Submission to

MINISTRY OF ATTORNEY GENERAL

Justice Services Branch
Civil and Family Law Policy Office

FAMILY RELATIONS ACT REVIEW

Issued by:

***FRA* Working Group**
Canadian Bar Association
British Columbia Branch
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PREFACE

The Canadian Bar Association nationally represents over 35,000 members and the British Columbia Branch (the "CBABC") itself has approximately 6,000 members. Its members practise law in many different areas and the CBABC has established 67 different Sections to provide a focus for lawyers who practise in similar areas to participate in continuing legal education, research and law reform. The CBABC also establishes special committees from time to time to deal with issues of interest to the CBABC.

This submission was prepared by a special committee: the *FRA* Review Working Group (the "CBABC *FRA* Working Group"). The comments expressed in this submission reflect the views of the CBABC *FRA* Working Group and are not necessarily the views of the CBABC as a whole.

The CBABC *FRA* Working Group was composed of the following members of the Family Law and Alternate Dispute Resolution (ADR) Sections and the Legislation and Law Reform Committee:

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- Kay Melbye;
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SUBMISSIONS

BACKGROUND

In February 2006, the Ministry of Attorney General began a review of the *Family Relations Act,* R.S.B.C. 1996, c. 128 (the "*FRA*"). The review is to modernize the *FRA.* The *FRA* was first enacted in 1978.

The review is planned in three phases.

Phase 1 is from February to May 2007.

The following discussion papers were released in Phase 1:

- Chapter 1: Background and Context for the *Family Relations Act* Review;
- Chapter 2: Division of Family Property;
- Chapter 3: Division of Pensions; and
- Chapter 4: Judicial Separation.

Phase 2 is from June to September 2007.

The following discussion papers are planned to be released in Phase 2:

- Chapter 5: Programs and Services;
- Chapter 6: Parenting Apart;
- Chapter 7: Meeting Access Responsibilities;
- Chapter 8: Children's Participation; and
- Chapter 9: Family Violence.

Phase 3 is from September to November 2007.

The following discussion papers are planned to be released in Phase 3:

- child status (legal parentage);
- spousal and parental support;
- co-operative approaches to resolving disputes; and
- other matters not included in Phases 1-3 or which arise in the consultations.

In March 2007, for Phase 3, and related to parental support, the British Columbia Law Institute released a report recommending that the parental support obligation contained in section 90 of the *FRA* be repealed.[1] Section 90 of the *FRA* provides that a child is liable to maintain and support a parent having regard to the other responsibilities and liabilities and the reasonable needs of the child.

PHASE ONE SUBMISSIONS

These submissions of the CBABC *FRA* Working Group are restricted to Phase 1 of the *FRA* Review. The CBABC *FRA* Working Group intends to make submissions for Phase 2 and 3 after the discussion papers for these phases are released by the Attorney General.

[1] British Columbia Law Institute, Report on the Parental Support Obligation in Section 90 of the *Family Relations Act.* (BCLI Report No. 48) (March 2007) (www.bcli.org/pages/projects/parentalsupport/Parental_Support_FRA_section_90_Report.pdf).

For Phase 1, the CBABC *FRA* Working Group's Submissions focus on three discussion papers released by the Attorney General:

- Chapter 2: Division of Family Property;
- Chapter 3: Division of Pensions; and
- Chapter 4: Judicial Separation.

Where questions or issues set out in the discussion papers are not considered by the CBABC *FRA* Working Group in these Submissions, this does not mean that the CBABC *FRA* Working Group either accepts or rejects these matters, but that the CBABC *FRA* Working Group has no comment on these matters at this time.

CHAPTER 2: DIVISION OF FAMILY PROPERTY DISCUSSION PAPER

In answer to Chapter 2 Division Of Family Property Discussion Paper,[2] the CBABC *FRA* Working Group's Submissions will generally address itself to the subjects and questions posed in the paper, with a few preliminary comments and some concluding submissions not directly raised by those questions.

[2] British Columbia Ministry of Attorney General, "Chapter 2: Division of Family Property" in *Family Relations Act* Review (February 2007)(www.ag.gov.bc.ca/legislation/pdf/Chapter2-Property.pdf)("Chapter 2).

Preliminary Comments

The CBABC *FRA* Working Group has a few preliminary comments in addressing the *FRA* review generally.

First, any legislative reform, however clearly drafted and well intentioned, will inevitably undergo a process of judicial inquiry and interpretation before becoming fully understood and accepted by the legal profession. This is unavoidable. For example, the framers of the *Federal Child Support Guidelines* may well have thought they made themselves clear, yet the *Contino* decision was decided by the Supreme Court of Canada just in 2005-- and both Bench and Bar are still trying to figure out just what the Supreme Court of Canada had in mind.[3]

Consequently, legislative amendments should be made sparingly. They should respond to a clear and demonstrated need -- perhaps to fill a gap in the law, or to correct an unwanted result from the legislation, or the case law, or to bring the statute more in line with case authority or practice.

Second, there is a general sense from the proposals that the law in this area is complicated -- and it is -- but that alone does not mean the law can, or should, be made simpler. The CBABC *FRA* Working Group does not see any persuasive consensus that the law is any more complicated than it needs to be. Simply put, we are dealing with the division of families' entire life savings, and all the myriad permutations that differing cultures, domestic arrangements, financial

[3] *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217. Unofficial copy available at: http://scc.lexum.umontreal.ca/en/2005/2005scc63/2005scc63.html

circumstances, and types of property can present. While it would be nice to hope that marital property can be identified and divided without a great deal of calculation or expense, the reality is often far more messy and complex. In order to achieve fairness, the law needs to be flexible enough to recognize and deal with that fact.

Third, there is a suggestion from the discussion paper that the law in this area is largely case driven, or judge-made – as if that were a bad thing. The genius of the common law is that we allow rules to evolve on a case by case basis, in response to highly specific and unpredictable circumstances, rather than prescribe the rules in advance and hope they do justice. Perhaps the fear is that precedent is not so accessible to the general public, and that if the rules are to be found in the case law rather than the statute itself, they will be easy to miss. This is a fair point. But codifying the law also has a cost. It may restrict the capacity for courts to further evolve the law, or respond to individual circumstances, and that is the heart of equity.

Fourth, while it is laudable to work towards the objective of keeping disputes as much as possible out of the courts, it would be reckless to also try to discourage the involvement or use of lawyers. To the contrary, the CBABC *FRA* Working Group urges that competent and experienced lawyers providing legal advice is fundamental to an equitable and efficient resolution of matrimonial property issues. The Supreme Court of Canada decision in *Christie* aside, lawyers do play a fundamental role in the delivery and (as the court recognized) quality of access

to justice. [4] Self-help is one thing, and legal information hubs and public legal education and information officers and web-sites are all laudable tools, but they do not provide an adequate substitute for legal experience and expertise. No one would want to go to hospital and, instead of seeing a doctor, be handed a disposable scalpel and a manual on how to take out an appendix. The public already knows that having a lawyer can make a difference. The feeling is notorious in criminal law: "He was guilty. He just had a slick lawyer, or a lot of money." If we are not careful, we can generate the same degree of cynicism and disaffection over the resolution of family matters.

Is there any benefit to changing the family property division model currently used in BC? (Question (Q) 1)

In answer to Question 1, the consensus of the CBABC *FRA* Working Group is no. There may be other systems in other jurisdictions that work well, but there is no strong consensus that those systems work any better than that in British Columbia.

We've had this system in place for a full 30 years now and it is part of the social, cultural and legal fabric of our society. Compensatory models may make sense but they have, as an underlying basis, a notion that non-owning spouses "earn" compensation for a general accretion of equity during the marriage. Our system

[4] *British Columbia (Attorney General) v. Christie*, 2007 SCC 21. See para. 22: "Lawyers are a vital conduit through which citizens access the courts, and the law. They help maintain the rule of law by working to ensure that unlawful private and unlawful state action in particular do not go unaddressed. The role that lawyers play in this regard is so important that the right to counsel in some situations has been given constitutional status." Unofficial copy available at: http://scc.lexum.umontreal.ca/en/2007/2007scc21/2007scc21.html.

presumes that married couples are in economic partnership and share acquisition and loss equally, regardless of who brought what into the marriage. They are two fundamentally different ways of thinking about family property. Undoubtedly, lawyers and clients coming from a compensatory jurisdiction, like Ontario, will find it a little disorienting trying to grapple with the concept of deferred community of property. But that would be nothing compared to the disorientation of British Columbia lawyers and residents waking up under a compensatory model of property division.

British Columbia residents understand community of property. That is the rule in California, as many are aware. Our clients expect it to be the rule here. To change it would, at the least, require a massive public re-education exercise – and would likely meet strong public resistance.

The concept of deferred community of property, or economic partnership, is ingrained in every aspect of our matrimonial property law, including most notably:

- the division of pensions: compensatory regimes cap the value of this asset at separation, as if the pensioned spouse quit his job at the date of separation; our system treats the spouse as a co-owner of their share of the pension, which grows in value along with the original pension;
- valuation dates: compensatory regimes are generally interested in the values at separation, which is antithetical to the idea of partnership, or co-ownership. Our system generally assesses value at the date of division,

absent questions of wasting or post-separation improvement (per *Blackett*[5]).

Should the *FRA* include a statement about why each spouse is entitled to an equal share in the family's assets? (Q2)

This question has not received broad consideration, but the conclusion of the CBABC *FRA* Working Group is that, while there may be some utility in stating an explicit rationale, care must be taken to make sure we get it right. Otherwise, it could provide a basis for unnecessary and unwanted argument.

For example, with the greatest of respect to Saskatchewan and their *Family Property Act*, it may be counterproductive to assert that "child care, household management, and financial provision are the joint and mutual responsibility of spouses" and that this justifies a sharing of family property. While the sentiment is certainly politically correct, and accurately reflects the sentiments of both *Moge*[6] and *Peter v. Beblow*[7], it asserts generally that spouses "earn" their share of family property – a concept more appropriate to common law property division than to Part 5 (Matrimonial Property) of the *FRA*.

The unintended consequence of explaining *why* most spouses merit an equal share is the argument that, in individual cases, certain spouses are in fact not worthy.

[5] *Blackett v. Blackett* (1989), 40 B.C.L.R. (2d) 99, 22 R.F.L. (3d) 337 (B.C.C.A.).
[6] *Moge v. Moge*, [1992] 3 S.C.R. 813. Unofficial copy available at: http://scc.lexum.umontreal.ca/en/1992/1992rcs3-813/1992rcs3-813.html.
[7] *Peter v. Beblow*, [1993] 1 S.C.R. 980. Unofficial copy available at: http://scc.lexum.umontreal.ca/en/1993/1993rcs1-980/1993rcs1-980.html.

They did not assume their role, or did it poorly, or for some other reason have become disentitled to a full share. As a matter of public policy, we doubt that either the public or the legal profession would want to encourage such an argument.

It could be said the *FRA* already opens the door to arguments about "effective" household management, or relative contribution, in sections 58(3)(e) and 59(2), or perhaps 65(1)(f).

Nonetheless, such considerations are confined to business assets or ventures, or arguments about reapportionment, and even here the case law discourages "fine distinctions regarding the respective contributions of the spouses during the marriage" (*Sutherland*, quoting *Silverstein*[8]).

The last thing we want to do in family law is encourage spouses to compete with one another in open court about the degree to which they feel they have been ill-served in the marriage.

If a statement why spouses are entitled in British Columbia to a presumptive 50% share of family assets is valuable -- which is not clear – then we suggest such a

[8] [1997] B.C.J. No. 1552 (BCSC), para 11. In *Sutherland*, supra, it was argued for the husband that, since the wife was a chronic alcoholic, she could not contribute as she should. The court said that, despite her condition this was not a case where she had made "no or negligible contributions to household management" (para. 12). See also *Piercy v. Piercy* (1991) 31 RFL (3d) 187 (BCSC), where the wife was supported as a society wife, complete with domestic helpers. The court concluded this was the role the parties selected for her, and doing it constituted her contribution.

statement would assert that, because public policy wishes to discourage any post-separation arguments over conduct or contribution, marriage is presumed, by law, to be a full economic partnership.

Should the *FRA* provisions for division of family assets apply to unmarried spouses? (Q 3)

In CBABC *FRA* Working Group, there is disagreement here, but the majority view is no.

The prevailing view is that there is still a societal value in, and a general public recognition that, the decision to marry has consequences, and a presumptive sharing of property is one of them. Deciding not to marry (or to stay with someone who refuses to marry) is also a choice, and most clients know that this decision too has consequences.

Pre-*Walsh*, there may have been some doubt on this point, from the legal profession at least.

That may, in fact, explain some of the more confusing cases using the constructive trust remedy, cases that seem hard to reconcile with a strict application of *Peter*. There was a notion for awhile that it would be only a matter of time before the exclusion of common-law spouses from Part 5 of the *FRA* would be ruled unconstitutional, so why not just do what you would under Part 5.

Post-*Walsh*, though, the law and the public seem to be back in accord on this issue.[9]

The CBABC *FRA* Working Group also has these comments:

- if common-law couples are brought within Part 5 and Part 6 (Division of Pension Entitlement) of the *FRA*, it makes marriage irrelevant;
- there are many varieties of unmarried domestic relationships, so if the same rules apply to common-law as to married couples, that would be a disservice to the choice and variety of these arrangements;
- as things stand, co-habitation agreements are more enforceable than marriage agreements. Bringing common-law couples into Part 5 might actually discourage them from settling their own affairs in an agreement (section 120.1?)

Question 3 of the discussion paper asks:

> Do you think the *FRA* provisions for division of family assets should apply to unmarried spouses (as defined by the Act):
>
> a) automatically, unless they agree that the *FRA* provisions should *not* apply;
>
> b) only if they make an agreement about how to divide their property, and even if the agreement says that the *FRA* provisions should not apply;

[9] *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325. Unofficial copy available at: http://scc.lexum.umontreal.ca/en/2002/2002scc83/2002scc83.html.

c) only if they make an agreement about how to divide their property and clearly state that the *FRA should* apply to part or all of their property;

d) never.[10]

As for the four options in Question 3, the CBABC *FRA* Working Group supports the possibility for common-law couples to opt into Parts 5 and 6, but only where they do so expressly, option (c). Option (b) merely emphasizes an unsatisfactory state of affairs with the present section 120.1. Common-law couples should be empowered to make a clear choice, not have one made for them – especially not inadvertently.

Should the *FRA* still define "family asset" as property that was ordinarily used for a family purpose? (Q 4)

Since much of our law has developed by interpreting this very phrase, "ordinarily used for a family purpose", the consequences of changing it and therefore starting completely anew, would militate against making any change. Whether the phrase should be further refined by legislation was the subject of most discussion within the CBABC *FRA* Working Group.

[10] Chapter 2 at page 6.

Would it be helpful if the *FRA* also said that certain types of property are not family assets? (Qs 5 and 6)

The general consensus in the CBABC *FRA* Working Group is that, yes, some legislative "amendment" of the current law is needed. The problems most commonly identified include:

- Registered Retirement Savings Plans ("RRSPs") or more specifically pre-marriage RRSPs;
- tax refunds;
- pre-marriage property generally;
- inheritances and gifts; and
- court awards.

The CBABC *FRA* Working Group believes that like property should be treated alike by the *FRA*. RRSPs are most like pensions, yet they are treated differently. RRSPs are defined as family assets whenever they are acquired, whereas pensions are divided only where they are accrued during the marriage. This should be addressed.

Income tax refunds pose a similar problem, in that there is a disconnect between the treatment of tax refunds and liabilities in the case law. Some cases treat refunds as income, and therefore incapable of being a family "asset" (even though accounts receivable and savings are both clearly assets), and some differentiate between when the refund is received, as opposed to when the savings are

generated. By contrast, income tax liabilities are generally accepted as being family debts. This does not seem equitable.

Pre-acquired property, gifts and inheritances all pose a different problem. There is a general sense that none should be divided, and yet the problem is most spouses do not differentiate between yours, mine and ours during the marriage, and some can make significant career or investment decisions in reliance on the other's gift, or inheritance, or expectancy. They can find themselves at a considerable disadvantage if these assets just disappear on the failure of the marriage.

For example, often when spouses each bring assets into the relationship, one's house, or furnishings or other property, are preferred and the other gets rid of his or hers. Sometimes the money is invested and preserved, but most often it is spent – on trips, or living expenses, or whatever. Is it fair to allow the one spouse to preserve pre-marriage ownership when the other cannot?

The current law, which divides pre-marriage property unless doing do would be "unfair", seems the best solution, as it gives the courts latitude to deal with unusual cases.

In the case of inheritances, some couples make irreversible lifestyle and financial decisions on the basis that they, together, will be provided for presently or prospectively from an inheritance. They give up jobs or houses. They make

decisions about retirement savings. Those decisions can have devastating effects when the marriage ends.

There are also significant problems when one spouse receives an inheritance, spends it on the family, or in acquiring divisible assets, then the parties separate, and the other spouse receives – or has every reason to expect – an inheritance of his or her own, which will not be subject to division. There is some flexibility in the present law to address these potential iniquities – reapportionment or divide "other" property – yet some specific rules here could be of assistance.

Finally, inheritances and gifts can pose problems for the definition of "family assets", as can pre-owned, separate savings or assets. Why should it make a difference to the characterization of a certain fund whether the family dipped into to it once, or twice, or twenty times? If the original fund was not a family asset, why should the unspent remainder be any different? And if *Hefti* is taken any farther, can we now consider intention, or prudence, as determining factors?[11] For example, a person might consider: "I might use these monies some day for the family's retirement," so the money's a family asset – versus – "I definitely plan on spending this all on myself", so it's not.

On the issue of gifts and inheritances, the CBABC *FRA* Working Group supports separate consideration for defining when they should be divided, and how.

[11] *Hefti v. Hefti*, (1998) 40 RFL (4th) 1 (BCCA).

As for court awards, again, these can cause similar difficulties in regard to definition, consequences for their being spent during the relationship, or detrimental reliance of the other spouse for present or future security.

Awards for past wage loss are treated inconsistently, a common argument being, as in the case of tax refunds, that the money replaces income and is therefore not an asset. But the money replaces income that would otherwise have been available to the family, and that the family may have had to make up with increased debt, or deferred opportunities.

Should a judge be allowed to divide excluded property if it would be unfair not to? (Q 6)

We're dealing here with exceptional remedies; nonetheless, there will be circumstances when this degree of flexibility is going to be necessary to achieve fairness. Some obvious examples include:

- when otherwise family property is incapable of being addressed directly (i.e. lands on Indian Reserves or foreign property);
- where the remaining family property is insufficient to effect an equitable economic division; for example, one spouse received his or her inheritance during the marriage and spent it, while the other spouse has received a considerable inheritance immediately after separation and there are few remaining assets to promote self-sufficiency for the first spouse.

The CBABC *FRA* Working Group favours retaining the discretion to divide non-family assets.

Family debts (Qs 7, 8 and 9)

The CBABC *FRA* Working Group agrees that family debts are a problem and need to be addressed by the legislation. As to whether those debts should be divided equally, that is a more difficult proposition.

Family debts are already identified by the case law and the factors specified in Question 8 of the discussion paper are already in our law. Also, family debts are generally considered to be the equal responsibility of spouses, just as family assets are generally considered to be the equal right of spouses. The two offset each other rather neatly, so long as there are assets in excess of liabilities. The real challenge is when family debts exceed family assets.

Once family assets are exhausted, it is not clear whether the law should promote an equal responsibility for the remaining debt. An equally compelling argument can be made that family debt in these circumstances should be divided according to the spouses' relative ability to pay.

Family debt is also a troublesome issue because it intersects with and may create unforseen or unwelcome consequences in two other areas.

One area is spousal support. At present, if a couple acquires more debt than they can reasonably support and only one has a job (or a sufficient income to support him or herself), the courts impose an obligation for spousal support first and worries about debt, second. It is generally considered that it would be better for the payor spouse to declare bankruptcy than to leave the recipient spouse with no, or insufficient, means. If family debts are to be divided under the *FRA*, that may reverse this priority and make spousal support a secondary consideration to servicing the existing family debt. The CBABC *FRA* Working Group believes this is inadvisable.

A second area is third party creditors and bankruptcy law. What if, under the *FRA*, family obligations for family debts are divided and then one spouse declares bankruptcy? Is a division of payment responsibilities vacated, or does the non-bankrupt spouse still have to contribute his or her share? If the *FRA* divides responsibilities for family debts, can third party creditors take advantage of that to sue directly for payment? One solution is that family debt in excess of family assets should be addressed in the context of support rather than property. That would not affect third party rights and would allow the court to balance most, if not all, of the factors mentioned above.

Spousal agreements (Qs 10, 11, 12)

The general consensus in the CBABC *FRA* Working Group is that it is unnecessary to identify separate types of spousal agreements:

- marriage;
- separation;
- anti-nuptial;
- post-nuptial;
- pre-nuptial; or
- cohabitation.

Rather, there should be a general rule that applies to all agreements.

The CBABC *FRA* Working Group favours judicial discretion to review spousal agreements, but recommends that the legislation identify criteria for procedural and substantive fairness (such as full disclosure, independent legal advice, absence of economic or emotional pressure) that, if met, would protect an agreement or consent order from review – or set a higher standard for review.

Family property and spousal support

This is one area where the judge-made rule may have to be reversed, especially with the advent of the spousal support advisory guidelines ("SSAG"). Since support is increasingly ordered without reference to property considerations, and

the SSAG doesn't consider those at all, property division should arguably come last. Otherwise, how can the court consider self-sufficiency under section 65?

At the least, the courts should have the flexibility to address these questions together, or in whatever order most makes sense for the case at hand. Despite the case law, CBABC *FRA* Working Group believes this is the approach most often taken in practice.

Triggering events (Qs 17 to 20)

The tension here is between having the parties do something unequivocal – though perhaps short of court action – so there is no argument about whether property rights have been triggered, versus recognizing that if parties are required to comply with some formal requirement, however simple, many will not do it and therefore might be prejudiced.

Two options have been discussed here. One option is to establish some form of a notice without the necessity of commencing legal action. A second option is to make the triggering event the date of separation.

The first notice option seems rather artificial (though no more artificial than a section 57 declaration). This option raises problems about what to call it, where to file it, how to authenticate or prove it, how to keep records of it, and so on.

The second option to make the triggering event the date of separation is the simplest solution. This option is also the one most likely to be fair in all situations, although it would still need to address two problems: where parties separate and then reconcile and the judicial severance of joint tenancy.

Triggering events have implications for third party interests, so if separation is the trigger, it should be clear that an intervening reconciliation returns the parties to their prior status. Otherwise, parties would have to take more steps to unwind the consequences of separation than a notice to separate would entail in triggering them.

At present, a triggering event requires some act of the parties, so the idea that joint tenancies are severed makes sense (they have treated their interests as being separate, and so disrupted the "unities"). A passive triggering event would not necessarily draw the same legal conclusion, but the legislation might specify that it does not, to remove any doubt.

Death as a triggering event (Qs 21 to 24)

The CBABC *FRA* Working Group did not comment on this subject.

Valuation dates (Qs 25 and 26)

For compensatory property regimes, these questions regarding valuation dates are key. For community of property regimes such as in British Columbia, the date of valuation has already been settled by the case law and it makes sense for most clients: Co-owners do not value property unless and until the property is divided, absent any question of post separation wasting or improvement.

Liquidating family assets to fund litigation

This is not raised in the discussion paper, but is a concern for many CBABC lawyers. With the loss of legal aid for many, if not all, spouses who have a claim for property but do not have the resources to pursue it, the law must allow courts more flexibility to allow pre-trial liquidation of family assets than the current case law.

CHAPTER 3: DIVISION OF PENSIONS DISCUSSION PAPER

The Division of Pensions discussion paper proposes to amend Part 6 of the *FRA*.[12] The proposed amendments follow the recommendations made in 2006 by the British Columbia Law Institute.[13]

The CBABC *FRA* Working Group has little to add to the discussion paper, except as it comments on common-law property division in Chapter 2: Division Of Family Property Discussion Paper.

One especially troubling issue is the ability of spouses to elect out of survivor benefits. For divorcing couples in their senior years, the effect of this can be devastating. To give the courts the power to order a return of such benefits would do violence to pension plans, but perhaps the ability to opt out should be disallowed for married or recently separated spouses.

[12] British Columbia Ministry of Attorney General, "Chapter 3: Division of Pensions" in *Family Relations Act* Review (February 2007 (www.ag.gov.bc.ca/legislation/pdf/Chapter3-Pensions.pdf).
[13] British Columbia Law Institute, Pension Division On Marriage Breakdown: A Ten Year Review of Part 6 of the *Family Relations Act* (BCLI Report No. 44) (May 2006) (http://www.bcli.org/pages/projects/pendiv/Pension_Division_Review_FRA_Part_6.pdf).

CHAPTER 4: JUDICIAL SEPARATION DISCUSSION PAPER

The judicial separation discussion paper proposes that judicial separations be abolished.[14]

In the CBABC *FRA* Working Group, the consensus is that judicial separation is no longer needed in British Columbia. It is rarely used, little understood, and it is hard to see how it any longer serves a useful function in our law. In the *FRA* its only function is as a triggering event -- and so many already confuse it with section 56(1)(b). Section 56(1)(b) is a declaration under section 57. Ironically, there is a widely held notion among clients that they need something called a "legal separation". They have no clear idea what they mean by that: separation agreement, start date for the one year separation, or permission to live apart. Nonetheless, they are quite content to be told no such formal step or permission is required, and that it would make little difference to how they resolve their affairs in any event.

If we can resolve the process for creating a triggering event, it will make none.

The CBABC *FRA* Working Group has reviewed the *FRA* and has found that there are numerous references to judicial separations:

- section 1(c)(ii) regarding the definition of "spouse";
- section 27(4)(c) regarding Supreme Court jurisdiction;

[14]British Columbia Ministry of Attorney General, "Chapter 3 Judicial Separations" in *Family Relations Act* Review (February 2007) (www.ag.gov.bc.ca/legislation/pdf/Chapter4-JudicialSeparation.pdf).

- section 27(4)(c) regarding parental guardianship;
- section 56(1)(c) regarding equality of entitlement to family assets on marriage breakup;
- section 61(2)(b) regarding marriage agreements;
- section 68(2) regarding variation of marriage settlements;
- section 93(1) regarding order for support and maintenance;
- section 123(4) regarding remedies; and
- section 127(1) regarding responsibility for debts of former spouse.

The CBABC *FRA* Working Group has reviewed the regulations under the *FRA* and has found that there are numerous references to judicial separations in the Division of Pensions Regulation (B.C. Reg. 77/95):

- Form 1: Claim of Spouse to Interest in Member's Pension;
- Form 2: Request for Designation as Limited Member of Pension Plan;
- Form 3: Request for Transfer from Unmatured Defined Contribution Plan; and
- Form 5: Request in relation to a Matured Pension Divided under an Agreement or Court Order Made Before July 1, 1995.

The CBABC *FRA* Working Group has also reviewed the British Columbia statutes and regulations that make reference to judicial separations under the *FRA:*

- *Court Rules Act*, R.S.B.C. 1996, c . 80 in the Supreme Court Rules (B. C. Reg. 221/90):
    - Rule 1 (Definitions) for "family law proceeding";
    - Rule 12 (Substituted Service) in subrule (10) regarding limits on substituted service;
    - Rule 60 (Divorce and Family Law) in subrule (15) regarding marriage certificate and subrule (27) regarding certificate of pleadings;
    - Form 69 regarding affidavit of executor (Rule 61 (3));
- *Crime Victim Assistance Act*, S.B.C. 2001, c. 38 in the Crime Victim Assistance (Income Support and Vocational Services or Expenses Benefits) Regulation (B.C. Reg. 162/2002) regarding section 8(1)(a) regarding income support for a spouse;
- *Wills Act*, R.S.B.C. 1996, c. 489 in section 16(2)(d) regarding revocation of gift on dissolution of marriage;
- *Land Title Act*, R.S.B.C. 1996, c. 250 in:
    - section 215(6) regarding registration of certificate of pending litigation in same manner as charge;
    - Form 33 in the Land Title Act Regulation (B.C. Reg. 334/79); and
- *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352 in section 63(3)(b)(iv) regarding prohibition and effect of assignment of benefits and money.

The CBABC *FRA* Working Group recommends that the government abolish judicial separations by repealing references to judicial separations in the *FRA* and other British Columbia statutes and regulations.

The CBABC *FRA* Working Group further recommends that if the government chooses to abolish judicial separations in British Columbia, it enact their repeal prospectively, not retroactively. The CBABC *FRA* Working Group further recommends that the prospective repeal of judicial separations be brought into force by future regulation.

Retroactive repeal of judicial separations would be unfair to those British Columbians who may wish to avail themselves of judicial separations or are subject to them, but could not, since the repeal would take effect at a time in the past without prior notice to those persons to take action.

If judicial separations are repealed and to take effect by future regulation, this will provide notice to British Columbians who may choose to rely on the judicial separation provisions in the *FRA* and other British Columbia statutes and regulations. This will also provide these persons with time in order to make an orderly arrangement of their legal affairs prior to the repeal taking effect.

Also, given the numerous references to judicial separations in not only the *FRA* but to other British Columbia statutes and regulations, repealing judicial separations by future regulation gives the government time to make the necessary repeals and consequential amendments. That way, the government's repeal process is efficient and effective.

RECOMMENDATIONS

The CBABC *FRA* Working Group recommends that:

CHAPTER 2: DIVISION OF FAMILY PROPERTY DISCUSSION PAPER

Preliminary Comments

1. the government should make legislative amendments sparingly and, where made, these amendments should respond to a clear and demonstrated need;

2. there is no persuasive consensus that the law is any more complicated than it needs to be and that any changes to the *FRA* should leave the law flexible enough to deal with the division of families' entire life savings, and all the myriad permutations that differing cultures, domestic arrangements, financial circumstances, and types of property can present;

3. competent and experienced lawyers providing legal advice and advocacy is fundamental to an equitable and efficient resolution of matrimonial property issues and that, while it is laudable to work towards the objective of keeping disputes as much as possible out of the courts, it would be reckless to also try to discourage the involvement or use of lawyers;

Is there any benefit to changing the family property division model currently used in BC? (Question (Q) 1)

4. the answer is: no. There is no strong consensus that other systems in other jurisdictions work any better than that in British Columbia;

Should the *FRA* include a statement about why each spouse is entitled to an equal share in the family's assets? (Q2)

5. the answer is, that, while there may be some utility in stating an explicit rationale, care must be taken to ensure that such a statement does not create unnecessary and unwanted arguments in court; if a statement why spouses are entitled in British Columbia to a presumptive 50% share of family assets is valuable -- which is not clear – then it is recommended that such a statement assert that, because public policy wishes to discourage any post-separation arguments over conduct or contribution, marriage is presumed, by law, to be a full economic partnership;

Should the *FRA* provisions for division of family assets apply to unmarried spouses? (Q 3)

6. while the CBABC *FRA* Working Group has disagreement, the majority view of the CBABC *FRA* Working Group is: no; the prevailing view is that there is still a societal value in, and a general public recognition that, the decision to marry has consequences, and it is recommended that a presumptive sharing of property is one of them;

7. other recommendations include:

    - if common-law couples are brought within Part 5 and Part 6 (Division of Pension Entitlement) of the *FRA*, it makes marriage irrelevant;
    - there are many varieties of unmarried domestic relationships, so if the same rules apply to common-law as to married couples, that would be a disservice to the choice and variety of these arrangements;
    - as things stand, co-habitation agreements are more enforceable than marriage agreements. Bringing common-law couples into Part 5 might actually discourage them from settling their own affairs in an agreement (section 120.1?)

8. common-law couples be permitted to opt into Part 5 (Matrimonial Property) and Part 6 (Division of Pension Entitlement) of the *FRA*, but only where they do so expressly if they make an agreement about how to divide their property and clearly state that the *FRA should* apply to part or all of their property;

9. permitting the *FRA* provisions for division of family assets applying to unmarried spouses only if they make an agreement about how to divide their property, and even if the agreement says that the *FRA* provisions should not apply merely emphasizes an unsatisfactory state of affairs with the present section 120.1 of the *FRA*; it is further recommended that

common-law couples should be empowered to make a clear choice, not have one made for them – especially not inadvertently;

Should the *FRA* still define "family asset" as property that was ordinarily used for a family purpose? (Q 4)

10. it is not recommended to change the current definition of "family asset" in the *FRA* since to start completely anew would not be efficient nor effective;

Would it be helpful if the *FRA* also said that certain types of property are not family assets? (Qs 5 and 6)

11. the answer is: yes; it is further recommended that some legislative "amendment" of the current law is needed and the problems most commonly identified include:

- Registered Retirement Savings Plans (RRSPs) or more specifically pre-marriage RRSPs;
- tax refunds;
- pre-marriage property generally;
- inheritances and gifts; and
- court awards;

12. regarding inheritances, while there is some flexibility in the present law to address these potential iniquities – reapportionment or divide "other" property – that some specific rules could be of assistance;

13. regarding inheritances and gifts, it is recommended that the government legislate in the *FRA* separate consideration for defining when they should be divided, and how;

Should a judge be allowed to divide excluded property if it would be unfair not to? (Q 6)

14. the judicial discretion to divide non-family assets be retained under the *FRA*;

Family debts (Qs 7, 8 and 9)

15. the *FRA* be amended regarding family debts;

16. if family debts are to be divided under the *FRA*, it is recommended that any legislative change not reverse the priority to make spousal support a secondary consideration to servicing the existing family debt;

17. family debt in excess of family assets be addressed in the context of support rather than property, so that any legislative change to the *FRA* would not affect third party rights and would allow the courts to balance most, if not all, of the relevant factors;

Spousal agreements (Qs 10, 11, 12)

18. it is unnecessary to identify separate types of spousal agreements, instead, it is recommended that the *FRA* be amended to have a general rule that applies to all agreements;

19. there be judicial discretion to review spousal agreements, but it is recommended that the *FRA* identify criteria for procedural and substantive fairness (such as full disclosure; independent legal advice; absence of economic or emotional pressure) that, if met, would protect an agreement or consent order from review – or set a higher standard for review;

Family property and spousal support

20. consideration be given to amend the *FRA* to reverse the current practice of judge-made rules, especially with the advent of the spousal support advisory guidelines ("SSAG"), where courts are increasingly ordering support without reference to property considerations, and the SSAG does not consider property considerations; it is further recommended that, at least, the courts should have the flexibility to address these questions of support and property together, or in whatever order most makes sense for the case at hand;

Triggering events (Qs 17 to 20)

21. two options for amending the FRA be considered:

    - one option is to establish some form of a notice without the necessity of commencing legal action; or
    - a second option is to make the triggering event the date of separation;

Valuation dates (Qs 25 and 26)

22. the *FRA* not be amended to include when to value family assets since the current case law has already settled the date of valuation and this makes sense for most British Columbians;

Amend the *FRA* to permit liquidating family assets to fund litigation

23. while not raised in the discussion paper, the *FRA* be amended to permit pre-trial liquidation of family assets in order to fund litigation;

CHAPTER 3: DIVISION OF PENSIONS

24. consideration be made to amend the *FRA* to disallow, for married or recently separated spouses, the ability to opt out of survivor benefits;

CHAPTER 4: JUDICIAL SEPARATION.

25. the government abolish judicial separations in British Columbia, specifically by:

A. repealing these *FRA* provisions which make reference to judicial separations:

- section 1(c)(ii) regarding the definition of "spouse";
- section 27(4)(c) regarding Supreme Court jurisdiction;
- section 27(4)(c) regarding parental guardianship;
- section 56(1)(c) regarding equality of entitlement to family assets on marriage breakup;
- section 61(2)(b) regarding marriage agreements;
- section 68(2) regarding variation of marriage settlements;
- section 93(1) regarding order for support and maintenance;
- section 123(4) regarding remedies; and
- section 127(1) regarding responsibility for debts of former spouse.

B. repealing references to judicial separations in the Division of Pensions Regulation (B.C. Reg. 77/95) under the *FRA*:

- Form 1: Claim of Spouse to Interest in Member's Pension;
- Form 2: Request for Designation as Limited Member of Pension Plan;
- Form 3: Request for Transfer from Unmatured Defined Contribution Plan; and
- Form 5: Request in relation to a Matured Pension Divided under an Agreement or Court Order Made Before July 1, 1995.

C. making consequential amendments to these statutes (or other relevant statutes identified by government) in order to repeal references to judicial separations:

- *Court Rules Act*, R.S.B.C. 1996, c . 80 in the Supreme Court Rules (B. C. Reg. 221/90):
    - Rule 1 (Definitions) for “family law proceeding”;
    - Rule 12 (Substituted Service) in subrule (10) regarding limits on substituted service;
    - Rule 60 (Divorce and Family Law) in subrule (15) regarding marriage certificate and subrule (27) regarding certificate of pleadings;
    - Form 69 regarding affidavit of executor (Rule 61 (3));
- *Crime Victim Assistance Act*, S.B.C. 2001, c. 38 in the Crime Victim Assistance (Income Support and Vocational Services or

Expenses Benefits) Regulation (B.C. Reg. 162/2002) regarding section 8(1)(a) regarding income support for a spouse;

- *Wills Act*, R.S.B.C. 1996, c. 489 in section 16(2)(d) regarding revocation of gift on dissolution of marriage;
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- *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352 in section 63(3)(b)(iv) regarding prohibition and effect of assignment of benefits and money.

CONCLUSION

The CBABC *FRA* Working Group would welcome the opportunity to provide further input and dialogue with the Attorney General respecting these submissions.

Any communications can be directed to:

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