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FLA Property Division Update: Interim Distributions and Excluded Property post *F. (V.J.)*

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1. INTRODUCTION

This paper will summarize recent developments in two areas of property division under the *Family Law Act*, S.B.C. 2011, c. 25 (the "*FLA*"):

1. Interim distributions of family property under s. 89 *FLA*; and
2. Characterization of excluded property pursuant to s. 85 *FLA*. Specifically, this paper will consider the decisions coming after *F. (V.J.) v. W. (S.K.)*, 2016 BCCA 186, 2016 CarswellBC 1147 (B.C. C.A.), leave to appeal refused 2016 CarswellBC 2855, 2016 CarswellBC 2856 (S.C.C.) dealing with the issue of whether property that is gratuitously transferred between spouses or to both spouses from a third party is properly characterized as excluded or family property. In this context, the application and continued viability of the presumption of advancement is disccused.

The authors also provide a brief case comment relating to the issue of when a beneficiary under a testamentary trust receives their interest in estate property for the purposes of its characterization under the *FLA*.

2. INTERIM DISTRIBUTIONS

(a) Introduction

Section 89, *FLA* expands the common law principles developed in cases following *Ansari v. Ansari*, 2000 BCSC 634, 2000 CarswellBC 818, [2000] B.C.J. No. 763 (B.C. S.C. [In Chambers]), which allowed for an interim distribution under s. 66 of the former *Family Relations Act*, R.S.B.C. 1996, c. 128 primarily to pay for disbursements related to experts and, in limited, cases legal fees.[1] Now,

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1 With that said, the Court has made orders under the former *Family Relations Act* for interim distributions to fund legal fees and to meet urgent financial hardship, including personal expenses and expenses for the parties' children, pursuant to Rule 15-8 of the Supreme Court Family Rules and s. 66 of the former *Family Relations Act* (*Reilly v. Reilly*, [1992] B.C.J. No. 2561, 21 B.C.A.C. 104 (B.C. C.A.) at para 39). In *Reilly*, the Court confirmed at para. 39 that a judge can make an order for interim distributions in such manner and on such terms as the circumstances of the parties permit or require (cited with approval in *Huggett v. Huggett*, [1996] B.C.J. No. 2168 (S.C.) at paras. 8-10). See *Radford v. Radford*, 2014 BCSC 791, 2014 CarswellBC 1237 (B.C. S.C.) at para. 2 and Schedule A, para. 18; *Ghuman v. Ghuman*, 2012 BCSC 1647, 2012 CarswellBC 3486 (B.C. S.C.) at paras. 31, 35-36; *H. (K.K.) v. H. (A.S.)*, 2006 BCSC 1853, 2006 CarswellBC

under s. 89, *FLA*, parties can seek interim distributions to pay legal fees, experts fees, fund litigation, mediation, arbitration and "family dispute resolution."[2]

(b) Legislation

Section 89 reads as follows:

> Orders for interim distribution of property
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> 89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund
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> (a) family dispute resolution,
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> (b) all or part of a proceeding under this Act, or
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> (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court

Family dispute resolution is defined in s. 1 of the *FLA* as:

> "family dispute resolution" means a process used by parties to a family law dispute to attempt to resolve one or more of the disputed issues outside court, and includes
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> (a) assistance from a family justice counsellor under Division 2 [Family Justice Counsellors] of Part 2,
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> (b) the services of a parenting coordinator under Division 3 [Parenting Coordinators] of Part 2,
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> (c) mediation, arbitration, collaborative family law and other processes, and
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> (d) prescribed processes;

(c) Case Law

(i) Guiding Principles

Interim distributions under s. 89 of the *FLA* continue to be "extraordinary" remedies (*McKenny v. McKenny*, 2015 BCSC 1345, 2015 CarswellBC 2173 (B.C.

3094 (B.C. S.C.) at para. 19; *Huggett v. Huggett*, 1996 CarswellBC 2321, [1996] B.C.J. No. 2168 (B.C. S.C. [In Chambers]) at paras. 16-17; *Mckay v. McKay*, 1990 CarswellBC 2174, [1990] B.C.J. No. 197 (B.C. S.C.) at pp. 3 and 5 and *McAndrew v. McAndrew*, 1997 CarswellBC 780, 27 R.F.L. (4th) 141, [1997] B.C.J. No. 669 (B.C. C.A.) at para. 4.

2 At least one case decided under the *FLA* has granted a release of funds from trust to enable the applicant to pay down debts she incurred for legal expenses, moving, and the purchase of a second hand vehicle: *Whatley v. Whatley*, 2014 BCSC 536, 2014 CarswellBC 842 (B.C. S.C.). While the applicant relied on s. 89 in her application, it is not clear in the brief reasons dealing with the distribution if the Court relies on s. 89 *FLA* or another authority.

S.C.) at para. 57). The purpose of interim distributions is to ameliorate imbalances of financial power:

> The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets. Application of s. 89 calls for a purposive interpretation, where the need of the applicant spouse to receive an interim distribution and the potential entailing harm to the other spouse are evaluated contextually with an eye on the larger objectives endorsed by the *FLA*.
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> *F. (I.) v. R. (R.J.)*, 2015 BCSC 793, 2015 CarswellBC 1266 (B.C. S.C.) at para. 192.

As summarized in *McKenny* at para. 57 and *Bartch v. Bartch*, 2017 BCSC 210, 2017 CarswellBC 330 (B.C. S.C.) at para. 26 (appeal filed), the test governing interim distributions of family property is two-fold:

1. The applicant must show an advance is required to adequately mount a challenge to the other spouse's position at trial or pre-trial; and
2. The applicant must show that the advance or payment on an interim distribution basis will not jeopardize the other spouse's position at trial.

An interim distribution will not be granted if it puts the other spouse at a significant disadvantage (*Longeau v. Wolfe*, 2016 BCSC 835, 2016 CarswellBC 1279 (B.C. S.C.) at para. 33). If incomes or cash flow are similar, an application may be dismissed (*Ren v. Emerson*, 2017 BCSC 547, 2017 CarswellBC 838 (B.C. S.C.) at para. 46). But the fact that spouses are in similar financial circumstances is not necessarily fatal (*L. (T.L.) v. L. (J.J.J.)*, 2016 BCSC 1353, 2016 CarswellBC 2062 (B.C. S.C.)).

The fact that there has been a prior distribution is also not fatal (*Negus v. Yehia*, 2015 BCSC 857, 2015 CarswellBC 1381 (B.C. S.C.) at para. 3, wherein the wife applicant already received $100,000).[3] Likewise, the applicant's receipt of significant periodic spousal support is not fatal (*Bartch* at paras. 17 and 26).

The second component of the test, based on the not "harmful to the interests of the spouse" criterion in s. 89, contemplates:

> . . . actual or potential economic harm, and is likely broad in its scope. Determination of the presence of harm requires the court to reasonably anticipate and then assess the consequences that may flow from the interim order being sought. That approach, in turn, invites a highly individualized component to the inquiry. For example, would the distribution being sought in the particular case require a sale of

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[3] See also *Bartch v. Bartch*, 2017 BCSC 210 (B.C. S.C.), at para. 17 (appeal filed), wherein the husband applicant had already received $51,000. However, it is not clear in the reasons if the $51,000 already received was an interim distribution under s. 89.

> property or of the encumbering of assets; what income tax ramifications might be triggered and what other transactional costs would arise? The concept of harm under s. 89 would also encompass economic implications such as whether the distribution would adversely impact the other spouse's lifestyle or effectively undermine or prejudice his or her argument for reapportionment.
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> *I.F.* at para. 193.

Harm may also include consideration of how the distribution may compromise the other spouse's asset base (*I.F.* at para. 199).
Harm within the meaning of s. 89 does not include that it may be commercially inconvenient or awkward for the other spouse to generate funds (*Negus* at para. 8).

The fact that there is a marriage or separation agreement that may preclude a party from entitlement to family property is not necessarily determinative (*I.F.* at para. 194, involving a marriage agreement; *Bartch* at para. 28,[4] involving a separation agreement). A reasonable way to attenuate the harm that would arise to other spouse's interests is requiring the applicant to demonstrate a reasonable prospect of success of impeaching the subject agreement (*I.F.* at para. 194; see also *Bartch* at para. 28).

In response to an argument that the applicant would be unable to repay the amount distributed, in the context of a marriage agreement limiting the applicant's entitlement, the Court has stated:

> Adoption of a strict interpretation of "harmful" could mean that the applicant must be in a position to repay the distributed funds more or less immediately upon the failure of his or her claim to impeach the pre-existing agreement at trial. Were the [C]ourt to endorse that formulation, then it would follow that a distribution might only be sanctioned where the applicant has assets equal or greater to the amount of the distribution, or a corresponding borrowing power or an assured minimum entitlement to family property so the court could be confident of repayment. Such an interpretation would place the most economically disadvantaged spouses beyond the reach of s. 89 and is not harmonious with a purposive approach.
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> In my view, the concept of being harmful to the financial interests of the spouse in terms of the recipient (sic) spouse's capacity to repay, must mean harm of an enduring nature. Accordingly, the fact that the recipient spouse may only be able to repay the distribution over a

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[4] As noted, this decision is under appeal. The main issue on the appeal of the Order granting the interim distribution will be whether it was properly made in light of s. 88, *FLA*, which provides that interim distributions can only be made before a "final agreement" or "final order" is entered into by the parties. The claimant will argue that the parties' separation agreement (which was prepared without counsel) was a "final agreement" and therefore the court had no jurisdiction to order an interim distribution under s. 89, *FLA*.

> reasonable period of time into the future, as opposed to immediately following an unfavourable outcome at trial, would not, of itself, qualify as being harmful to the other spouse's interests.
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> *I.F.* at paras. 197-98.

The amount of an interim distribution can be significant. In *Devathasan v. Devathasan*, 2017 BCSC 1010, 2017 CarswellBC 1647 (B.C. S.C.), the wife sought an interim distribution of $400,000 to fund the litigation. Her evidence was that she had already spent $125,000, and she presented a draft bill of costs for a 30-day trial, which showed costs of $412,385 plus taxes. She estimated that her request was for about 1% of the value of the parties' real estate assets. The assets at issue included the husband's medical practice and real estate in multiple jurisdictions. The parties had been together for 23 years and had a 17-year-old child. The wife had obtained a s. 183, *FLA* protection order, which the Court upheld on the husband's application to set aside. The Court granted the interim distribution, finding that the high conflict nature of the litigation will continue, the matters at issue were complex, the resolution may require a forensic analysis, there were outstanding disclosure issues and the husband took the position that Singapore is the appropriate forum and sought relief from the Singaporean courts (para. 153). It also appeared that the husband had breached a Mareva Injunction (para. 155).

(ii) Evidence Required on an Application for an Interim Distribution

The following points highlight the arguments and evidence that may be marshalled to assist in supporting an application for an interim distribution under s. 89 of the *FLA*:

1. The complexity of the action (see *McKenny* at para. 59, which is a case primarily about property division; *Stober v. Stober*, 2015 BCSC 743, 2015 CarswellBC 1204 (B.C. S.C.) at para. 48, a case about property and income determination; *L. (M.A.) v. L. (N.A.)*, 2014 BCSC 203, 2014 CarswellBC 315 (B.C. S.C.) at para. 15, about property and parenting issues);
2. If the other spouse has been difficult or applies "scorched earth" tactics, including non-compliance with the *Supreme Court Family Rules*, many interim applications or an appeal, these factors will support the applicant's position that there is need for the distribution (see *Bartch*, at paras. 14, 18 and 26, and *T.L.L.* at paras. 4, 10, and 35-39);
3. That obtaining financial disclosure has been an issue (see *Negus* at para. 2, where this information helps to justify a high level of legal fees at the early stage of litigation);
4. Legal fees to date (see *Karamanoglu v. Nygaard*, 2015 BCSC 376, 2015 CarswellBC 633 (B.C. S.C.) at para. 31, where there is no evidence of fees

to date, and the court is critical of the applicant's "bald statement" that she is unable to meet legal fees without collapsing her RRSPs. There is evidence of fees in both *Negus* at para. 2 and *T.L.L.* at para. 10. See also *Bartch*, at para. 19, where there is evidence of accounts owing to counsel);

5. A budget of anticipated legal fees and a timeline within which expenses will be incurred. This has been identified as the "preferable approach," but failing to provide this information does not render the application fatal (*I.F.* at para. 200);

6. Estimates from experts (i.e. s. 211 report assessor, business valuators), rather than counsel's estimates, and accounts owing to experts (see *Bartch*, at para. 19 and *T.L.L.* at para. 41);

7. Inability to meet legal fees from earnings or other sources of funds, including evidence of other expenses or commitments (see *T.L.L.* at para. 10, where this information is provided and *Karamanglu* at para. 31, where this information is lacking);

8. Disparity between the spouses' incomes and access to assets (see *M.A.L.* at paras. 3, 13, and 15);

9. Where there would be a significant tax consequence of liquidating other assets available to a spouse to meet the expense (i.e. RRSP) (see *T.L.L.* at para. 15); and

10. Where the other spouse controls a company, evidence about that company's ability to fund the distribution, including evidence that the company pays the other spouse's personal expenses, bought property, has equity in property, has a good income stream or cash reserves, or owes shareholders loans to the spouse(s) (see *Bartch*, at paras. 12, 27, and 32; *I.F.* at para. 195, and *Negus* at para. 5).

(iii) Evidence Required to Oppose an Application for Interim Distribution

In terms of opposing an application for an interim distribution, counsel should consider leading:

1. Facts that limit the applicant's entitlement to family property — a marriage or separation agreement that purports to limit entitlement, a short cohabitation period, post-separation contributions to assets made by the other spouse, or limited growth in excluded property during the relationship (see *Sigurdson v. Sigurdson*, 2016 BCSC 1141, 2016 CarswellBC 1696 (B.C. S.C.) at paras. 41-42);

2. Facts that support the non-applicant spouse's claim to an unequal division of family property under s. 95, *FLA*;

3. Facts that reduce the applicant's need, such as an agreement about the payment of expert fees and spousal support payments (see *Stober* at para. 44);
4. Evidence about expenses that the non-applicant spouse is committed to, and if possible, demonstrate that the spouses are dealing with the litigation in similar economic circumstances — in other words, that the playing field is already levelled;
5. Evidence about reasons why family property cannot be liquidated, such as RRSPs are locked in;
6. Evidence of calculations of capital gains or other tax consequences arising from liquidation of family property to fund the interim distribution; and
7. Estimates of transaction costs arising from liquidation, including real estate agent fees, other secured debts to be paid and early payment penalties on mortgages.

3. TRANSFERS OF EXCLUDED PROPERTY TO THE OTHER SPOUSE

A matter that continues to vex family law practitioners is when a spouse's claim to excluded property will be lost by virtue of transferring the property to the other spouse. This was the central issue in *F. (V.J.) v. W. (S.K.)*, 2016 BCCA 186, 2016 CarswellBC 1147 (B.C. C.A.), leave to appeal refused 2016 CarswellBC 2855, 2016 CarswellBC 2856 (S.C.C.) where a spouse used inherited funds to acquire real estate placed solely in the name of the other spouse. That case is more fully described below.

Since the decision in *F. (V.J.)*, there have been no fewer than 14 cases which have cited it.[5] Of these, there have been three subsequent appellate decisions, however one of those cases was decided under the former *Family Relations Act*[6] and the other two did not squarely address the issue of the transfer of potentially excluded property to a spouse.[7] Of the 11 Supreme Court decisions, one was decided under the former *Family Relations Act*[8] and one was a failed summary trial application where no findings were made.[9] Two others dealt with situations where a third party made a gratuitous transfer and the focus of the inquiry was not the transfer by the spouse but rather the transfer from the third party donor and the intention of that donor.[10] The seven remaining decisions dealt with

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5 Based on CanLII note up

6 *Hsieh v. Lui*, 2017 BCCA 51, 2017 CarswellBC 200 (B.C. C.A.).

7 *Holland v. Holland*, 2017 BCCA 75, 2017 CarswellBC 389 (B.C. C.A.) and *Jaszczewska v. Kostanski*, 2016 BCCA 286, 2016 CarswellBC 1777 (B.C. C.A.)

8 *Hu v. Li*, 2016 BCSC 2131, 2016 CarswellBC 3201 (B.C. S.C.).

9 *M. (S.) v. M. (B.)*, 2016 BCSC 2126, 2016 CarswellBC 3212 (B.C. S.C.).

10 *G. (J.D.) v. V. (J.J.)*, 2016 BCSC 2389, 2016 CarswellBC 3643 (B.C. S.C.) where the wife's mother transferred property to the wife but the court found the transfer to have

potential excluded property that is transferred between spouses. Of these seven cases:

1. One was decided on the basis that a valid s. 93 Agreement established an intention not to gift excluded funds when they were placed in title in joint names. Thus, there was clear evidence of an intention not to gift and, in any event, the parties were held to be bound by the agreement: *Bell v. Stagg*, 2016 BCSC 1491, 2016 CarswellBC 2266 (B.C. S.C.).

2. One appeared to follow *F. (V.J.)* and applies a presumption of advancement where funds are placed by a wife in the spouse's joint names: *L. (K.A.) v. L. (K.J.)*, 2017 BCSC 651, 2017 CarswellBC 1064 (B.C. S.C.), additional reasons 2017 CarswellBC 1970 (B.C. S.C.).

3. Another did the opposite and applied the presumption of resulting trust rather than the presumption of advancement because the transfer was made from the wife to joint property held by the husband and the wife. However, consistent with *F. (V.J.)*, evidence of intention by the wife to gift to the husband determined the outcome: *Donnelly v. Weekley*, 2017 BCSC 529, 2017 CarswellBC 881 (B.C. S.C.).

4. The remaining four distinguish the result in *F. (V.J.)* on the basis that *F. (V.J.)* dealt with a gift solely in the name of the donor spouse. With respect, these cases do not examine the intention of the donor to any great degree. One of them involves a transfer from husband to wife[11] and the other three involve transfers from wives to husbands. None of them applies a presumption of advancement and none of them mentions, as in *Donnelly*, a presumption of resulting trust being applicable to a transfer from wife to husband.

Additionally, there are at least three other cases decided after *F. (V.J.)* involving transfers of claimed excluded property between spouses and which do not cite *F. (V.J.)* They are consistent with the line of cases citing but distinguishing the result in *F. (V.J.)*. where the transfer is made from one spouse to both spouses in joint names. However, consistent with *F. (V.J.)*, these cases consider the intention of the transferring spouse.

The authors do not pretend to have all the answers and, with respect, there are aspects of some of these decisions that are difficult to reconcile with others. However, it is hoped that the discussion that follows is of assistance to counsel in

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been subject to a resulting trust in favour of the mother and thus the wife had no beneficial interest and, correspondingly, the property was not family property. *Wong v. Rooney*, 2016 BCSC 1166, 2016 CarswellBC 1746 (B.C. S.C.) where jewelry was found to have been gifted to both parties by the husband's mother but impressed with a trust for their child it was held to be family property as it was gifted to both parties but continued to be subject to the trust condition in favour of the child.

[11] *R. (K.) v. D. (J.)*, 2017 BCSC 182, 2017 CarswellBC 313 (B.C. S.C.).

organizing arguments and evidence to preserve or defeat claims to exclusions in any given case involving transfers between spouses.

Below, a brief overview of the general and evidentiary principles applicable to characterizing property under Part 5 of the *FLA* is set out, followed by a recap of the law relating to the presumptions of advancement and resulting trust. Following that, there is a recap of the decision in *F. (V.J.)* Finally, and most importantly, there is a discussion of the aforementioned Supreme Court decisions.

(a) General Principles of Property Division under the FLA

Under section 84, *FLA*, family property includes, on the date of separation, all real or personal property that is owned by at least one spouse or a beneficial interest of at least one spouse in property. The Court in *G. (J.D.) v. V. (J.J.)*, 2016 BCSC 2389, 2016 CarswellBC 3643 (B.C. S.C.) interprets "property that is owned by" a spouse in section 84(1)(a)(i) as meaning property that is legally and beneficially owned, noting that (at para. 178):

> [n]o purpose would be served by characterizing a legal interest alone as falling within the definition of family property. A legal interest in property which a spouse holds for the benefit of other(s) has no value as property. Instead it gives rise to obligations.

Family property does not include those categories of excluded property set out in s. 85, *FLA*. Excluded property includes property that is "derived" from the various categories of excluded property so that it need not remain in its original form, provided it can be traced or followed to property that existed at the date of separation (s. 85(1)(g), *FLA* and *F. (V.J.)* at paras. 57 and 68). However, the increase in value of excluded property during the relationship is family property (s. 84(2)(g), *FLA*).

Family property will presumptively be divided equally between the spouses unless it would be significantly unfair to divide the property equally having regard to the factors set out in s. 95, *FLA*. Excluded property will only be divided if it is significantly unfair not to do so having regard to the limited factors in s. 96, *FLA*.

(b) Onus & Burden of Proof

The spouse seeking to establish that property is excluded property or that family property should be divided unequally bears the onus (s. 85(2), *FLA*). The Supreme Court confirmed in *Asselin v. Roy*, 2013 BCSC 1681, 2013 CarswellBC 2759 (B.C. S.C.) that the lack of an evidentiary basis to trace or follow excluded property into currently held property may result in the loss of a claim for an exclusion. In *Asselin*, the Court rejected the respondent's claim that a portion of an acreage property that he allegedly acquired with inherited funds should be excluded, because there were no documents to allow the Court to determine the

extent of his down payment and to positively identify the source of those funds as his inheritance.[12]

The Court of Appeal in *Shih v. Shih*, 2017 BCCA 37, 2017 CarswellBC 143 (B.C. C.A.) (at paras. 40-42) established that the burden or standard for demonstrating excluded property is proof on a balance of probabilities, based on clear and cogent evidence, rather than precision or mathematical certainty. The Court noted that if documentary evidence is not available, the party bearing the onus will need to testify as to their recollection of the transactions in dispute, which evidence will be scrutinized for credibility (para. 43). The Court also confirmed that trial judges "must be permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties" (para. 44).

Ideally, counsel will lead documents confirming both the value and continued existence of the excluded property which, in turn, will allow the Court to follow or trace the excluded property into currently owned family property.

In terms of proving the increase in value of excluded property, which is divisible as family property, the Court in *F. (J.S.) v. F. (W.W.)*, 2015 BCSC 2375, 2015 CarswellBC 3743 (B.C. S.C.) held, at para. 161, that the party seeking to have the growth in value divided as family property has the onus of establishing the specifics of the increase.[13]

In *W. (S.L.M.) v. W. (M.R.G.)*, 2016 BCSC 272, 2016 CarswellBC 417 (B.C. S.C.) at paras. 67, and 69-71, the Court provided a framework for calculating the increase in value of excluded property that is to be divided between the spouses, summarized as:

1. The value of the excluded portion of the property is the value at the time the relationship began or the excluded property was acquired, less the value of any debts registered against or encumbering title to the property (i.e. mortgages, lines of credit or judgments).

2. The value of the property at the date of the hearing (or the date of an agreement) is the value at that date less any debts registered against or encumbering title to the property.

3. The increase in value that is divisible is the difference between the value of the property at the date of the hearing and the value of the excluded portion.

4. Presumptively, each spouse is entitled to 50% of the increase in value.

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[12] *Asselin v. Roy*, 2013 BCSC 1681, 2013 CarswellBC 2759 (B.C. S.C.) at paras. 209-212.

[13] In *J.S.F.*, the husband satisfied the onus of demonstrating that a 1966 Ford Mustang vehicle was acquired before the relationship and, while there was evidence that the vehicle increased in value after purchase, there was no evidence that its value increased during the relationship other than the husband's evidence that he spent approximately $10,000 during the relationship restoring the vehicle. The Court determined at para. 162 that the increase in value during the relationship was $10,000.

(c) Clarifying the Presumptions of Advancement and Resulting Trust

Recent cases address both the presumption of advancement and the presumption of resulting trust. Both are rebuttable presumption of law. Below, we provide an overview of these evidentiary presumptions.

A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption: see J. Sopinka, S.N. Lederman and A.W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at pp. 105-6, cited in *Pecore v. Pecore*, 2007 SCC 17, 2007 CarswellOnt 2752, 2007 CarswellOnt 2753 (S.C.C.) at para. 22. See also S.N. Lederman, A.W. Bryant, and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at pp. 148-9.

Generally speaking, the presumptions of advancement and resulting trust "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" (*Pecore*, at para. 23). The advantage of maintaining the presumptions of advancement and resulting trust is that "they provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers" (*Saylor v. Madsen Estate*, 2005 CarswellOnt 5896, 261 D.L.R. (4th) 597 (Ont. C.A.), affirmed 2007 CarswellOnt 2754, 2007 CarswellOnt 2755 (S.C.C.), cited in *Pecore* at para. 23).

A resulting trust arises when title to property is in one party's name but the party — because he or she is a fiduciary or gave no value for the property (i.e. the transfer was gratuitous) — is under an obligation to return it to the original title owner: see D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 394. It is presumed that the transferor intended to transfer the legal title but to retain the beneficial title (Lederman *et al.*, 4th ed. at p. 162).

The presumption of resulting trust is the general rule for gratuitous transfers and is premised on the maxim that "equity presumes bargains, not gifts." Where a transfer is made for no consideration, it is presumed that a gift was not intended and the burden of persuation is on the party who alleges that the transferor intended to make a gift (Waters' *et al.*, 4th ed. at p. 409; see also *Pecore* at para. 24; see also *G. (J.D.) v. V. (J.J.)*, 2016 BCSC 2389, 2016 CarswellBC 3643 (B.C. S.C.) at para. 145). As explained in *Hu v. Li*, 2016 BCSC 2131, 2016 CarswellBC 3201 (B.C. S.C.) at para. 36:

> When one person gratuitously transfers property to another adult person, there is a general presumption that the recipient holds the property in trust for the other. That is because equity presumes bargains, not gifts. The transferor can use this 'resulting trust' to recover his or her property, unless the transferee can show that a gift was intended.

Thus, when a transfer is challenged, the presumption of resulting trust allocates the legal burden of proof to the party claiming a gift; he or she must demonstrate that the transferor intended to make a gift (*Pecore* at para. 24).

While the presumption of resulting trust is the general rule, it will not arise in certain circumstances, set out below, and there will instead be a presumption of advancement (*Pecore* at para. 27).

The presumption of advancement is a presumption that a party who purchases property and puts it in another's name, or who voluntarily and gratuitously transfers property to the other party, intends to make a gift. The presumption is rebuttable with evidence that a gift was not intended. If the presumption of advancement applies, it will fall on the party challenging the transfer to rebut the presumption of a gift.

As established in *Pecore* at paras. 28, 33-36 and 40, the presumption of advancement arises in at least two circumstances:

1. Where there is a transfer from husband to wife; and
2. Where there is a transfer from a parent (mother or father) to a minor child.[14]

More recently, the Court in *Lawrence v. Mulder*, 2015 BCSC 2223, 2015 CarswellBC 3509 (B.C. S.C.) at para. 75 found that the presumption of advancement may apply in common law relationships. However, there are inconsistent decisions on this point and the Court of Appeal has not confirmed that this is so.[15] While the Court in *F. (V.J.)* held that the presumption of advancement continues to apply under the *FLA* to transfers from husband to wife, it does not indicate the applicability of the presumption of advancement between unmarried spouses or to a transfer from a wife to her husband (at para. 77).

In cases where a transfer is challenged, and evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive, the trial judge must determine which presumption applies and "weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention" (*Pecore* at paras. 44 and 55; *Wu v. Sun*, 2010 BCCA 455, 2010

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[14] The corollary is that, when there is a gratuitous transfer from a parent to an adult child, the presumption of resulting trust applies. As noted in *Pecore* at para. 41, a parent may intend to make a gift to an adult child. In that case, "[i]t is open to the party claiming that the transfer is a gift to rebut the presumption of resulting trust by bringing evidence to support his or her claim." If the adult child is dependent on the parent, evidence as to the degree of dependency of the adult transferee child on the transferor parent may be useful in rebutting the presumption of a resulting trust.

[15] For a discussion of whether the presumption of advancement arises between unmarried spouses see, *Lawrence v. Mulder*, 2015 BCSC 2223, 2015 CarswellBC 3509 (B.C. S.C.) at paras. 66-74, wherein the male spouse transferred property to the female spouse, and "FLA Property Update: Excluded Property and Jurisdiction & Choice of Law Rules for Property," Scott L. Booth and Kimberley J. Santerre for the Continuing Legal Education Society of British Columbia, July 2015.

CarswellBC 3253 (B.C. C.A.) at para. 18; *Hu* at para. 68). The evidence required to rebut both presumptions is evidence of the transferor's contrary intention on the balance of probabilities (*Pecore* at para. 43). The applicable "presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities" (*Pecore* at para. 44; *Hu* at para. 37).

When considering whether the transferor spouse intended to make a gift or not, the key factual issue is what did the transferor intend at the time of the transfer (*Hu* at para. 38). Did the transferor intend the recipient to become a beneficial owner? The court can consider circumstantial evidence that is relevant to the transferor's actual intention: the transferor's wishes and desires, whether the transferor wanted to share his or her property with the recipient, the transferor's instructions to their solicitor, the transferor's understanding of the consequences of transferring title, conversations between the spouses, and so on (*Berdette v. Berdette*, 1991 CarswellOnt 280, 33 R.F.L. (3d) 113, [1991] O.J. No. 788 (Ont. C.A.) at p. 5, leave to appeal refused 1991 CarswellOnt 6202, 1991 CarswellOnt 6203 (S.C.C.); *Hu* at paras. 45-47). The evidence of intention that arises subsequent to a transfer should not automatically be excluded but it "must be relevant to the intention of the transferor at the time of the transfer" (*Pecore* at para. 59; *J.D.G.* at para. 157). The Court "must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention" (*Pecore* at para. 59).

(d) Recap: *F. (V.J.) v. W. (S.K.)*, 2016 BCCA 186

In *F. (V.J.)*, the spouses were in a traditional marriage of approximately nine years in length. They had three children. The husband received a $2 million gift by way of an inheritance (para. 22). The husband used the $2 million to buy real property, which was registered solely in his wife's name, to pay debts on family property and to pay construction costs related to the real property (paras. 24-25). The parties separated shortly after construction began. The parties agreed to complete construction and sell the finished home, with the sale proceeds held in trust. The wife argued that the $2 million lost its status as excluded property and was gifted to her, such that it became family property (para. 31). The husband argued that the $2 million remained his excluded property, taking the position that, as they were traceable to the inheritance, they remained excluded property pursuant to s. 85(1)(g), *FLA*. He asserted that the presumption of advancement had been "effectively reduced. . . to ashes" by the *FLA* scheme.

The Court was faced with two competing lines of authority out of the Supreme Court — one that favoured the husband's position — and one that favoured the wife's. The Court determined that the inherited funds became family property when the husband registered title of the real estate in the wife's sole name. Key to doing so was the evidence of the husband's intention and the fact that he had placed title solely in his spouse's name. The Court found that it was clear the husband intended to retain no beneficial interest in the funds. He

had expressly registered title to the property purchased with inherited funds for "creditor protection" so that creditors would not be able to get at the beneficial interest (paras. 25, 51). The Court determined that, at separation, the fact that the husband had originally received the $2 million as a gift was no longer relevant as he "lost the exclusion when he voluntarily and unreservedly directed that the [real property] be transferred to [his wife] and 'derived' no property from that disposition" (para. 74). Thus, the real property in the wife's name was family property and the sale proceeds were family property.

The Court's reasons include the following important findings:

1. The *FLA* property regime is not a complete code, and common law and equitable concepts continue to apply. The statutory scheme builds on those principles, preserving concepts such as gifts, trusts, and evidentiary presumptions. (para. 74). In other words, the common law will continue to provide "interpretive context" for property division under the *FLA* regime (para. 73).

2. The Court explained the presumption of advancement when there is a gift from husband to wife: where the evidence of the donor husband's intention, when making a gift to his wife, is insufficient or equivocal, "the law normally provides an evidentiary presumption that a gift was intended and the burden of persuasion shifts to the opposite party [the donor] to rebut on the balances of probabilities" (para. 50). The Court confirmed that in the absence of a clear statement from the legislature abolishing the presumption of advancement, it continues to apply under the *FLA* (para. 77), even if its utility may be confined to "doubtful" cases (para. 53).

3. The Court confirmed that while a transfer for creditor protection is not generally objectionable as a fraudulent conveyance, provided the effect of the transfer was not to fraudulently defeat or prejudice creditors who had legal or equitable claims at the time, the transferor should not be able to claim that his or her gift was revocable or that no beneficial interest was intended to be transferred (para. 52). In other words, the transfer cannot be a "sham." The Court held it ought not to allow the transferor to rebut the presumption of advancement by leading evidence that he only transferred property to defeat his creditors — calling this a prevarication which should not receive a court's blessing (para. 70).

4. The Court rejected the husband's argument that the $2 million of sale proceeds remained his excluded property because the sale proceeds were property derived from the inheritance within the meaning of s. 85(1)(b.1) and (g), *FLA*. The Court determined that the husband "derived" no property when title was registered in the wife's name (para. 68) so that section 85(1)(g) did not apply to the proceeds of sale (para. 68).

5. The Court also rejected the husband's argument that once property is excluded property, it always remains so for the purposes of the *FLA*,

regardless of which spouse owns the property. The Court held that there is no provision in the *FLA* that suggests that excluded property becomes frozen in time (para. 69). The point in time at which family property and exclusions therefrom are determined is the date of separation of the spouses, subject to the extensions under s. 84(1)(b) for property that is acquired after separation and derived from family property (paras. 69 and 74).

(e) The Cases After *F. (V.J.)*

Bell v. Stagg, 2016 BCSC 1491, 2016 CarswellBC 2266 (B.C. S.C.)

In *Bell*, the unmarried spouses had a five-year relationship during which they purchased a home in the wife's sole name, each contributing funds from pre-relationship property ($60,000 by the husband and $25,000 by the wife). The husband's evidence was that this was done because he was a US resident and could not qualify for a CMHC insured mortgage. On the advice of their mortgage broker, the parties registered the home in the wife's sole name. The husband also signed a gift letter indicating his contribution to the downpayment was a gift to the wife. The parties signed a contemporaneous agreement, without legal advice, that confirmed they would each receive their original contribution and 50% of the remaining equity in the home if their relationship ended. The Court upheld the agreement and divided the former family home (which was purchased in part with the equity of the first home) in accordance with its terms. The fact that the gift letter contradicted the agreement was not characterized as a "prevarication" and does not appear to factor into the Court's decision (see paras. 107-117).[16] Even though this case dealt with the enforcement of an Agreement, the Court did consider (at paras. 111-113) whether it would be significantly unfair to enforce the agreement given the gift letter. The Court considered that the agreement — which preserved the husband's right to his downpayment — and his will — which the wife knew about — both provided evidence of his intention to retain the downpayment as excluded property.

Lahdekorpi v. Lahdekorpi, 2016 BCSC 2143, 2016 CarswellBC 3198 (B.C. S.C.)

In *Lahdekorpi*, the spouses were together for 36 years, were 59 and 58 years old at the time of trial, and had a 31-year-old son. During the relationship, the wife received a $30,000 inheritance, which was used to buy a home registered in joint names. During the trial, the husband conceded that the $30,000 was the wife's excluded property. After trial, the Court of Appeal released its decision in *F. (V.J.)* and the husband sought to retract his concession on the basis that the

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[16] For an excellent discussion of how a "prevarication" might factor into a discussion of beneficial ownership see: *Hu v. Li*, 2016 BCSC 2131, 2016 CarswellBC 3201 (B.C. S.C.). Although that case was decided under the FRA and applies to a transfer from a spouse's parent to the spouse, it does consider whether an alleged illegal title transfer scheme to avoid taxes necessarily negated the transferor parents from asserting a resulting trust on transfer. See *infra*, under "Prevarications and inconsistent statements."

funds were used to purchase a property in joint names and had therefore lost their status as excluded property (at para. 93). The Court determined that the wife's transfer of her excluded property into property held in joint tenancy with her husband did not cause a loss of her exclusion.

The Court's reasons on whether the exclusion is lost are brief. The Court distinguished *F. (V.J.)* and did not rely on the presumption of advancement. At paragraph 94 of the judgment, the Court finds:

> [94] The case before the court in V.J.F. involved an inheritance. More significantly, in that case the Court found that there was a gift of property to the wife where the husband intentionally transferred title to her. The property was registered solely in the wife's name. In the instant case, the Shirley Road property was purchased, in part, with the respondent's $30,000 inheritance and the property was registered jointly in both their names. In my view, the joint tenancy effectively preserved her contribution to the property, which was purchased for approximately $130,000. In these circumstances, I am not persuaded that the respondent could reasonably be said to have intended to gift her inheritance to the claimant. I note that, although the parties purchased subsequent properties using, in part, income derived from the Shirley Road property, the properties were either held jointly or in the sole name of the respondent. In my view, the $30,000 used in the purchase of the Shirley Road property can be traced back to the inheritance, such that it does not lose its character as an inheritance.

Central to the distinction of *F. (V.J.)* appears to be the fact that the respondent wife always retained some interest in the property.

L. (K.A.) v. L. (K.J.), 2017 BCSC 651, 2017 CarswellBC 1064 (B.C. S.C.), additional reasons 2017 CarswellBC 1970 (B.C. S.C.)

The parties had a long relationship of about 25 years during which they were married for 19 of those years. The claimant wife was 44 years old and the respondent husband was 45 years old at the date of trial. They had two children, aged approximately 15 and 12. The claimant worked as a clerk for a local school district and, as well, as a mortgage broker. The respondent had significant periods of unemployment and was alleged (by the claimant) to be dealing drugs at the time of trial. During the marriage, the claimant received an inheritance of about $140,000 from an aunt. She placed the funds into an investment account in her sole name. The claimant wife sought a greater than 50% share of the proceeds of sale of the parties' former family residence — apparently on two bases:

1. The claimant used the income generated from her inheritance account to make mortgage payments on the family residence so the Court considered whether that gave rise to a right to excluded property in the family residence.

2. The claimant argued that the date of separation should be used as a valuation date as she had solely maintained the home post-separation.

The court divided the family residence equally. In commenting on the matter of whether the income from the wife's inheritance gave rise to an exclusion claim, the Court observed:

How Should Income From Excluded Property be Dealt With?

> [264] Pursuant to s. 84(2)(g) of the FLA, family property includes the amount by which the value of excluded property has increased since the later date of the date the spouses' relationship began or the date the excluded property was acquired.
>
> [265] Section 85(1)(g) of the FLA is a tracing provision that is meant to clarify that any property derived from excluded property or the disposition of excluded property continues to be excluded property. Since the inheritancewas invested in a mutual fund, it can easily be traced and the mutual fund itself is still excluded property.
>
> [266] Where a party uses funds from excluded property to pay down a shared mortgage, the courts have considered this a gift to the other party.
>
> [267] Previously there was conflicting authority from the British Columbia Supreme Court about whether a gift of excluded property loses its status of "excluded property" when it transferred from one spouse to another.

The Court then went on to discuss *F. (V.J.)* and appeared to follow that decision in effectively holding that if the income generated from the excluded property was itself excluded then, by applying the funds to the jointly held mortgage on the jointly titled family residence, the exclusion was lost:

> [270 In this case, the house was purchased in the claimant's name using joint funds from the sale of a former family home. The mortgage was in joint names so the respondent was bound by the mortgage covenant. The claimant could not have obtained the mortgage without the respondent's income and covenant.
>
> [271] The presumption of advancement between married spouses applies to monetary transfers between spouses as invested in property. In the case at bar, the mortgage is in joint names. Therefore the transfer of the monthly interest payment to pay the mortgage could be considered an advancement to the respondent because it reduced the mortgage debt.
>
> [272] That is not to say that I intend to divide these interest payments between the parties. I do however consider it fair to consider that monthly interest payments to be joint funds which the claimant used to pay a portion of the mortgage prior to and after the date of separation.

The Court clearly identified the link between payments to a mortgage which reduced the mortgage debt and the increased equity in the property. However, the Court held that the presumption of advancement would apply to these payments. There is no discussion of what the intention of the claimant wife was when she made these payments. There was also no discussion of the basis for extending the presumption of advancement to payments from wife to husband.

With the greatest of respect, this case is perhaps best confined to its unusual facts. The argument that income generated from excluded property is itself excluded is not one that appears to have been recognized in the other cases. Further, such an argument appears to be contrary to the *FLA* Part 5 scheme in that if income generated by excluded property is held to be "derived" from that property under s. 85(1)(g), such that it is also excluded, s. 84 (2)(g) which requires growth in the value of excluded property to be shared is significantly undermined.

Donnelly v. Weekley, 2017 BCSC 529, 2017 CarswellBC 881 (B.C. S.C.)

The primary focus of this case is the determination of whether a separation agreement might be voided at common law or set aside under section 93 of the *FLA*. In considering the issue of whether to set aside the agreement for significant unfairness, the Court reviewed the wife's claims that certain gifts and inheritances she had received during the marriage ought to have been recognized as her excluded property rather than being shared with her former spouse pursuant to the provisions of their separation agreement.

The parties had a long marriage of over 27 years. At trial, the claimant wife was 72 years old and the respondent husband 68 years old. Both parties had disabilities. The facts relating to gifts and inheritances the claimant received are complicated. Notably:

1. She had placed title in a Calgary commercial property she had received by way of inheritance in her name and the respondent husband's name.
2. She had sold another Calgary commercial property and put the proceeds into a joint account (much of which was spent on the parties).
3. She had placed proceeds of sale of a farm property gifted to her by an uncle in joint accounts.
4. The parties had lived in a residence in Victoria which had been gifted to the wife by her mother and uncle, and when it was sold its proceeds were placed in joint accounts.

The Court considered that some of these claims would not have given rise to excluded property claims but for the separation agreement because there was a lack of evidence pursuant to which they could be traced (at para 136). At paragraph 140, the Court held that the intention of the transferring spouse was "critical" to the determination of whether any exclusion would have been maintained at the time of the separation agreement:

> [140] The intention of a person who puts an inheritance or gift into an asset held jointly with a spouse, or a common pot shared with the spouse, is critically important.

The Court considered the application of the presumption of resulting trust and the presumption of advancement. With respect to the presumption of resulting trust, the Court observed:

> [142] The effect of the presumption is that the person receiving the property bears the burden of showing on a balance of probabilities that the transfer was supported by consideration flowing from the grantee, or that the grantor intended a gift. It is the intent of the grantor alone that is relevant, and the time to determine the intent of the grantor is when the property was transferred: Kerr at paras. 18, 19, 25.
>
> [143] Each time Ms. Donnelly granted to Mr. Weekley an interest in either the property or its proceeds if it were sold, potential issues of resulting trust emerge if Mr. Weekley cannot establish that he gave consideration for the transfer, or that Ms. Donnelly intended to make a gift of property, or proceeds of sale of property.

With respect to the respondent husband's argument, based on *F. (V.J.)*, that the presumption of advancement ought to apply to make the transfers from the claimant to joint title or joint accounts, the Court found that the presumption did not apply to transfers from wife to husband (at para 145):

> [145] Mr. Weekley argues the presumption of advancement, relying on *Wells v. Campbell*, 2015 BCSC 3, and *V.J.F. v. S.K.W.*, 2016 BCCA 186. Both are cases of transfers from husband to wife. The presumption of advancement historically applied in two situations: where the transferor is the husband and the transferee is his wife; and when the transferor is a father and the transferee is his child: *Pecore v. Pecore*, 2007 SCC 17 at para. 28. The Court in Pecore added as a third situation where the transferor is the mother and the transferee is her child (at para. 33). However, the Court then narrowed the doctrine as it applied to the parent-child relationship so that it only applied to transfers by mothers and fathers to minor children (at para. 40). None of this expanded the presumption of advancement to situations where the transferee is a husband and the transferor is a wife. Mr. Weekley gets no benefit from a presumption of advancement.
>
> (emphasis added)

The Court then evaluated the evidence of intention and found that, while she gave no direct evidence on the point, there was sufficient evidence to infer an intention to gift to her husband based on the following factors:

1. In her examination for discovery the wife had acknowledged that one of the reasons for transferring one of the Calgary commercial properties to her husband was in recognition of the work he did helping to manage it (at para 144).[17]

2. Her decision to revoke a pre-nuptial agreement which excluded gifts and inheritances (at para 147).
3. A pattern of placing property or funds in joint title (at para 147).
4. A history of using the proceeds of property for the purchase of goods and services for the joint benefit of the parties including vacation spending (at para 147).

An interesting feature of this case is that the Court held that the presumption of advancement did not apply but that the presumption of resulting trust did. However, the Court found sufficient evidence of intent that the presumption was rebutted. The authors have two observations: First, in this situation it is hard to discern where the practical onus lies since the husband, opposing exclusion, had the onus to rebut the presumption of resulting trust and the wife, asserting the exclusion, would have the onus to demonstrate she was entitled to the exclusion under s. 85(2). Second, it seems inappropriate that an evidentiary presumption that operates between spouses in 2017 should operate only between spouses of the same gender and then only one way. The latter problem was highlighted by the Court in *F. (V.J.)* at para. 77 which, with respect, reads like an invitation to the legislature to address this.

R. (K.) v. D. (J.), 2017 BCSC 182, 2017 CarswellBC 313 (B.C. S.C.)

In *K.R.*, the Court dealt with a claim for an exclusion after the excluded property was transferred by a spouse into jointly-owned property. The spouses in *K.R.* were married for seven years and had a seven-year-old son. The husband was 45 years old and the wife was 37 years old at the time of trial. The husband argued that the proceeds of certain pre-relationship property owned by him could be traced or followed into the family residence (para. 35) which was registered in joint tenancy. Ultimately, the Court determined that the husband was not entitled to an exclusion because he lacked the requisite documentary evidence (citing *Shih* and *Lahdekorpi*). There was no evidence about the sale price of the pre-relationship property or the net proceeds received (para. 40).

In response to the husband's argument that *F. (V.J.)* does not determine what happens if excluded property is placed into an asset that is jointly owned by both spouses, the Court concluded at para. 38 that:

> [38] Mr. Macdonnell for the respondent submits that what happens if excluded property is placed into an asset that is jointly owned by both spouses remains undecided to date in British Columbia as a result of *V.J.F.* I disagree. *V.J.F.* is distinguishable from the case before me because *V.J.F.* involved the investment of one spouse's inheritance into property owned solely by the other spouse. In my view, no presumption of advancement arises when one spouse's investment is put into a property that is jointly owned by that person and his/her spouse.

[17] This might also mean that this particular transfer was not gratuitous such that the presumptions would not apply in any event.

> Additionally, courts dealing with similar facts under the *FLA* have deemed that spouse's initial investment as excluded property, so long as the party claiming excluded property establishes, on a balance of probabilities, the basis for and extent of the exclusion with precision: see *Shih v. Shih*, 2015 BCSC 2108 (CanLII) at paras. 64 and 103-107, aff'd 2017 BCCA 37 (CanLII) [Shih], *Lahdekorpi v. Lahdekorpi*, 2016 BCSC 2143 (CanLII) at paras. 93-94.
>
> (emphasis added)

The Court distinguishes *F. (V.J.)* because it dealt with property solely in the name of one spouse. At para. 37 of the judgment, the Court cites paras. 68 and 69 from *F. (V.J.)* where emphasis was placed on the point that where a spouse gifts property to the sole name of the other, there is no exclusion to follow, the donor spouse having derived nothing from the transfer within the meaning of s. 85(1)(g), *FLA*. Further, the court holds that no presumption of advancement applies to transfers from one spouse to the joint names of the spouses.

With respect, what is not apparent from the decision is any examination of intent of the respondent husband at the time he allegedly transferred the funds/property.

Dheenshaw v. Gill, 2017 BCSC 319, 2017 CarswellBC 525 (B.C. S.C.)

In *Dheenshaw*, the spouses were married for 15 years and did not have children. At trial, the wife was 45 years old and the husband was 46 years old. The wife received a gift of $10,000 from her mother that was used to acquire real property solely in the wife's name — Family Residence A. Later, the wife sold this property and used the proceeds and further advances from her mother totaling $50,000 to acquire another property — Family Residence B — also registered in her sole name. Later, Family Residence B was sold and its proceeds were used to acquire Family Residence C, which was in the joint names of the husband and wife. During the marriage, Family Residence C was refinanced so that the parties could use its equity to purchase a rental property in Edmonton — also held in joint names. Subsequent to their separation and two years prior to trial, the parties sold Family Residence C and "unreservedly" divided its net proceeds of sale equally. At issue was whether the $10,000 gift survived as excluded property traceable to the Edmonton property and whether the $50,000 advanced for the purchase of Family Residence B was a gift or, as alleged by the wife and her mother, a loan.

The Court considered *Pecore* and the presumption of resulting trust that applies to transfers between parents and their adult children. The Court concluded that the wife's mother's actual intention at the time the $10,000 was advanced was to make a gift to the wife, given that, among other things, the mother's evidence in direct and cross-examination was consistent: she intended to make a gift to her daughter to help with the purchase of the first property; she did not expect repayment; and there was no evidence of any demand for repayment before or after separation (paras. 81-86). There was of course also the note stating the advance to have been a gift.

The Court went on to discuss both *F. (V.J.)* and *Ladhekorpi* — noting that the basis for the distinction of *F. (V.J.)* in *Ladhekorpi* was that a gift had been made by the husband to his wife in her sole name (para. 90). The Court then stated "This case is similar to *Lahdekorpi*" noting that property in the sole name of one spouse had been transferred to Family Residence C in the joint names of the spouses (para. 94). However, ultimately the Court held that "while the claimant's gift of $10,000 from her mother may have been traceable to" Family Residence C, it had been disposed of and its proceeds divided unreservedly such that there was no excluded property component left to divide at trial. Further, the Court held that there was an insufficient link with the Edmonton property to find that the gift of $10,000 was traceable to it (para. 96).

M. (C.L.) v. S. (M.J.), 2017 BCSC 799, 2017 CarswellBC 1286 (B.C. S.C.), additional reasons *C.L.M. v. M.J.S.*, 2017 CarswellBC 2350 (B.C. S.C.)

This case involved unmarried spouses who cohabited for over seven years. They had one child. During the relationship, the parties purchased a home. Neither party had funds for the downpayment. Some funds were provided by the claimant's mother, which were an acknowledged gift to both. A further sum of $50,000 was advanced by the claimant's father. There was a dispute as to whether the funds were advanced as a gift to the claimant alone or to both parties. The Court characterized the evidence of the parties about the characterization and tracing of the $50,000 to be vague but it was common ground between them that the funds had been used to purchase the home and it appeared that the claimant had deposited them to a joint bank account before applying them to the joint purchase.[18] The Court accepted the testimony of the claimant's father to the effect that when he advanced the funds, he intended a gift be made only to his daughter, the claimant.[19] When the property was purchased, title was held by both parties — the claimant as to an "undivided 99/100 interest" and the respondent as to an "undivided 1/100 interest". The respondent's evidence was that this was done to take advantage of the first time home buyers credit.[20] In characterizing the $50,000 gift, the court first confirmed that since the gift had been intended by the donor to be solely for the claimant's benefit, it was the claimant's excluded property under section 85(1(b.1), *FLA* when it was received.[21] Second, the Court distinguished *F. (V.J.)* in finding that when the funds were used to acquire the jointly titled family home, the exclusion was not lost. In doing so, the court stated:

> [493] I am further satisfied that this gift did not lose its character as excluded property when the claimant used it toward the purchase of the family residence and likely for the payment of family debts. Unlike

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18 *M. (C.L.) v. S. (M.J.)*, 2017 BCSC 799, 2017 CarswellBC 1286 (B.C. S.C.), additional reasons *C.L.M. v. M.J.S.*, 2017 CarswellBC 2350 (B.C. S.C.) at paras. 42-47.

19 *Ibid.* paras. 52-55.

20 *Ibid.* para. 56.

21 *Ibid.* para. 492.

> *V.J.F.*, the claimant did not use her father's gift to intentionally purchase property solely in the respondent's name. She used it primarily to invest in a property jointly owned by her and to pay debts jointly owed (sic) by her. I am satisfied on the evidence as a whole that the claimant did not intend to gift her father's gift to the respondent in these circumstances. I cannot infer that her use of the funds was a reflection of any intention to make a gift to the respondent. The family residence was registered in both names, with the unequally divided interest specified, in order to secure the necessary financing for the purchase, to take advantage of the claimant's status as a first time home buyer, to ensure their shared obligation under the mortgage and to reflect their choice to share a home in which to raise the children. Like the situations in *Kalmiakov*, *Lahdekorpi*, *Shih*, *K.R.* and *Oleksiewicz*, *V.J.F.* is distinguishable from the case at bar and the presumption of advancement does not arise. The claimant has established that the $50,000.00 gift from her father in 2012 is excluded property.
>
> (emphasis added)

The Court did fully discuss what evidence there was with respect to intent but commented that the evidence did not permit the Court to infer an intent to gift..

Oleksiewicz v. Oleksiewicz, 2017 BCSC 228, 2017 CarswellBC 378 (B.C. S.C.)

The parties separated after 25 years of marriage. They had two children one of whom required financial assistance at trial. The claimant husband was 56 and the respondent wife was 52 at the time of trial. The wife had contributed funds in the amount of approximately $22,000 from the non-pecuniary damage portion of a personal injury settlement to fund the purchase of the family residence. The Court held that she had met the evidentiary burden necessary to trace the funds into the residence. The Court considered the effect of title to the home being registered in joint names. The Court held, relying on *Hu v. Li*, 2016 BCSC 2131, 2016 CarswellBC 3201 (B.C. S.C.), that no presumption of advancement arises when one spouse transfers their investment to joint property. The Court drew the inference that the wife had not intended to make a gift of her settlement funds based on all of the circumstances, including the fact that she had also purchased with them and retained as her separate property, a Crown Victoria automobile (referred to as "the Vicky"):

> [61] There is some evidence in the steps taken by the respondent when the Vicky was purchased and owned separately by her to the exclusion of the claimant up to separation. I conclude that this decision reflects the respondent's clear intention when she used her personal injury settlement to firstly to buy the Vicky. At the time the house was purchased the respondent again used her accident settlement and I accept it is more likely than not that she intended to keep her interest in the deposit money separate from the claimant. I conclude that insofar as she did not intend to make a gift of the Vicky to the claimant, it is reasonable to infer that she also intended to retain her interest deriving from the settlement funds in the Home notwithstanding that it was

> registered in joint tenancy. The parties had purchased the house together; I presume both owners were required by their lender to be covenantors on the mortgage and joint tenants. I cannot infer that the respondent's infusion of all of the cash used to purchase the house and registration of title as joint tenants was any indication of her intention to make a gift to him. It is most likely that title to the Home was registered in joint tenancy as a convenient means to reflect their shared use and ownership of the property and shared obligation under the mortgage but without any intention on the respondent's part to abandon her interest in the property and make a gift of her settlement funds to him.

The Court did not consider *F. (V.J.)* and nor did it refer to the presumption of resulting trust. However, insofar as the Court embarked on a determination of the intent of the transferor, this case is consistent with *F. (V.J.)*

Kalmiakov v. Shylova, 2016 BCSC 2095, 2016 CarswellBC 3177 (B.C. S.C.)

The parties had a 15-year relationship during which they were married. The claimant husband was 59 and the respondent wife 56 at the time of trial. They had no children of the relationship although the respondent had adult children from prior relationship. This was a summary trial determination. The wife owned a property prior to the relationship. She contributed $10,000 of its proceeds to the purchase of a jointly titled family residence. In addition, her mother advanced $65,000 for the purchase. The wife's mother signed a gift letter which was provided to the mortgage lender who financed the purchase of the family residence confirming that the $65,000 advanced was a gift to both spouses. The Court did not refer to *F. (V.J.)* Nor did it discuss either the presumption of advancement or resulting trust. With respect to the $10,000, the husband conceded it was excluded property. With respect to the $65,000 advanced by her mother, the Court relied on evidence of the wife that the only reason for the gift letter was that the bank required it for financing and that it indicated a gift to both because the spouses were taking joint title. The wife swore that the gift was just to her. Her mother did not provide evidence. Thus, there was at least some evidence of the mothers' intent when the original gift was made. However, there is no discussion of what the wife's intent was when she placed the gift in the names of both parties. The exclusion was preserved.

Bamford v. Mulyati, 2017 BCSC 945, 2017 CarswellBC 1506 (B.C. S.C.)

The parties had a 14-year marriage. At the time of hearing the claimant husband was 83 and the respondent wife 51. The respondent came from Indonesia and was live in housekeeper for the claimant before marriage. The respondent left the marriage suddenly and moved back to Indonesia taking the claimant's deceased former spouses' jewellery worth approximately $55,000. Five years into the marriage, the claimant transferred the home he owned before marriage into the respondent's name. The claimant sought to have 100% of family property allocated to him and to have his home determined to be excluded property. The respondent did not participate in the proceedings. The Court made

an uncontested finding that the Respondent did not contribute to the acquisition or maintenance of any family property. The Court did not consider *F. (V.J.)* but did consider *Pecore* and the presumption of advancement. An examination of the husband's intention at the time he transferred the home lead the court to conclude:

> [34] I am satisfied that when Mr. Bamford transferred property into Ms. Mulyati's name as well his, he did so on the condition that he and Ms. Mulyati would be together until he died and that once he passed away, she would have his home and investments. I find that Mr. Bamford, at all times, intended that in order for Ms. Mulyati to be entitled to the Family Home and the Edward Jones Portfolios, she would be required to remain married to him until his death. There was no absolute gift to Ms. Mulyati: see *Remmem v. Remmem*, 2014 BCSC 1552 (CanLII); *Wells v. Campbell*, 2015 BCSC 3 (CanLII). In reaching this conclusion, I have also considered the reasoning in *Oleksiewicz v. Oleksiewicz*, 2017 BCSC 228 (CanLII); that case applies *Pecore*, and supports a fact specific inquiry into the intention of transferor

With the caveat that this case was entirely unopposed, it is fair to say that it is consistent with *F. (V.J.)* inasmuch as the result is driven by findings of intent.

F. (H.C.) v. F. (D.T.), 2017 BCSC 1226, 2017 CarswellBC 1965 (B.C. S.C.)

The parties had a 12-year relationship and separated in 2014. The Claimant wife was 47 and the Respondent husband was 46 at the trial date. They had one child, an 11-year-old son. The husband was a successful investment banker and the wife a homemaker who had not worked outside the home for ten years prior to separation. The parties had significant valuable family property that was agreed to be divided equally. The husband argued that he was entitled to excluded property derived from three sources: a property he owned prior to the relationship, the book of business he acquired prior to the relationship and sold around the time the relationship commenced, and the proceeds of a further sale of his book of business that occurred during the relationship.

With respect to the second sale of his book of business which took place during the marriage[22] and resulted in proceeds of about $364,000, the Court followed *F. (V.J.)* and disallowed the exclusion on the basis that the husband had, for tax planning reasons, structured this payment so that he received some

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[22] Given the Court's conclusion based on *F. (V.J.)*, the Court did not consider the complicated argument of whether a sale of the book of business during the marriage gave rise to proceeds that were excluded property when the husband had received compensation for the same book of business at the commencement of the marriage. The husband's argument seems to have been that the book he sold during the marriage was made up of a lot of clients who he had at the outset of the marriage. The Court did note that at least some of the clients comprising the book would have been new clients the husband acquired after the relationship began. However, the Court did not consider whether, having been compensated once in relation to the book, there was any residual excluded property left.

of it and his wife received some of it as taxable income. The Court held that, in respect of these monies, he was stuck with the ratio in *F. (V.J.)* – that one cannot have it both ways. In *F. (V.J.)* the husband placed property in the name of his wife to be able to tell creditors he had no remaining beneficial title – in this case the husband agreed the payments for the book should be allocated as income to his wife with respect to which she would be liable for taxes thereon. Having agreed to allocate them that way, he could not take it back and have it both ways.

With respect to the first sale of the husband's book of business and the proceeds of his pre-relationship property, the husband was able to prove that these funds, totalling about $560,000 (but likely less than 5% of the overall value of property being divided), could be traced into the equity of the jointly titled family residence.

What is remarkable about this case is that, in considered and eloquent reasons, the Court went on to discuss the issue of whether, having placed the excluded funds in the jointly titled family residence, the husband had lost his exclusion by virtue of the operation of the presumption of advancement. Although the Court of Appeal in *F. (V.J.)* had specifically acknowledged the survival of the presumption, Mr. Justice Voith in *F. (H.C.)* determined that the evidentiary presumption has no place in the interpretation of the provisions of Part 5 of the *FLA*:[23]

> [149] The ongoing application of the presumption of advancement under the *FLA* would mean that of these various potential forms of relationship, within which all partners are "spouses" for the purposes of the *FLA*, the only subset of relationship to which the presumption of advancement would apply would be a gift from a man to women in a traditional marriage.
>
> [150] I will return to this but such a result would be incoherent. It would allow the presumption of advancement, an anachronistic legal principle, to continue in the context of legislation that was intended to recognize and reflect the broader and changed nature of relationships in present day society. It would also cause different property division rules and regimes to apply to different types of relationships.

The *F. (H.C.)* decision is under appeal at the time of this writing.

E. (A.J.) v. W. (T.B.), 2017 BCSC 1657, 2017 CarswellBC 2593 (B.C. S.C.)

In this case, the unmarried parties were found to have been living in a marriage-like relationship between 2011 and 2014 so that they were spouses under the *FLA*. During the relationship, the parties purchased a sailboat in their joint names using primarily funds the husband had prior to the relationship. They spent months together sailing the boat. The wife argued that the presumption of advancement applied such that the sailboat was family

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[23] See also paras. 168, 170, 172, 174 of the judgment.

property. The Court held that, relying on *F. (H.C.)*, it is doubtful that the presumption of advancement applies to unmarried spouses and further that, in any event it would not apply where a jointly owned asset is acquired using excluded property (at para. 149). In characterizing the sailboat as excluded property, there was no specific discussion by the Court of the issue of the parties' intention when acquiring the sailboat — i.e. whether the husband intended to gift his excluded property interest to the wife. However, in the context of determining the parties status as spouses, the Court did consider evidence regarding their separate finances and that, on the recommendation of the selling broker, the sailboat had been put into joint names to make it easier to move the boat should something happen to the husband (at para. 101).

B. (C.J.) v. B. (A.R.), 2017 BCSC 1682, 2017 CarswellBC 2622 (B.C. S.C.)

In *B. (C.J.)*, the husband used the proceeds of sale of pre-relationship property to purchase a property that was owned in joint tenancy with his wife. The Court discussed the line of cases both before and after *F. (V.J.)* dealing with transfers of excluded property to joint property in the name of both spouses and also considered the presumption of advancement. The Court held that where property is held in joint tenancy between spouses, the spouse who contributed their excluded property to the joint property retains the exclusion as a result of the joint property being "derived from" excluded property. The Court also said, at para. 387: "In my view, it is not necessary, in applying the terms of the *FLA*, to consider the fact that the Husband may be presumed to have made a gift to the Wife of an equal entitlement to the property as a joint tenant". In other words, the Court seems to be saying that the presumption does not apply to or is not relevant to the situation where the transfer is made to joint tenancy and the transferring spouse retains an interest (see also para. 386). Further, at para. 388, the Court held: "If I am wrong in that analysis of the effect of the presumption of advancement on a husband's gift to his wife of an interest as joint tenant, I would conclude, like Mr. Justice Voith in *F. (H.C.)*, that the presumption of advancement does not have ongoing application under the *FLA*, at least with respect to joint tenancy interests". The Court's reasons do not address the husband's intention when placing the property in joint tenancy.

(f) Commentary: Observations Regarding the Post-F. (V.J.) Cases

(i) The Importance of Presumptions

F. (V.J.) confirmed that, for the purposes of characterizing excluded property that has been transferred to a wife, the presumption of advancement has not been abolished. The presumption of resulting trust also remains a part of the law. That said, it is important to emphasize two things. First, that the statement in *F. (V.J.)* regarding the presumption of advancement was made in *obiter* since there was a finding that the husband clearly intended to gift his interest to his spouse such that no presumption operated. Second, *Pecore* makes it clear that it is only in those cases where the Court cannot find sufficient

evidence of intent that the presumptions operate. Clearly, they ought not to stand alone or be applied without an analysis of whether the intention of the donor can be found or inferred from the admissible evidence.

Of the post *F. (V.J.)*. cases where the presumption of advancement is considered in relation to transfers between spouses:

A. There was no mention of the presumption of advancement or resulting trust as between spouses in three cases: *Kalmiakov, Lahdekorpi, and Dheenshaw*.[24] All involved transfers from wife to the joint names of husband and wife. In all three, there is little discussion of the wife's intention at the time of transfer. In *Lahdekorpi*, the Court appears to rely on the absence of any evidence of an intention to gift to find that the excluded property was not lost when the transfer was made into joint names. With respect, this is essentially the same as applying the presumption of resulting trust.

B. In four cases the Court appears to rule that there is no presumption of advancement applicable to a transfer from one spouse to the joint names of the spouses: *R. (K.) v. D. (J.), Oleksiewicz, B. (C.J.) v. B. (A.R.)* and *M. (C.L.) v. S. (M.J.)*. The Court expressly made this point in the first three cases and *M. (C.L.)*. relies on *Oleksiewicz* and does not apply the presumption. *R. (K.) v. D. (J.)* and *B. (C.J.) v. B. (A.R.)* involved a transfer from husband to wife and the other two involved transfers from wife to husband. Therefore, these cases cannot be resolved amongst themselves on the basis that the presumption only operates from husband to wife. Of these four decisions, only *Oleksiewicz* provides a discussion of the evidence around determining intention. In *M. (C.L.)*, the Court cannot find enough evidence to "infer" an intention to gift. Again, as in *Lahdekorpi*, this is essentially the same as applying the presumption of resulting trust.

C. One decision clearly states that the presumption of advancement does not apply to transfers wife to husband: *Donnelly*. Instead, the Court considered the presumption of resulting trust. That being said, the Court in Donnelly examined evidence of intention and found that the presumption was rebutted.

D. Two decisions suggest that the presumption of advancement applies to a transfer to joint tenancy from wife to husband: *L. (K.A.) v. L. (K.J.)* and *Bamford. L. (K.A.) v. L. (K.J.)* does not contain a discussion regarding intent of the donor. *Bamford* considers that the presumption may apply but then examines evidence of intent and finds that there was no intent to gift.

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[24] Dheenshaw did discuss the presumptions but only in relation to the gift from the wife's mother to wife and not as between husband and wife.

E. One decision, *F. (H.C.)*, provides compelling reasoning that there is no presumption of advancement applicable to the interpretation of part 5, *FLA*. That reasoning is also endorsed in *B. (C.J.) v. B. (A.R.)*, albeit in the alternative. The *F. (H.C.)* decision is under appeal.

Although it is difficult to resolve all of these cases, the balance of the cases (A., B. and E., *above*, = 7 of 10) support the inference that the presumption of advancement is weak and either does not apply to transfers to joint tenancy and may not apply at all under the *FLA*.

On the other hand, the rule embodied by the presumption of resulting trust may continue to have utility and, by itself, does promote even handed treatment between spouses. Its continued application would also appear to be consistent with s. 85(1)(g) so that spouses do not lose exclusions by surprise or by virtue of the passage of time diluting their ability to call evidence of intention.

All of the above being said, following both *Pecore* and *F. (V.J.)*, wherever possible, counsel should call evidence to support their clients' position and, until the issues have been clarified at the appellate level, it would not be wise to simply rely on either of the evidentiary presumptions.

(ii) Evidence of Intention

The Court in *F. (V.J.)* noted that the intention of the donor was key in the determination of whether an exclusion was lost. Unfortunately, several of the decisions that have followed have not clearly articulated the evidence regarding intention. However, there are several that do and they indicate that the following may be helpful evidence with respect to intention:

A) Keeping other funds derived from the excluded property in a separate account and otherwise dealing with them separately suggests an intention not to gift (*Oleksiewicz*).

B) Conversely, a pattern of using funds derived from the excluded property for family purchases (dare we say, for a "family purpose"), suggests an intention to gift (*Donnelly*).

C) Rescinding a prior prenuptial or marriage agreement which would have had the effect of maintaining exclusions signals an intent to gift (*Donnelly*).

D) A rationale for transferring the excluded property to joint property, other than for the purpose of a gift, appears to be helpful. For example:

   a. Registration of title to the home in joint names for financing purposes and to reflect joint use (*Oleksiewicz*)

   b. Registration of the title to home in joint names to convey a right of survivorship should the parties relationship continue until death of the transferring spouse (*Bamford*).

c. Registration of title to the home in the name of the recipient spouse in order to qualify for a CMHC mortgage when the donor spouse did not qualify (*Bell v. Stagg*).

E) A document representing that property has been gifted may not be conclusive of intention if there is other evidence confirming the contrary. In *Bell v. Stagg* a gift letter provided by a spouse to the bank confirming that excluded funds were a gift was contradicted by an agreement between spouses. In *Kalmiakov*, a gift letter from the wife's mother confirming to the bank that her downpayment gift was made to both spouses was not conclusive evidence of her intention to gift given the contrary evidence lead.

An intention to gift or abandon the exclusion claim post separation may also factor into the analysis. In *Dheenshaw* it was held that dividing excluded funds/property "unreservedly" after separation and prior to trial was fatal to maintaining an exclusion claim.

Although not decided in the context of the *FLA*, logically, the kinds of evidence of intent noted above in the discussion clarifying presumptions (part III, C, of this paper) and in *Pecore* and *Berdette* should be canvassed as well.

(iii) Prevarications and inconsistent statements

A "prevarication" is in essence a lie or sham. In *F. (V.J.)*, the Court held that Mr. F. ought not to be able to represent to his creditors that he had no beneficial interest in the property held in his wife's name and, at the same time, to maintain the position that for the purposes of family property division he continued to have some interest in the property — ie, he maintained a "derived" interest within the meaning of s. 85(1)(g), *FLA*. The implication is that it would have been a sham to say one thing to creditors and another to the Court.

In the author's respectful view it would be an oversimplification to draw from this the idea that an inconsistent statement or position by itself causes the loss of an exclusion. The issue is:

a) what the spouse intended at the time of the transfer; and

b) whether they continue to maintain a beneficial interest in the excluded property after the transfer.

There are cases which support the argument that if there is evidence that, despite the inconsistent statement, the true intention of the transferor was to retain a beneficial interest, then the exclusion might not be lost. For example, *Hu v. Li*, 2016 BCSC 2131, 2016 CarswellBC 3201 (B.C. S.C.) which, although decided under the FRA, considered the reasoning in *F. (V.J.)* with respect to "prevarications". In *Hu*, the wife argued that an alleged illegal title transfer scheme to avoid taxes necessarily precluded the husbands transferor parents from asserting a resulting trust on transfer. The Court cited *Andrade v. Andrade*, 2016 ONCA 368, 2016 CarswellOnt 7727 (Ont. C.A.) at paras. 104-107,

additional reasons 2016 CarswellOnt 10237 (Ont. C.A.), for the proposition that "there is no strict bar preventing a party from taking one position when dealing with the CRA, and another when confronted with claims against their property," and a representation is just one fact to consider when determining actual intention (see para. 63). The Court also cites Professor Waters' proposition that "even where it could be found that a party intended to transfer property, to defeat, delay or defraud creditors . . ., that party can still recover property under a resulting trust if he or she does not need to rely on the presumably illegal purpose of the transfer in order to prove the trust" (para. 64). Finally, the Court cites *Nussbaum v. Nassbaum* 2004, 9 R.F.L. (6th) 455, 2004 CarswellOnt 3731 (On. S.C.J.) at para. 32, which establishes that "an illegal purpose is not a bar where the claimant may rely upon the resulting trust to establish his claim" (cited at paras. 63, 65).

Although there is no detailed analysis of the point in either *Bell v. Stagg* or in *Kalmiakov v. Shylova*, in both of those decisions the Court was not troubled by the inconsistent representations that had been made to lenders by way of gift letters. On the other hand, in *F. (H.C.)*, the Court held that by electing to have his wife receive some allegedly excluded funds as income in her hands, the husband was stuck with the ratio in *F. (V.J.)*.

The only way to reconcile the foregoing cases with the comments about prevarication in *F. (V.J.)*, is to recognize that the key finding in *F. (V.J.)* is that the husband in that case unreservedly did intend to convey full beneficial ownership to the wife. His evidence did not establish that he was creating a sham when he transferred property to her for creditor protection purposes.

4. CONTINGENT INTERESTS: COMMENT RE: *PARTON v. PARTON* 2016 BCSC 1528

Under s. 85(1)(b), *FLA*, a spouse's inheritance is excluded property. Since growth in value of excluded property is family property under s. 84(2)(g), *FLA*, the question arises as to when a spouse is considered to have received their interest in a testamentary trust — is it the date of death or is it the date of distribution from the estate? For example, if a spouse's parent dies leaving them real estate of significant value, do they acquire their interest in the real estate on death of the parent or when the estate transfers it to them? If the real estate increases in value significantly between the date of death and the date of distribution, there is the possibility of a contentious issue.

In *Parton v. Parton*, 2016 BCSC 1528, 2016 CarswellBC 2315 (B.C. S.C.), additional reasons 2016 CarswellBC 3334 (B.C. S.C.), the husband argued that the wife's interest in her inheritance from her mother's estate arose when her mother died (in 2010), and that the increase in value of that inheritance from the date it was received was family property (see para. 50). The spouses separated in August 2014 after 33 years of marriage. The spouses had two sons, both self-supporting. The Court held (at para. 51) that a spouse's interest in an inheritance arises not at the testator's death, but rather at the time the inheritance is received:

> . . . the inheritance exclusion applies as of the date a spouse receives his or her inheritance. A plain reading of s. 85(1)(b) leads to that conclusion. Before an inheritance can be excluded property, it must be received by the beneficiary. If that were not the case, the court would have to explore the administration of the estate to value the assets and liabilities as of the date of death and consider the likely estate expenses. This would prolong and complicate property division claims and would produce an illusory value for the exclusion.[25] . . .

With respect, this reasoning makes a lot of practical sense. There are many legitimate reasons why an estate's distribution may be complicated or turn on various contingencies unrelated to the spousal relationship. On the other hand, one can easily imagine a scenario where this result could lead to abuse. For example, a spouse who is an executor may delay administration of an estate in order to defeat a claim to growth. This reasoning may also run contrary to s. 85(1)(e) which provides that the various categories of excluded property, including an inheritance, remain excluded property where they are held in trust for the spouse. In other words, s. 85(1)(e) might be used to argue that the interest in excluded property arises on creation of the trust under the will — i.e. the date of death.

Although not considered in *Parton*, the difficult question of when growth is measured in relation to interests in *inter vivos* discretionary trusts — i.e. from creation of the trust or on the beneficiary's receipt — is also one that has to be answered.

5. CONCLUSION

One of the stated goals of Part 5 of the *FLA* was to simplify the property division scheme and to reduce the influence of judicial discretion. Four year have passed since its enactment and those laudable goals appear to have been met to some extent. For example, by enacting provisions for interim distributions. However, it is clear that there remain difficult issues which continue to vex practitioners and impede their ability to provide clear advice about a number of property issues — the focus in this paper being on the effect of transferring an excluded property to a spouse. While this paper does not provide the answers, it is hoped that it is of some assistance to the reader in providing advice and, in particular, fashioning good arguments to assist the Courts in clarifying Part 5 of the *FLA*.

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[25] The husband in *Parton* argued in written submissions that the wife, as executor of her mother's estate, was not acting in good faith — presumably in the sense that the estate was not wound up promptly or the wife as executor did not act prudently in the administration of the estate.