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CASE COMMENT

TOWNSHEND V TOWNSHEND & *BUTTAR V BUTTAR*: GIFTS, EXCLUSIONS, AND INTENTIONS

Jonathan Robinson[*]

This comment looks at two fairly recent decisions by the Ontario Court of Appeal, Townshend v Townshend (2012 ONCA 868) and Buttar v Buttar (2013 ONCA 617) with respect to the courts' handling of the exclusion of gifts under section 4(2) of Ontario's Family Law Act (RSO 1990, c F.3). In Ontario, gifts made by third parties outside the marriage to one spouse may be excluded from the calculation of a spouse's Net Family Property (NFP). Property may cease to be excludable if it is not kept separate or if it is used to the benefit of the family. In both Townshend and Buttar, the court had to grapple with fungible gifts and decide to what degree the gifts should be excluded from the NFP calculations. In both decisions, the courts relied upon a line of reasoning that placed too much weight on the intentions of the donor when deciding whether (or to what extent) to exclude the gifts while simultaneously undervaluing the subsequent behaviour of the donees after delivery of the gift. One worry these decisions raise is that, if donees of gifts may rely

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merely on the fact of a gift and not on their actions subsequent to delivery of the gift, litigants will become emboldened to find far more "gifts" among their property. Even more worrisome, however, is that the courts may be willing to grant exclusions regardless of post-delivery behaviour and thereby undermine the purpose of the NFP calculations: namely, as the preamble of the Family Law Act says, to allow the court to order an "equitable settlement of the affairs of the spouses".

§. 1. INTRODUCTION

Under Ontario's *Family Law Act* (*FLA*; or the Act), one may exclude gifts received from third parties from the equalization process.[1] Two recent decisions of the Ontario Court of Appeal illustrate some of the problems this exclusion can pose. Because gifts are presumptively excluded from a (former) spouse's net family property, it makes good economic sense to characterize one's assets as gifts. Excluding gifts from the equalization process also makes intuitive sense when the gift was made by a third party to one of the spouses. For though we may marry, our individuality and autonomy is not thereby irrevocably lost. If nothing else, a gift, *to me*, is a sign that we still recognize and value the individual in the partnership, the "me" in "team". By allowing gifts to be excluded from the calculation of family assets and from being shared at marriage breakdown, the legislature has signalled that, although individuals may be joined in a family (ad)venture, their individuality is never fully "comingled" and lost. Excluding gifts from the equalization process, then, would seem to be both natural and reasonable.

Still, the law has a remarkable power to complicate even the simplest of matters. The equalization process under the *FLA* is meant to be mechanical and predictable. Compared to other provinces where property is divided, judges in Ontario are

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[1] *Family Law Act*, RSO 1990, c F.3, s 4(2) [*FLA*].

supposed to have firmer checks on their discretion.[2] Gifts, too, are meant to be a simple matter. We give gifts all the time without judicial oversight. Yet, because gifts to one spouse during a marriage can have important consequences for how family property will be handled by the courts where spouses cannot agree how to divide their assets, gifts easily become hotly contested. We should not lose sight of the role the courts play in this process, for it is not merely a question of determining whether a gift was made. When a court declares a valuable asset is or is not a gift, the effect of that decision—implicitly, if not explicitly—is to foreground the relative importance of individual autonomy or familial interdependence. The analyses of *Buttar v. Buttar* and *Townshend v. Townshend*[3] are both problematic in the way they assess gifts and whether they should be excluded, and the balance between individual and family is upset as a result.

The problem in both cases is how the courts treat the intentions of the donors. A donor's intentions do matter. One must intend a gift to make a gift. The donor's intentions do three important things: they indicate *that* a gift was made, *what* the gift is, and *to whom* the gift was made. What the donor's intentions do not do is indicate *how* the gift may be used. A gift is not a contract[4] and one may not, generally, impose conditions on the use of the gift once ownership has passed. The recipient,

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2 See *Schreyer v Schreyer*, 2011 SCC 35, [2011] 2 SCR 605 at para 15; Mary Jane Mossman et al, *Families and the Law: Cases and Commentary*, 2nd ed (Concord, Ont: Captus Press, 2015) at 471–2.

3 *Buttar v Buttar*, 2013 ONCA 617, 116 OR (3d) 481 [*Buttar*]; *Townshend v Townshend*, 2012 ONCA 868, 113 OR (3d) 321 [*Townshend*]. These cases concern not only gifts, but gifts at the time of marriage breakdown.

4 Richard Hyland, *Gifts: A Study of Comparative Law* (Oxford: Oxford University Press, 2009) §§ 1315–6, 1324 (noting that common law regimes reject the civil law view of gifts as contracts).

or donee, may accede to the donor's wishes as a matter of logic or morality, but, from a legal perspective, the coincidence of the donor's intentions and the recipient's post-delivery actions are just that—a coincidence. Thus, it is important to recognize when the donor's intentions no longer matter for the purposes of the Act. Once the gift has been made, it is the intentions and actions of the recipient that matter. If a gift is to be excluded from the (original) recipient's assets in the family law context, it should not be because of what the donor intended. A court should pay little to no heed to the donor's intentions. Arguably, presuming the intentions of the donor were to benefit the individual and not the couple, if we treat a donor's intentions as having any legal meaning beyond determining *that* a gift was made, it will usually come at the cost of a corresponding de-emphasis on the recipient's intentions and actions post-delivery. The result is a privileging of the individual over the couple, which may be what a party wants while litigating their separation, but not necessarily what their intentions were during the marriage. Surely the time that matters most for determining how gifts should be treated pursuant to the Act comes not before the gift was made, and not after a marriage breaks down, but the time in between.

The Act describes the treatment of gifts in a deceptively straightforward manner. Under the *FLA*, subsection 4(2), it is clear that gifts following the date of marriage may be excluded from the calculation of a spouse's net family property (NFP); this may even include any income generated from the gift.[5] At

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5 Net family property is defined at *FLA*, *supra* note 1, s 4(1):

> "net family property" means the value of all the property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,
>
> (a) the spouse's debts and other liabilities, and
> (b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse's debts and other liabilities, other than debts or liabilities

common law, it is generally thought that there are only three basic requirements for an *inter vivos* gift: (i) the donor must intend to make a gift, (ii) the would-be recipient of the gift—the donee—must accept the gift, and (iii) control over the gift must be surrendered, which is sometimes referred to as (sufficient) delivery.[6]

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related directly to the acquisition or significant improvement of a matrimonial home, calculated as of the date of the marriage; ("biens familiaux nets")

FLA, *supra* note 1, s 4(2) reads, in part:

The value of the following property that a spouse owns on the valuation date does not form part of the spouse's net family property:

1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage.
2. Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse's net family property.
   [. . .]
5. Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced.

[6] See e.g. *McNamee v McNamee*, 2011 ONCA 533, 106 OR (3d) 401 at para 24 [*McNamee*]. See also Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 156-66. *Cf* Mary Jane Mossman & Philip Girard, *Property Law: Cases and Commentary*, 3rd ed (Toronto: Emond Montgomery, 2014) at 430–1.

	Ex. 1: No Gift		Ex. 2: $10,000 Gift		Ex. 3: $40,000 Gift	
	Pat	**Blair**	**Pat**	**Blair**	**Pat**	**Blair**
Assets at V-Day[1]	100,000	70,000	100,000	70,000	100,000	70,000
Gifts (exclusions)[2]	0	0	-10,000	0	-40,000	0
NFP	100,000	70,000	90,000	70,000	60,000	70,000
Difference	30,000		20,000		10,000	
Equalization	-15,000	15,000	-10,000	10,000	5,000	-5,000
Excluded Gift Value	0	0	10,000	0	40,000	0
Real World Assets[3]	85,000	85,000	90,000	80,000	105,000	65,000

[1] This refers to all worldly assets before any assessment is done as to what should be excluded (assets, that is, as a layperson might understand the term).

[2] An excludable gift is one that meets the criteria of *FLA*, s 4(2). It is added back to the balance sheet in the penultimate row.

[3] This includes each individual's "equalized" NFP plus the value of any excluded gift (assets as a layperson might understand them).

Table 1: Examples of Equalization Payment with a Gift Deduction.

In Ontario, the determination that some asset was a gift to only one of the spouses can radically revise the equalization payment one spouse owes to the other. Rather than divide a family's property and assets directly, the Act attempts to achieve a just and fair result by calculating a dollar value of each spouse's NFP and directing the spouse with the larger balance to pay one-half of the difference to the other spouse.[7] In the simplest scenario, if one can deduct a sizeable gift from their NFP, then one will become entitled to either a decrease or increase of 50% of the value of the gift in the equalization payment they will give or receive. In some cases, it is possible that exclusions of gifts will mean that the other spouse must provide the equalization payment rather than receive one (see Table 1 for a simplistic illustration[8]). In other words, excluding gifts can significantly affect what constitutes the just and fair division of property that is meant to flow from the "equal contribution" of the spouses during the marriage.[9]

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7 *FLA*, *supra* note 1, s 5(1).

8 Note that the tables are written only to highlight the net "real world" effect a gift has on the NFP: strictly speaking, excluded gifts are never truly a part of one's NFP.

9 See *FLA*, *supra* note 1, s 5(7) (stressing how marriages are comprised of "equal contribution[s]" which is the reason NFPs deserve

Both *Townshend* and *Buttar* illustrate some of the problems gifts pose for the Ontarian regime of equalization. In what follows, I shall outline the relevant circumstances of each decision (§. 2) and the reasons for the decisions (§. 3 and §. 4), before turning to an analysis of the deeper issues (§. 5). The last sections explore the impact (§. 6) and, by way of conclusion, the broader policy implications of these two decisions (§. 7).

§. 2. FACTS & ISSUES BEFORE THE COURT

In *Townshend*, the husband appealed an equalization payment order. The appeal came after a long marriage of 33 years ended in separation in 2005.[10] At trial, the judge had ordered the wife to pay the husband an equalization payment of $31,368.08,[11] which is $3,631.92 less than the $35,000 partial indemnity cost award made in favour of the wife.[12] One must surely wonder whether the costs of the trial, weighed against the equalization payment, influenced the husband's decision to appeal.

For Mr. Townshend, the issues on appeal related to the calculation of his NFP. These included:

1. A claim for an $8,500 credit with respect to a one-acre parcel of land;
2. An *inter vivos* gift valued at $25,000;
3. A 1967 Buick, which (he claimed) was a gift;
4. A GMAC car loan;

equalization).

10 *Townshend*, *supra* note 3 at para 1.

11 *Townshend v Townshend*, 2010 ONSC 6405, [2010] OJ No 5369 (QL) at para 63 [*Townshend* ONSC]. In the Court of Appeal the amount is said to have been one cent less; see *Townshend*, *supra* note 3 at para 2.

12 *Ibid* at paras 2, 55.

5. The wife's claim for a deduction of a $12,000 debt owed to her parents; and
6. A claim regarding the hall stand (later abandoned during oral argument).

In the subsequent sections, the focus shall be on the $25,000 gift.

Approximately half a year after *Townshend*, the Ontario Court of Appeal released its decision for *Buttar*, which partly considered similar issues. Separation again came after a long marriage of 36 years.[13] The facts are a little more involved in this case. The parties married in 1972 and built a home together on a property owned by the husband's family the following year. In 1978, his parents gave the couple the property on which the house was built.[14] The following year, Mr. Buttar's parents "transferred ownership and control" of the farming business to the couple; this included another property, referred to as the "Home/Main farm". They also sold their son livestock for $55,000, and "gifted to [him] alone" a 5,970 kg milk quota. Of particular significance was that the parents were careful and intentional in these transactions. The milk quota was structured as a gift in order to gain certain tax benefits.[15] The motivation was to avoid paying various taxes that would otherwise be required if the milk quota were not given as a gift. Over time, the Buttars acquired further properties, bringing the total to six, along with a time-share interest in a Collingwood property, and an increasingly large milk quota (27,561 kg).[16] In addition to the individual assets each person held, the milk quota sufficed to pay off the remaining debt the family had owed to Farm Credit Canada with a surplus of $358,253.46. Other farm equipment

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13 *Buttar*, *supra* note 3 at para 1.

14 *Ibid* at para 4. Note that the court wrote that "the parties" were given the property.

15 *Ibid* at para 5.

16 *Ibid* at paras 6–10.

was bought and sold following the date of separation.[17]

In the final years of the marriage, Ms. Buttar worked only sporadically at a local service club, earning less than $3,000 per year. Two bouts with cancer (1989 and 2006) made work involving heavy manual labour difficult.[18] Following the separation, the farm business seemed to prosper. Mr. Buttar's tax return for 2010 approached $900,000. However, he anticipated a drastic reduction in his income after the dairy operation ended in 2010, and suggested it might be less than $20,000 per year. He ceased his $2000 monthly payment of spousal support at that time.[19]

The court of appeal addressed a number of issues in light of this complicated sequence of events (many, it may be noted, taking place after the date of separation). These were:

1. Whether the appellant, Mr. Buttar, could deduct the present value of the disposition costs, including the capital gains tax, that he would incur when he sells the properties;
2. Whether the 1979 milk quota may be excluded from his NFP;
3. How much spousal support is owed to the respondent; and
4. Whether and how the jointly-owned properties should be distributed.[20]

Our focus in what follows is the second issue.

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17 *Ibid* at paras 10–11.

18 *Ibid* at para 12.

19 *Ibid* at para 13.

20 *Ibid* at para 14.

§. 3. REASONS IN *TOWNSHEND*

Mr. Townshend claimed an exclusion for a $25,000 gift, which was deposited (by the wife, he alleged) into a joint bank account. In the court below, Justice Kruzick, had accepted that the gift had been made to the husband alone.[21] But, crucially for him, the deposit into the joint account robbed the gift of its exclusive nature.[22] It became, in effect, a gift to the family. Ultimately, there was no exclusion, and both spouses were to enjoy the benefit of the gift equally. That is, the $25,000 benefited each spouse by the same absolute amount (compare columns 1 and 3 in Table 2, below, for a fictional illustration). If one is of the view that a deposit into a joint account signals an intention to benefit the family equally, then Justice Kruzick's decision makes sense.

Justice Simmons did not agree. Like Kruzick J., Justice Simmons did not accept that the money was deposited in a joint account contrary to Mr. Townshend's wishes or that he was unaware of the deposit.[23] Nonetheless, she concluded that the husband should have received an exclusion for "one-half of the amount of the gift".[24] Although apparently uneasy with it, Justice Simmons relied on the popular interpretation of *Colletta v. Colletta*:[25] when something is "deposited into a joint account it loses its exclusionary character to the extent of the one-half interest that is presumed to be gifted to the spouse".[26] Her reading of the Act is that a court must determine ownership prior

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21 *Townshend* ONSC, *supra* note 11 at para 44.

22 *Ibid*.

23 *Townshend*, *supra* note 3 at para 19.

24 *Ibid* at para 20.

25 *Colletta v Colletta*, [1993] OJ No 2537, 50 RFL (3d) 1 (CA). For her hesitations, see *Townshend*, *supra* note 3 at paras 27–28.

26 *Ibid* at para 28.

to calculating the spouses' NFP.[27] Section 4(2) of the *FLA* stresses that certain property that one in fact "owns . . . does not form part of the spouse's net family property".[28] As already mentioned, gifts from after the marriage can be excluded, as can gifts which can be "traced" into other property.[29]

	Ex. 1: No Gift		Ex. 2: $10,000 Gift		Ex. 3: $40,000 Gift	
	Pat	Blair	Pat	Blair	Pat	Blair
Assets at V-Day[1]	100,000	70,000	100,000	70,000	100,000	70,000
Gifts (exclusions)[2]	0	0	-10,000	0	-40,000	0
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Equalization	-15,000	15,000	-10,000	10,000	5,000	-5,000
Excluded Gift Value	0	0	10,000	0	40,000	0
Real World Assets[3]	85,000	85,000	90,000	80,000	105,000	65,000

[1] This refers to all worldly assets before any assessment is done as to what should be excluded (assets, that is, as a layperson might understand the term).

[2] An excludable gift is one that meets the criteria of *FLA*, s 4(2). It is added back to the balance sheet in the penultimate row.

[3] This includes each individual's "equalized" NFP plus the value of any excluded gift (assets as a layperson might understand them).

Table 2: Consequences of Decisions of Kruzick J and Simmons JA.

Although it is not stated outright, it seems that Justice Simmons relied on the tracing exclusion.[30] The $25,000 ultimately resided in an account that held $31,000 on the date of separation—about nine months after the deposit.[31] In this case, and due to the fungible nature of money, it is easy to find, if one wishes, that the entire $25,000 is "still" in the joint account. And Justice Simmons was willing to make that determination. More

[27] See *McNamee*, *supra* note 6 at paras 56–63, cited by Simmons J in *Townshend*, *supra* note 3 at para 28.

[28] *FLA*, *supra* note 1, s 4(2); *Cf McNamee*, *supra* note 6 at para 65.

[29] *FLA*, *supra* note 1, s 4(2) #5; the text is partially reproduced *supra* note 5.

[30] *Cf Townshend*, *supra* note 3 at para 35. On tracing, see Ilana I Zylberman & Brian J Burke, "Tracing Exclusions in Family Law" (2006) 25:1 Can Fam LQ 67.

[31] *Ibid* at para 34.

questionably, she rejected the suggestion that it would be better to analyze the actual credits and debits of the joint account to determine whether the "gift could be traced into the funds that remained in that account" on the date of separation.[32]

While it is likely true that producing and analysing such bank accounts would complicate and prolong cases such as these, drawing the *ratio* that one need not do so when dealing *in specie* is not without problems. It was easy in this case because the disputed amount was "still" available. After all, $25,000 is less than $31,000. But what if the amounts had been reversed? As noted above, Justice Simmons decided that one-half of the gift may be excluded even if deposited into a joint account. What would happen if the gift had been $31,000 but only $25,000 were left (for example, imagine $6000 had been invested in improvements to the matrimonial home)? Half of the gift—$15,500—would still be in the joint account. Should that be excluded and the remaining $9,500 be divided into each spouse's NFP? Could there ever be a situation where the entire remaining $25,000 would be considered a gift that one might exclude? Would that even make sense if some of the gift had been spent to benefit the family? It is not clear what the right answer is.[33] Justice Simmons' decision is unhelpful and provides no guidance if part of the gift is no longer clearly available in the way it is in *Townshend*. Indeed, it would only get more complicated if the interest on the value of the (excluded portion) of the gift were excluded as well pursuant to the *FLA*, subsection 4(2), paragraph 2.

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[32] *Ibid* at para 35, such an approach is rejected as "overly formalistic".

[33] But see *Ho v Ho*, 1 RFL (4th) 340, 1993 CarswellOnt 287 (WL) at paras 24–25 (wife able to "trace" $161,400 of a $200,000 gift from her father-in-law; entitled only to deduct that amount as the rest had been "comingled with the other funds to such an extent that it is not possible to trace the items claimed by the wife"). For other decisions on related matters, see Zylberman & Burke, *supra* note 30 at 92–99.

Of course, as the calculated NFP is merely a notional value, one solution might be to say that the donee is entitled to deduct one-half the value of the gift regardless of how the other property and finances of the former spouses line up. That is, the criticism above is only about the complexities of realizing the equalization payment; but it is not any more complicated to use the above *ratio* to determine the amount that may be excluded pursuant to a gift that was deposited into a joint account. Half of $31,000, in the end, is no more difficult to compute than half of $25,000. Yet, another problem remains. In fact, the consequence of allowing the original donee to deduct one-half the value of the gift from his or her NFP results in the donee ending up (in "real world" terms) with three-quarters of the benefit of the gift notwithstanding the arguably clear act of conjoining or comingling the gift with the other shared assets of the (former) family. The middle column of Table 2, above, helps illustrate the point. What it shows is that the beneficiary of the gift, despite his or her deposit into a joint account, ends up with 75% of the value of the gift.

§. 4. REASONS IN *BUTTAR*

In *Buttar*, the issues relate to the calculation of the spouses' NFP and spousal support (my focus shall be on the respective NFP calculations). Justice Rosenberg ruled that the milk quota should not be excluded from Mr. Buttar's NFP, despite the fact that it was initially described as a gift to one party.[34] Justice Rosenberg noted that the gift, or "transfer", seemed to serve a purpose beyond what a simple gift might have, for, as he noted, the gift helped Mr. Buttar's father avoid various tax consequences.[35] The gift lacked the altruism normally associated with gifts. It is hard

[34] *Buttar*, *supra* note 3 at para 5 (the quota "gifted to the appellant alone"; the quota was structured "as a gift to his son").

[35] *Ibid* at para 5; at para 26, Rosenberg J notes the application judge made the same determination.

to escape the conclusion that Justice Rosenberg is importing a concern with motivation into his analysis of intention.[36]

Justice Hatton, the application judge, found that because there was consideration for the transfer of the milk quota, which came in the form of a life interest in the family farm, it was not a gift.[37] In addition, the judge was concerned that the milk quota had been subject to a series of transactions over the years. Notably, it had grown in size and value. The milk quota which had been sold in 2010, therefore, was due to the efforts of both spouses.[38] Regarding the legal analysis of the requirements for a gift, Justice Rosenberg began his own analysis by stressing that gifts must be freely given. Altruism must be the central element.[39] However, after exploring the legal requirements for a gift, which here turned on a question of whether there was consideration for the milk quota, he declined to overturn the application judge's determination that consideration had been given. For Justice Rosenberg, this was a finding of fact that should only be overturned in a case of "palpable and overriding error",[40] and, in his view, there was none on this point.[41]

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[36] See *McNamee*, *supra* note 6 at para 34 (holding that it is an error of law to conflate intention, which is a prerequisite for a gift, with the "underlying motivation or purpose" for the gift); *Cf* Hyland, *supra* note 4 at § 288. The appellant in *Buttar* was alive to this issue: see *Buttar*, *supra* note 3 at para 30.

[37] *Buttar, supra* note 3 *at* para 26. I was unable to obtain a copy of Justice Hatton's decision.

[38] *Ibid*.

[39] *Ibid* at para 29, citing *Peter v Beblow*, [1993] 1 SCR 980, 101 DLR (4th) 621 at 991–92.

[40] *Buttar*, *supra* note 3 at para 33, citing *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at para 10.

[41] This was not true of other aspects of the original decision. See e.g. *Buttar*, *supra* note 3 at paras 54, 57, 63, 65, 67, 71.

§. 5. ANALYSIS

Jurists have long been suspicious of gifts,[42] but they are a common part of everyday life. When legal difficulties over gift-giving occur, it often relates to the requirement that the donor must surrender control or "deliver" the gift. In *Townshend* and *Buttar*, however, the problem for the courts seemed to be how much weight one should attach to the ("true") subjective intentions of the donor and/or donee.

This concern with intentions is surprising for a number of reasons. The most important is that, from a doctrinal perspective, the intentions of both parties are only important for determining that a gift was given (here the focus is on what might be called a simple gift: no trusts are being considered). Clearly, once the gift has been made, the intentions of the donor regarding the gifted item no longer have any legal force. This is what the requirement that the gift be "delivered" is meant to show: that one has surrendered any legal claim over the gift.[43] While it is true that the donee may feel some residual obligation to follow the wishes of the donor, and there may indeed even be good reasons to follow those wishes, there is no longer any legally enforceable obligation. The obligation may be moral or rational, but it is not legal.

The intentions of the donee are likewise specific and

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[42] Nicholas Laurent-Bonne, *Aux origines de la liberté de disposer entre époux* (Issy-les-Moulines: Lextenso Éditions, 2014) at 1 ("Le discours des juristes révèle une méfiance instinctive à l'égard des liberalités, de quelque nature qu'elles soient, ainsi qu'en témoignent les solennités particulières entourant, dans la plupart des législations occidentales, les donations, et ce depuis le droit romain tardif").

[43] Delivery is also sometimes said to be necessary because there can be no consideration given in return for a gift (where consideration is meant to indicate that the offeree accepted the offeror's terms). *Cf Re Cole*, [1964] 1 Ch 175 (CA), cited in Mossman and Girard, *supra* note 6 at 432, and Ziff, *supra* note 6 at 157.

solely focused on the act of receiving the gift. It is doubtlessly true that the donee may have other ideas about what she will do with the gift (invest it, burn it, “re-gift” it, etc.), but that is not the intention a court would assess directly for the purposes of determining whether there was an *inter vivos* gift. At best, such intentions about how the item will be disposed of in the future would be an indication that the person intended to receive the item as the donee of the gift. In this sense, the wording of the *FLA*, subsection 4(2), paragraph 2, may seem surprising:

> Income from property referred to in paragraph 1 [i.e., a gift or inheritance] [may be excluded], if the donor or testator has expressly stated that it is to be excluded from the spouse’s net family property.

In this case, the law is clear that the intentions of the donor regarding the disposition of the gift (or inheritance) should survive the transfer of the gift. Although this may appear to be an example of “dead hand control”, it is a justifiable provision. One important purpose this provision serves is that it allows a cash or fungible gift to operate in the same way the gift of a valuable item might. A valuable painting tends to appreciate over time, and when it is a gift being excluded under the *FLA*, subsection 4(2), it is the painting that is excluded, not the value of the painting on the day it was given. Thus, subsection 4(2), paragraph 2, allows fungible gifts the possibility of operating in the same way. One could imagine it as the gift-giver trying to give a gift that appreciates like a valuable painting might. In other words, the point is that the donor is given the authority to give the gift she intends to. The donor’s intentions, as discussed above, help us determine *what* the gift is, or, to put the matter differently, determine the scope of the gift. In that sense, it is not an example of “dead hand control” at all, but a way to counteract the (reasonable) default position that any consequent income from the gift will not be excluded unless it be explicitly so designated.

The problem with the *Townshend* decision, however, is that affords unjustifiable “dead hand control” to the donor at the expense of the post-delivery intentions of the donee. In fact, it should be the reverse. If the donee subsequently acts in a way that suggests that the gift is being used to benefit the family, it should no longer matter what the intentions of the gift-giver were. The donor (normally) is not in charge of the well-being of the family, and no longer has any “say” over how the gift can and cannot be used.[44] Once the gift is received, the only intention that should matter is that of the donee, who has become the owner. In the case of Mr. Townshend, the questions that should have been asked were: (i) what was his intention regarding this gift? and (ii) what did he do with this gift?[45] One might note, in passing, that the answers to these questions must include consideration of the donee’s intentions and actions prior to the breakdown of the marriage. It is usually all too easy to guess what they might be once litigation has begun.

The answers to these questions suggest that Justice Kruzick’s decision was the right one. It was not entirely clear who deposited the $25,000 into the joint account.

44 *Cf Mackedie Estate v Mackedie*, [1998] BCJ No 2200 (SC), cited in Mossman & Girard, *supra* note 6 at 438 (son, the donee, found to have received gifts where, post-delivery, the pictures were hung back on donor’s wall and thus still in the donor’s “possession”; attempt by donor to leave paintings to someone else by will failed).

45 For an example of a transfer to the other spouse, see e.g. *Cartier v Cartier*, 47 RFL (6th) 436, 2007 CanLII 52427 (Ont Sup Ct J) at para 3 (“when a spouse transfers gifted or inherited property into joint names, thereby conferring an interest in the other spouse, the transferring spouse loses the exclusion *only* to the extent of the gift he or she made to the other spouse, provided that the result intended by the transfer is joint ownership.” [emphasis in original]). Of course, determining the intention of a donee-turned-donor spouse may not be straightforward.

Mr. Townshend suggested it was his spouse. Even if this were true, he not only let that action stand, but it appears that the money may have been subsequently transferred into a "joint investment account".[46] With respect, when Justice Simmons writes that she can find no "legislative intent" regarding whether "the entire amount of the gift should lose its excluded character when deposited into a joint bank account",[47] she has already started down the wrong track. It is true that the wording of the *FLA* seems to suggest that gifts can never stop being a gift. But the idea is preposterous. It only begins to make sense when the gift is of significant value and, possibly, when the gift was not made too long ago. The reason for this may well be because although separating spouses would not care much about a $100 gift made five years ago, they likely will care a great deal about a $100,000 gift made 25 years ago. Regardless, depositing money into a "joint investment" account should generally signal an intention to use that money to benefit the family.

In the case of *Buttar v. Buttar*, it is difficult to disentangle all the strands related to the milk quota. There are two issues that must be considered: (i) the fact that the milk quota did not stay the same size (i.e., 5,970 kg) from the time of the gift, and (ii) the relationship of the milk quota to the larger transfer.

Regarding the first issue, one might think the best way to approach the quota is to treat it as a good that can be traded *in specie*, much like money (and unlike, say, a painting). If so, then there would be no difficulty in reasoning along the lines adopted in *Townshend*. After all, 5,970 kg is less than 27,561 kg. The quota of 5,970 kg was worth $403,858.02 at the date of

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[46] *Townshend* ONSC, *supra* note 11 at para 44; *Cf Townshend*, *supra* note 3 at para 18 (describing the "joint investment account" as simply a "Scotia McLeod joint account").

[47] *Townshend, supra* note 3 at para 32.

separation.[48] Since Mr. Buttar was ultimately ordered to pay an equalization payment of $112,986.69 and a $160,000.00 lump sum for spousal support, subtracting the value of the milk quota from his NFP would have radically revised the outcome Justice Hatton reached.[49] In fact, there is nothing particularly complicated in separating out, notionally, the portion of the milk quota that was a gift (if it were a gift). What more meaningfully differentiates the quota from the cash gift in *Townshend* is the idea that the quota was *used* by the *family* and, as a consequence of the family's activities, the family's prospects grew. It may not be possible to say that how they "used" the milk quota was the direct or sole cause of the quota's growth to nearly five times its initial value. What matters is that there is no clear indication that Mr. Buttar "hived off" the milk quota from the rest of the family—as if it were a private project for his own benefit all those years.

Thus, with respect to the second issue, even if the application judge had not determined that Mr. Buttar's family had received consideration in the form of a life interest in the farm,[50] the actions *after* the gift has been received should also matter. Intentions matter for gifts: essentially, both giver and receiver must have the intention to be involved in the transfer of a gift. Once it has been received, however, only the receiver's (subsequent) intentions matter. If the receiver should use the gift in a clearly private manner, then a case could be made that it should be excludable under the *FLA*, subsection 4(2). But what should the presumption be when the gift is not clearly used in an "exclusive" manner? Surely the correct answer is that the gift

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48 The ratios align in the following way: $\frac{5{,}960}{27{,}561} \approx \frac{403{,}858.02}{1{,}867{,}572.30}$.

49 I have been unable to find the original decision of Justice Hatton, and the appendix of *Buttar*, *supra* note 3, only includes "Schedule B", which shows how the property was divided. Presumably a "Schedule A" laid out the NFP calculations.

50 *Ibid* at 26, 33.

joins or becomes "comingled with" the family property. That is, the gift should lose its claim to an independent existence in proportion to the degree the donee chooses to treat it that way. Clearly, such a presumption would tend to affect fungible gifts *in specie* more than it would discrete items of value such as artwork. But is there not a difference between gifting, say, El Greco's *Adoracíon de los Reyes Magos* to an aficionado of Renaissance art and giving the same individual money which she deposits in her joint investment account?[51] Moreover, if the painting were sold and the proceeds then deposited in the joint investment account, would there be any doubt as to whether that sum should be "traced" pursuant to the *FLA*, subsection 4(2), paragraph 5? A recognition of this sort would, moreover, accord with the presumption of the "joint responsibilities" and "equal contribution" that underlies the purpose of equalization in subsection 5(7).[52]

In *Buttar*, it seems as though the right result was reached on the milk quota, but for the wrong reasons. The milk quota was excluded on the basis that it was not a gift. The parents received a life interest in the farm, it is true, but it is not directly or solely

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[51] *Cf Cortina v Cortina*, 2014 ONSC 5321 at paras 342–66 (husband receives *inter vivos* gift, deposits it in joint account, but then moves it to a private investment account; judge willing to trace the money "through the joint account" where it was temporarily "parked" without a finding of comingling). Justice Lafrenière's decision on the merits was upheld on appeal: *Cortina v Cortina*, 2015 ONCA 750 at paras 10–20. Unfortunately, the analysis in both decisions also relies, in part, on determining the donor's intentions.

[52] *FLA*, *supra* note 1, s 5(7): "The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection (6)."

in consideration of the milk quota that they acquired this interest. In order to connect the life interest to the milk quota, the gift had to be included in a larger transaction. In other words, the court went behind the (professed) subjective intention of the donors and decided that the gift could not be a gift because it was "structured" so only for the tax benefits.

Arguably, this is inconsistent with *McNamee*, where the same court stated in fairly clear terms that the motivation for a gift does not matter: "A transfer of property by way of gift may equally be motivated by commercial purposes provided the transfer is gratuitous."[53] The situation in *Buttar* is more complicated, to be sure, but it is by no means clear that the gift *must* be included among the larger transaction in such a way as to deny the professed understanding of the parties. Surely, had the court felt it more just in the circumstances, it would have had no trouble at all disaggregating the gift from the rest of the transaction and concluding that the consideration was not in exchange for the milk quota. In some respects, one might be inclined to suggest this conflation of motivation and intention is also inconsistent with *Ho v. Ho*, where Justice Ferrier ruled that the husband could not "have it both ways": if it was counted as a gift for tax purposes, then it should be considered as a gift in other contexts as well.[54]

§. 6. IMPACT OF *TOWNSHEND* AND *BUTTAR*

There should be little doubt that both of these decisions work against a presumption that the assets of a family should, by default, be shared. A more positive spin would be that the rules regarding the excludability of gifts is a recognition that spouses are still entitled to be individuals and have things of their own.

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53 *McNamee*, *supra* note 6 at para 37 (overturning the trial judge on this point); see also *ibid* at para 34.

54 *Ho v Ho*, *supra* note 33 at para 19.

When it comes to calculating our NFP, after all, we should not need to account for every trinket we were given.

Townshend is concerning for a few reasons. Above all, it will encourage divorcing spouses (or their lawyers) to seek to claim as many gifts as possible. The fact that one might still exclude half the value of the gift even after depositing it in a joint bank account (and then split the remaining half) will prove to be a strong incentive. Two further consequences follow from this. First, if the partners come from different enough economic backgrounds, the "wealthier" spouse may well insulate many assets from equalization. Second, if one spouse has regular or more frequent access to lawyers and legal advice, the gift exclusion has the potential to benefit the person who is aware of it. Indeed, if one can still benefit from three-quarters of the value of a gift after depositing it in a joint investment account, then there is a strong incentive to track down all the gifts one can.

The significance of *Buttar* may seem to temper the result of *Townshend*, but the analysis is also problematic. In terms of the impact the decision may have in the future, it is hard to say. To be sure, the inconsistency with *McNamee* is concerning. Do the motivations of the donor matter for gifts? If they may be discounted against a larger factual background, does this mean valuable gifts must be subject to legal formulae in order to succeed? It is by no means clear that even Declarations of Gift or passing about twigs or clumps of earth would suffice if *Buttar* holds sway.[55]

The other problem with *Buttar* is that it may implicitly support the undesirable elements of *Townshend*. That is, because the court decided that the milk quota was not truly a gift, the

[55] To be fair, a concern that legal formalities not be a sham is of ancient vintage as well. See Frederick Pollock & Frederic William Maitland, *The History of the English Law before the Time of Edward I*, 2nd ed (Indianapolis: Liberty Fund, 2010) vol 2 at 88.

decision does not help answer whether the quota could also be excluded in part like the $25,000 in *Townshend*. In other words, it is unclear what it would take for a gift to lose its status as a gift other than investing the value of the gift in the matrimonial home or squandering it outside the family.[56]

§. 7. BROADER POLICY ISSUES

The problem gifts pose in the family law context strikes right at the heart of what makes the dissolution of a family so tricky a matter at law. What was once joined together has come asunder. Yet, today we recognize for good reason that there are still two individuals at the heart of the marriage. The rightless and statusless *feme-covert* described by Blackstone thankfully no longer exists.[57] And if marriage consists of two legally competent individuals, then there is reason to grant that individuals may have things of their own. One can understand why gifts should be excluded: they are not directly a contribution (by the donor) to the "family". Now, to say that individuals might have things individually does not mean everything should be treated so. And thus the individually-held gift sits on the knife's edge that separates the autonomous individual from the common "good" of the family. However, it is important to remember that when two people marry, it is common to think

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56 See e.g. *FLA*, *supra* note 1, s 5(6): "The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to . . . (d) a spouse's intentional or reckless depletion of his or her net family property".

57 See Sir William Blackstone, Commentaries on the Laws of England in Four Books, Notes selected from the editions of Archibold, Christian, Coleridge, Chitty, Stewart, Kerr, and Others, Barron Field's Analysis, and Additional Notes, and a Life of the Author by George Sharswood, 2 vols (Philadelphia: JB Lippincott Co, 1893), online: <oll.libertyfund.org/titles/2140#Blackstone_1387-01_763>.

that they intend to work together for this common purpose. If anything, then, the default presumption should be that things belong to the family in all but the clearest cases that the gift was treated in an "exclusive" manner. In both *Townshend* and *Buttar*, the facts as described suggest that the gifts became family possessions. Money invested in a joint investment account and an income-generating milk quota both point squarely at the family's benefit.[58]

The analysis I have adopted here may seem to some to fly in the face of the Act's provision for "tracing". Tracing allows certain property, including gifts, to be found where it has not been irrevocably comingled with other property or the donee has not demonstrated an intention to share it with the other spouse.[59] In an insightful annotation to *Berdette v. Berdette*, Professor McLeod suggested that a purpose of tracing should be to encourage families to share their property.[60] On this analysis, spouses would be discouraged from "sharing their [gifted] property" if they risk losing the ability to trace the gift and seek an exclusion if the marriage should end. I am not persuaded. First, subsection 4(3) of the Act is clear that the person seeking

[58] Tangible gifts, which hang on the wall or in the closet or sit in a garage—your Richard Prince *Overseas Nurse*, your mink coat, your Maserati—may deserve to be excluded if a gift. But cash and other fungibles have less of a claim in that regard because it will often be difficult to show that they were for private advantage.

[59] *FLA*, *supra* note 1, s 4(2): "The value of the following property that a spouse owns on the valuation date does not form part of the spouse's net family property: . . . 5. Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced." See also the quotation from *Cartier*, *supra* note 45.

[60] *Berdette v Berdette* (1991), 33 RFL (4th) 290, 1991 CarswellOnt 280 (WL Can) (Ont CA). The relevant portion of the annotation is reproduced by Zylberman & Bruce, *supra* note 30 at 81–82.

the exclusion is obliged to prove it.[61] One might reasonably expect that the donee who "shares" a portion of the gift will have a harder time proving the exclusion than the spouse who—jealously or otherwise—did not share a portion of the gift but kept it fully separate.

Second, regarding the idea that liberal or lax tracing of gifts will encourage sharing, the argument seems aimed at family lawyers, academics, legal sophisticates, and, if indeed they are a separate group, pessimists. To begin with the last group, should we really imagine most people make decisions in contemplation of the end of their marriage?[62] Alternatively, it is also hard to credit that most married people base their decisions about how to treat gifts on consideration of the Act. What seems more likely instead is that, upon sitting down with a family lawyer because the marriage is at an end (or close to it) and learning that things can be "traced" in complex ways, people will be inclined to decide that things they thought they had shared were not, in the end, actually shared at all. Family money in joint investment accounts, perhaps, becomes *my* money. This is especially true if joint investment account monies can be recovered at a rate of three quarters on the dollar.

Finally, from a more philosophical perspective, tracing encourages people to privilege the time of the gift (when the donor's intentions matter) and the date of separation (when there is a tendency to revise or reinterpret past intentions and actions),

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61 *FLA*, *supra* note 1, s 4(3).

62 Presumably, if tracing encourages anyone with respect to gifts, it might be wealthy would-be donors who want assurance that their children will be able to recover the (value of the) gift when they realize the error of their ways and divorce their undeserving spouse. As I argue, these concerns are contrary to the spirit of the *Act* and should be discounted. For a radically different perspective, see Susan J Heakes, "Gifting Real Property to Married Children: The Creation of Legal Fictions to Avoid Section 4(2) of the *Family Law Act*" (2006) 25:2 Can Fam LQ 169.

and this emphasis comes at the cost of downplaying what occurred during the marriage. What matters more than how much of the gift is "left" is how it was treated when there was an opportunity to use it for the common benefit of the family. The doctrine of tracing does not encourage sharing in a family during marriage because most people have not heard of it before problems arise. What it encourages, in fact, is quite the opposite: an increasingly unequal—in literal and real world terms—"equalization" of the net family property. This point is tautologically true for most people because tracing only comes into play when spouses separate. I do not mean to suggest that all tracing is wrong, for it serves a useful purpose in the right circumstances. But the constraints on tracing I have in mind are easily undermined when the starting point of a tracing exercise begins with a donor's intentions. What happens then is that we feel like we should trace the item because the donor wants or would have liked us to do so. But as I have argued, what the donor wishes at this point is irrelevant.[63]

What matters in both cases is how the (would-be) gift was treated after being gifted. Both decisions, albeit in different ways, evince far too great a concern with the intentions, goals, and dreams of the donors. In *Townshend* there was no good reason to do so beyond for determining *that* a gift had been given. For the time after the date of the gift, the court should not have let those intentions of the donor colour the interpretation of the how the donee acted. In *Buttar*, the court arguably over-valued the wider intentions of the donor regarding the milk quota—if not outright confused motives with intentions. But it is more disappointing that the court failed to address how the milk quota was clearly used in a non-exclusive manner. Regardless of whether a gift was given, it should be clear that it lost its excludable "gift status" when it was used to the general

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[63] *Cf* McLeod's annotation to *Berdette*, *supra* note 60 (according to "strict gift law . . . [a] gift is not unwound simply because the donor's expectations did not materialize").

benefit of the family. The significance of a donor's intentions along with his or her actual control should not carry on beyond the point at which control is surrendered.

Ultimately, we might question the wisdom of the exclusion provisions in section 4 of the Act. It is somewhat strange that the intentions of third parties carry so much weight beyond the point of delivery of the gift. At best, it would make sense to allow the intention of the donor to carry weight in the evaluation of whether an excludable gift has been given, but not carry any weight as to whether the gift should be excluded since that intention normally ceases to carry any legal weight once delivery is completed. And while it is certainly true that *FLA*, subsection 4(2), paragraph 2, expressly permits a donor's "intention" to carry weight as to whether income derived from the gift should also be excluded from the NFP calculation, it does not mean that it is certainly right to do so. Even more importantly, however, courts must be careful not to privilege the intentions of donors, which can be murky enough to ascertain in the first place, at the cost of dismissing the overt actions of the donees. Otherwise, the courts risk undermining the very purpose of the Act itself: to provide for the "equitable settlement of the affairs of *the spouses* upon the breakdown of the partnership".[64]

[64] *FLA*, *supra* note 1, Preamble [emphasis added].