COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *V.J.F. v. S.K.W.,*
2016 BCCA 186

Date: 20160428
Docket: CA42767

Between:

V.J.F.

Appellant
(Claimant)

And

S.K.W. a.k.a. S.K.F.

Respondent
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

On appeal from: Order of the Supreme Court of British Columbia, dated April 16, 2015 (*V.J.F. v. S.K.W.*, 2015 BCSC 593, Vancouver Docket No. E131074).

Counsel for the Appellant:	J.A. Rose, Q.C. P.M. Daykin, Q.C.
Counsel for the Respondent:	L.J. Hamilton J.F. Brown
Place and Date of Hearing:	Vancouver, British Columbia March 11, 2016
Place and Date of Judgment:	Vancouver, British Columbia April 28, 2016

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

Summary:

A $2 million gift from a third party to husband, which was subsequently used to buy property put in the sole name of the wife for creditor protection, was found at trial to no longer be excluded property under s. 85 of the Family Law Act, but rather family property that should be evenly divided. Husband appealed, arguing that the "tracing" provision under s. 85(1)(g) means excluded property can never lose its excluded status. Held: Appeal dismissed. Once husband gifted the property to his wife, the exclusion was lost. He "derived" no property or consideration from the disposition thus s. 85(1)(g) is not applicable. The excluded property regime is not a "complete code" that "descends as between the spouses" upon separation, but rather builds upon existing common law and equitable principles, preserving concepts such as gifts and the presumption of advancement. The $2 million was properly characterized as family property and equal division of the funds was not significantly unfair.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] In this appeal, we are asked to resolve a question of statutory interpretation arising under the 'new' *Family Law Act*, S.B.C. 2011, c. 25 ("FLA"), which came into force in March 2013. It adopts an "excluded property" model designed to "better fit with people's expectations about what is fair" and to make family law simpler and easier to understand than the previous "family purpose" model. (Ministry of Attorney General, *White Paper on Family Relations Act Reform*, July 2010, at 80-2.) The basic principle intended to be applied to the property of spouses on separation is that they "keep what is theirs". Most notably, with respect to property acquired by a spouse before the marriage, only the increase in value that accrues during the spouses' cohabitation is (presumptively) divisible under the Act. The rest is "excluded property" that is presumptively not divisible.

[2] The White Paper predicted that the new regime would "make it easier to identify property subject to division and, therefore, reduce the potential for disagreement." (At 81.) As this case illustrates, however, not all questions of entitlement to property, or the value thereof, as between separating spouses are clearly resolved by the FLA. The specific issue raised here relates to excluded property gifted by one spouse to the other during the marriage; but the case also raises questions on a more general level about the nature of the FLA's overall scheme of property division. Judges of the Supreme Court of British Columbia have disagreed on this subject.

[3] One line of cases, of which *Remmem v. Remmem* 2014 BCSC 1552 and *P.G. v. D.G.* 2015 BCSC 1454 are the most prominent, suggests that the Act is a "complete code" and that on marriage breakdown, a "new property rights regime descends as between the spouses". On this view, a gift made by one spouse to the other that can be traced back to excluded property retains its status as excluded property within the meaning of s. 85 – even though at common law, it would be regarded as the donee's property on separation. The other line of cases, typified by *Wells v. Campbell* 2015 BCSC 3, holds that common law and equitable concepts of

property continue to apply under the FLA. On this view, a gift made by one spouse to the other becomes and remains the donee's "property" on separation and falls within the definition of "family property" in s. 84, even if the gift was previously excluded property of the donor spouse.

[4] A related question arising in the appeal is whether the presumption of advancement between spouses is effectively eliminated by the "complete code" of the Act, or whether it remains unaffected, as s. 104 might suggest.

The Legislation

[5] The *Family Law Act* of course replaces the *Family Relations Act*, R.S.B.C. 1996, c. 128 (the "FRA"), which imposed a "family purpose" regime of property division. In addition to conforming more closely to current conceptions of fairness, we are told, the new regime is designed to reduce the amount of judicial resources that were spent under the FRA in determining whether property had been used for a family purpose, and whether equal division would be unfair. According to the White Paper, *supra*, the new regime should involve less judicial discretion and be "simpler, clearer, easier to apply, and easier to understand for the people who are subject to it." The White Paper continues:

> Changing to an excluded property scheme removes the broad judicial discretion from the asset identification stage and leaves some discretion at the distribution stage. This change is designed to make it easier to identify property subject to division and, therefore, reduce the potential for disagreement. [At 81; emphasis added.]

[6] In a similar vein, the Ministry of Justice of British Columbia stated in a commentary entitled *The Family Law Act Explained*:

> 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.

[7] I have attached as a schedule to these reasons the provisions of Part 5 of the FLA, headed "Property Division", that are relevant to the case at bar. The central concepts of Part 5 are "family property", defined in s. 84; "excluded property", defined in s. 1 as "property that would otherwise be family property but [which] is excluded under s. 85"; and "family debt", described in s. 86. (Since this case does not involve family debt, I need not refer to it further.)

[8] The definition of "family property" in s. 84 has been said to establish a "communal pot" (see *P.G. v. D.G.* at paras. 83-4) from which only excluded property is removed. The definition in s. 84(1)(a) is very broad, reaching all property owned or beneficially owned by "at least one spouse" on the date of separation. Section 84(1)(b) then extends the reach of the definition to property or a beneficial interest acquired after separation if it was "derived from" property described in s. 84(1)(a). Section 84(3) confirms the inclusion of various forms of property as well as:

> (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.

[9] Section 85(1) defines "excluded property" to include *inter alia* property acquired by a spouse before the spouses' relationship began, property inherited by a spouse, and gifts received by a spouse from a third party (para. (b.1)). Ms. Hamilton on behalf of Ms. W. emphasized that para. (b.1) was added by amendment to the FLA in 2014. When asked to explain the effect of this section, the Attorney General told the Legislature:

> Again, we're not aware of case law, but family law lawyers were concerned with the way the provision was written. There was a possibility that gifts between spouses might be excluded, and the intention is only that a gift from a third party should be excluded. [British Columbia, Official Report of Debates of the Legislative Assembly, 40th Parl., 2nd sess., Vol. 9 No. 3 (March 27, 2014) at 2531; emphasis added.]

Importantly for our purposes, para. (g) of the definition of excluded property also reaches "property derived from" excluded property or from the disposition of excluded property.

[10] The consequence of the categorization of property as either family property or excluded property is that on separation, each spouse is generally entitled under s. 81 to an undivided half interest in family property as a tenant in common. The court may divide it unequally only if equal division would be "significantly unfair" having regard to all the factors listed in ss. 95(2) and (3). Excluded property in contrast must not be divided unless it would be significantly unfair not to divide it having regard to only two factors – the duration of the parties' relationship and any direct contribution by a spouse to the preservation or maintenance of the property (s. 96(b)). Obviously, the phrase "significantly unfair" is intended to set a higher bar for the exercise of judicial discretion than the 'unfairness' test in the FRA: see *Family Law Explained*, *supra*, at s. 95; *L.G. v. R.G.* 2013 BCSC 983 at para. 71; *Jaszczewska v. Kostanski* 2015 BCSC 727 at para. 166-9. As observed by Mr. Justice Savage (as he then was) in *Slavenova v. Ranguelov* 2015 BCSC 79:

> The "significant unfairness" contemplated by s. 95 requires much more than differing financial contributions in a relationship. Exactly equal contribution is more likely exceptional than commonplace. The new regime under the *FLA* recognizes that partners will come to a relationship in differing circumstances and accounts for those in the concepts of "family property" and "excluded property". The starting point in the division of property analysis already applies significant exclusions. [At para. 60.]

Other Jurisdictions

[11] In the debates in the Legislative Assembly on November 21, 2011, the Minister of Justice stated that the jurisdictions "primarily reviewed" by the Ministry in drafting the new statute had been Alberta and Saskatchewan.

[12] Section 7(2)(a) of Alberta's *Matrimonial Property Act*, R.S.A. 2000, c. M-8 and s. 23 of Saskatchewan's *Family Property Act*, S.S. 1997, c. F-6.3 are similar to s. 85 of the FLA in that property acquired by a spouse from a third party is exempt from distribution. However, unlike the FLA, both statutes expressly abolish the

presumption of advancement except where the property is placed in joint names of the spouses. In such situations, it is presumed the spouses intended that each would have a beneficial interest in the property. (See s. 36 in Alberta and s. 50 in Saskatchewan.) Ontario in contrast provides in s. 14 of the *Family Law Act*, R.S.O. 1990, c. F.3, that the presumption of resulting trust is to be applied as between spouses as if they were not married, but it also creates an exception in respect of property held in the name of both spouses as joint tenants.

[13] The Alberta legislation instructs the court, in s. 7(3)(d), to distribute property acquired by a spouse by gift from the other spouse in a "just and equitable" manner. The Ontario counterpart also instructs the court in section 5(6)(c) to consider "the part of a spouse's net family property that consists of gifts made by the other spouse" in ordering an unequal division of property. Manitoba, in *The Family Property Act*, C.C.S.M., c. F25 provides for the loss of excluded property status where the proceeds of sale from excluded property "are used to acquire a family asset" or where the "asset acquired in exchange is a family asset" under s. 6(5).

[14] Courts in Alberta, Saskatchewan and Ontario have held that subject to evidence of contrary intention, exempt property put into joint names loses its exempt status in respect of at least the one-half interest that was gifted to the other spouse: see *E.J. v. R.J.* 1989 ABCA 197; *Chalifoux v. Chalifoux* 2008 ABCA 70 at para. 48; *Van Slyke v. Van Slyke* 2012 ABQB 721 at para. 24; *Jensen v. Jensen* 2009 ABCA 272 at para. 60; *Knight v. Proust* 2014 SKQB 342 at paras. 77-80; *J.P.D. v. L.A.D.* 2006 SKQB 523 at para. 30; *Townshend v. Townshend* 2012 ONCA 868 at paras. 28-33. In addition, the Manitoba Court of Appeal has held that "an exemption for the value of assets owned prior to marriage becomes lost either if the property becomes mixed with family assets or otherwise loses its identity": *Kowaluk v. Kowaluk* (1996) 24 R.F.L. (4th) 261 (C.A.) at para. 10.

[15] I will not subject the reader to an examination of the family property legislation of the remaining Canadian provinces. Part 5 of the FLA is not exactly the same as any other regime in Canada, and in the end, we must decide issues of interpretation

on the basis of the British Columbia statute alone. It contains no express direction as to how gifts between spouses are to be treated or as to the effect of placing excluded property into the spouses' joint names.

Factual Background

[16] I turn to the factual background of this case, which the trial judge recounted beginning at para. 7 of his reasons.

[17] The parties were married in 2004 and had a traditional marriage. Mr. F. was already well established as a project manager with P. Co., his employer at all relevant times. P Co. was in the business of property development and was owned by the late M.I. Mr. F. had been trained as a financial analyst, had an M.B.A. from the University of Manitoba and since 1992 had been a certified managerial accountant. When he met Ms. W., he held funds in various bank accounts and RRSPs which the parties agreed at trial were excluded property.

[18] For her part, Ms. W. was working in sales for a software development company, having obtained her B.A. in sociology and psychology in 1999. She ceased working outside the home in 2005 to be a "stay-at-home mother". Eventually, the parties had three children, two boys who were nine and seven years of age at the time of trial, and a daughter, aged four.

[19] The family lived in a house in Richmond which Mr. F. had bought with his own funds in October 2003. Later on, in 2010, he transferred title to that property into Ms. W.'s sole name. Mr. F. agreed at trial that the Richmond property was family property and that the entire value thereof was subject to equal division with Ms. W.

[20] Mr. F. became a senior executive at P. Co. and indeed became part of M.I.'s "inner circle". The trial judge explained:

> Following their marriage, Mr. F.'s income increased over time to approximately $250,000 plus an annual bonus decided by M.I. (who is now deceased). In more recent years, Mr. F.'s annual income, including bonus, was $480,000 including a small car allowance. He was promoted to senior vice president in 2005 when Ms. W. was pregnant with their first child. Over time, Mr. F. became one of several key advisors (described as the "inner

> circle") to M.I. Mr. F. became a very close and trusted confidant to M.I., working closely on M.I.'s business and personal affairs. M.I. placed a great deal of trust in Mr. F. and from the description I was given in the evidence, the two of them enjoyed a relationship akin to father-son. [At para. 15.]

As a member of the "inner circle", Mr. F. joined the boards of several companies in the P. Co. group. Although he had concerns about his exposure to liability as a director "for unknown claims that might surface in the future such as delayed environmental claims", M.I. assured him that he would cover any such claims and discouraged him from buying liability insurance. As mentioned, however, Mr. F. did transfer the Richmond property into Ms. W.'s name. The trial judge found that he did so "in order to secure protection from potential future creditors arising from his role as a director of various companies" and that the transfer "was not a sham transaction." (Para. 23.) At trial, the parties agreed that the Richmond property had a value of approximately $1.5 million.

[21] Sadly, M.I. was diagnosed with terminal cancer in 2010. Mr. F. and others were asked to stay on with P. Co. in order to wind up M.I.'s extensive corporate holdings and administer his estate – a project that was likely to take about five years. Mr. F.'s base salary and annual bonus were consolidated into a salary of $480,000 (including car allowance) that would continue beyond M.I.'s death. (Para. 17.)

[22] M.I. decided to give $2 million to each member of his inner circle in order to protect them against potential claims of creditors. Following his death in June 2011, Mr. F. received a "distribution" of $2 million from the estate, which sum he deposited into his personal bank account. (Para. 21.) The trial judge ruled that it represented "a gift by way of inheritance" to Mr. F. and was therefore excluded property when received. In the Court's words:

> The document evidencing the payment is a cheque drawn on the account of an "alter ego" holding company, which I take to be an alter ego trust that refers to M.I. The cheque itself describes the payment as "MI Estate Distribution." Despite the lack of estate documents to corroborate the payment was an inheritance or gift (which according to *Asselin v. Roy*, 2013 BCSC 1681 ought to have been produced), I am satisfied on the whole of the evidence before me that the purpose of the payment was a gift by way of inheritance to Mr. F. that was designed to provide him with financial protection for his ongoing role as a director of various companies in the P.

> Co. group. I have determined that at the time of the distribution to Mr. F., the $2 million payment was excluded property under the *FLA*. [At para. 48; emphasis added.]

This finding is not challenged on appeal.

[23] Mr. F. also received an early severance package in December 2012 in the amount of $347,000 even though he continued to work for P. Co. and to serve as a director of related companies in the group. Mr. F. agreed at trial that the severance payment was family property and should be divided equally with Ms. W.

[24] At some point before these events, Ms. W. had formed the desire to relocate the family home from Richmond to Vancouver, where both their sons were attending private school. This was originally a source of disagreement in the marriage, but Mr. F. ultimately agreed. They found a piece of property on West 33rd Avenue on which to build a new home. The trial judge described the financial arrangements made by the couple to purchase the property in December 2011 and to fund construction of the new home:

> Mr. F. worked up a budget that called for the bulk of the $2 million payment (over $1.68 million plus closing costs) to be used to purchase the property, which had a tear down home on it.
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> Construction costs were estimated to be well over $1 million. Funding for the construction costs came from some of the remaining monies from the $2 million payment (which Mr. F. gave to Ms. W. to deposit into her bank account to fund some of the pre-construction costs), but mainly from a line of credit with a significant credit limit of well over $1 million. Ms. W. agreed with the lender's request to encumber the Richmond property, which by that time, was registered solely in her name and unencumbered, with a mortgage to secure the line of credit. The Richmond property was unencumbered because Mr. F. had used some of the $2 million payment to pay off a small amount owing on the pre-existing mortgage on that property (which was just over $37,000). Mr. F. also signed the mortgage in order to build what both parties agreed was to be their dream home in Vancouver.
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> . . .
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> In addition to using funds from the $2 million payment to fund the purchase of the Vancouver property and some of the pre-construction costs and to pay off the pre-existing mortgage on the Richmond property, Mr. F. used the remaining funds to pay off the outstanding debt on the Mercedes Benz motor vehicle registered in Mr. F.'s name and credit card debt. Mr. F. acknowledges that even though the vehicle was registered in his name but driven by Ms. F.,

> it is family property. He also acknowledges that the debt he paid was family debt.
>
> After he deposited the $2 million payment into his own bank account, Mr. F. transferred funds to different bank accounts from which he made all of those payments. For example, he transferred $236,895 to Ms. W.'s bank account so that she could fund the pre-construction costs. He also transferred funds to a different bank account (that was originally in his name but later put into both parties' names) to pay off the pre-existing mortgage on the Richmond property and the car loan. [At paras. 26-7, 29-30.]

[25] The trial judge found at para. 51 that Mr. F. used "nearly all" of the $2 million gift from M.I. to fund the purchase of the new property and to pay off certain debts on family property. When the purchase of West 33rd closed in December 2011, Mr. F. directed that title be registered in his wife's name "for creditor protection in light of Mr. F.'s ongoing role as a director in the various P. Co. group of companies." (Para. 28.) The parties planned to sell the Richmond home once the new one on West 33rd had been built.

Separation

[26] Unfortunately, the parties separated in early 2013. At that time, only the foundation work had been completed on the new house. The parties estimated that if they were to sell it, they would likely incur a loss of $500,000. They decided to proceed with the construction, drawing from their line of credit, and then sell the property. The total cost of construction ended up being some $1.5 million and the house was eventually sold for $3.55 million in late 2013, giving the couple a net profit of between $50,000 and $60,000.

[27] The couple were unable to agree on the disposition of $2 million of the sale proceeds. That amount was therefore put into a trust account, from which the parties have each taken advances. At the time of trial, some $2,124,700 was in trust. (Para. 32.)

[28] After the separation, Ms. W. and the children moved to a rented home in Vancouver. She hoped to purchase a larger home, which at the time of trial she expected would cost about $1.5 million, and was intending to enrol the children in

private schools nearby. She was also pursuing a master's degree in clinical counselling at the City University of Seattle, which consisted mainly of online courses. She hoped to complete this program at the end of 2017 and then to work as a counsellor.

[29] Mr. F. continued living in the Richmond property. At the time of trial, he expected that his full-time work with P. Co. would end in the summer of 2015, although he hoped to remain employed there for a further indeterminate period.

The Trial Judgment

[30] The main issue at trial was the characterization of the $2 million in trust. Other issues relating to spousal and child support were raised and determined, but since they are not challenged on appeal, I need not recount them in detail. It will be sufficient to note that the Court found it would be premature to determine the parties' income for purposes of a final spousal support order and the apportionment of s. 7 expenses. A review no later than October 31, 2015 was ordered, pending which Mr. F. was to continue to pay child support of $7,800 per month and spousal support of $8,000, as previously ordered by a master. (Para. 117.) The judge also ordered that Mr. F. would be entitled to purchase Ms. W.'s half interest in the Richmond property for $775,000 before the end of June 2015, failing which he was to list it for sale. As far as I can discern from the order, each party received approximately half of the value of the remaining assets.

Characterization of the $2 Million

[31] At para. 42 of his reasons the trial judge turned to the question of the "character" of the $2 million in sale proceeds from the Vancouver property which are being held in trust. He noted that Ms. W. had taken inconsistent positions in her pleadings, prior affidavit evidence, discovery, and testimony at trial as to the nature of the funds. Late in the trial, however, she had settled on the position that the payment by M.I.'s estate had been a gift to Mr. F. which had "lost its status as excluded property" almost immediately after he received it. (Para. 47.) In her submission:

> … nearly all of the $2 million payment was gifted to her to be used to provide a new family home and to pay for some of the pre-construction costs. She also says that Mr. F. also used nearly all of the rest of the $2 million payment to pay off the mortgage balance on the Richmond property and to pay off credit card debt and a loan on a vehicle registered in Mr. F.'s name (and regularly driven by Ms. W.), all of which Mr. F. agreed at trial is family property. [At para. 49; emphasis added.]

[32] Mr. F. agreed that he had received the $2 million as a "gift from a third party". He took the position, however, that he had not in turn "gifted the payment" to Ms. W. In his submission, she could not rely on the presumption of advancement because the presumption had been "effectively reduced… to ashes" by the FLA scheme. (Para. 56.) Although the funds had been co-mingled, he said, they could be readily "traced" through the West 33rd property to the proceeds of sale, to the funds now in trust.[1] He then relied on *Remmem* for the proposition that:

> … Once excluded property is brought into the relationship by one spouse,… under the regime contemplated by the *FLA* it cannot be gifted to the other. Intention, he submits, is no longer a relevant consideration. [At para. 56; emphasis added.]

If this was correct, Mr. F. contended, it meant that "effectively one spouse can never gift excluded property to the other." (At para. 56.)

[33] In *Remmem*, the Court had ruled that the property provisions in the FLA are to be applied without regard to the presumption of advancement between married spouses and that accordingly, certain property purchased in joint names using the

[1] I note parenthetically that the FLA does not use the term "trace" or "tracing". Technically, tracing is an equitable remedy used where an equitable right is asserted, while the common law process is called "following": see Law Reform Commission of British Columbia: *Report on Competing Rights to Mingled Property: Tracing and the Rule in Clayton's Case* (1983) at 15-20 and the seminal case of *Re Diplock* [1948] Ch. 465 (C.A.). Although this point was not argued, I regard the use of "derived from" in the FLA as possibly opening the door to a more flexible approach than the arcane rules of tracing, such as the rule in *Clayton's Case*, might permit. I also note that at paras. 50 and 69, the trial judge described the funds as having been "co-mingled" with funds derived from family property to purchase the property on West 33rd; but I as I understand it, the judge did not intend to suggest that 'tracing' in a non-technical sense was impossible, and he did not decide the case on that basis. It is doubtful that the 'co-mingling' of funds would preclude a court from tracing them into property purchased with such funds: see *Foskett v McKeown* [2001] A.C. 102 (H.L.) at 131 and *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.* 2010 BCCA 357 at paras. 31 and 41-3; and see generally Lionel Smith, *The Law of Tracing* (1997) and Maddaugh and McCamus, *The Law of Restitution* (looseleaf at ch. 5-7); and it is more doubtful in my view that it would preclude a finding that property is 'derived from' such funds.

sale proceeds of other property brought into the marriage by the husband remained excluded property. Butler J. described the Act as a "complete code" where no regard should be paid to the intention of the parties, even where they agreed to transfer excluded property into their joint names. To hold otherwise, he said, would:

> … bring uncertainty and a level of inequality into a property division structure that was intended to treat married and unmarried spouses equally and to provide for a greater level of certainty. [At para. 48.]

[34] Butler J. acknowledged that the Act "contains no provisions dealing with the presumption of advancement between spouses which would suggest that the presumption still applies"; but in his analysis, applying the presumption in the context of the FLA scheme would "raise a number of problems" including:

> a) The presumption only applies to married spouses and so gratuitous transfers between married and unmarried spouses would be treated differently.
>
> b) The presumption is at odds with and would thus limit the utility of the tracing provisions. Property (such as the Middle Point property) placed in joint names is clearly derived from excluded property and so it is easy to trace the full amount of the exclusion. Unlike the presumption of advancement, tracing does not depend on the parties' intentions. The application of the presumption of advancement and an examination of whether property was gifted is at odds with the simple concept of tracing.
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> c) When applied, the presumption of advancement would significantly reduce the value of the exclusion to the donor spouse.
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> d) Further, if half of the excluded property is a gift to the donee spouse, shouldn't he or she be able to claim that his or her half of the property is excluded? [At para. 50.]

[35] These problems, he said, would have two significant consequences if the presumption was applicable under the FLA – the apparent simplicity and certainty of the FLA's property division scheme would be lost; and the amount of the exclusion would be different as between married and unmarried spouses – a result apparently not intended by the legislation. Thus the Court in *Remmem* concluded:

> When I consider these difficulties, I conclude that the tracing provisions in the *FLA*, at least when applied to the circumstances in this case, are to be applied without considering or applying the presumption of advancement between married spouses. In other words, none of the excluded property – the fair market value of the Greaves Road property in October 1990 – was

> gifted to Ms. Remmem when the Middle Point property was placed in joint names. Mr. Remmem remains entitled to the full value of the exclusion of $65,000. [At para. 52.]

[36] For her part, Ms. W. in the case at bar relied on *Wells*, *supra*, where the Court was also concerned with the question of whether excluded property continued to include property owned by the husband prior to marriage but transferred into joint tenancy during the marriage. With respect to the four "problems" described in *Remmem*, Mr. Justice Masuhara suggested that the actual finding in that case was limited to its facts, since Butler J. had concluded that the "tracing provisions in the FLA, at least when applied to the circumstances in this case, are to be applied without considering or applying the presumption of advancement between married spouses." (At para. 37.) Masuhara J. emphasized that although some commentators have suggested the presumption of advancement has been reduced to "no significance" in light of the wide discretionary powers given to courts in family property legislation, "significance is obviously not the same as extinguishment". Indeed, the FLA had narrowed the court's discretion as compared to the FRA. He continued:

> The view that the presumption of advancement has been rendered insignificant in British Columbia as opposed to extinguished, was expressed in the case of *Zhu v Li*, 2009 BCCA 128 at para. 51 *et seq.* by Madam Justice Neilson where she found that there was a basis for the presumption to operate in regard to certain of the properties in question in that case. While I note that the decision was made under the *Family Relations Act*, now repealed, I do not see anything in the present act which would lead to a different view regarding the presumption. See also *M. Dhaliwal Holdings v. Pacific Blue Farms Ltd.*, 2014 BCSC 1482.
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> Also, I note that the definition of excluded property includes gifts to a spouse from a third party but does not include gifts between spouses.
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> Further, intention has not been eliminated from the considerations, given that the definition of "property" in the Act includes a beneficial interest "unless a contrary intention appears."
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> It seems that the excluded property relates to property which was held by a spouse prior to the relationship and in which an interest in title was not transferred to the other during the relationship. [At paras. 40-3.]

[37] Having found that a joint interest in the husband's excluded property had been transferred to the wife, Masuhara J. in *Wells* could not see how her interest

could be considered excluded property. He reasoned that if the Legislature had intended to alter the "well-established concept of a joint tenancy and/or the presumption of advancement, they [could] have done so explicitly as has been done in other jurisdictions. I do not accept that s. 85(1)(a) negates an intended disposition of an interest in land from one spouse to another." (At para. 44.)

[38] Returning to the case at bar, the trial judge concluded that he was bound to follow *Wells*, since it appeared s. 104 had not been brought to the Court's attention in *Remmem*. In his words:

> … the *FLA* does not prohibit *inter vivos* gifts between spouses. In this case, when excluded property owned by one spouse was comingled with funds derived from family property to purchase an asset that is placed solely in the name of the other spouse in order to immunize it from potential creditors, the exclusion is lost because the disposing spouse gifted it to the other. It is not open for Mr. F., as the transferor, to say that Ms. F., the transferee, holds the property in trust for him because it is inconsistent with the purpose of the transfer: *Bernard v. Weiss* (1986), 70 B.C.L.R. 318 (S.C.). In other circumstances, involving different purposes, the result may be different. The rebuttable aspect of the presumption of advancement allows for individual circumstances to be considered.
>
> Mr. F. cannot say that he gifted the funds to his wife insofar as creditors are concerned, but as between them, she held the property in trust for him. … [At paras. 69-70; emphasis added.]

[39] In the result, the judge agreed with Ms. W. that the "character" of the $2 million changed almost immediately after Mr. F. received it, in that he had made a gift of the majority of the funds to his wife by having the new property put in her name alone and by covering some of the construction costs. (Mr. Rose on behalf of Mr. F. clarified during the hearing in this court that Mr. F. was not advancing any claim in respect of the funds used to pay off the miscellaneous other debts.) In so doing, Mr. F. had acted to keep the funds "immune from seizure" by future potential creditors and to keep it "protected in his wife's hands." (Para. 73.) The judge referred to *Neville v. National Foundation for Christian Leadership* 2013 BCSC 183 (***aff'd*** 2014 BCCA 38**,** *lve. to app. dism'd.* [2014] S.C.C.A. No. 111), where Cullen A.C.J. confirmed that a "gift" is an act of "unqualified giving accompanied by delivery and acceptance by the recipient where the gift cannot be revoked by the donor". The trial judge here continued:

> … I find that is what occurred in the present case. Mr. F. used the funds to purchase land which he gifted to his wife. His intention was to immunize his assets from creditors for the protection of his wife and his family. He did not seek to obtain any beneficial interest in the Vancouver property. The interest he has in that property is what is afforded to him by statute only.
>
> My determination is not simply based upon Mr. F.'s failure to rebut the presumption of advancement. In this case I have found that Mr. F. made a gift to Ms. W. based upon Mr. F.'s actual conduct and as evidenced by his clear written and *viva voce* testimony of his purpose at the time. [At paras. 75-7; emphasis added.]

Property Division

[40] At para. 77, the trial judge ruled that the funds in trust were family property and were therefore to be divided equally, there being "no basis to rebut the presumption of equal division." He did not refer specifically to the factors listed in s. 95.

[41] The judge then considered in the alternative whether, even if the $2 million payment had remained excluded property, it would be "significantly unfair" not to divide it under s. 96. Although the phrase sets a high bar, he said, it is not so high as to make it "next to impossible" to find a significant unfairness. He referred to *Cabezas v. Maxim* 2014 BCSC 767, where the Court had found that significant unfairness would have resulted if the excluded property were not divided, in light of the respondent's contributions to its maintenance, her decision to undertake liability on a mortgage, her greater contribution towards expenses, and the length of the couple's cohabitation (6.5 years).

[42] The trial judge found that in this instance, Ms. W. had contributed significantly to the improvement and management of the Vancouver property. Her efforts to proceed with the construction of the house on West 33rd, he said, had saved Mr. F. from a significant loss. As well, she had made significant contributions to the household throughout the nine-year marriage, which were said to have greatly assisted her husband in developing his relationship with M.I.

[43] In all the circumstances, the trial judge concluded that even if the property had remained excluded property, it would have been significantly unfair not to order

that the trust funds be divided equally. He found it unnecessary to consider Ms. W.'s other submissions in favour of unequal division. (Para. 89.) At para. 116, he summarized his findings:

> The $2 million payment to Mr. F. was, at the time of receipt, an inheritance to Mr. F. and therefore excluded property under the *FLA*. Mr. F. then gifted the bulk of the funds to his wife in order to buy property and to pay some of the pre-construction costs of a new family home in Vancouver for the ongoing benefit of his wife and children. Those funds became family property under the *FLA*. The parties are entitled to an equal share of the funds presently held in trust. [At para. 116; emphasis added.]

Chambers Applications

[44] To conclude this narrative, I note that counsel for the parties appeared again before the trial judge in chambers in February 2016. On this occasion, Mr. F. sought a review of his obligation to pay spousal support and s. 7 expenses in respect of the children – an application that the Court found to be premature, given that this appeal was soon to be heard. Both parties also sought certain adjustments in the amount of spousal support and differed on the appropriate 'DivorceMate' calculation of their respective income levels.

[45] Ms. W. informed the Court that because of the risk she might not succeed on this appeal and might have to repay $1 million to Mr. F., she had left not only that $1 million in trust but an additional $750,000 received from Mr. F. in respect of the sale of her interest in the Richmond property to him. In other words, the trial judge said, "she has chosen, in the absence of a stay, not to use any of the distribution of family assets to acquire her own housing, and instead, continues to pay rent over $3,300 per month." Ms. W. had also put her studies (see para. 28 above) on hold and obtained employment in January of this year as a real estate agent with a starting salary of $3,000, which the judge was satisfied would "quickly increase to $4,000 per month" plus commissions.

[46] Given this change in circumstances, the chambers judge ruled (see 2016 BCSC 212) that Mr. F. was overpaying spousal support and that Ms. W.'s income should not be calculated at $0 as before, but at "at least $43,500 plus commissions."

(At para. 10.) The judge reduced interim spousal support to $5,500 per month pending the outcome of this appeal. (At para. 14.)

[47] The judge also clarified a mis-statement at para. 10 of his trial reasons in which he had said the parties had agreed with respect to funds in Mr. F.'s bank account at the time the parties met. In fact, he said, Ms. W. had agreed they were excluded property until Mr. F. transferred title of the Richmond property into her sole name in 2010 in order to immunize that asset from potential creditors. As I understand it, Ms. W.'s position was that these funds were included within the value of the Richmond property that Mr. F. gifted to her when title to the Richmond house was transferred into her name in order to protect creditors; thus the effect of the transfer of title should be the same as with respect to the husband's direction that the Vancouver property be acquired in Ms. W.'s name. The chambers judge concluded:

> I am satisfied on the facts of this case that Mr. F. gifted the Richmond Property to Ms. W. to avoid attack by creditors. I find the circumstances to be similar to those in which Mr. F. dealt with the $2 million inheritance. The approach he took to creditor proofing in both instances was the same. He sought to be in a position to say to creditors that he did not own legal title or a beneficial interest in the Richmond Property.
>
> I will conclude by stating that the onus is on the person claiming the asset is excluded. I respectfully disagree with Mr. F.'s submission that once he demonstrated the initial character of the asset to have been excluded, the onus shifts to Ms. W. to demonstrate that its character changed. The *Family Law Act* specifically speaks of the onus falling on the person claiming the asset is an excluded asset. In this case, Mr. F. has not met that onus:
>
> > s. 85(2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.
>
> Consequently, I have determined that the value of the Richmond Property is a family asset and not subject to a deduction of $85,054.85, for the amount of funds contributed by [*sic*; Mr. F.]. [At paras. 24-6; emphasis added.]

We are told that a separate appeal has been initiated to deal with the Richmond proceeds.

On Appeal

[48] On appeal, Mr. F. submits that the trial judge erred as follows:

> The Learned Trial Judge erred by failing to conclude that any property derived from the Appellant's $2,000,00.00 gift or from its disposition remained the excluded property of the Appellant.
>
> In the event this court determines that the presumption of advancement remains available under the FLA, then the Learned Trial Judge erred by not concluding that the Appellant had rebutted the presumption.
>
> The Learned Trial Judge erred by relying on s. 104(2) of the FLA over the specific excluded property provisions of the FLA.
>
> The Learned Trial Judge erred by applying s. 96 of the FLA to the proceeds of sale of West 33rd Avenue, rather than s. 95, having found that the proceeds were "family property".
>
> The Learned Trial Judge erred by applying s. 96 too narrowly and failing to conclude that it was not substantially unfair to allocate the proceeds to the Appellant.

The first alleged error in judgment is obviously the most important issue, but I begin with the second ground. I read it as challenging two conclusions of the trial judge – the conclusion of fact that Mr. F. had made a gift of the (approximately) $2 million to Ms. W. when he directed that the West 33rd property be placed in her name; and the conclusion of law, albeit tentative, that the presumption of advancement remains applicable in the FLA context.

Gift of a Gift

[49] As already mentioned, Ms. W. did not challenge the proposition that the $2 million paid or "distributed" from M.I.'s estate to Mr. F. was a gift – i.e., a gratuitous transfer of property in which the donor retained no interest and expected no remuneration: see *Peter v. Beblow* [1993] 1 S.C.R. 980 at 991-2; *McNamee v. McNamee* 2011 ONCA 533 at para. 23. It need hardly be added that without more, a gift is not revocable by the donor: see *Berdette v. Berdette* (1991) 3 O.R. (3d) 513 (C.A.) at 520-1; *Read v. Rayner* [1943] 2 D.L.R. 225 (P.E.I.S.C.) at 231, *aff'd* [1943] 4 D.L.R. 803 (S.C.C.); *Young v. Young* (1958) 15 D.L.R. (2d) 138 (B.C.C.A.).

[50] When property is transferred gratuitously by one spouse to the other it may be more difficult to discern the donor's intention than where the donor was a "third

party". Where the evidence is insufficient or equivocal and the transfer was made by husband to wife, the law normally provides an evidentiary presumption that a gift was intended and the burden of persuasion shifts to the opposite party to rebut on the balance of probabilities: see *Pecore v. Pecore* 2007 SCC 17 at paras. 22 and 44. This, of course, is the presumption of advancement. In *Pecore*, the Court stated that this presumption, and its opposite number, the presumption of trust, "continue to have a role to play" in disputes regarding gratuitous transfers. In the words of Rothstein J. for the majority:

> The presumptions provide a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. This may be especially true where the transferor is deceased and thus unable to tell the court his or her intentions in effecting the transfer. In addition, as noted by Feldman J.A. in the Ontario Court of Appeal in *Saylor v. Madsen Estate* (2005), 261 D.L.R. (4th) 597, the advantage of maintaining the presumption of advancement and the presumption of a resulting trust is that <u>they provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers</u>. [At para. 23; emphasis added.]

[51] As we have seen, the trial judge in the case at bar found that a second gift had been made – i.e., that Mr. F. gave to his wife most of the $2 million when he directed that the Vancouver property be placed in her name and made funds available for the construction of the new house on that property. The Court found that in so doing, Mr. F. had intended to "immunize his assets from creditors for the protection of his wife and his family", as he had done previously with the Richmond property.

[52] Counsel for Mr. F. was reluctant at trial to acknowledge that his client had been motivated by 'creditor protection', but as long as the effect of the transfer was not to fraudulently defeat or prejudice creditors who had legal or equitable claims at the time (whether or not yet brought to fruition), the fact he organized his affairs to protect personal or family property from business risks is not generally objectionable as a fraudulent conveyance: see *Mawdsley v. Meshen* 2012 BCCA 91 at paras. 1-2, 59-91, *lve*. *to app*. *dism'd*., [2012] S.C.C.A. No. 182. By the same token, any such transfer must not be a "sham" and the transferor may not claim that his or her gift

was revocable or that no beneficial interest was intended to be transferred. As Lord Denning stated in *Tinker v. Tinker* [1970] 1 All E.R. 540 (C.A.):

> Accepting that in the present case the husband was honest – he acted, he said, on the advice of his solicitor – nevertheless I do not think that he can claim that the house belongs to him. The solicitor did not give evidence. But the only proper advice that he could give was: 'In order to avoid the house being taken by your creditors, you can put it into your wife's name; but remember that, if you do, it is your wife's and you cannot go back on it.'
>
> But, whether the solicitor gave that advice or not, I am quite clear that the husband cannot have it both ways. So he is on the horns of a dilemma. He cannot say that the house is his own and, at one and the same time, say that it is his wife's. As against his wife, he wants to say that it belongs to *him*. As against his creditors, that it belongs to *her*. That simply will not do. Either it was conveyed to her for her own use absolutely; or it was conveyed to her as trustee for her husband. It must be one or other. The presumption is that it was conveyed to her for her own use; and he does not rebut that presumption by saying that he only did it to defeat his creditors. I think that it belongs to her. [At 542; emphasis added.]

(See also *Maysels v. Maysels* (1974) 3 O.R. (2d) 321 (Ont. C.A.) at 330-1; *Scheuerman v. Scheuerman* (1916) 52 S.C.R. 625; *Bernard v. Weiss* (1986) 70 B.C.L.R. 318 (S.C.) at 324-6; *Dubois v. Dubois* 2015 MBQB 13 at paras. 32-3; *Fehr v. Fehr* 2003 MBCA 68 at para. 45; *Cowan v. Cowan* (1987) 9 R.F.L. (3d) 401 (Ont. H.C.J.), ***aff'd*** 13 R.F.L. (3d) 381 (C.A.).) Similar reasoning has been applied where a husband places property in the joint names of both spouses. He is regarded as having made a "complete and perfect gift *inter vivos*": see, e.g., *Berdette*, *supra*; *Kearney v. Kearney* (1970) 2 O.R. 152 (C.A.); *Burke Estate v. Burke Estate* (1994) 7 R.F.L. (4th) 114 (Ont. Ct. J. (Gen. Div.)) at para. 35; and *Pecore* at paras. 48-9 (discussing joint bank accounts).

[53] The trial judge said his finding that Mr. F. had 'gifted' the $2 million was based not only on Mr. F.'s failure to rebut the presumption of advancement, but also on evidence of his "actual conduct and … his clear written and *viva voce* testimony of his purpose at the time." (At para. 76.) As I read this, the presumption of advancement was not determinative – even though it has been said to operate, practically speaking, only in "doubtful cases": see J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed., 1999) at 116-7. In any event,

Mr. F.'s evidence regarding his wish to place the property in Ms. W.'s name in order to 'protect his family' from the reach of creditors was in my view clear and unequivocal. It was thus more than sufficient, without resort to the presumption of advancement, to support the judge's conclusion.

[54] I would not accede to Mr. F.'s argument that the trial judge erred, 'clearly and palpably' or at all, in failing to find that Mr. F. had rebutted the presumption of advancement – assuming for the moment that it continues to apply under the FLA.

Section 85(1)(g) – Excluded Property?

[55] With respect to the primary ground of appeal, I start with the proposition that setting s. 85 aside for the moment, the West 33rd property became 'property of' Ms. W. prior to the spouses' separation. Mr. F. did not reserve any beneficial interest; nor did he purport to make the gift revocable. In normal circumstances, then, the sale proceeds were property Ms. W. "derived from" the Vancouver property after the date of separation. Thus they would normally come within s. 84(1)(b) and constitute family property.

[56] Counsel for Mr. F. contends, however, that the $2 million of sale proceeds remained "his excluded property", or at least "excluded property", because the proceeds are "property derived from … the disposition of property referred to" in s. 85(b.1) of the FLA – i.e., property derived from the disposition of the gift received by Mr. F. from M.I. Mr. Rose emphasized that the concept of property "derived from" other property or the "disposition" of same engages a broad set of transactions: s. 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, defines "dispose" as meaning "to transfer by any method and [to include] assign, give, sell, grant, charge, convey, bequeath, lease … and agree to do any of those things" and the word "derive" was said in *Minister of National Revenue v. Hollinger North Shore Exploration Co., Ltd.* [1963] S.C.R. 131 to be "broader than 'received' and … equivalent to 'arising or accruing'". (At 134.)

[57] There is little doubt that Mr. F. 'disposed of' the $2 million he received from M.I. when he used the funds to purchase the West 33rd property in his wife's name

and to pay some construction costs. If the property had been purchased in his own name, there is no doubt the ultimate proceeds from the sale of the property would constitute "property derived from the disposition" of excluded property and would have remained excluded property under s. 85(1)(g). Instead, Mr. F., for the protection of himself and his family, paid $2 million to the previous owner of the property and directed it be put into Ms. W.'s name and he paid some construction costs. The question arises what he 'derived from' this disposition.

[58] Counsel for Mr. F. argued that in the context of the FLA, the answer to this question is irrelevant, as is the fact of the gift itself. In counsel's submission, the FLA scheme generally disregards "title" and ownership. When pressed, counsel declined to say whose property the sale proceeds are, relying on the proposition adopted in *P.G.* that once property is excluded property, it always remains so for purposes of the FLA, regardless of which spouse owns it.

[59] *P.G.* was decided after the trial judge issued his reasons in this case. The husband in *P.G.* had owned a property on Main Street before he and Ms. G. married. During their marriage, he added his wife as a joint owner. The two spouses "repurposed" the house into a rooming house. When it became impractical to continue living there, they increased the mortgage on the property and bought a home in Langley, held in joint tenancy. Later, they sold the rooming house and paid off the mortgage on the Langley property. The Court found a "direct line" between Mr. G.'s original equity in the Main Street property and the couple's acquisition of the Langley home. (Para. 51.) Madam Justice Fenlon, as she then was, formulated the question before the Court thus:

> … whether the equity in the Main Street Property at the time of marriage continued to be excluded property after Mr. G. transferred the Main Street Property into joint tenancy on December 22, 2003, and after he put the proceeds of the sale of the Main Street Property into the Former Family Home, which was also held in joint names. [At para. 52.]

As she noted at para. 55, the Supreme Court had considered this issue in three cases – *Remmem*, *Wells*, and the trial decision in this case – that established two conflicting lines of authority.

[60] After considering the three cases, Fenlon J. in *P.G.* concluded that the approach taken in *Remmem* should be followed. First, she stated, *Wells* had "focused" on the presumption of advancement and had not addressed s. 85(1)(g) of the Act, "the tracing provision which expressly provides for the exclusion of property derived from excluded property or the disposition of excluded property." (At para. 67.) *Re Hansard Spruce Mills* [1954] 4 D.L.R. 590 (B.C.S.C.) mandated that where a relevant statutory provision is not addressed, the Court should not follow an otherwise binding decision. As well, she said, statutory provisions should be interpreted in accordance with the "modern rule" of statutory interpretation – i.e., read in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature. (At para. 69.) She noted the broad meanings of "derived from" and "disposed", observing that s. 85(1)(g) does not restrict "tracing" to an asset held solely by the spouse who owned the original excluded asset. She continued:

> … Recognizing the presumption of advancement when applying Part 5 of the *FLA* would generally "extinguish" the right of a spouse who has brought property into the relationship to retain it on separation whenever the pre-owned property is mingled with property held by the other spouse. The implications of this are far-reaching. Arguably an inheritance deposited into a joint bank account, a gift from a parent to one spouse used to pay down the mortgage on a home held as joint tenants, or an award of damages for pain and suffering used by a spouse as a down payment on a house placed in both names or placed in the other spouse's RRSP would be subject to the presumption of advancement. It would follow that the spouse who was the original owner of these assets, which are expressly defined as excluded property under s. 85(1) of the *FLA*, would not be able to claim them as excluded property at the end of the relationship, unless he or she could marshal evidence to rebut the presumption of advancement at the time the transfer occurred. [At para. 75; emphasis added.]

As I read this passage, Fenlon J. declined to find that the "transfer" of the couple's Main Street property and Langley home into their joint names was a gift (of an inchoate 50% interest) by Mr. G. to the wife because in the Court's view, the presumption of advancement is not applicable under the FLA scheme. Otherwise, Fenlon J. reasoned, the excluded property regime would be "effectively negated if the excluded property cannot be traced into assets placed in whole or in part in the name of the other spouse." (Para. 86.) She did not state what her conclusion would

be if the evidence clearly established that a gift was intended without the necessity of applying the presumption.

[61] On a more general level, Fenlon J. also preferred the reasoning in *Remmem* because she found it to be consistent with the objects of the statute as described in the White Paper, *supra*. (As she noted, Canadian courts have referred to white papers as aids to statutory interpretation, citing *Canada v. Kieboom* [1992] 3 F.C. 488 (C.A.) at 498.) In particular she emphasized the following passage from the White Paper:

> The model seems to better fit with people's expectations about what is fair. They "keep what is theirs," (such as pre-relationship property and gifts and inheritances given to them as individuals) but share the property and debt that accrued during their relationship. [At 81; emphasis added.]

[62] Fenlon J. suggested that while "general property law, including the presumption of advancement, applies during the parties' marriage", a "new property rights regime descends as between the spouses" on marriage breakdown. Again in her words:

> … The rights of third parties *vis-à-vis* the property held by the spouses remain unaffected (s. 82), but between the spouses, all changes. Whether property is held solely in the wife's name, solely in the husband's name, or jointly, it is all subject to the scheme of division created by Part 5 of the *FLA* (s. 84(1)). Some of that property is to be excluded under s. 85(1) and all the rest is presumptively to be divided equally regardless of whose name it is in at the date of separation.
>
> Under this scheme it does not matter that one spouse during the marriage is presumed to have gifted property, whether excluded or otherwise, to his or her spouse. There is a whole new regime once the marriage ends. [At paras. 79-80; emphasis added.]

[63] She found support for this proposition in s. 85(1)(b.1) which, it will be recalled, was amended in 2014 to clarify that only gifts from a third party, as opposed to from one spouse to the other, are excluded property. As a result of this amendment, all the spouses' property, whether a house or a piece of jewellery given by one spouse to another during the marriage, was said to "[fall] back into the communal pot" at separation. Some of it will then be excluded if the requirements of s. 85 can be met and the rest may be divided unequally under s. 95 (which deals with family property)

or s. 96 (which deals with excluded property) in certain cases. (At para. 83.) She then observed:

> Logically, if the presumption of advancement continues to govern on marriage breakdown, then a gift from one spouse to another would not fall back into the communal pot. If "a gift is an irrevocable gift" for the purpose of determining what can be claimed as excluded property, why would a gift not be an irrevocable gift for the purpose of determining what is family property to be divided at the end of a marriage? The amendment reflected in s. 85(1)(b.1) demonstrates the legislature did not intend that approach to be taken.
>
> The interpretation of s. 85 adopted in *Remmem* is also, in my view, more consistent with the objectives of the *FLA* and the reality of most marriages. In a majority of cases, assets owned by one spouse before the couple comes together will be mingled with property held in both names. The cost of owning a home in many parts of British Columbia practically compels spouses to pool their assets. Registering the home so acquired in both names as tenants in common reflects the unity of the couple in marriage; placing a home in joint tenancy is a practical tool for estate planning; and placing the home in the name of one spouse is an accepted way to protect a core family asset from business creditors. [At paras. 84-5; emphasis added.]

[64] Last, the Court suggested that "failing to give effect to the tracing provision" in s. 85(1)(g) when excluded property is placed in the name of the other spouse in whole or in part might result in unfairness, given that factors relating to the acquisition and preservation of family assets (factors previously considered under s. 65(1) of the FRA) are not specifically listed in the factors to be considered in the division of family property under s. 95(2) of the FLA. (Both lists of factors, however, contain 'basket' clauses.)

[65] In the result, the Court in *P.G*. followed *Remmem* and ruled that the equity in the Langley home derived from excluded property of the husband continued to be excluded property for FLA purposes notwithstanding the registration of the home in joint tenancy. *P.G.* has been followed in various other cases to which we were referred, including *Lawrence v. Mulder* 2015 BCSC 2223; *Andermatt v. Tahmasebpour* 2015 BCSC 1127; *Shih v. Shih* 2015 BCSC 2108; *Kuhberg v. Hall* 2015 BCSC 2230; and *J.B. v. S.C*. 2015 BCSC 2136.

[66] Not surprisingly, counsel for Mr. F. argued before us on the basis of *P.G.* that having found that the $2 million gift was excluded property of Mr. F. at the time he

received it, the trial judge should have found he did not "lose his exclusion" by virtue of the gift to his wife. Counsel referred to the "sanctity" of excluded property as being reinforced by s. 97(4), which clarifies that the Supreme Court may divide excluded property only where permitted under s. 96. When asked whether the funds would have become family property under s. 84(1)(a)(i) – "property that is owned by at least one spouse" – counsel again relied on the suggestion in *P.G.* that upon separation, a new property regime "descends as between the spouses". The court is restricted to carrying out the 'tracing' exercise and simply applying the definition of excluded property in s. 85(1)(g) regardless of who owns it (and when, it appears).

[67] In oral argument, counsel also suggested that if the $2 million did not remain excluded property, then entitlement under the FLA would come to depend on "title" – a result not intended by the Legislature. As long as one spouse owns the property, counsel submitted, it remains excluded property: 'once excluded, always excluded.' Otherwise, the donee of the gift would be the "sole owner" and (counsel suggested) the donor would have no further interest in it. This was described as an "absurd" result given the intent of the scheme to simplify property disputes and reduce the need for judicial determination.

[68] Although this approach certainly has the lure of simplicity, I am unable to agree with it. I begin with the technical difficulty of applying the wording of s. 85(1)(g) to the $2 million. Section 85(1)(g) defines "excluded property" to include:

> … property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

As earlier noted, this would clearly extend to the sale or exchange of excluded property by its owner, such that sale proceeds or property received in exchange would constitute property "derived from" the original excluded property. But what property did Mr. F. "derive" from the gift (the 'disposition') to Ms. W.? The very nature of a gift is that it is made for no consideration. It seems to me inescapable that Mr. F. 'derived' no "property" from the disposition. For this reason alone, the definition does not 'fit' the $2 million at issue.

[69] Equally important, s. 84 suggests that the point in time at which family property (and therefore the exclusions therefrom) are determined is the date of the spouses' separation (subject only to the extension under s. 84(1)(b) in respect of property acquired after separation if it was "derived from" property described in s. 84(1)(a)). There is no provision in the FLA that would suggest that excluded property becomes somehow 'frozen' at an earlier point in time. At the date of separation in this case, the West 33rd property was "owned by" Ms. W. She, not Mr. F., "derived" the proceeds of disposition from the property when it was sold.

[70] As far as fairness is concerned, if one of the objectives of the FLA is to ensure that spouses on separation "keep what is theirs", Ms. W. could rightly say that the funds were "hers" at the relevant point in time. This, I would have thought, is more consistent with fairness between the spouses than permitting the donor of a gift to 'recall' it. As far as outside parties such as creditors are concerned, it would be hypocritical at best if Mr. F. were able to assert at separation that the gift to his then wife is effectively meaningless as between them, but that as against creditors the asset was put beyond their reach. He cannot, as Lord Denning commented in *Tinker v. Tinker*, "rebut that presumption [of advancement] by saying that he only did it to defeat his creditors." No court of law would wish to give its blessing to such a prevarication.

[71] Counsel for Mr. F. did not point to any provision in the FLA that would support the argument that common law concepts such as property, title, and gift are to be somehow suspended or eliminated in the categorization of family vs. excluded property. Indeed, s. 104(2) states that rights arising under Part 5 "are in addition to and not in substitution for rights under equity or any other law." As observed by Professor Sullivan in *Sullivan on the Construction of Statutes* (5th ed., 2008) at 356, the common law is "always part of the legal context in which legislation must be read" and if common law concepts are to be jettisoned, the legislature must state so clearly and unequivocally. In *Rawluk v. Rawluk* [1990] 1 S.C.R. 70, the majority observed in connection with the availability of a constructive trust remedy under the *Family Law Act* of Ontario:

> It is trite but true to state that as a general rule a legislature is presumed not to depart from prevailing law "without expressing its intentions to do so with irresistible clearness" (*Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614). [At 90.]

The FLA certainly does not do so, much less with irresistible clarity; indeed it is replete with references to ownership, trusts, and gifts, and classifies spouses' property with reference to those concepts. Even at the later point when property is being divided under s. 81, ownership and beneficial ownership remain relevant. Section 97 empowers the court to may make such orders as are necessary to give effect to the division, such as orders transferring title or declaring that property be held in trust.

[72] This court's recent decision in *Cabezas v. Maxim* 2016 BCCA 82 provides additional support for the conclusion that common law precepts continue to apply at the earlier categorization stage. Its facts are somewhat similar to those of the case at bar. At issue was a trial judge's finding that certain payments made by the husband's parents on the mortgage on a matrimonial home had been a gift intended to benefit both spouses or alternatively, to "avoid the foreclosure of the property, resulting in a presumption of advancement" to both spouses. On appeal, the husband argued that the advances had in fact been "inheritances to a spouse", which are excluded from the definition of family property under s. 85(1)(b). He relied on *Remmem* for the proposition that Part 5 of the FLA is a complete code such that it is not appropriate to examine the intentions of the parties at the time of transfer of excluded property into joint tenancy. (At para. 30.) For her part, the wife submitted that the trial judge had not erred in examining the parents' intentions and relied on *Pecore* for the proposition that the laws of evidence should not be applied rigidly to exclude evidence of conduct subsequent to a transfer.

[73] On the appeal in *Cabezas*, this court described the husband's argument as resting on a "highly literal interpretation" of s. 85(1)(b) and "on the notion that the common law can play no role in determining whether particular property falls within the categories of excluded property listed in s. 85". Garson J.A. stated for the Court:

> In my view, Mr. Maxim's position on s. 85(1)(b) ignores common law principles, and is contrary to broadly accepted views of statutory interpretation. Statutory law and common law are necessarily intertwined. In *Poulin v. Serge Morency et Associés Inc.*, [1999] 3 S.C.R. 351 at para. 33, Gonthier J. emphasized the importance of overall context in the interpretation of statutes:
>
> > The overall context of an enactment includes, *inter alia*, the other provisions of the statute, the related statutes and other rules of the legal system.
>
> [At para. 36; emphasis added.]

She added that whether the FLA was regarded as "reform" or "program" legislation, the common law provides "interpretive context" and fundamental common law principles regarding the characterization of the assets could not be ignored in interpreting the statute. In the result, the trial court's order was upheld.

[74] With all due respect to the contrary view, I conclude that the new FLA scheme does not constitute a "complete code" that "descends as between the spouses" and eliminates common law and equitable principles relating to property. Rather, the scheme builds on those principles, preserving concepts such as gifts and trusts, and evidentiary presumptions such as the presumption of advancement between spouses. Thus I find that the gift of (slightly less than) $2 million made by Mr. F. to Ms. W. became her property and was "property owned by at least one spouse" under s. 84, as opposed to "property derived from the disposition of [excluded] property" within the meaning of s. 85. At the time the definitions are applied – the date of separation – the fact Mr. F. had originally received the $2 million as a gift was no longer relevant. He lost the exclusion when he voluntarily and unreservedly directed that the West 33rd property be transferred to Ms. W. and 'derived' no property from that disposition.

[75] I do not interpret the FLA as reversing the gift or requiring that it be ignored because of the spouses' separation. Nor do I agree that the FLA effectively 'prohibits' gifts between spouses, as Mr. F. suggested. (See para. 56.) Gifts between spouses can continue as they have through the ages. It would take much clearer wording to render them suddenly revocable or null or illegal. (See the comments of

Chief Justice Farris in a slightly different context in *Duncan v. Duncan (No. 2)* [1950] B.C.J. No. 50 at para. 13 (S.C.), *aff'd* [1950] B.C.J. No. 41. (C.A.).)

[76] Contrary to the suggestion made in *P.G.*, moreover, the $2 million gift received by Ms. W. does "fall back into the communal pot" on separation and is divisible as family property in the normal way. The spouses are presumptively entitled to equal shares as tenants in common. The fact s. 95 does not list the same set of factors previously listed in s. 65 of the FRA is, with respect, a choice made by the Legislature. (See *Ward v. Ward* 2012 ONCA 462 at para. 25.) The FLA is not to be interpreted by means of a comparison of the fairness of its provisions with those of the FRA.

[77] In the absence of a clear statement abolishing the presumption of advancement, I also conclude that it continues to apply under the FLA (although I would not necessarily refer to it as a "right" within the meaning of s. 104). Had the Legislature intended to abolish the presumption, it would have been an easy thing to so state, as other provinces have done. It would also be an easy matter to provide, or perhaps clarify, that the presumption applies to common law as well as formal marriages and even that it should apply to gifts from a wife to her husband, not just the reverse. (See Donavan Waters, Mark Gillen and Lionel D. Smith, *Waters' Law of Trusts in Canada* (4th ed., 2012) at 413; *J.B. v. S.C.*, *supra*, at paras. 85-7; *Lawrence v. Mulder*, *supra*, at paras. 66-75; *Kerr v. Baranow* 2011 SCC 10 at para. 20.)

[78] I acknowledge that judges may in some cases have to determine whether transfers of excluded property that may have taken place years before, were gifts or not. This seems likely to occur most often in cases where inherited property is transferred by the heir to his or her spouse or into joint names. (Of course, the presumption of advancement was invented as a way of resolving such questions where the evidence is unclear or equivocal.) That said, there are means by which the inheriting or recipient spouse can protect against 'losing' the exclusion. Subject to other relevant provisions of the FLA, for example, the transferor can require the

transferee to acknowledge that no gift of the excluded property (or its value) is intended.

[79] Finally, I take some comfort from the fact that my conclusions are generally in accord with the conclusions arrived at by other appellate courts under other "excluded property" legislation, and in particular from the fact that most jurisdictions regard inter-spousal gifts as constituting family property rather than exempt or excluded property.

Would equal division be significantly unfair?

[80] In light of the foregoing, we must go on to determine whether the equal division of the funds would be "significantly unfair" having regard to the factors listed in ss. 95(2) and (3). As noted earlier, the trial judge found simply that there was "no basis" to rebut the presumption that equal division would be unfair. His analysis dealt with the alternative assumption that the $2 million remained excluded property, such that the onus was on Ms. W. to show it would be significantly unfair not to divide it. It is not necessary for us to comment on that analysis or to address Mr. F.'s final ground of appeal relating thereto.

[81] Mr. Daykin on behalf of Mr. F. submitted that at most, paragraphs (a), (c) and (i), the 'basket clause', in s. 95(2) could be relevant in this case.

> Duration of Relationship: The parties' relationship lasted almost ten years. Mr. Daykin emphasized that Mr. F. had been begun working with M.I. at P. Co. in 1997, some years before he met Ms. W.
>
> Contribution to Career or Career Potential: Although the trial judge found at para. 86 that Ms. W. made "significant contributions" to the household which "greatly assisted" Mr. F. in developing his relationship with M.I., Mr. Daykin suggested that paragraph (c) should be construed fairly narrowly. On this point, he referred to *A.M.D. v. K.R.J.* 2015 BCSC 1539, where Sharma J. agreed at para. 66 with the Court's comments in *Nearing v. Sauer* 2015 BCSC 58 that:

> Section 95(2) does not appear to allow for the wide ranging examination of each spouse's contribution to the accumulation of family assets and their respective capacities that occurred pursuant to s. 65(1)(f). Instead the court may consider a spouse's contribution to the career or career potential of the other spouse under s. 95(2)(c) or a spouse's detrimental impact on to the value of family property or potential family property under s. 95(2)(g) which appears focused on the spouse's direct actions *vis-à-vis* the value of family property. I interpret the words "spouse's contribution" in s. 95(2)(c) as including the full spectrum of all levels of contribution from one spouse negatively impacting on the other spouse's career to greatly enhancing the career or career potential of the other spouse. [At para. 141; emphasis added.]

Counsel emphasized that Mr. F. had completed his education and begun working at P. Co. before he met Ms. W. On the other hand, the trial judge's finding that she greatly assisted him in developing his relationship with M.I. is a finding of fact that has not been shown to be clearly wrong.

Other Factors: The additional factors that might "lead to significant unfairness" in this case relate mainly to the circumstances under which M.I. gave the $2 million gift to Mr. F. The purpose of that gift was very specific – to protect Mr. F. from personal liability that might arise sometime in the future as a result of his acting as a director of companies in the P. Co. group. As I understand it, M.I. did not intend to make a gift for the more general purposes of enriching or increasing the wealth of Mr. F. or his family. If Ms. W. retains a substantial part of the funds, that portion will not be available to Mr. F. for his protection in the future. This, however, is an inevitable consequence of his decision to use the $2 million to purchase the West 33rd property rather than to retain it for his protection from possible future liability.

While I might have viewed these considerations as supporting an unequal division, we are bound under the FLA to apply the standard inherent in the phrase "significantly unfair". (See especially *Jaszczeswka*, *supra*, at paras. 166-9.) I cannot say that equal division would meet this high threshold in this case.

[82] It follows that I would uphold the trial judge's order that the funds in trust (less the small amount in respect of which Mr. Rose told us no claim was being asserted) should be divided equally as family property.

Disposition

[83] With thanks to all counsel for their able arguments, I would dismiss the appeal. If counsel wish to make submissions on costs, they may do so in writing within a reasonable time.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Mr. Justice Groberman"

Schedule 1

Equal entitlement and responsibility

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [*Pension Division*],

(a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and

(b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

Rights and remedies of third parties

82 Nothing in this Part affects the rights and remedies of a spouse's creditors, guarantors or assignees in relation to family debt.

…

Family 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:

(a) a share or an interest in a corporation;

(b) an interest in a partnership, an association, an organization, a business or a venture;

(c) property owing to a spouse

(i) as a refund, including an income tax refund, or

(ii) in return for the provision of a good or service;

(d) money of a spouse in an account with a financial institution;

(e) a spouse's entitlement under an annuity, a pension plan, a retirement savings plan or an income plan;

(f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;

(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.

…

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.

…

Unequal division by order

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

(a) equally divide family property or family debt, or both, or

(b) divide family property as required under Part 6 *[Pension Division]*.

(2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

(a) the duration of the relationship between the spouses;

(b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [*setting aside agreements respecting property division*];

(c) a spouse's contribution to the career or career potential of the other spouse;

(d) whether family debt was incurred in the normal course of the relationship between the spouses;

(e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;

(f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;

(g) the fact that a spouse, other than a spouse acting in good faith,

(i) substantially reduced the value of family property, or

(ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;

(h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;

(i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

(3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [*objectives of spousal support*] have not been met.

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.

Giving effect to property division

97 (1) For the purposes of giving effect to a division of property or family debt under this Part or Part 6 [*Pension Division*], the Supreme Court may

(a) determine any matter respecting the ownership, right of possession, or division of the property or family debt, and

(b) despite sections 94 (2) [*orders respecting property division*] and 215 (2) [*changing, suspending or terminating orders generally*], and subject to subsection (3) of this section, make any order that is necessary, reasonable or ancillary to give effect to the division.

(2) Without limiting subsection (1), the Supreme Court may make an order to do one or more of the following:

(a) declare who has ownership of, or right of possession to, property;

(b) require that title to a specified property granted to a spouse be transferred to, held in trust for, or vested in the spouse, absolutely, for life or for a term of years;

(c) require a spouse to pay compensation to the other spouse if property has been disposed of, transferred, converted, or exchanged into another form, or for the purpose of dividing the property;

…

(j) transfer property to a spouse.

(3) An order in relation to family debt applies only as between the spouses and does not affect an agreement between a spouse and any other person.

(4) Nothing in this section permits the Supreme Court to divide excluded property unless permitted under section 96 [*division of excluded property*].

…

Donor of gift is party to agreement

102 If a property agreement provides that specific gifts made to one spouse or both are not disposable by the spouse or spouses without the consent of the donor, the donor is deemed to be a party to the property agreement for the purposes of changing or enforcing the property agreement with respect to those gifts.

…

Rights under this Part

104 (1) If there is a conflict between this Part and the *Partition of Property Act*, this Part prevails.

(2) The rights under this Part are in addition to and not in substitution for rights under equity or any other law.

[Emphasis added.]