

ESTATE PLANNING UPDATE 2018

PAPER 1.1

“TILL DEATH DO US PART – HOPEFULLY”: PLANNING IN UNCERTAIN TIMES

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FAMILY LAW AND ESTATE PLANNING

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I. Introduction

The recent significant changes in family law created a corresponding dramatic impact on estate planning. Lawyers who practice estate planning must be alive to the potential consequences of a relationship breakdown upon the estate plan. This paper covers some important issues that estate planners should consider, including:

1. who could a “spouse” potentially be;
2. what are the potential risks (and rewards) of trust planning;
3. how can family law agreements be used as an effective part of an overall estate plan;
4. how are British Columbia’s courts interpreting the term “significantly unfair” under the new *Family Law Act*; and
5. what are the special considerations when planning for a blended family.

II. Who could the “spouse” potentially be, anyway?

In estate planning, a preliminary question is always who the client’s family members are - including whether they have a spouse. With the coming into force of the *Wills, Estates and Succession Act*, S.B.C. 2009, c.13 (“*WESA*”), the *Family Law Act*, S.B.C. 2011, c.25 (the “*FLA*”), and recent case law interpreting and applying these statutes, this question is now a more nuanced query.

WESA now defines “spouse” as:

When a person is a spouse under this Act

- 2 (1) Unless subsection (2) applies, 2 persons are spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time and

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- (a) they were married to each other, or
- (b) they had lived in a marriage-like relationship for at least 2 years.

...

(3) A relevant time for the purposes of subsection (1) is the date of death of one of the persons unless this Act specifies another time as the relevant time.

Determining what constitutes a “marriage-like relationship” can be an elusive and difficult exercise, and is always fact-specific.¹ Courts have developed a multi-faceted framework to determine the status of a relationship. The principles and cases enumerated in this paper outline the issues to consider when assessing whether a couple may be in a marriage-like relationship for the purposes of British Columbia law.

There is no “checklist” for determining which relationships are “marriage-like” and which ones are not.² Numerous cases in British Columbia and throughout the rest of Canada have relied on *Molodowich v. Penttinen* when assessing “marriage-like” relationships.³ In *Molodowich*, the following factors were identified as relevant in assessing whether a relationship is in fact “marriage-like”:

1. Shelter

- (a) Did the parties live under the same roof?
- (b) What were the sleeping arrangements?
- (c) Did anyone else occupy or share the available accommodation?

2. Sexual and Personal Behaviour

- (a) Did the parties have sexual relations? If not, why not?
- (b) Did they maintain an attitude of fidelity to each other?
- (c) What were their feelings toward each other?
- (d) Did they communicate on a personal level?
- (e) Did they eat their meals together?
- (f) What, if anything, did they do to assist each other with problems or during illness?
- (g) Did they buy gifts for each other on special occasions?

3. Services

What was the conduct and habit of the parties in relation to:

- (a) Preparation of meals,
- (b) Washing and mending clothes,
- (c) Shopping,

1 *A.J.E. v. T.B.W.*, 2017 BCSC 1657 at para. 17.

2 *Austin v. Goerz*, 2007 BCCA 586 at para. 58 (“*Austin*”); *J.J. G. v. K.M.A.*, 2009 BCSC 1056 at para. 34.

3 *Molodowich v. Penttinen*, 1980 CanLII 1537 (Ont. Dist. Ct.) (“*Moldowich*”).

- (d) Household maintenance,
- (e) Any other domestic service.

4. Social

- (a) Did they participate together or separately in neighbourhood and community activities?
- (b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

5. Societal

- (a) What was the attitude and conduct of the community towards each of them as a couple?

6. Support (Economic)

- (a) What were the financial arrangements between the parties regarding the provision of or contribution towards necessities of life (food, clothing, shelter, recreation, etc.)?
- (b) What were the arrangements concerning the acquisition and ownership of property?
- (c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

7. Children

- (a) What was the attitude and conduct of the parties concerning children?

While the *Molodowich* factors are often considered in evaluating whether a relationship is, in fact, “marriage-like”, British Columbia courts emphasize that this list is merely a guide for consideration.⁴ The analysis of who is a spouse is “fact-specific” and “must be made on a comprehensive basis, having regard to all of the evidence”.⁵

In 1986 the BC Court of Appeal concluded it is also important to look at both the couple’s subjective intent and their objective behaviour. This two-part test is:

- a. Subjective intention of the couple: Would the couple “consider themselves committed to life-long financial and moral support of that partner?”; and
- b. Objective analysis of the couple’s behaviour: How did the couple refer to themselves? Do they share legal rights to their accommodation? Did they share property or finances? Did they share vacations?⁶

In 2007 our BC Court of Appeal again considered a marriage-like relationship in *Austin*.⁷ The plaintiff brought an application for summary judgment requesting a declaration that the defendant was not a common-law spouse of the deceased within the meaning of the *Estate Administration Act*, R.S.B.C. 1996,

⁴ *Austin*, above at paras. 23-25; *A.J.E. v. T.B.W.*, 2017 BCSC 1657 at paras. 13-14 (“*A.J.E. v. T.B.W.*”).

⁵ *A.J.E. v. T.B.W.*, above, at para. 17.

⁶ *Gostlin v. Kergen* (1986), 3 B.C.L.R. (2d) 264 (CA).

⁷ *Austin*, above.

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c.122. The application was dismissed by the chambers judge. The central issue on appeal was the appellant's argument that the deceased's participation in the "marriage" did not involve the "financial maintenance and contribution that is a 'hallmark' of a marriage-like relationship".⁸ The Court of Appeal rejected that argument, citing the following passage from the Saskatchewan Court of Queen's Bench in *Yakiwchuk v. Oaks*

[10] Spousal relationships are many and varied. Individuals in spousal relationships, whether they are married or not, structure their relationships differently. In some relationships there is a complete blending of finances and property — in others, spouses keep their property and finances totally separate and in still others one spouse may totally control those aspects of the relationship with the other spouse having little or no knowledge or input. For some couples, sexual relations are very important — for others, that aspect may take a back seat to companionship. Some spouses do not share the same bed. There may be a variety of reasons for this such as health or personal choice. Some people are affectionate and demonstrative. They show their feelings for their "spouse" by holding hands, touching and kissing in public. Other individuals are not demonstrative and do not engage in public displays of affection. Some "spouses" do everything together — others do nothing together. Some "spouses" vacation together and some spend their holidays apart. Some "spouses" have children — others do not. It is this variation in the way human beings structure their relationships that make the determination of when a "spousal relationship" exists difficult to determine. With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage are much more difficult to ascertain. Rarely is there any type of "public" declaration of intent. Often people begin cohabiting with little forethought or planning. Their motivation is often nothing more than wanting to "be together". Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people "ease into" situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist.⁹

(emphasis added)

The Court of Appeal held the couple's financial arrangements were "but one factor to be considered" and concluded the respondent and the deceased were spouses at the time of the deceased's death. *Austin* establishes that whether a couple were in a "marriage-like relationship" requires a holistic approach, taking into account all aspects of their relationship.

In the more recent BCCA decision of *Weber v. Leclerc*, 2015 BCCA 492, the Court reviewed the evolution of the analysis of whether a couple is in a "marriage-like relationship" and stated that "Today, though economic dependence or interdependence exists in many marriages, it would be difficult to characterize such dependence as being an essential characteristic of marriage".¹⁰

⁸ *Austin*, above.

⁹ *Yakiwchuk v. Oaks*, 2003 SKQB 124.

¹⁰ *Weber v. Leclerc*, 2015 BCCA 492 at para.12.

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Two recent decisions make it clear that even cohabiting is not an absolute requirement for a couple to be found to be in a “married-like relationship”: *Re Connor Estate*¹¹ and *Robledano v. Jacinto*¹².

Previously being unable to cohabit because of recognized reasons (for example, work in other jurisdictions) was recognized not to be a bar to a determination of spousal status - these cases now make it clear the reason the couples did not cohabit may be determinative of spousal status (in one there was no cohabitation because of family and religious concerns, and in the other because of lifestyle choices).

In *Re Connor Estate*, Mr. Justice Kent concluded that the claimant, Mr. Chambers, and the deceased, Ms. Connor, were in a “marriage-like relationship” despite never living together.

The Court confirmed, in the context of *WESA*, a person can have more than one “spouse”. The Court noted that “there is no checklist of characteristics that will invariably be found in all marriages” and that the claimant’s and the deceased’s living arrangements, while unorthodox, did not preclude their relationship from being marriage-like. Mr. Justice Kent concluded:

[53] Like human beings themselves, marriage-like relationships can come in many and various shapes. In this particular case, I have no doubt that such a relationship existed between Mr. Chambers and Ms. Connor for many years and that it continued to exist right up to the date of her untimely death in January 2015. I therefore declare that at the time of her death, Mr. Chambers was the “spouse” of Ms. Connor within the meaning of s.2 of *WESA*.¹³

(emphasis added)

In *Robledano*, the testator, Ms. Jacinto, and the plaintiff, Ms. Robledano, began living together in 1985 and did so for 15 years. The plaintiff sought a declaration that she was the testator’s surviving spouse under s.2 of *WESA*.

Madam Justice Fleming concluded the testator and the plaintiff were in a marriage-like relationship from 1985 to 2000, and again from 2005 until the testator’s passing, notwithstanding the plaintiff and testator were not regularly sexually intimate nor consistently living in the same residences. Madam Justice Fleming concluded that it was not fatal to the plaintiff’s claim that the couple did not consistently live together (citing *Re Connor Estate* in support of her analysis) and justified the couple’s unusual living arrangements.¹⁴

Notwithstanding a client may not believe they have a spouse, it may be that a court would disagree. It is clear that a determination of who the spouse of the Deceased is as at their death is an inherently fact specific exercise. Accordingly, it is critical for any lawyer to discuss this issue with their client, if only to educate their client of potential consequences.

¹¹ *Re Connor Estate* 2017 BCSC 978 (“*Re Connor Estate*”).

¹² *Robledano v. Jacinto*, 2018 BCSC 152 (“*Robledano*”).

¹³ *Re Connor Estate*, above, at para. 58.

¹⁴ *Robledano*, above, at para. 89.

III. Risks and Rewards of Trust Planning

Trust planning can be a highly effective tool for sophisticated estate planning. However, the manner in which a beneficial interest in a trust will be treated by the *FLA* in the event of a relationship breakdown must be considered by estate planners. There are two significant questions, which have no easy answers:

1. Will a beneficial interest in a trust be treated as family property, subject to division?; and
2. If so, how will that beneficial interest be valued?

I note that in the second day of the CLE Estate Litigation Update 2018 Michelle Isaak will be speaking on *"The Trust as a Challenged Asset in Family Law Claims"*, from a litigation perspective.

The Family Law Act

The starting point of the analysis is the statutory regime set out in the *FLA*.

Section 81(a) of the *FLA* provides that spouses are presumed to each be entitled to an equal share in "family property".

Family property is defined in sections 84(1), (2) and (3) and 85 as follows:

Family Property

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate, property;
 - (i) that is owned by at least one spouse, or
 - (ii) in which at least one spouse has a beneficial interest;

...

(2) Without limiting subsection (1), family property includes the following:

...

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

(g) the amount by which the value of excluded property has increased since the later of the date

- (i) the relationship between the spouses began, or
- (ii) the excluded property was acquired.

(3) Despite subsection (1) of this section and subject to section 85 (1) (e), family property includes that part of trust property contributed by a spouse to a trust in which

- (a) the spouse is a beneficiary, and has a vested interest in that part of the trust property that is not subject to divestment,
- (b) the spouse has a power to transfer to himself or herself that part of the trust property, or

(c) the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.

“Excluded property” is defined at s.85 of the *FLA* as:

Excluded Property

85 (1) The following is excluded from family property:

...

- (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
- (f) a spouse's beneficial interest in property held in a discretionary trust
 - (i) to which the spouse did not contribute, and
 - (ii) that is settled by a person other than the spouse;

Will a beneficial interest in a trust be found to be family property?

Section 84(1)(a)(ii) specifically includes as family property a “beneficial interest of at least one spouse in property”.

It is clear that pursuant to s.84(3)(a) of the *FLA* a trust settled by one spouse to benefit him/herself will be considered to be “family property” (such as an alter ego or joint partner trust). If a spouse remains a beneficiary, has a power to transfer to himself or herself some part of the trust property, or has a power to terminate the trust (and upon termination, that part of the trust property will revert to the spouse) then the trust will be considered to be “family property” subject to s. 84(3).

If s.84(3) of the *FLA* does not apply, then property that a spouse disposes after the spousal relationship began and where “the spouse retains authority alone or with another party over the trust property to require its return or to direct its use or further disposition in any way”, is also deemed to be family property (s.84(2)(f)). This subsection allows courts to include assets that a spouse retains control of as family property, regardless of whether that control is exercised through a formal trust relationship or not. Subsection 84(2)(f) is broad and as demonstrated by the Supreme Court of British Columbia, can be used to prevent transactions that “deliberately divest” a spouse’s interest from being captured by the *FLA*.¹⁵

While s. 85(1)(f) defines “excluded property” as a “spouse’s beneficial interest in property held in a discretionary trust” (if the spouse did not settle nor contribute to that discretionary trust), the increase in value of that interest (since either the date the relationship began or the date the excluded property was acquired) is family property, subject to division. However, s.84(2.1) states, for the purposes of subsection (2)(g), that any increase in the value of a beneficial interest in a discretionary trust does not include the value of any property received from the trust.¹⁶

15 *M.C.V. v. F.V.*, 2018 BCSC 96 (“*M.C.V. v. F.C.*”).

16 Mary Hamilton, “Discretionary Trusts from a Family Law and Estates Perspective” (Vancouver: Pacific Business Law Institute, January 2018).

The case law interpreting section 84 and 85 of the *FLA* is now beginning to slowly develop. *S.L.M.W. v. M.R.G.W.* interpreted s. 84(3).¹⁷ The husband was a trustee of a trust holding the New Zealand property (together with a co-trustee, his solicitor) and a discretionary beneficiary of the trust. The husband had neither the power to transfer the trust property to himself nor to terminate the trust. The husband argued that the trust was excluded property and relied on s.84(3) of the *FLA* to demonstrate his beneficial interest did not fall under one of the three enumerated statutory categories of trust family property. Mr. Justice Steeves disagreed, concluding that while the husband's beneficial interest was not one listed specifically in s.84(3), it would be a "misreading of s.84 as a whole" to interpret s. 84 so narrowly. He held that the husband's beneficial interest in the trust was family property, and that the increase in the value of the discretionary interest from the beginning of the relationship was subject to division.

The two recent cases of *Baryla v. Baryla*¹⁸ and *M.C.V. v. F.V.*¹⁹ also consider a spouse's interest in a trust in the context of s.84.

In *Baryla*, the wife sought an unequal division of family property and spousal support. The husband asserted that a number of corporate shares should be excluded from the division of family property on the basis that they were held in an "informal trust" for his children. However, the Court found the husband's evidence to be "vague" and "contradictory" and held the shares (pursuant to s.84(3)(b) and (c)) to be family property as the husband had the ability to either transfer the shares directly to himself or terminate the "trust" with the shares returning to his ownership.

In *M.C.V.*, the husband settled property into a discretionary trust for himself and his family before he married. The husband remained as a trustee of the trust. The wife claimed the Squamish property was "family property" pursuant to s.84(2)(f). Madam Justice Dardi noted that, pursuant to s.84(2)(f), the legislature intended to discourage trust transactions that "deliberately divest" a spouse's interest from being captured by the *FLA*. She found that the husband's settlement of the property into the trust constituted such a discouraged transaction, and held that the increase in the value of the Squamish property during the time of the relationship was properly family property.

How will a beneficial interest be valued?

Perhaps more troubling than conclusively determining when a beneficial interest in a trust will be found to be subject to division is the difficult question of how that beneficial interest should be valued in the event of a relationship breakdown (or how the increase in value should be calculated). There are a number of potential methods to valuing a beneficial interest, including:

- a. **Fair Market Value:** the fair market value of the underlying trust property;
- b. **Value to Owner:** the amount that a beneficiary might be prepared to continue to remain a beneficiary of the trust;
- c. **Fair Value:** a value that is just and equitable in all of the circumstances;

¹⁷ *S.L.M.W. v. M.R.G.W.*, 2016 BCSC 272 ("*S.L.M.W.*").

¹⁸ *Baryla v. Baryla*, 2017 BCSC 1759 ("*Baryla*").

¹⁹ *M.C.V.*, above.

- d. **If and When:** avoiding determining a value of the beneficial interest, and merely divides the amount received “if and when” it is received;
- e. **No Valuation Possible:** an argument that a truly contingent beneficial interest is incapable of being valued as there is no guarantee of ever receiving a distribution from the trust.²⁰

Unfortunately, we do not yet have clear jurisprudence in British Columbia which definitely determines how a beneficial interest in a discretionary trust should be valued for the purposes of the *FLA*.²¹ A brief review of the Canadian jurisprudence, and the various methods in which courts have valued beneficial interests in discretionary trusts, is helpful in illustrating the complexities of the issue. We discuss these cases in chronological order.

BC Case Law

The BC Supreme Court in *Grove v. Grove* was rendered under the *FRA*.²² After discussing trust valuation principles in some detail, and noting that they would require actuarial evidence to accurately value the trust interest, the Court ultimately re-apportioned the trust interest.

The BC Court of Appeal in *McKenzie v. McKenzie* considered whether a recreational property held by a trust was family property.²³ The husband was the trustee of the trust and his two children were the beneficiaries. The Court concluded that the husband’s life interest in the recreational property was a family asset and ordered the husband compensate the wife for half of the value of the life interest (notwithstanding the husband was not a beneficiary of the trust).

In *Purtzki v. Saunders*, the husband owned the matrimonial home and placed it into a family trust before the marriage began.²⁴ The husband’s friends were trustees of the trust and his children were the two beneficiaries. The wife brought a claim for the division of the trust. The trial judge initially found that the husband’s interest in the family trust was a family asset and re-apportioned the trust interest 70% to the husband and 30% to the wife. The husband appealed in part on the basis that the trial judge erred in characterizing his interest in the family trust as a family asset, but this appeal was dismissed.

Case Law in Other Jurisdictions

There are several key cases to consider from other jurisdictions, which are also discussed in chronological order.

20 Christine Murray and Kendra Marks, “Valuing Discretionary Trusts” (Vancouver: Continuing Legal Education Society of British Columbia, June 2018).

21 Carmen S. Thériault, “WESA, Trusts and Family Law” (Vancouver: Continuing Legal Education Society of British Columbia, June 2015).

22 *Grove v. Grove*, 1996 CanLII 2626 (BCSC) (“*Grove*”).

23 *McKenzie v. McKenzie*, 2014 BCCA 381.

24 *Purtzki v. Saunders*, 2016 BCCA 344.

The Ontario Supreme Court case of *Sagl v. Sagl* is a prominent and early decision (that has subsequently frequently been criticised) that attempts to value a discretionary trust.²⁵ The husband settled a trust prior to his marriage to his wife, the beneficiaries of which were the husband, his three children from a prior marriage and the husband's grandchildren. The husband was initially a trustee (with the power to appoint or remove trustees of that trust) but had resigned as a trustee. In valuing the husband's contingent capital interest in the assets of the trust, the Ontario Supreme Court stated at para. 37:

...The valuation of a contingent interest in a discretionary trust under [the *Family Law Act*] is regarded as a difficult subject because the very nature of the "contingency" leans to uncertainty... I have decided to approach this difficult issue on a fair and equitable basis having regard to trust law, the definition of property and the evidence as to what the intention was at the time of the creation of the Trust. I have determined that Mr. Wolfson's compromise submission produces the fairest and most equitable result; it is that I should treat the Trust assets as if there were a deemed realization amongst all capital beneficiaries as at February 21, 1992. There were 5 capital beneficiaries on the date of marriage. There were seven on February 21, 1992. This produces the following calculation using the mid point of Mr. Freedman's values less contingent income taxes.

The Alberta Court of Queen's Bench utilized the "fair value" approach to valuing trust interests in *Kachur v. Kachur*.²⁶ In that case, a discretionary family trust was determined to be property owned by spouses for the purposes of the division of family property. A trial of a preliminary issue was held to determine the children's interest in the trust so that their interest could be subtracted from the parents' interest prior to division. The Court considered what interests the children would have in the trust and what contingencies applied to diminish their interest. Such contingencies included: (i) that the trustees might distribute trust property unequally among the beneficiaries – or entirely to one beneficiary; (ii) that grandchildren might be born and increase the size of the group eligible for distributions; (iii) that the trustees might terminate the trust and transfer the trust property to a charity; and (iv) that the trustees might exercise their discretion to amend the trust terms by adding more beneficiaries and exclude all the children. The Court also evaluated the trustee spouse's interest in the trust, including that the trust was created for the children, the trustees excluded him from all previous distributions and that he renounced his interest in the trust. In considering all of the above, the Court in *Kachur* concluded that the trustee spouse's interest was of no value.

The Manitoba Court of Queen's Bench in *Spiring v. Spiring* canvassed three different approaches to valuing trust interests.²⁷ The Court noted three approaches applied to evaluate trusts in the past: (i) the "if and when" approach; (ii) providing a *pro rata* distribution among the capital beneficiaries at the date of valuation; and (iii) using a holistic approach to consider the value of the trust interest while considering contingencies. However, the Court in *Spiring* never evaluated trust interests in the decision as the matter at issue was procedural and such an evaluation would be "premature".

Ontario's Superior Court of Justice in *LeVan v. LeVan* also considered the valuation of discretionary trust interests and noted the following factors should be considered:

25 *Sagl v. Sagl*, 1997 CanLII 12248 (ONSC) ("*Sagl*").

26 *Kachur v. Kachur*, 2000 ABQB 709 ("*Kachur*").

27 *Spiring v. Spiring*, 2004 MBQB 55 ("*Spiring*").

- the spouse did not have the ability to control the trust or trustees;
- the spouse could not force dividends;
- the history of dividend payments;
- the family dynamics;
- restrictions on share transfer;
- the application of generally accepted valuation principles; and
- other provisions of the “Voting Trust Agreement”.²⁸

In *Dillon v. Dillon* the Court considered a family trust that was settled for the benefit of the husband.²⁹ The husband’s mother was the sole trustee of the trust and she asserted that, as trustee, she had full authority over the trust assets and her son had no control over his interest in the family trust. The Court concluded that in the circumstances, considering the trust interest was discretionary, the husband’s interest could not be accurately valued. The Court specifically stated that *Sagl* was “contrary to accepted principles” and was not followed in “subsequent cases.”

The Saskatchewan Court of Appeal determined in *Grosse v. Grosse* that an “if and when” approach to trust valuation was not appropriate and that the fair market value of the assets as of the date of adjudication was the appropriate measure.³⁰ While the trial judge ordered an “if and when” division of the trust interest, on appeal the Court determined that an “if and when” order was not appropriate as the trust should have been considered family property that had a value that could be readily determined. The Court of Appeal further noted that if the spouse has the power to consume, invoke, or dispose of the property, it is deemed to be “family property” and its fair market value is *prima facie* divisible.³¹

In *Tremblay v. Tremblay*, the Court valued a spouse’s interest in a discretionary family trust.³² A family trust was created to hold the common shares of the holding company. The Court held that while the spouse’s interest was discretionary, the spouse exercised enough control over the trust that his interest was determinable and could be evaluated. In the result, the Court determined that the spouse’s interest in the trust would equal the trust’s “adjusted book value”.

Two Methods of Trust Interest Valuation

It appears the two most accepted approaches valuing trusts interests are the “fair market value” method and the holistic or “fair value” method.

The Fair Market Value Method

²⁸ *Levan v. Levan*, [2006] OJ No 3584 (QL) (“*Levan*”).

²⁹ *Dillon v. Dillon*, 2014 ONSC 2236 (“*Dillon*”).

³⁰ *Grosse v. Grosse*, 2015 SKCA 68 (“*Grosse*”).

³¹ Note that in *Grosse*, the Court of Appeal distinguished *Kachur*’s holistic approach on the basis that Saskatchewan’s legislative scheme differed from Alberta’s.

³² *Tremblay v. Tremblay*, 2016 ONSC 588 (“*Tremblay*”).

Section 87 of the *FLA* provides:

Valuing Family Property and Family Debt

87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

- (a) the value of family property must be based on its fair market value, and
- (b) the value of family property and family debt must be determined as of the date
 - (i) an agreement dividing the family property and family debt is made, or
 - (ii) of the hearing before the court respecting the division of property and family debt.

In *Stober v. Stober*, Mr. Justice Skolrood dealt with an application seeking an order for a joint valuation of the parties respective interests in a family trust, and the appropriate instructions to the valuator.³³ He recognized that assessing the fair market value of trust interests can be difficult and provided the following comments below:

The challenge in this case... is that the principles and methodologies are not well-known or established. There is no clear jurisprudence that guides the court or the expert in approaching the issue of value... It is not clear to me that the concept of fair market value, which is the central question to be posed to [the expert], even has any meaning or application to beneficial interests in a discretionary trust, again, given the likely absence of any market for such interests. Frankly, that may, in fact, be [the expert's] response when the question is posed to him.

However, what we do know is that while s.87 of the *FLA* leaves open the possibility that a value other than fair market value will be used when ascertaining and dividing family property, it nonetheless dictates that the value must be based on fair market value. Thus, when valuing family property for the purposes of division, the court must start with the fair market value and then go from there. In order to do so, the court requires evidence of fair market value or, as the case may be, evidence that there is no fair market value for a particular type of property.³⁴

(emphasis in original)

According to *Black's Law Dictionary*, "fair market value" is defined as "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction" or "the point at which supply and demand intersect".³⁵

The Saskatchewan Court of Appeal also endorsed the fair market value method in *Grosse*.³⁶ In that case, the Saskatchewan Court of Appeal relied on Saskatchewan's *Family Property Act* and determined that a spouse's interest in a trust constitutes family property, and went on to conclude that if a spouse has the power to consume, invoke, or dispose of the property, it is deemed to be "family property" and its fair

³³ *Stober v. Stober*, 2015 BCSC 2505 ("*Stober*").

³⁴ *Stober*, above, at paras. 38 to 39.

³⁵ *Black's Law Dictionary*, (10th ed. 2014), "fair market value".

³⁶ *Grosse*, above.

market value is *prima facie* divisible. The Court of Appeal rejected the lower Court's implementation of an "if and when" award and instead utilized the fair market value method.

There is not yet conclusive nor compelling jurisprudence in British Columbia that an interest in a discretionary trust should be ultimately valued on the basis of the fair market value of the underlying trust assets.

Holistic or "Fair Value" Method

Courts in both British Columbia and other Canadian jurisdictions have attempted to apply other methods when valuing a beneficial interest in a discretionary trust, the most common of which appears to be a holistic or "fair value" method (as described in *Kachur*³⁷).

Courts have acknowledged that beneficial interests are varied, and highly dependent upon the terms of the trust deeds which create these interests, and the exercise of discretion by the trustees. All beneficial interests in discretionary trusts are not identical nor should they be found to be equal in value.

The Court in *Kachur* cited author Lorne H. Wolfson's paper entitled "*Sagl v. Sagl: Valuation of an Interest in a Discretionary Trust under Ontario's Family Law Act*" in describing "fair value"³⁸:

What is "fair value"? According to Cole and Freedman, [*Property Valuation and Income Tax Implications of Marital Dissolution* (Toronto: Carswell, 1995) at 1-149] fair value describes a value that is just and equitable in the circumstances. Consideration of all the circumstances surrounding the valuation is critical to determining a fair value. Fair value is a notional concept and is much influenced by the nature of the property and the circumstances giving rise to the valuation.

How should a court determine the fair value of a contingent interest in a discretionary trust? According to Cullity: [M.C. Cullity, Q.C., *Trust Assets in a Family Law Case*, (Canadian Bar Association – Ontario, Continuing Legal Education, 2 October, 1995), at 17]:

For the purposes of the Family Law Act, the circumstances to be considered in valuing an interest that depends upon, or may be affected by, the exercise of a discretion would include... the intentions of the settlor, the fiduciary responsibilities of the holders of the power, the number of beneficiaries, and perhaps, the manner in which the power has been exercised in the past.

There is a line of Canadian jurisprudence that considers a holistic set of factors, in addition to those contemplated in *Kachur*, when valuing trust interests. Some factors that Courts have considered when valuing trust interests include:

- principles of trust law;³⁹
- the purpose of the trust;⁴⁰

³⁷ *Kachur*, above.

³⁸ *Kachur*, above, at para. 29.

³⁹ *Sagl*, above, at para. 37; *Kachur*, above, at para. 26.

- the intentions of the settlor;⁴¹
- the terms of the trust, including trustee duties and powers;⁴²
- the nature of the trust interest;⁴³
- relevant contingencies that govern whether a trust interest will materialize;⁴⁴ and
- previous trust distribution.⁴⁵

Recently, the BC Supreme Court in *Younger v. Younger* contemplated what factors might be relevant to trust valuation.⁴⁶ In *Younger*, the respondent spouse applied to reduce his child support payments by reducing his imputed income of \$100,000. The father asserted his income was \$50,000. However at the same time, the father was also a discretionary beneficiary of his deceased mother's \$2.4 million estate. Based on some limited financial disclosure, the Court determined the father earned about \$92,000 in the year preceding his application through employment income and his estate interest. The trust funds were held by the father's brother who had complete discretion over any distributions of capital or income to the father or his children. At the time of judgment, the Court refused to lower the father's imputed income, but instead ordered that the father produce all documents relating to his status as a beneficiary under the discretionary trust, including the full terms of the trust, any trust deed, all correspondence between him and the trustee and all records of any money received by him from the trust since its creation. From the Court's order, it is clear that Mr. Justice Skolrood was considering several holistic factors in his attempt to discern the value of the husband's interest in trust, and essentially endeavoured to provide the Court with ample documentation for a future valuation of the father's trust interest.

What Valuation Methods Can British Columbia Expect

We have not yet had a definitive decision from the BC Supreme Court under the FLA that clearly determines how a court is to approach the complex issue of how to value a beneficiary's interest in a discretionary trust (or an increase in the value of that interest). It appears the court is unlikely to accept the premise (in the family law context) that such an interest is incapable of being valued. It also appears

40 *Sagl*, above, at para. 37; *Kachur*, above, at para. 26.

41 *Sagl*, above, at para. 37; *Kachur*, above, at para. 26.

42 *Grove*, above, at para. 40; *LeVan*, above, at para. 149; *Younger v. Younger*, 2017 BCSC 363 at para. 42 ("*Younger*").

43 *Grove*, above, at paras. 39 and 40; *LeVan*, above, at para. 149; *Younger*, above, at para. 42.

44 *Grove*, above, at paras. 39 and 40.

45 *LeVan*, above, at para. 149; *Younger*, above, at para. 42.

46 *Younger*, above.

unlikely that a court will resort to an “if and when” approach, given the complexities of implementation and enforcement. Finally, while there is appeal to a “value to owner” approach, such an approach opens the door to potentially subjective and misleading arguments from both parties.

It would appear likely that a court valuing an interest in a discretionary trust will look at the underlying fair market value of the trust property, and also consider, at the very least, the following factors:

- a. the fair market value of the trust interest;
- b. the terms of the trust;
- c. the nature of the trust interest;
- d. beneficiary relationships with the trustee(s); and
- e. patterns of previous trust distribution.

However, solicitors and litigators alike in both the estate and family areas anxiously await clear guidance from the courts on this complicated issue.

Implications of the FLA and Case Law

When devising estate plans and considering the impact of the *FLA*, legal practitioners should keep the following principles in mind when considering whether a beneficial interest may be at risk of being found to be family property in a relationship breakdown:

- a. regardless of any other provision under ss.84 or 85 of the *FLA*, all beneficial interests in trusts that increase in value during the course of a marriage-like relationship are subject to family law claims to the extent of the increase itself, but not the value of the trust property as well (ss. 84(2)(g) and 84(2.1));
- b. trust property settled into a trust during a relationship is presumptively family property (s.84(3)(a));
- c. trust property settled into trust before the relationship began will not be caught as family property (s.84(1)(a) and (e)), however, the increase in value of the beneficial interest is considered family property and is subject to division (s.84(2)(g)).
- d. to minimize the risk of family law claims over trust property:
 - (i) the spouse should not settle property into a trust and then designate himself a beneficiary (s.84(3)(a));
 - (ii) if the spouse wishes to be a trustee, he/she should not have the power to appoint him/herself as beneficiary of the trust (s.84(3)(b));
 - (iii) If the spouse is the settlor, he/she should avoid settling a revocable trust (s.84(3)(c) and s.84(2)(f)); and
 - (iv) The spouse should consider not being a beneficiary of the trust at all to avoid claims over the increase in trust property value (s.84(2)(g)).

If concerned about potential valuation issues, estate planners should be aware:

- a. the starting point for any trust interest valuation under the *FLA* is the fair market value of the underlying trust property (*Grosse, Stober, s.87 FLA*);

- b. courts will likely look beyond fair market value to determine the value of a beneficial interest in a discretionary trust and will likely consider many factors, including but not limited to:
 - (i) the purpose of the trust;
 - (ii) the intentions of the settlor;
 - (iii) the terms of the trust, including trustee duties and powers;
 - (iv) the nature of the trust interest;
 - (v) the age, life expectancy and health of the beneficiaries; and
 - (vi) patterns of previous trust distribution;

(Grove, Sagl, Kachur, LeVan, Younger)
- c. depending on the circumstances of the trust and the beneficiary's interest, a trust interest may not have a defined value if the trust interest is truly discretionary (*Dillon*). However, if the courts determine that an interest is not fully discretionary or the beneficiary retains some control over the trust assets or the trust itself, or has a determined entitlement to the trust assets, then the trust interest may still be valued (*Tremblay, Purtzki*); and
- d. trust valuation must occur on the date of an agreement determining the valuation of the trust interest or on the date of trial involving the valuation of the trust interest (s.87(b)).

One final note, is to be aware that section 95 of the *FLA* allows a court to order an unequal division of family property, and section 96 allows the court to divide excluded property, both in certain circumstances.

IV. Incorporating Family Agreements into Estate Plans

With the vast array of potential marriage-like relationships, the popularity of Family Agreements is increasing.⁴⁷ Without a Family Agreement in place, should a relationship (whether marriage or marriage-like) terminate, the provision of the *Family Law Act* will apply to govern spousal support, child support, division of family property and family debt. A Family Agreement can address many issues, including (but not limited to):

- a. identifying the excluded property of each party for the purposes of s.85 of the *FLA*;
- b. contracting out of sharing the increase in value of excluded property (s.84(2)(g) of the *FLA*);
- c. contracting out of or limiting entitlement to spousal support; and
- d. agreeing to estate provisions to be put in place by each party.

Under the *FLA*, the formal requirements for a Family Agreement with respect to the division of property and spousal support upon separation are:

- a. it must be written;
- b. it must be signed by both of the spouses; and

⁴⁷ Cohabitation agreements and marriage agreements are both referred to as "Family Agreements" in this paper.

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- c. the execution by the parties must be witnessed by at least one other person.⁴⁸

However, under the *FLA*, a Family Agreement may be set aside if:

- a. there is some defect in the process of making the Family Agreement; or
- b. there is significant unfairness in the Family Agreement.⁴⁹

A defect in the process of making a Family Agreement exists if:

- a. a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the Family Agreement;
- b. a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
- c. a spouse did not understand the nature or consequences of the Family Agreement; or
- d. other circumstances that would, under the common law, cause all or part of a contract to be voidable.⁵⁰

Each party to a Family Agreement has a duty to make full and honest disclosure of all financial information. Courts view such disclosure as essential to protect the integrity of the result of negotiations and the failure to make such disclosure may cause the court to intervene "where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation."⁵¹ Independent legal advice for each spouse is the safest way to ensure that the requirements of paragraph (c) are satisfied.

Even if there is no defect in the process, the court may set aside or replace a Family Agreement with respect to property division if the marriage agreement is "significantly unfair" on consideration of the following:

- a. the length of time that has passed since the marriage agreement was made;
- b. the intention of the spouses, in making the Family Agreement, to achieve certainty; and
- c. the degree to which the spouses relied on the terms of the Family Agreement.⁵²

Similarly, a court may likewise set aside or replace a Family Agreement with respect to spousal support if the marriage agreement is "significantly unfair" on consideration of the following:

- a. the length of time that has passed since the Family Agreement was made;
- b. any changes, since the Family Agreement was made, in the condition, means, needs or other circumstances of a spouse;
- c. the intention of the spouses, in making the Family Agreement, to achieve certainty;

48 *FLA* at s. 93(1) and 164(1).

49 *FLA* at s. 93(5).

50 *FLA* at s. 93(3) and 164(3).

51 *Rick v Brandsema*, 2009 SCC 10 at para 47.

52 *FLA* at s. 93(5).

- d. the degree to which the spouses relied on the terms of the Family Agreement; and
- e. the degree to which the marriage agreement meets the objectives set out in section 161 [objectives of spousal support].⁵³

To ensure that a Family Agreement is not found to be significantly unfair, the parties should negotiate equitable terms with respect to property division and spousal support that are broadly consistent with the objectives of the *FLA* and contemporary community standards.

However, the existence of a valid Family Agreement is not a complete bar to a variation claim brought pursuant to s.60 of *WESA*.⁵⁴ Even if a Family Agreement meets the standard set by s.93 of the *FLA* and it is not “significantly unfair”, it may not satisfy a person’s legal and moral obligations to their surviving spouse, and so may not successfully bar a claim to vary their Will pursuant to s.60 of *WESA*.

The Supreme Court of Canada’s decision in *Hartshorne v. Hartshorne* stands for the proposition that the judiciary should not interfere with a couple’s agreement without reason.⁵⁵

However, the BC Supreme Court later explained in *Steenberg v. Steenberg* that *Hartshorne* does not prevent courts from varying wills where the estate relies on a pre-existing cohabitation agreement:

[79] There are a number of reasons why I have concluded that the Court’s analysis in *Hartshorne* is of limited assistance in the wills variation context. First, the Court in *Hartshorne* was specifically focused on only one legal obligation owed after separation, that relating to the division of property under the *FRA*. Other legal obligations are found in the law of unjust enrichment and the *Divorce Act*.

[80] Second, the Court in *Tataryn* concluded that the second part of the two-part wills variation test, dealing with moral obligations, is distinct from and goes beyond legal obligations. As noted above, the Court said that most people would agree that although the law may not require a supporting spouse to make provisions for a dependent spouse after death, a strong moral obligation to do so exists if the size of the estate permits.

[81] Third, the *FRA* explicitly provides that a marriage agreement will prevail unless a spouse can prove that it is unfair. *Hartshorne* was decided in that context. There is no such provision in the *WVA*.

[82] Finally, while both the *WVA* and the *FRA* consider fairness, each does so in a different context. The *FRA* is concerned with the situation in which a relationship breaks down and each person continues with his or her separate life; the *WVA* is generally concerned with a relationship that would have sustained but for the death.⁵⁶

British Columbia courts will consider the existence of Family Agreements when evaluating a spouse’s claim to vary the testator’s will pursuant to s.60 of *WESA*. For example, in the decision of *Brown v. Terins*, the deceased, Mr. Terins, died suddenly, leaving a will which left the residue of his estate to his

⁵³ *FLA* at s. 164(5).

⁵⁴ *Brown v. Terins*, 2016 BCSC 42 (“*Brown*”); *Morgan v. Pengelly Estate*, 2011 BCSC 1114.

⁵⁵ *Hartshorne v. Hartshorne*, 2004 SCC 22 (“*Hartshorne*”).

⁵⁶ *Steenberg v. Steenberg*, 2006 BCSC 1672.

two daughters but did not make provision for his common-law spouse of 14 years, Ms. Brown.⁵⁷ She brought a successful wills variation claim against the estate. In reaching its decision, the BC Supreme Court considered the impact of the couple's cohabitation agreement on Ms. Brown's claim:

[16] It is common ground that Ms. Brown's wills variation claim is not barred by the cohabitation agreement. The agreement that each would execute a will providing that their individual estates would go to their own issue – and the fact that each of the spouses executed a will consistent with this agreement – does not end the analysis. Having regard to the public interest and the scope and policy of the wills variation statute, the obligations of Mr. Terins must be examined in the complete factual context existing at the date of his death. A cohabitation agreement ought to receive consideration, but even an agreement that is fair, solemn and well-considered is unlikely to be a complete answer to a wills variation claim.

The Court concluded that “while their cohabitation agreement is important to the analysis of the legal and moral obligations owed by Mr. Terins to Ms. Brown, it was not an agreement that benefitted Ms. Brown” and varied the terms of the deceased's will and ordered that the surviving spouse was entitled to reside in the family home for a further two years and to a gift of \$500,000 from the estate (which was worth over \$2,000,000).

The Court dealt with a similar issue in the recent decision of *Kuzyk v. Czajkowski*.⁵⁸ The couple was married for 24 years, and had a valid marital agreement in which they agreed that their respective children would inherit assets they had each owned prior to the marriage. The surviving spouse received their home by rights of survivorship, but nothing pursuant to the terms of his will. The surviving spouse brought a wills variation claim and was successful. Mr. Justice Weatherill concluded the marital agreement “[did] not deal with claims to spousal support, [did] not waive the WVA and [did] not waive claims founded in unjust enrichment”. He interpreted the marital agreement strictly and would not absolve the estate from any obligations that were not specifically contemplated under the deceased's will, and varied the testator's will to provide the claimant with an additional \$150,000.

It is clear that even if a Family Agreement is in place, is valid, and is not found “significantly unfair” pursuant to the *FLA*, it may not be a complete bar to a variation claim brought by the surviving spouse. The legal obligations of one spouse to another upon death (which may be defined within the Family Agreement itself) are one piece of the puzzle. The moral obligations of one spouse to another upon death must also be considered. Careful and thoughtful planning is critical to ensure that a Family Agreement will continue to be effective upon death.

V. Where is the Case Law Taking Us – Significant Unfairness

As discussed above, a Family Agreement may be set aside by the court in specific circumstances, including in accordance with s. 93(3) and (5) of the *FLA* which provides:

⁵⁷ *Brown*, above, at para.60.

⁵⁸ *Kuzyk v. Czajkowski*, 2016 BCSC 1109.

- (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
- (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement; and
 - (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- ...
- (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but **that the agreement is significantly unfair on consideration of the following:**
- (a) the length of time that has passed since the agreement was made;
 - (b) the intention of the spouses, in making the agreement, to achieve certainty;
 - (c) the degree to which the spouses relied on the terms of the agreement.

(emphasis added)

The courts approach the application of s.93 of the *FLA* as a “two-pronged inquiry”: the initial analysis is directed at the formation of the agreement itself (s.93(3) of the *FLA*) and the secondary analysis is to examine the effect of the agreement (s.93(5) of the *FLA*).⁵⁹

British Columbia courts have concluded that the use of the phrase “significantly unfair” in the *FLA* has increased the bar over the previous “unfair” standard in the *FRA*.⁶⁰

L.G. v. R.G. provides assistance to understanding the appropriate interpretation of “significantly unfair” in the context of s.95(1) of the *FLA* [unequal division by order] at paragraphs 69-71:

[69] “Significant unfairness” has not been judicially defined in context of the *FLA*. I consulted several dictionaries, including the Oxford Dictionary of Current English, 1992; the online Merriam Webster; the Oxford Paperback Thesaurus 4th edition; and an online Dictionary of Etymology. Evidently, English first adopted use of ‘significant’ in the mid-16th century. In early usage, it conveyed the meaning of a ‘portent’, a ‘sign’, or ‘token’ – e.g. ‘a significant look’. In some contexts, it still does. In other contexts, it also came to mean ‘having an influence on something’, or refer to a matter of weight, substance and importance. Therefore, dictionary definitions encompass all of the

⁵⁹ *Asselin v. Roy*, 2013 BCSC 1681 at para. 125.

⁶⁰ *L.G. v. R.G.*, 2013 BCSC 983 at para. 7 (“*L.G. v. R.G.*”); *Remmem v. Remmem*, 2014 at para. 44;

concepts: of signs, of indication and of weightiness. The Oxford Paperback Thesaurus 4th edition, offers similes that include “important, of consequence, of moment, weighty, material, impressive, serious, vital, critical.”

[70] In *Reid v. Strata Plan LMS 2503*, 2001 BCSC 1578 (CanLII) [*Reid*], affirmed in *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126 (CanLII), Sinclair Prowse J. defined the phrase “significant unfairness” to mean “burdensome, harsh, wrongful, lacking in probity or fair dealing.” This definition was considered in *Gentis v. Strata Plan VR 368*, 2003 BCSC 120 (CanLII) [*Gentis*]; and *459381 B.C. Ltd. v. Strata Plan BCS 1589*, 2012 BCCA 44 (CanLII). Those cases involved reviews of certain actions of strata councils. In *Reid* at para. 27, the Court of Appeal affirmed the decision of Justice Masuhara in *Gentis*, and agreed that the use of ‘significant’ before ‘unfairness’ “indicates to the Court that it should not interfere with the actions of a strata council unless the actions result in something more than mere prejudice or trifling unfairness.”

[71] In my view, the term ‘significantly unfair’ in s. 95(1) of the *FLA* essentially is a caution against a departure from the default of equal division in an attempt to achieve ‘perfect fairness’. Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart from the default equal division.⁶¹

Unfortunately, to date, there are fewer decisions where the courts have considered “significantly unfair” in the context of s.93(5) of the *FLA*.

In *Donnelly v. Weekley* (a separation agreement decision) the Court concluded “significant unfairness [in the context of s.93(5) *FLA*] can be addressed by asking if an agreement is sufficiently divergent from community standards of family financial morality that it should be set aside.”⁶² In coming to this interpretation, Justice Johnston applied the BC Supreme Court’s reasoning in *L.G. v. R.G.*.

In contrast, in *Quan v. Quan* (also a separation agreement decision) the “significantly unfair” analysis focused on the circumstances in which the agreement was made and not the objective outcome of the agreement.⁶³ The wife brought an action to set aside or replace the portion of the separation agreement related to the matrimonial home under s.93(5) of the *FLA* arguing that the provision was significantly unfair (due to the length of time between execution and implementation of the separation agreement). The Court concluded s.93(5) of the *FLA* was the appropriate provision to address the wife’s concerns and agreed that the agreement was significantly unfair. Mr. Justice Weatherill concluded that the length of time that had passed since the agreement was executed resulted in the transaction as set out in the separation agreement being significantly unfair, and set aside and replaced those terms.

In the recent decision of *T.A. v. B.A. Estate*, 2018 BCSC 1273. the Court concluded that a 30 year old marriage agreement was “significantly unfair” and set it aside.⁶⁴

61 *L.G. v. R.G.*, above, at paras. 69 to 71.

62 *Donnelly v. Weekley* 2017 BCSC 529 at para. 134.

63 *Quan v. Quan* 2017 BCSC 2458.

64 *T.A. v. B.A. Estate*, 2018 BCSC 1273 at para. 65.

VI. Special Considerations for Blended Families

Blended families have an increased potential for conflict arising upon incapacity or death. Lawyers should carefully canvas with their client not only their testamentary wishes, but also additional unique issues to determine if there is a way in to minimize the chance for conflict. A non-exhaustive list of these potential considerations follows, in no particular order.

1. **Planning for Incapacity:** A key component of estate planning is always planning for potential incapacity. This decision can become even more important in a blended or high conflict family, especially as it relates to authorizing an attorney or representative to continue to financially support the other spouse. In a similar fashion, the potential for a specific representative to alienate the adult from family members should be discussed and planned for.
2. **Potential for a Variation Claim:** If a variation claim is possible or likely, special considerations should be given to minimizing that potential, or failing which, to prepare for the anticipated litigation.
3. **The Family Home:** In a blended family where one spouse owns the family home in which the parties have resided for a significant period of time, special consideration must be given to how to balance the competing interests of the surviving spouse (who may wish to remain in the home for their lifetime) and the children of the Deceased (whose inheritance may be significantly delayed by a spousal trust).
4. **Jointly Owned Property:** Conflict arises on a regular basis when the Deceased has, prior to death, transferred legal ownership of an asset into another's name, and there is no evidence of their intention with respect to who the beneficial owner was intended to be. Properly documenting transfer and gifts, to minimize conflict over who the true beneficial owner of an asset is, can minimize future litigation.
5. **Personal Property:** Family members frequently have unexpected deep attachment to personal property. Planning for a mechanism to recognize these emotional attachments and to ensuring that personal property which may be the subject of significant emotional attachment can be distributed to the appropriate family members can be of significant assistance in minimizing conflict after death. Likewise, properly documenting all gifts of personal property prior to death (such as art or jewellery) is helpful to avoid potential litigation.
6. **Choice of Executor:** Although this is always a critical decision in estate planning, in families where conflict exists or litigation is likely, the choice of personal representative may be even more crucial.
7. **End of Life Celebrations:** A disagreement among members of a blended family as to whether to cremate or bury the body, where to hold the end of life ceremony, where to sprinkle or bury the ashes or the body (and the list goes on) can be avoided by clear wishes instructed to the family members.

VII. Conclusion

The significant changes in family law (and the resulting corresponding impact on estate law) require those lawyers who practice in the area of estate planning to be aware of the potential unanticipated

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complications which may face their clients. This law continues to develop and may continue to do so for some time. Accordingly, the best formulated plans arise from both understanding the applicable law and also undertaking a careful, thoughtful and educated approach to their estate planning needs.