

## **Part 5 – Property**

The Family Law Act moves to an excluded property model that involves less judicial discretion, particularly at the initial stage of identifying which assets are subject to division. It will no longer rely on a two-stage process of identifying the property subject to division and then determining if that property has an “ordinary use for a family purpose,” as provided for in the Family Relations Act.

Family property will include all real and personal property owned by one or both spouses at the date of separation unless the asset in question is excluded, in which case only the increase in the value of the asset during the relationship is divisible. Whether an asset was ordinarily used for a family purpose will not be relevant in deciding if it is family property.

The exclusions include:

- property acquired before or after the relationship;
- gifts or inheritances;
- damage awards and insurance proceeds with some exceptions; and
- some kinds of trust property.

This resembles the approach taken under the Alberta Matrimonial Property Act.

The property division scheme will apply to all married spouses, as well as to unmarried spouses who have lived in a marriage-like relationship for at least two years. The inclusion of unmarried spouses in the property division scheme recognizes that the number of common-law relationships is on the rise and that common-law remedy of constructive trusts inadequately protects the interests of this growing number of unmarried spouses. It also makes for greater consistency in the treatment of unmarried spouses in family law generally and across related laws, including wills and estates, spousal support and income tax law, which already treat common-law families the same as married families.

These changes make the law simpler, clearer, easier to apply and easier to understand for the people who are subject to it. British Columbia historically had a higher than average level of property division disputes in court; the broad flexibility and discretion in this area created uncertainty and promoted litigation. As well, the excluded property division model is a better fit with people’s expectations about what is fair: they share the property and debt that they accrue together during their relationship.

## **Division 1 – General Rules**

This Division sets out the general principle that spouses are equally entitled to family property and equally responsible for family debt.

### **Section 81 Equal entitlement and responsibility**

- Section 81 sets out the principle that spouses are entitled to share property and debt owned by one or both of them at the time of separation. It clarifies the starting point and rationale underlying the division of family property regime and provides that, subject to any agreement or order, spouses are both entitled to family property and responsible for family debt regardless of their respective use or contribution.
- A single trigger event- the date of separation- replaces the four triggering events in the Family Relations Act (separation agreement, order that there is no possibility of reconciliation, divorce order, order declaring the marriage a nullity). The trigger event defines the scope of the scope of the property to be divided
- Using separation as the triggering event means that spouses will not be required to go to court or negotiate a separation agreement to trigger entitlement to an interest in family property. This accords with the recommendation of the Family Justice Reform Working Group and accords with most people's expectations; it makes intuitive sense for spouses to use the date of separation as the point from which to disentangle their overlapping financial lives.
- It is intended to also eliminate problems that can arise under the Family Relations Act if, for example, a spouse died or declared bankruptcy between the date of separation and the occurrence of the triggering event.
- Section 81 replaces section 56 of the Family Relations Act.

### **Section 82 Rights and remedies of third parties**

- Section 82 ensures that the interests, rights, and remedies of third parties like creditors, guarantors or assignees, are not effected by a division of family property and in particular division of family debt.

## **Division 2 – Determining Family Property and Family Debt**

This Division sets out the rules for determining what is to be divided, that is, what constitutes family property and family debt and how to determine value for the purposes of the division.

### **Section 83 Interpretation**

- Section 83 describes interpretative principles for this Part.
- It clarifies what does and does not constitute “separation” for the purposes of establishing the triggering event to determine what is within the scope of property to be divided.
- There is much case law on what does and does not constitute “separation” and this provision is not intended to be exhaustive but to simply provide some guidance.

### **Section 84 Family property**

- Section 84 establishes a regime that classifies all of the spouses’ debt and property at separation as family property unless it is excluded under section 85 of the Family Law Act. If property is excluded, any increase in the value of the excluded property during the relationship, is included as divisible property.
- This section provides a clear and closed list of what is family property. This will promote settlement by making it easier to predict outcomes.
- This section replaces section 58 of the Family Relations Act which identified divisible family assets based on whether the property was “ordinarily used for a family purpose.” The “family use” test has not been carried over; whether an asset was ordinarily used for a family purpose is no longer relevant in deciding if it is family property.
- Property division disputes under the Family Relations Act were heavily litigated because the law was so discretionary. In addition to the discretionary “family purpose” test, the law was unclear about the treatment of certain kinds of property, such as gifts, inheritances, ventures, court awards and income tax refunds.

### **Section 85 Excluded property**

- Section 85 establishes a shift to an excluded property model that involves less judicial discretion, particularly at the initial stage of identifying which assets are subject to division.
- The following is excluded from family property:
  - pre-and post- relationship property;
  - gifts and inheritances to one spouse;
  - settlements or damage awards, except that part meant to compensate both spouses or to replace wages;
  - non-property-related insurance proceeds, except that part meant to compensate both spouses or to replace wages; and
  - some kinds of trust property
- Business property is not singled out for special treatment as it was under section 59 of the Family Relations Act.

- The spouse claiming that property is excluded property has the burden of proof to demonstrate the property is excluded.

### **Section 86 Family debt**

- Section 86 describes family debt for the purposes of division. The starting point is that all debts incurred by either spouse during the relationship are to be equally divided.
- There is an exception for debt incurred after the date of separation where it is incurred to maintain family property. Since both spouses generally continue to benefit from the family property until it is divided, both are presumed to be responsible for the cost of maintaining that property until that time.
- If equal division of family debt is significantly unfair, the division may be adjusted under section 95 of the Family Law Act.

### **Section 87 Valuing family property and family debt**

- Section 87 describes how and when the value of property and debt is to be determined.
- It establishes a valuation date that is either the date of an agreement or the date of a court hearing dividing the property. A different date may be selected by agreement or court order.
- The Family Relations Act did not provide any guidance on setting a date for valuing family property. This resulted in criticism that judicial discretion with respect to determining valuation dates was too broad and resulted in too much uncertainty. This uncertainty, in turn, made negotiating settlements more difficult.

## **Division 3 – Before an agreement or final order is made**

The Division sets out certain types of orders which may be made before a division of property or debt is finalized by agreement or court order. These include orders for interim division of property to fund activities designed to resolve the dispute and orders for use of property or to protect property from disposition which could defeat a claim.

### **Section 88 Orders under this Division**

- Section 88 authorizes applications to court under this division prior to an agreement or final order.

### **Section 89 Orders for interim distribution of property**

- Section 89 authorizes judges to make orders for interim distribution of property prior to final resolution of the issues to assist in making assets available to economically-disadvantaged spouses who need them to achieve a fair division of family property.
- The Family Relations Act did not explicitly authorize orders respecting the interim distribution of family property, although case law provides some authority to order interim distribution in very limited circumstances.

### **Section 90 Temporary orders respecting family residence**

- This section provides for exclusive occupation of a family residence or possession or use of personal property to the exclusion of the other spouse.
- It authorizes the Supreme Court, which has exclusive jurisdiction over property issues, to make a temporary order for a specified period of time for exclusive occupation of a family residence or exclusive use and possession of personal property stored at the family residence.
- These temporary orders do not allow a spouse to materially alter the family residence or personal property nor do they grant a proprietary interest in either.
- Section 90 carries over sections 124 and 125 of the Family Relations Act.

### **Section 91 Temporary orders respecting protection of property**

- This section provides authority for orders restraining a spouse from disposing of property.
- It also ensures that spouses do not dispose of property to undermine the fair division of family property.
- Section 91 carries over section 67 of the Family Relations Act.

## **Division 4 – Dividing Family Property and Family Debt**

This Division provides that spouses may make agreements to divide their property and debt as they wish and limits the court's ability to interfere with those agreements. It authorizes the court to order an unequal division of family property and family debt if it would be significantly unfair not to having regard to a set of factors. It also makes it clear that the court must not order the division of excluded property except in limited circumstances. As well, it sets out various orders that the court may make to give effect to the division of property and family debt.

### **Section 92 Agreements respecting property division**

- Section 92 clarifies that spouses may make property agreements:
  - dividing family property or family debt or both;
  - dividing property or debt unequally;
  - including property or debt that would not by statute be included;
  - excluding property or debt that would otherwise be included; and
  - choosing a different valuation method for family property or family debt.
- The section clearly states that, subject to the court's limited ability to set aside a property agreement under section 94, spouses have autonomy to depart from the Family Law Act with respect to property division.

### **Section 93 Setting aside agreements respecting property division**

- Section 93 of the Family Law Act provides the basis on which all or part of a property agreement may be set aside, using a two part approach:
  - First: was the agreement procedurally fair at the time it was made, based on the criteria in section 93(3)? If not, the court is to set it aside and make an order dividing property, unless the order that it would make would substantially the same as the agreement.
  - Second: even if procedurally fair, the court may set aside the agreement and replace it with an order dividing property if the substance of the agreement is “significantly unfair” having regard to the limited criteria set out in section 93(5).
- The criteria the court must consider to determine if an agreement is procedurally flawed are whether:
  - a spouse failed to disclose significant property or debts or other information relevant to the negotiation of the agreement;
  - a spouse took improper advantage of the other spouse's vulnerability including the other spouse's ignorance, need or distress;
  - a spouse did not understand the nature or consequences of the agreement; and
  - other circumstances that would, under the common law, cause a contract to be voidable in whole or in part.
- The criteria that the court must consider to determine if the substance of an agreement is “significantly unfair” is:
  - the length of time that has passed since the agreement was made;
  - the intention of the spouses; and

- the degree to which the spouses have relied on the agreement.
- Section 65 of the Family Relations Act provided much broader discretion for judges to interfere with an agreement. The test was whether the agreement was “unfair” having regard to a number of factors. Section 68 of the Family Relations Act did not provide any guidance to judges on when a property agreement should be set aside.

### **Section 94 Orders respecting property division**

- Section 94 prevents a court from making an order respecting the division of property or debt that is already dealt with by an agreement unless it first sets aside part or all of the agreement in accordance with section 93.
- The Family Relations Act property division provisions were criticized for setting the threshold for review too low and providing courts’ with too much discretion to change agreements dividing property. It created uncertainty for spouses as to whether their agreements would be upheld.

### **Section 95 Unequal division by order**

- Section 95 sets out the factors for the Supreme Court to consider in ordering an unequal division of family property, family debt or both.
- It limits judges’ discretion to divide family property unequally between spouses.
- The section changes the threshold for dividing family property unequally from whether it would be “unfair” not to do so to whether it would be “significantly unfair” not to do so. It is intended to create a higher threshold and make the test for unequal division stricter.
- Judges still have some flexibility to take into account a spouse’s unique circumstances and divide property unequally, but may only do so based on a more limited basis than under the Family Relations Act.
- This section allows a court to use an unequal division of property to compensate for situations where spousal support is insufficient to meet the spousal support objectives.
- The Family Relations Act was silent on how property division should interact with spousal support; while property division and spousal support are separate issues in law, in practice, they overlap.

### **Section 96 Division of excluded property**

- Section 96 provides judges with flexibility to divide excluded property, but only in very limited and defined circumstances in order to not open this area to uncertainty.
- Excluded property may be divided only in two situations:
  - family property or family debt located outside British Columbia and cannot practically be divided; or
  - it would be significantly unfair not to divide excluded property considering the duration of the relationship and a spouse’s direct contribution to the preservation, maintenance improvement or management of the excluded property.

## **Section 97 Giving effect to property division**

- Section 97 authorizes the Supreme Court to make determinations and orders needed to give effect to a division of property or debt under this part, for example:
  - declare ownership or right of possession;
  - order title to be granted to a spouse;
  - require compensation be paid; or
  - order partition or sale of property.
- This section carries over section 66 of the Family Relations Act with changes to reflect that “family debt” is specifically dealt with in this part.



## **Division 5 – Enforcing and Protecting Property Interests**

This Division carries forward from the Family Relations Act provisions for enforcing and protecting property interests by filing documents in the land title office or personal property registry. It also makes clear that rights under this part augment and do not eliminate rights under equity or any other law.

### **Section 98 Definitions**

- Section 98 provides guidance on how specific terms will be used in this division.
- Although the substance of the other provisions in this division has not changed, the structure has and the definitions have been added to provide clarity in view of the new structure of the provisions.

### **Section 99 Filing in land title office**

- This section describes how filing with a land title office is to occur.
- It carries over the ability for parties to an agreement to protect interests by registering their interests against the property.
- The content of section 63 of the Family Relations Act is divided between this section and the next two sections.

### **Section 100 Filing in personal property registry**

- This section allows parties to an agreement to protect interests by registering their interests against the property in the personal property registry.

### **Section 101 Orders for postponement, cancellation or discharge**

- Section 101 provide the Supreme Court with the ability to order the appropriate registrar to cancel or postpone a notice or agreement under the land title office or postpone or discharge a registration with the personal property registry.
- It authorizes the Supreme Court to order the cancellation or postponement of a charge where a spouse cannot or unreasonably refuses to do so.

### **Section 102 Donor of gift is party to agreement**

- Section 102 carries over section 61(9) of the Family Relations Act to provide that a person who gives a gift to one or both spouses on the condition that it not be disposed of without that person's consent is deemed to be a party to a property agreement between the spouses for the purposes of changing or enforcing the agreement with respect to the gift.
- It allows a person who gives a gift conditionally to have a say in how the gift is dealt with in a property agreement between the spouses.

### **Section 103 Enforceability of interest in property**

- Section 103 carries over section 64 of the Family Relations Act.
- It clarifies that the provision in the Land Title Act about the effect of unregistered interests applies to a spouse's interest in land under the Family Law Act.
- The section provides that if a third party does not have actual notice of a spouse's interest in property, other than land, the interest cannot be enforced against that person.
- The section is intended to clarify that the relationship between the Land Title Act and the Family Law Act is preserved.

### **Section 104 Rights under this Part**

- Section 104 carries over section 69 of the Family Relations Act.
- This section establishes the primacy of the Family Law Act over the Partition of Property Act.

## **Division 6 – Jurisdiction and Choice of Law Rules**

When a dispute crosses borders, complex questions arise about where a claim for property division can or should be made (jurisdiction) and which province, state or country's law governs the resolution of the dispute (choice of law). As families become increasingly mobile, more and more couples will have spent time outside British Columbia during their relationship and are more likely to have assets outside B.C.

This Division adds provisions to be used by the B.C. Supreme Court to decide whether it has jurisdiction to hear a property division case, when it should decline to exercise that jurisdiction and which province, state or country's law should govern a dispute.

The provisions are based on the *Uniform Jurisdiction and Choice of Law Rules in Domestic Property Cases* adopted by the Uniform Law Conference of Canada in 1997. In 1998, the British Columbia Law Institute recommended that British Columbia adopt the Uniform Act because the common law is inconsistent with family law principles and is too complex and technical, which makes resolving these cases expensive and time consuming.

Most other provinces have some provisions dealing with jurisdiction, or choice of law or both. British Columbia will be the first in Canada to adopt the *Uniform Act*. Because the *Uniform Act* is a model only, each province must adapt the legislation to fit within its own legislative scheme when it is adopted. Therefore, although the structure, and in some cases, the wording may diverge from that used in the *Uniform Act*, the intention of this Division is to fully reflect the principles of the *Uniform Act*.

For more details and for greater interpretive assistance, please see the annotated the Uniform Act at: <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1j1>

The commentary below provides the corresponding provision of the *Uniform Act*.

### **Statistics:**

According to the 2006 census, from 2001-2006, almost 165,000 people (4.3% of British Columbia's population) moved here from another province and just over 206,000 people (5.3% of the population) moved here from another country.

Due to high immigration over the last two decades, the province's foreign-born population has continued to increase. According to the 2006 census, almost 1.2 million people (27.5% of the population of British Columbia) were born in another country.

### **Section 105 Definitions and interpretation**

- Section 105 provides interpretive guidance on how terms will be used in the regime governing conflicts of law and property orders and agreements.

### **Section 106 Determining whether to act under this Part**

- The B.C. Court Jurisdiction and Proceedings Transfer Act, which came into effect in 2006 and sets out the circumstances in which a British Columbia court has jurisdiction to hear a case, is inconsistent with family law principles and does not include most of the

circumstances relevant to determining a “real and substantial connection” for establishing jurisdiction in family property cases.

- The Family Relations Act was silent on how conflict of laws problems relating to family property should be resolved.
- Section 106 describes the circumstances where the Supreme Court has authority to make an order where there is an issue of which jurisdiction is the appropriate jurisdiction to deal with the matter.

### **Section 107 Applicable internal law**

- Section 107 describes what internal law is to be used under the choice of law rules in section 108.
- This section ensures that the most appropriate law applies to property division.

### **Section 108 Choice of law rules**

- Under the Family Relations Act, choice of law in family property cases were governed by the common law; this fostered complex, technical, time-consuming and expensive litigation.
- Section 108 sets out rules ensuring that the appropriate internal law applies to both agreements and orders for the division of family property and debt.
- Two main differences between this provision and the common law choice of law rules are:
  - this provision requires the same law to be applied to all property in dispute, rather than different laws for movable and immovable property.
  - the rules that govern choice of law under this provision are not based on the characteristics of the property in dispute.

### **Section 109 Extraprovincial property**

- Section 109 authorizes judges to make orders respecting extraprovincial property in cases where it would be appropriate to do so.