SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION (BRITISH COLUMBIA BRANCH)

TO THE BC MINISTRY OF JUSTICE

REGARDING

THE PRESUMPTION OF ADVANCEMENT
AND
PROPERTY DIVISION

UNDER THE

FAMILY LAW ACT

Issued By:

Canadian Bar Association
British Columbia Branch

Family Law Working Group

September 30, 2016

Table of Contents

PREFACE

Formed in 1896, the purpose of the Canadian Bar Association (British Columbia Branch) (the “CBABC”) is to:

- Enhance the professional and commercial interests of our members;
- Provide personal and professional development and support for our members;
- Protect the independence of the judiciary and the Bar;
- Promote access to justice;
- Promote fair justice systems and practical and effective law reform; and
- Promote equality in the legal profession and eliminate discrimination.

The CBA nationally represents approximately 36,000 members and the British Columbia Branch itself has over 7,000 members. Our members practice law in many different areas. The CBABC has established 75 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The CBABC has also established standing committees and special committees from time to time.

The CBABC Family Law Working Group (the "CBABC Working Group") is a special committee of the CBABC comprised of members of the CBABC who share an interest in, or who practice, family law. There are 50 members of the CBABC Working Group. The CBABC Working Group's submissions reflect the views of the CBABC Working Group only and, not necessarily the views of the CBABC as a whole.

EXECUTIVE SUMMARY

The CBABC Working Group considered the questions raised in the Ministry of Justice's Discussion Paper: The Presumption Of Advancement And Property Division Under The *Family Law Act*[1] (the "Discussion Paper"). In preparing its response, the CBABC Working Group conducted a survey, held or monitored several section meetings, including a Kamloops Family Section meeting, a Victoria Family Section meeting, and a meeting of the Family Section Chairs, and held several email and teleconference discussions among the CBABC Working Group members themselves.

The CBABC Working Group strongly recommends that the common law presumption of advancement and presumption of trust be abolished as between spouses and replaced with one clear statutory rule for gratuitous transfers between spouses, which would apply equally to both married and common law spouses. Unfortunately, we were almost evenly split over whether that rule should favour a gift or a trust.

[1] See http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/FLA/FLA-presumption-advancement-discussion-paper.pdf and see unofficial version of the *FLA* at: http://bclaws.ca/civix/document/id/complete/statreg/11025_00

We were similarly split over whether the result of a gratuitous transfer into joint names should be a 50/50 split after separation or whether the result should be the same as that in Alberta: 75% to the transferring spouse and 25% to the receiving spouse.

The survey and the Family Chairs' meeting did disclose a bare majority in favour of trust and the 75/25 result; but the other meetings and discussions did not confirm this view. Furthermore, the CBABC Working Group thinks this is just too close a result to base any recommendation on.

There are various policy considerations for this, as shown in the discussions and CBABC section meetings. While there were no clearly dominant themes, and we can offer no resolution, the various threads include:

(a) While the *FLA* has made a clear choice to treat common law and married spouses the same, the common law and the attitudes of those of us in the bench and bar that have gotten used to the former *FRA* have not fully caught up. To the greatest extent possible, that dissonance should be eliminated. (It has not gone unnoticed that the Discussion Paper speaks only of the presumption of advancement; but there are two competing presumptions in the common law.)

(b) Some members clearly prefer the “once excluded, always excluded” position and feel it is more in line with the public's view. These members feel that not allowing automatic tracing erodes both simplicity and certainty.

(c) Other members feel that the excluded property regime only applies to initial ownership and says nothing about what an owning spouse can or should do with it thereafter. Simplicity and certainty should not override individual autonomy. Furthermore, there is something artificial and counterintuitive about presumptions of trust or a rule that says once excluded always excluded. After all, if they think about it, most folks know that if they put their spouse on title that makes him or her an owner. Why should the legal result be any different?

(d) We were all disturbed by the idea that unwritten rules should "interpret" the otherwise clear language of the statute. That undermines the policy that rules of family property should de clear and should not require court intervention to sort them out.

(e) We were also all disturbed by the fact that most spouses do not think about these transfers, so it is rarely possible to discern any clear contemporary intention. There has to be a default rule, and we recognize that it can only be artificial; but hopefully once the rule is expressed in the *FLA* this will prompt spouses to turn their minds to it.

(f) Whatever the default rule is, the CBABC Working Group believes there should be a commitment to educate the public about it.

While there was some discussion about whether this rule should be limited to certain property, or certain types or lengths of relationships, or limited to transfers into joint names, the consensus of the CBABC Working Group was that there should be one rule applying to all gratuitous transfers alike. There was a view that mere deposit of excluded funds into a joint account should not determine beneficial ownership. Rather, that should depend on what the parties do with the funds, if anything.

The CBABC Working Group felt the interpretation of "derived from" in section 85(1)(g) of the *Family Law Act* (the "*FLA*") depended on the rule the courts or the Legislature chose, rather than influenced it. In effect, it begged the question: does the transferring spouse retain an interest or not, before or after separation?

In a consensus view, the CBABC Working Group felt that section 95 of the *FLA* was fine as is, but that section 96 of the *FLA* might be amended to include a consideration of: (i) wasting of family property and (ii) large discrepancies in family and excluded property in long-term marriages. Either or both would be included in section 96(b) and subject to the "significantly unfair" test. (The factor in (ii) might already be contemplated in subsection 96(b)(i), the duration of the relationship.) A dissenting opinion felt adding

factors to section 96 might confuse the public, erode the intent of section 85, or take us back to the arguably undue flexibility of the *Family Relations Act* (the "*FRA*").

The CBABC Working Group could not think of any other common law or equitable principles that might cause a future problem or confusion.

SUBMISSIONS

The CBABC Working Group is pleased to respond to the request for submissions from the Ministry of Justice regarding the Discussion Paper.

Discussion Paper: The Presumption Of Advancement And Property Division Under The *Family Law Act*

The Discussion Paper asks 8 questions:

Property: "Once Excluded, Always Excluded":

1. Is it more consistent with fairness between spouses for the *FLA to* provide that gifts of excluded property between spouses transfer beneficial ownership or to allow excluded property to always retain its excluded status? Consider the example of RRSP's or other investments purchased with the excluded property of one spouse and registered in the name of the other spouse? Should the value of the excluded property be returned to the transferor spouse or treated as family property under Part 5 of the *FLA*?

Application of the Presumption of Advancement under Part 5 of the *FLA*:

2. The BCCA decision in *VJF*[2] suggests that a spouse who wants to rebut the presumption of advancement can enter into an agreement that sets out that property exchanged between them is not a gift. Is this a practical way for spouses to address the issue?

3. Should consideration be given to amending the legislation to explicitly abolish the presumption of advancement for the purposes of Part 5 of the *FLA* entirely? Or, should consideration be given to adopting the approach used in other provinces?

4. If the presumption is not abolished for purposes of Part 5 of the FLA, should the *FLA* be clarified to ensure that the presumption also applies to those non-married spouses to whom Part 5 of the FLA applies?

The interpretation of "derived from" in section 85(1)(g) of the *FLA*:

5. The *VJF* Court of Appeal decision suggests that section 85(1)(g) of the *FLA* can be used to retain the status of excluded property only if: the test of the presumption of advancement is met; and there is property or some other benefit returning to the transferor spouse. Because section 85(1)(g) applies only between spouses, are there scenarios in which a transferor spouse will receive a

[2] *V.J.F. v. S.K.W.*, 2016 BCCA 186 (CanLII), http://canlii.ca/t/gpq44

benefit from the transferee spouse such that section 85(1)(g) can apply? For example, assuming a finding that the test of the presumption of advancement was met, if the facts of *VJF* were that the purchased property was registered in the joint names of the spouses rather than the sole name of the wife, would that difference have constituted a returning 'benefit' to the husband?

The application of sections 95 and 96 of the *FLA*:

6. The BCCA decision in *VJF* alludes to the usefulness of the presumption of advancement to ensure fairness between spouses. If the presumption of advancement continues to apply to matters under Part 5 of the *FLA*, does section 95 of the *FLA* provide sufficient flexibility to allow a Court to address any alleged unfairness caused by excluded property being converted to family property?

7. If the presumption of advancement is specifically abolished regarding matters under Part 5 of the *FLA*, does section 96 of the *FLA* provide sufficient flexibility to allow a Court to address any alleged unfairness that results from the tracing of excluded property?

Section 104 (2) of the FLA:

8. Are there other "rights under equity or any other law" that may interact with Part 5 of the *FLA* which require examination?

CBABC Kamloops Family Law Section Meeting September 14, 2016

On September 14, 2016, the CBABC Kamloops Family Law Section held a meeting to consider the questions in the Discussion Paper. On presumption of advancement, the Section all agreed among those present that it should be a statutory rule, applying to all gratuitous transfers between spouses. They split on whether the rule should favour a gift or a trust, although a slight majority favoured a gift. They were also split (with several abstaining) about the ¼ - ¾ versus 50/50 split for transfers to joint names. Everyone agreed the rule should be the same for married spouses and unmarried spouses.

CBABC Family Section Chairs' Meeting At The CBABC Provincial Council Meeting September 17, 2016

On September 17, 2016, for those CBABC Provincial Council members from around the Province attending the Family Section Chairs' Meeting at the CBABC Provincial Council Meeting, everyone agreed there should be a legislated rule and that it should apply to common law spouses and married spouses the same. They could not agree what the rule should be or even what their clients' expectations are.

As for client expectations, some members thought that most of their clients were influenced by the former *Family Relations Act* and whether they are legally married or not. Married couples generally expect everything is shared and unmarried couples generally expect that it is not. Other members said their clients know full well how the

new Act words and expect that if they brought property into the relationship, they keep it.

One member observed that often couples don't want to have the conversation, let alone 10 years into the marriage. While that may be true, all it does is emphasize the fact there is rarely any common intention in these types of transfers. If either spouse actually does form some sort of intention, the reason they don't want to talk about it is precisely because it is likely the other spouse doesn't share it. To raise the issue would just provoke argument.

The CBABC Working Group discussed whether there should one rule for transfer of an entire property and another for a transfer into joint tenancy. In the end, this idea was rejected for the sake of simplicity. Similarly, ideas were discussed and dismissed for limiting the rule to certain types of property, or certain types or duration of relationship.

All the members acknowledged that spouses are usually called upon to transfer property into joint names without thinking about it. The most common circumstances are these:

1. The parties do a will and the will drafter suggests joint tenancy as a testamentary strategy.
2. The parties acquire a new house using the proceeds of the old (excluded) and the realtors and conveyance just assume: married couple; both parties sign and it results in joint tenancy.

3. The parties refinance or renew financing and the bank gets nervous about a possible owner not being on title.
4. The non-owning spouse decides it is time he/she was on title.

   Only in the last case is it obvious the spouses would even contemplate the effect of their action on separation.

We also discussed the fact that often when spouses receive money from the sale of excluded property, or from an inheritance, they sometimes deposit it into a joint account, either because they don't currently have a separate account or because they just don't think about it. Should that make it joint property? Most felt not, that the act of putting it into the account alone should be neutral. Intention should be based on what the parties do with it. For example, if the inheritor subsequently pays it out into a separate investment account, then the parties intended to keep it excluded. If they spent in on vacations or other treats, used it to improve the family home, or pay off the mortgage, or put into spousal RRSPs or a joint investment, then they meant it to be shared. If it is still in the account, it is less easy to see, but a default rule might apply here.

Some members said the *FLA* itself makes the excluded property yours, so that should be the default position. Others believed that that only applies to the initial result: If, knowing it is yours, you transfer it anyway, that implies you clearly intended something different from the *FLA*. One member commented that it felt odd to require something more than the transfer itself to make a gift a gift (although this is what happens in presumption of trust cases).

Members attending this meeting voted 6-5 in favour of a presumption of trust.
There was no clear consensus among the members about the 50/50, 25/75 split for transfers into joint names (perhaps because a presumption of trust precludes any split).

CBABC Victoria Family Law Section Meeting September 28, 2016
On September 28, 2016, the CBABC Victoria Family Law Section held a meeting to consider the questions in the Discussion Paper.

There was consensus that something needs to be added to the *FLA* on whether or not the presumption of advancement applies. Everyone at the meeting wanted clarity because the status quo is not acceptable and creates problems when it comes to advising clients. Also, there was consensus that whatever determination is made, it should apply equally to married and unmarried spouses because the intention of the *FLA* is to treat common law and married spouses the same.

There was a split on whether the presumption of advancement or presumption of a trust should be the change to the *FLA*. There was discussion on also clarifying any exclusions whichever presumption is codified; however, there was disagreement on how detailed those exclusions should be because more detail will open clients up to more litigation. No consensus was reached on this.

At the meeting, there was also discussion about whether different types of property should be treated differently, such as a different presumption for the family residence. No consensus was reached on this.

There was also discussion on whether transferring into joint names or the sole name of the other party should result in a different presumption. No consensus was reached on this.

Finally, it was noted that previously, BC property law was very litigious and the purpose of the *FLA* was to reduce that, so that should be the purpose of any revisions to the *FLA*.

CBABC Working Group Survey

In making its submissions the CBABC Working Group engaged an online survey of CBABC members and the public based on the Discussion Paper's 8 questions (the "Survey"). The Survey was conducted over a one-week period from September 13 to 21, 2016. The Survey had 45 responses. The Survey had 10 questions.

The Survey questions: When a spouse makes a gratuitous transfer of property to his or her partner, and there is no contract or clear evidence whether a gift or a trust was intended:

Question 1 asked: “Should the result be the same whether the “spouses” are married or not (eg common law spouses)?”

- 82.22% said result should be the same;
- 17.78% said should not be the same.

Question 2 asked: “Should the result be determined by case law (which, as discussed is uncertain now and is largely unknown to those people who do not have legal training), or clearly set out in the *Family Law Act*?”

- 13.33% said determined by case law; and
- 86.67% said clearly set out in the *Family Law Act*.

Question 3 asked: “If you are going to have a default rule at all, which is the fairest: (a) that the transfer is a gift; or (b) that the transfer results in a trust?

- 47.73% said a gift;
- 52.27% said a trust.

Question 4 asked: “Should there be any exceptions to this rule, other than a contrary intention or contract?”

- 26.67% said yes;
- 73.33% said no.

Question 5 asked: “Should there be an exception to this rule if the parties had a short-term relationship?”

- 28.89% said yes;
- 71.11% said no.

Question 6 asked: “Should there be an exception to this rule, if the parties had a long-term relationship?”

- 15.56% said yes;
- 84.44% said no.

Question 7 asked: ‘‘Should there be an exception to this rule based on the nature of the originally exempt property (eg house, inheritance, RRSPs, prior-owned property or gifts or inheritances during the relationship)?”

- 15.91% said yes;
- 84.09% said no.

Question 8 asked: “What exception(s), if any, to the rule would you suggest?”
Of 44 respondents, 18 respondents provided comments.

These comments are, in no particular order of importance or preference, as follows:

a. If a contrary intention can be proven or if there is a valid agreement saying otherwise;
b. Absent a contract or evidence of intention, formal marriage justifies a presumption of gift - otherwise there ought to a presumption of trust;
c. This is not an exception but a comment to question #9. The clearest way to accomplish this is to legislatively extend the common law presumption of advancement for spousal transfers, to transfers between common-law spouses. Because it is only a "presumption" and not a "rule", it can be overridden by anything demonstrating a contrary intention.
d. I suggest that the rule should only apply to transfers into joint names and that transfers from one spouse to the other spouse's sole name should be an exception and not included in the rule.
e. Changes permitted at the discretion of the court or by agreement between the spouses.
f. None.
g. None.
h. None. Just intention.
i. If excluded property of one spouse is transferred from one spouse to another (either in sole or joint names) and it is presumed to be family property (either wholly or part) then the exceptions that should apply are already set out in s. 95 in determining whether it is significantly unfair to

divide family property equally. As length of marriage is already a factor in s. 95 then it is not necessary to specify length of marriage (long or short) as an exception for gratuitous transfers.

j. The exceptions require evidence of the particular case. Attempts to "categorize everything" are ridiculous and achieve nothing.

k. Where the gift is subject to a charge such as a mortgage, and the giving party continues to make the payments.

l. If the parties do not qualify to share property under the *FLA*, contrary intention, fraud, undue influence.

m. Presumption of advancement should not apply for non-married couples. Instead presumption of trust should apply.

n. Tracing of pre-relationship property, gifts, inheritances and other excluded property.

o. Some ability to consider a decision made by the spouses to spend one person's excluded property and not spend the other person's excluded property based on logistical considerations, ie if one spouse has an excluded TFSA and one spouse has an excluded RRSP and during the relationship they use spouse A's TFSA to go on a cruise because it is more liquid than the RRSP, spouse B should not be permitted to retain their exclusion.

p. Mental incapacity, undue influence, coercion, intimidation.

q. Undue influence; coercion; where there are children from previous relationships, obligations to such children (similar to Wills Variation issues).
r. No exceptions; there are many reasons a spouse transfers an asset to the other; the most obvious is so as to judgment proof the asset in case of a future claim by a creditor/judgment holder against the transferring spouse. The trust should be secure against claims by all except the transferring spouse on breakup of the relationship;
s. Clear intention, eg. letter or contract that it the property is held in trust instead of being received as a gift.

Question 9 asked: “Do you agree that this rule should only operate only in the absence of a contract or clear contrary intention? In other words, should this be the result in all cases of gratuitous transfer between spouses, or should the parties be allowed to opt out, so long as that choice is clear (eg contract, intention letter)?”

- 4.55% said apply in all cases of gratuitous transfer between spouses; and
- 95.45% said parties should be allowed to opt out of this rule so long as that choice is clear (eg contract, intention letter).

Question 10 asked: “Which result is fairer? If a spouse has property at the beginning if the relationship and puts his or her spouse on title as to half, as a gift (a) should they retain half each on separation; or (b) should the gifted half be shared between the spouses, resulting in a three-quarters/one quarter split?”

- 48.89% said split 50-50; and
- 51.11% said split 3/4-1/4.

General Comments On The Discussion Paper

Members of the CBABC Working Group had general comments on matters raised by the Discussion Paper.

One CBABC Working Group member wrote that we need to have a rule about the division of property that is transferred into joint names, and then allow for an application to correct if the outcome in law is different than what the parties' intended. And that rule could go either way: either a) to start with property becoming joint when put into joint names -- if the spouse who used to own the property is unhappy with this, they can apply to correct this automatic result in the law, or b) to allow "tracing and exclusion" even if in joint names, so that what a person put into the spouses joint names is excluded, and the other person has to apply to correct this automatic result in the law.

That member added: “… and a clear statement in the Act that says the common-law presumption of gifts does not apply. That way we don't have to worry about ‘gift’ or not.”

Another member suggests that in evaluating what is “fair”, it is easy to be influenced by what we have become accustomed to – namely, the former *FRA*. The *FLA* needs to be evaluated in light of its own values and policy objectives, the most important of these being: (a) that the rules should be evident to the lay reader; (b) that outcomes should be certain and predictable, and that (c) discretion, while necessary to do justice in the last resort, should be sparingly applied.

The *FLA* proposes firstly that “family property” for the most part should be property acquired during the relationship and secondly that the same rules which apply to married couples should also apply to common law couples. A tendency to interpret a “fair” result in light of what the former *FRA* used to do undermines this intent, and the application of common law presumptions can also. Which do we apply, the presumptions common to unmarried spouses or those common to married spouses? To avoid interpretations that derive from habit or historical anomalies in the common law, we need clear statutory rules.

One member of the CBABC Working Group believes that the *FLA* seemed clear: exemptions on family property are protected, and there are no gifts between spouses as it is either shared family property or excluded. Along came *Wells v. Campbell* and *VJF* creating uncertainty and confusion as to what the law is. This member’s opinion is that we need to remedy the unfairness of the new *FLA* regime for those who relied on the former *FRA*. This member recommends adding a transitional section to the *FLA* for

transfers between married spouses when the transfer was made under the former *FRA* to allow only them to use the presumption of advancement. Otherwise, the law should stay as it is written.

On the same issue, another member of the CBABC Working Group does not agree. The presumption of advancement was not determinative in *VJF.* This presumption did not even come into play based on the evidence of gift. This member strongly disagrees that the *FLA* was meant to ban gifts between spouses where there is real evidence of a spouse wanting to gift and benefit their spouse of money or property. If someone really intends to gift something to his or her spouse, why shouldn't that be family property on separation? This member cites examples of when spouses truly intend to share property or gift property:

- A wedding ring purchased by the husband with his excluded property (under *VJF* this is a gift and would be family property and form part the communal pot as opposed to going back to the husband);

- Consider a spouse who earns lots of income and wants a tax break and to benefit his non-earning spouse by purchasing RRSP's in her name with excluded property – do you think it is fair that these RRSP's all go back to the husband when perhaps they both relied on this as savings and made decisions based on it being shared—ie the wife didn't go back to work as the husband said don't worry you have financial security in the RRSP's (or other savings or a home purchased in her name, etc).

- In *VJF* let's say the husband instead of giving the $2 million to his wife, gave $1 million to his mistress (and kept no legal or beneficial interest in it) and $1 million to his wife (again keeping no legal or beneficial interest in it)—assuming the husband had no beneficial interest in the property, it only makes sense that s. 85(1)(g) does NOT come into play—he has no property left as he gave to the mistress (and neither he nor his wife can claim this legitimate gift back as the husband's property whether it's a mistress or his brother or a stranger if it is a legitimate gift). In the case of a gift to a spouse, if it is still owned by the spouse, then it is family property and shared on separation.

In this member's view, most average people who do not want to share their inheritance or pre-acquired property will not give it entirely away to their spouse (some won't even give part of it away). Most wealthy people with lots of excluded property will be in consultation with professionals and be more likely to get agreements done. Average people are less likely but they normally understand to keep things separate if they don't want to share.

Also, this member thinks the other provinces provide more clarity than BC – these provinces do away with the presumption and/or state what is to happen if excluded property is transferred to joint names – ie it will be shared 50/50 unless that party proves something else was intended. That can be clarified in the *FLA*.

This member does not agree that it is a given that the presumption of advancement does **not** apply to common law spouses: that is to be determined and could be argued to be applicable. However, the presumption is a bit of a red herring as it only comes into play as an evidentiary presumption when there is no evidence of the transferor's intention (ie the one who is transferring his or her excluded property not the recipient's intention that counts). How many cases would there be where the person who has transferred their property to joint or sole names will not be able to say what he, the transferor intended?

The presumption of advancement may seem archaic in certain circumstances (ie modern relationships with no financial reliance on each other) but still may be very helpful and relevant to situations where there is strong economic reliance such as traditional relationships among older but even among younger couples as well as in different cultures within Canada and BC. As a result, this member believes we need to keep cultural and relationship differences in mind, not just what family lawyers think of as the family law files cross family lawyers' desks.

A majority of the CBABC Working Group believed that section 96 has insufficient flexibility and that there might be some consideration to adding these factors to section 96: (a) where family property has been dissipated, and (b) in a long-term marriage where there is a significant discrepancy in the relative size of family and excluded property. These would fall under section 96(b) of the *FLA*. This last consideration may already be included in section 96(b)(i) of the *FLA*.

A minority of members of the CBABC Working Group expressed a contrary view. The *FLA* was replacing the *FRA* to be in line with public perceptions (see paragraphs 1 and 5 of *VJF*). Changing section 96 to account for dissipated family property and a long-term marriage simply prevents the general public from knowing what the law is, and appears to revert back to the *FRA* (see paragraph 6 of *VJF*). The significantly unfair test already covers the issues of the extent of family and excluded property. Are we no longer trying to simplify the legislation to assist and accord with the general public? The Court of Appeal noted at paragraph 68 in *VJF* "the lure of simplicity" in following the *Remmen* line of decisions, so why are we not making that clear in the legislation? The majority of the BC Supreme Court decisions were trending that way. Why are we trying to complicate things? Section 85 was introduced to give meaning to how society saw these issues, with and without lawyers. How many family lawyers would be able to protect, and would or do protect, excluded property in ways that the average citizen would have no idea about?

If we simply look at the list in section 85(1)(a) to (g) of the *FLA*, which item is it that the general public would feel should not be excluded property? If there are not any, why is the presumption not once excluded, always excluded, unless written directions otherwise? If family lawyers as counsel could not predict with some level of certainty what the law is, has the legislation not failed? At what year of relationship should some of the excluded property no longer be excluded property? Is it dependent upon the parties' ages? Is it dependent on children, how many, what ages? I encourage people

to ask their friends who are not lawyers whether section 85(1)(a) to (g) is what they would expect the law to be; at least as a rebuttable presumption. Too often as lawyers, we get overly preoccupied trying to inject our own morality into the equation and trying to overthink matters.

In addition, adding factors to section 96 of the *FLA* would create further situations in which it may be significantly unfair not to divide excluded property, which would create further uncertainty about the outcome of a property division claim on separation. Perhaps it would clearer to say that adding factors to section 96 will make it more difficult for the public to know what the application of the law might be.

The CBABC Working Group's Answers To The Discussion Paper's Questions

Question 1: Property: "Once Excluded, Always Excluded"?:

The CBABC Working Group was almost evenly split on this question. We can offer no consensus answer.

The survey and the Family Chairs' meeting did disclose a bare majority in favour of trust and the 75/25 result; but the other meetings and discussions did not confirm this view. Furthermore, the CBABC Working Group thinks this is just too close a result to base any recommendation on.

There are various policy considerations for this, as shown in the discussions and CBABC section meetings. While there were no clearly dominant themes, and we can offer no resolution, the various threads include:

(a) While the *FLA* has made a clear choice to treat common law and married spouses the same, the common law and the attitudes of those of us in the bench and bar that have gotten used to the former *FRA* have not fully caught up. To the greatest extent possible, that dissonance should be eliminated. (It has not gone unnoticed that the Discussion Paper speaks only of the presumption of advancement; but there are two competing presumptions in the common law.)

(b) Some members clearly prefer the “once excluded, always excluded” position and feel it is more in line with the public's view. These members feel that not allowing automatic tracing erodes both simplicity and certainty.

(c) Other members feel that the excluded property regime only applies to initial ownership and says nothing about what an owning spouse can or should do with it thereafter. Simplicity and certainty should not override individual autonomy. Furthermore, there is something artificial and counterintuitive about presumptions of trust or a rule that says once excluded always excluded. After all, if they think about it, most folks know that if they put their spouse on title that makes him or her an owner. Why should the legal result be any different?

(d) We were all disturbed by the idea that unwritten rules should "interpret" the otherwise clear language of the statute. That undermines the policy that rules of family property should de clear and should not require court intervention to sort them out.

(e) We were also all disturbed by the fact that most spouses do not think about these transfers, so it is rarely possible to discern any clear contemporary intention. There has to be a default rule, and we recognize that it can only be artificial; but hopefully once the rule is expressed in the *FLA* this will prompt spouses to turn their minds to it.

(f) Whatever the default rule is, the CBABC Working Group believes there should be a commitment to educate the public about it.

Question 2: Agreement That Property Exchanged Is Not A Gift Per VJF?

The CBABC Working Group agreed that agreements are an obvious answer for any spouse not wanting to give both legal and beneficial ownership.

Since transfers of land are the most common example, there was some discussion of requiring a conveyance form similar to the declaration of residency, setting out whether the transfer was intended as a gift or a trust. The problems with that are: (a) people are

already asked to sign forms that are actually contrary to their true intent (eg the “gift letter” that banks require parents or relatives to sign when they are advancing money for the purchase), and (b) this presumes that most people will give that form any more thought than the transfer itself.

There was a concern that, whatever the rule, there would have to be some public and professional education about the subject. As it is, a lot of people are engaging in these sort of transactions with little or no appropriate advice.

Question 3: Amend FLA to Abolish Presumption of Advancement?

With one notable dissent, the CBABC Working Group believed there should be a solution similar to the other provinces: abolish the common law presumptions for spouses and replace them with a clear rule. The CBABC Working Group cautioned only that if either the result in Alberta (75/25) or Saskatchewan (50/50) is favoured for transfers to joint names, it should be clearly spelled out in the legislation. The dissenter believed BC had followed other provinces enough already.

Question 4: Amend FLA to Clarify Presumption of Advancement Applies to Non-Married Spouses?

The CBABC Working Group strongly believed that the result should be the same for married or unmarried spouses.

Question 5: Interpretation of "derived from" in section 85(1)(g) of the FLA?

The CBABC Working Group thought that this question, like the Court's interpretation of "derived from" itself, is essentially a trick question. Or rather, it begs the real question: does the transferor retain a benefit? The answer depends on the rule, whether common law or legislated. If the rule is gift, then the transferor retains no interest if the entire property is transferred (but half on separation), and a half interest if only half of the property is transferred (but three-quarters on separation – if the Alberta rule is followed). If the rule is trust, it doesn't matter how much is transferred, the transferor will always retain the entire property – before and after separation.

Question 6: Application of section 95 of the FLA?

The CBABC Working Group arrived at the consensus that section 95 of the *FLA* provides sufficient flexibility to allow a Court to address any alleged unfairness caused by excluded property being converted to family property.

Question 7: Application of section 96 of the FLA?

The CBABC Working Group could not come to consensus that section 96 of the *FLA* provides sufficient flexibility to allow a Court to address any alleged unfairness that results from the tracing of excluded property. A majority of the CBABC Working Group believed that section 96 has insufficient flexibility and that there might be some consideration to adding these factors to section 96: (a) where family property has been dissipated, and (b) in a long-term marriage where there is a significant discrepancy in the relative size of family and excluded property. These would fall under section 96(b)

of the *FLA*. This last consideration may already be included in section 96(b)(i) of the *FLA*.

A minority of members of the CBABC WORKING GROUP expressed a contrary view. They felt the *FLA* was replacing the *FRA* to be more in line with public perceptions and that this would take us back. The significantly unfair test already covers the issues of the extent of family and excluded property. Adding factors to section 96 of the *FLA* would create uncertainty about the meaning and application of section 85 of the *FLA*.

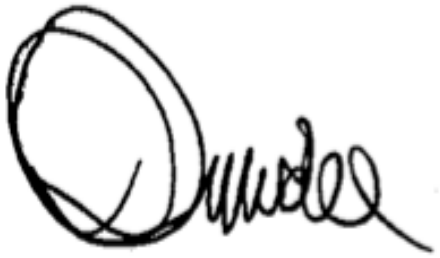
Question 8: Rights under Equity of Other Law in section 104(2) of the FLA that Interact with Part 5 of the FLA?

The CBABC Working Group could not think of any rights under equity or other law in section 104(2) of the *FLA* that interact with Part 5 of the *FLA*.

CONCLUSION

We would be pleased to discuss our submissions further with the Ministry, either in person or in writing, in order to provide any clarification or additional information that may be of assistance to the Ministry as it undertakes this important review of the presumption of advancement and property division under the *FLA*.

All of which is respectfully submitted.



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