THE TROUBLE WITH TRANSITION: PRE-*FLA* SEPARATION AGREEMENTS IN A POST-*FLA* WORLD

By Amanda James

As Lord Denning observed in *Seaford Court Estates Ltd. v. Asher*,[1] it is impossible for legislators to foresee all the facts that may arise in any area in which they legislate.[2] There will always be unexpected ways in which people manage to entangle themselves in legislative regimes. Perhaps nowhere are those unexpected interactions more prevalent than in family law, where many parties are self-represented.[3] Our Court of Appeal has described family law cases as full of "traps for the unwary",[4] with the problems being compounded by the fact that many litigants are unrepresented.[5]

The transitional provisions in s. 252 of the *Family Law Act*[6] ("*FLA*")—enacted to "catch those who fall between the cracks"[7] between the old *Family Relations Act*[8] ("*FRA*") and the *FLA*—highlight the difficulty of drafting remedial legislation capable of addressing the situation of all persons to whom the legislation might in some way apply. As will be discussed in this article, those who fall between the cracks left by this transition include common law couples who entered into agreements before the *FLA* came into effect.

SHIFTING LANDSCAPES IN THE FAMILY LAW REGIME

The transition from the *FRA* to the *FLA* ushered in wide-scale reforms to the existing family law regime in British Columbia that had traditionally excluded common law couples from property and pension division rights. Prior to the *FLA*, common law couples were left to rely on equitable remedies such as unjust enrichment for a share of property; a claim for unjust enrichment was notoriously expensive and difficult to pursue.[9]

The reforms were based largely on recommendations from the BC Justice Review Task Force in its report entitled *The White Paper on Family Relations Act Reform: Proposals for a New Family Law Act*.[10] Under the new *FLA*, the right to claim property and pension division was extended to common law spouses, provided they lived together in a marriage-like relationship for over two years.

Perhaps not surprisingly, the white paper made no firm recommendations for transitional provisions, citing the difficulty in applying two sets of laws indefinitely (depending on whether a claim was initiated before or after the legislation's effective date) and the ostensible unfairness of imposing a drastically different property regime on current common law couples who may not have had a chance to organize their affairs differently.[11] The white paper suggested the new rules should apply to all relationships so long as the government provided plenty of notice and delayed commencement to give couples the chance to readjust their affairs.[12] Thus, the implementation of the *FLA* was significantly delayed: the legislation received royal assent on November 14, 2011 but did not enter into effect until March 18, 2013.

THE REPEAL OF SECTION 120.1 OF THE *FRA*

At the time the *FLA* received royal assent in 2011, s. 120.1 of the *FRA*—a seldom-used provision of the *FRA*[13] allowing common law couples to make agreements that could be reviewed by the court—was immediately repealed. Under s. 120.1, common law couples could seek review of an agreement and obtain judicial reapportionment of family property if the agreement was found to be unfair, despite having no standalone rights to property or pension division under the *FRA*. In essence, this provision gave common law couples a path to access some of the property and pension division remedies enjoyed by married couples. The repeal of this path created a 14-month gap between royal assent and the effective date of the *FLA* in which common law couples had no effective rights under either statute to have an agreement reviewed for unfairness and obtain reapportionment.

The transitional provisions in the *FLA* are aimed at addressing how pre-*FLA* agreements and proceedings are to be treated.[14] The wording of s. 252 provides:

> 252(1) This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.
>
> (2) Unless the spouses agree otherwise,
>
> (a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or
>
> (b) a proceeding respecting property division started under the former Act
>
> must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

The application of the transitional provisions to married couples is relatively straightforward: married couples with pre-*FLA* agreements dealing

with property or pre-*FLA* proceedings are directed back into the *FRA*. As stated by Court of Appeal in *Halliday v. Halliday*,[15] s. 252 preserves the prior regime as it concerns property division for any separation agreements finalized before the *FRA* was repealed.[16] Married couples seeking review of an agreement made before the *FLA* was enacted, or seeking to continue family proceedings started under the *FRA*, must proceed under the *FRA*.

WHAT ABOUT COMMON LAW COUPLES WITH PRE-*FLA* AGREEMENTS?

For common law couples, the roadmap is not as straightforward. The complexity is further compounded by the new definition of "spouse" in the *FLA*. Under the *FRA*, the definition of "spouse" had a temporal component: only a "spouse" was eligible to seek property division and spousal support, and a person ceased to be a "spouse" two years after a divorce was pronounced.[17]

The *FLA* defines a "spouse" as anyone who has been in a marriage-like relationship for at least two years (this definition includes former spouses[18]) and sets out express time limits for anyone who qualifies as a spouse to bring a claim for property or pension division, or spousal support, and to apply to set aside an agreement.[19] The expansive *FLA* definition of "spouse" created interesting questions for the courts in determining who was or was not caught by the legislation.

In this regard, were persons who ceased to be spouses under the *FRA* and separated prior to the coming into force of the *FLA* able to make a claim? In 2016, the Court of Appeal answered in the affirmative, interpreting s. 252 in *Newton v. Crouch*[20] and in *Matteucci v. Greenberg*.[21] In both cases, the relationship at issue straddled the *FRA* and the *FLA*.

In *Newton*, one common law partner began a claim before the *FLA* came into force, and his former partner counterclaimed for equal property division under the newly passed *FLA*. The Court of Appeal dismissed the appeal from a decision allowing a claim for relief to be made under the *FLA*, confirming that while the definition of spouse is "prospective",[22] it could apply to events that occurred prior to the date on which the *FLA* came into force. As long as a person met the definition of "spouse" at some point in time—even prior to the *FLA*—by having lived in a marriage-like relationship with someone for over two years, he or she is entitled to claim relief under the *FLA*, provided the claim is brought in time.

In making this point, the court reiterated that a spouse is not limited to the remedies available to that person before the *FLA* came into force. As expressly indicated in the statute, the new bundle of rights under the *FLA* is in addition to, and not in substitution for, rights under equity (such as unjust enrichment remedies) or any other law (arguably the *FRA*).[23]

Similarly, in *Matteucci*, a common law couple separated seven months before the *FLA* came into force, but one partner later counterclaimed for relief under the *FLA*. The Court of Appeal concluded that the transitional provisions could not apply to spousal support or property claims that could have been brought by common law persons, as they had no statutory property entitlements under the *FRA*.[24]

Newton and *Matteuci* avoided leaving common law couples who separated before the *FLA* without a statutory remedy.

THE ROAD TO NOWHERE

The Court of Appeal in *Newton* and *Matteucci* did not explicitly address s. 252(2)(a) of the *FLA*, which requires that claims pertaining to pre-*FLA* agreements dealing with property be started or continued under the *FRA*. Since the repeal of s. 120.1, common law couples no longer have a right to seek review of an agreement under the *FRA*.

Where do they fall? The answer from the courts is inconsistent: two different decisions have reached incompatible conclusions on the application of s. 252(2)(a) to common law couples with pre-*FLA* agreements dealing with property.

In *B.L.S. v. D.J.S.*,[25] a common law couple entered into a separation agreement in the middle of the 14-month gap after the repeal of s. 120.1 but before the *FLA* came into effect. Their agreement had waived claims either of them may have had under the *FRA* (though there were none) and under the *FLA*, which had yet to come into force. The claimant sought to set the agreement aside under the *FLA*. Applying the transitional provisions, the court concluded that interpreting s. 252(2)(a) to require common law couples with pre-*FLA* agreements dealing with property to start or continue an action under the *FRA* would be meaningless, as s. 120.1 was repealed and consequently they had no rights under the *FRA* to obtain relief from an unfair agreement.[26]

Surely the legislature, in crafting remedial legislation aimed at addressing the disparity between common law and married couples, did not intend to send common law couples who signed pre-*FLA* agreements on a road to nowhere.

At the same time *B.L.S.* was heard, the same issue was being adjudicated in another case. In *Blunt v. Lee*,[27] a common law couple entered into an agreement during the same gap period as the couple in *B.L.S.* However, the court in *Blunt* came to the opposite conclusion and interpreted the wording of s. 252(2)(a) as precluding an application to set aside a pre-*FLA* agreement dealing with property from being brought under the *FLA*. The court held

that the wording of s. 252(2)(a) did not evince any legislative intention to exclude agreements involving common law spouses from the application of s. 252(2)(a).[28] The claimant in *Blunt* was left to pursue a claim to property via unjust enrichment principles.

The result in *Blunt*, I would argue, is correct, but the reasoning about s. 252(2)(a) is not. In terms of the result in *Blunt*, the application to set the agreement aside was brought more than four years after the agreement was signed, and the statutory claim was likely statute-barred regardless of whether the *FLA* applied.[29] With respect to the analysis, the court's reasoning in *Blunt* fails to address the presumption against redundancy, which requires courts to "avoid adopting interpretations that render any portion of a statute meaningless or redundant".[30]

Arguably, the reasoning adopted by the court in *Blunt* does exactly that: the *Blunt* interpretation of s. 252(2)(a) directs common law couples with pre-*FLA* agreements dealing with property and pension division back to the *FRA*, a legislative regime under which they have no remedy.

Such an interpretation is inconsistent with the legislative intent to remedy the "mischief" of treating common law couples differently than married couples, who still have a remedy under the *FRA* to review unfair agreements. Curiously, the portions of a pre-*FLA* agreement that deal with spousal support are reviewed under the *FLA*, as the transitional provisions apply only to the property division portion of the agreement. On the *Blunt* interpretation, common law couples with pre-*FLA* agreements dealing with property division slip through the cracks and onto a road to nowhere.

CONCLUSION

As noted at the outset of this article, the legislature can hardly be faulted for failing to envision every scenario that might arise. In the family law context, common law couples with pre-*FLA* agreements find themselves in a situation where the transitional provisions of the *FLA* were not crafted with the necessary specificity to address their situation. Appellate guidance—and a route to remediating the situation of common law spouses whose situations have not been resolved or have been resolved unfavourably to them—may be provided, as *B.L.S.* is set to be heard by the Court of Appeal this year.

ENDNOTES

1. [1949] 2 All ER 155 (CA).
2. *Ibid* at 164.
3. Court of Appeal for British Columbia, *2018 Annual Report* at 16, online: <www.bccourts.ca/Court_of_Appeal/about_the_court_of_appeal/annual_report/2018_CA_Annual_Report.pdf> (reporting that 36 out of 105 family appeals or applications for leave to appeal filed involved at least one self-represented litigant).
4. *Halliday v Halliday*, 2015 BCCA 82 at paras 1–2 [*Halliday*].
5. *Ibid*.

6. *Family Law Act*, SBC 2011, c 25 [*FLA*].
7. *Medovarski v Canada (Minister of Citizenship and Immigration); Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 17.
8. RSBC 1996, c 128 [*FRA*].
9. *Newton v Crouch*, 2016 BCCA 115 at paras 38–39 [*Newton*].
10. British Columbia, Ministry of Attorney General, Justice Services Branch, *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (Victoria: July 2010), online: <www.vancouversun.com/pdf/Family-Law-White-Paper.pdf>.
11. *Ibid*, ch 14.
12. *Ibid*.
13. CanLII lists only four decisions where s 120.1 was actually applied: *Atkinson v Klassen*, 2000 BCSC 1831; *TW v GDC*, 2005 BCSC 472; *CLW v SUR*, 2007 BCSC 453; and *Salomon v Catling*, 2009 BCSC 1394.
14. Ministry of Justice, "Family Law Act Section Note, Part 13 – Transitional Provisions", Interpretation Note, at 2, online: <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/part13.pdf>.
15. *Supra* note 4.
16. *Ibid* at para 42.
17. As explained in *Halliday*, this is not the case under the federal *Divorce Act* regime, which has no such express limitation period for spousal support. Under the *FRA* regime, a person who lived in a marriage-like relationship for over two years ceased to be a spouse if an application for spousal support was not made within one year. See *Halliday*, *supra* note 4 at paras 34–35.
18. See *FLA*, *supra* note 6, s 3(2).
19. *Ibid*, ss 198(3), 198(5).
20. *Supra* note 9.
21. 2016 BCCA 116 [*Matteucci*].
22. *Newton*, *supra* note 9 at paras 31, 62.
23. *FLA*, *supra* note 6, s 104(2); *Newton*, *supra* note 9 at para 42.
24. *Supra* note 21 at para 48.
25. 2019 BCSC 846 [*BLS*].
26. *Ibid* at para 26.
27. *Blunt v Lee*, 2019 BCSC 351.
28. *Ibid* at para 22.
29. The *FLA* requires applications to set aside a separation agreement to be brought within two years of the agreement being made, subject to any extensions by discoverability principles.
30. *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20 at para 45, citing *Hill v William Hill (Park Lane) Ltd*, [1949] AC 530 at 546 (HL), Viscount Simon.