RESPONSE OF THE CANADIAN BAR ASSOCIATION WESTMINSTER FAMILY LAW SUBSECTION TO THE ATTORNEY GENERAL DISCUSSION PAPER ON REVIEW OF THE FAMILY RELATIONS ACT, DIVISION OF FAMILY PROPERTY (Chapter 2)

OPENING COMMENTS

The Canadian Bar Association of British Columbia ("CBABC") Westminster Family Law Subsection welcomes the Attorney General's interest in undertaking a comprehensive review of the BC *Family Relations Act* ("FRA"), which is the central legislation for the overwhelming majority of family lawyers in British Columbia. While members of the public are users of the family law system at various times and the judiciary and family justice counsellors deal with family law problems on a regular basis, there is only one group which deals with family law issues on a daily basis: family lawyers! We are in a sense the primary stakeholders in the family law system and it is incumbent on us to assist in effective law reform. This submission reflects the view of a special committee of the CBABC Westminster Family Law Subsection and not the views of the CBABC as a whole.

We see problems in the system on a frequent basis that the occasional user may not see and may not have the resources, the expertise or perhaps even the desire to air publicly. We see nuances in practice that even the judiciary may not be aware of, given that the vast majority of family law cases are resolved well before there is a full trial. Collectively we can offer guidance and hopefully a little wisdom in making the primary legislative framework for family law more "user friendly" and accessible to all parties.

Looking at family property law reform as a whole, it is important to realize that elaborate substantive legislation may be of little benefit to the average litigant if little or no attention is paid to procedural aspects. One of the shortcomings of the discussion paper is that it focuses too much on the current sections of Part 5 of the FRA and appears to ignore procedural areas for accessing the property division mechanism.

If the non-owning party has little information and little to no financial resources for

obtaining proper discovery and valuations at an early stage, it is easy for the weaker spouse to become discouraged and to give up or give in. We have some ideas in this area which are set out at the end of this paper.

In February 2007, the Westminster Family Law Subsection established a committee which met half a dozen times and its 7 active members each took on the responsibility for working on various sections of Chapter 2. The views expressed here contain ideas and comments which are not necessarily shared equally by all members of the committee. However, none of the opinions are at significant variance with the general views of the members.

Our response follows the format of the discussion paper.

RECONSIDERING SOME ASPECTS OF FAMILY PROPERTY LAW

We certainly agree with the overall objectives stated for reform of family property law. The key is to achieve the right balance between flexibility and certainty which strives for a just resolution.

We must, however, take issue with the comment that while many separating spouses are able to agree on how to divide their property and for those who cannot agree, Part 5 of the FRA provides the rules if they go to court. This is not how our system works. Parts 5 and 6 provide the legislative framework in which cases settle. The property division machinery of the FRA is in fact used far more in settlement than in going to court. It is the lens through which negotiations occur. It is what frames the decision making process that leads to hopefully just resolutions.

For property division to be fair, the rules must be known and understood and hopefully this will lead, in fact, to avoiding litigation.

Question 1: Is there any benefit to changing the family property division model currently used in British Columbia?

The consensus is that our current deferred community of property regime works relatively well and should not be altered. It is based on a body of law which has developed over almost 3 decades. To change it now would create great uncertainty.

We also believe that a deferred community of property regime can create more certainty and security for the initially non-owning spouse if the owning spouse goes bankrupt or transfers assets, given the availability of tracing.

Furthermore, in many ways with s. 66 compensation orders, in fact, we already have a compensatory regime in practice.

PART A - WHY IS FAMILY PROPERTY DIVIDED?

Discussion Point (1) - Reasons for Dividing Family Property 50-50

Question 2: Should the FRA include a statement about why each spouse is entitled to an equal share in the family=s assets?

No. By providing a definition section, there would be unavoidable arguments as to who fits and who does not. If the perception is that one party contributes less to general household expenses, does this automatically mean that they receive less than 50%? We should try to avoid areas for new conflict.

PART B - WHO SHOULD FRA RULES APPLY TO?

Discussion Point (2) - Married and Unmarried Spouses

The committee was divided on the issue of whether the same property division rules should apply to unmarried couples as married couples, but the majority was firmly of the view that we should keep the current distinction.

We take the view that the Part 5 and Part 6 divisions of the FRA should NOT automatically apply to unmarried spouses and that the FRA provisions should apply to unmarried spouses *only if* they make an agreement about how to divide their property and clearly state that the FRA *should* apply to part or all of their property.

S.120.1 of the FRA currently allows unmarried spouses to opt into Parts 5 and 6 of the FRA by entering into an agreement between them in respect of property. As between married couples, the parties typically enter into an agreement for the purpose of opting out of the division of property regime as set out in the FRA and this raises the unintended consequence for unmarried couples that although they are engaging in similar "opting out" actions to those of the married couples, they are in fact opting into the FRA regime. In the case of unmarried couples, s.120.1 should be "fine tuned" to allow unmarried couples to enter into agreements to retain separate property without opting into the FRA unless by mutual agreement. Failing that, s.120.1 should be abolished.

The majority made these points:

1. People marry or don't marry for varying reasons and their decisions should be respected. They may have children from a first marriage and want to retain their assets for the children. They may have brought their respective fortunes to a new relationship late in life and want to protect those assets.

2. A legal marriage implies a permanent commitment and our society believes that a legal marriage is something different than a simple decision to live together. They feel that if parties do not wish to take on the commitment of marriage, the law should not presume to do it for them.

3. Parties enter into a legal marriage with the clear understanding that there will be consequences of an economic nature should their marriage fail.

The minority made these points:

1. Our current societal norm is one where the fact of a legal marriage no longer necessarily assumes that a relationship is permanent or that a common law relationship is one of impermanence, despite some opposition from people of more traditional moral or religious views.

2. When entering into a marriage or a marriage-like relationship, couples are considering factors beyond their economic union, which may not be the principal reason for their being together. Couples entering into marriage or a common law relationship may very well be ignorant of the economic consequences of the breakdown of their relationship as not being a realistic possibility at the time.

3. By treating all couples, unmarried or married, the same way in respect of the division of property, the process would be substantially streamlined and there would be a certainty of application which would result in a fairer treatment for all couples. As with married couples, in that case, the unmarried couples could rely on the application of s.65 to address any inequities or special circumstances.

Discussion Point (3) - Family Property on Reserve Land

This discussion point focuses principally on the application of the *Indian Act* to the ownership and division of real property. The governance of Indian lands and affairs comes under federal authority. The government of British Columbia has no constitutional authority to enact legislation in respect thereof. The *Indian Act* makes no specific mention of personalty, however, save and except that if a band member goes missing, the band can reallocate his or her possessions to his or her family to ensure that they continue to be financially supported.

Land on an Indian reserve is Crown land and provided to bands for distribution to their members by way of a certificate of possession only. Fee simple is not transferred. Lands belonging to the band are not registered in the Land Title Office, save and

except for certain leasehold properties whereby the band conveys a leasehold interest in the property and then the leasehold interest may be registered in the LTO. Typically this only takes place where the land is to be used by non-Band members.

If a couple lives on an Indian Reserve on real property allocated to them by the band council, then the matter of who retains the certificate depends upon membership in the band. If one party is a member of the band and one is not, then the one who is not has no right to the possession of the real property upon separation. If both parties are band members, then the usual course would be to allocate a second property to one of the two band members as soon as a property became available. Property is not always immediately available.

Band membership is not automatic upon marriage and must be applied for. Children's rights pass through the mother so if the mother is not a member, then the child must apply to become a member as well in order to acquire any property rights. The party who is not a band member continues to be a member of his or her original band and continues to retain property rights through that other band unless and until he or she takes membership in a different band.

Because the *Indian Act* does not deal with personalty, it may be possible to divide chattels located on Indian lands but ss.30ff of the *Indian Act* provide that persons entering onto reserve lands without permission are committing an offence. Much will depend upon where the asset in issue is located. While it is possible that the court could make a compensation order for property that is not actually or reasonably exigible by process of the court, the same difficulties in execution remain where the band member keeps all of his or her assets on the reserve.

The best solution to this problem would be cooperation between the Provincial and Federal governments to tailor specific legislation at the federal level to allow for the division of family assets between spouses other than real property, exclusive possession of the family residence, delivery of moveable property to spouses and the enforcement of orders made by our courts.

PART C - WHAT FAMILY PROPERTY SHOULD BE DIVIDED AND HOW?

Discussion Point (4) - Family Assets and Judicial Discretion

The review paper suggests the possibility excluding certain types of property from division at the outset to provide a greater degree of predictability, which might even exclude property later used for a family purpose. The current regime provides clearly that a family asset is property ordinarily used for a family purpose. It does not require use by the entire family; ordinary use by either spouse or a minor child of either spouse will bring the property within the definition.

The general consensus of the committee is that

1. Judicial discretion should not be fettered in this area of what constitutes a family asset, and

2. We should keep the current definition for Afamily asset@ based upon the family purpose test.

A foreseeable outcome of making such exclusions may be attempts to arrange a party's affairs in order to fit those exclusions or litigation to persuade the court to further define the terms of exclusion or to bully the other spouse into accepting the exclusion. The result would be potentially more litigation and attempts to use the court system against disadvantaged spouses by the advantaged ones.

Under the current system, if an asset was acquired pre-marriage, kept separate and was not used for a family purpose, then it is not a family asset and is excluded. If it is a premarital asset, it was used for a family purpose and the relationship was relatively short, s.65 allows for judicial discretion to allow for re-apportionment.

We all felt that there should be a clear exclusion of premarital assets for RRSPs and annuities, which by definition automatically become family assets. The current regime is inconsistent with the Part 6 treatment of pensions, where the general rule is that pre-marital contributions are excluded from division. Division of RRSPs could be transferred to Part 6 or have a specific exclusion for premarital contributions.

We submit that there should be no change to the existing definition of family assets and that it would not be helpful to create a category of excluded property.

Discussion Point (5) - Family Debts

This area requires some conceptual clarification since the rights of third party creditors cannot be affected. Generally, family debts are already deducted from assets and net assets are divided.

We strongly support the FRA making specific reference to family debts and propose that the definition for family debts be essentially the same family purpose test as we use for family assets.

The really intriguing question here is whether there should be a special statutory provision which could compel one party to pay the other party's debts in a case where there are not enough assets. We are of the view that this legislative tool should be considered or in the alternative be stated to be a basis for ongoing spousal support, to protect against a party who goes bankrupt to avoid such a payment order.

We now turn to the specific questions.

Question 7: Should the FRA say that each spouse is equally responsible for family debts unless a judge decides that it would be unfair?

Yes.

Question 8: What should be considered in a definition of family debt?

(i) whether the debt was incurred for a family purpose;
Yes.

(b) whether the debt was incurred to acquire, manage, maintain, operate or improve other family assets;
Yes.

(c) *when the debt was incurred (whether before or during the relationship, or after separation);*
This should depend on the family purpose test.

(d) *when the debt was paid off (whether before or during the relationship, or after separation); or*
If the debt has been paid, it could be subject to reapportionment of assets if unfair, but one cannot automatically deduct a debt that has already been paid.

Question 9: What should a judge consider when deciding whether equal responsibility for family debts would be unfair?

(a) *factors similar to those listed under s. 65?*
Yes, to the extent that they are applicable.

(b) *whether family debts exceed family assets;*
See comments above. This would be a significant new substantive remedy.

(c) *whether one spouse benefitted more from the property or service the debt was incurred for;*
Yes, in general, but this is hard to apply in practice.

(d) whether one spouse ran up the debt without the consent of the other;
Probably no, because it brings fault into it.

(e) whether a spouse believed, and then relied on the belief, that one or both of them would be responsible for the debt;
No. This is too subjective B how or what would be the objective factors?

(f) whether the spouses agreed that one or both of them would be responsible for the family debt;
Yes, in principle.

The committee believes that each party to a marriage should bear equal responsibility

for debts incurred for a family purpose during the course of the marriage unless otherwise ordered by the court. If there are too many qualifiers as to what a family debt is or how it should be shared, this will only invite litigation. This area should not be made too complicated.

Discussion Point (6) - Spousal Agreements and Judicial Discretion to Vary

Spousal property agreements and agreements in general are the norm in family law. With a more collaborative approach to family law, the importance of agreements can not be overemphasized. How the FRA treats agreements is critical and central to property division in our province.

The FRA only defines a marriage agreement. It does not define a separation agreement or any other agreement, for that matter. S.65 refers to marriage agreement and s. 68 to ante nuptial or post nuptial settlement that is not a marriage agreement. Courts have generally found that if a separation agreement meets the Amarriage agreement criteria under s.61, then only a s.65 variation is available and s.68 is not.

These distinctions appear illogical and not based on any sound policy rationale. It is our view that in order to make the FRA more user friendly, the language should be simplified and anachronistic distinctions eliminated. There should be one definition for all agreements and this should include consent orders which are in essence agreements, sometimes without real judicial approval.

We believe that the basic criteria set out under s.61 are sound. The essential components are that the agreement be

a) in writing,
b) deal with the property in question,
c) signed by the parties, and
d) witnessed by a third party.

These four criteria should apply to all property law agreements including consent property orders with the exception that if there is judicial scrutiny, then the signing and witnessing by the parties can be omitted.

With respect to varying property agreements, the current legislative regime lacks an overall structure and ss.65 and 68 are not linked. Ss.65 and 68 set out different tests. Is there any rationale for this? Why should the test under s.68 be broader and more open ended? Why should a post nuptial property settlement that meets the definition of a Amarriage agreement@ be limited to s.65 criteria? Such distinctions are artificial, only complicate matters and lead to expensive and frustrating technical arguments.

There should be one general legislative scheme for all family property agreements focusing on both the procedural and the substantive aspects. The legislative authority to vary should be specifically extended to consent property orders with a limitation that if there is appropriate judicial scrutiny, there should not be any variation for substantive fairness. In other words, there should only be statutory authority to vary a consent order which has received judicial scrutiny for procedural fairness.

To understand our reasoning, it is important to appreciate the critical distinction between review for procedural fairness vs. review for substantive fairness. *Miglin v. Miglin,* 2003 SCC 24 and *Hartshorne v. Hartshorne*, 2004 SCC 22 highlight these two critical aspects of family law agreements.

The current FRA does not have any specific statutory criteria for review for procedural fairness. While an agreement can always be reviewed on common law grounds such as duress, fraud, undue influence, and unconscionability, there is no reference to review for material non-disclosure or an inadequate understanding of the nature and consequences of an agreement.

The essence of an agreement is a meeting of minds. In the context of an emotionally charged separation due process is critical. If one party does not know what he or she is giving up, whether assets or rights, there can not be any real meeting of minds.

Clear legislative criteria that lack of proper disclosure and inadequate or no legal advice can be grounds for setting an agreement aside will send a crystal clear signal to all couples, whether they are negotiating a cohabitation agreement or settling finances at the end of a long term marriage, that they must act in good faith or else invite judicial intervention with significant consequences.

The *Ontario Family Law Act*, R.S.O. 1990, c.F3, s.56 (4) states:

> *A court may, on application, set aside a domestic contract or a provision in it,*
>
> *(a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;*
>
> *(b) if a party did not understand the nature or consequences of the domestic contract; or*
>
> *(c) otherwise in accordance with the law of contract*

It is our opinion that a similar provision in our legislation would be of great assistance and benefit.

Therefore, to summarize, we strongly recommend that the FRA be amended as follows:

1. There should be one definition for all family property agreements.

2. Consent orders as to property should be specifically included.

3. Ss.65 and 68 should be merged to allow for all property agreements to be reviewed for both procedural and substantive fairness.

4. There should be specific legislative criteria for reviewing for procedural fairness.

Discussion Point (7) - Family Property and Spousal Support

Question 13: Would it be helpful if the FRA said that a judge should first split family assets before deciding whether to order spousal support?

Given the complex and intertwined relationship between s. 65(1)(e), Aeconomic need@ and spousal support, this is not an easy question to answer but on balance our view is that there is no need for such a statutory provision and in fact such a provision could prove to be artificial and cumbersome.

British Columbia courts routinely award both an unequal division of assets and monthly spousal maintenance to economically disadvantaged spouses. The effect of such orders is that the allegedly economically more powerful spouse often feels that he or she has been beaten into complete submission.

We generally concur with the current case law which states that assets are to be divided before awarding spousal support. However, whether this is case law or set out in legislation does not change the intertwined relationship and does not clarify the law for litigants or lawyers.

The question being asked is not the right one. The question should examine the relationship between s.65(1)(e) and spousal support and determine whether legislative criteria would assist. Our courts have declined to offer any clear rationale or set of principles as to how reapportionment based on economic need is related to spousal support and particularly lump sum spousal support.

Please note that compensatory spousal support as set out by the Supreme Court of Canada in *Moge v. Moge* has, of course, been adopted by our courts in reapportioning assets under s.65(1)(e) but this does not take into consideration the impact of property reapportionment on entitlement or quantum of spousal support. This is has now become a particularly significant problem given the almost universal adoption of the *Spousal Support Advisory Guidelines* ("SSAG") following the reasoning of our Court of Appeal in *Redpath v. Redpath*. If the SSAG range of spousal support determines quantum of spousal support, this impacts directly on economic needs-based property re-apportionment.

One solution might be to have an express provision under the spousal support provisions of the FRA stating that if there is a re-apportionment based on economic need under s.65(1)(e), this may be a basis for deviating from awarding spousal support in an amount outside the range of the SSAG. This would be a clear signal to the courts, lawyers and litigants to focus on the balancing which is required between property reapportionment and spousal support.

There may also be some value in framing legislative criteria to address the policy principle that during long term marriages, the parties become intertwined economically and are deemed to be equal partners, and that not having an equal division of assets

and then having income transferred between spouses after the division is not promoting equality, barring exceptional circumstances.

One of our members proposed that parties should be compelled to choose a remedy and be required to seek either an unequal division of assets based on economic need of assets or ongoing spousal support, with appropriate notice to the other side. The majority was of the view that this would be too restrictive and would unduly fetter judicial discretion. However, this latter idea would allow lawyers to advise clients more easily.

Discussion point (8) - **Conflicts of Law**

The central question here is whether the FRA should have a section on conflicts of law or choice of law. Many other jurisdictions have a section but BC does not.

We are of the view that the current legislation and case law are sufficient and no amendments are necessary. *The Court Jurisdictions and Proceedings Transfer Act* sets out the criteria for a court to determine if the BC court has the power to hear the case.

Where the parties have property in more than one jurisdiction, ordinarily courts can only exercise power over the assets in BC but s.66 of the FRA provides for sufficient flexibility to make appropriate compensation orders against the parties to adjust for assets outside of the province.

The discussion paper recommends the adoption of the draft *Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act* (the "Uniform Act"). This draft statute is different from the usual approach employed by the courts in that it bases the choice of law on *where the parties lived together as a couple* rather than whether the property is moveable or immoveable, and then applies the law to all of the property in question. It is significant to note that no province or territory has adopted the draft Uniform Act. The BC Law Institute recommends that province adopt the Uniform Act.

Question 14: Should the FRA deal with choice of law issues?

No. This is not a priority and no evidence that it is a problem that cannot be dealt with by application of current case law and conflict of law principles.

Question 15: Should the FRA deal with both court jurisdiction and choice of law?

No. It is enough to exercise the jurisdiction where the parties are before the Court. Extra-judicial property or the choice of law can be dealt with under current law.

Question 16: Should the Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings be adopted in BC?

No other province has felt the need and there is not a sufficiently large number of cases coming before the court on this issue to warrant legislative change, at least not at this time.

PART D WHEN SHOULD FAMILY PROPERTY BE DIVIDED?

Discussion Point (9) - Triggering Events:

In our deferred community of property regime, the triggering event signifies the moment when a non-owning spouse acquires an actual legal and equitable interest in the assets of the owning spouse. This can be of critical importance in case of a separated spouse transferring assets to third parties, dying or going bankrupt.

Question 17: What events should trigger the right to a division of family property?

It would be preferable to have a triggering event that is not exclusively dependent upon the parties commencing litigation. This would be in line with the focus on resolving disputes before the parties enter the litigation stream.

The current choices for having an early triggering event are either to commence litigation and seek a s.57 FRA declaration or try to have a quick separation agreement. The first option forces a party to go to court. The second option requires consent and may not be feasible if a spouse wishes to be difficult or even if it is simply not possible to have an early resolution by way of agreement due to outstanding disclosure issues.

The objective is to grant a non-owning spouse the ability to obtain a triggering date at an early stage without the expense of having to seek the approval of a court or the other spouse. The question is how to give adequate notice to the other spouse and possibly to third parties.

Some ideas explored by the committee which could be an automatic triggering event included:

1. Filing of a writ of summons and/or statement of claim for divorce or corollary relief or the filing of a petition for an annulment. These documents contain clear information that the parties have separated and there is no intention to resume cohabitation. This does not require both parties to agree to the date and does not require them to apply to the court for a s.57 declaration.

2. entering into a mediation agreement,

3. death of a separated spouse where separation can be proven to have taken place prior to death (see further comments below), and

4. filing of a Notice of Separation by either party in a court or some registry, possibly in the same manner as notification of certificates of pending litigation by the Land Title Office.

With respect to the latter, it is our recommendation that the current court registries be used but that these Notices of Separation be filed in a separate system with a minimum of paper work and not requiring any filing fees. They should certainly not be the equivalent of starting a court action. This separate "notice registry@ or filing system may or may not be actually separate from the regular court system. It would also make sense to include in this new notice system the filing of separation agreements.

The key however is that any new system not be dependent upon opening up a new file headed toward a trial and that it not require a substantial fee or any major administrative expense. Perhaps even some on line system could be explored with parties having the option of simply e-mailing a prescribed notice, perhaps through the information hubs currently being tested as a pilot project in Vancouver and Nanaimo.

If the parties reconcile, this could be addressed by a withdrawal of that notice by consent of the two parties (their signatures or those of their counsel).

Question 18: If a separation agreement is a triggering event, should the FRA make it clear that a separation agreement can be a written agreement between the spouses about what is or will be their triggering event (even if they have not yet agreed about how their family property will be divided)?

No. This is not practical. It may even be an impediment to completion of a separation agreement, particularly if there are power imbalance issues involved. Having a date certain which cannot be bargained away may assist in settlement.

Question 19: If separation is a triggering event, should the FRA include the factors a judge would look at to decide the date of separation?

There are frequently disputes as to what the date of separation actually was, but a notice registry would assist in this determination. If no formal event of separation was entered into by the parties, the matter could go before a judge for a finding of fact, but we're trying to keep these matters out of the court, not put them back in.

Discussion Point (10) Property Rights of Surviving Spouses (Death as a Triggering Event)

Question 21: Is it unfair that some surviving spouses are able to use the FRA family property provisions when their spouses die and other surviving spouses are not?

This question is actually two embedded questions: Should surviving spouses be treated the same whether they are separated or not? Should all separated surviving spouses, married and common law, be treated the same?

As to the first question, surviving spouses who are not separated other than by the event of the death of the other spouse should not come within the purview of the FRA for the purpose of division of property. The Act should reflect this generally.

As to the second question, the matter of whether separated common law spouses should be entitled to the same rights and remedies as separated married spouses is addressed elsewhere and will not be discussed here.

Once a spouse's spouse dies, he or she is no longer a *spouse* within the meaning of the FRA in any event, and a new claim would have to be instituted against the estate of the deceased. This is in part why it is important to have a triggering event prior to death. If the moment before death is used as a triggering event, this could affect the rights of unseparated spouses as well as those of other beneficiaries, positively or negatively, depending on how the term "spouse" is defined for the purpose of property division. It could also lead to a substantial conflict between the wills and estates legislation and the FRA, which would tend to inflame litigation rather than defuse it, particularly given that death and divorce are both very emotionally charged situations.

It is our view that separation and death as it relates to property division should be kept separate. It is better to have a specific triggering event mechanism in the case of separating with a positive obligation on the separating parties and to leave the claims of the widow(er) in the field of wills and estates law. The worst situation is one where a dying spouse's lawyer is rushing into court to get a s.57 FRA declaration. With a definition of triggering event that does not require a court application, this situation would be ameliorated.

We are of the view that death of a spouse should be a triggering event where the parties can prove that the spouses were separated at the time of death, although this may lead to litigation in some cases. We anticipate that this will be a rare circumstance and litigation will not be pronounced on this issue.

Question 22: Do you know anyone who has been affected by the fact that some surviving spouses are able to use the FRA family property provisions when their spouses die and other surviving spouses are not?

Yes. There are obviously different outcomes but we have not seen any major problem arising from it and have addressed this question as above.

Question 22.1: If yes, how frequently do you encounter this situation?

Infrequently.

Question 23: Do you think the FRA should be amended to allow all surviving spouses to claim a share of a deceased spouse's property under its family property division provisions:

No. See above.

Question 24: If all surviving spouses are allowed to use the FRA family property provisions when their spouses die, should a surviving spouse be:

- *a. required to choose between the FRA and succession law*
- *b. allowed to use both the FRA and succession law*
- *c. other*

A choice of law only serves to complicate the process. It would be best to leave the wills and estates issues with the applicable legislation.

Question 24.1: Would your answer to question 24 apply:

- *a. always;*
- *b. unless the deceased spouse's will says otherwise; or*
- *c. other*

Not applicable, see above.

Discussion Point (11) Date for Valuing Family Property

This is a very important area and does require legislative change. There is currently too much discretion for judges in this area and hence too much uncertainty when we engage in negotiations.

Question 25: Would it be helpful if the FRA said something about when to value family assets?

It would be very helpful to have a general statement that the date of trial or consent resolution of the property issues is normally the valuation date, subject to significant changes which may have occurred since the date of separation.

It makes a lot of sense to focus discretionary reapportionment of property into one section so that everything is addressed at once and all competing factors are considered, including the type of asset, conduct of the parties in relationship to assets and their general circumstances such as whether occupation rent should be taken into account and who paid the mortgage after separation. Judicial discretion is important here, in particular where there are allegations of waste and dissipation of assets.

Without some general statement, parties often attempt to cherry pick for the best date for their own position. Generally speaking the parties should share in any increase or diminution over time of the value of their assets at the time their issues are finally determined (trial or agreement), and we think it would be helpful to set that out clearly that if one party causes a significant increase or decrease in the value beyond general market trends, this could be taken into account which could be addressed by an unequal division of those assets on evidence.

It does not make a lot of sense to use a valuation from an early date (separation) only to have to modify it later as a special circumstance, particularly where the general trend is for an increase in value, as in real estate.

In essence what we are recommending is a codification of the current law in this area. If

it is clearly set out in legislation, this will assist negotiating parties.

Question 25.1. If yes, what do you think the FRA should say about valuation dates?

a. *Let the spouses agree to a valuation date:*
   i. *in all circumstances;*
   ii. *in some circumstances;*
   iii. *for certain types of property;*
   iv. *other*.

   Given that the mandate here is to try to resolve disputes without necessarily proceeding to court, it is sensible to allow parties to set their valuation dates, at least for the purpose of separation agreements, to avoid either party delaying for their maximum benefit. It should be with legislative guidance as recommended above, however.

   This is different than allowing them to agree to a triggering event because the triggering event establishes the assets to be divided and allows for a level playing field to commence their negotiations. Having an agreed upon valuation date may allow them to conclude it in a more timely fashion.

b. *Let the judge choose any valuation date.*
   Generally, no, but we should not foreclose judicial safeguards. We are trying to streamline the process, not to create new uncertain areas to litigate. If there are inequities, they should be addressed by way of an unequal division of family assets, which has its own criteria for assessment.

c. *Let the judge choose among certain specified valuation dates, and:*
   i. *do not let the judge pick another date;*
   ii. *let the judge pick another date*
      1. *in some circumstances,*
      2. *for certain types of property,*
      3. if there is a change in property value between the valuation

date and trial (if the choices for a valuation date do not include the trial date),

4. other .

See comments above.

d. Set out a fixed valuation date, and:

i. do not let the judge pick another date;

ii. Require the judge to consider that the valuation date is fixed in deciding whether a 50-50 split of family assets would be unfair;

iii. let the judge pick another date;

1. in some circumstances,
2. for certain types of property,
3. if there is a change in property value between the valuation date and trial (if the trial date is not the valuation date),
4. other .

See comments above.

Question 26: If the FRA does set out when family assets should be valued, what should be the valuation date(s)?

a. the trial date;

This is sensible but subject to s.65 reapportionment.

b. the date the spouses make a separation agreement;

This is sensible to effect settlement.

c. *the date of separation;*

This does not account for increases or decreases due to market forces and therefore not the best choice.

d. the date when the spouses have been separated for a year.

This seems arbitrary. If the parties own an asset jointly, unless they agree otherwise, they should share in any increase or diminution of value based

on market forces, and any special effort, positive or negative, on the part of either party affecting the value can be dealt with by way of an unequal division of that asset.

e. the date of a court declaration that the spouses have no chance of reconciling;
This also seems arbitrary, for the same reason.

f. the date of divorce (or judicial separation or annulment);
A divorce or other determination of the marriage may not conclude the property issues between the parties and therefore is not the best choice.

g. the date one spouse applies to court to divide the family assets.
The date of application is no guarantee that the application will conclude in a court order or agreement, in which case one party may delay to his or her advantage.

h. other.

PART E - GENERAL FEEDBACK

We are of the view that there are significant areas which are not addressed in the discussion paper. The process of accessing the property division mechanism of the FRA has to be clearly addressed. What are the real costs to users, both financial and emotional? What are the very real barriers to accurate and reliable financial information upon which informed decisions can be made? A complex, expensive, and often unpredictable court process is frequently necessary to determine what the assets are and what their values are.

It is unfortunate that our adversarial legal system places the onus on usually the weaker spouse, who lacks the knowledge and often the financial means, to prove on a balance of probabilities that her spouse has this or that asset and what it is worth. Why force the weaker party to spend thousands and thousands of dollars on lawyers, forensic accountants and business valuators to prove business values or levels of income when the party in control of the key financial information can simply sit back and wait to see if

his (yes, this is usually gender specific) spouse will tire and hopefully give up and take a settlement which is less than fair?

The traditional Aproof on a balance of probabilities@ is deeply flawed in the area of family law and legislative criteria would be of great assistance in shifting the evidentiary burdens or at least making the playing field more level. Non-disclosure was brilliantly framed by Mr. Justice Fraser in *Cunha v. Cunha* [1994] B.C.. No. 2573, which should be mandatory reading for anyone with even a passing interest in family justice issues.

There are a number of useful ideas in this area and they include the following:

1. State clearly that there is a positive duty on both spouses to provide accurate and reliable financial information to the other party not only as to the existence of assets but also to their values and if values can not be ascertained easily as to why this can not be done.

2. There should be an automatic right to seek full disclosure by means of appropriate demands, without the need to start legal action, and if legal action is started for failure to comply with disclosure, there should be special costs awarded unless the offending party can show compelling reasons to the contrary.

3. Either party should be able to bring on an application in court at any stage of the proceedings to fund the full costs of an appropriate investigation and report into financial matters with legal fees, accounting fees and disbursements paid from family assets unless compelling reasons could be shown to the contrary.

4. If one party does not have access to financial resources to fund an investigation and report into financial matters the Court should be given broad discretion to order the full costs from the non disclosing party.

5. If there is a judicial finding of material non-disclosure, there should be specific legislative authority for judges to reverse the onus of proof on evidence and to draw appropriate adverse findings of fact against the non disclosing party, essentially incorporating the rationale of *Cunha v. Cunha*.

A number of these areas may be more appropriate for reform under the Rules of Court but having them stated in the FRA would send a strong signal to all users of the system about their rights and responsibilities regarding early and accurate disclosure.

In the area of property division, strong disclosure tools and an ability to access financial resources at an early stage are frequently the key to achieving a just and speedy settlement. The more procedural tools and resources a non-owning party has at an early stage, the greater the probability is that litigation can be avoided.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
At Surrey, June 15, 2007

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David Hart
Don Boyd
Nancy Harold
Olga Volpe
Janet L. Clark
David Halkett