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Civil and Family Law Policy Office**

**Family Relations Act Review**

**Chapter 2**

**Division of Family Property**

**Discussion Paper**

**Prepared by the Civil and Family Law Policy Office**

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**This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* should seek legal advice from a lawyer.**

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**RECONSIDERING SOME ASPECTS OF FAMILY PROPERTY LAW**

Ever since the *Family Relations Act* (“FRA”) provisions for dividing family property were introduced in 1979, they have been debated and studied by lawyers and researchers. From 1985 to 1998, the British Columbia Law Reform Commission and its successor, the British Columbia Law Institute, published several papers<sup>1</sup> recommending changes. Most recently, the British Columbia Family Justice Reform Working Group<sup>2</sup> suggested changes to the Act to support a shift away from using courts to settle disputes. Similar discussions have taken place outside of British Columbia and other governments have tried different approaches.<sup>3</sup>

Everyone wants rules that are simple, fair and certain. The challenge is to find a way to achieve each of these goals without sacrificing the others. For example, the simplest and most certain rules are those that have no exceptions. When the rules are clear, people are encouraged to make their own agreements because they know what the result would be if they were to go to court. But it is impossible to design a set of rules that will be fair in every situation, so most people agree that some flexibility is important.

The goal of this review is to find the right balance between flexibility and certainty. This paper is guided by the work that has been done in British Columbia and elsewhere and the many suggestions that have been made for making the FRA rules for dividing family property simpler, fairer and more certain.

The paper is divided into five sections. The first four discuss why family property is divided, who the family property provisions apply to, what family property is divided, and how, and when family property is divided. The final section asks you to identify any issues we have not covered in this paper and to say which you think are the most important. Once you have read the paper, use the feedback form to send us your feedback. The feedback form contains all of the questions included in this paper.

***Family Property Division under the Family Relations Act***

Many separating and divorcing spouses<sup>4</sup> are able to agree on how to divide their property. For those who cannot agree, Part 5 of the FRA provides the rules that will apply if they go to court. (Part 6 covers division of pensions and is discussed in a separate paper.)

The general rule is that each spouse has a right to half of the family assets, unless that would be unfair. A family asset is property owned by one or both spouses that is used for a family purpose. To decide if a 50-50 split would be unfair, a judge will consider several factors, including how long the relationship lasted and whether any of the property was a gift or inheritance received by one spouse.

If spouses do agree about how to divide their property but then run into problems later, they can go to court and a judge will use the FRA to decide if their agreement was unfair.

***Two Models for Family Property Division in Canada***

Two different models are used for dividing family property in Canada:

- the proprietary model – used in British Columbia and six other provinces and territories<sup>5</sup> – and
- the compensation model – used in five provinces and territories.<sup>6</sup>

The proprietary model is more flexible, but offers less certainty about how a judge would divide family property in each case. Sometimes, certain types of property are excluded from division even if used for a family purpose, but a judge might be able to divide this property—or even property that was not used for a family purpose—if it would be unfair not to. A judge is also allowed to order an unequal division of family property if, for certain reasons, a 50-50 split would be unfair.

The compensation model offers more predictable outcomes because judges are given less leeway. Under this model, when a relationship ends it is only the value of property that the spouses built up while they were together that is split 50-50. The value of property that each brought into the relationship, and often certain types of property received by either of them during the relationship, like gifts and inheritances, are excluded. In other words, spouses are “compensated” equally for the wealth they acquired as a couple. A judge is allowed to order an unequal division only in limited circumstances.

The FRA has been criticized for being so flexible that outcomes are too difficult to predict. Over a decade ago, the British Columbia Law Reform Commission proposed adopting a compensation model in British Columbia,<sup>7</sup> but there was little support from lawyers for this change.<sup>8</sup> Lawyers preferred the flexibility of the British Columbia model, even if it meant less certainty, because it allows for consideration of each couple’s individual circumstances in deciding what is fair. Also, they were concerned that under a compensation model even “easy” cases could become more complicated and expensive because spouses may have to go to court to resolve disagreements about what their property was worth, both at the start and end of the relationship. They preferred the idea of building on the current model rather than replacing it.

***QUESTIONS***

1. Is there any benefit to changing the family property division model currently used in British Columbia?
  - 1.1. If yes, what would that benefit be?

Each model has its pros and cons and it is hard to say whether one or the other results in fairer decisions. The rest of this paper looks at ways to achieve fairness in the division of family property, through the right balance of flexibility and certainty, without abandoning the proprietary model now used in BC.

**DISCUSSION****PART A – WHY IS FAMILY PROPERTY DIVIDED?****Discussion Point (1) – Reason for Dividing Family Property 50-50**

The law assumes that each spouse equally contributes to the family's wellbeing, whether by taking care of the children or the home, or by earning money and paying the family's bills. This assumption is not spelled out in the FRA, but the British Columbia Law Reform Commission said in its 1990 report on family property division<sup>9</sup> that a statement in the Act about this basis for the division of family assets might help judges make more consistent decisions about what to divide and how.<sup>10</sup> Most of those who commented on that suggestion agreed.

Many provinces and territories have such statements in their family laws.<sup>11</sup> For example, s.20 of Saskatchewan's *Family Property Act* says:

The purpose of this Act, and in particular of this Part, is to recognize that child care, household management and financial provision are the joint and mutual responsibilities of spouses, and that inherent in the spousal relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities that entitles each spouse to an equal distribution of the family property, subject to the exceptions, exemptions and equitable considerations mentioned in this Act.<sup>12</sup>

**QUESTIONS**

2. Should the FRA include a statement about why each spouse is entitled to an equal share in the family's assets?

**PART B – WHO SHOULD FRA RULES APPLY TO?****Discussion Point (2) – Married and Unmarried Spouses**

For purposes of spousal support and child custody and access, the FRA applies in the same way to both married and unmarried spouses. An unmarried spouse, for purposes of spousal support, is someone who has lived with another person in a marriage-like relationship for at least two years, as long as a claim under the Act is made within one year after separation.<sup>13</sup> But for the purposes of division of family assets, generally speaking, the FRA does not apply to unmarried couples.<sup>14</sup>

However, s.120.1 says that if an unmarried couple makes an agreement that would, if they were married, be a marriage agreement or a separation agreement under the FRA, the FRA does apply to that agreement and to any family assets covered by the agreement.<sup>15</sup> This means that if an unmarried couple makes such an agreement, each of them then has the same right that a married person has, to apply to court to change the agreed division on the grounds that it is unfair.<sup>16</sup>

The intention of s.120.1 is to allow unmarried spouses to “opt in” to the family property division provisions by making an agreement. Some lawyers feel that this section can be interpreted to mean that the FRA property division rules apply to any agreement between

unmarried spouses, even if the agreement specifically says the FRA does not apply.<sup>17</sup> This interpretation may discourage unmarried spouses from settling their disputes out of court because if they make an agreement they take the risk that the other person could someday ask a court to apply the FRA rules to say that their agreement was unfair. (If an unmarried spouse without an agreement wants to take a property division dispute to court, the claim must be based on common law principles of unjust enrichment, which can be difficult to prove.)

How unmarried spouses are treated under family property law differs across Canada. Other provinces and territories either:

- apply the same rules to married and unmarried couples;
- exclude unmarried couples from property division provisions (as used to be the case in BC); or
- allow unmarried couples to opt in (as intended by s.120.1 of the FRA).

Each approach takes a different view of the relationship between married and unmarried couples. Each is discussed here, in turn.

### ***Applying the Same Rules to Married and Unmarried Couples***

This approach has several logical bases:

- It recognizes the similarities between married and unmarried relationships.
- It promotes committed family relationships regardless of marital status.
- It recognizes that not everyone has a choice about whether or not to marry: for example, a couple might stay together even though one spouse wants to marry and the other does not.

Even spouses who choose not to marry may do so for reasons that are unrelated to whether or not the family property provisions will apply to their relationship. Or, they may (wrongly) believe that even if they do not marry, they have the same rights to family property as married spouses. This confusion can easily arise in British Columbia because the FRA does treat unmarried couples the same as married couples with respect to spousal support, child custody and access.

Saskatchewan, Manitoba, the Northwest Territories and Nunavut treat married and unmarried spouses the same. All spouses, married or not, have a right to an equal share of family property. As well, like married couples, unmarried couples can agree to opt out of the family property provisions, but a judge can interfere with the agreement in certain circumstances.<sup>18</sup> The family property provisions apply to an unmarried couple once their relationship has lasted for a specified period of time or they have a child together.<sup>19</sup>

***Excluding Unmarried Spouses from Family Property Provisions***

Not including unmarried spouses under the family property provisions assumes that married and unmarried couples are more different than alike. This approach supports the view that everyone has a choice of whether or not to marry and respects the choice not to marry and to avoid the legal consequences of marriage. However, it means that unmarried spouses who need to resort to the court to resolve disputes over property division must rely on common law principles of unjust enrichment, which are often difficult to prove.

This is the approach taken by Alberta, Ontario, New Brunswick and Prince Edward Island. If unmarried couples cannot agree on how to split their property, they cannot use the family property provisions to help them.

***Allowing Unmarried Spouses to Opt In to Family Property Provisions***

Letting unmarried couples choose to have the family property division provisions apply to them is a middle ground approach. It recognizes that both married and unmarried couples share similarities that are not based on their legal status, while respecting a person's choice to not marry and to avoid the legal consequences of marriage.

In some provinces and territories, unmarried couples can opt in by agreeing to have the family property provisions apply to them, as long as the agreement meets certain formal requirements, such as being in writing, signed, and witnessed.<sup>20</sup> Or, spouses can make an agreement not to opt in to the family property provisions, but to divide their property in some other way.

Unmarried spouses in British Columbia can opt in by making a marriage agreement, if it meets certain requirements,<sup>21</sup> or a separation agreement. (As mentioned earlier, it is unclear whether an agreement between spouses in British Columbia about how to divide their property may be viewed as opting in, even if the agreement specifies that the FRA does not apply.)<sup>22</sup> Manitoba and Nova Scotia use another opt in approach involving registration as domestic partners.<sup>23</sup>

***QUESTIONS***

3. Do you think the FRA provisions for division of family assets should apply to unmarried spouses (as defined by the Act):
  - a) automatically, unless they agree that the FRA provisions should *not* apply;
  - b) only if they make an agreement about how to divide their property, and even if the agreement says that the FRA provisions should not apply;
  - c) only if they make an agreement about how to divide their property and clearly state that the FRA *should* apply to part or all of their property;
  - d) never.

**Discussion Point (3) – Family Property on Reserve Land**

For most families, their home is their most significant asset, and one that has particular importance. The FRA recognizes this and gives the court power to intervene when the family home is in dispute. Under the FRA, a judge may let one spouse temporarily live in the family home and exclude the other, in certain circumstances.<sup>24</sup> A judge may also stop one spouse from selling the family home, or delay the sale for a time.<sup>25</sup>

But these protections are not available when the family home is on reserve land.<sup>26</sup> This is because the FRA is provincial legislation, whereas under the *Constitution Act, 1867*<sup>27</sup>, the federal government is responsible for reserve lands.

Various provisions can apply to real property on reserve lands, including the federal *Indian Act*<sup>28</sup>, self-government or land claims agreements, and agreements under the federal *First Nations Land Management Act*<sup>29</sup>. The result is that the legal situation of First Nations people in British Columbia, and across Canada, varies depending on which provisions apply to real property in their communities and whether those provisions say anything about how to deal with the family home when spouses break up.<sup>30</sup>

Most First Nations communities in British Columbia are governed by the *Indian Act*, which does not deal with this issue. In these communities, land is commonly held under a Certificate of Possession. A spouse who holds a Certificate of Possession for land on which the family home is built has the right to use, live in and transfer the property without court interference or the consent of the other spouse. A spouse without a Certificate of Possession has no right to the family home. When a relationship ends, the spouse who is not named on the Certificate of Possession (and any children under that spouse's care) usually must leave the family home. Due to housing shortages on reserves, often they must leave the reserve as well.<sup>31</sup>

The hardship faced by spouses and children on reserves because of the failure of the *Indian Act* to address the issue of family real property on reserves has been the subject of a number of recent papers and reports, both in Canada and internationally.<sup>32</sup> The federal government is working with First Nations representatives and provincial governments to resolve this problem. You can find more information about this work at the [Indian and Northern Affairs Canada web site](#).

**PART C – WHAT FAMILY PROPERTY SHOULD BE DIVIDED, AND HOW?****Discussion Point (4) – Family Assets and Judicial Discretion**

For the purposes of the FRA, a family asset is anything owned by one or both spouses that is ordinarily used for a family purpose.<sup>33</sup> It does not matter how the family got the asset or when: if it was used for a family purpose it is a family asset and should be shared by the spouses. The most common family assets are the family home, furniture and car. The FRA lists other types of property that are family assets as well, including bank accounts and investments such as term deposits, bonds, and RRSPs. A business owned by one spouse may be a family asset if the non-owning spouse contributed to buying or operating it, either directly—such as by working in the business or investing money in it,

or indirectly—such as by taking care of the children or the house to allow the owning spouse to focus on the business.<sup>34</sup>

The FRA allows a judge to depart from the general rule and order an unequal division of family assets if he or she decides that a 50-50 split would be unfair, based on certain factors.<sup>35</sup> (This power given to judges to make decisions based on the law and their good judgment is referred to as “judicial discretion.”) These factors include:

- how long the marriage lasted,
- how long the spouses were separated,
- when the assets came into the family,
- whether any of the assets were received by a spouse as an inheritance or gift, and
- the needs of each spouse for economic independence.

However, as the British Columbia Law Reform Commission has pointed out, the Act does not say anything about how the judge should apply or rank these factors.<sup>36</sup> And the Act gives the court still further discretion: a judge can order that property that is not a family asset be transferred from one spouse to the other in order to make a fairer property division.<sup>37</sup>

The concern expressed by the Law Reform Commission is that, in British Columbia, what property will be divided between spouses, and how, is an open question.<sup>38</sup> Judges decide what the family assets are based primarily on how they were used, and then have the discretion to divide those assets unequally—and to order the transfer of other assets as well—if a 50-50 split is considered unfair. This flexibility allows the judge to take particular circumstances into account, but makes it harder to predict outcomes.

Most other jurisdictions in Canada use a slightly different approach<sup>39</sup> and have provisions for determining what property to divide. Certain types of property, called “excluded property”, are left out from what is equally shared by the spouses. Examples are gifts or inheritances received by one spouse, and property that a spouse owned before the relationship began. In some provinces and territories excluded property is not divided.<sup>40</sup> In others, excluded property may be divided if fairness requires it.<sup>41</sup>

In its 1990 report, the British Columbia Law Reform Commission suggested that outcomes would be more predictable under the FRA if certain types of property were excluded from division at the start.<sup>42</sup> Then spouses would have a clearer understanding of what property would be split between them if they went to court. This could encourage them to agree on how to divide their property without having to resort to court.

The greatest degree of predictability is achieved if certain property is absolutely excluded from division between the spouses, but by allowing for some exceptions, certainty can be balanced against flexibility. The Law Reform Commission recommended that the FRA allow a judge to divide excluded property but only if it would be unfair not to, and suggested factors to guide judges in exercising this discretion.<sup>43</sup>

### ***Gifts and Inheritances***

Under the FRA, a gift or inheritance received by one spouse is a family asset if it was ordinarily used for a family purpose.<sup>44</sup> If it meets that test a judge will take into account the fact that it was a gift or inheritance when deciding if a 50-50 split of family assets would be unfair.<sup>45</sup> Even if a gift or inheritance is not a family asset, it could still be ordered to be shared with the other spouse if the judge decides that fairness requires it.<sup>46</sup> This approach provides flexibility but by reducing predictability it can result in fewer agreements and more court applications.

In other provinces and territories, property that one spouse receives as a gift or inheritance is excluded from division.<sup>47</sup> Some do not allow a judge to split an excluded gift or inheritance no matter what the circumstances.<sup>48</sup> This is simpler and more certain than the FRA, but it might not always be fair. For example, if a gift or inheritance increases in worth during the relationship and the other spouse contributed to that increased value, it might be unfair if it was excluded from division.<sup>49</sup> Other jurisdictions allow a judge to split an excluded gift or inheritance to reach a fair result, having regard to certain listed factors.<sup>50</sup> Some of those factors include: whether the other spouse contributed to the property;<sup>51</sup> whether the spouses agreed that the family could use the property without affecting the owning spouse's right to the property;<sup>52</sup> whether the property was supposed to benefit only the spouse who received it;<sup>53</sup> whether the property was an heirloom or had more than a money value to the spouse who received it;<sup>54</sup> whether the gift or inheritance was used to acquire, operate or use other family property;<sup>55</sup> and whether the spouses believed or relied on the belief that the gift or inheritance was family property.<sup>56</sup>

### ***QUESTIONS***

4. Should the FRA continue to define a family asset as property that was ordinarily used for a family purpose?
5. Would it be helpful if the FRA also said that certain types of property are *not* family assets, even if they were ordinarily used for a family purpose? In other words, should certain types of assets be considered excluded property?
  - 5.1. If yes, should excluded property be defined as property that a spouse received:
    - a) before the relationship began;
    - b) after separation;
    - c) as a gift or inheritance from someone else;
    - d) as a damage award or legal settlement;
    - e) as proceeds from an insurance policy;
    - f) under the terms of a spousal agreement;
    - g) as a gift from the other spouse;
    - h) as a result of selling or trading excluded property;
    - i) other \_\_\_\_\_.

6. Should a judge be allowed to divide excluded property between the spouses in some cases if it would be unfair not to?

6.1. If yes, when deciding if it would be unfair not to divide excluded property should a judge consider:

- a) the factors currently listed in s.65 of the FRA to help judges decide if a 50-50 split of family assets would be unfair, that is:
  - i. how long the marriage lasted,
  - ii. how long the spouses have been separated,
  - iii. when the property was acquired or disposed of,
  - iv. the extent to which the property was acquired by one spouse as a gift or inheritance,
  - v. the needs of each spouse for economic independence, and
  - vi. any other circumstances relating to how the property was acquired, preserved, maintained, improved, or used; or to the capacity or liabilities of either spouse;
- b) whether the other spouse contributed to the excluded property;
- c) whether the excluded property is the family home;
- d) whether the spouses agreed that the family could use the property without affecting the owning spouse's right to the property;
- e) whether the person who gave the gift or inheritance wanted the property to benefit only the one spouse;
- f) whether the property is an heirloom or has more than a money value to the spouse who received it;
- g) whether the property increased in value during the relationship;
- h) whether the property was used to acquire, operate or use other family assets;
- i) whether the other spouse believed or relied on the belief that the property was a family asset;
- j) other \_\_\_\_\_.

**Discussion Point (5) – Family Debts**

Most families have debts, yet the FRA says nothing about dividing debt between the spouses.

This can be remedied if the family has more assets than debt: a judge can consider what a spouse still owes on a family asset when calculating its value, or when ordering an unequal division. Some judges have tried to use the FRA property provisions in this way to produce a sharing of debts<sup>57</sup> but, because the Act does not address this specifically, it is difficult to predict the result in any particular case. And this is no help to the many families who have debts but no assets. In its 1990 report, the British Columbia Law Reform Commission said it is important to look at how debts should be dealt with under the FRA.<sup>58</sup>

Of the provinces and territories that use a property division model similar to British Columbia's, New Brunswick's is the only one that addresses the division of debts between spouses.<sup>59</sup>

By contrast, the provinces and territories that use a compensation model of property division do deal specifically with the division of debt.<sup>60</sup> Under the compensation model, each spouse calculates the value of the property he or she built up during the relationship and then subtracts any debts he or she had when the relationship began or has when the property is valued. The result is called a spouse's "net family property". The difference between the net family property of each spouse is split 50-50. In some jurisdictions, a spouse's net family property cannot be less than zero except in certain circumstances.<sup>61</sup> This means that debts might not be shared equally by the spouses, particularly if one spouse incurs more debt for the family than the other.<sup>62</sup>

Changing the FRA to deal with the division of family debts might encourage spouses to reach their own agreements, rather than go to court. It would also be fairer and would address the reality of the many families who have more debts than assets at separation.

Family debts could be dealt with in the same way that family assets are, under the FRA. The Act could define family debt and say that it will be shared equally when a relationship ends. In developing a definition, it might be helpful to look at the factors that judges have used in considering debts in the division of family assets, including:<sup>63</sup>

- how much each spouse benefited from the one spouse going into debt, or from the slow repayment of the debt, before or after separation;
- who they thought would be responsible for repayment when the debt was incurred;
- whether the debt was incurred before or after separation;
- if the debt is income tax, when the income was earned.

The FRA could also allow a judge to determine that an equal division of the family debt would be unfair. The FRA could list the factors to be considered in making such a decision,<sup>64</sup> just as it does with respect to an unequal division of assets. Or, it could be more specific. For example, the FRA could say that an equal split of a family debt would

be unfair if the family debts are more than the family assets and one spouse had more benefit from the property or service the debt was incurred for.<sup>65</sup>

### **QUESTIONS**

7. Should the FRA say that each spouse is equally responsible for family debts unless a judge decides that it would be unfair?
8. What should be considered in a definition of family debt?
  - a) whether the debt was incurred for a family purpose;
  - b) whether the debt was incurred to acquire, manage, maintain, operate or improve other family assets;
  - c) when the debt was incurred (whether before or during the relationship, or after separation);
  - d) when the debt was paid off (whether before or during the relationship, or after separation); or
  - e) other \_\_\_\_\_.
9. What should a judge consider when deciding whether equal responsibility for family debts would be unfair?
  - a) factors similar to those listed in s.65 for the division of family assets:
    - i. how long the marriage lasted,
    - ii. how long the spouses have been separated,
    - iii. when the debt was incurred or paid off,
    - iv. whether the debt was inherited by one spouse,
    - v. the needs of each spouse for economic independence, and
    - vi. any other circumstances relating to how the debt was incurred, maintained, paid off, or used, or to the capacity or liabilities of either spouse;
  - b) whether family debts exceed family assets;
  - c) whether one spouse benefited more from the property or service the debt was incurred for;
  - d) whether one spouse ran up the debt without the consent of the other;
  - e) whether a spouse believed, and then relied on the belief, that one or both of them would be responsible for the debt;
  - f) whether the spouses agreed that one or both of them would be responsible for the family debt;
  - g) other \_\_\_\_\_.

**Discussion Point (6) – Spousal Agreements**

Spouses can decide how to split their property by making an agreement. The FRA talks about four types of agreements:

- marriage agreements;
- separation agreements;
- ante nuptial (before marriage) settlements; and
- post nuptial (after marriage) settlements.

The FRA does not talk about prenuptial agreements, but most prenuptial agreements would qualify as marriage agreements under the FRA. Having four different types of agreements makes the FRA complicated.

The FRA also allows a judge to change an agreed division, in certain circumstances. There are two different tests to determine whether a judge can interfere with a property division agreement, depending on which type of agreement it is. This can result in different decisions for couples in similar circumstances. And both tests give judges a lot of discretion to change what spouses have agreed to, which creates uncertainty: spouses do not know whether a judge will order a property division different from what they agreed to, if one of them later applies to court for a change.<sup>66</sup>

***Spousal Agreements under the FRA***

Of the four types of agreements included in the FRA, only a marriage agreement is defined.<sup>67</sup> It is an agreement made by two people, before or during their marriage, that deals with family property and is in writing, signed, and witnessed.

A separation agreement is not defined, but it triggers each spouse's right to a division of family property under the FRA.<sup>68</sup> To make a separation agreement spouses only have to agree, orally or in writing, and intend to create a legal relationship.<sup>69</sup> If it meets the requirements of a marriage agreement then it is a marriage agreement under the FRA, whatever the spouses may call it.<sup>70</sup>

If spouses have a marriage agreement or a separation agreement, and one of them later asks a court to find that it is unfair, a judge can change the agreed property division, based on the factors set out in s.65.<sup>71</sup>

Spouses can make other agreements dealing with property that do not meet the requirements of a marriage agreement but are based on the belief that the relationship will last. These are called ante nuptial or post nuptial settlements. When a relationship ends, these arrangements no longer make sense. They are mentioned in the FRA so that a judge can change the agreed upon arrangements if the judge thinks they should be changed.<sup>72</sup>

There are some small steps that could be taken to make the FRA fairer, simpler and more certain:

- The FRA could make it clear that “marriage agreement” includes a separation agreement in some circumstances. The FRA does not define separation agreement, but judges have made decisions about separation agreements that

could be incorporated into the FRA: for example, a separation agreement does not have to meet the formal requirements of a marriage agreement before a judge can change the agreed property division because it is unfair.<sup>73</sup>

- FRA terminology could be changed to reflect language more commonly used today: for example, “prenuptial agreements” and “cohabitation agreements” could replace “ante nuptial” and “post nuptial settlements.”
- The same test for when a court can interfere with agreed property divisions could be applied to all four types of spousal agreements.

In a 1986 report, the British Columbia Law Reform Commission recommended using one term to cover all types of agreements.<sup>74</sup> Some provinces and territories use an umbrella term such as “agreement” or “domestic contract” for all spousal agreements that meet certain requirements.<sup>75</sup> One requirement might be that the spouses independently declare in writing in front of a lawyer that they understand the agreement, that they intend to give up the right to have a court change the agreement, and that neither was forced into making the agreement.

For agreements that meet these requirements, judges could be authorized to interfere only in limited circumstances such as where one spouse forced the other to make the agreement, or the agreement was unconscionable or grossly unfair.<sup>76</sup>

For agreements that do not meet these requirements, judges could be given more discretion to change the agreed property division, while bearing in mind what the spouses agreed.<sup>77</sup>

### ***Judicial Discretion to Vary Spousal Agreements***

The FRA gives judges a lot of discretion to interfere with how spouses agreed to split their property.

In the case of marriage agreements and separation agreements—the most common types of spousal agreements—a judge considers the six factors set out in s. 65 when deciding whether the agreement is unfair, but the FRA does not say what “unfair” means.<sup>78</sup> This creates uncertainty.<sup>79</sup> If spouses know that even if they agree on a division of their property, a judge may later find their agreement “unfair” and order a different division, they may prefer to use the court in the first place. (The fairness test does not apply to other spousal agreements such as ante and post nuptial settlements: judges can change those agreements simply if they think they should be changed.<sup>80</sup>)

In most of the rest of Canada, applications to court are seen as a last resort for spouses who cannot agree. In some provinces, judges may interfere with an agreement only if it can be shown to be “unconscionable,” “unduly harsh on one party,” or “fraudulent.”<sup>81</sup> In other jurisdictions, judges are not allowed to interfere with an agreement unless it was not made in accordance with the law; or one spouse did not tell the other about certain property he or she had when the agreement was made; or a spouse did not understand what the agreement said when it was made.<sup>82</sup>

It is important to encourage spouses to try to settle their own issues. In 1986 the British Columbia Law Reform Commission suggested that the FRA allow judges to interfere

with spousal agreements about property division only if the agreement was not made in accordance with the law or is unconscionable.<sup>83</sup> The Commission thought “unconscionable” should mean an agreement that:

- was substantially unfair at the time it was made, and
- was also unfair in how it was made: for example, if one spouse forced the other to agree.

If an agreement was unfair in how it divided property, but the agreement was made fairly, a judge should not be able to interfere.<sup>84</sup>

### ***QUESTIONS***

10. What types of agreements should the FRA address?

- a) marriage agreements;
- b) separation agreements;
- c) ante nuptial settlements;
- d) post nuptial settlements;
- e) prenuptial agreements;
- f) cohabitation agreements;
- g) other \_\_\_\_\_.

11. Should the FRA use one term to cover all types of spousal agreements?

12. Do you think there should be a more stringent test for allowing a judge to interfere with spouses’ property division agreements than “unfairness”?

12.1. If yes, should judges be limited to interfering with agreements about property division only:

- a) if the agreement is:
  - i. unconscionable;
  - ii. grossly unfair;
  - iii. unduly harsh;
  - iv. other \_\_\_\_\_.
- b) if how the spouses made the agreement was:
  - i. not in accordance with the law;
  - ii. unconscionable;
  - iii. grossly unfair;
  - iv. unduly harsh;
  - v. other \_\_\_\_\_.

12.2. Do you think it would be helpful if a more stringent test limiting the ability to vary an agreement was applied only if:

- a) the agreement is in writing;
- b) the agreement is signed by each spouse without the other spouse present;
- c) the agreement is signed by each spouse, without the other spouse present, and witnessed by another person;
- d) the spouses independently declare to a lawyer that they understand the agreement and that they intend to give up the right to have a court impose different terms;
- e) other \_\_\_\_\_.

### **Discussion Point (7) –Family Property Division and Spousal Support**

Property division and spousal support are separate issues. The British Columbia Court of Appeal has said that property division should be decided first and then spousal support.<sup>85</sup> But property division and spousal support overlap in both provincial and federal laws. The FRA and the federal *Divorce Act* tell judges to look at some of the same things when deciding whether a 50-50 property split would be unfair<sup>86</sup> and whether one spouse should pay spousal support to the other.<sup>87</sup>

This overlap can give the flexibility needed to reach fair outcomes in some cases.<sup>88</sup> For example, an unequal split of family assets may give one spouse enough income so that spousal support is not needed.

However, the overlap also makes outcomes less predictable because it can lead to over- or under-compensation. For example, a spouse might receive more than half of the family assets then a lump sum spousal support award as well.<sup>89</sup> On the other hand, a judge might wrongly think that giving a spouse more than half of the family assets is plenty, and not make a spousal support award.<sup>90</sup> Before deciding that a spouse should not get support, it is important to make sure that the division of family assets properly addresses the economic disadvantages that may have been caused to a spouse as a result of the marriage or its breakdown.<sup>91</sup> For example, if one spouse has been out of the workforce for many years while taking primary responsibility for child rearing, that person may need spousal support as well as an unequal division of assets. There might be more certainty if the FRA clearly said that family assets must be divided before deciding whether a spouse should get spousal support.

In other parts of Canada, family property and spousal support also overlap, but Newfoundland is the only province whose family property law says something about what to do about that overlap. It says that property should be divided before spousal support is ordered, and it cautions about the dangers of giving a spouse too much or too little. Specifically, the law says that spousal support is meant to satisfy certain goals (e.g., lessen a spouse's financial problems), but only to the point that these goals are not already satisfied by how the family property was split.<sup>92</sup>

**QUESTIONS**

13. Would it be helpful if the FRA said that a judge should first split family assets, before deciding whether to order spousal support?

**Discussion Point (8) – Conflict of Laws**

If a spouse lives or owns property outside British Columbia, the division of family property can raise conflict of laws issues. There are two types of conflict of laws issues:

- “Court jurisdiction” refers to whether or not a court in a particular place has the power to decide a case.
- “Choice of law” refers to situations where the laws of more than one place might apply.

Conflict of laws issues must be resolved before decisions can be made about how family property should be divided.

Most provinces and territories address conflict of laws issues in their family property law, but British Columbia does not.<sup>93</sup> In British Columbia, the court jurisdiction issue is dealt with in the *Court Jurisdiction and Proceedings Transfer Act*. That Act sets out when a British Columbia court has the power to hear a case and lists the factors a judge must consider when making that decision.<sup>94</sup> Basically, it reflects the rules developed by courts on this issue.<sup>95</sup> Saskatchewan and the Yukon Territory have similar Acts.<sup>96</sup> British Columbia’s Court Rules are also used to deal with the court jurisdiction issue.<sup>97</sup>

To deal with choice of law issues, judges in British Columbia rely on case law, which says that there are several factors that will determine which jurisdiction’s laws will apply. For example, whether the property in question is immovable (such as land) or movable (such as furniture) is relevant to the choice of laws,<sup>98</sup> whereas the FRA does not make this distinction. The result is that the laws of two or more places might be applied to different items of family property. This uncertainty can make it hard for spouses to reach agreements, and yet asking a court to resolve a conflict of laws issue can be expensive.<sup>99</sup>

Some other provinces and territories address choice of law issues<sup>100</sup> while others address both choice of law and court jurisdiction.<sup>101</sup> Some have laws that clearly say what the court can do if the family has immovable property in another place.<sup>102</sup> This kind of property can be a problem because a British Columbia judge cannot order a spouse to transfer ownership of land outside of British Columbia. Only a judge in the place where the land is located can make that order. A British Columbia judge dividing family property can do a number of things to take into account the value of the land, but these options could be clearer and more certain if they were expressly set out in the FRA.<sup>103</sup>

In 1997, the Uniform Law Conference of Canada created a draft uniform act (“*Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act*”) that deals with both court jurisdiction and choice of law in family property cases.<sup>104</sup> On the court jurisdiction issue the *Uniform Act* is similar to the *Court Jurisdiction and Proceedings Transfer Act*<sup>105</sup> but on the choice of law issue, it differs from the approach developed by our courts: it bases the choice of law on where the spouses lived together as a couple rather than whether the property is immovable or moveable and applies the same law to

all of the family property.<sup>106</sup> Also, the *Uniform Act* clearly says what the court can do if immovable property is located in another place, and even lets the court make an order that would affect the ownership rights of that property in certain circumstances.<sup>107</sup>

To date, no province or territory has adopted the draft *Uniform Act*. In 1998, the British Columbia Law Institute published a report on conflict of laws issues in family property cases, recommending that the province adopt the *Uniform Act*.<sup>108</sup>

### **QUESTIONS**

14. Should the FRA deal with choice of law issues?

15. Should the FRA deal with both court jurisdiction and choice of law?

16. Should the *Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act* be adopted by British Columbia?

## **PART D – WHEN SHOULD FAMILY PROPERTY BE DIVIDED?**

### **Discussion Point (9) – When Family Property Rights Arise (“Triggering Events”)**

Generally speaking, during a relationship spouses are free to deal with their own property as they wish, and neither one has rights to the property of the other. The concept of family property, and the right of each spouse to share in that property, does not arise until a “triggering event” occurs. At present, the only way to “trigger” the right to family property is to either:

- make a separation agreement, or
- go to court and get a divorce (or a [judicial separation](#), which is rarely, if ever, requested nowadays); or a declaration that there is no possibility of reconciliation; or an annulment (a declaration by a judge that the marriage was never legal in the first place).<sup>109</sup>

Even if they might eventually agree, spouses often feel compelled to apply to court for a declaration of no possibility of reconciliation just to establish the date on which the right to family property arises.

BC’s Family Justice Reform Working Group recommended that the FRA should define “separation agreement” to include a written agreement between spouses about what is or will be their triggering event.<sup>110</sup> This would allow spouses to set the date when their family property rights arise, without having to go to court. Then they could take the time they need to try to agree on how to divide that property.

Other provinces and territories also provide for various triggering events, including going to court to apply for a divorce, or applying for a division of family property.<sup>111</sup> But unlike British Columbia, most other provinces and territories also include separation as a triggering event.<sup>112</sup> British Columbia is the only place in Canada that lists a separation agreement – not the separation itself - as a triggering event.<sup>113</sup>

Including the separation date as a triggering event in the FRA would give spouses another way to trigger their interest in family property without having to go to court. It also could solve problems caused when one spouse gets rid of assets after the separation but before a triggering event occurs that would give the other spouse a right to a share in those assets.

Still, even the date of separation is often in dispute: sometimes spouses break up several times, or they may continue to share a home but on terms that at least one of them considers to be a separation.<sup>114</sup> Judges are sometimes called on to decide the actual date of separation under the *Divorce Act*<sup>115</sup> or under the FRA, and they have identified factors to help them make that determination. If the FRA were changed to include separation of the spouses as a triggering event, it could also include a specific reference to those factors that judges already use in other situations to determine when the spouses separated, for the purpose of establishing the date of the triggering event.

The British Columbia Law Institute has suggested that the FRA's list of triggering events should reflect the *Divorce Act's* approach to determining that a marriage has ended: that is, the right to family property would be triggered when the spouses have lived apart for more than a year and at least one of them does not want to get back together.<sup>116</sup>

In Alberta, the right to a division of family assets arises when the spouses have been "living separate and apart," generally, for one year.<sup>117</sup> The Alberta law offers some clarification about what it means to be "living separate and apart:" for example, spouses may be found to be "living separate and apart" even if they are living together or doing household tasks for each other.<sup>118</sup> Also, separated spouses who get back together to try to make the relationship work do not have to "restart the clock." If they are together again for less than three months, the year continues to run from the date of the original separation, although the time they were together is not counted as a period of separation.<sup>119</sup> Prince Edward Island's law also provides some help in figuring out what it means to "live separate and apart."<sup>120</sup>

In Manitoba and Saskatchewan, separation does not trigger a right to division of family property: a spouse has to apply to court for a division.<sup>121</sup> This means that one spouse can act alone to trigger family property rights, and can do it without first having to separate. This avoids any problems related to figuring out when spouses separated or were "living separate and apart,"<sup>122</sup> but the spouse does have to go to court.

### **QUESTIONS**

17. What events should trigger the right to a division of family property?

- a) the spouses make a separation agreement;
- b) the spouses separate;
- c) the spouses are separated for at least one year;
- d) a judge says that the spouses have no possibility of reconciling (that is, no chance of getting back together);
- e) a divorce (or judicial separation or annulment);
- f) one spouse applies to court to divide the family assets;
- g) other \_\_\_\_\_.

18. If a separation agreement is a triggering event, should the FRA make it clear that a separation agreement can be a written agreement between the spouses about what is or will be their triggering event (even if they have not yet agreed about how their family property will be divided)?
19. If separation is a triggering event, should the FRA include the factors a judge would look at to decide the date of separation?
20. Do you have any other comments about triggering events?

### **Discussion Point (10) – Property Rights of Surviving Spouses (Death as a Triggering Event)**

In British Columbia, a surviving spouse in a marriage that was coming to an end can sometimes be entitled to a greater share of the deceased spouse's assets than the spouse whose marriage was intact.

This is because the FRA property division rules do not apply if a spouse dies and no triggering event has occurred.<sup>123</sup> The surviving spouse in that case does not have the right to apply under the Act for a share in the family's assets, but may be entitled to a share in the deceased spouse's property under succession law – by inheriting under the terms of a will; or by successfully challenging the will; or, if there is no will, under the intestacy rules.<sup>124</sup>

But if there has been a triggering event, in some cases the surviving spouse will not only receive a share of the deceased spouse's property under succession law, but will also be entitled to a division of family assets under the FRA.

In many parts of Canada, a person can use the family property division provisions on the death of a spouse, whether or not a triggering event has occurred.<sup>125</sup> Either the death of a spouse is a triggering event<sup>126</sup> or surviving spouses are allowed to apply for a division of the family property after the death of a spouse.<sup>127</sup>

In B.C., if spouses separate before one spouse dies, the surviving spouse can only use the FRA family property division provisions if a triggering event occurred before the spouse died. If the spouses are living together, with no intention of separating when one spouse dies, the surviving spouse cannot use the FRA.<sup>128</sup> Some examples may help illustrate what that can mean. The scenarios assume that the couples were together for the same length of time and that the surviving spouses were financially dependent on their spouses at the time their spouses died.

**A.** These couples were separated before the death of one spouse.

Example 1

A and B separate. A starts a court action and gets a court order saying that A and B have no prospect of reconciling. This is a triggering event under the FRA. A now has the right to half of the family assets and also to ask the court to give her more than half by finding that a 50-50 split of the family assets would be unfair. After the triggering event, B dies without a will (intestate) and leaves two young children (under 19) from a previous relationship.

*Result* – A has a right to half of the family assets under the FRA, and maybe more if a judge decides that a 50-50 split would be unfair. Also, because A and B were married and B died without a will, under the *Estate Administration Act*, A has the right to the first \$65,000 of B’s estate (the other half of the family assets) plus 1/3 of any of his estate over and above the \$65,000.

Example 2

C and D separate. C plans to consult a lawyer about getting an order saying that C and D have no prospect of reconciling (which would be a triggering event), but D dies before this is done. Before his death, D makes a new will that leaves his entire estate to his two young children (under 19) from a previous relationship and says that C is left out because of the separation.

*Result* – C has no right to half of the family assets under the FRA. C also has no clear right to a share of D’s estate. C can start a court action under the *Wills Variation Act* to claim a share of D’s estate, but the process is expensive and how much of the property C would get is uncertain.

**B.** These couples were married and had no intention of separating at the time one spouse dies.

Example 3

A and B are married, with no intention of separating. Because no triggering event has occurred, neither of them has a right to half the family assets under the FRA. B dies and in his will leaves his entire estate to his two young children (under 19) from a previous relationship.

*Result* – A has no right to half of the family assets under the FRA. A also has no clear right to a share of B’s estate. A can start a court action under the *Wills Variation Act* to claim a share of B’s estate, but the process is expensive and how much of the property A would get is uncertain.

Example 4

C and D are married, with no intention of separating. Because no triggering event has occurred, neither of them has a right to half of the family assets under the FRA. D has two young children (under 19) from a previous relationship. D dies and does not leave a will.

*Result* – Under the *Estate Administration Act*, C has the right to the first \$65,000 of D's estate plus 1/3 of any of his estate over and above that. This means that if the estate is worth more than \$180,000, C's share is less than what she would have received had the couple separated and created a triggering event before D died and each had received half of the family assets under the FRA. C cannot file a claim for a share of D's estate under the *Wills Variation Act* because there is no will.

In spring 2005, a subcommittee of the Succession Law Reform Project looked at amending the FRA to make the death of a spouse a triggering event. The subcommittee proposed that on the death of a spouse, a surviving spouse would have to choose between using the FRA property division provisions, or using succession law, unless the deceased spouse indicated by will that the surviving spouse should be able to use both.

However, the general feedback from lawyers practising in the areas of family law and wills and estates was not positive. A key reason was that the FRA gives judges a lot of discretion to decide what property to divide and how to divide it. This makes it hard for spouses to predict what share of the family assets they will get under the FRA. If death were added as a triggering event, the choice between the FRA and succession law could be difficult because of uncertainty about what a spouse would get under the FRA. However, discussion points 4, 5, 6, 7, 8 and 11 in this paper suggest ways to amend the FRA that might make outcomes under the FRA more predictable.

Another concern is that the goals and underlying assumptions of family property law and succession law are different.<sup>129</sup> The FRA property division provisions are based on the presumption that each spouse equally contributed to the family and its property, and they focus on the rights of the spouses. They do not attempt to balance the rights of spouses with those of children or other dependents of the deceased spouse. And, they do not place such importance on which spouse owns a particular family asset. By contrast, succession law is concerned with dividing the property that a spouse owns at death, among that person's surviving spouse, children and other dependents. The goal is to provide for the financial needs of all of these dependents, while respecting any wishes of the deceased person about how the property should be divided.

It is not easy to reconcile these different goals. Making the death of a spouse a triggering event would give all surviving spouses access to the FRA family property provisions on the death of a spouse and so would address the unfairness of limiting this option to only those cases where a triggering event had occurred before the death. It also addresses the apparent unfairness of a surviving spouse from a broken down relationship getting half of the family property under the FRA and a surviving spouse from an intact relationship receiving less than half under succession law. But it may raise other concerns about

fairness to the deceased spouse's children and other dependents; about following the wishes expressed in the deceased spouse's will; about the need to settle estates in a timely way; and about the consequences of death on other financial arrangements including life insurance, pensions, taxation, and jointly held property. Ways to ease these concerns can be explored if a policy decision is made to give all surviving spouses the right to use the FRA family property provisions.

***QUESTIONS***

21. Is it unfair that some surviving spouses are able to use the FRA family property provisions when their spouses die and other surviving spouses are not?
22. Do you know anyone who has been affected by the fact that some surviving spouses are able to use the FRA family property provisions when their spouses die and other surviving spouses are not?
  - 22.1. If yes, how frequently do you encounter this situation?
23. Do you think the FRA should be amended to allow all surviving spouses to claim a share of a deceased spouse's property under its family property division provisions:
  - a) always
  - b) only if other changes are made to the FRA family property division provisions;
    - i. if so, what other changes should be made to the FRA family property division provisions?
  - c) never
  - d) other \_\_\_\_\_.
24. If all surviving spouses are allowed to use the FRA family property provisions when their spouses die, should a surviving spouse be:
  - a) required to choose between the FRA and succession law
  - b) allowed to use both the FRA and succession law
  - c) other \_\_\_\_\_.
  - 24.1. Would your answer to question 24 apply:
    - a) always;
    - b) unless the deceased spouse's will says otherwise; or
    - c) other \_\_\_\_\_.

**Discussion Point (11) – Date for Valuing Family Property**

Before spouses—or a judge—can make decisions about dividing family assets, they need to know how much the property is worth. The worth of property can change over time, so it is important to know the date on which the value is to be established. This date is known as the valuation date.

Like the laws in several other provinces and territories, the FRA does not say anything about valuation dates so judges have developed rules through case law to help determine valuation dates.<sup>130</sup> Generally, the valuation date is the trial date, but in some circumstances another date can be used.<sup>131</sup> Lawyers know these rules, but the law might be clearer to everyone if the FRA included provisions about valuation dates. The British Columbia Law Reform Commission said that setting out the valuation date in the FRA could create more certainty, encourage consistency in court decisions, and decrease the need for spouses to go to court to resolve disputes about the valuation date.<sup>132</sup>

Of the provinces and territories that use a family property division model like British Columbia's, Saskatchewan and the Yukon Territory have provisions about valuation dates in their laws. In Saskatchewan, a judge can choose between the triggering event and the trial date, depending on which the judge thinks is more appropriate.<sup>133</sup> In the Yukon Territory, the judge does not have a choice: the valuation date is the earliest of four possible triggering events: separation with no chance of resuming cohabitation; divorce; annulment; or an application for division of family assets.<sup>134</sup> The valuation date will be taken into account when the judge considers whether a 50-50 split of the family property would be unfair.<sup>135</sup>

The provinces and territories that use a compensation model of family property division generally have fixed valuation dates.<sup>136</sup> In most, the valuation date is the earliest of: separation; divorce; annulment; or a successful application to court based on the other spouse's dealings with the family property.

When the Law Reform Commission recommended that British Columbia switch to a compensation model of property division, it also recommended a fixed valuation date, but with some flexibility in cases where increases or decreases in value might lead to unfairness.<sup>137</sup> The suggestion was that a judge be allowed to consider these changes when deciding whether an equal division would be unconscionable.<sup>138</sup>

In Manitoba, the valuation date is either the date when the couple last cohabited or, if they are still cohabiting, the date when either applies for an accounting of assets. But spouses are also expressly allowed to agree to a date for valuing assets and debts.<sup>139</sup>

The FRA could be changed to address the issue of a valuation date in any of several ways:

- The Act could incorporate the rules that have been developed by our courts through case law to allow judges, when determining a fair division of property, to take into account changes in property values between the valuation date and trial. Care would have to be taken to make it clear that this is not a change in the law, so as not to cause confusion and promote needless applications to court for clarification.

- Using the trial date as the generally appropriate date to value family assets might not encourage spouses to settle their disputes out of court.
- The law might be more certain if the FRA provided for a fixed valuation date. This would sacrifice a degree of flexibility, but judges could still order an unequal division of family assets if a 50-50 split would be unfair.<sup>140</sup>
- The FRA could balance certainty with flexibility if it said that spouses might share in changes in property values between a fixed valuation date and trial, depending on what caused the value to go up or down (for example, the efforts of one spouse, the misconduct of the other, or market forces).<sup>141</sup>

## QUESTIONS

25. Would it be helpful if the FRA said something about when to value family assets?

25.1. If yes, what do you think the FRA should say about valuation dates?

- a) Let the spouses agree to a valuation date:
  - i. in all circumstances;
  - ii. in some circumstances;
  - iii. for certain types of property;
  - iv. other \_\_\_\_\_.
- b) Let the judge choose any valuation date.
- c) Let the judge choose among certain specified valuation dates, and:
  - i. do not let the judge pick another date;
  - ii. let the judge pick another date
    1. in some circumstances,
    2. for certain types of property,
    3. if there is a change in property value between the valuation date and trial (if the choices for a valuation date do not include the trial date),
    4. other \_\_\_\_\_.
- d) Set out a fixed valuation date, and:
  - i. do not let the judge pick another date;
  - ii. require the judge to consider that the valuation date is fixed in deciding whether a 50-50 split of family assets would be unfair;
  - iii. let the judge pick another date;
    1. in some circumstances,
    2. for certain types of property,
    3. if there is a change in property value between the valuation date and trial (if the trial date is not the valuation date),
    4. other \_\_\_\_\_.

26. If the FRA does set out when family assets should be valued, what should be the valuation date(s)?
- a) the trial date;
  - b) the date the spouses make a separation agreement;
  - c) the date of separation;
  - d) the date when the spouses have been separated for a year;
  - e) the date of a court declaration that the spouses have no chance of reconciling;
  - f) the date of divorce (or judicial separation or annulment);
  - g) the date one spouse applies to court to divide the family assets;
  - h) other \_\_\_\_\_.

**PART E – GENERAL FEEDBACK**

***QUESTIONS***

27. Are there issues related to the division of family property not covered in this paper that you would like to raise?
- 27.1. If yes, please describe.
28. In your opinion, what are the three most pressing issues related to the division of family property?
29. It is widely recognized that a barrier to access to justice is excessive process and procedures. Can you think of anything with respect to division of property that could be done to streamline the resolution of issues?

Please provide your [feedback](#).

## ENDNOTES

<sup>1</sup> T.G. Anderson & M. Karton (for British Columbia Law Reform Commission), “Study Paper on Family Property” (1985); British Columbia Law Reform Commission, “Report on Spousal Agreements” (1986); British Columbia Law Reform Commission, “Working Paper No.63: Property Rights on Marriage Breakdown” (1989); British Columbia Law Reform Commission, “Report on Property Rights on Marriage Breakdown” (1990); British Columbia Law Institute, “Report on Recognition of Spousal and Family Status” (1998); British Columbia Law Institute, “The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings” (1998)

<sup>2</sup> Family Justice Reform Working Group, “A New Justice System for Families and Children”, presented to the BC Justice Review Task Force (May 2005), available online at:

[http://www.bcjusticereview.org/working\\_groups/family\\_justice/final\\_05\\_05.pdf](http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf) (last accessed: November 17, 2006)

<sup>3</sup> This paper does not consider the family property provisions in Quebec.

<sup>4</sup> In this paper, “spouse” refers to married persons and, to the extent that family property provisions include them, unmarried persons. Because the FRA family property provisions generally exclude unmarried persons, issues in this paper focus on the FRA as it applies to married persons. The application of the FRA to unmarried persons is explored as a separate issue in this paper.

<sup>5</sup> See: *Matrimonial Property Act*, R.S.A. 2000, c.M-8; *The Family Property Act*, S.S. 1997, c.F-6.3; *Marital Property Act*, S.N.B. 1980, c.M-1.1; *Matrimonial Property Act*, R.S.N.S. 1989, c.275; *Family Property and Support Act*, R.S.Y. 2002, c.83

<sup>6</sup> See: *The Family Property Act*, C.C.S.M. c.F25; *Family Law Act*, R.S.O. 1990, c.F.3; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1; *Family Law Act*, S.N.W.T. 1997, c.18; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18

<sup>7</sup> British Columbia Law Reform Commission, “Working Paper No.63: Property Rights on Marriage Breakdown” (1989)

<sup>8</sup> British Columbia Law Reform Commission, “Report on Property Rights on Marriage Breakdown” (1990) at Appendix B

<sup>9</sup> British Columbia Law Reform Commission, “Report on Property Rights on Marriage Breakdown” (1990) at c.IV (Part B, section 2) and Appendix B (Part B)

<sup>10</sup> *Ibid*, at c.IV (Part B, section 2)

<sup>11</sup> *The Family Property Act*, S.S. 1997, c.F-6.3 at s.20; *Family Law Act*, R.S.O. 1990, c.F.3 at s.5; *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.2; *Matrimonial Property Act*, R.S.N.S. 1989, c.275, preamble; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1 at s.6; *Family Law Act*, R.S.N.L. 1990, c.F-2 at s.19; *Family Property and Support Act*, R.S.Y. 2002, c.83 at s.5; *Family Law Act*, S.N.W.T. 1997, c.18 at s.36; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at s.36

<sup>12</sup> *The Family Property Act*, S.S. 1997, c.F-6.3 at s.20

<sup>13</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.1 (“spouse”). For example, the FRA provisions on spousal support and child custody and access apply to unmarried couples in the same way as married couples.

<sup>14</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.1 (“spouse”)

<sup>15</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.120.1, and see e.g.: *Wiest v. Middelkamp*, 2003 BCCA 437 at paras.26-30 and *Johnstone v. Wright*, 2002 BCCA 406, leave to appeal to SCC refused [2002] SCCA 369

<sup>16</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at ss.61, 65 & 120.1

<sup>17</sup> See e.g., *Family Relations Act*, R.S.B.C. 1996, c.128 at s.120.1 and Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.5

<sup>18</sup> *The Family Property Act*, S.S. 1997, c.F-6.3 at s.24, Pt.IV & Pt.VII; *The Family Property Act*, C.C.S.M. c.F25 at s.5; *Family Law Act*, S.N.W.T. 1997, c.18 at Pt.I and *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at Pt.I

<sup>19</sup> *The Family Property Act*, S.S. 1997, c.F-6.3 at s.2 (“spouse”); *The Family Property Act*, C.C.S.M. c.F25 at s.1 (“common-law partner”); *Family Law Act*, S.N.W.T. 1997, c.18 at s.1 (“spouse”) and *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at s.1 (“spouse”)

<sup>20</sup> See e.g., *Family Law Act*, R.S.N.L. 1990, c.F-2 at ss.2, 63 & 65 and *Family Property and Support Act*, R.S.Y. 2002, c.83 at ss.1, 37, 60 & 61

<sup>21</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at ss.61 & 120.1

<sup>22</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.120.1 and see e.g., Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.5

<sup>23</sup> Registration as domestic partners gives them a legal status that is similar to but not the same as marriage. (See: *The Family Property Act*, C.C.S.M. c.F25 at s.1 (“common-law partner”); *Vital Statistics Act*, R.S.N.S. 1989, c.494, Pt.II) Once registered, the same family property provisions that apply to married couples automatically apply to them. Before same-sex couples had the legal right to marry, both the former Ontario Law Reform Commission and the BCLI recommended the use of registered domestic partnerships. (See: Ontario Law Reform Commission, “Report on the Rights and Responsibilities of Cohabitants under the *Family Law Act*” (1993); British Columbia Law Institute, “Report on Recognition of Spousal and Family Status” (1998); T.G. Anderson, “Comment on the Report of the British Columbia Law Institute on Recognition of Spousal and Family Status”, (2000) 12 Can. J. Women & L. 439; T.G. Anderson, “Models of Registered Partnership and Their Rationale: The British Columbia Law Institute’s Proposed Domestic Partner Act”, (2000) 17 Can. J. Fam. L. 89) Registered domestic partnerships were a way to give same-sex couples the same rights and obligations as married spouses. (See e.g.: K. Kuffner, “Common-Law and Same-Sex Relationships under the *Matrimonial Property Act*”, (2000) 63 Sask. L. Rev. 237 and T.G. Anderson, “Models of Registered Partnership and Their Rationale: The British Columbia Law Institute’s Proposed Domestic Partner Act”, (2000) 17 Can. J. Fam. L. 89) Now that same-sex couples can legally marry, registered domestic partnerships have much more limited appeal.

<sup>24</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.124

<sup>25</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.67 and s.125

<sup>26</sup> See: Cornet, W. & A. Lender, “Matrimonial Real Property on Reserve” (Discussion Paper) (Ottawa: Department of Indian Affairs and Northern Development, November 2002) at pp.38-46; Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at ch.4; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285; *Paul v. Paul*, [1986] 1 S.C.R. 306

<sup>27</sup> *The Constitution Act, 1867 (U.K.)*, 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II No.5

<sup>28</sup> *Indian Act*, R.S., 1985, c.I-5

<sup>29</sup> *First Nations Land Management Act*, 1999, c.24

<sup>30</sup> Canada, “Report of the Standing Committee on Aboriginal Affairs and Northern Development: Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property” (Ottawa: Communication Canada, June 2005) at pp.7-9, available online at: [http://www.ainc-inac.gc.ca/wige/mrp/pub\\_e.html](http://www.ainc-inac.gc.ca/wige/mrp/pub_e.html) (last accessed: November 17, 2006)

<sup>31</sup> Abbott, K., “Urban Aboriginal Women in British Columbia and the Impacts of the Matrimonial Real Property Regime” (2003), available online at: [http://www.ainc-inac.gc.ca/wige/mrp/pub\\_e.html](http://www.ainc-inac.gc.ca/wige/mrp/pub_e.html) (last accessed: November 17, 2006)

<sup>32</sup> Manitoba, “Report of the Aboriginal Justice Inquiry of Manitoba” (November 1999) at c.13, available online at: <http://www.ajic.mb.ca/volume1/chapter13.html>; Canada, “Report of the Royal Commission on Aboriginal Peoples”, vol.3 (Ottawa: Communications Canada, 1996), available online at: [http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html); Abbott, K., “Urban Aboriginal Women in British Columbia and the Impacts of the Matrimonial Real Property Regime” (2003), available online at: [http://www.ainc-inac.gc.ca/wige/mrp/pub\\_e.html](http://www.ainc-inac.gc.ca/wige/mrp/pub_e.html); Canada, “Report of the Standing Committee on Aboriginal Affairs and Northern Development: Walking Arm-in-Arm to Resolve the Issue of On-Reserve Matrimonial Real Property” (Ottawa: Communication Canada, June 2005) at Appendix A, available online at: [http://www.ainc-inac.gc.ca/wige/mrp/pub\\_e.html](http://www.ainc-inac.gc.ca/wige/mrp/pub_e.html); Nova Scotia Law Reform Commission, “Final Report – Reform of the Law Dealing with Matrimonial Property in Nova Scotia” (1997) at p.13; also see: United Nations Committee on Economic, Social and Cultural Rights, Concluding Observations (Canada), December 1998, available online at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.31.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.31.En?OpenDocument) and United Nations

Human Rights Committee, Concluding Observations (Canada), April 2006, available online at: [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7616e3478238be01c12570ae00397f5d/\\$FILE/G0641362.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/7616e3478238be01c12570ae00397f5d/$FILE/G0641362.pdf) (All websites last accessed: November 17, 2006)

<sup>33</sup> s. 58

<sup>34</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.59

<sup>35</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.65

<sup>36</sup> T.G. Anderson & M. Karton (for British Columbia Law Reform Commission), “Study Paper on Family Property” (1985) at pp.59 & 75

<sup>37</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.65(2)

<sup>38</sup> British Columbia Law Reform Commission, “Report on Property Rights on Marriage Breakdown” (1990) at c.II (Part C)

<sup>39</sup> The Yukon Territory is the other place in Canada that uses the same approach as British Columbia. See: *Family Property and Support Act*, R.S.Y. 2002, c.83 at ss.4-6.

<sup>40</sup> See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at s.37, and places using a compensation model: Manitoba, Ontario, Prince Edward Island, Northwest Territories, and Nunavut.

<sup>41</sup> See e.g., *The Family Property Act*, S.S. 1997, c.F-6.3 at s.23, *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.8 and *Matrimonial Property Act*, R.S.N.S. 1989, c.275 at s.13. As well, s.65(2) of the *Family Relations Act*, R.S.B.C. 1996, c.128 lets a court split property that is not a “family asset” if it needs to after it has found that it would be unfair to divide the family assets equally.

<sup>42</sup> British Columbia Law Reform Commission, “Report on Property Rights on Marriage Breakdown” (1990) at ch.IV. Excluding a particular value of property is another way to do this. (See: *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at s.7) For example, an asset’s value when a spouse gets it might be excluded, so that only the amount that it increases in worth during the relationship is included and shared. A downside of this option is that figuring out what an asset was worth in the past can be hard. (See: British Columbia Law Reform Commission, “Report on Property Rights on Marriage Breakdown” (1990) at c.IV (Part B, section 3))

<sup>43</sup> British Columbia Law Reform Commission, “Report on Property Rights on Marriage Breakdown” (1990) at c.IV (Part B, section 4). The BC LRC recommended that a judge be able to divide an excluded asset if failure to do so would be unfair having regard to: (a) how much, if at all, the non-owning contributed to getting, managing, maintaining, operating or improving the asset; (b) how much, if at all, the excluded asset changed in value or form after the marriage or the asset was acquired; and (c) how long the marriage lasted.

<sup>44</sup> *Family Law Sourcebook for British Columbia*, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §4.40. To decide if the property is a family asset, the court also may look at whether the other spouse contributed to the property (e.g., helped to get, maintain, operate or improve it) or whether the person who gave the gift or left the inheritance said who they wanted to benefit from the property (e.g., one spouse or both spouses).

<sup>45</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.65

<sup>46</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.65(2)

<sup>47</sup> See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8; *The Family Property Act*, S.S. 1997, c.F-6.3; *The Family Property Act*, C.C.S.M. c.F25; *Family Law Act*, R.S.O. 1990, c.F.3; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1; *Family Law Act*, R.S.N.L. 1990, c.F-2; *Family Law Act*, S.N.W.T. 1997, c.18; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18. Sometimes, only part of the gift or inheritance is excluded – for example, the amount the property was worth when the spouse got it. (Alberta (s.7), Saskatchewan (s.23)) If the property made income or increased in worth during the relationship, this can be excluded also or shared by the spouses. (Saskatchewan (s.23), Manitoba (s.7), Ontario (s.4)) Whether or not a gift or inheritance is excluded can depend on different things: when the spouse got it (e.g., before or after the relationship began) (Saskatchewan (s.23)), if the property is a family home (Saskatchewan (s.23), Ontario (s.4)), or if the person who gave the gift or left the inheritance said who they wanted to benefit from the property (e.g., one spouse or both spouses) (Manitoba (s.7), Ontario (s.4)).

<sup>48</sup> See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8; *The Family Property Act*, C.C.S.M. c.F25; *Family Law Act*, R.S.O. 1990, c.F.3; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1; *Family Law Act*, R.S.N.L. 1990, c.F-2; *Family Law Act*, S.N.W.T. 1997, c.18; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18.

<sup>49</sup> British Columbia Law Reform Commission, “Report on Property Rights on Marriage Breakdown” (1990) at c.IV (Part B, section 3)

- <sup>50</sup> See e.g., *The Family Property Act*, S.S. 1997, c.F-6.3 at s.23
- <sup>51</sup> See e.g., *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.6
- <sup>52</sup> See e.g., *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.6
- <sup>53</sup> See e.g., Saskatchewan Law Reform Commission, “*The Matrimonial Property Act: Selected Topics – Report to the Minister*” (1996)
- <sup>54</sup> See e.g., Saskatchewan Law Reform Commission, “*The Matrimonial Property Act: Selected Topics – Report to the Minister*” (1996)
- <sup>55</sup> See e.g., Saskatchewan Law Reform Commission, “*The Matrimonial Property Act: Selected Topics – Report to the Minister*” (1996)
- <sup>56</sup> See e.g., Saskatchewan Law Reform Commission, “*The Matrimonial Property Act: Selected Topics – Report to the Minister*” (1996)
- <sup>57</sup> Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §4.126-4.139
- <sup>58</sup> British Columbia Law Reform Commission, “Report on Property Rights on Marriage Breakdown” (1990) at c.IV (Part C, section 3)
- <sup>59</sup> *Marital Property Act*, S.N.B. 1980, c.M-1.1 at ss.1, 2 & 9
- <sup>60</sup> See e.g., *The Family Property Act*, C.C.S.M. c.F25; *Family Law Act*, R.S.O. 1990, c.F.3; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1; *Family Law Act*, S.N.W.T. 1997, c.18; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18
- <sup>61</sup> See e.g., *The Family Property Act*, C.C.S.M. c.F25 at s.4(4); *Family Law Act*, R.S.O. 1990, c.F.3 at s.4(5); *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1 at s.4(6)
- <sup>62</sup> British Columbia Law Reform Commission, “Working Paper No.63: Property Rights on Marriage Breakdown” (1989) at c.VI (Part F, section 6)
- <sup>63</sup> Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §4.133 and see e.g.: *Moore v. Moore*, [1988] B.C.J. No.740 (QL) (SC)
- <sup>64</sup> See e.g., Nova Scotia Law Reform Commission, “Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia” (1997) at pp.28-29 and *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.9
- <sup>65</sup> See e.g., American Law Institute, “Principles of the Law of Family Dissolution” (2002) at §4.09 (p.732), available on Lexis Nexis
- <sup>66</sup> British Columbia Law Reform Commission, “Report on Spousal Agreements” (1986)
- <sup>67</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.61
- <sup>68</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.56
- <sup>69</sup> Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.4
- <sup>70</sup> Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.3
- <sup>71</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.65; Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.17
- <sup>72</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.68 and Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.21-7.22
- <sup>73</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.65; Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.17
- <sup>74</sup> British Columbia Law Reform Commission, “Report on Spousal Agreements” (1986) at pp.36-37
- <sup>75</sup> See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8; *The Family Property Act*, S.S. 1997, c.F-6.3; *Family Law Act*, R.S.O. 1990, c.F.3; *Family Law Act*, R.S.N.L. 1990, c.F-2; *Family Property and Support Act*, R.S.Y. 2002, c.83
- <sup>76</sup> See e.g., *Family Law Act*, R.S.O. 1990, c.F.3 at s.56(4) and *The Family Property Act*, S.S. 1997, c.F-6.3 at s.24
- <sup>77</sup> See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at s.8 and *The Family Property Act*, S.S. 1997, c.F-6.3 at s.24
- <sup>78</sup> Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.19; British Columbia Law Reform Commission, “Report on Spousal Agreements” (1986) at pp.9-11; and see: *Hartshorne v. Hartshorne*, 2004 SCC 22 (“Hartshorne”)

- <sup>79</sup> British Columbia Law Reform Commission, "Report on Spousal Agreements" (1986) at pp.9-11
- <sup>80</sup> Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §7.22
- <sup>81</sup> See e.g., *The Family Property Act*, S.S. 1997, c.F-6.3 at s.24 and *Matrimonial Property Act*, R.S.N.S. 1989, c.275 at s.29
- <sup>82</sup> See e.g., *Family Law Act*, R.S.O. 1990, c.F.3 at s.56; *Family Law Act*, R.S.N.L. 1990, c.F-2 at s.66; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1 at s.55); *Family Law Act*, S.N.W.T. 1997, c.18 at s.8; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at s.8
- <sup>83</sup> British Columbia Law Reform Commission, "Report on Spousal Agreements" (1986) at pp.23-25 and pp.36-37
- <sup>84</sup> British Columbia Law Reform Commission, "Report on Spousal Agreements" (1986) at pp.23-25
- <sup>85</sup> See: *Slanz v. Slanz* (1984), 42 R.F.L. (2d) 390 (B.C.C.A.); *Loyva v. Loyva* (1985), 44 R.F.L. (2d) 398 (B.C.C.A.); *Tedham v. Tedham*, 2005 BCCA 502
- <sup>86</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.65(1)(e) & (f)
- <sup>87</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.89(1) & s.93(4); *Divorce Act*, R.S.C. 1985, c.3 (2<sup>nd</sup> Supp.), s.15.2(4) & (6)
- <sup>88</sup> See e.g., M. Gordon, "Spousal Support" (CLE Family Law Conference, Vancouver, British Columbia, July 15-16, 1999)
- <sup>89</sup> *Toth v. Toth* (1995), 17 R.F.L. (4<sup>th</sup>) 55 (B.C.C.A.)
- <sup>90</sup> *Tedham v. Tedham*, 2005 BCCA 502 at para.64
- <sup>91</sup> *Tedham v. Tedham*, 2005 BCCA 502 at para.64
- <sup>92</sup> *Family Law Act*, R.S.N.L. 1990, c.F-2 at ss.22 & 39(8)
- <sup>93</sup> See e.g., In Saskatchewan, the value of family property situated outside of Saskatchewan is a factor for the court to consider in a proceeding to vary an equal division of family property (*The Family Property Act*, S.S. 1997, c.F-6.3 at s.21).
- <sup>94</sup> Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c.28
- <sup>95</sup> Blom, J., "How Conflicts has Changed in the Last Fifteen Years" (CLE, Conflicts Issues, Vancouver, British Columbia, April 2006)
- <sup>96</sup> Uniform Law Conference of Canada, *Court Jurisdiction and Proceedings Transfer Act*, available online at: <http://www.ulcc.ca/en/us/>
- <sup>97</sup> See e.g., Peters, L., "Conflict of Laws Primer" (CLE, Conflicts Issues, Vancouver, British Columbia, April 2006) and Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §4.182-4.206
- <sup>98</sup> Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §4.182-4.206
- <sup>99</sup> British Columbia Law Institute, "The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings" (July 1998)
- <sup>100</sup> P. Daltrop & F. Robin, "Dealing with Land in Faraway Places" (CLE, Family Law Conference, Vancouver, British Columbia, July 2003) See e.g., *Family Law Act*, R.S.O. 1990, c.F.3; *Matrimonial Property Act*, R.S.N.S. 1989, c.275; *Family Law Act*, R.S.N.L. 1990, c.F-2; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1; *Family Law Act*, S.N.W.T. 1997, c.18; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18; *Family Property and Support Act*, R.S.Y. 2002, c.83
- <sup>101</sup> See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8; *The Family Property Act*, C.C.S.M. c.F25; *Marital Property Act*, S.N.B. 1980, c.M-1.1
- <sup>102</sup> See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at s.9; *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.45
- <sup>103</sup> Family Law Sourcebook for British Columbia, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §4.182-4.206
- <sup>104</sup> Uniform Law Conference of Canada, *Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act*; available online at: <http://www.ulcc.ca/en/us/>
- <sup>105</sup> British Columbia Law Institute, "The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings" (July 1998)
- <sup>106</sup> British Columbia Law Institute, "The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings" (July 1998) at p.10

<sup>107</sup> British Columbia Law Institute, “The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings” (July 1998) at p.11

<sup>108</sup> British Columbia Law Institute, “The Need for Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings” (July 1998) at p.12

<sup>109</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.56

<sup>110</sup> Family Justice Reform Working Group, “A New Justice System for Families and Children”, presented to the BC Justice Review Task Force (May 2005), available online at:

[http://www.bcjusticereview.org/working\\_groups/family\\_justice/final\\_05\\_05.pdf](http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf) (last accessed: November 17, 2006)

<sup>111</sup> See e.g., *The Family Property Act*, S.S. 1997, c.F-6.3 at s.21 and *The Family Property Act*, C.C.S.M. c.F25 at s.13

<sup>112</sup> See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at ss.5-6; *Family Law Act*, R.S.O. 1990, c.F.3 at ss.5-7; *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.3; *Matrimonial Property Act*, R.S.N.S. 1989, c.275 at ss.2 & 12; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1 at ss.6-7; *Family Law Act*, R.S.N.L. 1990, c.F-2 at s.21; *Family Property and Support Act*, R.S.Y. 2002, c.83 at ss.6 & 15; *Family Law Act*, S.N.W.T. 1997, c.18 at ss.36-38; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at ss.36-38

<sup>113</sup> *Family Relations Act*, R.S.B.C. 1996, c.128 at s.56

<sup>114</sup> Saskatchewan Law Reform Commission, “*The Matrimonial Property Act: Selected Topics – Report to the Minister*” (1996) at c.I (Part 3, section (c))

<sup>115</sup> *Divorce Act*, R.S.C. 1985, c.3 (2<sup>nd</sup> Supp.) at s.8(3)

<sup>116</sup> British Columbia Law Institute, “Report on Recognition of Spousal and Family Status” (1998) at pp.35-36

<sup>117</sup> *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at s.5

<sup>118</sup> *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at s.5(3)

<sup>119</sup> *Matrimonial Property Act*, R.S.A. 2000, c.M-8 at s.5(4)

<sup>120</sup> *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1 at s.1(3)

<sup>121</sup> See e.g., *The Family Property Act*, S.S. 1997, c.F-6.3 at s.21 and *The Family Property Act*, C.C.S.M. c.F25 at s.13

<sup>122</sup> Saskatchewan Law Reform Commission, “*The Matrimonial Property Act: Selected Topics – Report to the Minister*” (1996) at c.I (Part 3, section (c))

<sup>123</sup> *Family Law Sourcebook for British Columbia*, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §13.7-13.11; *Family Relations Act*, R.S.B.C. 1996, c.128 at s.56

<sup>124</sup> See: *Estate Administration Act*, R.S.B.C. 1996, c.122, *Wills Act*, R.S.B.C. 1996, c.489 at s.16 and *Wills Variation Act*, R.S.B.C. 1996, c.490. The British Columbia Law Institute recently recommended fixing the gap in the *Family Relations Act* and *Wills Act* or *Estate Administration Act* that lets some spouses use both the FRA family property provisions and succession law to get a share of their deceased spouse’s property. Under the recommendations, if a surviving spouse has the right to use the FRA when the other spouse dies, the surviving spouse would have to use the FRA and would lose any rights to the deceased spouse’s property under succession law, unless the deceased spouse’s will indicated otherwise. No surviving spouse would be able to use both the FRA and succession law (“double dipping”). (See: British Columbia Law Institute, “Wills, Estates and Succession: A Modern Legal Framework” (2006) at pp.125 (s.19) & 148 (s.43))

<sup>125</sup> See e.g., *The Family Property Act*, S.S. 1997, c.F-6.3 at ss.30-37, *The Family Property Act*, C.C.S.M. c.F25 at Pt.IV, *Family Law Act*, R.S.O. 1990, c.F.3 at ss.5-7, *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.4, *Matrimonial Property Act*, R.S.N.S. 1989, c.275 at s.12, *Family Law Act*, R.S.N.L. 1990, c.F-2 at s.21, *Family Law Act*, S.N.W.T. 1997, c.18 at ss.36-38, and *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at ss.36-38

<sup>126</sup> See e.g., *Matrimonial Property Act*, R.S.N.S. 1989, c.275 at s.12, *Family Law Act*, R.S.N.L. 1990, c.F-2 at s.21, *Family Law Act*, S.N.W.T. 1997, c.18 at s.36, and *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at s.36

<sup>127</sup> See e.g., *The Family Property Act*, S.S. 1997, c.F-6.3 at ss.30-37, *The Family Property Act*, C.C.S.M. c.F25 at Pt.IV, *Family Law Act*, R.S.O. 1990, c.F.3 at s.5, *Marital Property Act*, S.N.B. 1980, c.M-1.1 at s.4

<sup>128</sup> *Tataryn v. Tataryn Estate* (1994), 93 B.C.L.R. (2d) 145 (S.C.C.). The Supreme Court of Canada has said that a surviving spouse who challenges the terms of her deceased spouse’s will should be left no worse off financially than she would have been under the FRA had the spouses separated.

<sup>129</sup> See e.g., Alberta Law Reform Institute, “Final Report No. 83 – Division of Matrimonial Property on Death” (2000) at c.2

<sup>130</sup> See e.g., *Matrimonial Property Act*, R.S.A. 2000, c.M-8; *Marital Property Act*, S.N.B. 1980, c.M-1.1; *Matrimonial Property Act*, R.S.N.S. 1989, c.275; *Family Law Act*, R.S.N.L. 1990, c.F-2. Also, the Alberta Law Reform Institute recently published a background paper on valuation dates in family property statutes. (Alberta Law Reform Institute, “Background Paper – Matrimonial Property Legislation: Valuation Dates” (2005))

<sup>131</sup> *Family Law Sourcebook for British Columbia*, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia) at §4.69, for example: (a) the trial date is generally the appropriate valuation date for family assets, but the court can select another valuation date between the triggering event and the trial date to achieve fairness; (b) the value of assets at the triggering event should be considered when determining if an equal division is unfair under s.65, since the interests of each spouse come into existence on that date; (c) the value of assets on the trial date is generally appropriate when considering the mechanism under s.66 to achieve a division of family assets by, for example, vesting an asset in the name of one spouse in exchange for an order compensating the other for the divested interest; (d) the spouses generally will share any increase or decrease in value of an asset occurring after the triggering event, as their interests in the asset have vested; (e) the court may reapportion assets or make a compensation order in favour of a spouse having regard to certain events following the triggering event, such as the disposal or significant dissipation of a family asset by the other spouse.

<sup>132</sup> T.G. Anderson & M. Karton (for British Columbia Law Reform Commission), “Study Paper on Family Property” (1985) at p.89

<sup>133</sup> *The Family Property Act*, S.S. 1997, c.F-6.3 at s.2 (“value”) – The Saskatchewan Law Reform Commission has recommended giving the court more help in choosing between the two possible valuation dates – specifically, the valuation date should be the triggering date or, if the property value has changed since the triggering event because of any reason other than the efforts of the owning spouse, the trial date. (Saskatchewan Law Reform Commission, “*The Matrimonial Property Act*: Selected Topics – Report to the Minister” (1996))

<sup>134</sup> *Family Property and Support Act*, R.S.Y. 2002, c.83 at ss.6 & 15

<sup>135</sup> *Family Property and Support Act*, R.S.Y. 2002, c.83 at s.13

<sup>136</sup> See e.g., *Family Law Act*, R.S.O. 1990, c.F.3 at s.4; *Family Law Act*, R.S.P.E.I. 1988, c.F-2.1 at s.4; *Family Law Act*, S.N.W.T. 1997, c.18 at ss.33 & 35; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at ss.33 & 35; and also see: *The Family Property Act*, C.C.S.M. c.F25 at s.16 for a provision that provides some choice to parties.

<sup>137</sup> British Columbia Law Reform Commission, “Working Paper No.63: Property Rights on Marriage Breakdown” (1989) at c.VII (Part D, section 45(5)(d))

<sup>138</sup> British Columbia Law Reform Commission, “Working Paper No.63: Property Rights on Marriage Breakdown” (1989) at c.VII Part D, section 45(5)(d). This approach is used in the Northwest Territories (*Family Law Act*, S.N.W.T. 1997, c.18 at s.36) and Nunavut (*Family Law Act (Nunavut)*, S.N.W.T. 1997, c.18 at s.36), where the court must take into account any substantial change in the value of the net family property of either spouse that occurs after the valuation date and the cause of the change when it determines if it would be “unconscionable” to order an unequal division of the net family property.

<sup>139</sup> *The Family Property Act*, C.C.S.M. c.F25 at s.16

<sup>140</sup> *Family Relations Act*, R.S.B.C. 1996, c. 128 at s.65, and see: T.G. Anderson & M. Karton (for British Columbia Law Reform Commission), “Study Paper on Family Property” (1985) at p.89

<sup>141</sup> See e.g., Ontario Law Reform Commission, “Report on Family Property Law” (1993) at c.4