

P E R S P E C T I V E S

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Financial and estate planning

Meet the new BC Family Law Act

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In November 2012, the BC government passed regulations for the new Family Law Act (FLA), to be effective March 18, 2013. The FLA is considered the most significant change since the Family Relations Act (FRA) came into effect in 1978. The new FLA completely replaces the previous Act.

The FLA covers several different areas. In this issue, we will focus on the division of assets. The FLA signals some major changes in how B.C. courts will view relationships – both married and common-law – and how assets are dealt with upon relationship breakdown.

Under the current FRA, unmarried spouses are excluded from property division. The only recourse for unmarried spouses is to claim spousal support, or to make a claim via a constructive trust. A constructive trust benefits those who have been wrongfully deprived of their rights regarding property, where unjust enrichment to the other spouse occurs. Under the FLA, unmarried spouses, including same-sex spouses, who have lived together for two years in a marriage-like relationship, or in a marriage-like relationship and have children together, are now included for property division.

Also under the current FRA, the starting point upon marriage breakdown is a 50/50 division of family assets. Family assets are characterized by how they are used, not by who owns them.

The Ministry of Justice explains the new changes like this:

The new Family Law Act moves to an excluded property model. It will no longer rely on a two-stage process of identifying the property subject to division and then determining if that property has an "ordinary use for a family purpose".

Family property will include all real and personal property owned by one or both spouses at the date of separation unless the asset in question is excluded, in which case only the increase in the value of the asset during the relationship is divisible. Whether an asset was ordinarily used for a family purpose will not be relevant in deciding if it is family property.

The exclusions include:

- property acquired before or after the relationship;
- gifts or inheritances;

- damage awards and insurance proceeds with some exceptions; and
- some kinds of trust property

These changes make the law simpler, clearer, easier to apply and easier to understand for the people who are subject to it. British Columbia historically had a higher than average level of property division disputes in court; the broad flexibility and discretion in this area created uncertainty and promoted litigation. As well, the excluded property division model is a better fit with people's expectations about what is fair: they share the property and debt that they accrue together during their relationship.

One area of importance is the date at which assets are valued. The new triggering event for crystallizing interests is the date of separation. For the purposes of the FLA, spouses may be separated despite continuing to live together. The court may consider as evidence of separation:

- Communication, by one spouse to the other, of an intention to separate permanently, and
- An action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

In light of the new FLA, what should you consider? Couples are encouraged to enter into family law agreements. There are four types: cohabitation, prenuptial, postnuptial and separation. *It's important for you to identify and value assets at the outset, and enter into an agreement to protect them.*

We strongly recommend that you obtain independent legal advice, and would be happy to refer you to the appropriate advisors should you wish.

If you would like to read more about the whole Family Law Act, the Ministry of Justice explains it further online, at:

www.ag.gov.bc.ca/legislation/family-law/lacts-explained.htm



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