Property

VI. Classification of Family Property and Debt under the Family Law Act [§4.6]

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C. Excluded Property [§4.9]

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2. TRANSFERS OF EXCLUDED PROPERTY BETWEEN SPOUSES [§4.10A]

An issue that has arisen under the *Family Law Act* is whether the excluded property of one spouse that has been gratuitously transferred to the other spouse or to both spouses during the relationship is properly characterized as excluded or family property. Following enactment of the *Family Law Act*, two lines of authority have emerged from the Supreme Court:

(1) those that followed *Remmem v. Remmem*, 2014 BCSC 1552 and *G. (P.) v. G. (D.)*, 2015 BCSC 1454, which held that, pursuant to s. 85(1)(g) of the Act, a transfer of excluded property from one spouse to the other does not cause the excluded property to become family property; and

(2) those that followed *Wells v. Campbell*, 2015 BCSC 3 (Chambers), which held that a transfer of excluded property from one spouse to the other may be a gift which causes the loss of the transferring spouses' claim to excluded property—such that the gift becomes family property.

In *F. (V.J.) v. W. (S.K.)*, 2016 BCCA 186, the court considered the conflicting authorities. In *F. (V.J.)*, the spouses had had a traditional marriage of approximately nine years. They had three children. The husband received a $2 million gift by way of an inheritance. He used the $2 million to buy real property, which was registered solely in the wife's name, to pay debts on family property, and to pay construction costs related to the real property (at paras. 24 and 25). The parties separated shortly after construction began. They agreed to complete construction and sell the finished home, with the sale proceeds held in trust. The wife argued that the $2 million had lost its status as the husband's excluded property and was gifted to her, such that it became family property (at para. 31). The husband argued that the $2 million remained his excluded property, taking the position that, as the proceeds held in trust were traceable to the inheritance, they remained excluded property pursuant to s. 85(1)(g) of the *Family Law Act*. He asserted that the presumption of advancement had been "effectively reduced… to ashes" by the *Family Law Act* scheme.

The court found that the husband had intended to gift the inherited funds to the wife when they were invested in the property solely in her name and that it was clear he intended to retain no beneficial interest in the funds. He had expressly registered title to the property purchased with the inherited funds for "creditor protection" so that creditors would not be able to get at the beneficial interest (at paras. 25 and 51). The court determined that, at separation, the fact that the husband had originally received the $2 million as a gift was no longer relevant as he "lost the exclusion when he voluntarily and unreservedly directed that the [real property] be transferred to [his wife] and 'derived' no property from that disposition" (para. 74). Thus, the real property in the wife's name was family property and the sale proceeds were family property.

The court's reasons include the following:

(1) The *Family Law Act* property regime is not a complete code, and common law and equitable concepts continue to apply. The statutory scheme builds on those principles, preserving concepts such as gifts, trusts, and evidentiary presumptions (at para. 74). The common law will continue to provide "interpretive context" for property division under the *Family Law Act* regime (at para. 73).

(2) The court rejected the husband's argument that $2 million of sale proceeds remained his excluded property because the sale proceeds were property derived from the inheritance within the meaning of s. 85(1)(b.1) and (g). The court determined that the husband "derived" no property when title was registered in the wife's name so that s. 85(1)(g) did not apply to the proceeds of sale (at para. 68).

(3) The court rejected the husband's argument that once property is excluded property, it always remains so for the purposes of the *Family Law Act*, regardless of which spouse owns the property. The court held that there is no provision in the Act that suggests that excluded property becomes frozen in time (at para. 69). The point in time at which family property and exclusions therefrom are determined is the date of separation of the spouses, subject to the extensions under s. 84(1)(b) for property acquired after separation and derived from family property (paras. 69 and 74).

(4) The court explained the presumption of advancement, observing that when there is a transfer of property from husband to wife and the evidence of the donor husband's intention is insufficient or equivocal, "the law normally provides an evidentiary presumption that a gift was intended and the burden of persuasion shifts to the opposite party [the donor] to rebut on the balance of probabilities" (para. 50). The court indicated that in the absence of a clear statement from the Legislature abolishing the presumption of advancement, it continues to apply under the *Family Law Act* (at para. 77), even if its utility may be confined to "doubtful" cases (at para. 53).

(5) The court confirmed that while a transfer for creditor protection is not generally objectionable as a fraudulent conveyance, provided the effect of the transfer was not to fraudulently defeat or prejudice creditors who had legal or equitable claims at the time, the transferor should not be able to claim that his or her gift was revocable or that no beneficial interest was intended to be transferred (at para. 52). In other words, the transfer cannot be a "sham". The court held it ought not to allow the transferor to rebut the presumption of advancement by leading evidence that he only transferred property to defeat his creditors—calling this a prevarication which should not receive a court's blessing (at para. 70).

a. Presumption of Advancement and Resulting Trust [§4.10B]

The court in *F. (V.J.) v. W. (S.K.)*, 2016 BCCA 186, indicated that the presumption of advancement continued to apply in the context of the property division regime under the *Family Law Act*. Both the presumption of advancement and the presumption of resulting trust are rebuttable presumptions of law. A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption: see J. Sopinka et al., *The Law of Evidence in Canada*, 2nd ed. (Butterworths, 1999), at pp. 105-106, cited in *Pecore v. Pecore*, 2007 SCC 17 at para. 22. See also S.N. Lederman et al., *The Law of Evidence in Canada*, 4th ed. (Lexis Nexis, 2014), at pp. 148-149.

The presumptions of advancement and resulting trust apply only where there is insufficient evidence of intent. They "provide a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive" (*Pecore* at para. 23). The advantage of maintaining the presumptions of advancement and resulting trust is that "they provide a measure of certainty and predictability for individuals who put property in joint accounts or make other gratuitous transfers" (*Saylor v. Brooks*, 2005 CanLII 39857 (ON CA), cited in *Pecore* at para. 23).

A resulting trust arises when title to property is in one party's name but the party—because he or she is a fiduciary or gave no value for the property (i.e., the transfer was gratuitous)—is under an obligation to return it to the original title owner: see D.W.M. Waters et al. (Eds.), *Waters' Law of Trusts in Canada*, 3rd ed. (Carswell, 2005) at p. 362. It is presumed that the transferor intended to transfer the legal title but to retain the beneficial title (Lederman et al., 4th ed. at p. 162). The presumption of resulting trust is the general rule for gratuitous transfers and is premised on the maxim that "equity presumes bargains, not gifts". Where a transfer is made for no consideration, it is presumed that a gift was not intended and "the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts in Canada*, at

p. 375", cited in *Pecore* at para. 24; see also *G. (J.D.) v. V. (J.J.)*, 2016 BCSC 2389 at para. 145). As explained in *Hu v. Li*, 2016 BCSC 2131 at para. 36:

> When one person gratuitously transfers property to another adult person, there is a general presumption that the recipient holds the property in trust for the other. That is because equity presumes bargains, not gifts. The transferor can use this 'resulting trust' to recover his or her property, unless the transferee can show that a gift was intended.

Thus, when a transfer is challenged, the presumption of resulting trust allocates the legal burden of proof to the party claiming a gift; he or she must demonstrate that the transferor intended to make a gift (*Pecore*at para. 24).

While the presumption of resulting trust is the general rule, it will not arise in certain circumstances and there will instead be a presumption of advancement (*Pecore* at para. 27). The presumption of advancement is a presumption that a party who purchases property and puts it in another's name, or who voluntarily and gratuitously transfers property to the other party, intends to make a gift. The presumption is rebuttable with evidence that a gift was not intended. If the presumption of advancement applies, it will fall on the party challenging the transfer to rebut the presumption of a gift.

As established in *Pecore* at paras. 28, 33 to 36, and 40, the presumption of advancement arises in at least two circumstances:

(1) where there is a transfer from husband to wife; and

(2) where there is a transfer from a parent (mother or father) to a minor child.

More recently, the court in *Lawrence v. Mulder*, 2015 BCSC 2223, observed that the presumption of advancement may apply in common law relationships (at para. 75). However, there are inconsistent decisions on this point and the Court of Appeal has not ruled on the issue. While the court in *F. (V.J.)*observed that the presumption of advancement under the *Family Law Act* continues to apply to transfers from husband to wife, it does not indicate the applicability of the presumption of advancement between unmarried spouses or to a transfer from a wife to her husband (at para. 77).

In cases where a transfer is challenged, and evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive, the trial judge must determine which presumption applies and "weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention" (*Pecore* at paras. 44 and 55; *Wu v. Sun*, 2010 BCCA 455 at para. 18; *Hu* at para. 68). The evidence required to rebut both presumptions is evidence of the transferor's contrary intention on the balance of probabilities (*Pecore* at para. 43). The applicable "presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities" (*Pecore* at para. 44; *Hu* at para. 37).

When considering whether the transferor spouse intended to make a gift or not, the key factual issue is what the transferor intended at the time of the transfer (*Hu* at para. 38): did the transferor intend the recipient to become a beneficial owner? The court can consider circumstantial evidence that is relevant to the transferor's actual intention: the transferor's wishes and desires, whether the transferor wanted to share his or her property with the recipient, the transferor's instructions to their solicitor, the transferor's understanding of the consequences of transferring title, conversations between the spouses, and so on (*Berdette v. Berdette*, 1991 CanLII 7061 (ON CA); *Hu* at paras. 45 to 47). The evidence of intention that arises subsequent to a transfer should not automatically be excluded but it "must be relevant to the intention of the transferor at the time of the transfer" (*Pecore* at para. 59; *G. (J.D.)* at para. 157). The court "must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention" (*Pecore* at para. 59).

b. Transfers of Excluded Property to Joint Names [§4.10C]

The decision in *F. (V.J.) v. W. (S.K.)*, 2016 BCCA 186, involved a transfer of excluded property from one spouse to the sole name of the other. In the Supreme Court decisions since *F. (V.J.)*, particularly those dealing with transfers of excluded property into the joint names of the spouses, the legal effect of such a transfer remains unsettled. In addition, Supreme Court decisions have questioned the continued application and efficacy of the presumption of advancement to the characterization of property under the *Family Law Act*.

Supreme Court decisions citing *F. (V.J.)* and considering the effect of a transfer of excluded property have held as follows:

(1) Some decisions have applied *F. (V.J.)* and considered the transferring spouse's intention at the time of the transfer, finding that the intent of whether the excluded property was gifted or not is determinative. See *Oleksiewicz v. Oleksiewicz*, 2017 BCSC 228; *M. (C.L.) v. S. (M.J.)*, 2017 BCSC 799; *Bamford v. Mulyati*, 2017 BCSC 945; and *P. (A.I.) v. P. (L.D.)*, 2017 BCSC 1135. One case was decided on the basis that a valid s. 92 agreement established an intention not to gift excluded funds when they were placed in joint names. Thus, there was clear evidence of an intention not to gift and, in any event, the parties were held to be bound by the agreement (*Bell v. Stagg*, 2016 BCSC 1491).

(2) Some decisions have applied a presumption of advancement where funds were placed by a spouse into the spouses' joint names (*L. (K.A.) v. L. (K.J.)*, 2017 BCSC 651; *Namdarpour v. Vahman*, 2017 BCSC 1189; *H. (E.H.) v. M. (C.L.)*, 2017 BCSC 1299; *McFarlen v. McFarlen*, 2017 BCSC 1737).

(3) One case applied the presumption of resulting trust rather than the presumption of advancement because the transfer was made from the wife to property held by both spouses. However, consistent with *F. (V.J.)*, evidence of the wife's intention to gift to the husband determined the outcome (*Donnelly v. Weekley*, 2017 BCSC 529).

(4) Several cases distinguished the result in *F. (V.J.)* on the basis that it dealt with a gift solely in the name of the donor spouse and does not apply to transfers to joint tenancy such that, in the case of such transfers, the excluded property claim is not lost (*Lahdekorpi v. Lahdekorpi*, 2016 BCSC 2143; *R. (K.) v. D. (J.)*, 2017 BCSC 182; *Dheenshaw v. Gill*, 2017 BCSC 319; *B. (G.) v. R. (L.)*, 2017 BCSC 1342). These decisions did not apply a presumption of advancement or, as in*Donnelly*, a presumption of resulting trust. In *B. (C.J.) v. B. (A.R.)*, 2017 BCSC 1682, the court held that even if the presumption of advancement applied to transfers between husband and wife, it did not apply to transfers into joint tenancy.

(5) Two cases distinguished *F. (V.J.)* and held that the presumption of advancement does not apply under Part 5 of the *Family Law Act*: *F. (H.C.) v. F. (D.T.)*, 2017 BCSC 1226 (presently under appeal); and *B. (C.J.) v. B. (A.R.)*.

For a discussion of *F. (V.J.)* and the subsequent cases, see S.L. Booth et al., "FLA Property Division Update: Interim Distributions and Excluded Property Post V.J.F." in *Family Law Conference—2017*(CLEBC, 2017).