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BILL 17 - MODERNIZING THE FAMILY LAW ACT

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Amendments to the *Family Law Act* (S.B.C. 2011, c.25) (the "**FLA**") came into effect on May 11, 2023 when *Bill 17, the Family Law Amendment Act, 2023 ("Bill 17")* received royal assent.

The new amendments offer welcome guidance to individuals and lawyers faced with issues pertaining to evidentiary challenges arising in the context of excluded property claims, clarification of excluded property in family law claims, issues relating to pet ownership amongst separating spouses, and pension division.

Changes to Evidentiary Requirements

There is a new section 81.1 in the *FLA* which removes the presumption of advancement and the presumption of resulting trust as evidence in determining ownership of property under the *FLA*.

Section 81.1 specifically states:

81.1 (1) The rule of law applying a presumption of advancement must not be applied in questions respecting the ownership of property as between spouses.(2) The rule of law applying a presumption of resulting trust must not be applied in questions respecting the ownership of property as between spouses.

The presumption of advancement refers to a common law doctrine which presumes that when property is transferred between spouses, the transaction constitutes a gift to the recipient spouse. The application of the presumption of advancement in excluded property claims created significant discord. It unfortunately resulted in inconsistent judgments in British Columbia as courts were required to determine whether one spouse intended to make a gift, or whether the spouse could make a claim for excluded property.

A common example is when one spouse utilizes their inheritance monies (excluded under section 85 of the *FLA*) to purchase a home in joint names with their spouse. The presumption of advancement presumes that by putting the home in joint names, the spouse intended to make a gift to the other spouse, thereby causing one spouse to lose their exclusion. To address competing claims by parties, courts were forced to look at the intention of the parties at the time of the transfer and make a determination. Unfortunately, as noted above,





this resulted in two competing approaches, one being that the presumption of advancement overruled the excluded property section of the *FLA*, and the second approach upholding spousal claims for excluded property. The addition of section.81.1 will hopefully provide much needed clarity to an otherwise polarized and inconsistent body of law.

The presumption of resulting trust presumes that when an adult parent transfers property to an adult child without consideration (or for free), the child is holding the property in trust for the parent. This presumption is no longer applicable in questions respecting ownership of property between spouses.

It is important to note that section 81.1 does not apply to pre-existing proceedings.

Changes to Excluded Property

Section 85(1) classifies certain types of property as excluded property under the *FLA*. Common types of excluded property are:

- a) property acquired by a spouse pre-relationship;
- b) inheritances to a spouse;
- c) gifts to a spouse from a third party; and
- d) settlement monies or an award of damages to a spouse for compensation for injury or loss.

Section 85(2) stipulates that the spouse claiming excluded property is responsible for demonstrating that it is excluded.

Section 85 is amended by adding the following subsection:

- (3) If property is excluded from family property under subsection (1), the exclusion applies despite any transfer of legal or beneficial ownership of the property from a spouse to the other spouse.

This proposed amendment is significant because it squarely addresses the discord between the presumption of advancement and division of excluded property and enables parties to claim their excluded property even if the property has been transferred into the name of the other spouse.

Going back to the example above, if Spouse A uses their inheritance monies to purchase a home for their family, and registers it in joint names with Spouse B, the law no longer presumes that Spouse A intended to make a gift to Spouse B. If Spouse B wants to make a claim for division of the excluded property, they will need to do so under section 96 of the *FLA*.





The new section 96 of the FLA states:

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 the duration of the relationship between the spouses and one or more of the following factors:

- (i) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of the excluded property;
 - (ii) the terms of any agreement between the spouses respecting the excluded property, other than an agreement described in section 93 (1) [*setting aside agreements respecting property division*], including but not limited to terms respecting the transfer of the excluded property;

- (iii) if the Supreme Court makes a determination under section 95 (1) [*unequal division by order*] respecting significant unfairness, the extent to which the significant unfairness cannot be addressed by an unequal division of family property or family debt, or both.

It is important to note that it still remains open to the court to divide excluded property; albeit, on consideration of the factors above.

Changes to Ownership of Pets

The *FLA* has been modernized to reflect the unique relationship between individuals and their companion animals and the implications of separation on both.

Under the common law, pets have been treated as personal property subject to the overall division of family property and debt in family law claims. When determining ownership, courts considered factors such as who paid for the pet upon purchase or adoption, who signed the purchase or adoption contract, who has been paying for veterinary and food bills, and whose name is the pet registered under at the veterinary clinic.

Section 1 of the *FLA* now defines a companion animal as "an animal that is kept primarily for the purpose of companionship". Section 3.1 of the *FLA* clarifies what a companion animal is not, namely a companion animal is not a guide dog or service dog, an animal kept as part of a business, or an animal kept for





agricultural purposes.

Section 97(4.1) is a significant addition to the *FLA* which states:

(4.1) In determining whether to make an order under subsection (1) respecting a companion animal, the Supreme Court must consider the following factors:

- (a) the circumstances in which the companion animal was acquired;
- (b) the extent to which each spouse cared for the companion animal;
- (c) any history of family violence;
- (d) the risk of family violence;
- (e) a spouse's cruelty, or threat of cruelty, toward an animal;
- (f) the relationship that a child has with the companion animal;
- (g) the willingness and ability of each spouse to care for the basic needs of the companion animal;
- (h) any other circumstances the court considers relevant.

(4.2) An order respecting a companion animal must not

- (a) declare that the spouses jointly own the companion animal, or
- (b) require the spouses to share possession of the companion animal.

(4.3) Sections 95 [*unequal division by order*] and 96 do not apply to the making of an order respecting a companion animal.

Interestingly, the factors set out at section 97(4.1) closely resemble the factors set out at section 37 of the *FLA* being the best interests of child factors. Courts will now be required to undertake an analysis of the factors set out in section 97(4.1) when determining pet custody and rights. As such, it appears that companion animals will now be treated like the family members that they are rather than as personal property which they have been historically relegated as under the common law.

It should be noted that courts are not permitted to declare joint ownership of a companion animal or require separated spouses to share possession, or custody, of the companion animal.

Amendments in the *FLA* pertaining to companion animals are set to come into force by regulation of the Lieutenant Governor in Council.

Changes to Part 6: Pension Division





There have been significant changes made to Part 6 of the *FLA* pertaining to Pension Division. A few selected highlights are below:

- Section 113 allows for a deceased spouse's personal representative to file a notice to cause the spouse's estate to become a limited member of certain types of pension plans.
- A new section (Division 2.1) has been added to address the division of benefits in a LIRA or LIF. This is not yet in effect and will come into force by regulation of the Lieutenant Governor in Council.
- Section 118.1 clarifies the circumstances in which either Part 5 (Property Division) or Part 6 (Pension Division) of the *FLA* applies to the division of an annuity. This is not yet in effect and will come into force by regulation of the Lieutenant Governor in Council.
- Section 122 clarifies that the allocation of a member's disability benefits does not affect the division of other benefits under a plan.
- Section 124 allows for the calculation of the commuted value of a limited member's proportionate share of benefits under a plan to be made as of a valuation date set by regulation.
- Section 126 revises the way a spouse may waive their entitlement to survivor benefits under a pension. This is not yet in effect and will come into force by regulation of the Lieutenant Governor in Council.
- Section 140 clarifies that a plan administrator must deduct a specified fee from the payment of benefits unless the fee is paid by one or both spouses. This is not yet in effect and will come into force by regulation of the Lieutenant Governor in Council.

The changes to the *FLA* will undoubtedly affect separating and divorcing couples in some way. Contact any member of our Family Law team of lawyers for help navigating through these issues.

