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FLA Property Update: Excluded Property and Jurisdiction & Choice of Law Rules for Property

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FLA PROPERTY UPDATE: EXCLUDED PROPERTY AND JURISDICTION & CHOICE OF LAW RULES FOR PROPERTY

I. Introduction

The *Family Law Act*, S.B.C. 2011, c. 25 (the "*FLA*") has re-drawn the playing field for property and debt division upon relationship breakdown. Under s. 85, the *FLA* creates a category of excluded property which, subject to s. 96, is exempt from division between spouses. According to the White Paper, the policy rationale for this change included the following[1]:

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1 White Paper on Family Relations Act Reform: Proposals for a new Family Law Act, AGBC, July 2010 (White Paper).

> *The most compelling reasons for moving to an excluded property regime are to make the law simpler, clearer, easier to apply, and easier to understand for the people who are subject to it. The model seems to better fit with people's expectations about what is fair.* They "keep what is theirs," (such as pre-relationship property and gifts and inheritances given to them as individuals) but share the property and debt that accrued during their relationship. Where one spouse enters the relationship with more assets than the other, providing that spouses share the increase in the value of the excluded property promotes a fair outcome. For example, assume one spouse enters the relationship with a house and a mortgage. During the relationship, the spouses pay down the mortgage and invest in renovations to the house. Upon separation, the spouse who brought the house into the relationship retains the value the house had at the beginning of the relationship, and the associated mortgage. The spouses share in the increased equity flowing from renovations and mortgage payments over the duration of the relationship.
>
> *Changing to an excluded property scheme removes the broad judicial discretion from the asset identification stage and leaves some discretion at the distribution stage.* This change is designed to make it easier to identify property subject to division and, therefore, reduce the potential for disagreement. (emphasis added)

This seems to say:

(1) an excluded property regime will lead to results that are more fair in that it accords with expectations about what is fair; and

(2) the characterization of property as excluded property will be a relatively simple, clear, and more easily understood exercise than characterization of property under the former *Family Relations Act*, R.S.B.C. 1996, c. 128 (the "*FRA*").

Presumably, the reference to "broad judicial discretion" at the asset identification stage is a reference to the often difficult issue of what constituted "ordinary use" under the *FRA*.

To the experienced family law lawyer, the removal of "ordinary use" from the characterization exercise is a welcome change and it seems obvious that this will simplify, to some extent, the exercise of characterizing property for division purposes. With that being said, characterization of excluded property under the *FLA* may not be as simple, clear and accessible as one might have hoped. For example, the identification of an exclusion at the time of separation may involve complicated tracing[2] exercises and there is no guidance in the legislation as to what evidence or methods are required in order to do that. Further, cases have emerged which indicate that what the parties promised to each other, intended, and what they did with their excluded property during the relationship may also factor in the tracing/characterization of excluded property[3]—suggesting that the characterization exercise may be more complex and less predictable than one might have hoped.

The *FLA* also contains new provisions regarding conflict of laws in Division 6 of Part 5. These too appear to be complex in their application.

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2 See "Selected Tracing Issues under the Family Law Act," Scott Booth, for CLEBC, February 2013, and "Three issues arising from the property division sections of the new *Family Law Act,"* by Grace G. Choi QC, now Madam Justice Choi, BCSC, prepared for the National Judicial Institute, November 16, 2012.

3 *Wells v. Campbell,* 2015 BCSC 3; *V.J.F. v. S.K.W.*, 2015 BCSC 593; *Cabezas v. Maxim,* 2014 BCSC 767; and *Hoppen v. Kravariotis*, 2015 BCSC 779.

There have been several good survey papers on the limited number of property cases since Part 5 came into force.[4] The purpose of this paper is to narrow the focus to a review and commentary on some of the key decisions about the characterization and tracing of excluded property. This includes consideration of the issues that arise from the transfer of potentially excluded property between spouses.[5] In addition, the conflict of laws provisions of Part 5 are discussed along with a helpful recent decision interpreting them.

II. Overview of Relevant Part 5 Provisions

The *FLA*, like the *FRA*, sets out a deferred property sharing regime. Under the *FLA*, spouses do not acquire interests in family property and property is not characterized as family property until the date of separation. Under s. 81(b) of the *FLA*, upon separation, each spouse gains a right to an undivided half interest in all family property as a tenant in common.

Under s. 84 of the *FLA*, family property is all property that:

(1) on the date of separation, at least one spouse owns or has a beneficial interest in (s. 84(1)(a)); or

(2) after separation, at least one spouse owns or has a beneficial interest in that is derived from s. 84(1)(a) property or its disposition,

UNLESS the property is excluded property.

Section 85(1) of the *FLA* sets out the classes of excluded property:

> **Excluded property**
>
> 85(1) The following is excluded from family property:
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> (a) property acquired by a spouse before the relationship between the spouses began;
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> (b) inheritances to a spouse;
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> (b.1) gifts to a spouse from a third party;
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> (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
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> (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;
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> (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
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> (f) a spouse's beneficial interest in property held in a discretionary trust

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4 For a summary of decisions released before March 28, 2014, see "B.C. Cases Interpreting the Property Division Provisions of the Family Law Act," by the Honourable Marion J. Allan of Clark Wilson LLP and Kimberley Santerre of Jenkins Marzban Logan LLP, for CLEBC, April 2014. For a more recent summary, see "The Essential Family Law Act: Cases Every Family Law Lawyer Should Know," by J.P. Boyd for the Trial Lawyers Association of British Columbia, April 2015.

5 Those interested in this area should also see "Meet the New Law. Same as the Old Law," by Mark Slay and Ludmila Marenco, North Shore Law LLP for the Pacific Business & Law Institute, April 2015.

(i) to which the spouse did not contribute, and
(ii) 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).

The onus rests with the party seeking the exclusion to prove that it is available, pursuant to s. 85(2) of the *FLA*.

Section 85(1)(g) of the *FLA* is a tracing provision and makes it clear that excluded property does not have to remain in its original form throughout the relationship. When excluded property is converted into another form, a spouse can still argue that that portion of the new property (or its value) that is traceable to the original excluded property, is excluded property for the purposes of property division.

Section 84(2)(g) of the *FLA* includes as family property the increase in value of excluded property since the latter of the date:

(1) when the relationship began; or

(2) the excluded property was acquired.

In the writers' opinion, and at the risk of stating the obvious, the date of acquisition referred to in s. 84(2)(g) must be the date the original excluded property was acquired, and not the date of acquisition of the property subsequently acquired or derived from the original excluded property.[6] For s. 84(2)(g) to have remedial effect, the property derived from excluded property referred to in s. 85(1)(g), cannot include growth in value of the excluded property.

Section 84(2)(g) defines a positive change in value as family property. That is, the *FLA* deems change in value to be a form of property. It is not clear whether this grants a spouse who has a right to share in growth a proprietary right in the underlying property or a right to be compensated for the increase in value. In the case of originally excluded property (i.e., the original property that was owned at the date the relationship commenced or that was received during the relationship and which exists in the same form at the end of the relationship), it may be arguable that the right to share in growth in value should be a right to compensation since, unless s. 96 is applied, the court must not order a division of excluded property. Whereas, in the case of s. 85(1)(g) "derived" excluded property, the question will usually be what portion of the original excluded property is traceable to what is otherwise family property. On the other hand, s. 81 vests an interest in property so it may also be arguable that a right to share in growth vests an interest in otherwise excluded property proportional to one half the value of its growth. Further, s. 97, which provides the court with the machinery for giving effect to division, is not limited in its application to "family property," and so it would appear to permit the court to grant proprietary remedies in order to separate the family property portion from the excluded property portion of a complex item of property made up of excluded and non-excluded portions.

III. Background: Discussion of Presumptions and Types of Ownership

During a relationship, a spouse might convey excluded property to the other spouse for a variety of reasons, including:

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6 As set out more fully in Scott L. Booth, "s. 85: Prior Property and Gifts – Losin' Your Exclusion," Trial Lawyers Association of BC, April 2015, at 1.

(1) To convey a right of survivorship only. The idea being if the spouses do not separate prior to death, the spouse who conveys the right wants the other spouse to receive the property automatically on death.

(2) To convey immediate beneficial ownership of all or a portion of the property transferred. The spouse wishes to share the property with the other spouse.

(3) For tax planning or other estate planning reasons.

(4) To protect assets from potential creditors.

An issue that arises in some of the cases discussed below is the effect of these kinds of transfers of excluded property between spouses. The discussion below is intended to provide background on basic property law as it relates to these transfers between spouses.

A. Presumptions Applying to Gratuitous Transfers Between Spouses

Where one party gratuitously transfers property to another, equity usually presumes a resulting trust in favour of the transferor. Historically, the exception has been to transfers between father and child and between husband and wife where a gift to the recipient is presumed.[7] In the modern context, the presumption is that a married spouse who gratuitously transfers property to the other spouse will be presumed to have made a gift. The presumption is rebuttable with evidence that a gift was not what was intended. The question of whether the presumption of advancement arises between unmarried spouses is not fully resolved.[8] Traditionally, the presumption applied between married spouses although the Court of Appeal has suggested, in obiter, that the question of whether it applies between unmarried spouses remains open (*Aleksich v. Konradson* (1995), 5 B.C.L.R. (3d) 240 (C.A.)). Pre-*FLA* Supreme Court decisions were in conflict on whether the presumption applies to unmarried spouses (*Hedberg v. Heapes*, [1999] B.C.J. No. 1309 (S.C.) and, more recently, *McNamara v. Rolston*, 2013 BCSC 2115, held that it does apply, *McDonald v. Eckert*, 2004 BCSC 323 held that it does not).

B. Ownership: Joint Tenancy and Tenancy in Common

Two typical forms of ownership of property are joint tenancy and tenancy in common.

Joint tenancy arises when four unities, as identified by Blackstone, exist:

(1) The holdings of each joint tenant must be equal in nature, extent and duration (unity of interest);

(2) The interests must arise from the same act or instrument (unity of title);

(3) The interests of the joint tenants must arise at the same time (unity of time); and

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7 See *Pecore v. Pecore*, 2007 SCC 17 at paras. 23–36. Note in that case the court held that the presumption no longer operates between parent and adult child.

8 Cases in BC have called into question the utility of the rebuttable presumption of advancement as between married spouses (*Zhu v. Li*, 2009 BCCA 128). However, the Supreme Court of Canada, in *Kerr v. Baranow*, 2009 BCCA 111 confirmed that the presumption still remains as part of our law.

(4) The joint tenants' rights must relate to the same piece of property (unity of possession).[9]

As noted by Professor Ziff, the "legal fiction underlying a joint tenancy is that there is only one tenant and that there are no distinct shares held by anyone."[10]

An important incident of joint tenancy is the right of survivorship.[11] Upon the death of one joint tenant, the interest of that tenant is extinguished, and does not descend to an heir; instead it merges with the title of the surviving joint tenants by the right of survivorship, thereby increasing the beneficial interests of the survivors.[12]

A joint tenancy may be converted into a tenancy in common. In fact, a tenancy in common arises when a joint tenancy is severed without partition of the property.[13] Severance of the joint tenancy arises automatically upon the destruction of the four unities.[14] The severance of the joint tenancy can happen by the unilateral action of one tenant or by other means.[15] For instance, an owner becoming bankrupt severs a joint tenancy.[16] Pursuant to s. 81 of the *FLA*, a joint tenancy would appear to be severed upon separation when each spouse becomes a tenant in common in family property. Pursuant to s. 18(3) of the *Property Law Act*, R.S.B.C. 1996, c. 377, a joint tenant can also sever a joint tenancy by transferring his or her interest in the property to him or herself, and may do so without notifying the other joint tenant(s).

In *Bergen v. Bergen*, 2013 BCCA 492 ["*Bergen*"], the Court of Appeal held that a gratuitous transfer of real property into joint tenancy does not by itself convey a legal and beneficial interest in the entire property, including the right of survivorship, because a joint tenant can sever the joint tenancy at any time, which act would destroy the right of survivorship and the ability to increase the interest held in the property. The Court of Appeal cited *Pecore v. Pecore*, 2007 SCC 17 and confirmed that in gratuitous transfer situations, the actual intention of the grantor at the time of the transfer is the governing consideration.[17] That is, if the transferor intends an outright gift then the legal and beneficial interest passes and, if they did not intend a gift, then the transferee legal title on a resulting trust. *Bergen* dealt with a gratuitous transfer of real property between parents and their son where the presumption of resulting trust could not be rebutted by the son. As discussed above, in the case of gratuitious transfers between spouses, a presumption of advancement may apply which has the opposite effect—namely, putting the onus on the transferor to rebut the presumption that a gift was intended. It should be noted as well that the Court of Appeal in *Bergen* noted some distinction between joint ownership of real estate and joint accounts—though it seems that in either case, the transferors intention is the key to whether a gift was made.

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9 Bruce Ziff, *Principles of Property Law*, 6th ed (Toronto: Carswell, 2014) at 338; A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property* (Aurora: Canada Law Book Inc., 1985) at 788.

10 Ziff at 338.

11 Ziff at 338.

12 Ziff at 339.

13 See Anger at 820.

14 *Bergen v. Bergen*, 2013 BCCA 492 at para. 40.

15 Ziff at 339.

16 Ziff at 350.

17 *Bergen* at paras. 5 and 41.

Tenancy in common arises where two or more persons hold title in separate shares, which are undivided (in the sense that the property's boundary is not demarcated). The owners can hold different shares, interests or estates.[18] The only unity that is present is the unity of possession. The key distinction from joint tenancy is that when a tenant in common dies, their interest devolves on death to their estate, and there is no right of survivorship. Tenancy in common can only be severed by partition, so that each tenant becomes an owner of a divided share in severalty, or by one tenant acquiring ownership of the interests of the other tenants.[19]

IV. Characterization and Tracing of Excluded Property

A. The Cases

1. Asselin v. Roy

In *Asselin v. Roy*, 2013 BCSC 1681 ["*Asselin*"], unmarried spouses separated in May 2011, after a 24 year relationship. The proceedings were commenced before the *FLA* came into force and relief was sought on the basis of unjust enrichment. On the first day of trial, the parties consented to amend claims so as to have the *FLA* apply. At trial, the claimant was 53 years of age, and the respondent was 57.

Before the relationship began in 1987, the respondent owned a home, real property in Nova Scotia, his pension plan, an RRSP, and some savings. There was uncontroverted evidence that he had purchased his home in 1980 for $115,000, sold it in 1991 for $175,000, and there was no mortgage when the home was sold. The respondent used the sale proceeds to purchase the family home in 1991. During the relationship, the respondent bought additional properties and registered same in his sole name, including the family home. The parties also jointly purchased two properties in Nova Scotia. At the date of separation, there were seven properties owned in Nova Scotia, five of which were solely owned by the respondent and two were owned jointly.

Both parties received inheritances. The respondent claimed that he 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 that was registered in his sole name. The claimant received an inheritance of approximately $700,000 in 2006. She allegedly 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.

The parties signed a marriage agreement in 1990, which was drafted by the respondent's lawyer, and provided that the only property that would be shared was property acquired in joint names, all other property would be separate, and neither party would have a claim to an interest in property based on unjust enrichment or trust law principles. The claimant did not see the agreement until the day she was to sign it, and she received no legal advice in respect of the agreement.

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18 E. H. Burn and J. Cartwright, *Cheshire and Burn's Modern Law of Real Property*, 17th ed (Oxford: Oxford University Press), at 462.

19 Anger at 826.

The significant issues in the case included whether the respondent was able to trace the proceeds of sale of his pre-relationship property and whether each party was able to trace their respective inheritance to family property.

The court set aside the marriage agreement, and divided the property owned at trial in accordance with the *FLA*. Counsel had advocated for the court to apply a "broad brush" approach to the parties' competing claims for exclusions.[20] The court rejected that approach as being inconsistent with the approach mandated by the *FLA*.[21]

The court rejected the respondent's claim that a portion of the acreage property, a very significant asset, that he allegedly acquired with inherited funds should be excluded, because no documents were produced to allow the court to determine the extent of his down payment and to positively identify the source of those funds as his inheritance.[22] 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."[23]

Likewise, the respondent was not entitled to exclude his RRSP, savings, personal effects and musical instruments, all of which were set out in the marriage 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.[24] No evidence was led confirming the values of those assets or what had become of them.[25]

The court was prepared to recognize traceable exclusions, even though the respondent did not adduce appropriate documents, based on informed estimates. The respondent 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.[26] In order to determine the equity from the respondent'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 the 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.[27] The respondent was entitled to an exclusion in the total amount of $150,000: the purchase price of $115,000 plus the nearly linear estimate of the growth in value that occurred between the home's purchase and the commencement of the relationship. It may have been that the court was prepared to make an informed estimate because there was no conflicting

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20 *Asselin v. Roy*, 2013 BCSC 1681 at para. 191 ["*Asselin*"].

21 *Asselin* at para. 192.

22 *Ibid.* at paras. 209-12.

23 *Ibid.* at para. 210.

24 *Ibid.* at para. 214.

25 *Ibid.* at para. 213.

26 *Ibid.* at paras. 196-200.

27 *Ibid.* at paras. 197-99.

evidence and the respondent was not cross-examined as to the amount of the increase in value of the home.[28]

The claimant had invested $154,000 from her inheritance into one of the jointly-held properties acquired during the relationship and sought an exclusion for this. After the investment, extensive renovations were performed, a mortgage was taken (which significantly diminished the property's equity), and market forces had also reduced the value of the property. In the result, the property 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 the claimant 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.[29]

Likewise, the respondent 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.[30] The court held that there was nothing left of the "excluded portion" of the property to maintain for the benefit of the respondent.[31]

The respondent was entitled to an exclusion for the amount by which he paid out the mortgage registered against the family home (which was registered solely in his name). He had used part of his inheritance to pay the mortgage. 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.[32] The estimated payout amount of the mortgage was $115,000. The respondent was entitled to an exclusion for $115,000.

The claimant sought to further exclude funds from her inheritance in the amount of $120,000, which were used to improve the family home, solely owned by the respondent. The court noted that "were those improvements demonstrated to have enhanced the value of the property, the enhanced value would be excluded property."[33] Because the claimant did not present evidence that the improvements resulted in an identifiable appreciation in the value of the family home, the court did not find any excluded property was derived from this investment. The court noted that the loss of the investment was something that might give rise to an argument about fairness, but ultimately found that there was no basis to make an adjustment because an equal division of family property would not be significantly unfair.[34] The court did not consider the effect of the claimant contributing funds to a property registered solely in the respondent's name.

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28 *Ibid.* at para. 199.

29 *Ibid.* at para. 222.

30 *Ibid.* at paras. 206-8.

31 *Ibid.* at para. 208.

32 *Ibid.* at paras. 201-2.

33 *Ibid.* at para. 223.

34 *Ibid.* at para. 225.

2. Cabezas v. Maxim

In *Cabezas v. Maxim,* 2014 BCSC 767 ["*Cabezas*"], a decision which is under appeal, the unmarried parties were in a relationship for 6.5 years. They separated in December 2012. At the beginning of the relationship, the claimant owned furniture, a motor vehicle, a pension, and funds in an RRSP. The respondent owned and operated an incorporated roofing and automobile repair business, a number of vehicles, tools, a boat, a camper, and a life insurance policy.

Approximately 1.5 years into the relationship, the parties jointly purchased a mobile home and property located on the Sunshine Coast for approximately $265,000. The respondent provided the $56,000 down payment, using funds he held in a personal account and funds from his business.[35] The balance of the purchase was funded by a mortgage for which both parties were liable. The respondent gave evidence that the claimant agreed to repay 50% of the deposit and down payment for the property in order for them both to have an equal stake in the property. Towards the end of the relationship, the respondent added the claimant as a signatory to and joint holder of his bank account.[36]

On three occasions during the relationship, the respondent's parents contributed funds to pay the mortgage: two payments of $31,512 and one payment of $124,325 which retired the mortgage.[37] The final payment was made during the last year of the parties' relationship.

The mobile home and property were sold after separation. From the sale proceeds, the mortgage, a CRA tax debt owing by the respondent, outstanding property taxes and utilities, and the conveyancing lawyer's fees were paid and the balance of funds were held in trust.

The significant property division issues in this case were whether the respondent could trace his pre-relationship property or the gifts from his parents into the net sale proceeds, such that a portion of the net sale proceeds were excluded property, and if so, should the excluded property be reapportioned under s. 96 of the *FLA*.

The court determined that the parties' joint bank account and the net sale proceeds were family property.[38] The other assets in the possession of the respondent were acquired by him before the relationship began or were derived from such property, and as such, were excluded under s. 85 of the *FLA*. The respondent's father's Camaro, which was gifted to the respondent after his father's death, was excluded under s. 85(1)(b) of the *FLA*.[39] Further, the court found that the respondent's shares in his business corporation were also excluded property.[40] Having found that the business had significant debts, the court was not persuaded that there had been any increase in value of the shares during the relationship. The court also found that the claimant's pension was excluded property under s. 85(1)(a) of the *FLA*.

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35 *Cabezas v. Maxim,* 2014 BCSC 767 ["*Cabezas*"] at para. 43.

36 *Cabezas* at para. 11.

37 *Ibid.* at paras. 52, 57 and 58.

38 *Ibid.* at apara. 39.

39 *Ibid*.

40 *Ibid.* at para. 40.

The court found that the parties had agreed that the claimant would repay 50% of the amount used for the down payment, and that the claimant did repay the required amount.[41] The court found that "both parties ultimately contributed equally to the down payment on the [property], and the respondent's initial contribution of the down payment does not entitle him to anything other than the one-half interest in the property granted to him by s. 81 of the [*FLA*]."[42] The court observed that the conduct of the parties in registering title in joint names was consistent with their agreement.[43]

The court was not prepared to find that the respondent's parents' financial contributions were excluded property traceable into the net sale proceeds. The court found that it was the intention of the respondent's mother's to benefit both spouses on the basis that:

(1) The mother's evidence was that she helped the respondent with his finances because she knew he was going to lose the property because *they* were behind in payments on *their* mortgage.[44]

(2) The respondent's evidence was that his mother did not tell him whether her contribution was either gift or loan and, in cross examination, suggested her intention in making the contribution was to help both the claimant and the respondent.[45]

(3) The court concluded that the respondent's parents advanced funds to the respondent in the same manner as they had advanced funds to their other adult children, namely they transferred funds "regardless of the fact that the spouses of these children would also benefit from their financial assistance."[46]

Relying on the decision in *Wiens v. Wiens* (1991), 31 R.F.L. (3d) 265 (B.C.S.C.) ["*Wiens*"], Chief Justice Hinkson found that, in the alternative, the funds advanced by the respondent's mother were subject to a presumption of advancement to *both* spouses and the respondent had not lead sufficient evidence to rebut that presumption.[47] In *Wiens*, the presumption operated as between parents and married spouses whereas the parties in *Cabezas* were not married.

3. Remmem v. Remmem

The parties in *Remmem v. Remmem*, 2014 BCSC 1552 ["*Remmem*"] had a 22 year relationship and separated in November or December 2012. They had two children. The eldest was no longer a child of the marriage at the time of trial. The youngest was 15 and resided primarily with Mr. Remmem after separation. Mr. Remmem was a commercial fisherman and Ms. Remmem was a traditional homemaker, although she had done some work as a hairdresser and in the family fishing business.

When the parties' relationship began Mr. Remmem had:

(1) A fishing vessel known as the M.V. Chaser which was worth $100,000.

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41 *Ibid.* at para. 46.

42 *Ibid*.

43 *Ibid.* at para. 45.

44 *Ibid.* at para. 56.

45 *Ibid.* at paras. 57 and 59.

46 *Ibid.* at paras. 64-65.

47 *Ibid.* at paras. 49-50 and 68.

(2) A Class A licence to fish which was worth $100,000.

(3) An interest in a property (the Greaves Road Property) worth $65,000.

Ms. Remmem apparently had no significant pre-relationship property.

At the date of trial, the parties had between them in excess of $1.8 million in assets. The bulk of this value was in their fishing assets, namely:

(1) The M.V. Chaser that Mr. Remmem had when the relationship began, worth $52,500.

(2) A company which they had incorporated and used to conduct fishing operations worth $104,000.

(3) Various fish licences which were worth approximately $1.2 million.

They also owned three pieces of real-estate, one of which was bare land in Halfmoon Bay, British Columbia, which was owned jointly by the parties and on which they had intended to construct a family home.

Mr. Remmem sought to exclude the full $265,000 in value of the property he brought into the relationship, as follows:

(1) He took the position that he was entitled to an exclusion of $100,000 as against the various fish licences held at separation because the value of the Class A licence that he owned when the parties commenced the relationship was traceable into a Prawn Licence held at separation.

(2) He sought the exclusion of $65,000 relating to the value of the Greaves Road Property which was traceable into the Halfmoon Bay bare land (MacMillan Road Property).

(3) He sought an exclusion of $100,000 in relation to his fishing boat, the M.V. Chaser. Although the vessel was worth only $52,500 at the time of trial, he argued that the original value of $100,000 should be fully excluded because further interests in fishing licences were derived from the operation of the vessel or, alternatively, that it would be significantly unfair not to re-allocate family property under s. 95 of the *FLA* so as to recognize the full value of what he brought into the relationship.

Ms. Remmem agreed that the $100,000 value attributable to the Class A licence when the parties commenced their relationship was completely traceable into the Prawn licence held at separation and did not dispute that exclusion. However, with respect to the fishing vessel and Greaves Road Property she took the position that:

(1) To the extent that the fishing vessel depreciated in value during the relationship the exclusion was lost and the only exclusion available at trial was the vessel itself at its current depreciated value.

(2) Although the Greaves Road Property value at the commencement of the relationship, $65,000, was traceable into the MacMillan Road Property, the exclusion was partially lost by virtue of the Greaves Road Property proceeds being put into property that was jointly held. She argued that by placing the Greaves Road Property proceeds in a property held in joint names Mr. Remmem had effectively gifted a ½ interest in the Greaves Road Property exclusion to her.

The significant property issues in the case were:

(1) whether placing excluded property in joint names lead to a loss of the exclusion; and

(2) whether the original value of depreciated excluded property may be claimed as excluded property.

The court rejected Ms. Remmem's argument and concluded that an exclusion is not lost by placing the proceeds of excluded property in joint names. In reaching this conclusion, the court made the following notable findings:

> The property provisions of the *FLA* are intended to be a *complete code* so that *there is no need to examine the intention of the parties at the time of a transfer of excluded property to joint tenancy*. To come to the opposite conclusion would bring uncertainty and a level of inequality into a property division structure that was intended to treat married and unmarried spouses equally and to provide for a greater level of certainty.[48] (emphasis added)
>
> The new scheme is easier to apply if subsequent transactions only have to be examined to see if property is derived from the excluded property. *If the court also has to look at subsequent transactions to determine if property was gifted, it would have to consider the parties' intentions in transactions which may have taken place many years before trial.* This would be a difficult exercise which would require considerably more court time.[49] (emphasis added)
>
> The court also considered the application of the presumption of advancement to transfers between spouses and noted the following potential difficulties:
>
> a. If the presumption does not apply to unmarried spouses then differential treatment would result as between married and unmarried spouses which is not consistent with the apparent intention of the legislation.[50]
>
> b. Whether an exclusion exists might also change from case to case for married spouses in similar situations depending on whether the presumption applied or had been rebutted.[51]
>
> The court held, "[w]hen I consider these difficulties, I conclude that the tracing provisions in the *FLA*, at least when applied to the circumstances in this case, are to be applied without considering or applying the presumption of advancement between married spouses."[52]

With respect to the depreciated M.V. Chaser, the court rejected Mr. Remmem's position and held that only the depreciated value of the vessel was to be excluded as follows:

(1) The court distinguished the language in the *FLA* from the legislation in Alberta and Saskatchewan and found that the approach taken in those provinces in inapplicable in BC.[53]

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48 *Remmem v. Remmem*, 2014 BCSC 1552 ["*Remmem*"] at para. 48.

49 *Remmem* at para. 51.

50 *Ibid.*

51 *Ibid.*

52 *Ibid.* at para. 52.

53 *Ibid.* at para. 40.

(2) Section 85 of the *FLA* provides that property acquired by a spouse before the relationship began is excluded, not the value of the property. As a result, when excluded property depreciates no part of the property is subject to division.[54]

(3) In considering Mr. Remmem's submission it would be significantly unfair not to re-allocate property to grant to him an effective exemption of the full $100,000 of original value of the vessel, the court observed:

(a) "Significantly" is understood to mean more than a regular impact—something weighty, meaningful, or compelling. In other words, the legislature has raised the bar for a finding of unfairness to justify an unequal distribution.[55]

(b) The only applicable factors under s. 95(2) were 95(2)(a) (duration of the relationship) and 95(2)(c) (contributions to career or career potential) and both of them militated against an unequal division of family property in Mr. Remmem's favour.[56]

(c) The correct approach to determining significant unfairness is, as it was with s. 65 of the *FRA*, to first notionally divide family property equally, taking into account the exclusions and then determine whether that is significantly unfair.[57]

(d) In all of the circumstances of the case and given the parties were splitting in excess of $1.8 million, the loss of $47,500 in claimed exclusion due to depreciation would not create anything unfair let alone significantly unfair.[58]

Mr. Justice Butler also noted, at para. 29 of his decision, that the result he reaches is consistent with Mr. Justice Harvey's decision in *Asselin* where, at para. 222, he noted that the *FLA* does not permit tracing of a lost exclusion into other family property to make up for the loss.

4. Wells v. Campbell

In *Wells v. Campbell*, 2015 BCSC 3 ["*Wells*"], the married parties separated after approximately 22 years. At trial, the claimant was 86 years old and the respondent was 74. The parties had signed an agreement just prior to their marriage, which provided that their respective assets and debts were to be considered separate property.

At the time of marriage, the respondent had no significant assets. The claimant had a property on Hornby Island and a pension with Veterans Affairs. The parties agreed that the Hornby Island property was worth $185,000 at the start of the relationship. It was appraised at $850,000 at trial. There was never a mortgage against title.

Throughout the relationship the parties lived at the Hornby Island property. The claimant was responsible for maintaining and renovating the property. The respondent provided some assistance to the claimant, but was primarily responsible for cooking, cleaning, managing the rental cottage on

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54 *Ibid.* at para. 42.

55 *Ibid.* at para. 44.

56 *Ibid.* at para. 45.

57 *Ibid*.

58 *Ibid.*

the property, and gardening. In 2008, after suffering a heart attack and stroke, the claimant transferred the property into joint tenancy with the respondent.

The trial proceeded by way of summary trial, and no objection was raised as to the appropriateness of summary trial. At trial, the claimant did not seek to enforce the marriage agreement. The key issue was how to divide the Hornby Island property and whether the claimant had an exclusion for the pre-relationship value of the property.

The court was required to deal with the same issue as in *Remmem*—what would have been excluded property had been transferred into a property held in joint tenancy during the relationship. The court reached the opposite conclusion in *Wells* and distinguished *Remmem* as limited to its facts.[59]

The court found that the claimant had intended to gift an equal interest in the Hornby Island property to the respondent when he transferred it into joint tenancy.[60] Factors which influenced the finding of intention were:

(1) Had intention been an issue, the claimant would not have selected the summary trial process.[61]

(2) The claimant could have raised a contrary intention about the transfer of the property into joint tenancy, but did not.[62]

(3) The claimant transferred title after having the benefit of legal advice, and did so in the face of the marriage agreement which purported to keep the property as the claimant's separate property.[63]

The court was also unable to conclude that an equal division would be significantly unfair, given the length of the relationship and the needs of each party. Note that the claimant, in opposition to a potential claim by the respondent to unequal division of the appreciation of the property, submitted an equal division would not be significantly unfair given the length of the relationship and the needs of each party.[64]

5. V.J.F. v. S.K.W.

The court again considered the issue of transfers between spouses in a third decision, *V.J.F. v. S.K.W.*, 2015 BCSC 593 ["*V.J.F.*"]. The *V.J.F.* decision is under appeal.

In *V.J.F.*, the married parties separated after a 9.5 year relationship. They had a traditional marriage, wherein the claimant worked and the respondent left the workforce to care for the parties' three young children. At trial, the claimant was 53 and the respondent was 38 years old.

Shortly after cohabitation, the claimant purchased the family home in Richmond with his own funds and title was placed in his name. In order to protect the home from potential claims against

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59 *Wells v. Campbell*, 2015 BCSC 3 ["*Wells*"] at para. 37.

60 *Wells* at paras. 30 and 32.

61 *Ibid.* at para. 34.

62 *Ibid.* at para. 31.

63 *Ibid.* at para. 31.

64 *Ibid.* at para. 46.

the claimant arising from his role as a director of various companies, he transferred title into the respondent's sole name in 2010.[65] At trial, the claimant agreed that the Richmond home, appraised at $1.5 million, was family property. The court found that the transfer of title to the respondent's name was not a sham transaction.[66]

The claimant was close to the principal of his employer. Late in the relationship, in 2011, the principal died and the claimant received $2 million from the estate.[67]

The respondent wanted to relocate the family from Richmond to Vancouver. In December 2011, the claimant agreed, and the parties selected a property upon which to build a new home. The claimant prepared a budget that would require the bulk of the $2 million payment to be used to purchase the property.[68] The property was registered in the respondent's sole name for creditor protection purposes.[69] Funding for the construction costs came primarily from two sources: a line of credit with a credit limit of over $1 million, secured by a mortgage over the Richmond family residence, and approximately $237,000 came from the funds remaining from the $2 million payment. The claimant gave those funds to the respondent to deposit in her bank account.

The parties separated shortly after construction of the Vancouver home began. At separation, both parties agreed not to sell the Vancouver property so as to avoid a loss of $500,000. Instead, the parties agreed to build and then sell the Vancouver home. Construction costs were approximately $1.5 million, and approximately $1.1 million was charged to the line of credit. In the end, the Vancouver property was sold and, after repaying the line of credit drawn against the Richmond family home, there was a modest profit of between $50,000 to $60,000. The net sale proceeds, after an equal distribution to the parties of $75,000 each, were approximately $2.1 million.[70]

The primary issue at trial was the characterization of the net sale proceeds of the Vancouver property. The claimant argued that the funds he had received from his employer's estate were a gift that could be traced into the net proceeds of sale such that most of the proceeds were his excluded property. The claimant provided evidence that he did not intend to gift to his spouse the entire benefit of the $2 million—instead he had registered title in her name for creditor protection purposes.[71] The respondent, on the other hand, relied on the presumption of advancement between spouses and argued that, if the payment was a gift to the claimant, the funds lost their status as excluded property when the claimant contributed it to a property solely in her name.[72] In the alternative, the respondent argued that if the net proceeds were derived from excluded property, they should be divided equally pursuant to s. 96 of the *FLA*.[73]

The court determined that, at the time of distribution, the $2 million payment was a gift by way of inheritance to the claimant that was designed to provide him with financial protection for his

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65 *V.J.F. v. S.K.W.*, 2015 BCSC 593 ["*V.J.F.*"] at para. 23.

66 *Ibid.* at para. 23.

67 *Ibid.* at para. 29.

68 *Ibid.* at para. 26.

69 *Ibid.* at para. 28.

70 *Ibid.* at para. 32.

71 *Ibid.* at para. 39.

72 *Ibid.* at para. 47.

73 *Ibid.* at para. 41.

ongoing role as director, and was excluded property.[74] The court considered the reasons in *Wells* and *Remmem*, and decided to follow *Wells*. The court found that s. 104(2) of the *FLA*, which expressly preserves the rights under equity or any other law and was not raised before the court in *Remmem*. Ultimately, the court found that the *FLA* does not prohibit *inter vivos* gifts between spouses in all cases, and in this case, found that the claimant had made a gift of the bulk of the payment when he contributed it to the Vancouver property:

> In this case, when excluded property owned by one spouse was comingled with funds derived from family property to purchase an asset that is placed solely in the name of the other spouse in order to immunize it from potential creditors, the exclusion is lost because the disposing spouse gifted it to the other. It is not open for [the claimant], as the transferor, to say that [the respondent], the transferee, holds the property in trust for him because it is inconsistent with the purpose of the transfer: *Bernard v. Weiss* (1986), 70 B.C.L.R. 318 (S.C.). In other circumstances, involving different purposes, the result may be different. The rebuttable aspect of the presumption of advancement allows for individual circumstances to be considered.
>
> [The claimant] cannot say that he gifted the funds to his wife insofar as creditors are concerned, but as between them, she held the property in trust for him. …[75]

The court determined that in the circumstances before it, there was evidence that the claimant intended to gift his legal and beneficial interest in the property to the respondent.[76] However, the court also indicated that this may not be the outcome in all cases.

6. Hoppen v. Kravariotis

In *Hoppen v. Kravariotis*, 2015 BCSC 779 ["*Hoppen*"], the parties separated on May 1, 2013, after a relationship of just over three years. They had one child, a daughter born on July 17, 2012. The claimant was 47 years old, and the respondent was 49.

Prior to the relationship, the claimant owned a condominium. Around the time the parties relationship began, she purchased a property in her sole name in Vancouver on East 11th. She financed the purchase without contribution by the respondent, borrowing funds from her mother, raising funds against her condominium, and through a conventional mortgage. She then sold the condominium, and used the net sale proceeds to pay down the mortgage and debt owing to her mother. The court found that her equity in the East 11th property at the date of marriage was $173,109.[77] Later, the claimant transferred ownership of the East 11th property into joint tenancy.[78]

The respondent received an ICBC settlement arising from his motor vehicle accident in January 2010.[79] Between February and May 2010, the respondent contributed approximately $10,800 of these funds to the claimant which the claimant used to fund expenses on the East 11th property.

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74 *Ibid.* at para. 48.

75 *Ibid.* at paras. 69-70 and 77.

76 *Ibid.* at para. 76.

77 *Hoppen v. Kravariotis*, 2015 BCSC 779 ["*Hoppen*"] at para. 78.

78 *Ibid.* at para. 53.

79 *Ibid.* at para. 36.

Renovations were being done at the East 11th property at this time.[80] In May and June 2010, the respondent gave the claimant a total of a further $131,326 to pay down the mortgage on the East 11th property.[81] The claimant only used $100,000 to pay down the mortgage. It is not clear from the reasons how the remaining $31,326 was spent by the claimant. However, the court accepted the respondent's evidence that it was his intention and expectation that all of the $131,326 was to be paid on the mortgage.[82] The court found that, including the $10,800 previously contributed, the respondent's total contribution to the East 11th property from his excluded property was $142,126.[83]

The property issues at trial included tracing the parties' excluded property. The claimant was able to trace the equity she created in the East 11th property by paying down the mortgage with the proceeds from the sale of her condo, which she owned before the relationship.[84] The court did not consider the effect the claimant transferring an interest in the East 11th property to the respondent. The respondent's contributions and intended contributions to the East 11th property were also traceable, and he was able to exclude the full amount he contributed – not just the $100,000 that was paid down on the mortgage.[85]

In *Hoppen*, the court did not consider the effect of the transfer by the claimant to the respondent of the East 11th property into joint names. Nor did the court consider whether, by contributing his excluded property (settlement proceeds) to a property solely owned in the name of his spouse, the respondent had lost his exclusion. *Hoppen* was argued before the decisions in *Wells* and *V.J.F.* were given. It does not appear that *Remmem* was considered.

B. Principles from the Cases

It is respectfully submitted that the following principles can be taken from the cases set out above:

1. Evidence

(1) The lack of an evidentiary basis to trace excluded property into currently held property may result in the loss of a claim for an exclusion. Documents confirming both the value and continued existence of the excluded property are required. (*Asselin*)

(2) A court may infer or deduce the value of excluded property and, consequently, growth in value from established facts. However, historical valuation evidence should be provided. (*Asselin*)

(3) 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. (*Asselin*)

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80 *Ibid.* at paras. 31-32.

81 *Ibid.* at paras. 52-53.

82 *Ibid.* at para. 54.

83 *Ibid.* at para. 55.

84 *Ibid.* at paras. 76-77.

85 *Ibid.* at paras. 77-78.

2. Depreciating Excluded Property

(1) 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 other words, exclusions depreciate with the value of the property into which they are traceable.[86] (*Asselin*) Section 85 of the *FLA* provides that property acquired by a spouse before the relationship began is excluded, not the value of the property. As a result, when excluded property depreciates no part of the property is subject to division. (*Remmem*)

3. Using Excluded Funds to Pay Secured Debt

(1) The use of a spouse's inherited funds to pay down a mortgage against property held solely by that spouse, thereby increasing its equity, entitles that spouse to an exclusion to the extent that the equity is increased. (*Asselin*) Use of excluded funds to pay down a mortgage against property held by the other spouse may also give rise to an exclusion. (*Hoppen*) This suggests that the use of excluded property to discharge secured debt does not cause loss of the exclusion as would likely be the case if the debt were unsecured.[87] (*Asselin*)

4. Effect of Informal Agreements on Exclusions

(1) The intention of the parties reflected in an informal agreement to share excluded property resulted in the loss of an exclusion claim. (*Cabezas*)

5. Gifts from Third Parties

(1) A gift intended for both spouses does not give rise to an exclusion claim. The intention of the donor determines whether a gift was made. (*Cabezas*)

(2) Funds gifted by the parents of an adult child for contribution towards a family home that is owned jointly by the child and their spouse are presumed, absent evidence to the contrary, to be gifted to both the child and their spouse. (*Cabezas*)

6. Transferring Excluded Property Between Spouses

(1) *Remmem*: Part 5 of the *FLA* is a complete code. The intention of spouses is not relevant to the characterization of excluded property. The presumption of advancement does not apply in this case.

(2) The other cases:

   (a) The *FLA* does not alter the law of *inter vivos* gifts. (*Wells*, *V.J.F.*)

   (b) Section 85(1)(a) of the *FLA* does not negate either the presumption of advancement or an intended gift of an interest in land from one spouse to another." Intention remains a relevant consideration. (*Wells*, *V.J.F.*)

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86 This proposition was confirmed in *Remmem*.

87 With that said, in *V.J.F.,* the claimant used $37,000 of excluded funds to pay off the mortgage on the family home, which he agreed was family property, but this did not result in an exclusion for the claimant.

(c) A transfer of one spouse's excluded property into the name of the other spouse for the purposes of creditor protection, so that the transferring spouse can assert they have no beneficial interest in the property, results in the loss of the exclusion. (*V.J.F.*)

7. Resolving Conflicts in the Cases

The reader is reminded, and cautioned, that as of the date of this paper, both *V.J.F.* and *Cabezas* are under appeal. Clearly, the clash between *Remmem* on the one hand, and *Wells* and *V.J.F.*, on the other, needs to be reconciled. While aspects of the result in *Asselin* and *Hoppen*[88] are consistent with *Remmem*, it does not appear that the effect of gratuitous transfers between spouses was considered in either.

It does appear that s. 104(2) of the *FLA* was not drawn to the court's attention in *Remmem* so that the "complete code" finding is vulnerable. Section 104(2) provides: "the rights under this Part are in addition to and not in substitution for rights under equity or any other law." Section 104(2) is identical to s. 69(2) of the *FRA*. Under the *FRA*, the Court of Appeal has confirmed that s. 69(2) explicitly preserves the availability of unjust enrichment remedies even between married spouses to whom Part 5 of the *FRA* applied (see *Devick v. Devick*, 2005 BCCA 329 and *Wilson v. Fotsch*, 2010 BCCA 226 at para. 43). Logically, the identical language in Part 5 of the *FLA* suggests the same result. It should be noted however, that these same decisions also, and for very good reason in the writers' opinion, suggest that if an adequate remedy is available under the legislation resort should not be had to the unjust enrichment remedy.

The finding that Part 5 of the *FLA* is a complete code may also be at odds with the Supreme Court of Canada's majority decision in *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70. That case considered whether the Ontario family law statute was a complete code which displaced the availability of unjust enrichment remedies between married spouses. Even though the Ontario statute in issue had no rights preserving clause equivalent to s. 104(2) of the *FLA*, the Supreme Court of Canada held that such remedies remained available and repeated as "trite law," the proposition that in order for a statute to displace existing rights and depart from prevailing law, it must do so with "irresistible clearness."[89]

With respect to the examination of intention, one of Mr. Justice Butler's apparent concerns in *Remmem*, and a very good point, was that examining parties' intentions at various stages to determine if they made gifts of their excluded property, would make matters under the *FLA* more complex and undermine one of the policy objectives of the *FLA* (see the White Paper reference in the introduction above). Further, the characterization of family property occurs on separation without regard to intention—an argument could be made that the same approach be taken with excluded property? On the other hand:

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88 Contribution of funds to the other spouse's property did not result in the loss of exclusion and there was no mention of the presumption of advancement.

89 For the minority, McLachlan J. (as she then was), made a compelling argument against grafting the unjust enrichment remedies onto the Ontario statute and pointed to the problem of complexity and uncertainty that multiple remedies might lead to—similar concerns to those raised by Justice Butler. However, she was careful to confine this to Ontario and noted that the question may be answered differently in other provinces.

(a) in a deferred property sharing regime, where one can clearly give away potential family property before it is characterized for division purposes, why would one be precluded from intentionally giving excluded property to a spouse?

(b) unlike family property (other than growth in value), characterization of excluded property that has changed form necessarily involves a historical review of what a party did with the property from the date of its receipt or the commencement of the relationship.

With respect to the presumption of advancement, as was pointed out in *Remmem*, consistency between married and unmarried spouses under Part 5 of the *FLA* would be undermined if a presumption was applied in favour of only one group. That would seem to be counter to the policy of the *FLA*. However, consistency could be achieved either by finding that the presumption is no longer alive in BC or, alternatively, confirming that it does apply equally between both married and unmarried spouses. If the presumption does continue to apply in all cases, it will obviously be important to lead evidence of intention in many cases. Spouses will also be discouraged from co-mingling property or investing in property in the name of the other. For example, had the presumption applied to the spouse in *Hoppen,* who invested in a property solely in his spouse's name, he might have faced the concurrent burden of a presumption of advancement and the onus of proving his exclusion.

An issue that appears to be unaddressed by the cases is whether, when a spouse transfers property to the other in joint tenancy, the entire beneficial interest is presumed to be advanced. Consider, for example, that a spouse adds her spouse as a 50% tenant in common to excluded real property. Presumably the 50% retained by the spouse would remain subject to their exclusion claim. Is the situation different with a transfer to joint tenancy given that either spouse may at any time sever the joint tenancy? Based on the discussion above regarding the nature of ownership in joint tenancy, it is arguable that one cannot rely on *Wells* and *V.J.F.* for the proposition that when a spouse transfers excluded property into joint tenancy, they are presumed to have automatically gifted their *entire* interest in excluded property. While a presumption of advancement may operate, it is rebuttable, and the question should be what was the transferors intention when making the transfer. Still, cautious counsel should advise clients that any transfer of excluded property to a spouse may result in the loss of an excluded property claim.

V. Dealing with Disputes that Span More than One Jurisdiction

It is not uncommon for spouses who separate in BC to have property in another place, or to have signed a marriage agreement in a different province or country. These facts raise conflict of law issues. Before the *FLA*, such issues were resolved by common law rules and the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (the "*CJPTA*"). Now, Division 6 of Part 5 of the *FLA* prescribes jurisdiction and choice of law rules for property division disputes. Division 6 sets out when the court can assume jurisdiction and hear a proceeding (see s. 106(2) and (3)), whether to decline jurisdiction in favour of another court (see ss. 106(4) and (5)), and if jurisdiction is exercised, which law applies to resolve the dispute (see s. 108). The provisions set out in Division 6 have been described as "ridiculously complex."[90]

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90 J.P. Boyd, "Supreme Court Releases Important Decision on Jurisdiction in Property Cases Under the FLA," online: *JP Boyd on Family Law: the Blog* <http://bcfamilylawresource.blogspot.ca/2015_01_01_archive.html>.

A. Cockerham v. Hanc

The court in *Cockerham v. Hanc*, 2014 BCSC 2432 ["*Cockerham*"] was tasked with resolving a jurisdictional dispute about a claim for spousal support and property division. While there are provisions in the *FLA* for extra-provincial property issues, there are no provisions dealing with spousal support claims that raise conflict of law issues. The parties in *Cockerham* resided in a marriage like relationship in Ontario. After separation, the claimant moved to BC and commenced an action under the *FLA*, seeking spousal support and division of family property and family debt. The claimant filed an application for interim spousal support. The respondent sought an order that the action be dismissed or stayed, either on the basis that the court lacks jurisdiction or ought to decline to exercise jurisdiction, and sought a declaration that any entitlement to spousal support falls within the scheme of the *Interjurisdictional Support Orders Act*, S.B.C. 2002, c. 29 (the "*ISOA*").

The court explained that s. 106(2)(c) of the *FLA* provides that the court has "authority," which is synonymous with jurisdiction, to make an order under Part 5 if *either* spouse is habitually resident in BC.[91] The court concluded that s. 106(2)(c) of the *FLA* represents "a significant extension of territorial competence pursuant to the CJPTA, which required the *defendant* to be ordinary resident in British Columbia."[92] The court found that because the claimant was habitually resident in BC at the time of filing her claim, the court had jurisdiction over the property dispute.[93]

Although the court had jurisdiction, it declined to exercise it pursuant to ss. 106(4) and (5) of the *FLA* in favour of Ontario, given that the property and debts at issue are located in Ontario, the witnesses (who are based in Ontario) would face inconvenience and expense if compelled to testify in BC, and given that under s. 108 of the *FLA*, Ontario law would apply, an expert in Ontario family law would have to provide opinion evidence.[94]

Finally, the court considered the spousal support claim, which is governed by Part 7 of the *FLA*. The court noted that the *ISOA* creates a complete code for the recognition, enforcement and variation of support orders between BC and reciprocating jurisdictions.[95] In *Virani v. Virani*, 2006 BCCA 63 and 2006 BCCA 341, the Court of Appeal determined that the former *FRA* does not empower the court to make an original order for support against a non-resident.[96] The court held that in the absence of express statutory language rendering the *ISOA* inapplicable, the *Virani* decisions are binding authority, and further held that the court has no jurisdiction to make an original order for support against the respondent, as he was not a resident of BC.[97]

In the result, the court dismissed the family law action, including the claim for spousal support.

The *FLA* provisions about jurisdiction are similar, but not identical to the *CJPTA*. As confirmed in *Cockerham*, one key difference is that under the *CJPTA*, the court would not have jurisdiction over a claim if the respondent is not ordinarily resident in BC and there is no real and substantial connection between BC and the facts on which the proceeding is based. However, under

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91 *Cockerham v. Hanc,* 2014 BCSC 2432 ["*Cockerham*"] at para. 42.

92 *Cockerham* at para. 50.

93 *Ibid.* at paras. 52-56.

94 *Ibid.* at paras. 60-66.

95 *Ibid.* at paras. 81-86.

96 *Ibid.* at paras. 87-89.

97 *Ibid.* at paras. 92-93.

s. 106(2)(c) of the *FLA*, the court has jurisdiction over the respondent if either the claimant or the respondent is habitually resident in BC.

B. Practical Considerations when Dealing with Conflict of Law Matters

From a practical perspective, it is imperative to follow Rule 18-2 of the Supreme Court Family Rules, which requires a party seeking to challenge the court's jurisdiction to file a Notice of Jurisdictional Response and to file a Notice of Application or responsive pleading (i.e., a Response to Family Claim that alleges the court does not have jurisdiction over the respondent) within 30 days of filing the Jurisdictional Response to avoid attorning to the court's jurisdiction.

Further, the basis pursuant to which the court can assume jurisdiction over a family property dispute has been broadened. When it comes to disputing jurisdiction, counsel ought to carefully consider the factors at play in each case, and prepare a reasoned argument for why the court should decline to exercise jurisdiction in favour of another court, as it seems the real battle will be over whether the court should decline to exercise its jurisdiction.

	A	B	C	D	E	F	G	H	I	J	K	L
1			**SCOTT SCHEDULE**									
2												
3		John Doe and Jane Doe										
4												
5	**WITHOUT PREJUDICE - Priviledged & Confidential for discussion purposes only**											
6	Issues: Division of Assets, Support											
7	Date of Marriage: December 5, 1991											
8	Date of Separation: November, 2011											
9												
10												
11	**Nature of Property/Debt**	**Value Basis**	**Associated Liability**	**Exclusion Claimed by John**	**Exclusion Claimed by Jane**	**Net Value of family property/Debt for Division**	**Proposed Allocation of Family Property**	**% Entitlement/ Responsibility John**	**% Allocated to John**	**Value or Share to John**	**Value or Share to Jane**	**Compensation Payment to Jane**
12	**REAL PROPERTY**											
13	1234 Westridge Rd., North Vancouver	1.Assessment 2015 = $1,234,000 2. Agreed List Price $1.5Million.	1. BMO LOC $300,000 2. Selling costs	$0.00	$0.00	$1,200,000	1. Family residence to be divided unequally pursuant to s. 95 65% to Jane 35% to John	50%	50%	$600,000	$600,000	$0
14	**VEHICLES**											
15	John's 2011 F150 pickup	1. $35,000 (John's estimate)	Nil	$0.00	$0.00	$35,000	1. John to retain - set off against Jane's vehicle	100%	100%	$35,000	$0	$0
16	Monterey Bowrider boat	1. $22,500 (John's estimate)	Nil	$0.00	$0.00	$22,500.00	1. John to retain and compensate Jane	50%	100%	$22,500	$0	$11,250
17	Jane's 2010 Audi A5	1. $35,000 (John's estimate) 2. $30,000 Jane's estimate per F8	Nil	$0.00	$0.00	$32,500	1. Jane to retain - set off against John's vehicle	0%	0%	$0	$32,500	$0
18	**RRSP's/RESP's**											
19	John's Monaris Capital RRSP Acc #####	1. 86,782 per F8	1. Latent tax on withdrawal	$0.00	$0.00	$86,782	1. To be equalized by spousal rollover at value at rollover day.	50%	50%	$43,391	$43,391	$0
20	John's RBC Dominion RRSP ######	1. $542,588 per F8.	1. Latent tax on withdrawal	$100,000.00	$0.00	$442,588	1. This is excluded property as this RRSP account existed prior to relationship with holdings of $100,000 - s. 85(1)(a). Growth in value is available for division.	50%	50%	$221,294	$221,294	$0
21	Jane's Monaris Capital RRSP Acc #####	1. $260,309 per F8	1. Latent tax on withdrawal	$0.00	$0.00	$260,309	1. To be equalized by spousal rollover at value at rollover day.	50%	50%	$130,155	$130,155	$0
22	**PENSIONS**											
23	CPP Credits	Unknown					1. To be divided pursuant to legislation.			$0	$0	$0
24	**BANK ACCOUNTS**									$0	$0	$0
25	Joint Account(s) -RBC ####	Nominal - not in use	Nil	$0.00	$0.00	$0.00	1. John to retain	50%	50%	$0	$0	$0
26	John's Chequing - RBC ####	1. Approx. $9,000 per Apr. 15 statement	Nil	$0.00	$0.00	$0.00	1. John to retain. Funds accumulated post-sep. so not family property.	100%	100%	$0	$0	$0
27	Jane's CIBC ######	1. $3800 per Jane's F8	Nil	$0.00	$0.00	$0.00	1. Jane to retain. Funds accumulated post-sep. so not family property.	0%	0%	$0	$0	$0
28	**CORPORATE/TRUST PROPERTY**											

	A	B	C	D	E	F	G	H	I	J	K	L
10												
11	**Nature of Property/Debt**	**Value Basis**	**Associated Liability**	**Exclusion Claimed by John**	**Exclusion Claimed by Jane**	**Net Value of family property/Debt for Division**	**Proposed Allocation of Family Property**	**% Entitlement/ Responsibility John**	**% Allocated to John**	**Value or Share to John**	**Value or Share to Jane**	**Compensation Payment to Jane**
29	John's Excavating Ltd. John and Jane equal shareholders.	1. $800,000 per BMM report.	1. Latent tax.	$200,000.00	$0.00	$600,000.00	1. Jane to transfer her shares to John in the most tax efficient manner that is practical. Parties to share equally transfer and tax costs.	50%	100%	$600,000	$0	$300,000
30	Doe Holdco. John and Jane equal shareholders.	1. Passive Holdco. Holds investments in various equities at Monaris Capital totalling	Latent tax on withdrawal	$0.00	$0.00	$250,000.00	1. Parties to liquidate and utilize gains exemption.	50%	50%	$125,000	$125,000	$0
31	Doe Family Trust	Nominal - flow through from Law .		$0.00	$0.00	$0.00	1. John to retain and Deb to renounce her interest as beneficiary.	50%	0%	$0	$0	$0
32	**INSURANCE**									$0	$0	$0
33	John's disability and critical illness policy	1. No CSV		$0.00	$0.00	$0.00	1. John to retain and maintain for so long as required to pay spousal support.			$0	$0	$0
34	John's Life Insurance Policdy	1. No CSV		$0.00	$0.00	$0.00	1. John to retain.			$0	$0	$0
35	Jane's Life Insurance Policy	1. No CSV		$0.00	$0.00	$0.00	1. Jane to retain			$0	$0	$0
36	**PERSONAL PROPERTY**											
37	Contents of former family residence	Unknown		$0.00	$0.00		1. Parties to divide by agreement. Each will forego any excluded property claim to household chattels brought into the			$0	$0	$0
38	Gold Coins gifted to John by his parents	1. 14 coins $20,000 per John's F8.	Nil	$20,000.00	$0.00	$0.00	1. John to retain - s. 85(1)(b) excluded property.					
39	Parties Credit Card Points and Aeroplan Points.	Unknown	Nil	$0.00	$0.00	$0.00	1. parties to divide equally.	50%	50%	$0	$0	$0
40	**SUB-TOTAL FAMILY**									**$1,777,340**	**$1,152,340**	**$311,250**
41	**Debt (Unsecured)**									$0	$0	$0
42	Joint RBC Personal Line of Credit	1. $3950 per May 15 statement	N/A	$0.00	$0.00	($3,950)	1. Family debt to be divided equally	50%	50%	($1,975)	($1,975)	$0
43	John's Visa - CIBC ##4067	Modest balance	N/A	$0.00	$0.00	$0	1. John to retain. Accumulated post-separation - not a family debt.	100%	100%	$0	$0	$0
44	Jane's CIBC Visa ##6301	1. 1,395 per Jane's F8	N/A	$0.00	($1,395.00)	$0	1. Jane to retain. Accumulated post-separation - not a family debt.	0%	0%	$0	$0	
45										$0	$0	$0
46												
47				John	Jane							
48		Excluded Property Retained by Parties		$320,000	($1,395)		Family Property Retained by John & Jane Schmidt			$1,777,340	$1,152,340	$311,250
49		S. 96 Division of Excluded property/debt		$320,000	($1,395)		Equalization Payment John to Jane			($311,250)	$311,250	
50							Combined Equalization/Compensation/Rollover			$1,466,090	$1,463,590	
51							Less Family Debt			($1,975)	($1,975)	
52							Net Family Property			$1,464,115	$1,461,615	
53												
54							% Net Family Property			50.04%	49.96%	
55												
56							Excluded Property/Debt Retained			$320,000.00	($1,395.00)	
57												
58							Total Net Property Retained			$3,248,229.50	$2,921,834.50	
59												
60							% All Net Property			52.64%	47.36%	

	A	B	C	D	E	F	G	H	I	J	K	L
10												
11	**Nature of Property/Debt**	**Value Basis**	**Associated Liability**	**Exclusion Claimed by John**	**Exclusion Claimed by Jane**	**Net Value of family property/Debt for Division**	**Proposed Allocation of Family Property**	**% Entitlement/ Responsibility John**	**% Allocated to John**	**Value or Share to John**	**Value or Share to Jane**	**Compensation Payment to Jane**
61												
62												