

Trust Interests on Relationship Breakdown: Characterization, Valuation and Tax Issues in British Columbia

Parveen Karsan, TEP
Karsan Tax Law Corp.

Please read the required pre-reading "*Issues Arising on Divorce – B. Katlai and H. Neilson*"
in preparation for this session.

Trust Interests on Relationship Breakdown: Characterization, Valuation and Tax Issues in British Columbia

By: Parveen Karsan, JD, TEP

A. Introduction

A trust, under Canadian law, is fundamentally a legal relationship rather than a separate legal entity. In the common law provinces, a trust arises when a settlor transfers property to a trustee, who then holds and manages that property for the benefit of one or more beneficiaries. *Waters' Law of Trusts in Canada*¹ states the following:

The essential features of a common law trust...are a segregated fund comprising an asset or a number of assets, a person or purpose as the object of the trust with exclusive right to the enjoyment of the fund or its dedication, and a person holding title to the asset or assets held in the trust and in some instances administering or managing the fund.²

Property division on marital breakdown is complicated where trusts are involved because legal title, beneficial ownership, control, and economic expectation may be held by different persons. The analysis must not begin and end with ascertaining the fair market value of assets held in a trust. Rather, it begins with the identification of the interest actually held by the spouse in question and proceeds to the characterization of that interest under the applicable family property regime. Finally, it addresses the value of the interest.

This paper addresses the British Columbia family law framework, with emphasis on discretionary trusts, bare trusts, resulting trusts, constructive trusts and valuation issues. It also addresses select income tax issues relating to the breakdown of marriages and common-law partnerships.

B. Spouses and Common-Law Partners

The term "spouse" is not defined uniformly throughout the relevant provincial and federal legislation. The *Family Law Act*, S.B.C. 2011, c. 25 (the "*FLA*"), the *Income Tax Act*, RSC 1985, c. 1 (5th Supp) (the "*ITA*"), and the *Wills, Estates and Succession Act*, SBC 2009 c. 13 ("*WESA*") each use the concept for a different purpose and define the term accordingly.

1. The Income Tax Act

1.1. The Definitions (And Lack Thereof)

In the *ITA*, the terms "spouse" and "common-law partner" act as structural bridges between Canada's individual tax system and economic family units. The question of whether a particular

¹ Donovan Waters, Mark Gillen, and Lionel Smith, *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Carswell, 2021).

² *Ibid.*, at 3-4.

individual is a “spouse” or “common-law partner” of the other may impact on, among other things, the availability of tax-deferred rollovers, the application of anti-avoidance rules, the formation of relationships (extending beyond the couple itself) and the accessibility of the principal residence exemption in respect of a particular property.

While the term “spouse” is used over 3,500 times in the *ITA*, the *ITA* does not explicitly define it. The ordinary meaning of “spouse” is a person who is married to another individual.³ In other words, it may describe a person that has participated in a legal marriage ceremony with another individual which is permitted by the jurisdiction in which the ceremony occurred and who has not subsequently divorced the other individual. Subsection 252(3) of the *ITA* extends the meanings of “spouse” and “former spouse” for the purposes of the listed sections to include an individual who is a party to a void or voidable marriage with the other individual.⁴

The term “common-law partner”, on the other hand, is explicitly defined in the *ITA*. The definition of “common-law partner” is as follows:

common-law partner, with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and

(a) has so cohabited throughout the 12-month period that ends at that time, or

(b) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(c) and (e) and subparagraph 252(2)(a)(iii),

and, for the purpose of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were living separate and apart at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship;⁵

In other words, cohabitation throughout a 12-month period or, alternatively, cohabitation together with shared offspring, may trigger common-law partnership for the purposes of the *ITA*. Once triggered, the parties will be deemed to continue to be common-law partners unless and until they live apart for at least 90 days because of a breakdown of their conjugal relationship.

While the *ITA* provides some clarity as to the meaning of “common-law partner”, including the circumstances that may lead to the termination of a common-law partnership, the lack of a definition for the term “spouse” can lead to a fair bit of confusion. In *Enns v. Canada*, 2025 FCA 14, the Federal Court of Appeal considered whether, for the purposes of paragraph 160(1)(a) of

³ *Enns v. Canada*, 2025 FCA 14 (herein after referred to as “*Enns*”), at paragraph 30.

⁴ This section may have application where, for example, a person lacked capacity to enter into a marriage at the time of the ceremony, where the person did not consent to the marriage or where one of the marrying parties was already married to another individual at the time of the ceremony.

⁵ *Income Tax Act*, RSC 1985, c. 1 (5th Supp), at subsection 248(1).

the *ITA*, Mrs. Enns continued to be the “spouse” of Mr. Enns following his passing. The relevant portion of paragraph 160(1)(a) reads as follows:

Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

(a) the person’s spouse or common-law partner or a person who has since become the person’s spouse or common-law partner,

...

the following rules apply...

Again, in *Enns*, the sole issue was whether Mrs. Enns continued to be the spouse of Mr. Enns when, upon his death, his RRSP transferred to her.

The authority on this issue was conflicting. Specifically, in *Kiperchuk v. The Queen*,⁶ Lamarre J. cited *Kindl Estate, Re* 1982 CarswellOnt 340 (ONSC) in support of the proposition that the status of marriage is ended by death. As the RRSP in *Kiperchuk* devolved to the transferee when she was no longer related by marriage to her former husband, she was not his spouse at the time of the transfer. Lamarre J. further held that the transferee was not a person with whom the transferor was not dealing at arm’s length at the time of the transfer. Subsection 160(1) was therefore inapplicable.

In *Kuchta v. The Queen*,⁷ Graham J. conducted a textual, contextual and purposive analysis of the term “spouse”. On the strength of the purposive analysis, Graham J. held that a widow or widower would remain a spouse of their late spouse after death of the late spouse.

From a textual standpoint, the Court in *Enns* noted that the death of a spouse would result in the end of his or her marriage. This favours the conclusion that the survivor would have ceased to be the spouse of the deceased. From a purposive standpoint, the Court noted that allowing an assessment against Mrs. Enns based on the fair market value of the RRSP transferred would require Mrs. Enns to withdraw the funds from a locked-in retirement account and to pay tax on the withdrawal of the funds. This harsh consequence favours a finding that Mrs. Enns was not the spouse of Mr. Enns at the time of the transfer.

The truly interesting portion of the case is the contextual analysis. The Court examined the definition of “common-law partner” and noted that two individuals would cease to cohabit following the death of one of the two. However, the definition of “common-law partner” deems individuals that have cohabited for the requisite 12-month period (or cohabited and had offspring) to continue to be common-law partners “unless they were living separate and apart at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship”. The parties cannot live separate and apart for the requisite period after

⁶ *Kiperchuk v. The Queen*, 2013 TCC 60.

⁷ *Kuchta v. The Queen*, 2015 TCC 289.

one of them has passed (and certainly not due to a breakdown of their conjugal relationship). As such, on a plain reading of the provision, a common-law partnership would not be interrupted by death but would persist indefinitely. As common-law partnership has consequences, there may be real implications to such a conclusion. For example, subsection 251(2) states that individuals may be related persons for the purposes of the *ITA* if connected by marriage or common-law partnership. Subsection 251(6) further provides that persons are connected by marriage or common-law partnership where one is married or in a common-law partnership with a person who is connected by blood relationship to the other. For example, a spouse or common-law partner is related to their parents-in-law and vice-versa.

The Court noted that Parliament intended the *ITA* to apply equally to couples (whether married or in common-law partnerships). As marriage ends on the death of one of the married individuals, married individuals cease to be “connected by marriage” to the blood relatives of their late spouse. To ensure that common law spouses are not “connected by common-law partnership” indefinitely following the passing of their partner and to ensure that couples are treated fairly, regardless of marital status, common-law partnerships must also end on death.

As a person will no longer be a “common-law partner” following the death of their partner, a transfer of the RRSP will not constitute a transfer to a common-law partner. To ensure fairness, the transfer of a married individual’s RRSP to their designated beneficiary on death would also not constitute a transfer of property to a “spouse”.

The Court also acknowledged that some provisions of the *ITA* (such as subsections 146(8.91), 70(6), 72(2) and 148(8.2)) would be rendered meaningless if partners ceased to be spouses on the death of one partner. For example, subsection 70(6) states:

Where any property of a taxpayer who was resident in Canada immediately before the taxpayer’s death ... is, as a consequence of the death, transferred or distributed to

(a) the taxpayer’s spouse or common-law partner who was resident in Canada immediately before the taxpayer’s death...

Similarly, subsection 72(2) opens with:

Where property of a taxpayer ... has, on or after the death of the taxpayer and as a consequence thereof, been transferred or distributed to the taxpayer’s spouse or common-law partner...

Subsection 148(8.2) includes the following language:

...where, as a consequence of the death of a policyholder ..., an interest of the policyholder in a life insurance policy ... is transferred or distributed to the policyholder’s spouse or common-law partner who was resident in Canada immediately before the death...

The references to “spouse or common-law partner” would render these provisions meaningless⁸ unless the terms could be extended to include surviving partners. While acknowledging this to be the case, the Court noted that “finding that the ordinary and legal meaning of “spouse” applies to subsection 160(1) of the [ITA] does not render this subsection meaningless” as it could continue to apply to transfers between “spouses” during their lifetimes.⁹

Enns serves to highlight the ambiguity inherent in this seemingly clear definition. The fact that conflicting authority exists, provisions are present that would be rendered meaningless by application of the judicially accepted meaning of “spouse” to them and that the term “spouse” can no longer be uniformly interpreted throughout the *ITA* is certainly a signal that further legislative intervention is required to ensure clarity, certainty and predictability.

1.2. Conjugal Relationships

As noted, the term “common-law partner” is defined to mean a person who cohabits in a conjugal relationship with the taxpayer for the stipulated term. While the term “conjugal relationship” is not defined in the *ITA*, the “Molodowich Factors”, developed in the family law context and set out in *Molodowich v. Penttinen*,¹⁰ are typically utilized in determining if a conjugal relationship exists. The Molodowich Factors were described as follows at paragraph 16 of *Molodowich*:

I propose to consolidate the statements just quoted by considering the facts and circumstances of this case with the guidance of a series of questions listed under the seven descriptive components involved, to varying degrees and combinations, in the complex group of human inter-relationships broadly described by the words “cohabitation” and “consortium”:

(1) SHELTER:

- (a) Did the parties live under the same roof?
- (b) What were the sleeping arrangements?
- (c) Did anyone else occupy or share the available accommodation?

(2) SEXUAL AND PERSONAL BEHAVIOUR:

- (a) Did the parties have sexual relations? If not, why not?
- (b) Did they maintain an attitude of fidelity to each other?
- (c) What were their feelings toward each other?
- (d) Did they communicate on a personal level?
- (e) Did they eat their meals together?
- (f) What, if anything, did they do to assist each other with problems or during illness?
- (g) Did they buy gifts for each other on special occasions?

(3) SERVICES:

⁸ This is the case at least in respect of the portions of the provisions reproduced in this paper. Some provisions may be rendered only partially meaningless where they apply to situations beyond those involving spouses and common-law partners.

⁹ *Enns*, *supra* note 3 at paragraph 52.

¹⁰ See *Molodowich v. Penttinen* (1980), 1980 CanLII 1537 (ON H CJ), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.).

What was the conduct and habit of the parties in relation to:

- (a) Preparation of meals,
- (b) Washing and mending clothes,
- (c) Shopping,
- (d) Household maintenance,
- (e) Any other domestic services?

(4) SOCIAL:

- (a) Did they participate together or separately in neighbourhood and community activities?
- (b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

(5) SOCIETAL:

What was the attitude and conduct of the community towards each of them and as a couple?

(6) SUPPORT (ECONOMIC):

- (a) What were the financial arrangements between the parties regarding the provision of or contribution towards the necessities of life (food, clothing, shelter, recreation, etc.)?
- (b) What were the arrangements concerning the acquisition and ownership of property?
- (c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

(7) CHILDREN:

What was the attitude and conduct of the parties concerning children? ¹¹

The Molodowich Factors were cited with approval by the Supreme Court of Canada in *M. v. H.*¹² In *M. v. H.*, the Court referred to the Molodowich Factors as “the generally accepted characteristics of a conjugal relationship” and noted that the elements set out may be present in varying degrees.¹³ The Court went on to note that it was not necessary for all of the Molodowich Factors to be present in order for the relationship to be considered to be conjugal.

As noted, the Molodowich Factors were developed in the context of a family law dispute. They have, however, been utilized extensively to determine whether litigants are in a conjugal relationship for the purposes of the *ITA*¹⁴ and other legislation.

It is not necessary, nor sufficient, for individuals to live together in order to establish the existence of conjugal relations. For example, the Courts have held that two individuals had terminated their

¹¹ Ibid., at paragraph 16.

¹² *M. v. H.*, [1999] 2 S.C.R. 3 (herein referred to as “*M. v. H.*”).

¹³ Ibid., at paragraph 59.

¹⁴ See, for example, *Richard c. La Reine*, 2003 TCC 774, *Bellavance c. La Reine*, 2004 TCC 5, *Hendricken v. The Queen*, 2008 TCC 48, *Harrison v. The Queen*, 2008 TCC 314, and *Brunette v. The Queen*, 2009 TCC 584.

conjugal relationship, even though they continued to reside in the same home.¹⁵ By way of contrast, the Canada Revenue Agency (the “CRA”) has taken the position that the fact that two individuals maintain separate residences would not preclude them from being found to be in a conjugal relationship.¹⁶

As a review of the foregoing makes clear, determining whether parties are in a conjugal relationship is not a simple task and requires a review of all of the relevant facts. As there are many factors to consider, and as the weight to be given to each may vary depending on the circumstances (and, perhaps, on the perspective of the trier of fact), the question of whether the parties are in a conjugal relationship may be a difficult one to answer with certainty. Furthermore, given the nature of human relationships, the dynamics between the parties may fluctuate, such that inquiries into the Molodowich Factors may yield different responses over time.

1.3. *Living Separate and Apart*

The *ITA* also contains a number of provisions that apply where an individual is living separate and apart from their spouse or common-law partner because of a breakdown of their marriage or common-law partnership. For example, subsection 74.5(3) provides that the spousal attribution rules set out in subsection 74.1(1) and section 74.2 do not apply to attribute income and capital gains to a spouse where the income or loss from the property in question relates to the period throughout which the individual is living separate and apart from that person because of a breakdown in their marriage or common-law partnership.¹⁷ The Courts have held that spouses may live “separate and apart”, even while living under the same roof.¹⁸

2. The Wills, Estates and Succession Act

WESA operates at a different time and for a different purpose. The analysis of whether a person is a spouse for the purposes of *WESA* is typically undertaken in order to determine whether benefits arise for an individual on the death of their partner.

Under subsection 2(1) of *WESA*, two persons are considered spouses if they were both alive immediately before a relevant time (typically the death of one of the spouses) and were either married or had been living with each other in a marriage-like relationship for at least 2 years. In the case of a marriage, individuals cease to be spouses for the purposes of *WESA* when an event occurs that causes an interest in family property (as defined in Part 5 of the *FLA*) to arise.¹⁹ Separation causes an interest in family property to arise and is often the trigger for the termination of the spousal relationship for the purposes of *WESA*. In the case of a marriage-like relationship, the parties cease to be spouses when one or both persons terminate the relationship. *WESA* further

¹⁵ See *Bellavance c. La Reine*, 2004 TCC 5.

¹⁶ CRA External Technical Interpretation 2002-0161185 – Meaning of Common-Law.

¹⁷ A joint election must be filed in respect of section 74.2.

¹⁸ See *Kelner v. R.*, [1996] 1 CTC 2687 (TCC) and *Roby v. The Queen*, [2002] 1 CTC 2579.

¹⁹ *Wills, Estates and Succession Act*, [SBC 2009], c. 13 (“*WESA*”), at paragraph 2(2)(a).

provides that spouses will be considered not to have separated if, within one year, the parties resume living together primarily to reconcile and do so for one or more periods totaling at least 90 days.²⁰

What is a “marriage-like relationship” for the purposes of *WESA*? As with conjugal relationships (discussed above), there is no single factor that can conclusively establish the existence of a marriage-like relationship. In *Austin v. Goerz*,²¹ Frankel, J.A. (writing for the Court) noted the following:

It is understandable that the presence or absence of any particular factor cannot be determinative of whether a relationship is marriage-like. This is because equally there is no checklist of characteristics that will invariably be found in all marriages. In this regard I respectfully agree with the following from the judgment of Ryan-Froslic J. in *Yakiwchuk v. Oaks*, 2003 SKQB 124:

[10] Spousal relationships are many and varied. Individuals in spousal relationships, whether they are married or not, structure their relationships differently. In some relationships there is a complete blending of finances and property - in others, spouses keep their property and finances totally separate and in still others one spouse may totally control those aspects of the relationship with the other spouse having little or no knowledge or input. For some couples, sexual relations are very important - for others, that aspect may take a back seat to companionship. Some spouses do not share the same bed. There may be a variety of reasons for this such as health or personal choice. Some people are affectionate and demonstrative. They show their feelings for their “spouse” by holding hands, touching and kissing in public. Other individuals are not demonstrative and do not engage in public displays of affection. Some “spouses” do everything together - others do nothing together. Some “spouses” vacation together and some spend their holidays apart. Some “spouses” have children - others do not. It is this variation in the way human beings structure their relationships that make the determination of when a “spousal relationship” exists difficult to determine. With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage are much more difficult to ascertain. Rarely is there any type of “public” declaration of intent. Often people begin cohabiting with little forethought or planning. Their motivation is often nothing more than wanting to “be together”. Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people “ease into” situations, spending more and more time together. Agreements

²⁰ Ibid., at subsection 2(2.1).

²¹ *Austin v. Goerz*, 2007 BCCA 586.

between people verifying when their relationship began and how it will operate often do not exist. (Emphasis added)²²

The foregoing demonstrates the difficulty in ascertaining whether two persons were in a marriage-like relationship for the purposes of *WESA*. The BC Court of Appeal in *Weber v. LeClerc*²³ pointed to the parties' expectation that the relationship would be of lengthy, indeterminate duration together with objective evidence of the parties' lifestyle and interactions to determine whether a marriage-like relationship could be established. The Court in *Jones v. Davidson*²⁴ noted that the inquiry is contextual and that it "involves the subjective intentions of the parties and objective evidence, and the subjective intentions, where there is evidence of such, may be tested by reference to the objective evidence. In turn, that objective evidence may address a wide assortment of characteristics or indicia for which there is no definitive classification system to determine the ultimate characterization of the relationship. That answer must be given by the judge, understanding the concept and fully considering the evidence."²⁵ The Court in *Coad v. Lariviere*²⁶ noted that the term "conjugal" has essentially the same meaning as "marriage-like".²⁷ As such, the Molodowich Factors discussed above are also relevant to the determination of whether parties are in a marriage-like relationship.²⁸

3. The Family Law Act

For the purposes of the *FLA*, persons are spouses if they are married to each other or have lived together in a marriage-like relationship for at least two years.²⁹ Section 81 provides that, on separation, each spouse has a right to an undivided half interest in family property as a tenant-in-common (subject to an agreement or order that provides otherwise as well as Parts 5 and 6 of the *FLA*). The separation date is therefore the date at which family property rights arise and, generally, the date at which the property to be identified is determined.

A couple who resumes living together in an effort to reconcile is not considered to have separated if, within one year after the separation, they live together for one or more periods totaling at least

²² *Ibid.*, at paragraph 58.

²³ *Weber v. LeClerc*, 2015 BCCA 492.

²⁴ *Jones v. Davidson*, 2002 BCCA 31.

²⁵ *Ibid.*, at paragraph 24.

²⁶ *Coad v. Lariviere*, 2022 BCCA 222.

²⁷ *Ibid.*, at paragraph 129.

²⁸ Note, also, that the definition of "child" for the purposes of *WESA* was recently considered in *Stainer v. Thurgood*, 2026 BCSC 326 (herein referred to as "*Stainer*"). While a discussion of *Stainer* is beyond the scope of this paper, it is an interesting case as it leaves open the possibility that, where a person stands *in loco parentis* to another person, that other person may meet the definition of "child" for the purposes of *WESA* and may therefore have standing to seek variation of the will of the "parent". While *Stainer* was an application to summarily dismiss a wills variation claim and did not judicially expand the meaning of the term "child" for the purposes of the relevant provisions of *WESA*, it suggested that this may be possibility. Note that in *Hope v. Raeder Estate* (1994) 2 BCLR (3d) 58 (BCCA) and *Peri v. McCutcheon*, 2011 BCCA 401, the courts had declined to expand the meaning of "child" in this manner. However, in *Peri*, the BC Court of Appeal did not declare that such reconsider could not occur and noted that the question should await "a more compelling factual foundation".

²⁹ *Family Law Act*, S.B.C. 2011, c. 25, at subsection 3(1).

90 days and reconciliation was the primary purpose of doing so.³⁰ That said, a married couple may be separated while continuing to occupy the same residence.³¹ (See the discussion regarding the Molodowich Factors above). The inquiry is factual and concerns whether the parties have separated and whether there is a reasonable prospect of reconciliation. Divorce is not required for rights under Part 5 to arise.

C. The Family Law Act and the Division of Property

Broadly speaking, the *FLA* provides that both spouses are entitled to family property and are responsible for family debt, regardless of their respective use or contribution (unless an agreement or order provides otherwise).³² As a starting point, therefore, it must be determined whether a given property (including an interest in a discretionary trust) constitutes family property (and whether a debt constitutes family debt). The event that crystallizes the parties' statutory interests is separation (as opposed to the filing of a claim or the granting of a divorce). The question of whether any given property constitutes family property is therefore generally identified as of the separation date.

Subsection 84(1) of the *FLA* reads as follows:

Subject to section 85 [*excluded property*], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,
 - (i) property that is owned by at least one spouse, or
 - (ii) a beneficial interest of at least one spouse in property;
- (b) after separation,
 - (i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or
 - (ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.

Subsection 84(2) of the *FLA* sets out a number of assets that are specifically included as family property. Among these inclusions are:

- (a) a share or an interest in a corporation;
- (b) an interest in a partnership, an association, an organization, a business or a venture;

³⁰ Ibid., at subsection 83(1).

³¹ Ibid., at paragraph 3(4)(a).

³² *FLA*, supra note 29, at subsection 81(1).

- (c) property owing to a spouse
 - (i) as a refund, including an income tax refund, or
 - (ii) in return for the provision of a good or service;
- (d) money of a spouse in an account with a financial institution;
- (e) a spouse's entitlement under an annuity, a pension plan, a retirement savings plan or an income plan;
- (f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;
- (g) the amount by which the value of excluded property has increased since the later of the date
 - (i) the relationship between the spouses began, or
 - (ii) the excluded property was acquired.

Paragraph 84(2)(f) was applicable where, during the course of the relationship, a spouse transferred real estate to a discretionary trust of which he was the settlor, one of two trustees and a beneficiary.³³

Paragraph 84(2)(g) indicates that, while excluded property is not divisible, growth in the value of excluded property from the later of the date the relationship between the spouses began and the date the excluded property was acquired (the “Commencement Date”) is considered to be family property and, therefore, divisible. Subsection 84(2.1) of the *FLA* notes that, for the purposes of paragraph 84(2)(g), “any increase in value of a beneficial interest in property held in a discretionary trust does not include the value of any property received from the trust”.

Subsection 84(3) of the *FLA* notes that:

despite subsection (1) and subject to paragraph 85(1)(e), family property includes that part of trust property contributed by a spouse to a trust in which

- (a) the spouse is a beneficiary, and has a vested interest in that part of the trust property that is not subject to divestment,
- (b) the spouse has a power to transfer to themselves that part of the trust property³⁴, or

³³ See *M.C.V. v. F.V.*, 2018 BCSC 96.

³⁴ It is of note that, while paragraph 84(2)(f) specifically includes situations where the spouse retains authority over the property to be exercised alone or with another person, there is authority to suggest that, when acting with one or

- (c) the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.

Subsection 84(3) will apply where a spouse transfers property to a trust in circumstances where the spouse has the ability to cause the property to revert to that spouse (whether by way of a transfer or by terminating the trust) or retains a vested interest in it.

Section 85 of the *FLA* sets out a number of exclusions from family property (“Excluded Property”). To the extent that property qualifies as Excluded Property, it will not constitute family property (even if it may otherwise appear to fall into an inclusion under section 84). Excluded Property, for the purposes of the *FLA*, includes:

- i. “property acquired by a spouse before the relationship between the spouses began”.³⁵
- ii. “property referred to in paragraphs 85(1)(a) through (d) held in trust for the benefit of a spouse”.³⁶ This signifies that property acquired by a spouse before the relationship that is subsequently moved into a trust will not lose its status as Excluded Property.
- iii. “a spouse’s beneficial interest in property held in a discretionary trust to which the spouse did not contribute, and that is settled by a person other than the spouse”.³⁷ This would include interests held by beneficiaries in discretionary trusts settled, for example, by their parents for the benefit of their Issue.³⁸

Subsection 83(3) of the *FLA* explicitly provides that for the purposes of Part 5 (Property Division), property received by a spouse from a trust in respect of the spouse's beneficial interest in property held in the trust is to be considered to be property derived from that beneficial interest while subsection 83(4) provides that the term “property” includes a beneficial interest in property (unless a contrary intention appears).

The *FLA* was amended by the *Family Law Amendment Act*, S.B.C. 2023, c.12 (the “*Amendment Act*”), which received Royal Assent on May 11, 2023. One of the amendments introduced by the *Amendment Act* was the introduction of subsection 85(3) of the *FLA*. Subsection 85(3) provides that if property is excluded, the exclusion applies despite any transfer of legal or beneficial ownership of the property from one spouse to the other spouse. In practical terms, if one spouse transfers Excluded Property into joint ownership with their spouse or to the other spouse outright, that act alone does not convert the property from Excluded Property into family property. It is of note that claims brought prior to May 11, 2023 will continue to be governed by the former regime

more additional trustees, a trustee does not have the requisite power to transfer property to themselves for the purposes of subsection 84(3). See *W. (S.L.M.) v. W. (M.R.G.)*, 2016 BCSC 272.

³⁵ *FLA*, supra note 29, at paragraph 85(1)(a).

³⁶ *FLA*, supra note 29, at paragraph 85(1)(e).

³⁷ *FLA*, supra note 29, at paragraph 85(1)(f).

³⁸ It is of note that trusts that are not truly discretionary in nature may not qualify as Excluded Property under paragraph 85(1)(f) of the *FLA*. See *Negus v. Yehia*, 2018 BCSC 604.

in which transfers from one spouse to another during the relationship could result in the loss of the transferred property's status as Excluded Property.³⁹

Section 87 of the *FLA* provides that, unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6, the value of family property must be based on its fair market value. This is a departure from the *Family Relations Act*, RSBC 1996, c. 128 (the “*FRA*”) and other family legislation which, typically, is silent on the valuation methodology to be employed. As a starting point, therefore, the courts in British Columbia are now required to look to the fair market value of assets (including interests in discretionary trusts) in dividing assets between parties. Note that family property is ordinarily valued at fair market value on the date the spouses make an agreement dividing it or, if the court decides the division, on the date of the hearing (the “Valuation Date”). An agreement or order can provide otherwise, and the court may use another valuation date where justified by the evidence and the statutory significant unfairness analysis.

Subsection 95(1) of the *FLA* allows the court to order an unequal division of family property if it would be significantly unfair to divide it equally. Domestic agreements may also be set aside on the basis of significant unfairness. It is of note that the “significant unfairness” threshold is a significant one and restricts judicial discretion to a greater extent than was the case under the terms of the *FRA*.

Section 96 of the *FLA* also allows for the division of Excluded Property where family property or debt outside British Columbia cannot practically be divided or it would be significantly unfair not to divide the Excluded Property. However, it is of note that the *FLA* contains no provision similar to section 87 requiring Excluded Property to be valued based on its fair market value, should section 96 be invoked.

A spouse seeking to maximize family property may, first, seek to establish that the property held by their spouse is family property. If they are able to do this, they may be entitled to share equally in the value of the property with their spouse. If they cannot do so, they may seek to establish that the value of the Excluded Property increased in value significantly between the Commencement Date and the Valuation Date (by arguing for a lower valuation at the Commencement Date, a higher valuation as of the Valuation Date or both). As the growth in the value of Excluded Property from the Commencement Date is family property, this will still allow the claiming spouse to share in the value of the property to some degree.

D. Characterization of Trust Interests

In family (and estate) litigation, a given transfer is commonly construed in competing ways. The challenge placed before the courts is often to determine what the parties had intended when a

³⁹ See *V.J.F. v. S.K.W.*, 2016 BCCA 186 and *Venables v. Venables*, 2019 BCCA 281. Decisions in such cases often turned on the intention of the transferor. See also *Dignard v. Dignard*, 2025 BCCA 25.

particular transfer was made. This task is frequently complicated by lack of evidence, the presence of conflicting evidence and, perhaps, a lack of communication or agreement at the time the transfer in question took place. The label selected after-the-fact is not determinative. The question is what legal relationship the parties created when the transfer took place.

1. Gifts

It is not unusual for a parent of one of the spouses to transfer funds to their child or to make funds available for their child's use. For example, the parent may wish to assist their child (or perhaps the couple) to purchase real estate to make an investment. When the relationship terminates, the parties may not agree as to how the transfer from the parent should be characterized. As a starting point, the parent may argue that the transfer was intended to be a loan while one or both members of the couple may be quite certain that the transfer was, in fact, a gift. If the transfer constituted a loan, it may well constitute a family debt for the purposes of the *FLA* (and, therefore, be shared equally by the spouses).⁴⁰

As between the couple, there may be further disagreement as to whether the gift was made to the child of the donor or, alternatively, to the couple. Gifts and inheritances are Excluded Property for the purposes of the *FLA*. As such, if the gift was made solely to one spouse, the other spouse's interest in the gift would typically be limited to the value of the growth of the value of the gift (or property substituted for it) from the Commencement Date. If the claim is made subsequent to May 11, 2023, the Excluded Property would continue to enjoy this status, even where there has been a transfer of legal or beneficial ownership of the property from one spouse to the other spouse. If, on the other hand, the gift was made to the couple, both may be entitled to an equal share of it.

In *Neville v. National Foundation for Christian Leadership*,⁴¹ the Court noted that a gift constitutes the act of "unqualified giving accompanied by delivery and acceptance by the recipient where the gift cannot be revoked by the donor". The essential elements of a valid *inter vivos* gift are therefore:

- i. donative intent (that is, the donor intended to make an immediate, voluntary, and unconditional transfer of the beneficial interest, as opposed to a revocable arrangement);
- ii. delivery or transfer (that is, the donor took the steps necessary to transfer the property by, for example, delivering funds, transferring title, or endorsing and delivering shares); and
- iii. acceptance (that is, the recipient must have accepted the gift).

⁴⁰ *FLA*, supra note 29, at paragraph 81(a). Note that section 53 of *WESA* abrogates a number of common law presumptions relating to gifts made to children including the presumption of law that a gift by a will-maker made his or her lifetime to his or her child is an advancement of a portion that is intended to revoke a gift in the will-maker's will in favour of the child.

⁴¹ *Neville v. National Foundation for Christian Leadership* 2013 BCSC 183 (aff'd 2014 BCCA 38, lve. to app. diss'd. [2014] S.C.C.A. No. 111).

Furthermore, the gift must be completed. The donor cannot retain an unrestricted right to take it back.⁴²

Again, the inquiry will typically turn on evidence of the donor's intent (assuming delivery was properly completed) and that the gift was not repudiated by the recipient). A deed of gift and other contemporaneous documentation would be very helpful in supporting a claim advanced on this basis.

2. Express Trusts

An express trust is created through voluntary and intentional acts of the settlor. It is therefore distinct from a resulting or constructive trust, both of which generally arise by operation of law.⁴³ The party alleging the existence of an express trust must establish certainty of intention, certainty of subject matter and certainty of objects. They must also establish that the trust property has become vested in the trustee.⁴⁴

Certainty of intention may be express or implied and may be established even where the word "trust" is not used.⁴⁵ There must, however, be evidence of an intention to benefit another person. In addition, the evidence must reflect an intention that the legal title holder hold property for another person's benefit. Imperfect gifts cannot simply be given effect as property held in trust.⁴⁶ It must also be clear that the donor has divested himself or herself of beneficial ownership in respect of the property in question.⁴⁷ If the donor continues to hold legal title to the property in question, it must be clear that he now does so as trustee.

Certainty of subject matter requires that the property subject to the trust be identifiable. Certainty of objects requires that the beneficiaries or permitted objects be sufficiently ascertainable. In addition, a voluntary settlor must complete the steps necessary to constitute the trust. As noted, equity does not generally perfect an imperfect gift by recasting it as a trust.

Contemporaneous documents are of great assistance in determining whether a trust has been properly constituted and in ascertaining its terms. A trust deed, declaration of trust, corporate resolution, share register, loan agreement, beneficial ownership schedule or written direction may not be conclusive, but may greatly assist in identifying the intended and actual legal relationship.

⁴² *V.J.F. v. S.K.W.*, 2016 BCCA 186.

⁴³ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at paragraph 83.

⁴⁴ *Suen v. Suen*, 2013 BCCA 313 (herein referred to as "*Suen*"), *McInerney v. Laass*, 2015 BCSC 1708.

⁴⁵ Albert H. Oosterhoff, Robert Chambers & Mitchell McInnes in *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Carswell, 2014) at 193–194, cited with approval in *Xu v. Hu*, 2021 BCCA 2 (herein referred to as "*Xu*").

⁴⁶ *Xu*, supra note 45, at paragraph 16.

⁴⁷ *Xu*, supra note 45, at paragraph 17.

3. Bare Trusts and Agency Arrangements

A bare trust is a legal relationship in which the trustee holds legal title but generally has no independent beneficial entitlement and no active discretion concerning the property in question.⁴⁸ The bare trustee's essential function is to hold, protect, and convey the property in accordance with the beneficial owner's direction. The term is described in *Canadian Taxation of Trusts*⁴⁹ as follows:

The term "bare trust" does not have any single meaning within the general law of trusts, nor is the term defined in the [ITA]. Generally, the term refers to a trust whose trustee acts merely as the holder of title to trust property and has no independent or discretionary powers; rather the trustee, simply carries out the instructions of the beneficiaries.⁵⁰

In family litigation, the asserted bare trust often involves a parent, adult child or related corporation. Use of the label "bare trust" should not substitute for proof that a true bare trust exists. The court must determine the parties' actual intention, the trustee's powers, the source of the purchase funds, who bore the economic risks and benefits, and whether the alleged beneficial owner exercised the incidents of ownership. Relevant evidence includes the acquisition documents, source of purchase funds, financing, declarations of trust, tax reporting, insurance, payment of expenses, receipt of income, control of disposition, and communications made before the dispute. Note that a bare trust may be constituted as an express trust where the parties expressly and intentionally declare or agree that the titleholder holds legal title solely for specified beneficial owner(s), with no independent dispositive discretion. However, this is not always the case. A bare trust may arise where a gratuitous transfer engages the presumption of resulting trust and the transferee holds title as a bare trustee, subject to the beneficial owner's right to demand conveyance.⁵¹

Recent British Columbia family cases show the practical importance of proper documentation. In *Wang v. Li*,⁵² the British Columbia Court of Appeal upheld a finding that the spouses held residential properties as bare trustees for the wife's parents where the evidence included an explanation of assets, a written bare trust declaration, and evidence of the parents' retained beneficial ownership.⁵³ In *Wang v. Cao*,⁵⁴ on the other hand, the court rejected an assertion of bare

⁴⁸ The bare trustee will still be vested with the duty to exercise reasonable care over the property in his care. See Donovan W.M. Waters, *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005), at 32.

⁴⁹ Ellie S. Roth, Chris Anderson, Kim Brown, Rhonda Rudick and Ryan Wolfe, *Canadian Taxation of Trusts*, 2nd ed. (Toronto: Canadian Tax Foundation, 2025)

⁵⁰ *Ibid.*, at 94.

⁵¹ See *Mong Alter Ego Trust No. 1 v. Yip*, 2022 BCSC 1327 where the presumption of resulting trust could not be rebutted and, as a result, the Court held that the Defendant held her interest in the property as bare trustee.

⁵² *Wang v. Li*, 2025 BCCA 256.

⁵³ *Ibid.*, at paragraphs 24-29, 65-70.

⁵⁴ *Wang v. Cao*, 2026 BCSC 1475.

trust in a family proceeding because it was undocumented, had not been disclosed during the relationship, and was inconsistent with the conduct of the parties.

The law remains unsettled as to whether a genuine transfer of legal title to a bare trustee engages section 160(1) of the *ITA*. In *Minister of National Revenue v. Livingston*,⁵⁵ the Federal Court of Appeal stated, in obiter, that a transfer of property can occur for the purposes of subsection 160 even if beneficial ownership does not pass, because legal title has been transferred to the trustee.⁵⁶ Specifically, the Court noted the following at paragraph 22:

In addition, there is a transfer of property for the purposes of section 160 even when beneficial ownership has not been transferred. Subsection 160(1) applies to any transfer of property-"by means of a trust or by any other means whatever". Thus, subsection 160(1) categorizes a transfer to a trust as a transfer of property. Certainly, even where the transferor is the beneficiary under the trust, nevertheless, legal title has been transferred to the trustee. Obviously, this constitutes a transfer of property for the purposes of subsection 160(1) which, after all, is designed, inter alia, to prevent the transferor from hiding his or her assets, including behind the veil of a trust, in order to prevent the [Canada Revenue Agency] from attaching the asset.⁵⁷ (Emphasis added)

The Federal Court of Appeal subsequently reserved the issue in *Minister of National Revenue v. Rose*,⁵⁸ stating that "[t]he implications of *Livingston* are best left for another day."

In *Minister of National Revenue v. 9101-2310 Québec Inc.*,⁵⁹ the Federal Court of Appeal discussed the comments made in *Livingston* "given the controversy that *Livingston* has raised", but ultimately concluded that it was "neither necessary nor appropriate to consider the merits of this rule in the context of the present case..."⁶⁰

In *Goldman v. The Queen*,⁶¹ Graham J. noted that "[y]ears later, these observations are still causing a great deal of confusion in the tax community" noting that the conclusion that "the mere receipt of legal title to funds by a trustee was sufficient to make the trustee personally liable under subsection 160(1) for the full value of the funds...is neither supported by the Act nor supported by general valuation principles."⁶²

The obiter remarks made in *Livingston* were recently followed by the Tax Court of Canada in *Gill v. The King*.⁶³ In *Gill*, the Court accepted that, when legal title in the family home was transferred

⁵⁵ *Minister of National Revenue v. Livingston*, 2008 FCA 89 (herein referred to as "*Livingston*").

⁵⁶ Note that the case itself did not involve a valid trust, and its disposition did not depend on this statement.

⁵⁷ *Livingston*, supra note 55, at paragraph 22.

⁵⁸ *Minister of National Revenue v. Rose*, 2009 FCA 93.

⁵⁹ *Minister of National Revenue v. 9101-2310 Québec Inc.*, 2013 FCA 241.

⁶⁰ *Ibid.*, at paragraph 42.

⁶¹ *Goldman v. The Queen*, 2021 TCC 13.

⁶² *Ibid.*, at paragraph 56.

⁶³ *Gill v. The King*, 2026 TCC 18 (herein referred to as "*Gill*").

to a taxpayer, beneficial title was not transferred. However, citing *Livingston*, it concluded that this was not sufficient to prevent the application of subsection 160(1).⁶⁴

Despite the criticism levelled at *Livingston*, *Gill* signals that the obiter comments made in *Livingston* retain persuasive force in the Tax Court. Additional guidance from the Federal Court of Appeal regarding these obiter remarks would be very welcome. Until such guidance is provided, however, practitioners should proceed cautiously and should not assume that documenting a genuine bare trust will, on its own, insulate a legal titleholder from liability under subsection 160(1) of the *ITA*.

4. Resulting Trusts

A resulting trust arises by operation of law, typically where a person transfers property or supplies purchase money without receiving value and without intending to make a gift. It may also arise where both partners contribute to the acquisition of property but title is registered in the name of only one of the two.

The Supreme Court of Canada noted in *Kerr v. Baranow*⁶⁵ that:

...there is not much one can say about resulting trusts without a well-grounded fear of contradiction. There is debate about how they should be classified and how they arise, let alone about many of the finer points... However, it is widely accepted that the underlying notion of the resulting trust is that it is imposed “to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it. Thus, the beneficial interest ‘results’ (jumps back) to the true owner”: Oosterhoff, at p. 25. There is also widespread agreement that, traditionally, resulting trusts arose where there had been a gratuitous transfer or where the purposes set out by an express or implied trust failed to exhaust the trust property: *Waters*, at p. 21.⁶⁶

Where the transfer is gratuitous,⁶⁷ the intention of the transferor at the time of transfer will be the key consideration in determining whether a resulting trust exists.⁶⁸ In determining the transferor’s intention, the appropriate presumption (as discussed below) should be applied. All evidence

⁶⁴ *Ibid.*, at paragraphs 40-41.

⁶⁵ *Kerr v. Baranow*, 2011 SCC 10 (herein referred to as “*Kerr*”).

⁶⁶ *Ibid.*, at paragraph 16.

⁶⁷ A contribution need not always be in cash form. *Sidhu v. Sidhu*, 2025 BCCA 263 demonstrates that co-signing a mortgage or pledging credit may constitute consideration, but whether it does is fact specific. *Freeland v. Farrell*, 2022 BCCA 99 gives the complementary warning. The fact that a person is on title and is a covenantor on a mortgage does not necessarily establish that they provided value. In *Freeland*, the British Columbia Court of Appeal upheld a finding that the co-owner had provided no material value where the purchaser was financially capable of completing the purchase alone and the co-owner’s risk was not real in the circumstances. The Court emphasized that the determination of value is fact specific and that the transferor’s intention remains central.

⁶⁸ *Pecore v. Pecore*, 2007 SCC 17 (herein referred to as “*Pecore*”), at paragraphs 43-44.

relating to the transferor's actual intention must then be examined to determine if the presumption in question has been rebutted.⁶⁹

There are two competing presumptions that apply in situations where gratuitous transfers have been made. In each case, the presumption allocates the burden of proof. As a starting point, it is understood that equity presumes bargains, not gifts. As such, in the face of gratuitous transfers, a resulting trust is presumed and the transferee bears the onus of demonstrating that, on a balance of probabilities, a gift (rather than a resulting trust) was intended.⁷⁰ This is referred to as the presumption of resulting trust.

On the other hand, there are certain relationships in which bargains may not be presumed. For example, parents are legally required to provide for their minor children and generally seek to support or "advance" them. As such, where a parent transfers property to a minor child, intention to gift is presumed and the burden of proof falls to the person challenging the intention to gift. This is called the presumption of advancement. It is of note that the presumption of advancement does not extend to transfers to adult children (whether independent or otherwise). Rather, in the case of adult children, the presumption of resulting trust will apply and the transferee will be required to prove that a gift was intended.⁷¹

Intention may be evidenced by contemporaneous documentation including, among other things, a gift letter, trust declaration, or communication describing the purpose of the transfer. Subsequent conduct can assist if it reliably sheds light on the transferor's original intention, but it must be treated with caution where it is self-serving or may reflect a later change of position.

As previously noted, the *FLA* was amended by the *Amendment Act*, which received Royal Assent on May 11, 2023. Section 81.1 was added to the *FLA* by virtue of the *Amendment Act*. Section 81.1 reads as follows:

- (1) The rule of law applying a presumption of advancement must not be applied in questions respecting the ownership of property as between spouses.
- (2) The rule of law applying a presumption of resulting trust must not be applied in questions respecting the ownership of property as between spouses.

As such, while the presumption of advancement may otherwise have applied to transfers between spouses, subsection 81.1(1) states that the presumption of advancement must not be applied in questions respecting the ownership of property as between spouses. This provision was introduced together with subsection 85(3) which provides that if property is excluded, the exclusion applies despite any transfer of legal or beneficial ownership of the property from one spouse to the other spouse. In other words, if one spouse transfers Excluded Property into joint ownership with their

⁶⁹ Ibid., at paragraph 55.

⁷⁰ Ibid., at paragraph 24.

⁷¹ Ibid., at paragraph 36.

spouse or to the other spouse outright, that act alone does not convert the property from Excluded Property into family property. The presumption of advancement will also not be applicable to such a transfer.

It is of note that section 81.1 and subsection 85(3) are applicable for the purposes of the *FLA*, but are not applicable to claims under other legislation. It is also of note that these provisions apply as between the spouses. Where the key inquiry relates to transfer from third parties (including parents and other family members), the presumptions of advancement and resulting trust may still be relevant. *Pecore* remains central where a parent's gratuitous transfer to an adult child, or a claimed resulting trust in favour of a third party, is in issue.

5. Constructive Trusts

Like resulting trusts, a constructive trust is a remedy arising by operation of law. In the family context it most commonly arises as a remedy for unjust enrichment.⁷² Unjust enrichment is established where the evidence shows an enrichment or benefit to the defendant, a corresponding deprivation to the claimant, and the absence of a juristic reason for the enrichment.⁷³ A juristic reason is a reason in law or justice for a defendant to retain a benefit conferred at the claimant's expense. The inquiry is not an open-ended appeal to fairness. Under the two-stage framework in *Garland v. Consumers' Gas Co.*,⁷⁴ the claimant must first show that no established category (such as contract, a disposition of law, donative intent, or another valid legal obligation) justifies the defendant's retention of the benefit. This *prima facie* case is, however, rebuttable where the reasonable expectations of the parties and public policy considerations justify denial of recovery. The question is ultimately whether the defendant has a sufficient reason in law or justice to retain the benefit, assessed through this structured inquiry rather than a purely subjective judgment of what seems fair.⁷⁵

Where unjust enrichment is established, the remedy is typically monetary. A proprietary remedy requires a sufficiently direct link between the claimant's contribution and the acquisition, preservation, maintenance or improvement of the particular property. It is appropriate only where a monetary award is inadequate or where the circumstances otherwise justify recognition of a proprietary interest.⁷⁶ *Peter v. Beblow*⁷⁷ confirms that domestic and caregiving contributions can found an unjust enrichment claim, but that a proprietary remedy still requires both monetary inadequacy and a nexus between the contribution and the property claimed.

⁷² Note: constructive trusts can also be imposed as a result of "wrongful acts like fraud and breach of duty of loyalty": see *Soulos v. Korkontzilas*, [1997] 2 SCR 217 (herein referred to as "*Soulos*"), at paragraph 43.

⁷³ *Kerr*, supra note 65, at paragraph 32.

⁷⁴ *Garland v. Consumers' Gas Co.*, 2004 SCC 25

⁷⁵ *Kerr*, supra note 65.

⁷⁶ See *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57.

⁷⁷ *Peter v. Beblow*, [1993] 1 SCR 980.

While both resulting and constructive trusts arise by operation of law, there are important distinctions between the two. A resulting trust addresses beneficial ownership where there has been a gratuitous transfer or contribution. A constructive trust is a remedial response to unjust enrichment or, in an exceptional category, wrongful acquisition of property. In *Suen*, the British Columbia Court of Appeal set aside the resulting trust analysis but remitted the unresolved unjust enrichment claim because the two doctrines required different factual and legal inquiries.⁷⁸

There is also a distinct constructive trust category that addresses wrongful acquisition through breach of fiduciary duty or loyalty. In *Soulos v. Korkontzilas*,⁷⁹ the Supreme Court of Canada held that a constructive trust could be imposed where a fiduciary wrongfully acquired property in breach of a duty of loyalty, even absent a conventional loss calculation. That category is exceptional and should not be confused with the ordinary domestic unjust enrichment claim. It may nevertheless be relevant where a trustee, director, attorney or other fiduciary diverts an opportunity or misuses a family enterprise asset.

In the family enterprise setting, *Haigh v. Kent*⁸⁰ demonstrates that a constructive trust may be found to exist where long-term labour and financial contributions to an informal family business also directly and substantially improve the land on which the business operates. In *Haigh*, the British Columbia Court of Appeal held that the claimant's lack of an expectation of a direct interest in land was relevant but not determinative. The central inquiry was the nature and directness of the contribution and whether a monetary award was inadequate.⁸¹ In *Wong v. Wong*,⁸² the British Columbia Court of Appeal likewise upheld a constructive trust remedy after a lengthy common law relationship in which domestic, caregiving, and unpaid business contributions supported the accumulation of business and real estate assets.⁸³

Evidence of the existence of a joint family venture does not eliminate the need to prove unjust enrichment. In *Sidhu*, the British Columbia Court of Appeal confirmed that a spouse cannot assert a derivative unjust enrichment claim based simply on the other spouse's possible claim against their parents. Rather, there must be evidence that the underlying claim exists and has value.⁸⁴ A spouse's possible unjust enrichment claim against parents must be established, rather than assumed, before it can be treated as an asset capable of valuation for the purposes of division.⁸⁵

⁷⁸ *Suen*, *supra* note 44.

⁷⁹ *Soulos*, *supra* note 72.

⁸⁰ *Haigh v. Kent*, 2013 BCCA 380 (herein referred to as "*Haigh*").

⁸¹ *Ibid.*, at paragraphs 31-34, 49-59.

⁸² *Wong v. Wong*, 1999 BCCA 344.

⁸³ *Ibid.*, at paragraphs 42-62.

⁸⁴ *Sidhu*, 2025 BCCA 263 ("*Sidhu*") at paragraphs 76-100.

⁸⁵ *Sidhu*, *supra* note 84, at paragraphs 58-75, 76-87.

6. Registered Title and the Family Law Inquiry

Subsection 23(2) of the *Land Title Act*, RSBC 1996, c. 250 makes indefeasible title conclusive evidence, at law and in equity, of the registered owner's estate in fee simple, subject to statutory exceptions. It does not, however, prevent the court from recognizing an express, resulting or constructive trust where the evidence supports one.

In *Suen v. Suen*⁸⁶, the British Columbia Court of Appeal explained that registered title may be displaced by a resulting trust, an enforceable agreement inconsistent with title, or the underlying equitable interests between the parties, including unjust enrichment. Notably, in *Suen*, the British Columbia Court of Appeal rejected a resulting trust finding on the record before it because the claimant had not established that the joint registration was a gratuitous transfer. It remitted the alternative unjust enrichment claim for determination.⁸⁷ The case cautions against treating resulting trust and constructive trust as interchangeable pleadings. Each rests on a distinct factual and legal foundation.

Consequently, the parties should identify legal title, then ask whether there is evidence of an express trust, a gratuitous transfer giving rise to a resulting trust, or unjust enrichment supporting a constructive trust. Only after determining the beneficial ownership should the adviser turn to the *FLA* characterization of the spouse's actual interest and, ultimately, to valuation of that interest.

E. Valuation of an Interest in a Discretionary Family Trust

Once the nature of the interest held by the spouse in question has been determined and the categorization (as family property or Excluded Property) has been ascertained, it becomes necessary to value the interest in question.

The valuation of interests in discretionary family trusts was discussed at length in my paper titled "Old Traps, New Teeth: The New Bite of Existing Tax Traps Following the Introduction of the Enhanced Trust Reporting Rules"⁸⁸ ("Tax Traps"). For a comprehensive discussion of this topic, I refer you to Tax Traps. For the purposes of this paper, I wish to briefly comment on the Ontario Court of Appeal in *Lang-Newlands v. Newlands*⁸⁹. Tax Traps discusses the facts of the case and the decision of the Ontario Superior Court which, at the time Tax Traps was written, was under appeal.⁹⁰

The fair market value of an interest in a discretionary trust will depend on what a knowledgeable, informed and prudent arm's length party would be willing to pay to acquire it. By its very nature,

⁸⁶ *Suen*, *supra* note 44.

⁸⁷ *Suen*, *supra* note 44, at paragraphs 34-38, 73-77.

⁸⁸ Parveen Karsan, "Old Traps, New Teeth: The New Bite of Existing Tax Traps Following the Introduction of the Enhanced Trust Reporting Rules" (2025) in *2025 British Columbia Tax Conference* (Toronto: Canadian Tax Foundation, 2025), at 1-4.

⁸⁹ *Lang-Newlands v. Newlands*, 2026 ONCA 530 (herein referred to as "*Lang-Newlands*").

⁹⁰ *Lang-Newlands v. Newlands*, 2024 ONSC 6285.

an interest in a discretionary trust merely grants to its holder a right to be considered by the trustee for distributions. The beneficiary has no right to force distribution of the underlying property and has no control over when (if ever) any distributions will be made to him or her. The holding of an interest in a discretionary trust has been held not to “ameliorate in any meaningful way” the financial situation of a beneficiary before such time as distributions are made to them.⁹¹

The recent decision in *Cottrell v. Cottrell*⁹² provides useful guidance on determining the fair market value of an interest in a discretionary trust. Notably, in *Cottrell*, the British Columbia Court of Appeal held that the increase in the fair market value of the discretionary trust in issue was nil. This was the case despite the fact that:

- i. Roughly 12 years elapsed between the time at which the Muster Family Trust was settled (September 14, 2010) and the time of trial (2022);
- ii. According to the terms of the trust deed, the final distribution of the trust is to be made on September 1, 2031 or earlier if the trustees in their discretion decide to terminate the trust;
- iii. According to the terms of the trust deed, if Robert Muster (“Robert”) is still alive at the time of the final distribution, the trustees may make an unequal distribution of the balance of the assets to any of the beneficiaries. However, if he is not then alive, Joanne Cottrell (“Joanne”) is to receive half of the remaining assets of the trust at the time of the final distribution;
- iv. Robert would be in his early 90s at the time of the final distribution;
- v. As the trust was set up in the course of an estate freeze, the value of the underlying property in 2010 was likely nominal; and
- vi. The value of the underlying property (and, therefore, the increase in value of the underlying assets during the period in question) was \$12,596,744.84 (according to Paul Cottrell’s calculations).

Whereas, when Joanne received her interest in the trust, she could expect to wait 21 years (at most) to receive her interest (if any), this was no longer the case in 2022. At the time of trial, Joanne’s wait was roughly nine years long, Robert was then in his eighties and Robert had not disinherited Joanne in the twelve years that had elapsed. Additionally, no beneficiaries had been added to the trust besides Joanne’s own children.

Furthermore, the underlying assets had increased in value quite significantly. More specifically, the increase appears to have been from a nominal amount in 2010 to \$12,596,744.84 in 2022. This would, in theory, make an interest in the trust far more appealing to an arm’s length buyer.

⁹¹ *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, at paragraph 49.

⁹² *Cottrell v. Cottrell*, 2022 BCSC 1607 (herein referred to as “*Cottrell*”).

In spite of these facts, the BC Court of Appeal concluded that Joanne's interest in the trust had not increased between 2010 and 2022. The uncertainty surrounding her interest was too significant as she, like other beneficiaries of a discretionary trust, had no real interest in the property owned by the trust. Joanne had no right to force distributions to herself and had no control over when any such distributions would be made (though, again, the final distribution was to be made in 2031). Robert could make a bad investment and reduce the value of the assets held by the trust significantly. The logical conclusion of the Court's decision is that Joanne's interest in the trust, while more appealing, was not sufficiently certain to draw a willing buyer.

To look at the result in *Cottrell* differently, it seems that if one were to purchase a lottery ticket (which, admittedly, carries a degree of randomness that would not be found in most family trusts), one may be willing to pay more for a ticket carrying a chance at a \$13 million payout than for a lottery ticket carrying a chance at a \$1 payout. Similarly, one may be willing to pay more for a lottery ticket where the winner would be drawn in 9 years than for a similar ticket where the winner would be drawn in 21 years. It may be, however, that a prospective buyer would be unwilling to pay much for either ticket. While the lottery ticket with a \$13 million payout may be more attractive, it may still carry sufficient uncertainty so as to discourage a purchase for more than a few dollars on the open market. It is this uncertainty that results in the untethering of the value of an interest in a discretionary family trust from the value of its underlying assets.

The law on this point is, nonetheless, far from settled. The recent Ontario Court of Appeal decision in *Lang-Newlands v. Newlands*⁹³ (which was decided under Ontario's *Family Law Act*, R.S.O. 1990, c. F.3.) affirmed the use of the *pro rata* division approach set out in *Sagl v. Sagl*⁹⁴ and *Kushnir v. Lowry*⁹⁵. For a more detailed discussion regarding the facts in *Lang-Newlands* and a discussion of the decision of the Ontario Superior Court, I direct you to Tax Traps. Again, *Lang-Newlands* was decided under different legislation and does not reverse *Cottrell*. Nonetheless, given the inconsistency with which interests in discretionary family trusts are valued, determining the fair market value of these interests (or the growth in the value of these interests over time) is a difficult undertaking.

F. Conclusion

As this paper has attempted to show, the division of trust interests on relationship breakdown in British Columbia cannot be reduced to a single valuation exercise. The analysis proceeds in stages: identifying the interest actually held by the spouse in question, characterizing that interest

⁹³ *Lang-Newlands* 2026, supra note 89.

⁹⁴ *Sagl v. Sagl*, [1997] O.J. No. 2837, 31 RFL (4th) 405.

⁹⁵ *Kushnir v. Lowry*, [2004] O.T.C. 133.

under the applicable family property regime, and only then valuing it. Skipping any of these steps, or collapsing them into one another, risks a fundamentally flawed result.

Even the threshold question of who counts as a spouse or common-law partner resists a single, uniform answer. The *FLA*, the *WESA*, and the *ITA* each define the relevant relationship differently and for different purposes. *Enns* demonstrates that, even within the *ITA*, a single definition of the term “spouse” cannot be applied with confidence in every context. The fact-intensive Molodowich Factors and marriage-like relationship inquiries add a further layer of uncertainty that can lead to different results depending on when, and by whom, the question is asked.

The characterization of a trust interest is equally dependent on the facts. Whether a transfer amounts to a gift, an express trust, a bare trust, a resulting trust, or gives rise to a constructive trust through unjust enrichment turns on the intention of the parties at the time of the transfer, not on the label later attached to it. As the case law canvassed above illustrates, courts return repeatedly to the same touchstones: contemporaneous documentation, the source of funds, the exercise (or non-exercise) of the incidents of ownership, and the conduct of the parties both before and after the transfer. Registered title, while significant, does not foreclose the inquiry into the underlying equitable interest. Practitioners advising clients who hold or have contributed to trust property would be well served to encourage clear, contemporaneous documentation of intention, since the absence of such evidence is what most often turns a straightforward transfer into protracted and costly litigation.

Finally, valuation remains the most unsettled part of the analysis. *Cottrell* confirms that the fair market value of an interest in a discretionary trust may bear little relationship to the value of the underlying trust property, given the beneficiary’s inability to compel a distribution and the discretion retained by the trustees. *Lang-Newlands* shows that a different provincial regime can produce a materially different approach.

Taken together, these areas of continuing uncertainty — the meaning of “spouse”, the characterization of trust interests, and their valuation — underscore the need for careful, fact-specific advice at every stage of a family law matter involving trust property. They also point to a broader need for legislative and judicial clarification, particularly where, as in *Enns* and *Livingston*, existing authority is conflicting or unresolved. Until such clarity is provided, practitioners advising spouses and common-law partners on the breakdown of their relationship must proceed methodically through each stage of the analysis, resist the temptation to treat any one step as a formality, and document the true nature of trust-related transactions as they occur, rather than attempting to reconstruct intention long after the fact.