INTRODUCTION

British Columbia’s Family Law Act has introduced dramatic changes to family law in the province.¹ The FLA, modernizing and updating the family law regime, was the culmination of much reflection and consultation. The Family Justice Reform Working Group recommended in its 2005 report, A New Justice System for Families and Children,² that “the law more overtly support co-operative rather than adversarial approaches [to family dispute resolution] and that it more closely reflect the reality that the vast majority of family disputes settle short of trial.”³ Adopting this recommendation, one of the primary goals of the 2011 reform was to maximize, where possible, the opportunities for out-of-court settlements in family disputes, with the new Act specifically drafted “to help support non-court processes.”⁴

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⁴ Ibid.
Conscious of the need to better facilitate private ordering, Part 5 of
the FLA has introduced particularly important changes to the property
division scheme applied on relationship breakdown in the province.
Reflecting Dewar’s assertion that “the law’s shadow needs to be well
defined if private agreement is to be feasible”, at the heart of the recent
reforms was a desire to ensure greater certainty and foreseeability. To this
end, new provisions were included in the FLA for the identification of
assets subject to division and stricter limitations were placed on the
exercise of judicial discretion. Yet, although the reforms are of acute
importance from both a qualitative and a quantitative perspective
(especially in light of their extension to common law spouses), unlike
other aspects of the FLA, they have received little academic attention to
date. This article seeks to address this gap.

Part I of this article analyses the evolution of the property division
regime as applied in British Columbia over the past 45 years, from the
adoption of the Family Relations Act in 1972 and its various iterations,

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474, citing Robert Mnookin & Lewis Kornhauser, “Bargaining in the Shadow of the

6 The importance of the changes is heightened in light of the increasing divorce rate in
British Columbia (noted below) and the extension of the property division scheme
to common law spouses in the province. However, the property division reform has
been somewhat overshadowed by other, perhaps more controversial, aspects of the
FLA such as the introduction of three-parent families. See Fiona Kelly,
“Multiple-Parent Families Under British Columbia’s New Family Law Act: A
Challenge to the Supremacy of the Nuclear Family or a Method by which to Preserve
Biological Ties and Opposite-Sex Parenting” (2014) 47:2 UBC L Rev 535) and the
inclusion of new relocation provisions. See Patrick Parkinson & Judy Cashmore,
“Reforming Relocation Law: An Evidence-Based Approach” (2015) 53:1 Fam Ct
Rev 23; Susan B Boyd & Matt Ledger, “British Columbia’s New Family Law on
Guardianship, Relocation, and Family Violence: The First Year of Judicial
Interpretation” (2014) 33:3 Can Fam LQ 317). See also Susan B Boyd & Ruben

7 Family Relations Act, SBC 1972, c 20 [FRA 1972], as repealed by the Family
Relations Act, SBC 1978, c 20, s 89.
notably the *Family Relations Act* 1996\(^8\) to the current deferred partnership of acquests regime under the *FLA*. Despite its apparent novelty, Part 5 of the *FLA* builds on a number of reform projects over the decades that strongly advocated for the adoption of a more certain, more rule-oriented family property division scheme. Part II of this article then places the spotlight on the application and interpretation of key property division provisions in the *FLA*, having regard to the case law emerging from the Supreme Court of British Columbia and the British Columbia Court of Appeal. Finally, Part III of this article evaluates the likely success of the new legislation in achieving its stated goals of increasing certainty and better facilitating settlements.

**I. THE EVOLUTION OF PROPERTY DIVISION ON DIVORCE IN BRITISH COLUMBIA\(^9\)**

**A. EQUITABLE REDISTRIBUTION TO PRESUMPTIONS OF EQUAL SHARING: THE *FAMILY RELATIONS ACTS***

Like many countries across the common law world, separation of property remained the prevailing family property regime in British Columbia for much of the twentieth century.\(^10\) Significant modification of this regime did not occur until the enactment of the *FRA* 1972. Adopting an equitable redistribution approach to govern the division of assets on marriage breakdown, the *FRA* 1972 empowered the court with the discretion to order a fair distribution of matrimonial property provided such action was taken within two years of proceedings to

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\(^8\) *Family Relations Act*, RSBC 1996, c 128 [*FRA* 1996], as repealed by the *Family Law Act*, SBC 2011, c 25, s 259.

\(^9\) Although common law spouses are now subject to the statutory property division scheme, this is a new innovation in the *FLA*. See *FLA, supra* note 1 at s 3. Thus, in considering the evolution of the regime, reference is made to “divorce” exclusively. Note, married and common law spouses may contract out of the sharing provisions in the *FLA*. See *FLA, supra* note 1 at 92, 93.

\(^10\) Note that in Canada, notwithstanding that divorce law operates at a federal level, family property regimes operate under provincial jurisdiction.
terminate the marriage. However, the legislation afforded minimal
guidance to the judiciary in the exercise of this power. The legislature
quickly realised the shortcomings of the regime.\textsuperscript{11} The FRA 1972 was
soon repealed and replaced with the Family Relations Act 1979,\textsuperscript{12} which
first introduced a presumption of equal sharing of certain property
pursuant to a deferred community of property regime. The last
incarnation of the broad scheme developed in 1979 was applied by the
FRA 1996.

Until very recently, Part 5 of the FRA 1996 governed property
division on divorce in British Columbia. Upon the legal affirmation of
separation—an occurrence known as a triggering event—irrespective of
their ownership, both spouses were entitled to an undivided half interest
as a tenant-in-common in all family assets.\textsuperscript{13} Unlike many provincial
regimes in Canada, the FRA 1996 did not limit property claims
exclusively to property acquired during the marriage. “Family assets”
subject to division included “property owned by one or both spouses . . .
ordinarily used . . . for a family purpose”.\textsuperscript{14} The family home was usually
included, as was “money of a spouse in an account with a savings
institution if that account is ordinarily used for a family purpose”\textsuperscript{15} and

\begin{footnotesize}
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\item[11] See Keith B Farquhar “Section 8 of the Family Relations Act—An Experiment in the
\item[12] Family Relations Act, RSBC 1979, c 121 [FRA 1979], as repealed by the Family
Relations Act, RSBC 1996, c 128.
\item[13] Triggering events defined under subsection 56(1) of the FRA 1996 were each based
on a legal affirmation of the separation.
\item[14] FRA 1996, supra note 8, s 58(2). The legislation did not identify the date on which
an asset ought to be characterized. On the basis of the case law, however, the
characterization of assets occurred on the triggering event. See Newson v Newson,
\item[15] FRA 1996, supra note 8, s 58(3)(c). See also Albert J McClean, “Matrimonial
Property—Canadian Common Law Style” (1981) 31:4 UTLJ 363 at 374. See also
ibid at 374-376.
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the entitlement of either spouse under an annuity or pension plan.\textsuperscript{16} “Family assets” also included “business assets” or “ventures” to which money or money’s worth was, directly or indirectly, contributed by or on behalf of the other spouse.\textsuperscript{17} According to subsection 59(2), an indirect contribution included “savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property”\textsuperscript{18}

However, the \textit{FRA 1996} also provided the judiciary with discretion to depart from equal sharing. Section 65 of that Act provided the court with the discretion to order a reapportionment where it considered an equal division would be unfair, having regard to certain criteria.\textsuperscript{19} The factors which the court was required to consider were:

1. The duration of the marriage;
2. The duration during which the spouses had lived separate and apart;
3. The date on which property was acquired or disposed of;
4. The extent to which property was acquired by one spouse through inheritance or gift;


\textsuperscript{17} \textit{FRA 1996}, supra note 8, ss 58(3)(c), 59(1).

\textsuperscript{18} \textit{FRA 1979}, supra note 12, s 59(2), cited in \textit{Eisom v Eisom} (1983), 3 DLR (4th) 500, 49 BCLR 297. Business assets were regularly included without serious effort to establish any nexus between the contribution and the asset. This presumption was rebuttable.

\textsuperscript{19} This action had to be taken within two years of the making of an order for the dissolution of the marriage or an order for judicial separation. The burden of proof lay with the spouse trying to obtain an unequal division to prove that an equal division would be unfair having regard to the reapportionment criteria set out by section 65. See also section 61. Note that the use of the term “unfair” generated controversy. See the British Columbia, Law Reform Commission of British Columbia, \textit{Report on Spousal Agreements}, LRC 87 (Vancouver: LRC, 1986) Chapter II, Part E).
5. The needs of each spouse to become or remain economically independent and self-sufficient, or;
6. Any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.\textsuperscript{20}

This list of considerations was not exhaustive.\textsuperscript{21} In effect, the court could take into account other factors it considered relevant.\textsuperscript{22}

B. DISSATISFACTION AND STATUTORY REVIEWS

Notwithstanding that the deferred community of property regime applied pursuant to the \textit{FRA} post-1979 was considered preferable and more predictable than the preceding equitable redistribution regime, difficulties nonetheless persisted. Weaknesses were identified in the ambiguous “family purpose” test, which created difficulties in establishing the community of assets for division.\textsuperscript{23} Furthermore, although theoretically the courts should have been reluctant to depart from an equal division unless factors listed in section 65 applied, the presumption of an equal entitlement to family property was sometimes

\textsuperscript{20} \textit{FRA} 1996, \textit{supra} note 8, s 65(1).


\textsuperscript{22} See \textit{M(SB) v M(N)}, 2003 BCCA 300, 14 BCLR (4th) 90 at para 23. The BC Court of Appeal analyzed the approach for assessing a claim under \textit{FRA} 1996, section 65. See also \textit{Kaur v Ram}, 2005 BCSC 1536, [2006] WDLF 419, rev’g in part 2006 BCCA 527, [2007] WDLF 966. Once the community of property for division was established, and the shares to be allocated to each spouse determined, the \textit{FRA} 1996 empowered the courts to make various orders for the redistribution of assets. \textit{FRA} 1996, section 66 was pivotal in this regard and provided the court with “wide powers to effect a division of family assets, whether that division be ultimately equal or unequal”: see Keith B Farquhar, “Matrimonial Property and the British Columbia Court of Appeal” (1988) 23:1 UBC L Rev 31 at 33 [Farquhar, “Matrimonial Property”]. See also \textit{FRA} 1996, ss 124, 125.

\textsuperscript{23} See Farquhar, “Matrimonial Property”, \textit{supra} note 22 at 34. He noted that the \textit{FRA} 1996 left “a substantial number of very important questions about the ultimate destination of matrimonial property . . . unanswered”: \textit{ibid}. 

merely regarded as a “starting point”. These weaknesses gave rise to considerable uncertainty resulting in “a flood of litigation on property issues between husbands and wives whose marriages [had] broken down.”

The prevailing dissatisfaction with the scheme and desire for further reform were highlighted in key official publications in the province. Having noted the development of the law from 1972 to 1979, the Law Reform Commission of British Columbia stated in 1989: “It is our tentative conclusion that legislation must continue in its evolution by providing further guidance on the division of family property in more precisely defined terms and thereby minimizing the role of judicial discretion.”

In concluding the 1989 report, the Commission made proposals for reform drawing heavily from the provisions applied in Ontario. Central to the reform advanced was that, rather than determining the divisible property using a family purpose and contributions-based test, the legislation should aim for the equalization of gains: “Increases in the financial worth of the spouses occurring over the course of the marriage attributable to income they earn or changes in value of their assets should be assessed and a payment made to the spouse who has acquired less wealth over the course of the marriage in order to ensure equality between the spouses.”

The 1989 proposals made no distinction between family assets and business assets and included no special provisions to protect the

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25 Farquhar, “Matrimonial Property”, supra note 22 at 35.

26 Law Reform Commission, Property Rights on Marriage Breakdown, supra note 24 at 66.

27 Ibid at 113–114.

28 Ibid at 113. The Commission noted “[t]he theory upon which shared rights in property depends is clarified. Unless the spouses otherwise decide, the economic side of marriage is to be thought of as a joint venture or financial partnership where each contributes equally”: ibid.
matrimonial home. The Commission also proposed that “a non-owning spouse should not share in the value of property acquired by gift or inheritance. Increases in the value of such property, however, should be taken into account when determining the amount of an equalizing payment.”

The Commission believed that such an approach would “dramatically [reduce] the role of judicial discretion in ascertaining the rights of spouses” while simultaneously retaining the power to order a reapportionment. These reforms were never enacted, however, and it was subsequently noted they generated “little support at that time from lawyers.”

C. White Paper on Family Relations Act Reform and the FLA

The issue of family property division was once again revisited in the Ministry of the Attorney General’s 2010 White Paper on Family Relations Act Reform. The key difference between this review and its predecessor, however, is that the more recent proposals were largely implemented by the FLA. It received Royal Assent on 24 November 2011 and came into force on 18 March 2013, repealing and replacing the FRA 1996.

As noted, the overriding theme in the 2010 White Paper was a desire to better facilitate out of court settlements by clarifying the law and reducing the role of judicial discretion. In particular, it noted that

29 In this regard, the proposals departed from Ontario. See below for further discussion.
30 Law Reform Commission, Property Rights on Marriage Breakdown, supra note 24 at 114.
31 Ibid.
32 White Paper, supra note 3 at 79.
33 Ibid at 87–93.
34 It could be argued that by extending the application of its property division provisions to common law spouses, the FLA in fact extends judicial discretion in this field. However, it is widely considered that one of the key objectives of the reform was the reduction of judicial discretion with a view to better facilitating private
under the FRA 1996, British Columbia “relie[d] heavily on judicial
discretion to sort out property division disputes.” As the Ministry of
Justice commented: “British Columbia historically had a higher than
average level of property division disputes in court; the broad flexibility
and discretion in this area created uncertainty and promoted litigation.”
To overcome these weaknesses, the White Paper proposed a number of
key reforms.

Central to the proposals advanced was a move away from the family
purpose and contributions-based model of identifying the community of
assets subject to division to a partnership of acquests model. It was
argued that this reform would make the characterization of assets
“simpler” and “clearer”, thereby reducing litigation, and would “[accord]
better with most people’s intuitive sense of fairness.” The system
proposed dictated that family property subject to division would include
all real and personal property owned by one or both spouses at the date
of separation unless the asset in question was excluded. Excluded
property would include property acquired gratuitously, such as “gifts and

bargaining. For example, see the BC Court of Appeal decision in Jaszczewska v
Kostanski, 2016 BCCA 286, [2016] BCWLD 5350 [Jaszczewska 2016]. Here,
having regard to the Ministry of Attorney General’s White Paper and legislative
debates, Harris J noted that the intention of the legislature was “to limit and control
judicial discretion in reapportioning property and to foster certainty and
predictability in property division”: ibid at para 37.

White Paper, supra note 3 at 79.

British Columbia, Ministry of Justice, “The Family Law Act Explained”, online: <
www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system
/legislation-policy/fla/notes-binder.pdf> [FLAExplained].

Note: the regime is also frequently referred to as an “excluded property” regime. See
the White Paper, supra note 3 at 80.

Ibid. Another factor, which was noted in the White Paper and was also arguably
more important in the introduction of such reform, was that it would bring British
Columbia in line “with most other provinces in this increasingly mobile age”: ibid.
More arguments in support of this change in the law are set out at 81.

Whether an asset was ordinarily used for a family purpose would be irrelevant in
deciding if it is family property.
inheritances to one spouse”, as well as property acquired pre-and post-relationship.40 Spouses would, nevertheless, share in the increased value of excluded assets.41 Putting forward the argument in favour of such reform, the White Paper noted: “Changing to an excluded property scheme removes the broad judicial discretion from the asset identification stage . . . . This change is designed to make it easier to identify property subject to division and, therefore, reduce the potential for disagreement”.

The overall effect of this development, it was hoped, would be to reduce recourse to the courts in determining what constitutes the community subject to sharing, thereby better facilitating out-of-court settlements. These recommendations are implemented, with only minor amendments, by sections 84 and 85 of the FLA.43

Moreover, although pursuant to the FRA 1996 family debt was not expressly subject to division—“except insofar as it could be considered where unfairness resulted in the division of assets”44—the White Paper recommended spouses should, as a default, share such debt equally. Consequently, section 81 of the FLA now provides that while on separation each spouse has a right to an undivided half interest in all family property, each spouse is also “equally responsible for family

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40 See White Paper, supra note 3 at 81. It also stated that “where there is a dispute about whether an asset is excluded property, the person claiming the exclusion will bear the burden of proof”: ibid.

41 No determination was made on whether negative equity should be shared between the spouses. This was described as an “outstanding policy issue” in White Paper, supra note 3 at 81 (see below).

42 Ibid.

43 FLA, supra note 1. For instance, paragraph 85(1)(b.1) of the FLA clarifies that only “gifts to a spouse from a third party” are excluded. Hon S Anton noted this amendment was made in response to the concerns of family law lawyers: “There was a possibility that gifts between spouses might be excluded, and the intention is only that a gift from a third party should be excluded”, as quoted in G(P) v G(D), 2015 BCSC 1454 at para 82, [2015] BCWLD 6482 [G(P) v G(D)].

debt”. Section 86 defines family debt as including “all financial obligations incurred by a spouse (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and (b) after the date of separation, if incurred for the purpose of maintaining family property”.  

The 2010 White Paper furthermore sought to strengthen the presumption of equal sharing by proposing to raise the threshold to be surmounted in order to obtain a reapportionment. While the FRA 1996 permitted the court to order an unequal division of assets if it would be “unfair” not to do so having regard to specified criteria, it was suggested that this standard should be increased to that of “clearly unfair,” which would “make the test for reapportionment stricter”. Although the FLA raises the threshold, it is a departure from the recommendation. Under subsection 95(1) of the FLA the court is now directed to consider whether an equal division of family assets and debt would be “significantly unfair”. In making such a determination in relation to the division of property, subsection 95(2) sets out a non-exhaustive list of factors which the court may consider. Residual judicial discretion is also retained pursuant to section 96 in relation to the possible division of

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45 FLA, supra note 1.
46 Ibid. Although outside the scope of this paper, it is worthwhile to note significant issues have arisen in relation to the FLA’s debt allocation regime. In particular, issues have arisen relating to the appropriate valuation date of debts that have necessitated the exercise of judicial discretion. Pursuant to section 87, debts are required to be valued, like assets, at the date of the trial. However, the court may exercise its discretion and establish a different valuation date. The discretion provided hereunder and that provided in section 95 have been called upon on a number of occasions to date to tackle the issues that may arise in this context. See J(KM) v N(JHD), 2014 BCSC 1895 at paras 140–43,146, [2015] WDFL 363; Piderman v Piderman, 2015 BCSC 475, [2015] WDFL 277; Blair v Johnson, 2015 BCSC 761, [2015] WDFL 3010.
47 White Paper, supra note 3 at 82.
48 FLA, supra note 1 [emphasis added].
49 Ibid.
excluded assets. Section 96 provides that the Supreme Court must not order a division of such property unless the family property (or debt) is located outside British Columbia and cannot practically be divided, or where it would be “significantly unfair” not to divide excluded property in light of the duration of the relationship and “a spouse’s direct contribution to the preservation, maintenance, improvement, operation or management of excluded property”.

II. PROPERTY DIVISION UNDER THE FLA

A. INTRODUCTION

The FLA has significantly reformed the law governing property division on relationship breakdown in British Columbia. Reflecting the seemingly long-held desires of law reformers in the province, changes to both the community of assets subject to division and the threshold for the exercise of judicial discretion appear to have inched the regime ever closer towards a more rule-based scheme with ostensibly dwindling scope for the exercise of judicial discretion. As we mark three years since the commencement of the FLA, it is worthwhile to now consider how these changes have been interpreted and applied to date in the BC Supreme Court and the BC Court of Appeal.

B. REFORMULATION OF THE COMMUNITY OF ASSETS FOR DIVISION

In general, the transition to a deferred partnership of acquests regime appears to have been quite smooth. Pursuant to section 81, and in the absence of an agreement or order that provides otherwise, on separation each spouse has an automatic right to an undivided half interest in all family property as a tenant in common. “Family property”, as defined

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50 FLA, supra note 1.

51 Ibid. To provide clarity on when separation arises, section 83 adds that “spouses are not considered to have separated if, within one year after separation, (a) they begin to live together again and the primary purpose for doing so is to reconcile, and (b) they continue to live together for one or more periods, totalling at least 90 days”: ibid. It is also important to note that in the absence of an agreement to the contrary,
by sections 84 and 85, includes all assets acquired during the relationship, otherwise than by gift from a third party or by inheritance, as well as the increase in the value of any excluded assets.\textsuperscript{52} Nevertheless, despite the outward semblance of simplicity, certain shortcomings in the legislative provisions governing the identification of community assets subject to division have emerged, necessitating judicial interpretation and generating some confusion.

One of the most controversial issues to emerge to date vis-à-vis asset identification is the lack of clarity surrounding the scope of the tracing provisions included in the \textit{FLA}. Paragraph 85(1)(g) provides that property derived from excluded property or the disposition of excluded property continues to be excluded property.\textsuperscript{53} What is not specifically addressed in the legislation, however, is whether these tracing provisions apply when excluded property is transferred into the name of the other spouse or into the spouses’ joint names. Similarly, it is not clear if the provisions apply where property is purchased with the proceeds of sale of excluded property, and the new property is placed in the name of the other spouse or in the spouses’ joint names.\textsuperscript{54}

\textit{Remmen v Remmen} was one of the first decisions to consider this issue.\textsuperscript{55} Here, the claimant husband argued that he should be given credit for the full value of each of the excluded assets he brought into the relationship, notwithstanding that the proceeds from the sale of one of the assets was subsequently used to purchase a new property in the joint

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the scheme outlined in Part 5 must be applied by the courts. A court is not at liberty to choose an alternative scheme of division.
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\textit{Ibid.}
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From a practical perspective this distinction can be of considerable importance. If an “excluded asset” is transferred into joint names after the commencement of the relationship, and is deemed to have lost its “excluded asset” status, the full value of the asset falls into the pot for sharing. If the asset retains its “excluded asset” status, only the increased value of the asset would be subject to sharing.
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2014 BCSC 1552, [2014] BCWLD 7064 [\textit{Remmen}]. See also Asselin, supra note 44, which was the first judgment on the property division provisions of the \textit{FLA}.
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names of both him and his wife. The respondent, by contrast, argued that the presumption of advancement between spouses was “alive and well in British Columbia” and that the claimant had presumptively gifted her one-half of his interest in those proceeds by virtue of the new property being placed in a joint tenancy. The Court found against the respondent. Butler J held: “The property provisions of the FLA are intended to be a complete code so that there is no need to examine the intention of the parties at the time of a transfer of excluded property to joint tenancy.” He added, “[t]o come to the opposite conclusion would bring uncertainty and a level of inequality into [the] property division structure”.

Soon after, Masuhara J reached the opposite conclusion in Wells v Campbell. Here, again, the “key issue” was whether the respondent wife was entitled to an equal division in the entire value of the family home, which had been brought into the relationship by the claimant husband and years later transferred into a joint tenancy or only entitled to an equal division of the appreciated value of the property. The Court concluded that the respondent was entitled to share in the entire value of the property as the presumption of advancement applied. The “overriding fact”, the Court suggested, was that the claimant transferred the property into a joint tenancy with the respondent. Thus, the Court

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56 Remmen, supra note 55 at para 20.
57 Ibid at para 48.
58 Ibid. In particular, Butler J argued that the application of the presumption of advancement would “raise a number of problems when applied under the scheme of the FLA”: ibid at para 50. Although it was observed in B(J) v C(S), 2015 BCSC 2136 at para 85, [2016] BCWLD 542 [B(J) v C(S)] that “[t]he question of whether the presumption of advancement applies to common law spouses is unclear, and is in need of appellate consideration”, in Lawrence v Mulder, 2015 BCSC 2223 at para 80, [2016] BCWLD 905 [Lawrence] the Court held the presumption did apply to common law relationships.
59 2015 BCSC 3, 74 BCLR (5th) 153 [Wells].
60 Wells, supra note 59 at para 19.
61 Ibid at para 30.
held that the home was transferred as a “perfected inter vivos gift” that could not be revoked.\textsuperscript{62} Rejecting the approach adopted in \textit{Remmem}, Masuhara J held:

While I do not disagree certain problems can be presented; I am not persuaded that they lead to the conclusion that the Act displaces or extinguishes the presumption of advancement, or the effect of an \textit{inter vivos} gift resulting in a joint tenancy. There is no explicit extinguishment in the Act, as has been done in other jurisdictions.\textsuperscript{63}

The precedent in \textit{Wells} was followed by Walker J soon after in in the BC Supreme Court decision of \textit{F(VJ) v W(SK)}.\textsuperscript{64}

The approach in \textit{Remmem} has, however, remained the preferred authority within the BC Supreme Court to date. Conscious of the conflicting judicial interpretations in the area, Fenlon J presented a particularly robust argument in favour of the \textit{Remmem} approach in \textit{G(P) v G(D)}.\textsuperscript{65} She noted that although “\textit{Wells} and \textit{[F(VJ)]} focussed on the continued existence of the presumption of advancement — neither case addressed s. 85(1)(g)”.\textsuperscript{66} Fenlon J explained:

Section 85(1)(g) does not restrict tracing to an asset held solely by the spouse who owned the original excluded asset. Recognizing the presumption of advancement . . . would generally “extinguish” the right of a spouse who has brought property into the relationship to retain it on separation whenever the pre-owned property is mingled with

\textsuperscript{62} \textit{Ibid} at para 32.

\textsuperscript{63} \textit{Ibid} at para 38. Having included the full value of the property, the Court held that the proper avenue to seek an unequal division was via section 95 but concluded that an equal division would not be “significantly unfair”: \textit{ibid} at para 45.

\textsuperscript{64} 2015 BCSC 593 at para 68, 75 BCLR (5th) 115 [\textit{F(VJ)} 2015]. Although this decision was appealed to the BC Court of Appeal, the appeal was dismissed. See note 73 below.

\textsuperscript{65} \textit{Supra} note 43.

\textsuperscript{66} \textit{Ibid} at para 67.
property held by the other spouse. The implications of this are far-reaching.\textsuperscript{67}

In addition to believing that the approach in \textit{Remmene} was consistent with the objects of the \textit{FLA},\textsuperscript{68} she also felt the previous decisions of \textit{Wells} and \textit{F(VJ)} focused on the legal effect of a transfer of property during the marriage “without reference to the overall scheme of the \textit{FLA} on marriage breakdown.”\textsuperscript{69} On this point, she expanded:

In my view, general property law, including the presumption of advancement, applies during the parties’ marriage . . . \textit{On marriage breakdown, however, a new property rights regime descends as between the spouses,} just as it did under the former [\textit{FRA 1996}]. The rights of third parties \textit{vis-à-vis} the property held by the spouses remain unaffected . . . but between the spouses, all changes. Whether property is held solely in the wife’s name, solely in the husband’s name, or jointly, it is all subject to the scheme of division created by Part 5 of the \textit{FLA} . . . Some of that property is to be excluded under s. 85(1) and all the rest is presumptively to be divided equally regardless of whose name it is in at the date of separation. Under this scheme it does not matter that one spouse during the marriage is presumed to have gifted property, whether excluded or otherwise, to his or her spouse. \textit{There is a whole new regime once the marriage ends.}\textsuperscript{70}

When the issue subsequently arose in \textit{Andermatt v Tahmasebpour}, Pearlman J also favoured the approach adopted in \textit{Remmene}: only the increased equity of the home in question was shared despite the fact that title to the excluded property was transferred into both parties’ names under a joint tenancy over ten years prior to the divorce.\textsuperscript{71} The \textit{Remmene} approach has been followed in several decisions in the interim by the BC

\textsuperscript{67} \textit{F(VJ)} 2015, \textit{supra} note 54 at para 75.

\textsuperscript{68} \textit{Ibid} at para 76. In this regard she quoted from the \textit{White Paper, supra} note 3.

\textsuperscript{69} \textit{G(P) v G(D)}, \textit{supra} note 43 at para 78.

\textsuperscript{70} \textit{Ibid} at paras 78–80 [emphasis added].

\textsuperscript{71} \textit{Andermatt v Tahmasebpour}, 2015 BCSC 1743, [2015] BCWLD 7354 [\textit{Andermatt}].
Supreme Court and seems, for the moment at least, to represent the dominant approach at first instance.\(^2\)

How long this will remain the case, however, looks increasingly uncertain. Delivering the judgment of the BC Court of Appeal in \textit{F(VJ) v W(SK)}, Madam Justice Newbury recently held that, notwithstanding “the lure of simplicity” inherent in the \textit{Remmem} approach, such an interpretation of the legislative scheme was flawed.\(^3\) She advanced a number of arguments supporting this conclusion. First, she highlighted that although paragraph 85(1)(g) defines “excluded property” to include property derived from excluded property or the disposition of excluded property, where the applicant husband had bought property in the name of his wife, he had “derived” no “property” from the disposition.\(^4\) On the basis that the transfer was made to the wife for no consideration, paragraph 85(1)(g) did not apply. Second, she noted that “if one of the objectives of the \textit{FLA} is to ensure that spouses on separation ‘keep what

\(^2\) See \textit{Shib v Shib}, 2015 BCSC 2108, [2016] WDFL 534 [\textit{Shib}]; \textit{B(J) v C(S), supra} note 58; \textit{Kubberg v Hall}, 2015 BCSC 2230, [2016] WDFL 556 [\textit{Kubberg}]. In \textit{Lawrence, supra} note 58, the Court followed this approach, noting the wording of the \textit{FLA} clearly “states that the property is excluded from an equal division because it was acquired by the respondent before the relationship”: at para 90. Also, note the Court’s conviction that the precedents of \textit{G(P) v G(D), supra} note 43 and \textit{Remmem, supra} note 55 were applicable: “The former is more recent in time and it includes a detailed analysis of the \textit{FLA} and all of the conflicting judgments. As well, again, it gives broad effect to s. 85(1)(g) and the exclusion of property acquired by a spouse before the relationship began. And the concerns about tracing discussed in \textit{Remmem} and \textit{[G(P)] are of some significance}”: \textit{Lawrence, supra} note 58 at para 91. Nevertheless, the Court did state, at para 89:

I confess to be concerned about the fact of a gift from the respondent to the claimant in joint tenancy of the Tunney Avenue property. This coincided with reciprocal wills (as well as the parties engagement to be married) and the evidence is clear that the parties intended to share Tunney Avenue as part of their commitment to a long-term relationship. It is also clear that the $17,000 cash the claimant brought to the relationship was intended for, and was in fact used for, the benefit of both parties.


\(^3\) 2016 BCCA 186 at para 68, [2016] 8 WWR 421 [\textit{F(VJ) 2016}].

\(^4\) \textit{Ibid}. See also para 69.
is theirs’, [the respondent wife] could rightly say that the funds were ‘hers’ at the relevant point in time.”  

This, she argued, would be “more consistent with fairness between the spouses than permitting the donor of a gift to ‘recall’ it”. Moreover, she added: “As far as outside parties such as creditors are concerned, it would be hypocritical at best if [the applicant husband] were able to assert at separation that the gift to his then wife is effectively meaningless as between them, but that as against creditors the asset was put beyond their reach.”

Newbury J also expressly rejected the suggestion that the new FLA scheme “constitute[s] a ‘complete code’ that . . . eliminates common law and equitable principles relating to property.” Instead, she reasoned: “the scheme builds on those principles, preserving concepts such as gifts and trusts, and evidentiary presumptions such as the presumption of advancement between spouses . . . . Gifts between spouses can continue as they have through the ages. It would take much clearer wording to render them suddenly revocable or null or illegal.”

While this decision casts doubt on the correctness of the interpretation originally adopted in Remmen, it is unlikely to be the last word on the issue with the further intervention of the BC Court of Appeal, and potentially the Supreme Court of Canada, expected going forward.

C. STRONGER PREASSUMPTION OF EQUAL SHARING & REDUCED JUDICIAL DISCRETION

75 F(VJ) 2016, supra note 73 at para 70.
76 Ibid.
77 Ibid.
78 Ibid at para 74.
79 Ibid at paras 74–75 [emphasis in original].
80 The BC Court of Appeal in Jaszczevska 2016, supra note 34 did not appear to accept the approach adopted in F(VJ) 2016, supra note 73 as necessarily proving definitive. It noted “[i]t may be that the use of the phrase . . . in s. 85(1)(g) allows for a more flexible approach to identifying excluded property than would the formal rules of tracing” : Jaszczevska 2016, supra note 34 at para 59 [emphasis added].
The second major reform in the *FLA* from a property division perspective was the way in which the bar for the exercise of judicial discretion pursuant to sections 95 and 96 was raised—an explicit effort to reduce the flexibility of the regime and indirectly strengthen the presumption of equal sharing. Although discretion continues to be vested in the court to order the unequal division of family assets or the sharing of excluded assets, these powers may now only be exercised where to do otherwise would be “significantly unfair”.

1. **The meaning of “significantly unfair” and interpretation of the statutory factors under subsection 95(2)**

In the absence of a legislative definition of “significantly unfair”, the courts have endeavoured to elucidate its meaning. Justice Brown in *G(L)v G(R)* defined “significantly unfair” in subsection 95(1) as “essentially . . . a caution against a departure from the default of equal division in an attempt to achieve ‘perfect fairness’”. He added it is “[o]nly when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart [sic] from the default equal division”. The term “significantly unfair” was also considered by the BC Supreme Court in *F(VJ)* 2015. Here, Walker J had regard to cases defining the phrase in other contexts. In particular, he referenced the interpretation afforded to the term under

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81 *FLA, supra* note 1, s 95. Note that similar discretionary powers apply vis-à-vis the division of debt.

82 In one of the earliest decisions delivered under Part 5 following the commencement of the *FLA*, Harvey J in *Asselin, supra* note 44 stated that although he would “know it when [he saw] it”; he would “leave [it] to others to formulate an intelligible definition”: at paras 253–254.


85 *Supra* note 64.
the *Strata Property Act*\(^\text{86}\) in the Court of Appeal decision of *459381 BC Ltd v Strata Plan BCS 1589* where the Court held “characterization of an action as significantly unfair is not a matter of discretion but is an inquiry requiring consideration of the facts before the court and what legally constitutes unfair action”.\(^\text{87}\) Walker J continued: “The Court referred to the definitions given to the phrase in other cases... -- ‘unfairly prejudicial’, ‘burdensome, harsh, wrongful’, and ‘lacking in probity and fair dealing’--and, as I read the reasons for judgment, concluded that significantly unfair must be *something more than ‘mere prejudice and trifling unfairness’.*\(^\text{88}\)

Perhaps the most oft quoted definition to emerge to date is that provided in *Remmem* where Butler J held: “The *Concise Oxford English Dictionary* defines ‘significant’ as ‘extensive or important enough to merit attention.’ Significantly is understood to mean more than a regular impact—something weighty, meaningful, or compelling... It is *necessary to find that the unfairness is compelling or meaningful* having regard to the factors set out in s. 95(2).”\(^\text{89}\)

Despite cautioning that “[i]t would be unwise to attempt to define the test with too much precision in anticipation of circumstances arising in individual cases”,\(^\text{90}\) Harris JA, delivering the judgment of the BC Court of Appeal in *Jaszczewska*, recently appeared to cite Butler J’s definition with approval.\(^\text{91}\) He also suggested that “something objectively

\(^{86}\) *Strata Property Act* SBC 1998, c 43.

\(^{87}\) *F(VJ)* 2015, supra note 64 at para 81, citing *459381 BC Ltd v Strata Plan BCS 1589*, 2012 BCCA 44 at para 15, 27 BCLR (5th) 68.

\(^{88}\) *F(VJ)* 2015, supra note 64 at para 81 [emphasis added].

\(^{89}\) *Supra* note 55 at para 44 [emphasis added].

\(^{90}\) *Jaszczewska* 2016, *supra* note 34 at para 42.

\(^{91}\) *Ibid* at para 41.
unjust, unreasonable or unfair in some important or substantial sense” would be required to justify a departure from equal division.\textsuperscript{92}

Whatever the precise definition, the threshold to obtain an equal division under the new scheme is higher. Moreover, although subsection 95(2) enumerates factors to which the court may have regard in deciding to exercise its discretion in ordering an unequal division of assets, there are significantly fewer than formerly existed pursuant to the \textit{FRA} 1996, thus heightening their relative importance.\textsuperscript{93} Judicial interpretation of several of these factors to date appears to highlight emerging trends.

Pursuant to paragraph 95(2)(a), in exercising its discretion the court may have regard to the duration of the relationship between the spouses.\textsuperscript{94} In \textit{D(AM) v J(KR)}, Sharma J found a relationship of four years and three months was of “short duration”.\textsuperscript{95} This was considered a “strong” factor in supporting a reapportionment.\textsuperscript{96} Similarly, in \textit{Kubberg}, the court appeared to be influenced by, among other factors, the short duration of the relationship which lasted just less than five years in ordering a reapportionment.\textsuperscript{97} By contrast, in \textit{Remmem}, the Court noted that the length of the 22 year relationship was a “significant factor”

\begin{itemize}
\item \textit{Ibid} at para 42. The Court added that “[n]o doubt the nuanced meaning attaching to the test of ‘significant unfairness’ will develop in the case law. No other province uses the same test, so there is no clear persuasive authority to look to”: \textit{ibid}.
\item \textit{FLA, supra} note 1. A number of the factors included in subsection 95(2) relate exclusively to the division of debt.
\item \textit{Ibid}.
\item 2015 BCSC 1539 at para 69, [2015] BCWLD 7582 [\textit{D(AM) v J(KR)}]. The Court held it would be “significantly unfair to the respondent to equally divide the family property”. The property was shared 60%/40% in favour of the respondent. The Court observed that “[t]he strongest factor in favour of re-appointment [was] the length of the marriage” but also noted “that the respondent bore the risk alone of the value of the Home decreasing since the relationship began and that the claimant probably would not have been in the financial position to acquire such an asset without the respondent’s initial investment”: \textit{ibid} at para 72.
\item \textit{Ibid} at para 69.
\item \textit{Supra} note 72 at para 150.
\end{itemize}
which “strongly” favoured an equal division of family property.\textsuperscript{98} Nevertheless, the relevance of this factor in mid-length relationships remains somewhat unclear. In \textit{Jaszczewska}, the BC Supreme Court considered a relationship of 10 years and nine months “of middle duration - neither a very short nor a very long relationship, and therefore a neutral factor”.\textsuperscript{99} However, in \textit{P(G) v P(M)}, Weatherill J appeared to consider an almost 11-year marriage as a relevant feature (seemingly as a marriage of short duration) in ordering a reapportionment of assets in favour of the respondent husband.\textsuperscript{100}

Paragraph 95(2)(c) which directs the court to consider “a spouse’s contribution to the career or career potential of the other spouse” has also received attention.\textsuperscript{101} In \textit{Nearing v Sauer}, Fleming J observed: “I interpret the words ‘spouse’s contribution’ . . . as including the full spectrum of all levels of contribution from one spouse negatively impacting on the other spouse’s career to greatly enhancing the career or career potential of the other spouse.”\textsuperscript{102}

\textsuperscript{98} \textit{Supra} note 55 at para 46. The Court added “[t]he parties worked very much in partnership”; \textit{ibid}.

\textsuperscript{99} \textit{Jaszczewska} Kostanski, 2015 BCSC 727 at para 143, [2015] BCWLD 4644 \textit{[Jaszczewska 2015]}. Although the division of assets ordered by the BC Supreme Court was appealed, the husband’s appeal and wife’s cross appeal were largely dismissed. See \textit{Jaszczewska} 2016, \textit{supra} note 34. In \textit{Hodel v Adams}, 2016 BCSC 910, BCWLD 4009 the Court noted “[r]elationships of short duration may support an argument that family property should not be equally divided. Relationships of longer duration tend to support equal division of family property.”: at para 42. There, a relationship of 12 years did not support a claim for an unequal division of family property. See also \textit{Wallburger v Lindsay}, 2015 BCSC 341 at para 102, [2015] BCWLD 3218 [\textit{Wallburger}].

\textsuperscript{100} 2015 BCSC 1757, [2015] BCWLD 7771 \textit{[P(G) v P(M)]}.

\textsuperscript{101} \textit{FLA}, \textit{supra} note 1.

\textsuperscript{102} 2015 BCSC 58 at 141, BCWLD 2209 \textit{[Nearing]}. Fleming J concluded: “the respondent made essentially no contribution to the claimant’s career or career potential during their relationship . . . At the same time, the claimant urged the respondent to seek full time employment and, given her role in caring for the children and the household, he was entirely free to do so”: \textit{ibid} at para 150. Consequently, she held that it would be “significantly unfair” to divide the claimant’s
Thus, in \( P(G) \) vs \( P(M) \), the claimant wife’s attainment of two university degrees, “funded mainly by the respondent”,\(^{103}\) during the marriage was a relevant factor in ordering a reappportionment of assets in favour of the husband. Weatherill J observed: “While I accept that the claimant performed the majority of the household activities and . . . looked after [the children] when she was not attending school, it is significant that as a result of the respondent’s financial support she is equipped with a strong future income-earning potential.”\(^{104}\)

Elsewhere, in \textit{Khorramatash v Boroojeni}, the Court reapportioned 100\% of the applicant common law wife’s pension to her in light of the parties’ relative contributions to the career of the other.\(^{105}\) Although the applicant contributed to the respondent’s career “by working for his company, where she contributed in excess of the monies she was earning”, as well as by “cooking, cleaning, and otherwise caring for [him]”, allowing him “to pursue his career unfettered by these responsibilities”, the Court noted the respondent “made no contribution to [her] career or career potential”.\(^{106}\)

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pension benefits having regard to s 95(2)(c): \textit{ibid} at para 151. See also \textit{ibid} at para 152.

\(^{103}\) \textit{Supra} note 100 at para 132.

\(^{104}\) \textit{Ibid.} This conclusion was reached in light of the evidence of a labour market expert report confirming the high employability of a registered nurse, the career path chosen by the 38-year-old claimant wife. The claimant had also worked in the field on a near full-time basis for some time prior to the hearing, again increasing her employability.


\(^{106}\) \textit{Ibid.} The Court also noted “She also gave up her employment and a potentially larger pension to come to Canada”: \textit{ibid} at para 48. Note that while in \textit{McGrail v McGrail}, 2016 BCSC 104 at para 83, [2016] WDFL 1632 [\textit{McGrail}], “taking on the primary burden of looking after the home and the children” was seen as an indirect contribution to the career potential of a spouse supporting, among other factors, an unequal division of assets, somewhat similar contributions were insufficient to merit unequal division in \textit{Ashak v Ashak}, 2016 BCSC 941 at paras 38–39, [2016] WDFL 3534.
Paragraph 95(2)(g) furthermore provides that a spouse’s detrimental impact on the value of family property or potential family property may be considered by the court. Fleming J in *Nearing* noted her belief that this section “appears focused on the spouse’s direct actions vis-à-vis the value of family property.” In *Bilawchuk v Bilawchuk*, the Court rejected that the respondent had “substantially reduced the value of the family home” either by allowing the mortgage to fall into arrears, resulting in foreclosure proceedings and a forced sale at a lower price, or by imprudent comments made to prospective purchasers.

Finally, paragraph 95(2)(i) provides “catch-all grounds” by permitting the court to consider any other factors, except those found in subsection 95(3), that may lead to significant unfairness. Although the full extent of this provision has yet to be determined, in *Nearing*, the

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107 *FLA, supra* note 1.

108 *Supra* note 102 at para 141 [emphasis added].


110 *Nearing, supra* note 102 at para 138.

111 *FLA, supra* note 1. Subsection 95(3) provides:

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

Section 161 states:

In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives: (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship; (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child; (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses; (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Thus, the *FLA* empowers the court to "use an unequal division of property to compensate for situations where spousal support is insufficient to meet the spousal support objectives": see *FLA Explained, supra* note 36).
presence of undisclosed financial assets was a factor considered under this heading.\textsuperscript{112}

2. THE CONTINUED ASSESSMENT OF FINANCIAL CONTRIBUTIONS UNDER SECTION 95?

A further issue which has generated conflicting decisions (and which is not explicitly addressed in the legislation) is the extent to which the courts may, notably pursuant to paragraph 95(2)(i), continue to have regard to the spouses’ respective contributions to the overall pool of family assets in ordering an unequal division.

On one hand, in \textit{P(G) v P(M)}, Weatherill J ordered a reapportionment of assets in favour of the respondent husband noting, among other factors, the “unequal contribution” of both spouses to the asset base at the beginning of the marriage: “The respondent brought assets into the marriage. The claimant did not.”\textsuperscript{113} Such contributions were again held to be of importance in \textit{Kuberg}.\textsuperscript{114} Reapportioning the entire increased value of the respondent’s business to him, Skolrood J was influenced by a number of factors, including the fact that the business was built solely through the respondent’s efforts and expertise prior to the parties meeting and the fact that the goodwill attached to the business was “generated solely as a result of [his] personal involvement

\textsuperscript{112} \textit{Supra} note 102 at para 152. See also \textit{McGrail, supra} note 106. The use of secret offshore accounts by financially stronger spouses as a means of hiding assets on divorce has recently attracted media attention in Canada. See Harvey Cashore, Priscilla Hwang, & Kimberly Ivany, “KPMG promoted hiding money from wealthy clients’ ex-spouses in offshore ‘sham’”, CBC News (7 June 2016), online: <www.cbc.ca/news/business/kpmg-tax-dodge-divorce-1.3618743>.

\textsuperscript{113} \textit{Supra} note 100 at para 132. See also the notional divorce test applied in a wills variation action in \textit{Brown v Terins} 2016 BCSC 42 at paras 38–41, 74 RFL (7th) 132. Following a 14 year relationship, the Court felt the common law spouse would be entitled to only 20% of the increased equity of the family home. Among the factors noted was that “Ms. Brown made no contribution to its acquisition and little contribution to its upkeep”: at para 39.

\textsuperscript{114} \textit{Supra} note 72.
and efforts”. The Court noted that while the claimant did contribute to the company, she was paid an amount which “significantly” exceeded the value of the work done by her.116

Sharma J in D(AM) v J(KR), on the other hand, refused to adopt such an approach. She cited Fleming J in Nearing, who observed that subsection 95(2) “does not appear to allow for the wide ranging examination of each spouse’s contribution” to the accumulation of family assets and their respective capacities that occurred pursuant to the FRA 1996.117 Sharma J found this approach preferable particularly in light of section 81, which provides that spouses are both entitled to family property “regardless of their respective use or contribution”.118 Taking a similar stance, Savage J explained in Slavenova v Rangelov:

The “significant unfairness” contemplated by s. 95 requires much more than differing financial contributions in a relationship. Exactly equal contribution is more likely exceptional than commonplace. The new regime under the FLA recognizes that partners will come to a relationship in differing circumstances and accounts for those in the concepts of “family property” and “excluded property”. The starting point in the division of property analysis already applies significant exclusions.119

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115 Supra note 72 at para 150.

116 Ibid. The Court added the following, ibid at para 151:

These factors, combined with the fact that the claimant will receive a significant financial benefit from her share in the two residential properties, for which she made a minimal financial contribution, support the conclusion that it would be significantly unfair to afford the claimant an equal, or any, share of [the business].

See also Walburger, supra note 99 at para 109 (where Fitzpatrick J accepted unequal contribution as one of several factors justifying unequal division).

117 D(AM) v J(KR), supra note 95 at para 66, citing Nearing, supra note 102 at para 141. See specifically FRA 1996, supra note 8, s 65(1)(f).

118 D(AM) v J(KR), supra note 95 at para 68 [emphasis in original].

119 2015 BCSC 79 at para 60, [2015] WDFL 5681. See also Nitouere v Jagtap, 2015 BCSC 1562 at para 149, [2015] WDFL 5681; G(P) v G(D), supra note 43 at para 78; Andermann, supra note 71. Similarly, in Shih, supra note 72, the court noted
The issue was brought again to the fore in *Jaszczewska v Kostanski*.\(^{120}\) Despite observing that “[h]ad the Legislature intended unequal contribution to be a significant factor justifying unequal division of family property under s. 95, surely the Legislature would have specifically said so”, Baker J in the BC Supreme Court appeared to proceed by considering the disparity in contributions (particularly contributions relating to the acquisition, maintenance and enhancement of family property) in supporting a departure from equal sharing.\(^{121}\) In reviewing the decision, the BC Court of Appeal acknowledged the seemingly incongruous outcome.\(^{122}\) Nevertheless, although conceding that there seemed to be “merit in Ms. Jaszczewska’s observation that the judge [appeared] to have placed undue emphasis on unequal contribution to the acquisition of family property during the relationship”, Harris J, holding for the court, dismissed the claim.\(^{123}\) He concluded that, despite appearances, the trial judge’s finding was not grounded in a broad consideration of the parties’ respective contributions during the relationship pursuant to paragraph 95(2)(i) but was instead rooted in paragraph 95(2)(f) of the *FLA*.\(^{124}\) The unequal division ordered was justified under paragraph 95(2)(f) in light of the appellant’s contributions made after the date of separation, which had caused a significant increase in the value of family property beyond market trends.\(^{125}\) Echoing Baker J’s rhetoric in the BC Supreme Court, Harris J

\(^{120}\) See *Jaszczewska 2015, supra* note 99; *Jaszczewska 2016, supra* note 34.

\(^{121}\) *Jaszczewska 2015, supra* note 99 at para 163.

\(^{122}\) *Jaszczewska 2016, supra* note 34.

\(^{123}\) *Ibid* at para 50.

\(^{124}\) Conscious of the apparent confusion in the trial judge’s judgment, the Court noted in *Jaszczewska 2016, supra* note 34 that “I think the judge was not assisted in her analysis by Mr. Kostanski’s argument that emphasized the residual discretion in s. 95(2)(i) rather than focusing on s. 95(2)(f)” at para 50.

\(^{125}\) *Jaszczewska 2016, supra* note 34 at para 52.
added: “Allowing relative contribution to become a regular consideration in the context of s. 95 would likely create uncertainty and complexity. This would be contrary to the legislative objectives . . . that underlie the FLA division of property regime.” However, he cautioned:

in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness . . . in my view, one cannot read the FLA as abolishing unequal contribution as a factor that may be relevant to reapportionment, although the circumstances in which it may be considered and relied on are intended to be much constrained.

3. **THE EXERCISE OF DISCRETION UNDER SECTION 96**

Finally, it is important to remember that judicial discretion is not merely limited to ordering a reapportionment of family assets. As noted above, section 96 of the FLA empowers the court to override the excluded property regime if, again, the court believes it would be “significantly unfair” not to divide excluded property having regard to certain factors included in subsection (b), namely:

1. the duration of the relationship between the spouses, and
2. a spouse’s direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

Echoing the interpretation of the term in section 95, the Court in *Andermatt* held that “significant unfairness” warranting the division of excluded property under section 96 “must be compelling or meaningful”

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126 *Jaszczeńska 2016, supra* note 34 at para 43.
127 *Ibid* at para 44.
128 *FLA, supra* note 1. Note that the increased value of the asset will automatically be subject to sharing without the exercise of judicial discretion. This provision, however, allows the court to bring the full value of the asset into pool for sharing. Paragraph 96(a) also provides that the court may order the division of excluded assets if “family property or family debt located outside British Columbia cannot practically be divided”.
129 See *F(VJ) 2015, supra* note 64; *B(J) v C(S), supra* note 58.
on a consideration of the factors set out in subsections 96(b). The Court added: “Division will be justified where the court finds that the consequences of not dividing excluded property would be so weighty as to produce an unjust or unreasonable result.”

Emerging case law appears to show a clear focus on the need to demonstrate direct financial contributions to the excluded property. In *Cabezas v Maxim*, the Court was willing to apply section 96 in favour of the applicant wife where she had maintained the home and but for her financial contributions, the property would have been lost to foreclosure. A division of potentially excluded property was also considered appropriate in *F(VJ) 2015*. Here, the wife made significant contributions to the preservation and maintenance of the home. She agreed to encumber a property that she owned to obtain funds to build the new house in question and leveraged her credit to secure a line of credit for the property. She took legal responsibility for payment of all the construction bills and, in total, increased her personal indebtedness by in excess of $1 million.

On the other hand, in *Andermatt*, the Court found the husband’s contributions in the form of a down payment for the property and some repayments were not so weighty as to justify a section 96 intervention. Distinguishing the facts at hand from those in *F(VJ) 2015*, the Court noted that the applicant wife’s contribution in *F(VJ) 2015* “were of an entirely different order of magnitude than the contributions of the respondent in this case”. Likewise, in *B(J) v C(S)*, the Court refused to

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130 *Supra* note 71 at para 59.

131 Ibid.

132 2014 BCSC 767, [2014] WDLF 2926, aff’d 2016 BCCA 82, [2016] WDLF 1963. Although the case was appealed, the appeal was dismissed.

133 *Supra* note 64. Note that although this decision was appealed, the appeal was dismissed. See *F(VJ) 2016*, *supra* note 73.

134 *F(VJ) 2015*, *supra* note 64 at para 84.

135 *Supra* note 71.

136 Ibid at para 69.
divide the full value of excluded property.\textsuperscript{137} Although the Court acknowledged that the respondent had “made some modest direct contributions toward the preservation of the excluded property”, these contributions were insufficient.\textsuperscript{138} Duration of the relationship and contributions again were brought to the fore in \textit{Staehli}.\textsuperscript{139} In refusing to exercise its discretion under section 96, the Court noted “[t]his was not a long relationship” and while the applicant had paid the property taxes on the property in question, “she had the benefit of living there”.\textsuperscript{140}

III. DOES THE NEW PROPERTY DIVISION SCHEME APPLIED UNDER THE \textit{FLA} ACHIEVE ITS GOALS?

The \textit{FLA} was drafted with “an eye” to supporting a number of “general policy values”.\textsuperscript{141} Among these values, as noted at the outset, was a desire to encourage families “to resolve their disputes in co-operative ways”.\textsuperscript{142} One of the key goals of the new Act was “Not Making Court a Presumptive Starting Point”, but rather facilitating out-of-court settlements where appropriate.\textsuperscript{143} In seeking to achieve this goal in relation to the division of property on relationship breakdown, the legislature sought to clarify the law governing family property disputes and reduce judicial discretion, “particularly at the initial stage of identifying which assets are subject to division”.\textsuperscript{144} It also sought, indirectly, to bolster the presumption of equal sharing. The question therefore arises: how has the \textit{FLA} fared in striving to achieve its objectives?

\textsuperscript{137} \textit{Supra} note 58 at para 105.
\textsuperscript{138} \textit{Ibid} at para 105.
\textsuperscript{139} \textit{Supra} note 84.
\textsuperscript{140} \textit{Ibid} at para 95.
\textsuperscript{141} \textit{White Paper, supra} note 3 at 2.
\textsuperscript{142} \textit{Ibid}.
\textsuperscript{143} \textit{Ibid} at 5 [emphasis in original].
\textsuperscript{144} \textit{Ibid} at 80.
Although only in its infancy, early indications do suggest that at least certain aspects of the FLA have brought increased certainty to the overall property division regime. The arguably indefinite “family purpose” test has been replaced with a simpler “bright-line” approach to asset identification through the introduction of the partnership of acquests model. Notwithstanding that a significant amount of time has already been spent in determining the scope of the tracing provisions included in the FLA, the recent intervention of the BC Court of Appeal, if followed, may also facilitate a clear line of authority emerging on this point. Few other asset identification issues have proved especially problematic. The community of property subject to sharing is now becoming clearer, minimizing the scope for dispute.

However, the extent to which the limitations placed on the exercise of judicial discretion, particularly pursuant to section 95, have contributed towards increasing the certainty and foreseeability of the overall property division regime is more questionable. On one hand, although “[t]he FLA has not set the bar so high that finding significant unfairness is next to impossible”, it would appear that it ought to be considerably more difficult to surmount the new, more stringent, threshold. Nevertheless, the seemingly significant number of reapportionments already ordered by the BC Supreme Court is arguably

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145 For discussion of the relative merits of functional tests and community of acquest or excluded asset models, see Kathryn O’Sullivan, “Rethinking Ancillary Relief on Divorce in Ireland: The Challenges and Opportunities” (2016) 36:1 Leg Stud 111.

146 The intervention of the Supreme Court of Canada, however, may be required to definitively resolve the conflict. The problems in this area and the impact they have had on the attainment of other objectives of FLA are discussed further below.

147 Associated issues in relation to the division of negative equity of excluded assets have been addressed by the judiciary. This was an “outstanding policy issue” in the White Paper, supra note 3 at 81, and was not addressed directly in the FLA. However, this issue was tackled in Asselin, supra note 44 and later in Remmen, supra note 55 (in which the Court held “where excluded property has depreciated in value since one party brought it into the relationship, that party has no ability to look to other family property to make up the loss in value,” at para 29).

148 F(VJ) 2015, supra note 64 at para 83.
a cause for some concern.\textsuperscript{149} The inconsistency evident in the application of certain factors pursuant to section 95, notably the role of relationship duration, as well as the conflicting lines of authority which have emerged in relation to the importance of contributions, serve to amplify this fear. The development of clear lines of authority in relation to these issues will be vital in determining how strong the presumption of equal sharing really is under the new scheme and how foreseeable property division will be going forward.\textsuperscript{150}

Tying into the overall desire to better facilitate out-of-court settlements, the property division reform also sought to develop a “simpler” and “easier to understand” approach which would “better fit with people’s expectations about what is fair”, allowing them, through the new regime, to “keep what is theirs” (such as pre-relationship property and gifts and inheritances given to them as individuals).\textsuperscript{151} However, the lack of clarity which has arisen in relation to tracing has, to date, seriously undermined the attainment of this goal. The dominance of the Rule of Law approach within the BC Supreme Court, albeit prioritizing the attainment of certainty, appears particularly liable to generate confusion at grass roots level, with spouses’ views on “what is theirs” likely to differ greatly. As Fenlon J explained in \textit{G(P) v G(D)}, under this line of authority, even where a spouse’s name is on the title to a property, they are legally treated as a co- or sole-owner while the relationship subsists; on death, should the relationship flounder, the new property rights regime which “descends” ensures their inclusion on the title will hold little currency if their former spouse can claim the asset as

\textsuperscript{149} A cursory search of CanLII (as of 25 November 2016) for “section 95” highlights 81 recorded cases referring to s 95, with a considerable number of applications succeeding in obtaining a reapportionment.

\textsuperscript{150} Although a clear line of authority appears to be emerging in relation to section 96 of the \textit{FLA}, inconsistencies remain a feature of the exercise of judicial discretion pursuant to section 95 of the \textit{FLA}.

\textsuperscript{151} \textit{White Paper, supra} note 3 at 81.
excluded property.\textsuperscript{152} While a legal practitioner may be able to discern the
distinction, such clarity of understanding may be more challenging for
the spouse concerned, particularly, perhaps, if the property involved is
the family home.\textsuperscript{153} Nevertheless, the recent rejection of the \textit{Remmem}
approach in \textit{F(VJ) 2016} does throw this line of authority into some
doubt, with the BC Court of Appeal decision in the latter presenting an
arguably more intuitive approach to the question of inter-spousal gifts
than the one currently dominating at first instance. How this conflict of
interpretation is resolved going forward will play a significant role in the
attainment of the legislature’s goal of ensuring ease of understanding in
the overall scheme.\textsuperscript{154}

Arguably the greatest shortcoming of the property division regime
introduced by the \textit{FLA} is the seemingly weak protection afforded to the
family home, specifically. Pursuant to the \textit{FLA}, where the home
constitutes an excluded asset, the full value of the property may only be
subject to sharing under section 96 if significant direct financial
contributions were made to it.\textsuperscript{155} Where section 96 does not apply—for
example, where the contributions were indirect or not of a sufficiently
substantial financial nature—only the increased equity of the property

\textsuperscript{152} \textit{Supra} note 43 at paras 78–79. Although they will share in the increased value of the
asset, if any, the entire value of the asset will not be subject to sharing.

\textsuperscript{153} Moreover, this potential for confusion vis-à-vis ownership of the family home is even
more likely when the protection afforded to it pursuant to the \textit{FLA} is juxtaposed
with that provided by the \textit{FRA 1996}, \textit{supra} note 8. Under the \textit{FRA 1996}, the family
home, where present, was always subject to equal sharing given its use for a “family
purpose”, even in circumstances where the non-owning spouse’s name was not on the
title. Under the \textit{Remmem} interpretation of the \textit{FLA}, however, even where title is held
jointly or solely in relation to the family home, a spouse may only be entitled to share
in the increased value of the property, if any.

\textsuperscript{154} It is arguable that if the \textit{Remmem} line of authority is ultimately accepted as
definitive, notwithstanding the current shift with the decision in \textit{F(VJ) 2016}, a
focused public awareness campaign should be employed to educate spouses on the
practical implications of the tracing provisions included in the \textit{FLA}. Such action
would arguably reduce conflict by better shaping parties’ expectations.

\textsuperscript{155} \textit{FLA}, \textit{supra} note 1. See earlier discussion.
will be subject to sharing. Although rising property prices may give the illusion that a share in the increased equity of the home pursuant to the FLA regime is sufficient, inflation is not guaranteed. Consequently, a non-owning spouse’s ability to share in any value of the property, if excluded, may depend heavily on the performance of the wider economy and the continued upward-trend of property prices.

It was open to the legislature to provide for the automatic inclusion of the family home in the pool of assets for sharing akin to other Canadian provinces including Ontario. Although this would have met the stated goals of certainty and simplicity, and was lobbied for by a cohort of BC legal professionals, the probability of such reform being implemented was slim. In various reviews of its family property regime, the British Columbian legislature showed limited concern with protecting the property. In considering the options for reform of the Family Relations Act in 1989, the Law Reform Commission of British Columbia examined the special provisions adopted in Ontario directed at the protection of the family home. The Commission refused to recommend the incorporation of such special protection, concluding that the home should be treated like any other asset owned by the

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156 Theoretically, if considerable indirect contributions have been made to the family home and it remains excluded, the unfairness caused by a failure to share in the full value of the property could perhaps, notwithstanding paragraph 82(a), be considered under FLA, s 95(2)(i) in ordering unequal division of the community assets, including an unequal division of the increased value of the home. However, a line of authority to this effect has not yet emerged and the possibility of such a development is merely speculative.

157 Law Reform Commission, Property Rights on Marriage Breakdown, supra note 24 at VI(D)(2)(G). The equivalent legislation in Ontario explicitly stated the full value of the family home should always be subject to sharing, even if the property was brought into the marriage, or received by gift or inheritance.
spouses.\textsuperscript{158} This view was also adopted in the 2010 \textit{White Paper} and, as a result, the \textit{FLA} makes little provision for the family home.\textsuperscript{159}

Nevertheless, given that the home, unlike most assets, is a source of comfort, security and protection, lying at the “material substratum of the matrimonial consortium”,\textsuperscript{160} it is argued a mechanism ought to exist whereby the \textit{full value} of the property could be subject to sharing, absent direct financial contributions. One way in which better protection could be provided vis-à-vis the family home would be to allow indirect contributions to the home to be a factor considered pursuant to section 96 in permitting the sharing of the property if excluded.\textsuperscript{161} While such reform may generate increased uncertainty, thereby jeopardizing the foreseeability of the regime, and although it was arguably overlooked on this basis, reform could incorporate much needed flexibility in the legislation in relation to this most important asset.\textsuperscript{162}

\textsuperscript{158} See Law Reform Commission, \textit{Property Rights on Marriage Breakdown}, supra note 24 at 107–108. A seemingly major factor influencing this view was the desire to move away from an asset specific regime.

\textsuperscript{159} Note that paragraph 90(2)(a) does empower the court to make a temporary order for the exclusive occupation of the property. It is submitted that the failure to prioritise the protection of the family home reflects the comparatively weak protection afforded to the home elsewhere under British Columbian family property law. See e.g. Kathryn O’Sullivan, “Protection against Unilateral Dispositions of the Family Home: An Irish perspective” (2013) 27:3 Intl JL Pol'y & Fam 399 at 399–400 (for discussion of the \textit{Land (Spouse Protection) Act 1996}). The protection afforded to the home has also arguably been weakened on death with the removal of the life estate pursuant to the \textit{Wills, Estates and Succession Act}, SBC 2009, c 13.


\textsuperscript{161} As this could be limited to the family home, specifically, the scheme could retain its overall focus: certainty. It would also require the rewording of section 81 to state that assets in the pool automatically are so included “irrespective of contributions, other than where otherwise stated”. This should also remain subject to paragraph 96(b)(i)’s requirement to have regard to duration—this would be important in order to value the contributions over time as Eekelaar has noted. See J Eekelaar, “Asset Distribution on Divorce—Time and Property” (2003) 33:11 Family Law Journal 828.

\textsuperscript{162} It would also partially respond to the charges levelled by various BC lawyers that the \textit{FLA} could leave financially vulnerable spouses, often women, in a weaker position
CONCLUSION

Recognizing that the “scope and scale of social change in Canada in the more than 30 years since [the FRA 1979] was introduced has been enormous”, the Ministry of the Attorney General recently noted that divorce has evolved “from a rare event to a common occurrence” in British Columbia. In this environment, the importance of striving to facilitate out-of-court settlements, where possible, is clear. With its latest reform and the introduction of Part 5 of the FLA, the British Columbian legislature has sought to meet this need.

Inching ever further along the rule-discretion continuum, the new property division scheme endeavours to provide spouses with much needed foreseeability on relationship breakdown, particularly in the identification of the assets subject to sharing, while simultaneously retaining limited judicial discretion to depart from the prescribed scheme where appropriate. While some trends are becoming evident in the approach of the British Columbian courts to the exercise of this discretion, it may be some time before the law can legitimately be described as clear and certain. It is hoped that sooner, rather than later—through the intervention of the BC Court of Appeal and, potentially, the Supreme Court of Canada—definitive precedents will be established, particularly in the various areas of contention highlighted, thereby paving the way for the development of a settled body of jurisprudence and providing the well-defined ‘shadow of the law’ sought to facilitate private bargaining in the province.

than they would have been pursuant to the FRA 1996. This threat to economically weaker spouses would appear to have been amplified by the dominant interpretation afforded to the tracing provisions of the FLA in the BC Supreme Court, discussed above.

163 White Paper, supra note 3 at 1. It noted that “[a]ccording to Statistics Canada data, as of 2002, 41 per cent of British Columbia marriages ended in divorce before their 30th anniversary”: ibid at 3.