Jenkins Marzban Logan LLP
lawyers

CLAIMS UNDER THE B.C. *FAMILY RELATIONS ACT* RELATING TO TRUSTS AND MARRIAGE AGREEMENTS

Suite 900, Nelson Square Box 12144, 808 Nelson Street Vancouver, BC V6Z 2H2 Canada
Tel: 604 681 6564 Fax: 604 681 0766 www.jml.ca

These materials were prepared by Dinyar Marzban, Q.C. and Angela T. Santoro of Jenkins, Marzban Logan LLP for a conference held in Vancouver, B.C. hosted by the Pacific Business & Law Institute, June 16th, 2009.

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I. COHABITATION & MARRIAGE AGREEMENTS

A. Family Relations Act Provisions

Part 5 of the British Columbia *Family Relations Act* (the "*Act*") sets out the property division regime applicable upon the breakdown of a marriage. In particular, s.56 provides as follows:

Equality of entitlement to family assets on marriage breakup

56 (1) Subject to this Part and Part 6 (pensions), each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

(a) a separation agreement,

(b) a declaratory judgment under section 57,

(c) an order for dissolution of marriage or judicial separation, or

(d) an order declaring the marriage null and void

respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to

(a) an order under this Part or Part 6, or

(b) a marriage agreement or a separation agreement.

(4) This section applies to a marriage entered into before or after March 31, 1979.

Once there has been a triggering event under s.56(1), each spouse acquires an undivided one-half interest in all of the family assets as a tenant in common. This property division regime only applies to parties who are, or were, married. Unmarried "common law spouses" who have entered into a property agreement under s.120.1 of the *Act* may apply to vary the agreement pursuant to s.65 of the *Act*, but unmarried parties are not otherwise entitled to claims under Part 5 of the *Act*. Common law spouses must pursue property claims using the equitable remedies of resulting and constructive trusts.

Parties wishing to opt out of the *Act's* property division regime may enter into a marriage agreement before marriage, during marriage, or upon separation, in accordance with the terms of s.61 of the *Act*, the operative terms of which provide as follows:

> *Marriage Agreements*
>
> ***61*** *(1) This section defines marriage agreement for the purposes of this Part and this definition applies to marriages entered into, marriage agreements made and to property of a spouse acquired before or after March 31, 1979.*
>
> *(2) A marriage agreement is an agreement entered into by a man and a woman before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for*
>
> *(a) management of family assets or other property during marriage, or*
>
> *(b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.*
>
> *(3) A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons.*
>
> *(4) Except as provided in this Part, if a marriage agreement is made in compliance with subsection (3), the terms described by subsection (2) (a) and (b) are binding between the spouses whether or not there is valuable consideration for the marriage agreement.*

Pursuant to s.65 of the *Act*, an application may be brought to vary the terms of a marriage agreement, including a separation agreement, on the basis that the provisions of the agreement would be unfair. Section 65 provides as follows:

Judicial reapportionment on basis of fairness

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

(a) the duration of the marriage,

(b) the duration of the period during which the spouses have lived separate and apart,

(c) the date when property was acquired or disposed of,

(d) the extent to which property was acquired by one spouse through inheritance or gift,

(e) the needs of each spouse to become or remain economically independent and self sufficient, or

(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

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

(2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

Married spouses must bring such an application to vary within two years after a triggering event under s.56(1). Applications to vary property agreements entered into by unmarried spouses pursuant to s.120.1 of the *Act* may be subject to a one year time limit from the date the parties cease to live together, although this issue does not appear to have been judicially considered.

B. The Effect of the *Hartshorne* Decision

Prior to 2004, British Columbia courts frequently varied marriage agreements under s. 65 of the *Act* on the basis of unfairness. However, since the Supreme Court of Canada's decision in *Hartshorne v. Hartshorne* [2004] S.C.J. No. 20 (SCC), greater deference has been given to such agreements.

In *Hartshorne*, the parties were married in 1989. It was a second marriage for each of them and, at the time of the marriage, the husband owned $1.6 million in assets, and the wife owned no assets and carried significant debt. Before the wedding, the husband insisted on the parties entering into an agreement whereby they would each retain their separate property, and the wife would be entitled to a 3% interest in the matrimonial home for each year the parties were married, up to a maximum of 49%. The parties each received independent legal advice and the wife ultimately signed the agreement with a few amendments, including a clause confirming her right to spousal support, despite her lawyer's advice that the agreement was grossly unfair to her. Throughout the parties' nine years of marriage, the wife withdrew from the practice of law to raise their two children.

Upon separation, the effect of the marriage agreement was that the wife was entitled to property valued at $280,000, while the husband was entitled to property worth $1.2 million. The trial judgment concluded that the agreement was unfair pursuant to s.65(1) of the *Act* and ordered a 60/40 division in favor of the husband of most of the family assets, including the husband's law practice. The husband was also ordered to pay spousal support. While that judgment was upheld by the majority in the B.C. Court of Appeal, it was ultimately overturned by the Supreme Court of Canada.

The Supreme Court of Canada identified "fairness" as the primary policy objective guiding the courts' role in a division of property on marital breakdown in British Columbia, and made the following comments with respect to the variation of marriage agreements under s.65 of the *Act*:

> *Once an agreement has been reached, albeit a marriage agreement, the parties thereto are expected to fulfill the obligations that they have undertaken. A party cannot simply later state that he or she did not intend to live up to his or her end of the bargain. It is true that, in some cases, agreements that appear to be fair at the time of execution may become unfair at the time of the triggering event, depending on how the lives of the parties have unfolded. It is also clear that the FRA permits a court, upon application, to find that an agreement or the statutory regime is unfair and to reapportion the assets. However, in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement, particularly where independent legal advice has been obtained. They should not conclude that unfairness is proven simply by demonstrating that the marriage agreement deviates from the statutory matrimonial property regime. Fairness must first take into account what was within the realistic contemplation of the parties, what attention they gave to changes in circumstances or unrealized implications, then what are their true circumstances, and whether the discrepancy is such, given the s.65 factors, that a different apportionment should be made.*

The Court found that the parties were living out the intentions expressed in their agreement with respect to remaining financially independent, having children, and the wife remaining at home to care for those children. While the duration of the marriage was a significant factor, the Court found that it had to be considered in light of the fact that the majority of the property was acquired by the appellant prior to the commencement of the relationship. In addition, before making a determination that the agreement operated unfairly, the trial judge should have considered the impact of the spousal and child support to which the respondent was entitled under the agreement, which would have recognized the economic disadvantage suffered by the respondent in sacrificing her career for her family. Ultimately, the Court found that the agreement was fair at the time of the triggering event, in light of the provisions of the *FRA*, the provisions of the agreement, and the circumstances of the parties at the time of separation. The Court noted that “by signing the agreement, the [parties] entered their marriage with certain expectations on which they were reasonably entitled to rely.”

The best strategy to limit the risks of variation of a marriage agreement is obviously to make it as objectively fair as possible. The language of the agreement should include an acknowledgment by the parties of their expected roles in the relationship and the possible impact that they might have on their respective financial positions. The agreement should generally provide for some sharing of assets if the marriage endures. An incremental formula giving the spouse who does not own the excluded asset an annually increasing percentage or monetary interest is a common approach. It is not advisable to include waivers of spousal or child support. The latter are entirely unenforceable and the former are not a bar to a subsequent award of spousal support. The explicit preservation of the spousal support claim arguably saved the *Hartshorne* agreement. Complete and accurate financial disclosure must be included in the agreement, and independent legal advice for both parties is key.

II. TRUST PROVISIONS OF THE *FAMILY RELATIONS ACT*

A. Introduction

Discretionary trusts continue to be a valuable and unique vehicle in estate planning. Such trusts are frequently settled by parents of substantial means for the benefit of minor or adult children with a number of goals in mind, including:

1. Tax planning;

2. Deferring the gift of assets to beneficiaries until they are of a certain age; and

3. Protecting settled assets from claims by third parties, including current or future spouses of a beneficiary.

This paper will focus solely on the third goal.

Section 58(3) of the *Act* deals specifically with trusts, while s.68 deals with ante nuptial or post nuptial settlements.

B. Claims Pursuant to Section 58(3) of the *Act*

1. Overview

The relevant sections of the *Act* provide as follows:

Family asset defined

58 *(1)* *Subject to section 59, this section defines family asset for the purposes of this Act.*

(2) *Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.*

(3) *Without restricting subsection (2), the definition of family asset includes the following:*

(a) *if a corporation or trust owns property that would be a family asset if owned by a spouse,*

(i) *a share in the corporation, or*

(ii) *an interest in the trust*

owned by the spouse;

(b) *if property would be a family asset if owned by a spouse, property*

(i) *over which the spouse has, either alone or with another person, a power of appointment exercisable in favor of himself or herself, or*

(ii) *disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;*

(c) *money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;*

(d) *a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;*

> *(e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.*
>
> *(4) The definition of family asset applies to marriages entered into and property acquired before or after March 31, 1979.*

Excluded business assets

59 *(1) If property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and if the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.*

(2) In section 58 (3) (e) or subsection (1) of this section, an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.

A spouse advancing a claim pursuant to subsection 58(3)(a)(ii) of the *Act* must establish that:

1. His or her spouse owns an interest in a trust; and

2. Property owned by the trust would be a family asset if that asset was owned by the spouse.

The first requirement is usually not in issue. In most cases, the focus is on the second requirement and, if it is met, the remedy available.

2. Interest in a Trust Owned by a Spouse

The issue of whether or not a spouse “owns an interest in a trust” arises where a spouse has only a “potential” interest in a trust at the time of the triggering event. The distribution of trust assets or income to a spouse as a beneficiary is either contingent on the happening of a future event or is within the trustee’s discretion.

The British Columbia case law is unsettled.

In *Whittall v. Whittall* [1987] B.C.J. No. 3143 (SC), the Court found that "a contingent interest is an interest, and that is all that is required to bring one within the language of [the *Act*]". *Whittall* has since been cited for that proposition and followed in a number of other B.C. Supreme Court decisions: *Grove v. Grove* [1996] B.C.J. No. 658 (SC); *Todd v. Freeman* [2003] B.C.J. No. 1788 (SC); *M(HR) v. B(DM)* [2004] B.C.J. No. 186 (SC).

However, a number of other B.C. Supreme Court decisions seem to have found the contingent or discretionary nature of a beneficiary's interest in a trust to weigh against the trust being classified as a "family asset" under the *Act*: *Graham v. Graham* [1983] B.C.J. No. 1936 (SC); *Aylott v. Aylott*, [1999] B.C.J. No. 1524 (SC).

The two British Columbia appellate decisions on this issue are difficult to reconcile. In *Todd v. Freeman* [2005] B.C.J. No. 2277, the Court referred to *Whittall, supra* and appears to have accepted that even a contingent interest in a trust can be a family asset if that interest was ordinarily used for a family purpose. In the more recent decision in *Delasalle v. Delasalle* [2006] B.C.J. No. 2661 (CA), however, the Court considered whether a husband's contingent interest in a discretionary trust could be said to be "owned" by him for purposes of s.58(3)(a) and found as follows:

> *The respondent did not "own an interest" in the…Trust at the date of the triggering event or, indeed, at any earlier date. So long as Mrs. Delesalle [the beneficiary's mother] was alive, nothing in the trust vested in any of the potential beneficiaries. The subsection in question simply has no application.*

At the very least, it appears that *Delasalle* has questioned whether a contingent beneficiary of a trust can be said to "own an interest" in the trust. If not, the trust could not be subject to a claim under s.58(3)(a)(ii).

3. Property Would be Family Asset if Owned by Spouse

With respect to the second requirement, not all assets owned by either of the spouses are "family assets" subject to division under the *Act*. Assets are family assets or become family assets if they fit into any one of the categories defined by subsections (2) and (3) of s.58.

The ordinary use of an asset for family purpose, or the lack of such use, is often the main issue to be determined by the Court. Section 60 of the *Act* places a reverse onus on the party opposing a claim to establish that an asset was **not** ordinarily used for a family purpose. Accordingly, if there is no evidence regarding such use of a trust asset, there is a legal presumption that the asset was ordinarily used for a family purpose and would have become a family asset if owned by the spouse. The party opposing such a claim must lead evidence to rebut this presumption.

Ordinary use for a family purpose is easily established in the case of residential property which is occupied on more than a very occasional basis. Recreational property which is used for vacations, even once a year, over a period of years will be found to have been ordinarily used for a family purpose. Undeveloped land has been held to have been ordinarily used for a family purpose where it was adjacent to other property on which the parties vacationed and was used incidentally by the parties (for walks and boating): *MacLean v. MacLean* (1990), 28 R.F.L. (3d) 103 (BCSC). Such findings turn on the nature and frequency of use. The more difficult cases turn on the intended use of the asset(s). It has been held that where property was intended to be used for the future security or enjoyment of the family, such intention can amount to ordinary use for a family purpose: *Tezcan v. Tezcan* (1990), 44 B.C.L.R. (2d) 343 (SC*); MacLean*.

Where the assets of the trust are real estate, vehicles or other chattels, evidence of ordinary use tends to be more obvious. That may not be the same where the assets are securities, cash or other “passive” investments. The distinction that is made in the latter cases is between the use of income from the trust as opposed to capital held by it. It has generally been held that the “mere” use of income derived from assets (including assets held by a trust) does not necessarily amount to ordinary use of the assets themselves for a family purpose: *Stuart v. Stuart* (1996), 76 B.C.A.C. 30*; Bastin v. Bastin* (1996), 26 B.C.L.R. (3d) 223 (SC). However, consistent use of income, over many years for family purposes may convert the asset or trust interest into a family asset: *Starko v. Starko,* [1986] B.C.D. Civ. 1682-02 (SC). The distinction is still an available defense, although its effectiveness has been weakened by claims based on intended use.

The use of capital assets usually takes the form of either an advance or a loan by the trust to the beneficiary. In determining whether such transactions amount to ordinary use for a family purpose, the Court will look to the frequency and amount of the advances, as well as to the use to which the funds were put: *Grove v. Grove,* [1996] Fam. L.D. 61 (BCSC).

If the trust assets include shares in a company in which the beneficiary is involved as an employee, director or officer, the provisions of s.58(3)(e) and 59(2) may also apply to make the trust interest a family asset.

The outcome of a claim based on s.58(3)(b) is more predictable. These provisions are designed to deal with situations where a spouse retains the power to control assets or otherwise use them for his or her own benefit, although the assets are held by a trust, corporation or third party.

In *Francis v. Francis* (1998), 53 B.C.L.R. (3d) 50 (SC), a trust set up during the marriage for income tax purposes was effectively "pierced" by the Court on the basis that the husband was the sole trustee and had the power to appoint anyone, including himself, as a beneficiary of the trust.

C. Claims Pursuant to Section 68 of the *Act*

The relevant section of the *Act* provides as follows:

Variation of marriage settlements

68 *(1)* *This section applies to an ante nuptial or post nuptial settlement that is not a marriage agreement under this Part.*

(2) *The Supreme Court may, on application, not more than 2 years after an order for dissolution of marriage, for judicial separation or declaring a marriage null and void, inquire into an ante nuptial or post nuptial settlement affecting either spouse and, whether or not there are children, make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses or a child of a spouse or of the marriage.*

(3) *The Supreme Court may, on application, if circumstances warrant, extend the period during which an application may be made or power exercised under this section.*

This section gives the Court the power and discretion to vary "ante nuptial or post nuptial settlements". Neither term is defined in the *Act*. This section has received very little judicial consideration although it was enacted over twenty years ago. In *Grahame v. Grahame,* [2002] B.C.S.C. 1526 (SC), the interpretation and scope of s. 68 was the main issue before the Court. The wife in that case was a discretionary beneficiary of two trusts established by her father. One trust was *inter vivos* and the other was testamentary. Both trusts were settled after the parties were married. The parties separated and the husband successfully applied to add the trustee of both trusts as a party in order to enable him to seek orders directly against the trustee for variation of the trust and distribution of trust assets to the husband. The trustee applied by stated case to be removed as a party, claiming that there was no reasonable claim against him.

The parties agreed that the trusts were "settlements." The issue was whether they were "post nuptial settlements". The husband's position was that, in order to invoke the Court's jurisdiction to vary the trusts, he only had to establish that the trusts were settlements made after the marriage and that his spouse was a beneficiary of each of them.

The Court held that, in order to qualify as a post nuptial settlement, a settlement had to have some causal connection to the marriage in the sense that the benefit conferred by the trust on a spouse was conferred "in his or her character as a spouse, and with reference to the marriage." The trustee's application was allowed and all claims against him were dismissed. This order did not in any way preclude the husband for pursuing claims under s.58(3)(a)(ii) of the *Act*. An appeal was taken from the judgment but later discontinued.

In *EJR v. KDA et al,* [2002] B.C.S.C. 1649 (SC), section 68 was considered and applied to attach assets traced to what was held to be a post nuptial settlement. The wife was one of the named beneficiaries of a trust settled by the husband. After the separation, the husband transferred the assets of the trust to several, new derivative trusts, including one for the benefit of the wife. Although the Court held that the "winding up" of the original trust was done for legitimate tax and estate planning reasons, it nevertheless held that the transfers of assets to all the derivative trusts qualified as a "post-nuptial settlement affecting either spouse", allowing the Court to deal with the settled assets as it deemed appropriate under s.68(2). *EJR* adopted a less restrictive definition of post-nuptial settlements. The Court held that s.68 does "…not preclude a determination that a "settlement" may include a deed or other form of transfer of ownership that has the effect of depriving one spouse of property to which he or she might otherwise be entitled." The reasons in *EJR* were released after argument in *Grahame* was concluded and were not referred to in *Grahame.*

Due to the limited jurisprudence on the application of s.68, it is difficult to predict which trusts will fall within the ambit of that section. It is clear, however, that a trust that names the spouse of a beneficiary as a potential beneficiary is more likely to be caught by the section and such a structure should be avoided.

D. The Strategy

How can one structure a trust against claims under Part 5 of the *Act*?

The structure of the trust is crucial. Trusts which hold assets which will be ordinarily used for a family purpose will be open to attack in the manner outlined above. They remain, however, effective in a practical sense. The successful claimant can only obtain a share in the beneficiary's *interest* in the trust. Where that interest is a contingent one, it is virtually impossible to value as it may never be perfected. The only remedy available is an "if and when" order requiring the beneficiary to pay the claimant his or her share of any assets received by the beneficiary from the trust. This may never occur if the trust is entirely discretionary. It will, however, permanently "charge" the beneficiary's interest and effectively defeat one of the goals of the trust. *Delasalle* may be interpreted to exclude "if and when" orders with respect to contingent trust interests.

There are some practical strategies which may prevent the trust interest from being characterized a family asset. The obvious strategy is to ensure that the trust assets are never used for a family purpose during the marriage. Ideally, not even the income would be used for a family purpose, but this would effectively defeat the purpose of the trust. Although there is some risk that the use of income alone from a trust will be found to be ordinary use of its assets for a family purpose, this is less likely under current jurisprudence unless the use is frequent and the family is to a significant degree dependent on the trust income for its general living expenses.

An estate plan involving the use of multiple trusts and the use of financing outside any trusts for specific bequests are alternatives that should be considered where appropriate.

E. The Use of Multiple Trusts

Example 1:

- Two beneficiaries
- Two trusts
- Each of the beneficiaries is a beneficiary of each trust
- Trustees have absolute discretion with respect to both income and capital distributions.
- Trustees use one trust exclusively for distributions to only one beneficiary and the other trust for the second.

One of the beneficiaries is divorcing. Having received and used income and capital from his trust for family purposes, his or her interest in the trust is deemed to be a family asset pursuant to s.58(3)(ii) of the *Act*. An "if and when" order is made with respect to any future distributions from that trust. The other trust cannot be attacked as no funds of any kind were ever received from it by that beneficiary. The tainted trust can still be used to benefit the second beneficiary. The other trust is still available to benefit the divorced beneficiary in the future.

Example 2:

- Single intended beneficiary
- Two trusts each naming the beneficiary and other contingent beneficiaries

The settled assets are divided between the trusts in a manner designed to minimize risk in the event of marital breakdown. Family business shares and other capital assets which are not likely to be liquidated or used for income in the short term, are isolated in one trust (the "Capital Trust"). Income-generating assets and ones that are more likely to be distributed over the shorter term are held in the second trust (the "Income Trust"). Use of the Capital Trust is deferred for as long as possible and all financial bequests are made through the income trust, preferably limited to use of trust income alone. If the divorce takes place before the Trustee has resorted to use of the Capital Trust, it will not be a family asset.

F. Financing the Purchase of a Residence

This is a common form of assistance which wealthy parents give to their adult children. It is also the type of transaction which will most certainly convert the trust interest into a family asset if the funds are advanced from a trust. If other assets are available, by far the best vehicle for providing such assistance is a secured, personal loan to both of the parties from one or more of the parents. It is essential that the security be renewed as required and that the transaction be treated as a commercial one. This includes independent legal advice for each mortgagor. Records should be kept and the balance owing from time to time confirmed in writing. Undocumented loans between a spouse and his or her family are viewed with great skepticism by family law judges: *Wiens v. Wiens* (1991), 3 R.F.L. (3d) 265 (BCSC).

G. Vulnerability of Non-Family Assets to claim under Section 65(2)

Although a finding that an asset is not a family asset will usually result in the exclusion of that asset from division under the *Act*, the fact that one spouse will be retaining such an asset to the exclusion of the other can result in a finding of "unfairness" under s. 65.

Section 65 of the *Act* is generally used to divide family assets unequally to address what the Court deems to be unfairness flowing from the equal division otherwise required by the *Act*. If the section is applied, the Court "reapportions" or divides one or more family assets unequally. The more troubling provision of the section is that contained in subsection (2). In *Hefti v. Hefti* (1998), 57 BCLR (3d) 171 (CA), the Court of Appeal confirmed that s.65(2) allows the Court to divide between the parties an asset that is not a family asset in order to address unfairness under s.65(1). This remedy is only available in the context of a reapportionment claim based on unfairness.

It is unlikely that s.65(2) would be used to attach an interest in a discretionary trust which would not otherwise be a family asset. That is because such an interest would be of uncertain value and the Court could not ascertain the impact of such an order in redressing the perceived unfairness of an equal division of the family assets.

H. Conclusion

Despite the provisions of the *Act*, trusts can still be an effective asset protection vehicle if they are structured with specific goals in mind. They can be particularly effective in protecting assets which would otherwise be divided under the *Act* at the end of shorter marriages. Their effectiveness decreases with longer marriages during which increased use of trust assets is likely to occur and a mutual intent to rely on the trust assets for future family security would be more evident. The use of multiple trusts, where practical, can give the settlor and trustee some additional comfort and flexibility in dealing with prospective claims under the *Act*.

III. CONSTRUCTIVE TRUST CLAIMS

Claims in B.C. for division of assets between unmarried partners (including same sex couples) are limited to trust claims. These are usually claims based on constructive trust principles. The claimant must establish three things:

1. He conferred a benefit that enriched his partner;
2. He suffered a corresponding deprivation; and
3. There is no juristic reason for the enrichment.

There is no presumption of equal division as Part 5 of the *Act* does not apply to unmarried couples unless they have entered into a cohabitation agreement as defined by s.120.1 and one of them applies to vary it pursuant to s.65. No matter how long the relationship lasts, Part 5 of the *Act* will never apply to the division of the parties' assets. Contrary to what many clients think, there is no one or two year period after which unmarried couples acquire the same property rights as married couples. There is a two year period after which they only acquire the same spousal support rights as married couples. Accordingly, the plaintiff who is not married will have a much more difficult case to prove than a married claimant. Because of this difference, it is not always in a client's interests to enter into a cohabitation agreement as a means of protecting his assets from future claims by a "common law" spouse. By entering into such an agreement pursuant to s.120.1 of the *Act,* the parties make the agreement, and any assets covered by it, subject to Parts 5 and 6 of the *Act*. If the couple eventually decides to marry, the need for such an agreement can be revisited.