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PAPER 1.1

B.C. Cases Interpreting the Property Division Provisions of the Family Law Act

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BC CASES INTERPRETING THE PROPERTY DIVISION PROVISIONS OF THE FAMILY LAW ACT

On March 18, 2013, the *Family Law Act*, S.B.C. 2011, c. 25 ("*FLA*") established a new regime for dividing family property when married and unmarried spouses separate. This paper will review and comment on the few key cases[1] where the Supreme Court has considered the provisions of the *FLA* regarding the following topics:

(a) which spouses are entitled to rely on the *FLA* (ss. 3 and 198);

(b) setting aside written agreements (s. 93);

(c) characterizing family property (s. 84);

(d) characterizing & tracing excluded property (s. 85);

(e) characterizing family debts (s. 86);

(f) determining when an equal division of family property and family debt would be significantly unfair (s. 95); and

(g) dividing family property and family debt (ss. 81, 83, 87, 94, and 96).

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1 Unless otherwise noted, the cases discussed herein are summarized in Appendix "A."

I. Which Spouses are Entitled to Rely on the FLA

As described more fully below under the heading "Dividing Family Property and Family Debt," parties who are "spouses" are entitled to a presumptive equal division of family assets and family debts pursuant to s. 81 of the *FLA*. The term "spouse" is defined in s. 3:

> 3(1) A person is a spouse for the purposes of this Act if the person
>
> (a) is married to another person, or
>
> (b) has lived with another person in a marriage-like relationship, and
>
> (i) has done so for a continuous period of at least 2 years, or
>
> (ii) except in Parts 5 [*Property Division*] and 6 [*Pension Division*], has a child with the other person.
>
> (2) A spouse includes a former spouse.
>
> (3) A relationship between spouses begins on the earlier of the following:
>
> (a) the date on which they began to live together in a marriage-like relationship;
>
> (b) the date of their marriage.
>
> (4) For the purposes of this Act,
>
> (a) spouses may be separated despite continuing to live in the same residence, and
>
> (b) the court may consider, as evidence of separation,
>
> (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
>
> (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

The issue of whether unmarried parties lived in a marriage-like relationship, and were therefore spouses under s. 3(1), was considered by Mr. Justice Rogers in *Trudeau v. Panter*, 2013 BCSC 706, [2013] B.C.J. No. 820. Mr. Justice Rogers confirmed that the onus rests with the party asserting spousal status to establish that fact (para 35). Further, Rogers J. adopted the test for determining whether unmarried parties lived in a marriage-like relationship as set out by the Court of Appeal in *Gostlin v. Kergin*, 1986 CanLII 164 (B.C.C.A.), 3 B.C.L.R. (2d) 264 at 267 (para. 36):

> In deciding whether a couple lived together as husband and wife, I would be guided by the scheme and intention of the Act itself. The purpose of the legislative scheme is to impose on an unmarried couple the same obligations under [former] s. 57 as are voluntarily undertaken by a married couple. So I would ask whether the unmarried couple's relationship was like the relationship of the married couple in that the unmarried couple have shown that they have voluntarily embraced the permanent support obligations of [former] s. 57. If each partner had been asked, at any time during the relevant period of more than two years, whether, if their partner were to be suddenly disabled for life, would they consider themselves committed to life-long financial and moral support of that partner, and the answer of both of them would have been "Yes", then they are living together as husband and wife. If the answer would have been "No", then they may be living together, but not as husband and wife.
>
> Of course, in the particular circumstances of any case, the answer to that question may prove elusive. If that is so, then other more objective indicators may show the way. Did the couple refer to themselves, when talking to their friends, as husband and wife, or as spouses, or in some equivalent way that recognized a long-term commitment? Did they share the legal rights to their living accommodation? Did they share their property? Did they share their finances and their bank accounts? Did they share their vacations? In short, did they share their lives? And, perhaps

> most important of all, did one of them surrender financial independence and become economically dependent on the other, in accordance with a mutual arrangement?
>
> All those questions, and no doubt others, may properly be considered as tending to show whether a couple who lived together for more than two years have done so with the permanent mutual support commitment that, in the relevant sense of the Family Relations legislation, constitutes living together as husband and wife.

Section 198 of the *FLA* governs the time limits for advancing claims. Generally, a married spouse must bring his or her claim for division of property within two years from the date the married spouses were divorced. Unmarried spouses must bring their claim within two years of the date of separation:

> 198(1) Subject to this Act, a proceeding under this Act may be started at any time.
>
> (2) A spouse may start a proceeding for an order under Part 5 [*Property Division*] to divide property or family debt, Part 6 [*Pension Division*] to divide a pension, or Part 7 [*Child and Spousal Support*] for spousal support, no later than 2 years after,
>
> (a) in the case of spouses who were married, the date
>
> (i) a judgment granting a divorce of the spouses is made, or
>
> (ii) an order is made declaring the marriage of the spouses to be a nullity, or
>
> (b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.
>
> (3) Despite subsection (2), a spouse may make an application for an order to set aside or replace with an order made under Part 5, 6 or 7, as applicable, all or part of an agreement respecting property or spousal support no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.
>
> (4) The time limits set out in subsection (2) do not apply to a review under section 168 [*review of spousal support*] or 169 [*review of spousal support if pension benefits*].
>
> (5) The running of the time limits set out in subsection (2) is suspended during any period in which persons are engaged in family dispute resolution with a family dispute resolution professional.

Prior to the enactment of the *FLA*, unmarried spouses could not rely on the provisions of the *Family Relations Act*, R.S.B.C. 1996, c. 128 ("*FRA*") to advance claims for the division of family property. However, the property division regime under the *FLA* applies to both married and unmarried spouses. Further, pursuant to s. 252 of the *FLA*, married parties who commenced actions under the *FRA* must continue their proceedings under that Act unless they otherwise agree, while unmarried parties may amend their pleadings to advance claims under the *FLA*, provided that: (1) they are spouses pursuant to s. 3; (2) they have met the time limit imposed by s. 198; and (3) they are otherwise at liberty to amend their pleadings. Section 252 provides:

> 252(1) This section applies despite the repeal of the former Act and the enactment of Part 5 [*Property Division*] of this Act.
>
> (2) Unless the spouses agree otherwise,
>
> (a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or
>
> (b) a proceeding respecting property division started under the former Act
>
> must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

Early on, a key issue arose as to whether the property division provisions of the *FLA* apply to unmarried spouses who separated before the *FLA* came into force (on March 18, 2013). In other words, did the *FLA* have retrospective effect? Madam Justice Hyslop addressed this issue in *Meservy v. Field*, 2013 BCSC 2378, [2013] B.C.J. No. 2844.

Prior to *Meservy*, there were three decisions dealing with the issue of whether unmarried parties ought to be granted leave to amend their pleadings to advance claims under the *FLA*. In two cases, the court dismissed the applications on the basis that the parties had been separated for more than two years before the *FLA* came into force and the proposed claims were statute-barred: *Reynolds v. Huard*,[2] 2013 BCSC 1251, [2013] B.C.J. No. 1533 and *P.N.K. v. C.L.*, 2013 BCSC 1856, [2013] B.C.J. No. 2231.

However, in *Smith v. Anderson*, 2013 BCSC 2009, [2013] B.C.J. No. 1557, Master Bouck allowed Mr. Smith to amend his claim to include claims under the property division regime of the *FLA* even though it was unclear if the parties separated within the two-year time limit imposed by s. 198. Mr. Smith argued that the unmarried parties separated within two years of his application to amend the pleadings, whereas Ms. Anderson argued that the parties separated more than two years before the application (para. 6). On this basis, *Smith* is distinguishable from *Reynolds* and *P.N.K.,* given that in *Smith*, it *may* be the case that the claims were not statue-barred. Master Bouck considered whether leave ought to be granted where proposed amendments make claims that are potentially statute-barred, as set out in *G.A.D. v. B.C. Children's Hospital*, 2003 BCSC 443, [2003] B.C.J. No. 654. She was unable to conclude that the claims made in the proposed amendments were bound to fail (para. 31). Further, the master held that it would be just and convenient to allow the amendments to ensure that all matters between the parties were properly adjudicated. If his amendments were not permitted, Mr. Smith would have brought another action under the *FLA.* It was advisable to avoid a multiplicity of proceedings. She found that Mr. Smith could not be faulted for the delay in seeking the amendments, as the application could not have been made before the *FLA* came into force; Ms. Anderson had notice that the amendments would be pursued; and any resulting prejudice to her could be remedied with a costs award at trial (paras. 33-37).

In *Bressette v. Henderson*, 2013 BCSC 1661, [2013] B.C.J. No. 1977, the parties separated within the two-year time period. Madam Justice Griffin noted that, arguably, there was an ambiguity in the drafting of the transition provisions of the *FLA* in relation to the property rights of unmarried spouses. In the absence of full legal argument, she declined to decide the issue of the applicability of the *FLA* and instead applied the common law principles of unjust enrichment to resolve the property claims. Finally, in *Asselin v. Roy*, 2013 BCSC 1681, [2013] B.C.J. No. 2005, the parties agreed that the property division regime under the *FLA* would apply, such that the Court did not have to address the issue. Thus, the issue of whether the property division provisions of the *FLA* apply to unmarried spouses who separated before the *FLA* came into force was first addressed in *Meservy.*

In *Meservy*, the parties were unmarried spouses, whose marriage-like relationship had lasted longer than two years. The parties were separated for less than two years when the action was commenced, a few days before the *FLA* came into force. As a result, the time limit imposed by s. 198 did not come into play. Mr. Field amended his counterclaim to include a claim under the *FLA* for division of family property (which Ms. Meservy owned or had an interest in). Mr. Field sought a declaration that Part 5 of the *FLA* applied to the action. Ms. Meservy argued that, because the parties separated before the *FLA* came into force, the *FLA* did not apply.

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2 *Reynolds v. Huard* is summarized within the brief of *Meservy v. Field* in Appendix "A."

Madam Justice Hyslop held that the *FLA* has retrospective effect. In particular, parties who:

(1) meet the definition of spouse in s. 3; and

(2) bring their claim within two years of their separation (as required by s. 198),

obtain the status of spouses (or former spouses) under the *FLA* on the date of the coming into force of the *FLA*, and therefore qualify as spouses entitled to rely on the property division regime under the *FLA*. This results even if the facts giving rise to their status of spouses (or former spouses) under the *FLA* occurred prior to the coming into force of the *FLA*. If the parties separated before the coming into force of the *FLA*, Part 5 of the *FLA* will apply *provided that* they separated within two years of the *FLA* coming into force (i.e., at some point after March 18, 2011). On this basis, Hyslop J. declared that the property division regime of the *FLA* applied.

II. Setting Aside Written Agreements

Section 93 of the *FLA* sets out when the court may set aside a written agreement dealing with the division of property and debt, either because of procedural unfairness (s. 93(3)) or operational unfairness (s. 93(5)). In *H.J.S. v. K.C.S.*, 2013 BCSC 998, [2013] B.C.J. No. 1206, Mr. Justice Barrow did not apply the *FLA* when determining whether to set aside a separation agreement. However, he commented in *obiter* (at para. 39) that s. 93 is an "attempt to codify the law developed by the Supreme Court of Canada in, among other cases, *Miglin v. Miglin*, 2003 SCC 24, [[2003] S.C.J. No. 21] and more recently, *Rick v. Brandsema*, 2009 SCC 10, [[2009] 1 S.C.R. 295.][3]"

Section 93 provides as follows:

> 93(1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.
>
> (2) For the purposes of subsection (1), the same person may witness each signature.
>
> (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
>
> (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
>
> (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
>
> (c) a spouse did not understand the nature or consequences of the agreement;
>
> (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
>
> (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.
>
> (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the

3 In *H.J.S. v. K.C.S.*, Barrow J. compares s. 93 to the principles developed in the common law pertaining setting aside agreements.

> agreement but that the agreement is significantly unfair on consideration of the following:
>
> (a) the length of time that has passed since the agreement was made;
>
> (b) the intention of the spouses, in making the agreement, to achieve certainty;
>
> (c) the degree to which the spouses relied on the terms of the agreement.
>
> (6) Despite subsection (1), the Supreme Court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

The leading case on setting aside written agreements is *Asselin*. In this case, the unmarried parties signed an agreement that provided that only property acquired in joint names would be divided upon separation, other property would be separate, and the parties were precluded from claiming an interest in the other's property based on the principles of unjust enrichment and trust law (the "Agreement") (paras. 47-48). The Agreement was prepared by Mr. Roy's counsel, and Ms. Asselin did not see it before she signed it (paras. 37, 40, and 120). She did not have legal advice about the Agreement prior to signing (paras. 42 and 119). During the relationship, which was 24 years in length, Ms. Asselin used $120,000 of her inheritance on renovations to the former family home, even though it was registered in Mr. Roy's sole name and she had no entitlement to this property under the Agreement (para. 123). At trial, Mr. Roy conceded that given the length of time that had passed since the Agreement was made, it was significantly unfair as it applied to the former family home, but he argued that the Agreement was otherwise binding (para. 114). Ms. Asselin argued that the Agreement should be set aside entirely, or, in the alternative, set aside in whole or in part based upon a finding of significant unfairness (para. 117).

Mr. Justice Harvey found that while Ms. Asselin signed the Agreement, she did so to assuage Mr. Roy (para. 120). However, he also found that she was able to understand the terms of the Agreement and recognized that it limited her future rights (para. 120).

In interpreting s. 93, Mr. Justice Harvey noted the distinction between procedural unfairness (s. 93(3)) and operational unfairness (s. 93(5)) (paras. 125-131):

> Section 93 contemplates a two-pronged inquiry as to the enforceability of an agreement. The first inquiry is directed at the formation of the agreement; the second stage, its effect.
>
> Even if the court determines the agreement was unfairly reached, there is still discretion to decline to set aside or vary the agreement if the result would not be substantially different from that which is contained in the agreement (s. 93(4)).
>
> If an agreement was fairly reached, having regard the enumerated factors in s. 93(3), the court must go on to consider whether the agreement is significantly unfair having regard to the enumerated criteria in s. 93(5).
>
> Judicial discretion has been modified, particularly as it relates to the assessment and enforceability of agreements. Under the previous legislation, a finding of unfairness based on one of an enumerated factors in s. 65(1) was sufficient to allow the court to, in effect, rewrite the parties' [a]greement to achieve the fairness found lacking in the original version.
>
> Critics of the legislation argued the threshold for judicial intervention was low, resulting in uncertainty which, in turn, encouraged litigation.

> Certainty is no doubt a desirable objective and parties should be encouraged, where mutually desired, to establish regimes of property entitlement which deviate from the statutory scheme.
>
> However, certainty should not trump either procedural or operational fairness as defined in s. 93.

Further, Harvey J. confirmed that nothing in s. 93(3)(c) ameliorates the following statement of law in *Gurney v. Gurney*, 2000 BCSC 6, [2000] B.C.J. No. 13 at para. 29 (para. 142):

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

Ultimately, Harvey J. found that the Agreement was procedurally unfair and should be set aside, for the following reasons (paras. 134-47):

> 1. Ms. Asselin did not have the opportunity to receive independent legal advice;
>
> 2. There was incomplete financial disclosure;
>
> 3. Ms. Asselin did not have the necessary information to fully consider her position in entering into the Agreement;
>
> 4. Ms. Asselin waived potential rights to spousal and child support without her situation being explained to her by someone safeguarding her interests;
>
> 5. While Ms. Asselin may have understood generally that she was giving up her rights in making the Agreement, absent independent legal advice, she likely would not be able to substantially understand the specific import of the Agreement;
>
> 6. Mr. Roy arranged the meeting with a lawyer, and told Ms. Asselin that she was to sign something;
>
> 7. Rather than giving the Agreement to Ms. Asselin once it was drafted, Mr. Roy sprang it on her at what she perceived to be a social gathering at the lawyer's office;
>
> 8. Ms. Asselin did not play any role in drafting the Agreement, the terms of which favoured Mr. Roy; and
>
> 9. The parties were attempting to conceive a child together at the time the Agreement was executed, and this exacerbated Ms. Asselin's vulnerability as the word is used in s. 93(3)(b).

Having found that the Agreement was procedurally unfair and should be set aside, Harvey J. considered whether to exercise his discretion under s. 93(4) and decline to set aside the Agreement. He chose not to exercise that discretion on the basis that the distribution of assets under the Agreement was significantly at odds with the distribution that would accrue under the *FLA*

(paras. 149-50). Further (although he was not required to), Harvey J. considered whether the Agreement ought to be set aside for being significantly unfair pursuant to s. 93(5). He concluded that it was significantly unfair for the following reasons: the circumstances leading to the execution of the Agreement could not be said to have been the result of the joint intentions of the parties to preserve their separate assets against future claims and there was no joint intention to achieve certainty; only Mr. Roy sought an agreement protecting his financial position; and Mr. Roy could not say he relied upon the terms of the Agreement while concurrently allowing Ms. Asselin to make significant contributions from her separate assets to improve a property that would remain his separate property (paras. 152-57).

III. Characterizing Family Property

Section 84(1) of the *FLA* defines "family property" as all real and personal property (unless excluded under s. 85) as follows:

> (a) on the date the spouses separate, property that is owned by at least one spouse, or in which at least one spouse has a beneficial interest, and
>
> (b) after separation, property acquired by at least one spouse, or in which at least one spouse acquires a beneficial interest, *and* is derived from the property referred to in s. 84(1)(a) or derived from the disposition of that property.

Section 84(1)(b) is obviously an important tracing provision. If, after separation, one spouse acquires property, or a beneficial interest in property, from family property that existed at the date of separation, that new property will also be considered family property at trial. Specific examples of family property are set out in s. 84(2)(a-f).

In addition, "family property" includes the *increase* in value of property that is excluded under s. 85 since the beginning of the relationship between the spouses or since the date that the excluded property was acquired: s. 84(2)(g).

Again, s. 3(3) provides that a relationship between spouses begins on the earlier of:

> (a) the date on which they began to live together in a marriage-like relationship;
>
> (b) the date of their marriage.

Section 84(3) addresses certain trust property that is not excluded trust property under s. 85(1)(f). In particular, ss. 84(3)(b) and (c) include as "family property" that part of trust property that a spouse has transferred to the trust, where the spouse no longer owns or has a beneficial interest in the property, but where the spouse has a power to have the property returned to him or her by way of transfer or termination of the trust.

As addressed more fully below under the heading "Dividing Family Property & Family Debt," all assets that are family property are subject to the presumptive equal division required by s. 81.

To date,[4] no reported cases have directly addressed the characterization of family property or the issue of whether property is family property, except insofar as they arise with respect to excluded property. The leading case on excluded property, tracing and, indirectly, family property is *Asselin*. In *Asselin*, Harvey J. set out a chronology of the parties' acquisition of their many assets acquired before and throughout their relationship. He determined which of the parties' assets were family properties subject to the parties' claims for excluded property traceable into the family property

4 NTD: March 28, 2014.

(paras. 162-68). However, the court was not asked to consider whether specific assets, for example, interests in trusts, were properly characterized as family assets.

IV. Characterizing & Tracing Excluded Property

Section 85 of the *FLA* details the categories of property that are excluded from the presumptive equal division of assets required by s. 81 (subject to the limited jurisdiction of the court to order the division of excluded property under s. 96). Section 85(1) lists the categories of property that are excluded from family property:

> 85(1) The following is excluded from family property:
>
> (a) property acquired by a spouse before the relationship between the spouses began;
>
> (b) gifts or inheritances to a spouse;
>
> (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
>
> (i) loss to both spouses, or
>
> (ii) lost income of a spouse;
>
> (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
>
> (i) loss to both spouses, or
>
> (ii) lost income of a spouse;
>
> (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
>
> (f) property held in a discretionary trust
>
> (i) to which the spouse did not contribute,
>
> (ii) of which the spouse is a beneficiary, and
>
> (iii) that is settled by a person other than the spouse;
>
> (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
>
> (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

Section 85(1)(g) is a tracing provision. It clarifies that property derived from excluded property, or the disposition of excluded property, is also excluded property, notwithstanding its conversion from one form of property to another. In effect, the parties can trace excluded property into property that would otherwise be family property.

The onus of proving that property is excluded property is on the spouse seeking the exclusion: s. 85(2).

In *Asselin*, the court considered the provisions of the *FLA* dealing with excluded property and tracing issues. By way of factual background, the parties were not married and they separated after a 24-year relationship. Before the relationship began in 1987, the respondent, Mr. Roy owned a home, real property in Nova Scotia, his pension plan, an RRSP and some savings. Mr. Roy had purchased his home in 1980 for $115,000, and sold it in 1991 for $175,000. There was no mortgage owing when the home was sold. Mr. Roy used the sale proceeds to purchase the family home in 1991. During the relationship, Mr. Roy bought additional properties and registered same in his sole name, including the family home. The parties also jointly purchased two properties in Nova Scotia. As detailed above, the parties signed the Agreement, which dealt with the division of property and was drafted by Mr. Roy's lawyer.

During the relationship, both parties received inheritances. Mr. Roy received an inheritance of $150,000 in 1998, which he used to pay down the mortgage on the family home and as a down payment on an acreage property which was registered in his sole name. Ms. Asselin received an inheritance of approximately $700,000 in 2006. She used some of these funds to renovate the family home ($120,000), some for the down payment on a jointly-owned property acquired during the relationship ($154,000), and invested some in another jointly-owned property acquired during the relationship ($10,000). Some of her inheritance remained in her separate bank account and RRSPs at the date of separation.

As addressed more fully below under the heading "Characterizing Family Debt," Mr. Roy asserted that his credit card debt was a family debt. Ms. Asselin asserted that the three mortgages for which she was jointly liable were family debts.

Ms. Asselin commenced proceedings on the basis of unjust enrichment claims, but the parties agreed to have their rights determined according to the provisions of the *FLA* pursuant to s. 252. Ms. Asselin sought to set aside the Agreement and divide the family property equally, subject to her excluded property claims. In particular, she sought to exclude the registered and non-registered accounts that arose from her inheritance, and the investment of funds from her inheritance traceable into other properties. Mr. Roy conceded that the Agreement was unfair as it related to the family home, but submitted that it was otherwise binding. In the alternative, he sought exclusions for the real and personal property he owned before cohabitation; for the equity from the home that he owned before cohabitation, which was traceable into the family home; and for the acreage property purchased with his inheritance.

The court set aside the Agreement, and divided the property owned at trial in accordance with the *FLA*. With respect to traceable exclusions, the decision sets out the following principles:

(1) If the excluded property of a spouse is used to acquire other property owned at the time of separation, then the spouse is entitled to an exclusion.

In this case, Mr. Roy was entitled to an exclusion from the division of the family home of the value of the property he brought into the relationship because the sale proceeds of that pre-relationship property were used to purchase the family home (paras. 196-200). Likewise, Ms. Asselin was entitled to an exclusion for her investment accounts because the Court accepted that these investments were traceable to her inheritance (para. 217). She was also entitled to exclude $10,000, which she invested in a jointly-owned property acquired during the relationship, because that was traceable to her inheritance (para. 218).

(2) The value of excluded property traceable into family property is payable in the first instance to the party who claimed the exclusion before the family property is divided (e.g., paras. 202 and 218).

(3) If there is no equity or insufficient equity at the time of trial in the asset into which excluded funds can be traced, then a spouse cannot trace the exclusion into other family property.

In this case, Ms. Asselin had invested $154,000 from her inheritance into one of the jointly-held properties acquired during the relationship, but it had little equity by the time of trial. The court held:

> [section] 85 doesn't provide for a tracing of otherwise excluded funds beyond the asset which was acquired through the disposition of her inheritance. Just as [Ms. Asselin] is entitled to no consideration for monies expended by her from the inheritance on matters such as travel or other disposables, if there is no equity or

> insufficient equity in [the jointly-owned property acquired during the relationship] to repay her original investment, she cannot look to other family property to make up the difference (para 222).
>
> Likewise, Mr. Roy was not entitled to claim an exclusion for the equity of property that he brought into the relationship which had little or no equity at the date of trial (paras 206-208). The Court held that there was nothing left of the "excluded portion" of the property to maintain for the benefit of Mr. Roy (para 208).

(4) The use of excluded property or funds to pay down a mortgage, thereby increasing the value of family property, entitles the spouse to an exclusion.

Such funds are traceable to the increased equity in family property and this is not a payment of debt that erases an exclusion. In this case, Mr. Roy was entitled to an exclusion for the amount by which he paid out the mortgage registered against the family home. He had used part of his inheritance to pay the mortgage (paras. 201-2).

(5) In order to obtain an exclusion for excluded funds used to improve property, the spouse seeking the exclusion must show that the improvements have enhanced the value of the property.

In this case, Ms. Asselin sought to exclude funds from her inheritance in the amount of $120,000, which were used to improve the family home. The court noted that "were those improvements demonstrated to have enhanced the value of the property, the enhanced value would be excluded property" (para. 223). Because Ms. Asselin did not present evidence that the improvements resulted in an identifiable appreciation in the value of the family home, the court did not grant an exclusion. It left open the issue of whether the loss of her investment was something that ought to be compensated as a matter of fairness (para. 225). Ultimately, as addressed below under the heading "Determining When an Equal Division Would be Significantly Unfair," the court found that there was no basis to make an adjustment on the grounds of significant unfairness, save for possible reservations concerning pension division.

The *Asselin* decision sheds some light on the approach to be applied under the *FLA* and the type of evidence that will be necessary to prove exclusions. Counsel for Ms. Asselin suggested that the court should apply a "broad brush" approach to the parties' competing claims for exclusions (para. 191). The court rejected that approach as being inconsistent with the approach mandated by the *FLA* (para. 192). Instead, the court's reasons indicate that historical appraisals and other evidence as to the value of excluded property at the date of cohabitation or the date of acquisition are normally required to assess claims for exclusions (e.g., paras 196, 201, and 213-14). Accordingly, the court rejected Mr. Roy's claim that a portion of the acreage property that he acquired with inherited funds should be excluded, because no documents were produced to allow the court to determine the extent of Mr. Roy's down payment and to positively identify the source of those funds as his inheritance (paras. 209-12). The court held that: "the absence of any evidence as to the amount of the down payment or any basis upon which to make an informed estimate of the amount precludes any finding that any portion of the [acreage property] is excluded property" (para. 210).

Likewise, Mr. Roy was not entitled to excluded his RRSP, savings, personal effects and musical instruments, all of which were set out in the Agreement as assets owned by him, because the court was unable to find that any of that property still existed or was traceable into other property presently owned by him (para. 214). No evidence was led confirming the values of those assets or what had become of them (para. 213).

Nonetheless, even though Mr. Roy did not adduce the evidence that would normally be required, the court found two traceable exclusions for Mr. Roy based on informed estimates.

First, in order to determine the equity from Mr. Roy's pre-relationship home that was traceable into the family home, the court made an estimate based on the difference between the purchase price of the property in 1980, seven years before the relationship began in 1987 and the sale price of the property in 1991, four years after the relationship commenced. The court found that the home increased in value by $60,000 in that 11 year period that it was owned and determined that $35,000 of that increase in value occurred during the seven years that the property was owned before the relationship began (paras. 197-99). Mr. Roy was entitled to an exclusion in the total amount of $150,000: the purchase price of $115,000 plus the growth in value that occurred between the home's purchase and the commencement of the relationship. The court noted that Mr. Roy was not cross-examined as to the amount of the increase in value of the home and there was no other evidence before the court on that issue (para. 199). Had Ms. Asselin challenged Mr. Roy's testimony, query whether the court would have granted the exclusion.

Second, the court considered Mr. Roy's claim for an exclusion because he used his inheritance to pay the balance owing on the mortgage against the family home. The estimated payout amount of the mortgage was $115,000. The court found that the principal amount of the mortgage was $135,000 when the family home was purchased in 1991, and that the mortgage payments made between 1991 and 1998 would have reduced the principal outstanding (paras. 201-2). Mr. Roy was entitled to an exclusion for $115,000. Again, the court noted, at para. 201, that there was no dispute that the mortgage was discharged by funds provided by Mr. Roy without contribution from Ms. Asselin.

In addition, the court commented (at paras. 105-6) on the types of evidence future litigants advancing claims for exclusions under the *FLA* will be required to provide:

(1) Where exclusion of property is sought, documents showing the value of the property as at the time cohabitation commenced and at the date of separation will be critical;

(2) Where excluded property has changed character into another asset, documents should be provided to allow the court to trace the transaction back to the property said to be excluded; and

(3) Where inheritances are said to come into play, estate documents should be produced.

Further, the court stated that many of the accounting problems encountered by the parties would have been avoided if they had prepared Scott Schedules detailing their assets and liabilities as of the date of separation (paras. 104 and 169).

V. Characterizing Family Debt

Section 86 of the *FLA* states that "family debt" includes all financial obligations incurred by a spouse:

(a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate. [The relationship begins on the earlier of: the date on which the spouses begin to live together in a marriage-like relationship or the date of their marriage: s. 3(3)]; and

(b) after the date of separation, if incurred for the purpose of maintaining family property.

Section 81 states that, subject to an agreement or order that provides otherwise, generally all family debts are to be shared equally by the spouses, regardless of their respective use or contribution. This equal sharing of family debt is subject to the limited jurisdiction of the court to vary the sharing under s. 95 if the equal sharing of family debt would be significantly unfair. This issue is discussed below under the heading "Determining When an Equal Division Would be Significantly Unfair."

In *Asselin*, *Mr.* Roy claimed that the purpose of the debt in his name, in excess of $81,000, incurred after the date of separation was for "construction expenses." He sought to share this debt as a family debt under s. 86(b). The court found that it was insufficient for Mr. Roy to provide only oral testimony and a Form F8 Financial Statement in support of his claim. The *FLA* requires cogent documentary evidence to establish that debt is a family debt (para. 241). The court noted that only Mr. Roy had the wherewithal to produce documents relevant to his claim (para. 244). Ultimately, the court held that the mortgages acquired during the relationship and the mortgage that was refinanced during the relationship, were family debts (para. 248).

The court emphasized the evidence necessary to advance claims that debts are family debts (para. 247):

> Absent proof of debt existing at the time of separation coupled with proof, in the broad sense of the word, as to how the debt was incurred (so as to assess whether it would be significantly unfair to divide such debt equally), [Mr. Roy] is responsible for whatever debt he now has in his name.

VI. Determining When an Equal Division Would be Significantly Unfair

Under the *FRA*, the court could divide assets unequally if an equal division would be "unfair." Under the *FLA*, the threshold for reapportionment and unequal division has been elevated to "significant unfairness." That is the threshold that must be met in order to:

(1) set aside an agreement on the distribution of property and debt between spouses (s. 93(5));

(2) divide family property or family debt other than equally (s. 95(1), (2)(i));

(3) divide property normally excluded from division (s. 96(b)); and

(4) set aside an agreement on spousal support (s. 164(3)).

In particular, s. 95(1) of the *FLA* provides a limited discretion to the court to order an unequal division of family property or family debt, or both, if it would be significantly unfair to:

(1) equally divide family property or family debt, or both, or

(2) divide benefits as required under Part 6 [*Pension Division*].

Section 95(2) sets out the factors the court may consider when determining whether it would be significantly unfair to equally divide family property or family debt or pensions:

(a) the duration of the relationship between the spouses;
(b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) *[setting aside agreements respecting property division]*;
(c) a spouse's contribution to the career or career potential of the other spouse;
(d) whether family debt was incurred in the normal course of the relationship between the spouses;

> (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
> (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
> (g) the fact that a spouse, other than a spouse acting in good faith,
> (i) substantially reduced the value of family property, or
> (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
> (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
> (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

Finally, s. 95(3) provides that the court may also consider:

> the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 *[objectives of spousal support]* have not been met.

To date, there have been five decisions considering the concept of significant unfairness under s. 95: *Asselin*, *Karreman v. Karreman*, 2014 BCSC 381, [2014] B.C.J. No. 409, *L.G. v. R.G.*, 2013 BCSC 983, [2013] B.C.J. No. 1159, *Bressette*, and *P.N.K.*

In *Asselin*, the court found that there was no significant unfairness in an equal division of the family property, save for possible reservations concerning pension division (paras. 253-54). However, the court did not provide an analysis of what would constitute significant unfairness. The court did note that the parties' relationship was long, and the division of property under the *FLA* would leave each party in a position of economic well-being and self-sufficiency, despite the fact Mr. Roy was not working (para. 255).

Karreman was also determined under the *FLA.* Both parties were self-represented and Madam Justice Duncan did not have the benefit of submissions on the meaning of "significantly unfair." She considered s. 95 and found that there were "elements to this case that clearly militate against dividing up the proceeds of sale [of the family home] equally between the parties" (para. 15). If the proceeds were divided equally, the result would have been that the husband received a double benefit—giving the wife the family home in lieu of child support and then effectively clawing half of it back, while retaining the benefit of his equipment and vehicles. In the result, the court concluded that it would be significantly unfair to award the husband any of the proceeds from the matrimonial home.

In *L.G.*, a case involving married spouses decided under the *FRA*, the court commented on the interpretation of significantly unfair in *obiter* (para. 71):

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

In that case, Mr. Justice Brown noted that his conclusions with respect to the division of assets would have been the same under either Act.

Bressette also involved unmarried couples and a claim to property. Ms. Bressette commenced her claim on the basis of constructive trust and unjust enrichment under the *FRA*. Subsequently, she amended her claim to include reliance on the *FLA*. Given the ambiguity in the transition provisions of the *FLA* and the lack of legal argument addressing whether the property division regime of the *FLA* applied, Griffin J. applied the common law principles of unjust enrichment. Madam Justice Griffin concluded that the result under the *FLA* would not have differed from the result based on the unjust enrichment analysis (para. 26).

The court granted Ms. Bressette an interest in two properties based on the principles of unjust enrichment. The court found that she had made significant contributions to both properties, that the parties expected that she would share equally in the surviving value of the properties, and that Mr. Henderson would be enriched if Ms. Bressette were not compensated for her contributions to the properties (paras. 188-89). In *obiter*, Griffin J. held that if the *FLA* applied, and she applied the "significantly unfair" test, it would not be significantly unfair to grant Ms. Henderson an interest in those properties. However, the Court noted that it would be significantly unfair to grant an interest in the rest of the property registered in Mr. Henderson's name to Ms. Bressette.

P.N.K. involved unmarried spouses and a claim to property on the basis of a unjust enrichment and constructive trust. The court found that P.N.K. had not made out a claim in unjust enrichment and noted that the parties had orally agreed to remain financially separate. After hearing submissions on the applicability of the new legislation, Mr. Justice Punnett determined that the *FLA* did not apply. However, he considered that his conclusions regarding property division would have been the same under either the *FRA* or the *FLA*. C.L. had contributed to P.N.K.'s career or career potential but P.N.K. had not contributed to C.L.'s career or career potential. As those were relevant considerations under s. 95(2)(c) of the *FLA*, the Court found that it would be significantly unfair to equally divide the real and personal property held in C.L.'s name. Thus, had the *FLA* applied (with the result that P.N.K. would be entitled to an equal interest in the property despite not being able to make out a claim in unjust enrichment), the court would have found that an equal sharing of family property would be significantly unfair. The court did not attempt to define the term "significantly unfair."

Thus, in *Bressette* and *P.N.K.*, had the *FLA* applied (with the result that the claimant would be entitled to an equal interest in all family property despite not being able to make out a claim in unjust enrichment to all of the properties at issue), the court would have found that an equal sharing of all of the family property would be significantly unfair.

VII. Dividing Family Property & Family Debt

Section 81 of the *FLA* provides that on separation, each spouse is presumptively entitled to an undivided half-interest in all family property as a tenant in common, and is equally responsible for family debt, regardless of their respective use of, or contribution to, family property and family debt. This is of course subject to an agreement or a court order that provides otherwise. Further, a party may seek to rely on s. 95, which allows the court to change the presumptive equal sharing of family property and family debt in limited circumstances, and/or s. 96, which allows the court to divide otherwise excluded property in limited circumstances.

As a result of s. 81, there is now only one triggering event which determines the parties' entitlement to an interest in family property: the date of separation.

The question of when spouses have separated takes on increased importance in light of that sole triggering event under the *FLA*. Section 83(1) offers some guidance about when parties have not

separated. It provides that for the purposes of Part 5 of the *FLA* (dealing with the division of property), spouses are *not* considered to have separated if, within one year after separation:

> (a) they begin to live together again and the primary purpose for doing so is to reconcile, and
>
> (b) they continue to live together for one or more periods, totaling at least 90 days.

Section 3 offers some guidance as to when spouses may be separated. Section 3(4)(a) states that spouses may be separated despite continuing to live in the same residence. Section 3(4)(b) provides that the court may consider, as evidence of separation:

> (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
>
> (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

In addition to the foregoing principles, the common law principles developed under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) regarding when the spousal relationship has ended may assist in determining the date of separation. The key factor to consider is whether one of the parties has formed an intention to end the matrimonial relationship. Physical separation is a factor to be considered but it is not determinative: *L. (M.B.) v. L. (B.S.)*, 2003 BCSC 229, [2003] B.C.J. No. 553 at para. 65).[5]

Section 83(2) addresses the circumstances of parties who enter into an agreement (or who have received a court order) dividing family property who reconcile and then separate again. It provides that nothing in Part 5 of the *FLA* affects a division of property under such an agreement or court order.

Section 87(a) provides that the value of family property must be based on its fair market value, unless an agreement or court order provides otherwise and except in relation to a benefit under a pension plan.

Section 87(b) provides that the value of family property and family debt must be determined as of the date:

> (i) an agreement dividing the family property and family debt is made, or
>
> (ii) of the hearing before the Court respecting the division of property and family debt.

Thus, while the date of separation is the triggering event, the date of valuation is the date an agreement is entered or the date of trial.

The *FLA* limits the property that the court may divide. Section 94 clarifies that the court may not make an order respecting the division of property and family debt that is the subject of an agreement described in s. 93(1) (which deals with setting aside written agreements respecting property division), unless all or part of the agreement is set aside under s. 93. Generally, the court cannot divide excluded property. However, s. 96 gives the court limited jurisdiction to make an order dividing excluded property if:

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5 See Briana J. Hardwick, "The Fundamentals of Property Division under the Family Law Act: An Examination of Triggering Events and Separation, the Definition of Family Property, Excluded Property and the Definition of Family Debt" (Paper prepared for CLEBC Conference, *The Family Law Act: Everything You Always Wanted to Know*, January 2013)[unpublished] at 2.1.4.

(a) family property or family debt located outside British Columbia cannot practically be divided, or
(b) it would be significantly unfair not to divide excluded property on consideration of:
    (i) the duration of the relationship between the spouses , and
    (ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

To date, the only case wherein the court divided property under the *FLA* is *Asselin*. There, the court noted that, unlike the regime under the *FRA*, there is no requirement under the *FLA* to establish that an asset was ordinarily used for a family purpose or that a spouse contributed to the asset; instead, "the Court merely has to determine that such property existed on the date of separation and at least one spouse owned it or had a beneficial interest in it" (para. 160).

In terms of the approach to dividing family property applied in *Asselin*, the court reviewed the assets owned throughout the relationship, and determined:

(1) which assets were excluded property, on the basis that such assets were owned before cohabitation, noting that any increase in value would be family property; and

(2) which assets were family property, subject to claims for excluded property traceable into the family property (paras. 162-68 and 173).

The court then summarized the divisible assets, subject to excluded property claims, that were to be divided equally (paras. 173-74). After considering the claims for excluded property traceable into property owned at the date of separation, claims for division of family debt, and the issue of whether equal division would be significantly unfair, the court ordered an equal division of the family property, and allowed the parties 90 days to resolve how their respective interests in the family property would be realized (paras. 256-57). The court deferred determination of the parties' pension entitlement to allow for production of evidence regarding the values and structure of the pensions (para. 186).

The court dealt with the issue of when the assets to be divided should be valued. The valuation of assets which are family property consisting of accounts and financial institutions subject to day to day use, such as checking accounts, should be taken as at the date of separation (para. 171). However, "for those accounts representing long-term investments, specifically the RRSPs of each party found to be family property; those are to be divided in *specie* at the time of division unless it can be shown contributions were made post-separation. In such case, the amount of such contribution should be subtracted from the divisible portion of the asset" (para. 172).

VIII. Concluding Remarks

The *FLA* incorporates an excluded property model that permits less judicial discretion, particularly at the initial stage of identifying which assets are subject to division. The court no longer identifies the property subject to division first and then determines whether that property has an "ordinary use for a family purpose," as it did under the *FRA*.

The inclusion of unmarried spouses in the property division scheme enhances consistency in the treatment of married and unmarried couples.

While the *FLA* has been in force since March 2013, few BCSC cases have interpreted the provisions governing the division of family property. There are no Court of Appeal cases to date and many questions remain unanswered. While the property division scheme under the *FLA* resembles the

Alberta *Matrimonial Property Act*¸ R.S.A. 2000, c. M-8, it is surprising that of the BC cases referred to in this paper, only one—*Meservy*—referred to legislation or jurisprudence in other Canadian jurisdictions. In that case, Hyslop J. referred to Ontario jurisprudence in her analysis of whether the *FLA* has a retrospective effect; she was not asked to consider cases dealing with the property division regime in other jurisdictions.

In the past year, our Supreme Court has provided some direction about the issues discussed in this paper. While the Ministry of Justice has indicated that the higher test of "significant unfairness" was introduced into the *FLA* to reduce the incidence of reapportionment, it will be interesting to see how the Court of Appeal interprets that phrase. It is worth noting that, in *Asselin*, Mr. Justice Harvey obviously considered the concept of "significant unfairness" to be elusive and he avoided defining it. At para. 251 ff, he stated:

> Otherwise, I conclude that an equal division of the family property as earlier found would not be "significantly unfair" to either party.
>
> In concluding this, I refer to the remarks of Justice Stewart who, in *Jacobellis v. Ohio* (1964), 378 U.S. 184 , famously stated:
>
> > I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hard-core pornography"]; and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*, and the motion picture involved in this case is not that. [Emphasis added]
>
> I, too, will leave to others to formulate an intelligible definition of "significantly unfair" as that term is defined in section 95 and elsewhere in the *Act*.
>
> However, "I know it when I see it" and this, save for my possible reservations concerning pension division, this is not "it".

IX. Appendix A—Summary of Cases Interpreting the Property Division Provisions of the Family Law Act (the "FLA")

A. Trudeau v. Panter, 2013 BCSC 706, [2013] B.C.J. No. 820

Facts: the parties were unmarried spouses, who began living together in a marriage-like relationship in November 2007 and separated in mid-October 2011. The claimant commenced an action seeking an interest in a mobile home on the basis of unjust enrichment. There was no claim under Part 5 of the *FLA*. The claimant sought spousal support, which required her to establish that she was a spouse under s. 3(1)(b) of the *FLA*.

Issue: whether the claimant has lived with the respondent in a marriage-like relationship?

Reasons:

The court confirmed that the onus rests with the party asserting spousal status to establish same (para. 35).

The court cited the Court of Appeal decision *Gostlin v. Kergin*, 1986 CanLII 164 (B.C.C.A.), 3 B.C.L.R. (2d) 264 at 267, for the principles that apply, and the factors to be considered, in determining if parties live together in a marriage-like relationship (para. 36):

> In deciding whether a couple lived together as husband and wife, I would be guided by the scheme and intention of the Act itself. The purpose of the legislative scheme is to impose on an unmarried couple the same obligations under [former] s. 57 as are voluntarily undertaken by a married couple. So I would ask whether the unmarried couple's relationship was like the relationship of the married couple in that the unmarried couple have shown that they have voluntarily embraced the permanent support obligations of [former] s. 57. If each partner had been asked, at any time during the relevant period of more than two years, whether, if their partner were to be suddenly disabled for life, would they consider themselves committed to life-long financial and moral support of that partner, and the answer of both of them would have been "Yes", then they are living together as husband and wife. If the answer would have been "No", then they may be living together, but not as husband and wife.
>
> Of course, in the particular circumstances of any case, the answer to that question may prove elusive. If that is so, then other more objective indicators may show the way. Did the couple refer to themselves, when talking to their friends, as husband and wife, or as spouses, or in some equivalent way that recognized a long-term commitment? Did they share the legal rights to their living accommodation? Did they share their property? Did they share their finances and their bank accounts? Did they share their vacations? In short, did they share their lives? And, perhaps most important of all, did one of them surrender financial independence and become economically dependent on the other, in accordance with a mutual arrangement?
>
> All those questions, and no doubt others, may properly be considered as tending to show whether a couple who lived together for more than two years have done so with the permanent mutual support commitment that, in the relevant sense of the Family Relations legislation, constitutes living together as husband and wife.

The court held that while the parties lived together, the evidence did not establish that they were committed to a permanent relationship (para. 37). Ultimately, the court dismissed the claimant's claim for spousal support, and held that the parties were not spouses within the meaning of either s. 1(1) of the *Family Relations Act* or s. 3(1) of the *FLA*.

B. Smith v. Anderson, 2013 BCSC 2009, [2013] B.C.J. No. 1557

Facts: the parties were unmarried spouses, who began living together in a marriage-like relationship some 20 years ago and separated on or about January 15, 2012, according to the claimant, or September 2010, according to the respondent. The claimant commenced the action in May 2012 on the basis of unjust enrichment. The claimant sought leave to further amend his Notice of Civil Claim to include claims for property division under the *FLA*.

In December 2012, the claimant's counsel advised that the claimant would be seeking further amendments once the *FLA* came into force. An examination for discovery of the claimant was conducted in January 2013. The claimant's application to amend was heard on October 30, 2013 (which is within two years of the claimant's date for separation, but is more than two years after the respondent's date for separation). A five-day trial was set for January 20, 2014.

Issues: whether the claimant ought to be granted leave to amend his claim to include claims for division of property under the *FLA*, despite the possibility that such claims are statute-barred?

Positions:

The respondent opposed on the grounds that the amendments are statute-barred. Further, she argued that a significant prejudice will result if the amendments are allowed, given that all of the discovery processes and trial preparation conducted to date had focused on the constructive trust/unjust enrichment claim, and will be effectively wasted time and money; and the trial date may be lost to allow for additional discovery addressing the new claims (para. 18). She also argued that the *FLA* can have no retroactive or retrospective effect (para. 18).

The claimant argued that he was within the time limit imposed by s. 198, and that if his amendments were not allowed, a separate claim would be initiated at a greater expense to both parties and contrary to the objectives of the Supreme Court Family Rules (para. 19).

Reasons:

Given the conflict in the evidence about the date of separation, the court stated that it would leave determination of the date of separation to the trial judge (para. 22).

The court determined that it was unable to conclude that the claims made in the proposed amendments were bound to fail (para. 31). The test for whether leave ought to be granted where proposed amendments make claims that are potentially statute-barred is set out in *G.A.D. v. B.C. Children's Hospital*, 2003 BCSC 443, [2003] B.C.J. No. 654 (appv'd in *Chouinard v. O'Connor*, 2011 BCCA 121 (CanLII)) (para. 23):

> (a) amendments should be permitted as are necessary to determine the real question in issue between the parties
>
> The basic rule, set out expressly in the former Rules and no doubt still applicable, is that such amendments should be permitted as are necessary to determine the real question in issue between the parties. Rule 1(5) requires an interpretation of the rules which permit the just and speedy determination of the dispute on its merits. Similarly, the *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 10, requires the court to grant all such remedies as any of the parties may appear to be entitled to "so that, as far as possible, all matters in controversy between the parties may be completely and finally determined. *Victoria Grey Metro Trust Co. v. Fort Gary Trust Co.* 1982 CanLII 227 (BC SC), (1982) 30 B.C.L.R. (2d) 45 (S.C.);

> (b) the court will not give its sanction to amendments which violate the rules that govern pleadings, including the prohibition of pleadings which disclose no reasonable claim. In considering this question, the court will apply the same tests and considerations as applicable on an application to strike claims already pleaded, see *Victoria Grey Metro Trust Co. supra*;
>
> (c) a party is not required to adduce evidence in support of a pleading before trial, see *McNaughton v. Baker* 1988 CanLII 3036 (BC CA), (1988), 25 B.C.L.R. (2d) 17 (B.C.C.A.);
>
> (d) on an application to amend the facts alleged are taken as established, see *Canada (Attorney General) v. Ellis-Don Ltd.,* 2000 B.C.C.A. 111;
>
> (e) the discretion is to be exercised judicially, in accordance with the evidence adduced and the guidelines of the authorities. Factors to be considered include: the extent of delay, the reasons for delay, any explanation put forward to account for the delay, the degree of prejudice caused by the delay, the extent of the connection between the existing claims and a proposed new cause of action. The over-riding consideration is what is just and convenient, see *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* 1996 CanLII 3033 (BC CA), (1996), 19 B.C.L.R. (3d) 282 (C.A.).

The court reviewed the authorities to date, and concluded that none addressed whether an amendment should be allowed in an action already commenced with a separation date that *may* be within the two-year period required by s. 198. The Court then considered whether it would be just and convenient to allow the amendments, and held as follows (paras. 33-36):

> First, I accept the claimant's submission that denying the amendments would simply result in another action being commenced. A multiplicity of proceedings is to be avoided. A second action will certainly not lead to a speedy resolution of the parties' dispute: Rule 1-3 of the SCFR.
>
> Second, I find that no fault lies with the claimant for the suggested delay in bringing this application before the court. The application could not have been made before the *FLA* came into force. The delay in having the application heard can be attributed to a number of factors, including both counsel's other commitments and the vagaries of Supreme Court chambers time.
>
> As well, I accept that the respondent was given reasonable notice that these amendments were going to be pursued.
>
> Third, while it is appreciated that the amendments may lead to further discovery (and probably additional expert reports), any resulting prejudice to the respondent can be remedied by the trial judge in a costs award.

Ultimately, and after weighing all of the foregoing, the court allowed the amendments (para. 37).

C. Meservy v. Field, 2013 BCSC 2378, [2013] B.C.J. No. 2844

Facts: the parties were unmarried spouses, who began living together in a marriage-like relationship in January 2009 and separated in September 2011. Their relationship was longer than two years and they had been separated for less than two years when the action was filed (the action was commenced on March 14, 2013, before the *FLA* came into force on March 18, 2013).

The claimant commenced the action on the basis of unjust enrichment, seeking an interest in the former family home in the name of the respondent (para. 10). The claimant also sought a declaration that the respondent had no interest in two pieces of real property that she owned or had an interest in. The respondent filed a counterclaim seeking orders of unequal division of family property pursuant to s. 95 of the *FLA* (para. 13).

The parties were previously directed by the Master presiding over the Judicial Case Conference to bring an application to determine whether the *FLA* applies. The respondent brought an application seeking a declaration that Part 5 of the *FLA* applied to the action.

Issues:

(1) Whether the parties were spouses under the *FLA* for the purposes of Part 5 of the *FLA*?

(2) Whether Part 5 of the FLA applied?

Positions:

The respondent argued that at the time he filed his counterclaim, he was a former spouse under ss. 3(1)(b)(i), 3(2) and 198 of the *FLA*, and was entitled to bring a claim under Part 5 of the *FLA* (para. 5). He further argued that the *FLA* is retrospective (para. 9).

The claimant argued that persons in "marriage-like relationships which commence on or after March 18, 2013, and endure for a period of two years, are entitled to make claims under Part 5 of the *FLA*" (para. 6), and for "those persons whose marriage-like relationships have endured for more than two years, on March 18, 2013, but have not ended, the *FLA* will apply to the whole of their relationship both before and after the *FLA*'s proclamation" (para. 7). In other words, the *FLA* applies to *only* those relationships: (1) that have lasted for two years; and (2) in which the parties were living together when the *FLA* came into force, or alternatively separated after the *FLA* came into force. She further argued that if the claimant's argument were correct, then the *FLA* is retroactive and cannot apply (para. 9).

Reasons:

Summary of Prior Decisions Interpreting the FLA

The court reviewed the prior decisions that related to the issue of determining whether unmarried parties are former spouses entitled to rely on Parts 5 and 6 of the *FLA*, but did not directly address the issue.

The court commented that there is support for the respondent's argument in *Reynolds v. Huard*, 2013 BCSC 1251, [2013] B.C.J. No. 1533, a decision of the Supreme Court involving an action in unjust enrichment seeking a constructive trust. By way of background, in *Reynolds*, the parties had lived together in a marriage-like relationship from 1992 to 2003, the action was commenced in 2008, and they had been separated for nine years (i.e., more than the two year period permitted under s. 198). The claimant sought to amend his claim to include a remedy under Parts 5 and 6 of the *FLA*. The Court stated (paras. 22-23):

> In Reynolds, the Master dismissed the application for the amendment, amongst other reasons, as the claim was barred pursuant to s. 198(2)(b) of the *FLA*. The Master's decision was appealed.
>
> [The Supreme Court hearing the appeal] refused the amendments sought and, in doing so, said the following:

> [26] In my view there is nothing in the Act which would allow me to conclude the legislation was intended to have unlimited retroactive or retrospective applicability.
>
> [27]… there is clear language that supports a determination that the Legislature intended that the *FLA* would have some retrospective application. For example, the transition provisions generally support the use of the *FLA* even when proceedings have begun under the *Family Relations Act*…, s. 3 of the *FLA* states that it applies to all "former spouses," all new proceedings must be brought under the *FLA* even if the end of a marriage-like relationship occurred prior to the *FLA* coming into effect, and s. 198(1) states "a proceeding under this Act may be started at any time."
>
> [28] However, even though the *FLA* has some retrospective application, this is insufficient to support a claim that the Act is retrospective in all situations. …
>
> [29] The limit of the retrospective power of the *FLA* can be detected in the language of the Act. For example, although s. 198(1) allows a proceeding to be started at any time, s. 198(2) requires a proceeding under Part 5, 6, or 7 of the Act to be started within two years of separation or divorce.

The Supreme Court hearing the appeal] refused to permit the amendments stating at para. 36:

> In this case, because the spouses separated in 2003 Mr. Reynolds could not commence a proceeding under Part 5 of the *FLA* in 2013. To allow him to avoid the limitation period in s. 198(2) through an amendment would be to allow him to do something indirectly that he could not do directly.

The court reviewed *P.N.K. v. C.L.*, 2013 BCSC 1856, [2013] B.C.J. No. 2231, wherein the claimant's application to amend his claim for constructive trust to include claims under the *FLA* was dismissed. The parties were unmarried spouses. In *P.N.K. v. C.L.*, the court found that the parties separated more than two years prior to the *FLA* coming into force and the potential claim was barred by the application of s. 198(2) (para. 24).

Thus, in both the *Reynolds* and *P.N.K. v. C.L.* decisions, the court found that the parties had separated more than two years before the *FLA* came into force, and refused an application to amend the claims to include claims under the *FLA*.

The court reviewed *Bressette v. Henderson*, 2013 BCSC 1661, [2013] B.C.J. No. 1977, wherein the claimant commenced an action based on constructive trust and unjust enrichment, and amended her claim to include relief under the *FLA*. The parties were not married and lived in a six or seven year marriage-like relationship before they separated in February 2012. In *Bressette*, the trial judge found that the claimant's amendments were brought within the limitation period provided by s. 198. However, the trial judge in *Bressette* noted that there is ambiguity in the drafting of the transition provisions of the *FLA* (para. 25):

> [123] Arguably, there is ambiguity in the drafting of the transition provisions of the *FLA* as concerns property rights of unmarried spouses. The transition section

> does not expressly address what is to happen to proceedings between unmarried spouses which are undetermined when the *FLA* comes into force: does the new law apply or not?
>
> …
>
> [126] The respondent argues that the clear intention of the legislature must have been to exclude any existing proceedings between separated spouses, whether unmarried or married, from the provisions of the *FLA*. However, this position raises many questions. If that is the case, why did the legislature only expressly exclude property proceedings brought under the *Family Relations Act*? Was there a legislative intention to immediately confer benefits on unmarried spouses and to provide clarity in the law, so that resort to more uncertain common-law remedies would be unnecessary? Was the two-year limitation period and "significant unfairness" basis for reapportionment thought to be a sufficient protection for unmarried spouses whose relationship had either begun or run its course before the *FLA* was brought into force?

Ultimately, the court in *Bressette* concluded that it did not have the benefit of full legal argument as to whether or not Part 5 of the *FLA* applied (the claimant was a lay litigant), and concluded that the result under the *FLA* would not have differed from the result based on the unjust enrichment analysis (para. 26). The court decided the property issues under the common law principles of unjust enrichment.

Comments on the Purpose of the FLA

The court summarized the impact of ss. 198(1) and 198(2)(b) as requiring that "the spouse or former spouse must commence their claims pursuant to Part 5 of the *FLA* no later than two years after the former spouse ceased living in the marriage-like relationship" (para. 19).

The court made the following comments, which pertain generally to the purpose of the *FLA*, its distinction from the *Family Relations Act*, R.S.B.C. 1996, c. 128 (the "*FRA*") and its preservation of common law claims for unjust enrichment (paras. 29-31):

> The *Family Relations Act*, R.S.B.C. 1996, c. 128 [*FRA*] allowed only married persons to seek remedies of property division. The purpose of the *FLA* was to include those in marriage-like relationships to have the same rights and obligations as those that are married and, so long as those persons that are in a marriage-like relationship qualify as spouses. Whether they were former married spouses or former marriage-like spouses, their claims must be started within two years from the date of separation in the case of marriage-like relationship spouses and the case of married spouses within two years of the date of their divorce. This puts married spouses and marriage-like relationship spouses all on an equal footing as intended by the legislature.
>
> The transition section of the *FLA*, s. 252 does not relate to those persons who are in a marriage-like relationship because they had no property rights under the *FRA* to continue or to pursue.
>
> The granting of property rights under Part 5 and 6 of the *FLA* is in addition to and not in substitution of rights enjoyed by spouses "under equity or any other law" [s. 104(2) of the *FLA*]. As an example, claims for unjust enrichment and claims of trust are not replaced by the *FLA*.

Retroactive vs. Retrospective Effect

Recognizing that the issue raised by the parties is more than whether the two-year limitation period has passed, the court considered whether the legislature intended Parts 5 and 6 of the *FLA* to apply to unmarried spouses who separated before the *FLA* came into force—in other words, would those individuals be entitled to rely on the *FLA*? This involved a determination of whether the legislature intended the *FLA* to have retroactive or retrospective effect.

The court explained the distinction in the authorities between statutes that have a retroactive effect and those with a retrospective effect. In particular, the court cited E.A. Driedger's article, "Statutes: Retroactive Retrospective Reflections" (1978) 56 *Canadian Bar Review* 264, at 268 and 269, which provides a definition of retroactive and retrospective legislation (para. 34):

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.

The court also cited Pierre-André Coté, *The Interpretation of Legislation in Canada*, Fourth Ed. (para. 39):

> Normal retroactive effect modifies all the legal consequences of the facts at issue, regardless of the moment when they were accomplished. However, the legislature can decide to modify only the future effects of past facts, while leaving unchanged the consequences which occurred prior to commencement. This second case is termed "retrospective effect".

The court further cited Coté and provided an example of retroactive effect (para. 42):

> For example, a new statute may convey a benefit on all married persons. Here, the date of marriage is of no significance: it is the ongoing fact of being married and not the momentary fact of marriage which results in application of the law. As long as a person's marital status is "married" subsequent to the commencement of the statue, they may claim the benefits created by the statue. The date of marriage is irrelevant from the standpoint of transitional law.

Further, the court confirmed that there is a presumption against legislation having a retroactive effect (para. 25).

Application to Case at Bar

The court rejected the claimant's arguments and held that the *FLA* is "not dependent on the parties living together at the time of the *FLA* coming into effect" (para. 28). Further, the court noted "if property rights applied to only those in a marriage-like relationship on March 18, 2013, then the legislature would have excluded former spouses from seeking property rights under the *FLA*, and defined their entitlement by restricting or narrowing the definition of 'spouse' (para. 32).

The court found that the claimant acknowledged that she and the respondent were former spouses in her Notice of Family Claim, by stating that they began their marriage-like relationship in January 2009 and separated in September 2011 (para. 18).

The court determined that the parties are "former spouses" by operation of the definition of former spouse in s. 3, and so long as the action is started within two years after the date that they separated, either party may make a claim under Part 5 of the *FLA* (para. 27). The court concluded that this "status" occurred prior to the coming into force of the *FLA* (para. 45). To borrow from Driedger, it is this status which serves as the past event that gives rise to new results under the *FLA*. Accordingly, the court concluded that had the respondent not brought his claim within two years after separation, then he would not have the status of a spouse entitled to make claims under Part 5 of the *FLA* (para. 45).

The court reviewed an Ontario Court of Appeal decision, *Re Sanderson and Russell*, 24 O.R. (2d) 429, wherein a claimant sought spousal support under the *Family Law Reform Act*, 1978 (Ont.), c. 2 ("*FLRA*"), which came into force after the parties separated. The issue before the Ontario Court of Appeal was the application of the *FLRA* to a common law relationship that ended before the *FLRA* came into force. In the *FLRA*, the definition of a spouse was that they had to have cohabited together in a conjugal relationship for five years and they had to have resided together the previous year prior to making the application (para. 46). The claimant in *Re Sanderson* made an application for support after the *FLRA* came into force and within the one year period from the date of separation (para. 48). In *Re Sanderson*, the parties lived together for six years in a manner sufficient to meet the definition of spouses in the *FLRA*. In *Re Sanderson*, the respondent resisted the application on two bases (paras. 49-50):

(1) It would be unwarranted retrospective application of the *FLRA* to hold that such period can be the basis of a claim; and

(2) The relationship was over when the *FLRA* came into force and that the parties were no longer spouses.

The Ontario Court of Appeal rejected this argument and stated (para. 50):

> [a]ccording to the scheme of [the *FLRA*] this depends upon whether she was a "spouse" at the time of her application. The appellant submits that she was not because: (1) the five years was complete before March 31, 1978, and (2) that part of [the definition] requiring continuous cohabitation within the preceding year (there is no dispute that this means preceding the application) is a limitation period and not really part of the definition of "spouse". I do not accept this submission. While the one-year period undoubtedly serves the necessary purpose of a limitation provision it is expressly made part of the definition of spouse. Therefore, a person satisfying the requirements of [the definition] is a spouse for the purpose of [spousal support]. … Support then will serve a useful function. With this consideration in mind it seems to me that it is reasonable to regard the final clause of [the definition] as part of the substantive definition of "spouse" and not just a limitation provision. In short, the definition means what it says.

The Ontario Court of Appeal also considered the policy of the *FLRA*, which "… is to enable certain persons who are in need to claim support. … regardless of the kind of "spouse" seeking it" (para. 51).

The Ontario Court of Appeal concluded that the language in the *FLRA* had (para. 52):

> all of the factual ingredients giving a person status to assert a claim for support are contained in the definition provision. This provision, of course, is not an operative one. It defines an existing status, albeit by reference to past events. When the defined term is used in the operative provisions [for spousal support] it is

> reasonable to assume that the Legislature intended that a person having the defined status on the date the Act came into force would be entitled to the benefit of the operative provisions.

The Ontario Court of Appeal found that the *FLRA* was not retroactive because the applicant spouse became a spouse before the *FLRA* became law. The importance was that she was a spouse at the time she made her application (para. 53).

Ultimately, the court found a parallel to *Re Sanderson* and the case at bar. In particular, the *FLRA* gave married and unmarried spouses obligations and rights to spousal support dependent upon their status prior to the *FLRA* coming into force (para. 55). Likewise, as of the coming into force of the *FLA* (paras. 56-57):

> unmarried and married spouses in British Columbia were entitled to seek a division of "property and debt" within two years from the date of their separation in the case of unmarried persons in marriage-like relationships and [in] the case of married people two years from the date of divorce. The two year period relates to their status of a spouse.
>
> As in *Re Sanderson*, the date of separation is not just a limitation period, but is part of the substantive definition of a spouse in British Columbia.

D. Asselin v. Roy, 2013 BCSC 1681, [2013] B.C.J. No. 2005

Facts: the parties were unmarried spouses, who began living together in a marriage-like relationship in October 1987 and separated in May 2011 (24 year relationship). Proceedings had been commenced on the basis of unjust enrichment claims but the parties consented to having their rights determined under the *FLA* under s. 252. The parties also agreed that the Court could make orders affecting the ownership of the properties located in Nova Scotia that were at issue.

Before the relationship began in October 1987, the respondent owned a home on Laurentian Avenue, which he purchased in 1980 for $115,000. In addition, the respondent owned a property in Nova Scotia, pensionable credits, an RRSP and modest savings (para. 16). The claimant moved into the respondent's home. At the time the relationship began, the claimant had no significant assets. During the relationship, the parties acquired properties, as detailed below.

In December 1990, the parties signed an agreement that provided that only property acquired in joint names would be divided upon separation, other property would be separate, and the parties were precluded from claiming an interest in the other's property based on the principles of unjust enrichment and trust law (the "Agreement") (paras. 47-48). The Agreement was prepared by the respondent's counsel, and the claimant did not see it before she signed it (paras. 37, 40, and 120). The claimant did not have legal advice about the Agreement prior to signing (paras. 42 and 119).

In 1991, the respondent sold the Laurentian Ave. home for $175,000, and purchased the new family home located at 313 Princeton Avenue (the "Family Home") (paras. 18-19). The Family Home was registered in the respondent's name and was purchased using the sale proceeds of the Laurentian Ave. home as the down payment. There was a mortgage for $135,000 taken in the respondent's name.

Both parties received inheritances during the relationship. In 1998, the respondent received an inheritance of $150,000 (para. 79). The respondent used some of these funds to pay out the mortgage on the Family Home and as the down payment on an acreage property in his name in Nova Scotia. In 2006, the claimant received an inheritance of $700,000 (para. 81). The claimant retained some of these funds in her separate bank account, spent $120,000 on renovations to the

Family Home, used $154,000 as the down payment on a jointly-owned property in Nova Scotia and $10,000 was put towards another jointly-owned property in Nova Scotia (para. 84).

At the time of separation, there were six properties owned by the respondent, which were acquired as follows:

(1) In 1981, the respondent bought a property in Nova Scotia for $75,000. The respondent could not recall the amount of his down payment, but could recall that the property was encumbered at the time of the parties' cohabitation (para. 59). Since cohabitation, this property was refinanced and the claimant had co-signed on the mortgage (para. 70);

(2) In 1988 or 1989, the respondent bought a property in Nova Scotia, but provided no details as to the purchase price or the source of the down payment (para. 59);

(3) In 1991, the respondent bought the Family Home using funds from the sale of the Laurentian Ave. home, as detailed above;

(4) In 1998, the respondent bought a property in Nova Scotia for $62,000, using $4,000 cash as a down payment and obtaining a mortgage for the balance of the purchase price (para. 60);

(5) In 1998, the respondent bought an acreage property in Nova Scotia and alleged that he used inheritance funds to acquire same (paras. 61-62); and

(6) Later, the respondent bought a property in Nova Scotia for $25,000, using his salary and credit cards (para. 63).

In addition, at the time of separation, there were two properties held in joint names in Nova Scotia, which were acquired after 2006, by using part of the claimant's inheritance. Both parties were liable for the mortgages on these properties (paras. 65-66 and 70).

There were other assets owned at separation (paras. 73-77). The respondent owned pension credits, investments, RRSPs, savings, a violin collection and a vehicle. The claimant owned pension credits, investments that arose from her inheritance, an RRSP and a vehicle.

The respondent asserted that his credit card debt was a family debt (para. 89). The claimant asserted that the three mortgages on the Nova Scotia properties for which she was jointly liable were family debts (para. 90).

Issues:

(1) Is the Agreement binding on the parties and determinative of their property rights?

(2) If the Agreement is set aside or varied, what is the family property, what is the excluded property and what is the family debt?

(3) Would equal division of the family property and debt under the *FLA* be significantly unfair to either party?

Positions:

The claimant contested the validity of the Agreement and sought an equal division of all of the real estate and personal property. The claimant also sought an order that the residue of her inheritance (held in investments and RRSPs) be excluded from the calculation of family property, and that the real and personal property acquired with her inheritance be excluded.

The respondent conceded that the Agreement was unfair as it related to the Family Home, but argued that the Agreement was otherwise binding. In the alternative, he sought an exclusion for the real and personal property owned by him before the relationship began and purchased with excluded property and his inheritance. In particular, the respondent argued that the down payment on the Family Home (arising from the sale of the Laurentian Ave. home, which was owned by him before the relationship began) was excluded property and that the proceeds from his inheritance were excluded property to the extent that they can be traced to family property.

Reasons:

Does the FLA Apply?

The court held that, under the *FLA*, the parties were spouses as a result of their having resided together in a relationship akin to a martial relationship for a period in excess of two years (para. 102). The parties agreed that the property division regime under the *FLA* would apply (para. 99).

Distinctions between the FLA v. FRA

With respect to the distinction between the *FLA* and the former *FRA*, the court stated that "the broad judicial discretion formerly available under the *FRA* [has] been replaced with a more formulaic approach to both the identification and division of family property" (para. 105). Further, the court stated that "[t]he tenor of the new *Act* appears to favour a less interventionist approach than its predecessor, the *FRA*" (at para. 124).

The claimant argued that the court should adopt a "broad brush" approach in determining the parties' competing claims for exclusions (para. 191). The court did not agree, and stated that "these suggestions on property division are not consistent with the approach mandated by the [*FLA*]; rather, the proposed division harkens back to the broad discretion given trial judges under the *FRA*" (para. 192).

Evidence

The court made observations about the nature of evidence that will be required under the *FLA* (paras. 105-6):

(1) Where exclusion of property is sought, documents showing the value of the property as at the time cohabitation commenced and at the date of separation will be critical;

(2) Where excluded property has changed character into another asset, documents should be provided to allow the court to trace the transaction back to the property said to be excluded; and

(3) Where inheritances are said to come into play, estate documents should be produced.

Further, the court noted that it would have expected production of an historical appraisal of the Laurentian Ave. home to properly assess the respondent's claim for an exclusion of the equity of the home at the time of cohabitation (para. 196). The court commented about the insufficiencies in the evidence regarding when assets were acquired, the value of assets at acquisition, and whether assets were used to acquire other assets (see paras. 201 and 213-14).

In addition, the court suggested that litigants should prepare Scott Schedules detailing the assets and liabilities of each party as at the date of separation (paras. 104 and 169).

Setting Aside the Agreement

The court provided an interpretation of s. 93, noting the distinction between procedural unfairness (s. 93(3)) and operational unfairness (s. 93(5)) (paras. 125-31):

> Section 93 contemplates a two-pronged inquiry as to the enforceability of an agreement. The first inquiry is directed at the formation of the agreement; the second stage, its effect.
>
> Even if the Court determines the agreement was unfairly reached, there is still discretion to decline to set aside or vary the agreement if the result would not be substantially different from that which is contained in the agreement. s. 93(4)
>
> If an agreement was fairly reached, having regard the enumerated factors in s. 93(3), the Court must go on to consider whether the agreement is significantly unfair having regard to the enumerated criteria in s. 93(5).
>
> Judicial discretion has been modified, particularly as it relates to the assessment and enforceability of agreements. Under the previous legislation, a finding of unfairness based on one of an enumerated factors in s. 65(1) was sufficient to allow the Court to, in effect, rewrite the parties' Agreement to achieve the fairness found lacking in the original version.
>
> Critics of the legislation argued the threshold for judicial intervention was low, resulting in uncertainty which, in turn, encouraged litigation.
>
> Certainty is no doubt a desirable objective and parties should be encouraged, where mutually desired, to establish regimes of property entitlement which deviate from the statutory scheme.
>
> However, certainty should not trump either procedural or operational fairness as defined in s. 93.

Further, the court confirmed that nothing in s. 93(3)(c) ameliorates the following statement of law, from *Gurney v. Gurney*, 2000 BCSC 6, [2000] B.C.J. No. 13 at para. 29 (para. 142):

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

The court confirmed that under s. 93(6), the court can intervene and set aside a written agreement dealing with property even if that agreement is not witnessed, provided that the agreement should be set aside based on an assessment of the factors in s. 93(3) or (5) (paras. 132 and 125-31).

The court determined that the Agreement was procedurally unfair, given that (paras. 134-47):

(1) The claimant did not have the opportunity to receive independent legal advice;

(2) There was incomplete financial disclosure;

(3) The claimant did not have the necessary information to fully consider her position in entering into the Agreement;

(4) The claimant waived potential rights to spousal and child support without her situation being explained to her by someone safeguarding her interests;

(5) While the claimant may have understood generally that she was giving up her rights in making the Agreement, absence independent legal advice, she likely would not be able to substantially understand the specific import of the Agreement;

(6) The respondent arranged the meeting with a lawyer, and told the claimant that she was to sign something;

(7) Rather than giving the Agreement to the claimant once it was drafted, the respondent sprang it on the claimant at what she perceived to be a social gathering at the lawyer's office;

(8) The claimant did not play any role in drafting the Agreement, the terms of which favoured the respondent; and

(9) The parties were attempting to conceive a child together at the time the Agreement was executed, and the court found this exacerbated the claimant's vulnerability as the word is used in s. 93(3)(b).

Having found that the Agreement was procedurally unfair and should be set aside, the court considered whether to decline to set aside the Agreement pursuant to s. 93(4), and elected not to exercise this discretion, given that the distribution of assets under the Agreement was significantly at odds with the result that would accrue under the *FLA* (paras. 149-50). Although not required to, the court considered whether it would set aside the Agreement for being substantively unfair, and concludes it would (paras. 152-57).

Exclusions & Tracing

The court confirmed that the onus of proof rests upon the spouse seeking to exclude property (paras. 195 and 210).

The respondent was able to exclude the equity in the Laurentian Ave. home that existed at the time the relationship began from the Family Home, as the court accepted that substantially all of the net sale proceeds from the Laurentian Ave. home (which was unencumbered at the time of sale) were applied to the acquisition of the Family Home (paras. 197-98). However, as the court was not provided with evidence of the equity in the Laurentian Ave. home at the time of cohabitation, the court was left to determine (by estimating) this value. The court made an estimate based on the difference between the sale price of the property four years after the relationship began and the purchase price of the property six years before the relationship began. The court found that the home increased in value by $60,000 in the 10 year period that it was owned and determined that $35,000 of that increase in value occurred during the six years that the property was owned before the relationship began (paras. 197-99). Accordingly, the respondent was entitled to exclude $115,000 (the original purchase price) plus $35,000, for a total of $150,000, from the division of the Family Home. Thus, there was a direct deduction from the division of the Family Home to recognize the exclusion in favour of the respondent.

The respondent was able to exclude the principal amount of the mortgage on the Family Home that he paid out using his inheritance, as the court accepted that the mortgage was discharged by funds provided by the respondent without contribution from the claimant. Again, the court was not provided with documents that would indicate the value of the inheritance and the purpose to which

it was applied. The court determined (again, by estimating) that the principal amount of the mortgage at the time of payout was $115,000, given the original value of the mortgage ($135,000) less the monthly payments between 1991 and 1998 that would have reduced the principal outstanding (paras. 201-3). Thus, use of excluded property to pay down a mortgage, thereby increasing the value of family property, entitles a spouse to an exclusion. In other words, excluded funds used to pay down a mortgage are traceable to increased equity in family property and this is not a payment of debt that erases an exclusion.

The court accepted the claimant's evidence that she received an inheritance of approximately $700,000 in 2006, in part because she provided documentary evidence showing $512,000 on deposit at ScotiaMcLeod (paras. 215-17). The claimant did not produce estate documents showing the value of her inheritance. The court held that the claimant was able to exclude the value of her ScotiaMcLeod accounts, as this was traceable to her inheritance. The claimant was also entitled to exclude $10,000, which was invested in one of the jointly-owned properties in Nova Scotia, as this was traceable to her inheritance (para. 218).

The claimant was entitled to an exclusion for the $154,000 from her inheritance that she invested in one of the jointly-held Nova Scotia properties acquired during the relationship, but this was qualified (para. 221). In particular, the court held that:

> [section] 85 doesn't provide for a tracing of otherwise excluded funds beyond the asset which was acquired through the disposition of her inheritance. Just as the claimant is not entitled to consideration for monies expended by her from the inheritance on matters such as travel or other disposables, if there is *no equity* or *insufficient* equity in [the jointly-owned property in Nova Scotia] to repay her original investment, she cannot look to other family property to make up the difference" (para. 222).

The respondent was not entitled to an exclusion for the value of inherited funds that were allegedly used as the down payment to acquire an acreage property in Nova Scotia. The court held that it had no evidence of the value of the down payment or the source of the down payment (paras. 210-12). The court notes that given the history of the acquisition of properties in Nova Scotia, it was unlikely that the down payment was significant (para. 204). Thus, a party seeking an exclusion must provide some evidence of the value of the excluded property that is sought to be traced, as well as evidence with respect to the traceability into property held at the date of separation.

The respondent was not entitled to an exclusion for the equity of property that he brought into the relationship that had little to no equity at the date of trial (paras. 206-8). The court held that there is nothing left of the 'excluded portion' of the property to maintain for the benefit of the respondent (para. 208).

The respondent also sought to exclude an RRSP, savings, personal effects and musical instruments, all of which were set out in the Agreement. No evidence was led confirming the values of these assets or what became of the assets. The court was unable to find any of the property set out in the Agreement either still existed or was traceable into other property presently owned by the respondent (para. 214). The respondent was not granted an exclusion.

The claimant sought to exclude funds from her inheritance in the amount of $120,000 that were used to improve the Family Home. The court held that "were those improvements demonstrated to have enhanced the value of the property, the enhanced value would be excluded property" (para. 223). As the claimant did not lead evidence that the improvements resulted in an identifiable appreciation to the value of the Family Home, the court did not grant an exclusion, but did leave open the issue of

whether the loss of her investment is something that ought to be compensated as a matter of fairness (para. 225). Ultimately, the court found that there is no basis to make an adjustment on the grounds of significant unfairness, save for possible reservations concerning pension division.

Family Debt

The respondent claimed that the debt in his name incurred after the date of separation, in excess of $81,000, was incurred to maintain family property, and sought to share this debt with the claimant as a family debt under s. 86(b). He testified that part of the indebtedness arose as a result of construction expenses regarding a jointly-owned property in Nova Scotia (para. 231). He also provided a financial statement sworn in May 2011 and statements for one credit card from February 2011 to January 2012 (paras. 233-34).

The court held that it is insufficient to provide only oral testimony and a Financial Statement, as the *FLA* requires cogent documentary evidence to establish that debt is a family debt (para. 241). The court noted that the respondent had the wherewithal to produce documents given to his bookkeeper in respect of the renovation costs and credit card account statements (para. 244). The court held that "absent proof of debt existing at the time of separation coupled with proof, in the broad sense of the word, as to how the debt was incurred (so as to assess whether it would be significantly unfair to divide such debt equally), the respondent is responsible for the debt in his name alone" (para. 247). The court did find that the mortgages against the Nova Scotia properties for which the claimant was jointly liable were family debts to be equally shared.

Significantly Unfair

The court did not provide a definition of significantly unfair. Nonetheless, the court determined that, save for possible reservations concerning pension division, the division of property under the *FLA* in this case was not significantly unfair (para. 253). The court noted that the parties' relationship was long, and the division of property under the *FLA* will leave each party in a position of economic well-being and self-sufficiency, despite the fact the respondent was not working (he voluntarily retired following a criminal investigation against him) (para. 255).

Division of Property under the FLA

The court reviewed the assets that the parties owned throughout the relationship, and determined which assets were excluded property and which were family property (including any increase in value in excluded property (paras. 173-74).

After considering the claims for excluded property traceable into property owned at the date of separation, claims for division of family debt, and whether equal division would be significantly unfair, the court ordered an equal division of the family property, and allowed the parties 90 days to resolve how their respective interests in the family property are to be realized (paras. 256-57). As noted below, the court deferred determination of the parties' pension entitlement.

With respect to valuing the assets, the court stated that "those assets which are family property consisting of accounts and financial institutions subject [to] day to day use, such as checking accounts, the valuation should be taken as at the date of separation" (para. 171). Further, "for those accounts representing long-term investments, specifically the RRSPs of each party found to be family property; those are to be divided in *specie* at the time of division unless it can be shown contributions were made post-separation. In such case, the amount of such contribution should be subtracted from the divisible portion of the asset" (para. 172).

Pensions

The court addressed the parties' pensions separately (paras. 175-86). A portion of the respondent's pension was excluded, on the basis of his contributions made before cohabitation (paras. 175 and 227). Ultimately, the court stated that it lacked the facts necessary to determine whether the pension division under Part 6 of the *FLA* would be significantly unfair. The parties were directed to obtain information as to the value and the structure of their pensions, and re-attend to make submissions.

E. L.G. v. R.G., 2013 BCSC 983, [2013] B.C.J. No. 1159

Facts: the parties were married spouses who separated after 16.9 years of marriage. The claimant brought an application seeking, among other things, an equal division of the respondent's entitlement to his pension annuity upon his retirement.

Issue: whether it would be significantly unfair to grant the claimant an equal share of the respondent's entitlement to his pension?

Reasons: The court confirmed that the *FRA* continues to govern property division in this case, but commented in *obiter* that s. 95 of the *FLA*, allows a court to make an unequal division of family property if it would be significantly unfair to do so. The court made the following observations (paras. 69-71):

> "Significant unfairness" has not been judicially defined in context of the *FLA*. I consulted several dictionaries, including the *Oxford Dictionary of Current English*, 1992; the online *Merriam Webster*; the *Oxford Paperback Thesaurus* 4th edition; and an online Dictionary of Etymology. Evidently, English first adopted use of 'significant' in the mid 16th century. In early usage, it conveyed the meaning of a 'portent', a 'sign', or 'token'—e.g. 'a significant look'. In some contexts, it still does. In other contexts, it also came to mean 'having an influence on something', or refer to a matter of weight, substance and importance. Therefore, dictionary definitions encompass all of the concepts: of signs, of indication and of weightiness. The *Oxford Paperback Thesaurus* 4th edition, offers similes that include "important, of consequence, of moment, weighty, material, impressive, serious, vital, critical."
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> In *Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578 (CanLII), 2001 BCSC 1578 [*Reid*], affirmed in *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126 (CanLII), 2003 BCCA 126, Sinclair Prowse J. defined the phrase "significant unfairness" to mean "burdensome, harsh, wrongful, lacking in probity or fair dealing." This definition was considered in *Gentis v. Strata Plan VR 368*, 2003 BCSC 120 (CanLII), 2003 BCSC 120 [*Gentis*]; and *459381 B.C. Ltd. v. Strata Plan BCS 1589*, 2012 BCCA 44 (CanLII), 2012 BCCA 44. Those cases involved reviews of certain actions of strata councils. In *Reid* at paragraph. 27, the Court of Appeal affirmed the decision of Justice Masuhara in *Gentis*, and agreed that the use of 'significant' before 'unfairness' "indicates to the Court that it should not interfere with the actions of a strata council unless the actions result in something more than mere prejudice or trifling unfairness."
>
> In my view, the term 'significantly unfair' in s. 95(1) of the *FLA* essentially is a caution against a departure from the default of equal division in an attempt to achieve 'perfect fairness'. Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart from the default equal division.

The court stated that the claimant's conduct with respect to parental access and the unnecessary litigation that ensued led to the respondent's anxiety and depression, which in turn negatively affected his earning capacity, diminished the value of his pension during the period of his disability and led to large capital losses (paras. 83 and 89).

The court stated that its analysis would be the same under the *FLA* as under the *FRA*, and found that it would be significantly unfair to divide the respondent's pension equally with the claimant (paras. 72 and 89). The court granted the claimant a 20% interest in the benefits accrued during the marriage (paras. 89-92).

F. P.N.K. v. C.L., 2013 BCSC 1856, [2013] B.C.J. No. 2231

Facts: the parties were unmarried spouses who separated after 20 years of cohabitation. The claimant brought a claim for an interest in the respondent's real and personal property, including her pension, on common law principles under the doctrine of constructive trust. The claimant also sought to amend his claim (on the morning that the trial was to start) to include property claims under the *FLA*. The parties had orally agreed to keep their financial affairs separate and apart, and they did so throughout their relationship.

Issue: whether it would be significantly unfair to equally divide the family property?

Reasons: The *FLA* did not apply in this case, as the parties had separated more than two years before the *FLA* came into force (para. 47). In *obiter*, the court stated that s. 92 of the *FLA* permits oral agreements between spouses (para. 86). The court concluded that the claimant did not make out a case for unjust enrichment (paras. 58-74 and 76-79).

The court also considered whether it would order an unequal division of assets if the *FLA* applied. Section 95(2)(b) of the *FLA* allows the court considering whether to grant an unequal division of property and debt to consider the terms of any agreement between the spouses, other than an agreement described in s. 93 of the *FLA* (i.e., written agreements respecting the division of property). The court found that s. 92 of the *FLA* allowed the court to consider oral agreements between the spouses. The court found that the parties agreed to keep their finances separate, and never agreed to share the real property, RRSPs or pension in the respondent's name. Section 95(2)(c) of the *FLA* allows the court to consider a spouse's contributions to the career or career potential of the other spouse. The court stated, in *obiter*, that if the *FLA* applies, it would order unequal division of family property under s. 95 of the *FLA*, on the following basis (paras. 88-89):

(1) The agreement between the parties to keep their finances separate is either an agreement to divide family property and debt unequally, or an agreement to exclude family property items that would otherwise be included under the *FLA*; and

(2) The respondent's contributions to the career or career potential of the claimant, and the lack of contributions by the claimant to the respondent's career.

In the result, had the *FLA* applied, the court would have reached the same result as under the unjust enrichment analysis, namely that the claimant is not entitled to a declaration of any interest in the respondent's property.

G. Bressette v. Henderson, 2013 BCSC 1661, [2013] B.C.J. No. 1977

Facts: the parties were unmarried spouses who separated after six years of cohabitation. The relationship ended in February 2012, before the *FLA* was brought into force. The claimant sought

an interest in the respondent's real and personal property, including his pension, and property held in joint names based on common law principles under the doctrine of constructive trust. She amended her claim to include relief under the *FLA*. During the relationship, the respondent was aware that there was a different property regime that applied to married couples to that applicable to unmarried couples.

Issue: whether it would be significantly unfair to equally divide the family property?

Reasons: Given the ambiguity in the transition provisions of the *FLA*, and in the absence of full legal argument as to the applicability of the *FLA*, the court decided this case on principles of unjust enrichment. The court determined that the parties did not treat all of their assets as a single combined pool of assets or as a single joint family venture (para. 187). However, the court found that the claimant did make significant contributions to two real properties held by the respondent, that the parties expected that the claimant would share equally in the surviving value of those assets, and that the respondent would be enriched if the claimant was not compensated for her contributions to these assets (paras. 188-89).

In addition, the court stated that if the *FLA* did apply, it would have been required to determine whether the division of property required under it was significantly unfair. In *obiter*, the court stated that the results under the *FLA* would be the same as the result reached under the unjust enrichment analysis if the significantly unfair test was applied (paras. 133 and 197-98). The court stated, in *obiter*, that it would be significantly unfair to reach a different result than that based on the unjust enrichment remedy, given that the unjust enrichment remedy is based on fairness and the legitimate expectations of the parties, and in this case, the parties never considered or expected that there would be a new statutory regime applicable to their relationship (para. 134). In addition, the court noted that it would consider the following factors under the *FLA* in reaching the conclusion that equal division of all family property would be significantly unfair, which include the same factors the court considered in determining the unjust enrichment claim, namely:

(1) The duration of the relationship, per s. 95(2)(a) of the *FLA*;

(2) The parties' intentions and expectations during the relationship, which includes contributions to the other spouse's career per s. 95(2)(c) of the *FLA* and agreements made by the spouses regarding the acquisition of some property in joint names per s. 95(2)(b) of the *FLA*; and

(3) The parties' respective direct and indirect contributions to the acquisition of property during the relationship.

The latter factor is not dissimilar to the factors set out in s. 95 of the *FLA*.