from the date of trial as the valuation date pursuant to s. 87. To conclude otherwise would allow for an earlier valuation date resulting in a radical departure from an equal division as of the date of trial in circumstances where the significant unfairness threshold under s. 95 is not met. I say this leaving aside circumstances where it is necessary to set an earlier date because family property has been sold etc. or debt eliminated prior to the hearing. It is important to bear in mind the basic principle of equal entitlement (and responsibility) found in s. 81 that is integral to the division of family property regime in the FLA.

## 2. Dividing Property

**Unequal division of family property.** To determine whether an equal division of family property would be unfair, the court must first undertake a notional equal division of that property. This requires that the property be valued at both the date of separation and the chosen valuation date.

*[74] In Remmem, the court found that in order to determine if it would be significantly unfair to divide family property equally, the family property must first be notionally divided, taking into account the exclusions, in accordance with the FLA (para. 47). ...*

*[75] In order to consider whether a significant unfairness would arise from an equal division due to a significant increase in the value of the shares ... I must also determine the value of the shares at the time of separation. ...*

**Length of relationship.** Relationships of medium duration militate neither in favour or against a finding of significant unfairness under s. 95(2)(a).

*[73] I regard the length of the parties' relationship as a neutral factor here. ...*

**Contribution to career or career potential.** A spouse's failure to contribute to excluded property owned by the other may be a factor militating in favour of a finding that it would be significantly unfair to equally divide the increase in value of that property under s. 95(2)(c).<sup>73</sup>

*[78] Mr. Blair also seeks an unequal division in the increase in the value of the shares based on Ms. Johnson's lack of contribution to his businesses throughout their relationship, relying on s. 95(2)(c). Ms. Johnson submits guaranteeing the secured line of credit for Integral in early 2012 was a significant contribution. She also points to small loans she made to Mr. Blair's company, all of which she said were repaid with interest, except the last one provided to [Company A]. ...*

*[80] The other important evidence relating to the question of Ms. Johnson's contribution was that the parties were not involved either directly or indirectly with one another's professional lives. There is no dispute they operated their respective businesses separately. Until later in the relationship, neither supported the other. They shared living expenses equally. ...*

*[82] While I agree Ms. Johnson's role in arranging for a secure line of credit for [Company A] was a form of contribution, I am not persuaded in the context of the relationship as a whole that it was a significant one. Ms. Johnson testified that she had no real plans for her retirement although she did want to write a cookbook. After she stopped working for the most part, Ms. Johnson's lack of involvement in Mr. Blair's businesses continued, reflecting, in my view, the extent to which the parties intended to keep their business lives separate. ...*

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<sup>73</sup> However, see the finding of Baker J. to the contrary in *Jaszczewska* at para. 156.

**Increase or decrease in value beyond market trends.** A spouse's role in increasing the value of excluded property beyond market trends after separation may be a factor militating in favour of a finding that it would be significantly unfair to equally divide the increase in value of that property under s. 95(2)(f). This provision does not require a spouse to have contributed to the increase in value in a new way; increases attributable to the spouse's customary management of the property may qualify.

*[76] There is no dispute that the dramatic increase in the value of Alberta Co.'s shares between the 2012 and 2014 valuation dates was driven by increased revenues for [Company B]. [There was no] dispute about the evidence provided by Mr. Blair regarding the importance of his role in generating work for [Company B] through his key client contacts, relationships and his First Nations status. ...*

*[77] ... Based on the evidence, I find that in addition to market forces, which will always be at play for resource based businesses, Mr. Blair's role in the operations of [Company B] – his expertise, key client contacts and relationships within the industry – contributed significantly to the dramatic increase in the value of [holding company's] shares between the 2012 and 2014 dates ... While Mr. Blair's role in the company was just as critical in 2012, I do not regard s. 95(2)(f) as requiring a spouse to cause an increase in the value of family property by a new means after separation.*

#### [N. C.M. v M.S.](#)

The decision of Grist J. in *C.M. v M.S.*<sup>74</sup> involved, among other matters, a financially dependent spouse struggling to find employment at the end of a 10-year relationship and a payor unable to make payments of spousal support sufficient to address the objectives for spousal support set out in s. 161 of the *Family Law Act*. This case provides helpful but brief commentary on s. 95(3) and on the possibility that s. 95 provides the court with a broader latitude to divide property unequally than was available under s. 65 of the *Family Relations Act*.

**Discretion to divide family property unequally.** The catchall provision of s. 95(2)(i), allowing the court to consider “any other factor ... that may lead to significant unfairness” in determining whether to divide family property unequally, is broader in scope than the catchall provision of s. 65(1)(f) of the *Family Relations Act*. The new act provides the court with a broader discretion to divide family property unequally than was previously available, and address causes of significant fairness other than those enumerated in s. 95(2)(a) to (h).

*[34] One of the changes effected by the change from s. 65 of the FRA to s. 95 of the FLA lies in a more restricted discretion to redistribute family assets in order to meet a need to enhance one party's capacity to be independent and self-sufficient. Section 95(3) stipulates that this objective is to be first considered in determining entitlement to spousal support with reapportionment being a secondary form of relief.*

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<sup>74</sup> *C.M. v M.S.*, 2015 BCSC 1031

[35] But the second observation I would make is that s. 95 gives a broader discretion to redistribute assets based on a more open-ended direction in s. 95(2)(i) allowing redistribution based on “any other factor ... that may lead to significant unfairness.” This contrasts with s. 65 of the FRA which allowed for redistribution for unfairness, but confined to unfairness generated by one of the enumerated factors in s. 65(1)(a) to (f). This discretion is tempered by the requirement that the unfairness address needs to be classified as “significant”. ...

[36] ... In light of the more open discretion expressed in s. 95(2)(i), I am of the view that this section can be used directly to deal with ... sources of significant unfairness separate from the consideration of the need for independence and self-sufficiency, a matter which the FLA directs the court to consider by way of spousal support before having any effect on distribution of property.

**Failure to meet the objects of spousal support.** Where a spouse is entitled to spousal support and the objectives of an order for spousal support cannot be met, family property may be divided unequally to address the unmet need under s. 95(3).

[33] Section 161 stipulates the objectives of a spousal support order:

161. In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

(a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;

(b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;

(c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;

(d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time. ...

[38] ... Ms. C.M. is in need of assistance in order to provide for her independence and self-sufficiency until she is able to improve her employment skills and find work. However, the priority given to child maintenance ahead of spousal maintenance limits the ability to make an order under the Spousal Support Advisory Guidelines that would make any substantial contribution to promoting her economic self-sufficiency. Accordingly, the objective of s.161 in this regard cannot be met and s. 95 again becomes available.

### *O. P.G. v D.G.*

The issue of the application of common law principles to claims under Part 5 arose yet again in *P.D. v D.G.*,<sup>75</sup> in the context of a 14-year marriage and a property brought into the relationship that was first used as collateral for the joint purchase of a second family home and then sold and used to pay off the mortgage on the first family home, also held jointly.

Despite a subsequent decision of the Court of Appeal, the reasoning of Fenlon J. in this case is important for its persuasive and elegant reconciliation of the conflicting decisions in *Remmem*, *Wells* and *V.J.F.* and the exception provided for gifts to children. It is also, not that it matters, the approach I prefer, for reasons including the Ministry's stated objects of making the act "simpler, clearer, easier to apply, and easier to understand for the people who are subjected to it,"<sup>76</sup> and the latter point in particular as it relates to access to justice for litigants without counsel.

**The effect of the presumption of advancement.** First, under s. 85(1)(g), property derived from the disposition of excluded property, including gifts, is excluded property. The tracing of property's status as excluded is not limited to property owned only by the spouse who owned the original property. Applying the presumption of advancement to limit the application of s. 85(1)(g) in this manner would treat all excluded property commingled with family property as family property, despite the express intention of the legislation to exclude such property from division. Second, the approach in *Remmem* is more consistent with the objects of the *Family Law Act*. Third the scheme governing the property rights of spouses changes upon their separation, from the general law of property, including the common law presumptions, which applied while their relationship was intact, to the regime set out in the *Family Law Act*. Under the *Family Law Act* regime, gifts between spouses made during their relationship are irrelevant; ss. 84 and 85 impose a new characterization on the spouses' property. Fourth, applying the presumption of advancement would defeat the tracing provision in s. 85(1)(g) and may result in an unfairness not included among the factors for determining the significant unfairness of an equal division of family property set out in s. 95(2).<sup>77</sup>

*[67] Having considered [Remmem, Wells and V.J.F.] I conclude that I should follow the approach taken in Remmem for a number of reasons. First, Wells and V.J.F. focused on the continued existence of the presumption of advancement – neither case addressed s. 85(1)(g), the tracing provision which expressly provides for the exclusion of property derived from excluded property or the disposition of excluded property.*

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<sup>75</sup> *P.G. v D.G.*, 2015 BCSC 1454

<sup>76</sup> *Supra*, fn 14

<sup>77</sup> This analysis was considered and adopted by: Pearlman J. in *Andermatt v Tahmasebpour*, 2015 BCSC 1743 at paras. 36 to 51; Warren J. in *Shih v Shih*, 2015 BCSC 2108 at paras. 57 to 59; Young J. in *J.B. v S.C.*, 2015 BCSC 2136 at paras. 71 to 89; Steeves J. in *Lawrence v Mulder*, 2015 BCSC 2223; and, Skolrood J. in *Kuhberg v Hall*, 2015 BCSC 2230 at paras. 98 to 109

[68] In *Wells*, it appears the effect of s. 85(1)(g) was not raised. The subsection is not listed in the summary of the relevant provisions of the FLA at para. 17, and is not referred to at all in the analysis. In *V.J.F.*, s. 85(1)(g) is referred to in the summary of the claimant's position at para. 39, but it is not referred to in the discussion of excluded property at paras. 53-55 of the analysis. As set out in *Re Hansard Spruce Mills*, ... given that a relevant statutory provision was not addressed, I am not bound to follow these decisions.

[69] In considering the effect of s. 85(g), I am mindful that the provisions of a statute are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the legislature ...

[70] Section 85(1)(g) of the FLA is broadly worded. The section excludes property "derived from property or the disposition of property" acquired by a spouse before the relationship between the parties began. ...

[75] Section 85(1)(g) does not restrict tracing to an asset held solely by the spouse who owned the original excluded asset. Recognizing the presumption of advancement when applying Part 5 of the FLA would generally "extinguish" the right of a spouse who has brought property into the relationship to retain it on separation whenever the pre-owned property is mingled with property held by the other spouse. The implications of this are far-reaching. Arguably an inheritance deposited into a joint bank account, a gift from a parent to one spouse used to pay down the mortgage on a home held as joint tenants, or an award of damages for pain and suffering used by a spouse as a down payment on a house placed in both names or placed in the other spouse's RRSP would be subject to the presumption of advancement. It would follow that the spouse who was the original owner of these assets, which are expressly defined as excluded property under s. 85(1) of the FLA, would not be able to claim them as excluded property at the end of the relationship, unless he or she could marshal evidence to rebut the presumption of advancement at the time the transfer occurred.

[76] The second reason I prefer the approach in *Remmem* is that it is consistent with the objects of the FLA. In the British Columbia Ministry of Attorney General's White Paper on Family Relations Act Reform: Proposals for a new Family Law Act, ... the reason for introducing an excluded property regime was described as follows:

*The most compelling reasons for moving to an excluded property regime are to make the law simpler, clearer, easier to apply, and easier to understand for the people who are subjected to it. The model seems to better fit with people's expectations about what is fair. They "keep what is theirs," (such as pre-relationship property and gifts and inheritances given to them as individuals) but share the property and debt that accrued during their relationship. ...*

*Changing to an excluded property scheme removes the broad judicial discretion from the asset identification stage and leaves some discretion at the distribution stage. This change is designed to make it easier to identify property subject to division and, therefore, reduce the potential for disagreement. ...*

[78] Third, the reasoning in *Wells and V.J.F.* focusses on the legal effect of a transfer of property during the marriage without reference to the overall scheme of the FLA on marriage breakdown. In my view, general property law, including the presumption of advancement, applies during the parties' marriage. While the relationship continues, a transfer of real property from the husband's sole name into joint tenancy gives the wife an undivided interest in that property. If the husband dies, the entire property vests in the wife and does not fall into the husband's estate. If the house is put into the wife's sole name, it is hers absolutely during the marriage and the husband's creditors, absent a fraudulent conveyance, cannot pursue it because the husband has no interest in that property.

[79] On marriage breakdown, however, a new property rights regime descends as between the spouses, just as it did under the former FRA. The rights of third parties vis-à-vis the property held by the spouses remain unaffected (s. 82), but between the spouses, all changes. Whether property is held solely in the wife's name, solely in the husband's name, or jointly, it is all subject to the scheme of division created by Part 5 of the FLA (s. 84(1)). Some of that property is to be excluded under s. 85(1) and all the rest is presumptively to be divided equally regardless of whose name it is in at the date of separation.

[80] Under this scheme it does not matter that one spouse during the marriage is presumed to have gifted property, whether excluded or otherwise, to his or her spouse. There is a whole new regime once the marriage ends. In my view, this interpretation finds support in s. 85(1)(b.1), which was amended to clarify that only gifts from a third party, as opposed to a spouse, are excluded property. ...

[83] As a result of this amendment and the property regime under the FLA as a whole, whether a house or a piece of jewellery is given by one spouse to another during the marriage, it all falls back into the communal pot when the marriage ends. Some of the property will then be excluded if a spouse can meet the requirements of s. 85, and the remainder may, in certain cases, be divided unequally under s. 95. Section 96 of the FLA provides that even excluded property may, in certain cases, be divided if justice so requires.

[84] Logically, if the presumption of advancement continues to govern on marriage breakdown, then a gift from one spouse to another would not fall back into the communal pot. If "a gift is an irrevocable gift" for the purpose of determining what can be claimed as excluded property, why would a gift not be an irrevocable gift for the purpose of determining what is family property to be divided at the end of a marriage? The amendment reflected in s. 85(1)(b.1) demonstrates the legislature did not intend that approach to be taken. ...

[87] It is unlikely that when the legislature drafted the new excluded property regime under the FLA it was unaware of the practical reality that many spouses will combine assets during their marriage.

[88] Finally, I note that failing to give effect to the tracing provision in s. 85(1)(g) when excluded property is placed in the name of the other spouse in whole or in part may result in an unfairness. Section 95 of the FLA replaces s. 65(1) of the FRA and provides for an unequal division of family property in circumstances of "significant unfairness". However, whereas

*s. 65(1) of the FRA specifically invited the Court to consider circumstances relating to acquisition and preservation of family assets, those factors are not included in the enumerated factors to be considered in s. 95 of the FLA ...*

**Effect of gifts.** Gifts from spouses to their children are not captured by the property regime set out in Part 5, and the presumption of advancement will accordingly apply if not rebutted.

*[90] The parties do not agree on whether two musical instruments are family property: a violin used by [Child A] worth \$6,000 and a cello used by [Child B] worth \$3,000.*

*[91] Mr. G. submits these are family property while Ms. G. asserts that the instruments were gifts to the children, belong to them, and should not be divided between the parties.*

*[92] I find that the instruments were purchased by the parents and given to their daughters. The presumption of advancement applies when a parent transfers property to a minor child ... The presumption that the musical instruments were gifts to [Child A] and [Child B] has not been rebutted by Mr. G. The violin and cello therefore do not constitute family property.*

#### [P. A.M.D. v K.R.J.](#)

The decision in *A.M.D. v K.R.J.*<sup>78</sup> concerned the parties to a relationship of slightly more than four years' duration and the respondent's claim for the unequal division of family property he brought into the relationship. The judgment of Sharma J. in *A.M.D.* is, like those in *Jaszczewska* and *Blair*, useful for its exploration of factors claimed to support a finding that an equal division of family property would be significantly unfair.

#### 1. Application of Case Law on Reapportionment

**Case law developed under the *Family Relations Act*.** Case law on reapportionment claims brought under s. 65 of the *Family Relations Act* are of limited assistance in interpreting s. 95 of the *Family Law Act* as the bar to justify an unequal division is higher in the new legislation and as the only way to exclude property brought into the relationship under the old legislation was through a reapportionment claim.

*[59] The respondent relies on case law under the Family Relations Act ... in which property was reapportioned to the husband because of the short duration of the marriage and the fact that he brought the major portion of the family assets into the marriage ...*

*[60] These cases are distinguishable. First, I note that the threshold for reapportionment was lower under the FRA ("unfair") than under the FLA ("significantly unfair"). The legislature has raised the bar to justify an unequal distribution; it is necessary to find that the unfairness is*

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<sup>78</sup> *Supra*, fn 60

*“compelling” or “meaningful” having regard to the s. 95(2) factors ... Cases under the former “unfair” threshold are of limited assistance ...*

*[61] Second, the property regime under the FRA did not exclude property acquired by a spouse before the relationship between the spouses began as the FLA now explicitly does in s. 85. The only remedy for excluding such property was through reapportionment under s. 65 of the FRA. In the new framework, such property is already excluded, except for its increase in value during the relationship until the time of trial. ...*

## 2. Dividing Property

**Length of relationship.** Relationships of short duration are a factor in favour of a finding of significant unfairness under s. 95(2)(a).

*[69] I agree that the parties’ relationship of four years and three months was of short duration, which supports an unequal division. I find this to be a strong factor in the respondent’s favour. ...*

*[72] Having considered all of the relevant factors in s. 95(2), I do find it would be significantly unfair to the respondent to equally divide the family property ... The strongest factor in favour of reapportionment is the length of the marriage. ...*

**Tax consequences.** Tax liabilities incurred as a result of a transfer of property are a factor in favour of a finding of significant unfairness under s. 95(2)(h).

*[73] In addition, I understand that there may be tax consequences to the division of the respondent’s shares. I find that ... the tax consequences should be taken into account ...*

**Disproportionate contributions made to the the family property.** Unequal contributions to family property may be a factor in favour of a finding of significant unfairness under the catchall provision of s. 95(2)(i), however s. 81(a) clearly states that the parties’ entitlement to family property is independent of their use of or contribution to that property.

*[64] I note that the factors for consideration under reapportionment have changed in the new legislation. In particular, s. 65(1) of the FRA specifically invited the court to consider circumstances relating to the acquisition, preservation, maintenance or improvement of family assets. These factors are not included in s. 95 of the FLA. It could be argued that the parties’ relative contributions should be considered under s. 95(1)(i) as “any other factor ... that may lead to significant unfairness”, but in my view, the court cannot ignore the clear language in s. 81 which states that “spouses are both entitled to family property and responsible for family debt, regardless of their use or contribution.”*

*[65] Justice Baker reviewed recent FLA case law on this issue in Jaszczewska at paras. 165 to 170, noting that in some cases the court did consider unequal contribution, among other*

*factors, to warrant unequal division or as insufficient reason to establish “significant unfairness”. ...*

*[66] Respectfully, I agree with Justice Fleming in Nearing v Sauer ... :*

*[141] Section 95(2) does not appear to allow for the wide ranging examination of each spouse’s contribution to the accumulation of family assets and their respective capacities that occurred pursuant to s. 65(1)(f). Instead the court may consider a spouse’s contribution to the career or career potential of the other spouse under s. 95(2)(c) or a spouse’s detrimental impact on to the value of family property or potential family property under s. 95(2)(g) which appears focused on the spouse’s direct actions vis-à-vis the value of family property. I interpret the words “spouse’s contribution” in s. 95(2)(c) as including the full spectrum of all levels of contribution from one spouse negatively impacting on the other spouse’s career to greatly enhancing the career or career potential of the other spouse. ...*

*[68] In the circumstances of this case, I do not take into account the parties’ financial contribution to the family property during the relationship as s. 81 is clear that each spouse has a right to an undivided half interest in all family property regardless of their respective use or contribution. Moreover, the evidence was uncontroverted that the claimant had the responsibility for maintaining the home by doing chores, etc. during the relationship, and, therefore, contributed positively to the building up of the asset.*

**Disproportionate ownership of property at beginning of relationship.** The *Family Law Act* exempts property brought into the relationship from division between spouses. Whether one spouse has brought more property into a relationship than the other is not a basis for the unequal division of family property under the catchall provision of s. 95(2)(i).

*[61] ... In the new framework, such property is already excluded, except for its increase in value during the relationship until the time of trial. ...*

*[62] In any event, I find that the respondent did not bring substantial assets into this relationship. In [Jasinski v Jasinski], for example, the husband brought assets to the marriage valued at \$350,000 (para. 50). In [Li v Long], it was millions (para. 147). In contrast, the respondent bought the home with a \$5,000 down payment and had contributed about another \$1,000 to the principal of the mortgage by the time the parties began cohabitating.*

#### [Q. Chang v Xia](#)

The decision of Fleming J. in *Chang v Xia*<sup>79</sup> involved the unrepresented parties to a 6-year marriage, evidence challenging the respondent’s credibility and the adequacy of his disclosure,

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<sup>79</sup> *Chang v Xia*, 2015 BCSC 1994

and concerned, among other issues, the respondent's claims for an unequal division of the family property and an equal division of the family debt.

This case is one of the few property cases under the *Family Law Act* to discuss the consequences of nondisclosure and the impact of that venerable line of cases on the subject beginning with *Cunha v Cunha*,<sup>80</sup> on proceedings under the new legislation.<sup>81</sup>

**Effect of nondisclosure.** Nondisclosure may be addressed through the imputation of property to the offending party or the unequal distribution of family property or family debt under s. 95(2)(f) and (i), including through a finding that it would be significantly unfair to require the other party to share in a family debt.

*[47] Where a spouse fails to disclose financial assets and dissipates family assets after separation, the court may impute assets to the spouse and/or reappportion family assets or debt pursuant to s. 95(2) of the FLA if the court finds it would be significantly unfair to order an equal division, or the common law.*

*[48] In Cunha v Cunha, ... the court referred to the non-disclosure of assets in family cases as the cancer of matrimonial property litigation. The court determined it was not sufficient to respond to such conduct with an award of costs or by dealing only with the known assets. Instead, the court divided the parties' family assets on the basis that the husband's undisclosed assets had an imputed equal value to the disclosed assets. The court then vested all the known assets in the name of the wife.*

*[49] In Laxton v Coglton, ... the court clarified that where the non-disclosing party has not satisfied the court that full disclosure has been made, the court may infer the value of the undisclosed assets is at least equal to the value of the disclosed assets. ... The court in Laxton also observed that the principle in Cunha applies only where there is a strong evidentiary basis for the proposition that one of the parties to the litigation has hidden assets. ...*

*[51] In this case, it is clear the respondent failed to disclose his pension assets and the existence of any remaining RRSP assets and that he dissipated his RRSP assets ...*

*[52] Given the absence of evidence as to the nature and value of his pension and the value of any remaining RRSP asset, however, I do not regard it as appropriate to impute assets to the respondent. Instead, I find pursuant to s. 95(2)(f), it would be significantly unfair to divide his student loan debt equally, and reappportion that debt entirely to the respondent. In other words, the claimant will not be required to make any contribution to this family debt.*

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<sup>80</sup> *Cunha v Cunha* (1994), 99 BCLR (2d) 93 (BCSC)

<sup>81</sup> See *Assselin* at para. 106 and *Cizmic v Cizmic*, 2015 BCSC 1430 at paras 105 to 110.

## R. *Shih v Shih*

The issue of the evidence necessary to prove a claim to excluded property, first discussed in *Asselin*, was raised again in *Shih v Shih*,<sup>82</sup> a case heard by Warren J. involving the parties to an unmarried 8-year relationship and a variety of property and debt. After reviewing the relevant case law, the court concluded that a party raising a claim to excluded property must establish the basis for and amount of the exclusion on the balance of probabilities. Where the excluded property has been sold and used to acquire new property, the party must provide sufficient evidence to trace the excluded character of the old property into the new property.

**Identifying excluded property.** Although a party claiming an entitlement to excluded property is generally required to provide documentary evidence establishing the exclusion and its amount, proof on the balance of probabilities may suffice when such evidence is not available. The claimant must prove, to the satisfaction of the court, both the basis for and extent of the exclusion with precision. The court may consider the credibility of the claimant and the reliability of his or her evidence in light of the whole of the evidence tendered.

*[61] Ms. Shih says Asselin establishes that documentary evidence is required to prove a claim to excluded property. Mr. Shih submits that conclusive documentary evidence is not essential and that even if a party does not have documentary evidence to establish a direct link from an excluded asset into an existing asset, an exclusion will be established provided there is a sufficient evidentiary basis for the court to conclude, on a balance of probabilities, that there is such a link. He emphasizes that in Asselin, Mr. Justice Harvey found that the husband had established some excluded property on the basis of an informed estimate notwithstanding the absence of specific documentary proof of its value.*

*[62] As noted in Asselin and subsequent cases that have considered this issue such as Cizmic v Cizmic ... and V.J.F., the FLA reflects a more formulaic and less discretionary approach to both the identification and division of family property than existed under the former Family Relations Act. As stated by Mr. Justice Harvey in Asselin at para. 106 “more mathematical certainty from a clear evidentiary record is required.” Thus, generally speaking, a party asserting a claim to excluded property is expected to produce documents showing the value of the property at the critical times and, where relevant to the claim, documents showing the movement of the property as it changes character from one asset into another.*

*[63] Notwithstanding that general expectation, I do not read Asselin as holding that documentary evidence is invariably required. In Asselin, the respondent established a claim to certain excluded property on the basis that it was derived from property he owned before the relationship began, notwithstanding the absence of documentary evidence establishing the value of the property at that time. ... This is because Mr. Justice Harvey was satisfied that the evidence tendered was sufficient to permit him to make informed findings ...*

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<sup>82</sup> *Supra*, fn 77

[64] *The principle that emerges from the case law is that a broad brush or rough estimate approach to identifying excluded property is not appropriate and that a party claiming excluded property must establish, on a balance of probabilities, the basis for and extent of the exclusion with precision. Where it is asserted that excluded property has changed character, each link in the chain required to trace the property into a currently owned asset must also be established. Depending on the nature of the claim in question, this may mean, in practical terms, that it is impossible for a party to meet the onus without documentary evidence. For example, where the claim in question is a bank account that one party says pre-existed the relationship the court may conclude that a party's viva voce testimony of the balance in the account at a particular point in time several years earlier is unreliable, and therefore insufficient to meet the onus, if not corroborated by a bank statement. On the other hand, where the claim in question is founded upon an unusually memorable event, such as inheritance, the court may conclude that a party's viva voce testimony as to the value of the inheritance is reliable without corroborating documents. In other words, in determining whether the onus has been met, the court will assess the credibility and reliability of the whole of the evidence tendered in the context of the specific case, but having regard for the precision mandated by the more formulaic approach of the FLA.*

### *S. Jackson v Jackson*

The problem of identifying the excluded portion of an ambiguous insurance settlement arose again in *Jackson v Jackson*,<sup>83</sup> a decision of Burnyeat J.

**Identifying excluded property in insurance settlements.** The portion of insurance settlements allocated to injury or loss is excluded property under s. 85(1)(c); the portion attributable to lost income is, in a departure from the law established under the *Family Relations Act*, shareable family property. The party claiming the exclusion bears the onus of proving the portion of a settlement attributed to injury or loss, however a failure to establish the portion attributed to injury or loss may not result in the entire settlement being found to be family property.

[10] *The first question which arises is whether, because some of the Settlement may relate to "lost income", all or part of the Settlement should not be found to be "family property". Clearly, it was the intention of the Legislature to exclude from family property that portion of a "settlement or an award for damages" which could not be attributed to "lost income". Section 85(1)(c) of the Act was a departure from the law established under the Family Relations Act ... that compensation for past wage losses was not a family asset.*

[11] *I am satisfied that, if a spouse cannot show what portion of "compensation or injury or loss" relates to "lost income", the entire portion "settlement" or "damages" should not be excluded from what will be considered as "family property". In this regard, A.A.P. v G.T.F. ... dealt with a settlement in relation to a motor vehicle accident where a lump sum payment had been received. The conclusion reached was that the claimant had not demonstrated that*

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<sup>83</sup> *Jackson v Jackson*, 2015 BCSC 2114

*a portion of the settlement money received was excluded property. ...*

*[12] Even if I was not bound by the decision reached in A.A.P., I would have reached the conclusion that the Claimant has not demonstrated that \$100,000 of the Settlement should be considered as excluded property. First, the onus is on the Claimant to show the Settlement does not include “lost income”. He is not able to do so. The information in that regard is not available. Second, without being able to show what portion of the Settlement would relate to “lost income”, the Claimant cannot demonstrate what portion of the Settlement is excluded property because it relates to an award for damages as compensation for injury or loss. While I am satisfied that it is likely that a substantial portion of the Settlement did not compensate the Claimant for lost past or future income, the portion relating to this “injury or loss” is unknown. Because it is unknown, no part of the Settlement can be excluded from family property. It may be the case that the “price” to be paid by the Claimant for obtaining the advantage of not requiring the breakdown of the Settlement into all of its component parts including lost and future income at the time the Settlement was reached is that the Claimant is not now in a position to claim that part of the Settlement is excluded property.*

### *T. J.B. v S.C.*

The application of the presumption of advancement to claims under Part 5 returned for consideration in *J.B. v S.C.*,<sup>84</sup> a case involving the parties to an 8-year unmarried relationship during which property brought into the relationship by one spouse was sold and used to buy an interest in a property registered in the other spouse’s name. Although Young J. applies the reasoning of Fenlon J. in *P.G.* on the issue, she makes an important point about the differential treatment of married and unmarried spouses, first raised under the *Family Law Act* in *Remmem*, and concludes that, should the presumption continue to apply, it ought to apply equally to all spouses.

**Application of presumption of advancement.** The scheme for property division under the *Family Law Act* treats unmarried and married spouses equally. There is accordingly no principled basis upon which the application of the presumption of advancement should be limited to spouses in married relationships.

*[87] In my view, if the presumption of advancement is going to continue to apply to spouses in British Columbia, it should apply equally to common law spouses. The Family Law Act recognizes that married and unmarried spouses have similar responsibilities and obligations to one another, and I see no principled basis for restricting the application of the presumption of advancement to married spouses only. This accords with the view that Mr. Justice Affleck expressed at para. 14 of *McNamara v. Rolston*, ... where he said:*

*[14] The respondent refers to substantial changes in society to the way that marriage and property rights are understood. She argues that although the two were viewed as*

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<sup>84</sup> *Supra*, fn 77

*attached in the past, this is no longer the case. In my opinion, the doctrine of presumption of advancement remains a part of the law of this province but insofar as it applies to marriage, it is no longer confined to those who are formally married to each other. It may be applied in appropriate circumstances to what are frequently called “common law relationships” or to “marriage-like relationships”, the latter being a basis for the definition of “spouse” found in the Family Law Act ...*

*[89] The inconsistency between the presumption of advancement and the property division scheme under the Family Law Act is apparent both in that it extinguishes rights under the tracing provisions of s. 85(1)(g), and that it creates the possibility that married and unmarried spouses will be treated differently, as the law is currently unsettled as to whether the presumption of advancement applies to common law spouses.*

### [U. J.S.F. v W.W.F.](#)

The judgment of Weatherill J. in *J.S.F. v W.W.F.*<sup>85</sup> concerned the division of property and other issues arising between the parties to a rather fraught 11-year marriage and is of note for the court’s comments on proving the increase in value of excluded property and on the characterization of debt and accounts receivable incurred as a result of investments made in the normal course of a relationship.

With respect to excluded property, the legislation and the case law to date, including *Asselin* and *A.A.P.*, are clear that the onus lies on the spouse claiming the exemption to prove both the exemption and its value. Weatherill J. helpfully notes the corollary obligation lying on the *other* spouse to establish the increase in value claimed to be family property.

With respect to the outcome of investments made during a relationship, Weatherill J. observed that where a spouse has consented to the investments being made, the spouse is not entitled to “retroactively withdraw her consent” to the investments. The consequences of consent include: not being entitled to compensation for one-half of funds loaned but one-half of any actual repayments, if and when received; and, being liable for one-half of funds borrowed for the purposes of the investments.

#### 1. Valuing Property

**Proving the increase in value of excluded property.** The spouse claiming that property brought into the relationship is excluded property has the burden of establishing that the property existed prior to the parties’ relationship and its value. The spouse claiming that an increase in value of excluded property is shareable family property has the burden of establishing the increase in value of that property.

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<sup>85</sup> *J.S.F. v W.W.F.*, 2015 BCSC 2375

*[160] The respondent has satisfied his onus of demonstrating that [the car] was acquired by him prior to the beginning of his relationship with the claimant. While there is evidence that the value of [the car] increased after 1994, there is no evidence that its value increased during the parties' relationship, other than the respondent's evidence that he spent approximately \$10,000 during the marriage restoring and maintaining the vehicle. In particular, there is no evidence as to the vehicle's value at the time the parties' relationship began.*

*[161] In my view, to the extent that the claimant seeks to have any increase in the value of [the car] during the relationship included in family property, it is the claimant, not the respondent, who has the onus of establishing what the increase was. If she is dissatisfied with the respondent's evidence that the increase was approximately \$10,000, she had the obligation to lead evidence to the contrary. This she did not do.*

## 2. Characterization of Investments

**Contingent recovery of accounts receivable.** Where credit has been extended by a spouse with the knowledge of the other spouse, the other spouse is not entitled to recover one-half of the amount advanced but one-half of the amount actually recovered.

*[170] The parties agree that the respondent's shares in [Company A] are family property. However, the claimant submits that she should be entitled to a repayment from the respondent of 50% of the \$125,000 which is collectively on the books of [Company A] as owed to the parties by way of a loan.*

*[171] I disagree. The claimant was well aware of the respondent's involvement in [company] and, although she may not have been aware of the details of the investment, I find that she had authorized the respondent to make that investment on her behalf.*

*[172] I am ordering that 50% of the respondent's shares in [Company A] be transferred by him to the claimant. Any future recovery by [Company A] from its joint venture partner is family property to be shared equally by the parties.*

**Unequal division of debt.** The equal allocation of liability for debt incurred by a spouse for the purpose of making investments is not significantly unfair if the investments were made in the normal course of the parties' relationship and with the consent or knowledge of the other spouse

*[177] The claimant takes the position that the respondent did not act in good faith and breached her trust in using the parties' joint line of credit for the investments he made in [Company A] and [Company B]. Both investments lost money. The claimant says that it would be significantly unfair for her to be burdened by the respondent's poor investment decisions and seeks an order pursuant to s. 95 of the FLA that the joint line of credit debt be divided unequally.*

[178] The phrase “significantly unfair” has been interpreted to mean “consequences significantly weighty to render an equal division unjust or unreasonable” ... and “compelling or meaningful” ...

[179] As mentioned above, during the parties’ marriage, the claimant gave the respondent virtual carte blanche authorization to make investments on the family’s behalf. I find that he did so for proper purposes in the normal course of the parties’ relationship in a bona fide attempt to better the family’s financial position. ...

[181] In my view, it would not be significantly unfair to order that the parties’ joint line of credit debt be equally divided ....

## V. *Walsh v Chambers*

In *Walsh v Chambers*,<sup>86</sup> Rogers J. addressed the consequences and sharing of debt incurred during a relationship to improve excluded property brought into the relationship, the family home, resulting in a net decrease in the value of the property over the course of an 11-year unmarried relationship.

### 1. Valuing Property

**Proving the increase in value of excluded property.** Where the debt encumbering excluded property increases during the spouses’ relationship, there is no increase in value of that property to be divided between the parties as family property.

[53] During the parties’ relationship, the mortgage debt on the house increased by more than the increase of its assessed value. I find that the equity in the house did not increase during the relationship and that there is, therefore, no family property to divide between the parties.  
...

### 2. Dividing Debt

**Unequal division of family debt incurred to improve excluded property.** A spouse bringing property into a relationship encumbered by debt is solely responsible for that debt. Where additional debt is incurred during the parties’ relationship to improve that property such that there is no increase in value to be divided as family property, it would be significantly unfair for the other spouse to be equally responsible for that additional debt.

[53] ... The claimant is solely responsible for payment of the mortgage. Nothing that the respondent did or did not do caused the claimant to incur the original mortgage debt. For that reason I do not consider the original mortgage debt to be a family debt. That debt is not divisible between the parties.

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<sup>86</sup> *Walsh v Chambers*, 2016 BCSC 67

*[54] The increase of the mortgage debt in 2007 was attributable to renovations carried out during the relationship. The claimant will enjoy the benefit of those renovations going forward; I cannot see how it would be fair to require the respondent to contribute to the cost of the renovations beyond the share of payments he made prior to the parties' separation. For that reason I will not accede to the claimant's demand that the respondent directly pay or indemnify the claimant for one-half of the outstanding balances of the renovation expense.*

**Equal division of family debt incurred to improve excluded property.** A spouse may, however, be jointly liable for other debt incurred with respect to excluded property owned by the other spouse, especially if the debt includes an amount incurred for the spouse's individual benefit.

*[55] On the other hand, the parties are jointly liable for the consolidation loan. Further, the consolidation loan arises out of a joint decision to bring a number of family debts under a single loan. Those debts included \$10,000 borrowed for the renovations and another \$12,000 for other family obligations. Among those additional family obligations were, for example, legal fees for family litigation that were charged to the respondent. Doing relatively rough justice here, I find that one-half of the at trial balance of the consolidation loan is a family debt and that that half is divisible equally between the parties. The balance of that loan at trial was \$8,521. The respondent is liable for one-half of one-half of that debt, or \$2,130.*

#### *W. Tobias v Tobias*

Pearlman J. addressed the presumption of resulting trust in *Tobias v Tobias*,<sup>87</sup> a case involving the parties to a 24-year married relationship during which funds were received by a spouse from the spouse's parents to renovate the family home. The court preferred the reasoning of the Court of Appeal in *Beaverstock v Beaverstock*<sup>88</sup> over that applied in *Cabezas* and *H.C.* in concluding that the funds were provided as a loan.

**The presumptions of advancement and resulting trust.** Whether a transfer of property to a spouse from the spouse's parent was a loan or gift depends on the parent's intention at the time of the transfer. Where a transfer is gratuitous, the presumption of resulting trust applies to characterize the transfer as a loan; the onus lies on the other spouse to rebut the presumption and establish that the transfer was intended as a gift. If the property was transferred as a loan, the debt is a family debt for which both spouses are liable.

*[37] In Beaverstock v Beaverstock, ... the appellant mother claimed that she had loaned \$50,000 to her son to refinance his purchase of the property. The respondent, the son's widow, executrix, and sole beneficiary, said she had no knowledge of a loan and that prior to the separation, her husband told her that his mother had given him \$50,000 as an advance on his inheritance. There was also conflicting evidence about whether the respondent had acknowledged the advance was a loan and had admitted an obligation to repay it.*

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<sup>87</sup> *Tobias v Tobias*, 2016 BCSC 125

<sup>88</sup> *Beaverstock v Beaverstock*, 2011 BCCA 413

[38] *The Court addressed the correct approach to the resolution of the dispute at para. 9:*

*[9] The correct approach to the resolution of this dispute is not in dispute. It is set out in Pecore v Pecore ... Whether the transfer was a loan or a gift depends on the actual intention of the appellant when she made the advance, which is a question of fact. As the advance was gratuitous, the onus was on the respondent to demonstrate that the appellant intended a gift, since equity presumes bargains, not gifts (para. 24). This equitable principle gives rise to a presumption the son received the money on a resulting trust, which is a rebuttable presumption of law. The trial judge was therefore required to presume the advance was not a gift and to determine whether the respondent had satisfied the burden of rebutting the presumption of resulting trust on a balance of probabilities (para. 44). ...*

*[47] The respondent relies upon a line of authorities that holds that where a parent advances funds to a child for the purchase or maintenance of the family home, there is a rebuttable presumption that the funds are a gift to both the child and his or her spouse ...*

*[51] In cases dealing with issues of excluded property under s. 85 of the FLA, judges of this Court have followed and applied Cabezas in J.B. v S.C. ... , H.C. v H.P.C. ... , and Madruga v Madruga ....*

*[52] It does not appear that Beaverstock was brought to the attention of the court in Cabezas or the other authorities cited by the respondent.*

*[53] On the case law cited on this application, I conclude that the governing authority is the judgment of the Court of Appeal in Beaverstock. I must determine whether the actual intention of the claimant's parents was to make a gift or a loan. Because the advance was gratuitous, the respondent bears the onus of demonstrating that the transferors intended a gift, "since equity presumes bargains, not gifts". In determining the transferors' intention, the court must take into account the Locke factors, along with all of the other evidence. ...*

*[64] After weighing all of these factors and considering the evidence as a whole, I find that Mr. and Mrs. Haebler, when they advanced the \$70,000, intended to loan those funds rather than gift them to the parties.*

#### [X. S.L.M.W. v M.R.G.W.](#)

The case of *S.L.M.W. v M.R.G.W.*,<sup>89</sup> concerned domestic and foreign property, the valuation of family property and excluded property, including certain trust property, and the division of family debt in the context of a 10-year married relationship. The decision of Steeves J. is helpful for:

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<sup>89</sup> *S.L.M.W. v M.R.G.W.*, 2016 BCSC 272

- a) the court's analysis of the trust property as family property or excluded property, the only judicial consideration of s. 84(3) to date;
- b) its discussion of the means available to rectify significant unfairness in the division of debt, in light of the decision of Betton J. on the matter in *K.M.J.*; and,
- c) the methodology it articulates for determining the value of family property derived from the increase in value of excluded property.

The trust property in question consisted of a New Zealand property, purchased by borrowing against a property owned by the respondent in British Columbia; the respondent was a co-trustee and a discretionary beneficiary of the trust. The respondent argued that the trust property was excluded property. Unsurprisingly, the claimant took the position that the trust was a sham intended to deprive her of an interest in the trust property. Steeves J. was ultimately unable to resolve the issue on the evidence and arguments provided, and directed the parties to make further submissions.

## 1. Characterization of Property

**Trust property as family property or excluded property.** The list of various types of property that are defined as family property at s. 84(2) is non-exhaustive; the specific trust property defined as family property at s-s. (3) adds to that list, and extends the general definition of family property at s-s. (1) by providing that the specific trust property is family property whether or not the spouse owns or has a beneficial interest in that property. Characterizing trust property as family property or excluded property required reference to both s. 84 and the list of various types of property that are excluded from family property at s. 85. A trust property which is neither the trust property identified as family property at s. 84(3) nor the excluded trust property identified at s. 85(1)(f) may still fall under the general, inclusive definition of family property at s. 84(1).

*[94] I note that s. 84 is directed to what is family property and s. 84(3) is one example of property that is family property under the statute. Section 84(2) describes other examples. ... The evidence is that the three subsections of s. 84(3) do not apply to the respondent in this case. On this basis I am urged by the respondent to find that the [trust] is not family property.*

*[95] In my view, that is a misreading of s. 84 as a whole and s. 84(3) specifically. Section 84 describes what is included as family property. It cannot, in my view, be interpreted to mean that property is excluded because it does not meet, for example, the description in s. 84(3). In fact, as set out in ss. 84(2) and (3), family property "includes" the enumerated categories and the plain meaning is that there could be other types of family property that is not described in ss. 84(2) or (3) but is captured by s. 84(1).*

[96] ... Subsection (3) extends the reach of s. 84 by deeming trust property to be family property if any of (3)(a) through (c) apply, whether or not the spouse owns, or has a beneficial interest in, the trust property.

[97] It is s. 85 which expressly describes what property is excluded from family property and it is conceded by the respondent that s. 85(1)(f) does not apply to exclude the [trust]. As above, that subsection states that a “beneficial interest held in a discretionary trust”, to which the spouse did not contribute and that is settled by a person other than the spouse, is excluded from being family property. ... However, the respondent’s beneficial interest in the [trust] predates the relationship, and therefore its pre-relationship value is excluded under s. 85(1)(a).

[98] Returning to s. 84, as a matter of evidence, I agree with the respondent that the [trust] does not come under s. 84(3). However, that is not the end of the matter and I am required to consider all of s. 84 (as well as s. 85) to determine whether the [trust] has some family interest.

[99] In particular I note that s. 84(1)(a)(ii) states that “a beneficial interest of at least one spouse in property”, on the date of separation, is family property. I also note that, under the terms of the trust (s. 1.2), the respondent is one of four “Discretionary Beneficiaries.” I conclude that the respondent has a beneficial interest in the [trust]. Since he acquired that interest before the relationship began, only the increase in value of his beneficial interest is family property: s. 84(2)(g).

[100] Some discussion of that interest is necessary. Broadly speaking there is the issue of valuing a beneficial interest in a trust generally and there is an issue as to whether any of the trust property is derived from family property.

[101] More specifically, s. 84(1)(a)(ii) of the FLA states that it is the “beneficial interest” of the respondent which is family property. That is, the underlying trust property itself may not be family property. If it is, it is not clear how and in what form the interest of a discretionary beneficiary of the [trust] can be transposed to a family interest in that trust under the FLA. In this regard I note s. 84(2.1) states that, for the purposes of subsection (2)(g), “any increase in value of a beneficial interest in property held in a discretionary trust does not include the value of any property.”

## 2. Dividing Property

**Calculating the value of family property deriving from excluded property.** The value of the excluded portion of property brought into a spousal relationship is the value of the property on the date the relationship began, less the amount of any debts encumbering the property on that date. The value of the property at the date of trial is the fair market value of that property less the amount of any debts encumbering the property on that date. The value of the property

which is shareable family property is the value of the property at the date of trial less the value of the property at the date the relationship began.<sup>90</sup>

[69] *The calculation for the value of [Property A] when the marriage-like relationship commenced on December 1, 2001 is:*

(a) **Value of property as of December 1, 2001:** ... I assess the value of [Property A] as of December 1, 2001 to be \$825,000.

(b) **Line of credit owing:** ... I assess the line of credit balance as of December 1, 2001 at \$293,698.

(c) **Judgment registered against property:** A charge was registered against the property on August 23, 1996, in the amount of \$15,096. ...

(d) **Value at commencement of marriage-like relationship (a – b – c):** \$516,206.

[70] *I calculate the value of [Property A] at the date of trial, November 2015, as follows:*<sup>91</sup>

(e) **Value of property as of November:** \$1,000,000 (appraisal as at November 4, 2015).

(f) **Mortgage owing:** As of August 28, 2015 the balance owing on a mortgage was \$113,311. I have taken that amount and three monthly payments of \$832 for September, October and November 2015 for a figure of \$110,815.

(g) **Line of credit debt:** ... I assess \$60,000 as the balance of the line of credit as of the date of trial in November 2015.

(h) **Value at date of trial (e – f – g):** \$829,185.

[71] *Therefore, the value of [property] for the purposes of s. 84(2)(g), from the date the marriage-like relationship began ... to the date of trial ... is \$312,979 (h minus d, or \$829,185 minus \$531,302). The claimant is entitled to one-half of that amount: \$156,490.*

### 3. Dividing Debt

**Unequally dividing debt where a spouse did not contribute following separation.** As Betton J. observed in *K.M.J.*, significant unfairness in the division of a debt paid by a spouse after separation may be rectified by adjusting the date of the valuation of the debt under s. 87 or by allocating the debt unequally between the spouses under s. 95. These are not the only two

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<sup>90</sup> The same approach will apply to excluded property acquired during a spousal relationship. Substitute “on the date the property was acquired” for “on the date the relationship began.”

<sup>91</sup> I have corrected certain numbering errors in the CanLII text of the decision in this paragraph.

options available; significant unfairness in the division of a debt may be remedied in other ways. One option is to require the other spouse to compensate the spouse for one-half of the payments made.

*[59] The respondent submits that the June 2013 date of separation should be used for the calculation of family debt with respect to [Property A] and [Property B]. This is because he has paid the mortgage payments for both parties and the claimant has not made any contribution to the mortgages after separation in June 2013. That is a fact. In Ranguelov the date of separation was used for the valuation of family property because it had increased in value after separation and one party had managed the property and paid down the debt after separation ...*

*[60] The respondent also relies on an example given in K.M.J. ... where it was suggested that s. 87 or s. 95 could be used where significant unfairness results from one party paying off family debt post-separation but pre-hearing. Justice Betton in K.M.J. would use s. 87 and interest accumulated to the date the debt was retired would have to be considered.*

*[61] In the subject case the respondent relies on the following statement given as part of this example in K.M.J.: “[t]he same process would be applied if the debt had been paid down but not retired entirely.” According to the respondent, he has paid down some of the debt and this statement supports the use of the date of separation as the date of determining the value of family debt in this case to reflect that fact.*

*[62] I do not agree that K.M.J. goes as far as saying this approach is necessarily required by the operation of s. 87. As well, I have not been given any calculation comparing the amount of debt paid down by the respondent and the amount of debt at the date of separation versus the amount at date of trial. In my view, some calculation is necessary to avoid the arbitrary application of s. 87 (or s. 95).*

*[63] Nonetheless I accept that some adjustment is required to remedy the significant unfairness that would result from the fact that the respondent has paid the debts associated with the two properties while the claimant did not contribute. In my view, the remedy here is a straightforward one: the claimant is required to pay one-half of the debt payments made by the respondent for the material times.*

### *Y. Sardinha v Sardinha*

The decision of Betton J. in *Sardinha v Sardinha*,<sup>92</sup> a case involving the division of property between the parties to a 12-year marriage, was the first to consider the judgment of the Court of Appeal in *Cabezas v Maxim*,<sup>93</sup> itself the first substantive appellate decision on Part 5 of the *Family Law Act*. As in that case, the parties in *Sardinha* had benefitted from the payment of the

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<sup>92</sup> *Sardinha v Sardinha*, 2016 BCSC 348

<sup>93</sup> *Cabezas v Maxim*, 2016 BCCA 82

mortgage encumbering the family home by the claimant's parents and, as in that case, the resulting questions were: whether the funds applied to the mortgage were an advance on the claimant's inheritance or a gift; and, if a gift, whether the gift was to both parties or to the claimant alone.

**Identifying family property.** Where a spouse receives funds from a parent that are provided as an advance on the spouse's inheritance, the funds are the spouse's excluded property. Where funds are received as a gift and applied to property owned by both spouses, however, the gift is presumed to be a gift to both spouses and the funds are the spouses' family property. Characterization of funds received from a parent as inheritance or gift requires proof of the donor's intentions in transferring the funds.

*[38] There are numerous decisions that have dealt with situations where the parents of children in relationships have participated in paying for homes or repairs of homes. Often a significant point of contention in those decisions is whether or not the funds provided by the parents in those circumstances were a gift or a loan. Here, there is no suggestion that the funds from the claimant's parents were a loan. The question that arises here is whether or not the funds were an advancement on the claimant's inheritance or a gift. Further if they were a gift, was it a gift to both of the parties or only the claimant. ...*

*[40] Where gifts of money to one party are made for reasons other than the purchase or maintenance of a home, s. 85(1)(b) provides that they would be excluded property. Until the Court of Appeal decision in Cabezas, there was some uncertainty as to whether the presumption of advancement operated in respect of gifts that went toward the purchase or maintenance of a family residence. ...*

*[41] The trial decision in Cabezas v Maxim ... does make reference to the impact on the analysis if funds are found to be in the nature of an advancement on a party's inheritance. This was not the subject of comment by the Court of Appeal. Chief Justice Hinkson said this:*

*[67] I have already concluded that the [property] was a family asset. Considering the factors outlined in Locke, I am not persuaded that the funds used to pay off the mortgage were provided to the respondent either as a loan or as an advancement on his inheritance. Such a conclusion would be at odds with how the respondent's parents treated all of their children. While I accept that the respondent's mother has subsequently and sensibly chosen to treat the gifts to both of her sons and their partners as advancements against what the sons will inherit from her estate, I find that such an intention was formed well after the gifts were given. I therefore find that the funds in question were given as a gift intended to benefit both the respondent and the claimant.*

*[42] A further example of a case dealing with funds that might be characterized as an inheritance is L.A.F. v E.H.D. ... There, Madam Justice Baker said the following:*

[114] Mr. D submitted that the court should conclude that the funds given to Ms. F in 2010 were intended to be a gift to both of the parties. He relies on the decision in *Cabezas v Maxim* ... In that case the respondent's parents had advanced money to pay off the mortgage on a home jointly owned by the parties. Based on the evidence before him, Chief Justice Hinkson concluded that the funds were given as a gift intended to benefit both the respondent and the claimant. In the alternative – and in my view this conclusion is *obiter dicta* – he stated that the presumption of advancement would have applied, absent evidence to rebut the presumption.

[115] In my view, the facts in that case are quite different from the facts in this case. Here the funds advanced to Ms. F in 2010 were clearly intended to be in the nature of an inheritance. The funds were advanced to her alone. She chose to use some of the funds to pay construction costs and to make a lump sum payment on the mortgage. The evidence does not establish that Mrs. F Sr. intended Mr. D to receive any of the funds or to have any control over the use that Ms. F made of the funds. The funds advanced were not directed in any specific way. *Cabezas* does not assist the respondent.

[43] There are features of the case before me that distinguish it from both *Cabezas* and *L.A.F.* Unlike *Cabezas*, there is evidence here to suggest the monies were in the nature of an inheritance. Unlike *L.A.F.*, the money here was applied directly to the mortgage, an instrument that the claimant's parents were debtors under, and was, obviously, specifically for the home of which both parties were registered owners. ...

[47] In the circumstances, I conclude that the funds were provided as an advancement on the claimant's inheritance. ...

### *Z. M.J. v M.W.*

Grist J. addressed the intersection of third party rights, allegations of unjust enrichment and claims under Part 5 in *M.J. v M.W.*<sup>94</sup> In this case, the family home was purchased with use of funds provided by the respondent's parents from the refinancing of their own home, and was registered in the names of the respondent and her mother as joint tenants. The respondent sought an order that her mother have a one-half interest in the property, such that only the remaining half interest would be subject to division with the claimant; the claimant argued that the mother would be unjustly enriched by receiving a half interest in the property.

The court ultimately concluded that, despite the ownership indicated on the title to the family home, the parties intended the claimant to have an interest in the home. As a result, the respondent's mother would be unjustly enriched if the claimant's interest in the property was limited to one-half of the respondent's half interest in the property as a result of the combined effect of the *Land Title Act* and the *Family Law Act*.

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<sup>94</sup> *M.J. v M.W.*, 2016 BCSC 856

**Rebutting the presumption of indefeasible title.** Under the *Land Title Act*, the parties named on the title of real property have an indefeasible estate in that property. This presumption can be displaced by equitable principles including the presumption of advancement and the enforcement of an agreement between the parties for a different ownership arrangement.

*[30] Section 23(2) of the Land Title Act ... provides that an indefeasible title is conclusive evidence that the person named on title is indefeasibly entitled to an estate in fee simple to the specified land. In this case, the 'persons' on title are Ms. A.W. and Ms. M.W., as joint tenants.*

*[31] This is a statutory presumption which may be displaced by equitable principles. Two principles often listed are: (1) the presumption of advancement; and (2) the enforcement of an agreement between the parties in order to prevent an unjust enrichment should the face of a title be upheld.*

*[32] The second of these exceptions can sustain an action for an equitable remedy where it is shown that the parties' intentions were that a person on title was never intended to hold a beneficial interest (or perhaps the particular percentage interest indicated on title) ... Reliance on this equitable consideration has resulted in the reordering of beneficial interests from those to be presumed from the title where a person came on title to assist with financing the property, but was not to have been beneficially entitled to the listed interest ...*

*[33] At the same time, there is value to such a person's contribution and the position on title may be justified, or at least the presumption in favour of the person holding the listed interest may be sustained, in any individual case. The issue, when the interest is challenged, is whether the evidence is capable of rebutting the presumption in favour of the registered interest ...*

*[40] ... The second equitable exception to the presumption resulting from the form of the legal title has application here: the enforcement of an agreement between the parties in order to prevent an unjust enrichment should the face of a title be upheld. ... It was, as Mr. M.J. indicated in his evidence, to be the younger couple's home and the parents' contribution was to assist in its acquisition for this purpose. The repayment of the parents' contribution supports the view that the parents' interest was to be a diminishing one.*

*[41] As between the mother and daughter, the joint tenancy was not to determine their eventual beneficial interests. Ms. A.W. was clearly intending to ultimately benefit her daughter; and, at the same time, to do little to benefit Mr. M.J. Further, I accept Mr. M.J.'s evidence that he was originally to be on title but, as it turned out, it was deemed convenient by the mother and daughter to retain the title in their joint names.*

*[42] The presumption of a continuing equal beneficial ownership is rebutted by this evidence. The joint expectation at the time the house was purchased was that the parent's interest would be a diminishing one; and in my view, this was in consideration of the changing equities associated with the younger couple's contributions.*

**Determining unjust enrichment.** Unjust enrichment is established upon proof of a party's enrichment, a corresponding deprivation to the party alleging the enrichment and the absence of juristic reason justifying the enrichment.

*[34] In addition to the authorities recognizing the equities that might displace the statutory presumption equating the beneficial interest to the listing on the title, perhaps beginning with *Pettkus v Becker ...* and *Peter v Beblow ...*, listed owners can be held to be constructive trustees for a claimant as a remedy granted to prevent an unjust enrichment. These are cases where the claiming party has made substantial contributions to the acquisition, preservation, maintenance or improvement of the property ...*

*[43] At this point, the consideration of an equitable remedy merges with Mr. M.J.'s claim for a remedy by way of an unjust enrichment.*

*[44] The elements of an unjust enrichment are well-known. There must be: an enrichment, in this case because of the state of title in favour of the mother and daughter; a corresponding deprivation to Mr. M.J.; and no juristic reason to account for the enrichment ...*

*[45] Enrichment and corresponding deprivation are found in the fact that Mr. M.J., along with Ms. M.W., used their joint resources over a number of years to significantly pay down the sources of mortgage financing that allowed for the purchase of the home. They also put significant effort into improving and maintaining the property. Mr. M.J. did much of this work himself and paid a number of the expenses directly ...*

*[48] None of the established categories [of juristic reasons] are engaged here, nor do the expectations of the parties or public policy considerations form a basis upon which to deny recovery. As mentioned, I am satisfied that there was no agreement in place to treat the property as a short term investment, with the profits from its sale to be divided equally. Accordingly, the claim for unjust enrichment has been established.*

**Remedy where unjust enrichment is established.** Where an allegation of unjust enrichment is proven, the court may order a monetary award be paid by the enriched party or, if the monetary award be inadequate, the court may impose a constructive trust over the enriched party's interest in the property in favour of the deprived party.

*[49] The next issue to consider is the appropriate remedy. As stated in *Kerr ...*, "A successful claim for unjust enrichment may attract either a 'personal restitutionary award' or a 'restitutionary proprietary award'." A personal restitutionary award is a monetary remedy, whereas a restitutionary proprietary award results in a constructive trust. The first remedy to be considered is a monetary award, which may be calculated on either a value received approach determined by the cost of the benefits on the open market, or a value survived approach determined by the value created in an asset by the claimant's contributions ... It is only where a monetary award is deemed inadequate and there is a "sufficiently substantial and direct" contribution to the acquisition, preservation, maintenance or improvement of the property in which the trust is claimed that a constructive trust may be considered ...*

*[51] In this case, I view an equitable distribution to be established and each parties' contributions to the acquisition, maintenance and enhancement of the property to be properly recognized if each party, Ms. A.W., Ms. M.W., and Mr. M.J., is found to be entitled to a one-third interest in the equity in the [property], after repayment of the first mortgage and the remaining balance of the second mortgage on the parents' home.*

## IV. Case Law Developing in the Court of Appeal

In this section, I will review the two substantive appellate decisions on claims under Part 5 of the *Family Law Act* published to date, *Cabezas v Maxim*,<sup>95</sup> released on 23 February 2016, and *V.J.F. v S.K.W.*,<sup>96</sup> released on 28 April 2016.

### A. *Cabezas v Maxim*

The primary issue on appeal in *Cabezas* concerned the payments made by the respondent's parents to the mortgage on the family home and whether those payments should be considered "a gift to both spouses, or a loan or inheritance." The payments were characterized by Hinkson C.J. at trial as a gift intended to benefit both parties,<sup>97</sup> making the gift divisible family property, relying on the presumption of advancement to reach the same result in the alternative. The trial court held thusly on the matter:

*[67] ... I am not persuaded that the funds used to pay off the mortgage were provided to the respondent either as a loan or as an advancement on his inheritance. Such a conclusion would be at odds with how the respondent's parents treated all of their children. While I accept that the respondent's mother has subsequently and sensibly chosen to treat the gifts to both of her sons and their partners as advancements against what the sons will inherit from her estate, I find that such an intention was formed well after the gifts were given. I therefore find that the funds in question were given as a gift intended to benefit both the respondent and the claimant.*

*[68] Had Mrs. Maxim's intentions been unclear, I would nonetheless have found that, in keeping with the statement of Harvey J. in Wiens, the funds used to pay off the mortgage on the [property] were provided by the respondent's parents as a gift to avoid the foreclosure of the property, resulting in a presumption of advancement to the claimant. This presumption of advancement is limited in scope, and does not apply to all gifts or inheritances received by a spouse from his or her parents. Generally, such gifts are excluded property under s. 85(1)(b) of the Act, as was the [car] received by the respondent from his father in this case. However, where a parent chooses to provide funds to a child for the purchase or maintenance of the*

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<sup>95</sup> *Supra*, fn 93

<sup>96</sup> *Supra*, fn 21

<sup>97</sup> *Supra*, fn 53

*family residence (to use the language of the Act), those funds are presumed to be a gift to both the child and his or her spouse. Absent evidence rebutting that presumption, the funds and any proceeds derived from them are family property under s. 84 of the Act. None of the evidence presented is capable, in my view, of rebutting that presumption.*

Should the payments be characterized as a loan, however, the payments would be a family debt for which the claimant would be one-half liable; should they be characterized as an inheritance, the payments would be the sole property of the respondent and excluded from division with the claimant.

### 1. Characterization of Property

The Court of Appeal concurred with the conclusion of the trial judge that the payments were a gift:

*[34] ... The trial judge found that the mortgage payments were intended as a gift at the time they were made. It is not suggested that he made a palpable and overriding error in making that finding. There was evidence, including evidence of similar gifts made to Mr. Maxim's siblings, to support this conclusion. Additionally, the judge was not persuaded that the subsequent decision to treat the gifts as advancements on the Maxim children's future inheritance nullified evidence that, when made, they were intended to be gifts to both parties. There is no basis to disturb these findings of fact.*

The court further held that the terms of ss. 84 and 85 do not preclude the application of common law principles to characterize property as family property or excluded property. As a basic principle of statutory interpretation, "statutory law and common law are necessarily intertwined:"

*[39] I agree, as was said in Remmem, that s. 85 codifies the types of assets that are excluded from family property. However, in interpreting the FLA (and s. 85 in particular) one cannot completely ignore fundamental common law principles regarding the characterization of the assets themselves. The court may turn to common law when determining if a particular asset falls into the categories set out in s. 85. This is not controversial.*

*[40] Remmem is also distinguishable insofar as there was no dispute that the jointly purchased property was acquired from what clearly fell into a category of excluded property; that is, property acquired before the parties commenced living in a marriage-like relationship. The dispute was whether the value of the property should be excluded notwithstanding that half of that amount was effectively gifted to the other spouse through the purchase of joint property. In this case, the dispute concerns whether the property in question can be fairly categorized as excluded property at all.*

Agreeing with the characterization of the payments as a gift, the court also upheld the decision of Hinkson C.J. to divide the proceeds of sale of the family home equally.

## 2. Application of the Presumption of Advancement

The court did not, however, agree with the trial judge's conclusions with respect to the presumption of advancement as an alternative ground upon which the equal division of the payments from the respondent's parents could be ordered. Relying on the decision of the Supreme Court of Canada in *Pecore v Pecore*,<sup>98</sup> and its subsequent interpretation in *Zhu v Li*,<sup>99</sup> the court held that the presumption was inapplicable, "at least on these facts:"

*[43] While not necessary for the purposes of resolving this ground of appeal, one additional point should be addressed for the purposes of clarity. I observe that at least on these facts, the trial judge erred in relying on the presumption of advancement as an alternative basis for finding that the mortgage payments made by Mr. Maxim's parents were gifts.*

*[44] As noted, the trial judge relied on Wiens as authority for the application of the presumption of advancement. However, the Supreme Court of Canada's decision in Pecore, which implicitly overrules Wiens, was not put before him. In Pecore, Rothstein J. for the Court held that the presumption of advancement no longer applies between parents and adult independent children. He explained the rationale for this conclusion as follows, focusing primarily on present social conditions relating to elderly parents and adult children:*

*[36] ... First, given that a principal justification for the presumption of advancement is parental obligation to support their dependent children, it seems to me that the presumption should not apply in respect of independent adult children. As Heeney J. noted in McLear, ... parental support obligations under provincial and federal statutes normally end when the child is no longer considered by law to be a minor: see e.g. Family Law Act, s. 31. Indeed, not only do child support obligations end when a child is no longer dependent, but often the reverse is true: an obligation may be imposed on independent adult children to support their parents in accordance with need and ability to pay: see e.g. Family Law Act, s. 32. Second, I agree with Heeney J. that it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs. There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs.*

*[45] In Zhu v. Li, ... Neilson J.A. further explained the rationale for abandoning such a legal presumption in both the matrimonial and familial context. At para. 51, she said:*

*[51] First, there is considerable support for the view that the presumption of advancement has lost its force in the contemporary matrimonial context. The editors of Waters' Law of Trusts describe its origins in the 18th century, rooted in the assumption*

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<sup>98</sup> *Pecore v Pecore*, 2007 SCC 17

<sup>99</sup> *Zhu v Li*, 2009 BCCA 128

*that when a husband or father transfers an asset to his wife or child, his intention is to make a gift due to the donee's financial dependence on him and the reasonable expectation that the donee would share in his estate. They observe that this premise has lost its persuasiveness in contemporary society, to the point that the presumption of advancement has been eliminated by express legislation in the majority of Canadian provinces and territories. While it has not been abolished in British Columbia, they say that legislation dealing with the division of matrimonial property has "reduced the presumption to no significance" ...*

*[46] It follows from Pecore and Zhu that the presumption of advancement is not applicable to the facts of this case, and I will not consider it further.*

The extent to which the presumption of advancement between parent and child has been rendered nugatory in family law disputes is unclear. Although the comments of Rothstein J. in *Pecore* seem to provide a repudiation of the presumption, at least in respect of independent adult children,<sup>100</sup> the Court of Appeal may have confined its opinion to the specific facts of the case before it and Betton J., writing in *Sardinha*, appears to limit the effect of the decision to gifts from a parent intended to be applied to the "purchase or maintenance" of a family home:

*[40] Where gifts of money to one party are made for reasons other than the purchase or maintenance of a home, s. 85(1)(b) provides that they would be excluded property. Until the Court of Appeal decision in Cabezas, there was some uncertainty as to whether the presumption of advancement operated in respect of gifts that went toward the purchase or maintenance of a family residence. If it did, the funds would be presumed to be a gift to both parties in the absence of evidence rebutting the presumption. ...*

## B. *V.J.F. v S.K.W.*

The conflict between the line of cases headed by *Remmem* and *Wells* was squarely before the Court of Appeal in *V.J.F.*:

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<sup>100</sup> Rothstein J. wrote as follows in *Pecore*:

*[23] ...I think the long-standing common law presumptions continue to have a role to play in disputes over gratuitous transfers. The presumptions provide a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. ...*

*[36] ... the presumption should not apply in respect of independent adult children ...*

*[40] ... I am reluctant to apply the presumption of advancement to gratuitous transfers to "dependent" adult children because it would be impossible to list the wide variety of the circumstances that make someone "dependent" for the purpose of applying the presumption. Courts would have to determine on a case-by-case basis whether or not a particular individual is "dependent", creating uncertainty and unpredictability in almost every instance. I am therefore of the opinion that the rebuttable presumption of advancement with regard to gratuitous transfers from parent to child should be preserved but be limited in application to transfers by mothers and fathers to minor children.*

*[3] One line of cases, of which Remmem v Remmem ... and P.G. v D.G. ... are the most prominent, suggests that the Act is a “complete code” and that on marriage breakdown, a “new property rights regime descends as between the spouses”. On this view, a gift made by one spouse to the other that can be traced back to excluded property retains its status as excluded property within the meaning of s. 85 – even though at common law, it would be regarded as the donee’s property on separation. The other line of cases, typified by Wells v Campbell, ... holds that common law and equitable concepts of property continue to apply under the FLA. On this view, a gift made by one spouse to the other becomes and remains the donee’s “property” on separation and falls within the definition of “family property” in s. 84, even if the gift was previously excluded property of the donor spouse.*

*[4] A related question arising in the appeal is whether the presumption of advancement between spouses is effectively eliminated by the “complete code” of the Act, or whether it remains unaffected, as s. 104 might suggest.*

For the purpose of this paper, the primary issue on appeal was the availability of the presumption of advancement in claims under Part 5. The conclusions of the trial judge that the funds received by the claimant were “a gift by way of inheritance” and were excluded property “at the time of the distribution” were not challenged on appeal, nor was his finding that the funds were applied to building a new family home and paying off the mortgage on the old family home.

After reviewing the reasoning of Fenlon J. in *P.G.* in some detail, commensurate with the number of trial court judgments adopting her analysis, the court ultimately concluded that the principles of equity and the common law continue to apply to disputes under Part 5:

- a) the common law is necessarily available to interpret and give context to statute law (para. 73)
- b) the *Family Law Act* does not contain a “clear statement” doing away with the presumption of advancement, and had government intended to abolish the presumption it could have done so; (para. 77) and,
- c) the rights provided in Part 5 are, pursuant to s. 104(2), “in addition to and not in substitution for rights under equity or any other law.” (para. 71).

The nub of the court’s opinion was expressed thusly:

*[74] With all due respect to the contrary view, I conclude that the new FLA scheme does not constitute a “complete code” that “descends as between the spouses” and eliminates common law and equitable principles relating to property. Rather, the scheme builds on those principles, preserving concepts such as gifts and trusts, and evidentiary presumptions such as the presumption of advancement between spouses. ...*

*[75] ... Nor do I agree that the FLA effectively ‘prohibits’ gifts between spouses, as Mr. F. suggested. Gifts between spouses can continue as they have through the ages. It would take much clearer wording to render them suddenly revocable or null or illegal. ...*

*[76] Contrary to the suggestion made in P.G., moreover, the \$2 million gift received by Ms. W. does “fall back into the communal pot” on separation and is divisible as family property in the normal way. The spouses are presumptively entitled to equal shares as tenants in common. The fact s. 95 does not list the same set of factors previously listed in s. 65 of the FRA is, with respect, a choice made by the Legislature. ... The FLA is not to be interpreted by means of a comparison of the fairness of its provisions with those of the FRA.*

*[77] In the absence of a clear statement abolishing the presumption of advancement, I also conclude that it continues to apply under the FLA (although I would not necessarily refer to it as a “right” within the meaning of s. 104). Had the Legislature intended to abolish the presumption, it would have been an easy thing to so state, as other provinces have done. It would also be an easy matter to provide, or perhaps clarify, that the presumption applies to common law as well as formal marriages and even that it should apply to gifts from a wife to her husband, not just the reverse. ...*

*[78] I acknowledge that judges may in some cases have to determine whether transfers of excluded property that may have taken place years before, were gifts or not. This seems likely to occur most often in cases where inherited property is transferred by the heir to his or her spouse or into joint names. (Of course, the presumption of advancement was invented as a way of resolving such questions where the evidence is unclear or equivocal.) That said, there are means by which the inheriting or recipient spouse can protect against ‘losing’ the exclusion. Subject to other relevant provisions of the FLA, for example, the transferor can require the transferee to acknowledge that no gift of the excluded property (or its value) is intended.*

Accordingly, the gift received by the claimant was in turn gifted to the respondent when it was applied to benefit properties registered in her name alone. Although the original gift qualified as excluded property under s. 85 when received, the exclusion was lost when the claimant “voluntarily and unreservedly” transferred the funds to the respondent.

## V. Conclusion

The case law on the interpretation of Part 5 of the *Family Law Act* has begun to gel, particularly with the pronouncements of the Court of Appeal resolving the question of the applicability of the presumption of advancement – and presumably the other principles of equity and the common law – on claims under Part 5 in *Cabezas* and *V.J.F.*

Reviewing the case law accumulating to date, it appears that government’s intentions for the *Family Law Act* have only been partially realized. There is, happily, a near consensus in the case law that the “broad judicial discretion” available for the division of family assets under the

*Family Relations Act* has been fettered to some degree and that the threshold of “significant unfairness” that must be met to divide property and allocate debt unequally, or to divide excluded property, is indeed a tangibly higher threshold than mere unfairness. However, the goal of a scheme for the division of property and debt that is “simpler, clearer, easier to apply, and easier to understand for the people who are subject to it” remains frustratingly out of reach.

A summary of the principles emerging from the case law might include the following.

1. The occurrence of the triggering event: severs joint tenancies (*Wells*); and, does not affect the ownership of excluded property (*Remmem*).
2. The burden lies on the party claiming an exclusion to prove the value of the excluded property on the later of the date that spouses’ relationship began or the property was acquired and, where excluded property has changed character, to provide the documents necessary to trace the exclusion (*Asselin, A.A.P., Shih, Jackson, J.S.F.*).
3. A failure to prove the value of excluded property brought into the relationship, or applied to the purchase of property, may result in no part of the property being excluded from division (*Asselin*).
4. Where the value of excluded property has depreciated or fallen below that of the debt encumbering the property, no portion of the property will be family property and family property may not be used to provide restitution for the diminution in value of the excluded property (*Asselin, Remmem, Walsh*).
5. Where excluded property is contributed to improve family property, the excluded portion of the family property is the amount by which the value of the family property improved, not the value of the excluded property (*Asselin, A.A.P.*).
6. The presumptive date for the identification of family property and family debt is the date of separation (*K.M.J., Slavenova*).
7. There is no requirement of use or contribution before entitlement to family property is established. All that is necessary is to prove that the property existed on the date of separation (*Asselin*).
8. The presumptive date for the valuation of family property and family debt is the date of trial, absent an order or agreement for another date, as spouses should share in the increases and decreases in value following separation (*K.M.J., Blair*).
9. A party seeking to use a date other than the date of trial for the valuation of family property and family debt must demonstrate that it would be significantly unfair to use the trial date (*Blair*).

10. The date of valuation of family debt may be adjusted to address significant unfairness in the division of debt (*K.M.J., Tobias*).
11. Gifts to both spouses are family property (*Cabezas* trial), gifts between spouses are family property (*V.J.F.* trial).
12. Gifts to a spouse to buy or maintain a family home are family property (*H.C., Sardinha*).
13. Gifts are made out when property is transferred and accepted without consideration and cannot be revoked by the donor (*V.J.F.* trial).
14. Claims for the unequal division of family property require the court to first identify the family property and then perform a notional equal division of that property, taking all exclusions into account, before determining whether an equal division would be significantly unfair (*Remmem, Walburger, Blair*).
15. “Significant unfairness” means unfairness that is weighty, compelling or meaningful (*Remmem, Walburger*).
16. Factors that may lead to a finding of significant unfairness in the division of family property include: disproportionate responsibility for childcare (*H.C.*); agreements for an unequal division of family property (*Slavenova*); contributions to the career of a spouse (*Jaszczewska*); considerably disproportionate contributions to the family property (*Jaszczewska, A.M.D.*); failure to contribute to excluded property owned by the other spouse (*Blair*); a spouse’s role in increasing the value family of family property beyond market trends (*Blair*); failure to achieve the objects of spousal support when a spouse is entitled to support (*C.M.*); relationships of short duration (*A.M.D.*); tax liabilities incurred as a result of the transfer of property (*A.M.D.*); and, nondisclosure (*Chang*).
17. Factors that may *not* lead to a finding of significant unfairness in the division of family property include: differing contributions to the family property (*Slavenova*); relationships of medium duration (*Jaszczewska, Blair*); the absence of contributions to the career of a spouse (*Jaszczewska*); and, the disproportionate ownership of property brought into a relationship (*Jaszczewska, A.M.D.*).
18. The burden lies on the party claiming that debt is family debt to prove that the debt exists and that it was incurred during the spouses’ relationship (*Jaszczewska*).
19. The payment of family debt by one spouse following separation does not relieve the other spouse of liability for those debts (*K.M.J.*).
20. Factors that may lead to a finding of significant unfairness in the division of family debt include: nondisclosure (*Chang*); increases in debt to improve excluded property (*Walsh*); and, noncontribution to a family debt following separation (*Tobias*).

21. Factors that may *not* lead to a finding of significant unfairness in the division of family debt include: debts incurred in the normal course of the relationship with the consent or knowledge of a spouse (*J.S.F.*).
22. Spouses may make valid agreements dividing property that are oral or are written and signed without their signatures being witnessed (*Asselin, Walburger*).
23. Only written agreements dividing property are subject to judicial oversight under s. 93 (*Walburger*).

## Appendix: Statutes and Cases Referenced

This appendix is included for the convenience of the reader and provides a list of the statutes relevant to the division of property under Part 5 of the *Family Law Act* and the case law developed under Part 5 referenced in this paper, with hyperlinks to these materials on CanLII.

Clicking on a link in the electronic version of this paper will launch your default web browser and open the document in CanLII, and may result in a box popping up warning of a security risk. Clicking ALLOW and the “Remember my action for this site” box will permanently enable the link.

### A. Principle Statutes

*Court Jurisdiction and Proceedings Transfer Act*, [SBC 2003, c. 28](#)

*Divorce Act*, [RSC 1985, c. 3 \(2nd Supp.\)](#)

*Family Homes on Reserves and Matrimonial Interests or Rights Act*, [SC 2013, c. 20](#)

***Family Law Act***, [SBC 2011, c. 25](#)

Division of Pensions Regulation, [BC Reg. 348/2012](#)

Family Law Act Regulation, [BC Reg. 347/2012](#)

*Family Relations Act*, [RSBC 1996, c. 128](#)

*Interpretation Act*, [RSBC 1996, c. 238](#)

*Land Title Act*, [RSBC 1996, c. 250](#)

*Partition of Property Act*, [RSBC 1996, c. 347](#)

### B. Family Law Act Case Law Referenced

*A.A.P. v G.T.F.*, [2015 BCSC 662](#)

*A.M.D. v K.R.J.*, [2015 BCSC 1539](#)

*Andermatt v Tahmasebpour*, 2015 BCSC 1743  
*Asselin v Roy*, 2013 BCSC 1681

*Bilawchuk v Bilawchuk*, 2014 BCSC 2067  
*Blair v Johnson*, 2015 BCSC 761

*Cabezas v Maxim*, 2014 BCSC 767  
***Cabezas v Maxim*, 2016 BCCA 82**  
*Cizmic v Cizmic*, 2015 BCSC 1430  
*C.M. v M.S.*, 2015 BCSC 1031  
*Cockerham v Hanc*, 2014 BCSC 2432

*H.C. v H.P.C.*, 2014 BCSC 1775  
*Hoppen v Kravariotis*, 2015 BCSC 779

*Jackson v Jackson*, 2015 BCSC 2114  
*Jaszczewska v Kostanski*, 2015 BCSC 727  
*J.B. v S.C.*, 2015 BCSC 2136  
*J.S.F. v W.W.F.*, 2015 BCSC 2375

*Khorramtash v Boroogeni*, 2015 BCSC 2275  
*K.M.J. v J.H.D.N.*, 2014 BCSC 1895  
*Kuhberg v Hall*, 2015 BCSC 2230

*Lawrence v Mulder*, 2015 BCSC 2223

*M.J. v M.W.*, 2016 BCSC 856

*Parker v Mitchell*, 2016 BCSC 723  
*P.G. v D.G.*, 2015 BCSC 1454

*Remmem v Remmem*, 2014 BCSC 1552  
*Sardinha v Sardinha*, 2016 BCSC 348  
*Shih v Shih*, 2015 BCSC 2108  
*Slavenova v Ranguelov*, 2015 BCSC 79  
*S.L.M.W. v M.R.G.W.*, 2016 BCSC 272  
*Stanbridge v Stanbridge*, 2015 BCSC 1468

*Tobias v Tobias*, 2016 BCSC 125

*V.J.F. v S.K.W.*, 2015 BCSC 593  
***V.J.F. v S.K.W.*, 2016 BCCA 186**

*Walburger v Lindsay*, 2015 BCSC 341

*Walsh v Chambers*, [2016 BCSC 67](#)

*Wells v Campbell*, [2015 BCSC 3](#)

*Williams v Killey*, [2014 BCSC 1846](#)