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### **FAMILY PROPERTY LAW AND PRACTICE IN CANADA**

**Wilton & Joseph**  
**Release No. 4, August 2025**

This unique work delivers both a thorough introduction to matrimonial property law and a detailed examination of the specific issues arising in every province which practitioners must be familiar with. This resource discusses: unequal divisions of property, excluded property, the valuation of the various kinds of property including pensions and the specific legislation and case law pertinent to each jurisdiction.

### **What's New in this Update:**

This release features updates to Chapter 3 (British Columbia).

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## Highlights

This release updates Chapter 3, British Columbia with 37 new case law developments, including the following:

- This appeal provided an opportunity to consider the appropriate approach under the FLA to the tracing of excluded property (defined at s. 85) that has been co-mingled with family property. The parties agreed that the trial judge erred in failing to identify a substantial sum of family property existing a time of separation. The parties asked this court to substitute what it considered to be the appropriate orders as opposed to remitting this matter back to the trial court. The appellate court considered in this case whether and to what extent the value attaching to the husband's inherited property could be traced to Trust Funds. The question becomes whether and in what manner the original value survives in the intermixture and can thereby be traced into successive transactions for substitute assets. The appellate court concluded that it is appropriate and in keeping with the requirements of the FLA generally to approach the exercise of tracing excluded property through co-mingling of family and excluded property on a pro rata basis: *Mills v. O'Connor*, 2025 CarswellBC 258, 2025 BCCA 34 (B.C. C.A.).
- Prior to recent amendments to the FLA a spouse could lose their claim to excluded property by transferring property to their spouse because of common law presumptions of advancement and resulting trust. Amendments to the FLA (May 11, 2023) provide that the common law presumptions don't apply to transfer of ownership between spouses. These amendments do not apply to a pre-existing proceeding, as in this case. The question of whether otherwise excluded property becomes family property depends not only on the intentions of the parties but also on whether it would be unfair to permit equal division. Both parties had property that they brought into the relationship. The appellate submitted that both properties should be excluded or both properties should be considered gifted. The trial judge erred in finding that the appellate had granted a concession to the Husband on his property being excluded without considering the second part of her argument that if so, then her property should also be excluded. The trial judge's error in misconstruing the submissions was a palpable error. Further it was unfair, unreasonable and unjust to apply an equal division to family property, resulting in the husband receiving a disproportionate growth in family property given the application of an exclusion to his property alone: *Dignard v. Dignard*, 2025 CarswellBC 309, 2025 BCCA 43 (B.C. C.A.).
- The trial judge set aside property provisions of an Agreement, pursuant to s. 93(5) due to the fact that they were "significantly unfair" to the wife. The husband appealed. The appellate court stated that the factors set out in s. 93(5) do not conclusively decide the issue of unfairness and that discretion remains for the court to determine the issue based on the facts. The appellate court found no error in the trial judge relying on, as a starting point, the historical market value of the property when the agreement was signed. That historical market value was significantly more than what the parties had agreed that it was. As well, the judge did not err in considering the increased value of property when

evaluating the fairness of an agreement. The appellate court also said that the trial judge's finding that the value of the property set out in the agreement was not the product of a common mistake was not inconsistent with finding unfairness and thus was not a reviewable error. The husband's appeal was dismissed: *Schrader v. Schrader*, 2025 CarswellBC 375, 2025 BCCA 50 (B.C. C.A.).

- Any and all business interests held by the husband under a marriage agreement were not subject to division. The business interests grew from approximately \$3.3M to \$130M over the course of the 17-year marriage. The trial judge found that the marriage agreement was valid and fair. The wife appealed. She did not contest the validity of the agreement but argued it was unfair. The appellate court referred to s. 65 (1) FRA and to *Hartshorne v Hartshorne*, 2004 SCC 22 in finding that the trial judge committed palpable and overriding errors of fact in his analysis of the operational fairness of the marriage agreement. In particular, under s. 65(1)(f) the trial judge failed to consider the indirect contributions to the business made by the wife. Indirect contributions considered by the appellate court included: the wife left her occupation as a realtor to stay at home to care for the children and the manage the household. This permitted the husband time to pursue corporate endeavours and to deal with litigation regarding the family-owned business. A spousal award was not the proper mechanism to address unfairness, rather the appropriate remedy is reapportionment. The appellate court allowed the appeal in part and reapportioned the assets to satisfy the objectives of the FRA and *Divorce Act*: *Bradley v. Callahan*, 2025 CarswellBC 657, 2025 BCCA 69 (B.C. C.A.).
- This was a 30-year common law relationship where the male spouse held title to the home and filed a trespass claim against the female partner. The female spouse argued that the home was family property under the FLA and therefore she was entitled to stay in the home. A spouse may start an action for division of property no later than 2 years after the date of separation. The court found that the common law wife's FLA claim was statute barred under s. 198(2) FLA. The court recognized that this was harsh but said that the right of an unmarried person to seek division of family property is a statutory right governed by the FLA. The common law wife was ordered to vacate the property within 180 days, having regard to her age and health: *Hennan v. Nolan*, 2024 CarswellBC 2232, 2024 BCSC 1383 (B.C. S.C.).

## ProView Developments

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