Avoid Inadvertently Losing Your Exclusion of Your Property Under Family Law

Case Comment on *V.J.F. v. S.K.W.*, 2016 B.C.C.A. 186, April 28, 2016

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On April 28, 2016, the B.C. Court of Appeal made a decision that is the first significant higher court decision under the *Family Law Act* (FLA) dealing with excluded property in B.C.

In summary, under the *Family Law Act*, all property owned by either or both spouses at the date of separation is "Family Property" to be divided between the spouses, unless it is "Excluded Property". Family Property is comprised of assets that can include real property, bank accounts, pensions, businesses, and property in which there is a beneficial interest, etcetera. Family Property is presumed to be shared equally between the spouses, regardless of their use of or contribution to that property.

Excluded Property is any property that is excluded from the communal pot of family property to be shared by the spouses. Excluded Property includes property of a spouse owned before the date of marriage or the date the spouses began living together, whichever is earlier, plus certain kinds of property acquired during the spouses' relationship. Excluded Property includes property that was acquired with the use of excluded property ("traced"). Excluded Property includes gifts, inheritances, and certain kinds of insurance or court awards, whether received before or during the relationship. Generally, Excluded Property is presumed to remain the property of the spouse who owns it, and is not to be shared. On the other hand, the increase in value of the Excluded Property during the term of the relationship is Family Property and is shared with the spouse.

As set out by the Court of Appeal in *V.J.F. v. S.K.W.*:

> [10] The consequence of the categorization of property as either family property or excluded property is that on separation, each spouse is generally entitled under s. 81 to an undivided half interest in family property as a tenant in common. The court may divide it unequally only if equal division would be "significantly unfair" having regard to all the factors listed in ss. 95(2) and (3). Excluded property in contrast must not be divided unless it would be significantly unfair not to divide it having regard to only two factors – the duration of the parties' relationship and any direct contribution by a spouse to the preservation or maintenance of the property (s. 96(b)). Obviously, the phrase "significantly unfair" is intended to set a higher bar for the exercise of judicial discretion than the 'unfairness' test in the FRA: see Family Law Explained, supra, at s. 95; L.G. v. R.G. 2013 BCSC 983 at para. 71; Jaszczewska v. Kostanski 2015 BCSC 727 (CanLII) at para. 166-9. As observed by Mr. Justice Savage (as he then was) in Slavenova v. Ranguelov 2015 BCSC 79 (CanLII):
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> 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. [At para. 60.]

In *V.J.F. v. S.K.W.*, the couple was married for almost 10 years. During the marriage, the husband's former employer gifted a $2-million inheritance to the husband to thank him for his service. The husband then used this money to buy property in which the family lived. He placed the property in the sole name of the wife for creditor protection to protect him from future possible claims against the husband. Upon the breakdown of their marriage, the main dispute was whether or not the property derived from the $2 million was Family Property to be shared or Excluded Property to stay with the husband.

At trial, the court ruled that the $2 million was no longer Excluded Property under s. 85 of the FLA. It was considered family property that is to be divided evenly between the parties. The husband appealed the decision and lost his appeal.

During the appeal, the husband argued that the "tracing" provision under s. 85(1)(g) meant the excluded property can never lose its excluded status. The Court of Appeal disagreed and ruled that, once the husband gave the property to his wife, there was a rebuttable presumption of a gift and the exclusion was lost. The presumption of advancement is an evidentiary presumption that a gift was intended when a there is a gratuitous transfer of property made from one spouse to the other spouse. It is meant to operate where the evidence is insufficient or equivocal on the intention of the transferor.

In other words, the court found no clear evidence that the transfer was not meant to be a gift to the wife.

The court also found that, on the facts, the husband derived no property or consideration from the transfer to his wife, so s. 85(1)(g) is not applicable.

The Court of Appeal found that the property regime as set out in the FLA is 'not a complete code' but, rather, it builds upon existing common law and equitable principles.

The Court of Appeal recognized that spouses may wish to transfer ownership of assets to the spouse or put assets into joint names, without losing the exclusion. The Honourable Madam Justice Newbury wrote on behalf of the Court of Appeal:

> I acknowledge that judges may in some cases have to determine whether transfers of excluded property that may have taken place years before, were gifts or not. This seems likely to occur most often in cases where inherited property is transferred by the heir to his or her spouse or into joint names. (Of course, the presumption of advancement was invented as a way of resolving such questions where the evidence is unclear or equivocal.) That said, there are means by which the inheriting or recipient spouse can protect against 'losing' the exclusion. Subject to other relevant provisions of the FLA, for example, the transferor can require the transferee to acknowledge that no gift of the excluded property (or its value) is intended.

Even if the exclusion is lost, it is still open to the transferor spouse to claim, pursuant to s. 95 of the FLA,

that equal division would be significantly unfair. This was argued by the husband in *V.J.F. v. S.K.W.*, but the Court found that the facts did not support that argument.

Conclusion

Based on *V.J.F. v. S.K.W.*, one must take care when transferring assets into joint names with the spouse or solely into the name of the spouse, if one does not want to lose an exclusion. There may be reasons why a transfer is desirable, such as for estate planning or financial planning reasons. It will be important to document the intention of the transferor, noting that the transfer is not intended to be a gift. It would also be wise to have a written agreement confirming that the transferee spouse is holding the property beneficially for the transferor and to confirm the intention of the transferor.

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