

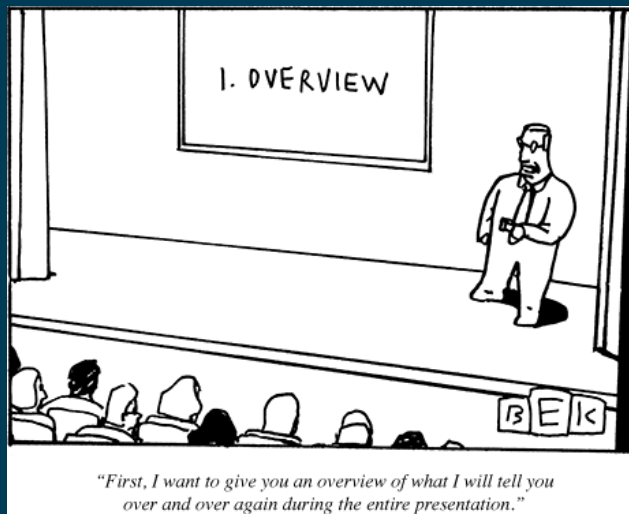
Excluded Property: Case law updates

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What excluded property provisions are we discussing?

- Section 85 of the *Family Law Act* (Excluded Property)
- Section 96 of the *Family Law Act* (Division of Excluded Property);



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Section 85 – Excluded property

85 (1) The following is excluded from family property:

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

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Section 96 – Division of excluded property

96 The Supreme Court must not order a division of excluded property unless

(a) family property or family debt located outside British Columbia cannot practically be divided, or

(b) it would be significantly unfair not to divide excluded property on consideration of

- (i) the duration of the relationship between the spouses, and
- (ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

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Section 84 – Increase in value of excluded property

84 (1) Subject to [section 85](#) [excluded property], family property is all real property and personal property as follows:

(a) on the date the spouses separate,

- (i) property that is owned by at least one spouse, or
- (ii) a beneficial interest of at least one spouse in property;

(b) after separation,

- (i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or
- (ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.

(2) Without limiting subsection (1), family property includes the following:.....

(g) the amount by which the value of excluded property has increased since the later of the date

- **(i) the relationship between the spouses began, or**
- **(ii) the excluded property was acquired.**

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Onus

- The party claiming the exclusion bears the onus of proving their exclusion;
 - *Shih v. Shih*, 2017 BCCA (paragraphs 37 and 43);
 - *Pisarski v. Pieski*, 2019 BCCA 129 (paragraph 24);

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Onus

- If the party claiming the exclusion proves their exclusion, the onus shifts to the claimant to challenge the factual basis for it;
 - *S.K. v. S.M.*, 2021 BCSC 241 (paragraph 179);

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Evidence

- The party claiming the exclusion must provide **“clear and cogent evidence”** of the exclusion;
 - *Shih v. Shih*, 2017 BCCA 37 (paragraph 43, referred to with approval and applied in *Pisarski v. Piesik*, 2019 BCCA 129 at paragraph 24);

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Evidence

- The party claiming the exclusion must provide **proof on a balance of probabilities**;
 - *Shih v. Shih*, 2017 BCCA 37 (paragraph 42);

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Evidence

- If documentary evidence is not available, the party bearing the onus of proof must testify as to his recollection of the transaction in dispute;
- While that evidence will be scrutinized for credibility, a trial judge is permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties: *Pisarski*, at paragraph 24

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Evidence – some examples and notes

- *P.J. v. A.M.* 2020 BCSC 814: Money used to retire family debt is *prima facie* evidence that one party intends to make a gift to the other and the funds become family property (absent evidence to the contrary) (paragraph 194) (also see *T.M.V. v. H.M.V.* 2020 BCSC 78);

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Wellard v. Wellard, 2020 BCSC 1877

- A failure to comply with a court order for disclosure and provide documents regarding exclusion allowed the trial judge to make an adverse inference that documents would not have supported the exclusion (paragraph 79);
- NOTE: the party's testimony regarding exclusion was also not found reliable (paragraph 80)

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Pidwerbeski v. Garcia, 2020 BCSC 2022

- Decision provides an example of testimony was given and relied upon by court to provide mortgage balance and evidence of mortgage being paid down (in case of no documentary evidence) (paragraphs 79-82);

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Boyd v. Foster, 2020 BCCA 177

- Court discusses evidence regarding determination of portion of personal injury settlement that was found to be excluded (paragraph 54);

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Jean Louis v. Jean Louis, 2020 BCCA 220

- If you are seeking to prove an exclusion, it is important to have an appraisal at the relevant date (and ensure the appraisal is based on accurate information) (paragraphs 53 and 54);

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Use of Evidentiary Presumptions

- The presumptions of resulting trust and advancement are legal assumptions that the Court will make absent of satisfactory evidence that the assumption is incorrect;
- The party opposing a presumption bears the burden of presenting sufficient evidence to rebut it;
- For gratuitous transfers, a presumption of resulting trust is the norm;
- The presumption of advancement is the opposite rule and, as set out in *Pecore v. Pecore*, 2007 SCC 17, applies to:
 - Transfers between parents (of either gender) and minor children; and
 - Transfers from husband to wife (married).

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Pecore v. Pecore, 2007 SCC 17

- The presumption provides “a guide for courts... where evidence as to the transferors intent in making the transfer is unavailable or unpersuasive” (paragraph 23);
- Before applying the presumptions, Courts must “weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor’s actual intention” (paragraph 44);
- The applicable “presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities” (paragraph 44);
- The key issue is what was intended at the time of transfer;
- Circumstantial evidence may permit an inference of intent (conversations with spouse, course of conduct etc.);
- Evidence of intention that rises subsequent to a transfer should be weighed carefully to guard against “evidence that is self-serving or that tends to reflect a change in intention” (paragraph 59)

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Presumptions and the *FLA*

- Unlike other provinces with an excluded property regime, the *FLA* did not expressly abolish the presumption of advancement;
- After the *FLA* came into force, two lines of authority developed with respect to this question, one line finding that the property division regime under the *FLA* displaced the presumption of advancement and the other finding that it did not;
- The Court of Appeal addressed this issue in *V.J.F. v. S.K.W.*, 2016 BCCA 186, and concluded that the presumption of advancement continued to operate within the *FLA*'s property division regime;

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Decisions subsequent to *V.J.F.*

- The trial decisions that have been decided subsequent to *V.J.F.* have remained inconsistent in their conclusions;
- The Supreme Court's decision in *H.C.F. v. D.T.F.*, 2018 BCSC 1226, *C.J.B. v. A.R.B.*, 2017 BCSC 1682, and *McManus v. McManus*, 2019 BCSC 123 provided thorough and well-reasoned analysis of why the presumption of advancement no longer ought to apply;
- However, the Court of Appeal has not endorsed any of these decisions;
- On the contrary, in their decisions in *Baryla v. Baryla*, 2019 BCCA 22, *Pisarski v. Piecsic*, 2019 BCCA 129, and *Namdarpour v. Vahaman*, 2019 BCCA 153, the Court found that the presumption of advancement continues to apply under the *FLA*;

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Presumption of Advancement – recent cases

- *Price v. Price*, 2020 BCSC 1558;
- A helpful summary of the case law to date at paragraphs 112-118;
- Paragraph 117: “More generally, ascribing intention to a spouse at an early stage of a relationship as to whether the spouse intended to gift is somewhat artificial; one would anticipate any spouse would be expecting the relationship to last indefinitely, if not “‘til death do us part””
- NOTE: Do not wait until closing submissions to bring up presumption of advancement (paragraph 120);

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Hopson v. Hannon 2020 BCSC 794

- Look at intent (paragraph 155) with a helpful summary of intent at paragraph 162: [162] In summary, Mr. Hannon’s intention in transferring ownership is key in determining whether any excluded property he transferred to Ms. Hopson, solely or jointly, became family property. If he intended the transferred property be a gift, then it is family property. A conclusion about his intention is only to be determined after consideration of all the circumstances, including both direct and circumstantial evidence. It is only if I am unable to determine his actual intention that the presumption of advancement will apply. An intention to derive a benefit that flows from Ms. Hopson acquiring an ownership interest is strongly suggestive of donative intent. Again, in *V.J.F.*, evidence that one spouse transferred excluded property into the other’s name in order to protect it from creditors was more than enough to support the conclusion that a gift was intended. In *Namdarpour*, the realization of a benefit in the form of income-splitting indicated that a gift was intended. In *Venables*, evidence that excluded property was transferred by one spouse into the parties’ joint names to derive tax benefits supported the same conclusion. Finally, a pattern of joint control and use of funds, including the pooling of resources, is also suggestive of donative intent: *Namdarpour*; *Pisarski*.

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Intention

- *Basi v. Basi*, 2021 BCSC 421:
- The party claiming an exclusion had not taken action to protect investment of excluded property in the purchase of a new property (i.e. no statement or agreement it was excluded or acknowledgment it was not a gift) (paragraph 41) (citing *Wickstrom v. Ng*, 2019 BCSC 1655). As there was a conclusion that the respondent intended to pool money, there was no need to consider presumption of advancement (paragraph 44) (citing *Wu v. Sun*, 2010 BCCA 455 at paragraph 18).

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New and Interesting



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F.K.L. v. D.M.A.T., 2020 BCSC 1269

- An animal brought into the relationship is the excluded property of the person who brought the pet into the relationship (paragraphs 141-145);
- No evidence of increase in value of the dog;

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Nolin v. Ramirez, 2020 BCCA 274

- Party argued Section 23 of the *Land Titles Act* provides a statutory presumption in favour of the legal owner also being the beneficial owner;
- Court disallowed this argument- *LTA* has no application;

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Laipis v. Keshow, 2021 BCSC 502

- Court considered argument that lump sum spousal support payment was analogous to S. 85(1)(c) property;
- Paragraphs 244-250 – court finds that lump sum spousal support is not lost wages and is excluded property;

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Jean Louis v. Jean Louis, 2020 BCCA 220

- Closing costs, legal fees, CMHC fees etc. do not form a part of excluded property (paragraph 57);

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Small v. Small, 2020 BCSC 707

- An award of punitive damages aims to punish the defendant rather than to compensate for a loss;
- Punitive damages do not fall in the scope of Section 85(1)(c) (paragraph 173);

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Chapman v. Chapman, 2020 BCSC 1029

- Value of excluded inheritances are to be valued as at date spouse receives the inheritance;
- Paragraph 258: Before an inheritance can be excluded it must be received by the beneficiary;
- Question – what if spouse claiming exclusion is executor and beneficiary?

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M.Y.T.C. v. L.H.N. 2020 BCSC 414

- Wife had excluded property by way of gifts from her parents. These were put into joint names (paragraph 136-138);
- The wife had referenced her “exclusion” as her financial contribution towards the property/relationship when the husband complained about her lack of contributions ...this was indicative of a gift (she cannot have it both ways);

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Section 96: *Klebe v. Klebe* 2020 BCSC 652

- Section 96(b)
 - If the Respondent had met the burden of proving settlement funds were excluded, they would have been divided under this section as they were spent for various family purposes such as vacation...(paragraph 77)

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El-Jaroudi v. El-Mikati, 2020 BCSC 868

- Section 96(b) – you can only consider two factors... and you need some evidence of those...paragraph 73 (adopting V.J.F.)

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THANKS!

Questions?

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