IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20060623
Docket: E050928
Registry: Vancouver

Between:

Patricia Jean McDonald

Plaintiff

And:

Robert George McDonald

Defendant

Before: The Honourable Madam Justice Bennett

Oral Reasons for Judgment

June 23, 2006

Counsel for the Plaintiff	T.L. Jackson
Counsel for the Defendant	G.A. Lang
Place of Hearing:	Vancouver, B.C.

[1] **THE COURT:** This case involves primarily the division of assets and spousal support.

[2] The parties were married May 6, 1977, and separated December 1, 2003. Mrs. McDonald, who I will refer to as "the wife," is 56 years old and Mr. McDonald, who I will refer to as "the husband," is 58 years old. The parties have one daughter, Christa, who is 22 years old. Christa has completed four years of university and should finish her undergraduate degree by June of 2007.

[3] The declaration pursuant to section 57 of the ***Family Relations Act*** was made on July 20, 2005.

[4] The wife obtained a Bachelor of Arts degree from York University in 1972. She obtained a teaching certificate from the University of British Columbia in 1976. She could not obtain a teaching position upon graduating, but, as she had been working in the airline industry, she decided to continue in that industry and stayed there until she took early retirement at age 50 in 2000.

[5] The wife worked full time for Canadian Airlines International and its predecessor commencing in 1974. She married the husband in 1977. At that time she was working in the reservations department. In July of 1977 she started in the training department as an instructor. She stayed in the training department for the rest of her career, moving from training and sales and service to training and management. She worked full time for the airline for ten years. Her job involved teaching primarily in Vancouver, Winnipeg, Calgary, Toronto and Montreal, with some overseas work as well.

[6] When Christa was born the wife took a year off work. She decided to return to work part time. She never returned to work full time.

[7] The wife testified that she did not progress in her employment in terms of salary or position; however, she did not lead evidence of what her situation would have been if she had worked full time. Also, she did say that her job changed as she progressed from doing training in basic areas, which then evolved into training in management positions. I acknowledge that I may take judicial notice of the fact that someone not working full time will lose opportunities for promotion, salary increases, and benefit increases; however, part-time work and job-sharing for women, particularly those in professions, has become much more predominate in the past ten years and I am no longer certain that there is significant loss of opportunity as there once was. However, clearly there will be some loss and I am aware of the fact that the wife went part time in 1984 when part-time work was far less common. I am also aware that there is no need to call expert evidence by the parties seeking to demonstrate these facts. However, it would not have extended the trial or have been expensive to file a document from the airline stating current salaries and benefits for someone in the wife's occupation who continued with full-time employment. Having said that, the fact this evidence was not called does not affect my final conclusion. The wife's employment required her to travel at some points and the husband cared for Christa when the wife was on these trips.

[8] The husband has an engineering degree. He completed this degree before he met the wife. He completed a Masters Degree in Business Administration during

the marriage. He took classes in the evening while otherwise working full time. He obtained his MBA in 1985.

[9] The wife contributed to her airline pension plan for the first 10 years of her employment. However, when she returned to work she was not allowed to continue her contribution. At some point she was permitted to buy back her pension, but the husband believed she would do better investing the money in RRSPs, which is what she did.

[10] In 2000, Air Canada, which had now taken over Canadian Airlines, offered the wife an early retirement package. She received a cash settlement of $130,000 plus a small pension of $243 per month. There is no cost of living attached to this pension. She had worked there for over 26 years. When she left, she was earning $27 per hour. Her husband supported her decision to retire from the company. Although it was not discussed, it was implicit that she would not look for other work. She was 50 years old at this time.

[11] Christa was 16 years old when the wife retired from Air Canada. The money from the payout was placed in an investment account with Phillips Hagar & North. In 1999 the wife's mother moved to the Lower Mainland, as she had a stroke, and the wife visited her every day. Since retirement, the wife has spent more time on her garden, drove Christa to her various activities and volunteered at the Vancouver Aquarium. The wife repeatedly described how much fun she was having during her retirement. She is also volunteering with a literacy organization. She spends a great deal of her time golfing and also races with a dragon boat team.

[12] The wife has not looked for any type of employment since separation in 2003. She says that returning to work is not what she planned to do. She said she could "push pantyhose at the Bay," but did not feel she had the skills or heart to find a job. She thinks it would be difficult to find a job at her age; however, she has not made any efforts to find employment. She appears to be in good health and in fact stated that she was.

[13] The separation understandably had a detrimental effect on the wife's mental health. She was not expecting to separate and it came as a shock to her when her husband left. After the first year of separation, she started antidepressant medication, which she is still taking, plus takes the occasional sleeping pill. She started counselling in February 2004, which has helped, and she is still seeing a counsellor. She testified that at this point she has no medical impediment to working.

[14] In terms of household duties, the wife testified that she looked after most of the housework, cooking and social planning. The husband was a supportive father, a good husband and did a lot of work around the house as well. Christa was in daycare when the wife worked and they had a nanny for a period of time. The husband worked long hours and the wife spent more time with Christa.

[15] In 1986 the husband started a mushroom company. His initial plan was to grow and sell specialty mushrooms. The company struggled initially and the concept went from growing mushrooms to importing mushrooms. The wife supported the husband's idea to start this business; indeed, she was prepared to

return to work full time if necessary to support this endeavour. The wife never actually worked in the business.

[16] The wife testified to some lean times. She said they stayed in a house that had one bathroom for 18 years. They had lean years and did not take any grand trips. They lived in Kerrisdale between 1978 to 1994 and then in 1994 they bought a home in North Vancouver where the wife is still living.

[17] The wife has been living in the family home since separation. She does not want to sell the home and she says it is very comfortable and has a nice garden. She would like to stay there until Christa is on her own. Christa lives with her mother during the summers and school breaks. The wife does not charge her any room and board. The husband pays all of Christa's expenses for schooling, including tuition, room and board, books and a living allowance. Christa is not expected to work during the school year. She works in the summers, but is permitted to keep the money for her own use entirely. She does not contribute to her education costs.

[18] The wife received an inheritance from her father in the form of shares of TorStar, (Toronto Star), about eight years ago. About three years ago she left some of these shares with Raymond James Investments; sold some of the shares and invested the money with Phillips Hagar & North.

[19] The wife's mother died and left her about $200,000, which was invested in a Philip Hagar & North account along with her severance package funds. The wife also expects to receive another $126,000 from her mother's estate. It is presently tied up in a dispute with a sibling.

[20] The husband holds a joint account with his mother, but he has no interest in that account. The companies run by the husband are called the Emperor Group of Companies. The first company was incorporated in 1986, called Emperor Mushroom Industries Inc. This is now a shell company. Its shares were bought by Emperor Holdings Ltd., which I will refer to as "Holdings," which was incorporated around 1986 or 1987. It is now only a holding company which holds all of the shares of the other Emperor companies. Emperor Specialty Foods, which I will refer to as "Specialty," which is the main company, was incorporated in 1986 and Emperor Mushroom Corporation, which I will refer to as "Corporation," was incorporated in 1990 and was the company that did business in the United States. There are presently no operations in the United States. When referring to the business operations, I will refer to these collectively as "the company".

[21] The company's business is to import produce such as mushrooms and fruit, primarily from China, and export wild mushrooms, primarily to Europe. The company has supply contracts with major food companies, including Costco and Save-On-Foods. The company presently has nine employees in the office, 14 in the warehouse and one in China.

[22] The company has been growing since inception, although it has had some financial difficulties from time to time. The company has managed to survive what has been, on occasion, serious financial setbacks. The company did very well in 2003, but had a setback in 2005, in part because of the local truckers' strike.

[23] Over the years, the husband paid an income to both his wife and daughter as a form of income splitting. The wife never worked for Emperor and Christa worked there for a short time a number of years ago. As a result, the wife's income as filed for tax purposes is not what she actually earns.

[24] When the parties were separated the wife was paid by the company. She was given $1,829 twice per month and other money as required. She understood that she was receiving $5,000 per month gross. In fact, the husband was putting his monthly draw into the joint account as well, but only the wife was using this money. The husband also gave her other money as she requested.

[25] On August 1, 2005, this situation changed and the money was paid by the husband as opposed to the company. At this point the wife received $5,000 gross or $3,658 net per month. The wife also has income from her investments, which is approximately $7,200 annually, plus her pension, as I have mentioned.

[26] After August 1, 2005, the husband no longer paid for everything the wife requested. He paid for some cost of maintaining the house, if the expenses were discussed in advance and were more in the nature of maintenance as opposed to decorating. He also paid half the taxes on the house. As a result, the wife has spent a considerable amount of money on the house which has not been shared by the husband. The husband also took over paying for Christa's expenses directly either to the university or to Christa. The wife took Christa on a cruise for her 21st birthday and the husband paid for that trip.

[27] The wife filed a financial statement that suggests her expenses are $177,000 annually or something in the range of $350,000 gross income. She has reduced these expenses somewhat in her evidence. She testified that she is living a bare-bones life on $3,600 net per month. She has no mortgage to pay from this or a car payment. Property on Bowen Island was sold and the proceeds were put into an account. She has been drawing money from the Bowen Island account, which I will refer to in more detail shortly, and when that was depleted she began withdrawing money from her other account. I add that the husband's financial statement claims approximately $250,000 in expenses, which would require an income of approximately $400,000 to sustain. Clearly both parties have either substantially inflated their expenses or are living grossly beyond their means. I expect it is a combination of both. I will return to this later.

[28] By paying spousal support to the wife directly instead of through the company, the wife cannot make RRSP deposits that are not taxable. However, since it was a fiction that she was working for the company, I do not see how she can complain about this. The company should never have been paying her anything at all. These payments were not legitimate income splitting.

[29] The wife has taken most of the money that was invested from the sale of the property on Bowen Island and has spent the money. The husband took some of these monies as well. When I reach the division of assets, I will deal with this money specifically.

[30] The wife has passes from Air Canada which she uses to take trips. For example, she took Christa to Hawaii in 2005 and, as I mentioned, to Italy on her 21st birthday. She went to Cuba just after she separated. The husband paid for the trip. The wife also went to England with friends in 2005 and on another cruise in 2004. She also took shorter trips with her dragon boat team for races.

[31] A counsellor talked her into purchasing critical illness insurance, which she initially was paying $475 per month. However, this is now reduced to $265 per month. The husband has taken a few trips as well since separation. For vacation he went to Italy and he took a skiing trip to Golden, British Columbia. He also made business trips to China and Costa Rica.

[32] The husband developed what he referred to as a "personal relationship" with Sabrina Jin. Or in other words, she was his girlfriend. The wife gave evidence that the husband had an extramarital affair. I assume it was with Ms. Jin, but I do not know for certain. The husband is no longer with Ms. Jin. However, when he was with her, he wrote a letter for her to use in her family litigation with her ex-husband that purported to offer her a job in Shanghai in order to convince someone, perhaps a judge, to permit her to move to Shanghai with her son. There was no job in Shanghai that she was going to take. He wrote or caused other similar letters to be written so Ms. Jin could obtain a visa to travel to China as well as a fake letter of reference for a job application. The husband said he is now not proud of doing those things; however, it does speak to his veracity in these proceedings. On the other hand, there is little conflict in the evidence, except in regards to the valuation of the company and even that is explained by the experts.

[33] The parties agree on the value of many of their assets. They agree on a value of the matrimonial home of $1,095,000. I have fixed the valuation for assets invested and not drawn on as the date of trial. In other words, these assets were intact and each party benefits from the interest accrued. Where the asset has been drawn down, such as the Bowen Island account and the shareholder's loan, I have used the date of separation. I will speak more to this when I deal with the issue. The following are agreed family assets and values (or have a minor dispute over the value):

- The matrimonial home at 575 Kings Road East, North Vancouver, is valued at $1,095,000.
- Joint TD chequing account at $925.44.
- Joint Investors Group inc. account at $32,348.51 which are valued at the closest estimate to the date of trial.
- TD Canada Trust account number ******5065 - $82,414.73. This account contained the proceeds of the sale of the Bowen Island property. The agreed date of valuation is separation, as the fund has been depleted by the parties. The husband took $5,000 from this account and the wife took the rest.
- The plaintiff's savings account TD Canada Trust at number ******7033 at $6,188.27.
- The plaintiff's term life is valued at $852 as of December 31, 2005. The defendant has a different value in his Scott schedule but has not indicated

where the value has come from, so therefore I accept the value as set out in the plaintiff's documents.

- The Sun Life Financial CI Funds (Policy No. *****690) are owned by the defendant. There is no reference to this fund in the plaintiff's Scott schedule and no value is provided in the defendant's schedule. The defendant agrees that these are family assets and says they should be divided *in specie*.

- The defendant's US bank account, TD Canada Trust number ******378: $72.86.

- The defendant's investment account, E*Trade Canada #9****L: $1,490.09 as of December 31, 2005. The date of trial is taken for valuation as nothing has occurred in this account, except it appears to have lost money.

- The defendant's Investment Account, Raymond James account # ******610A0 - $64,061.89.

- The defendant's stock in Sun Life Financial: $11,729.23. The defendant's Clarica Life Insurance Policy # ******890 - $4,218.75.

- The Shareholder's Loan Account, as of the time of separation was $196,596.43. It has now been reduced to nil. The wife received approximately $46,000 of this money and the husband used the rest - $150,596.43.

- The defendant's RRSP account; Raymond James, # *****1610R - $230,127.

- The wife's vehicle is a 1996 Saab valued at $4,000.

- The defendant's vehicle is a 2001 Acura MDX. The value is disputed. The income statements have the vehicle valued in May 2005, at $24,236, which was the payout price of the lease. The defendant estimates the vehicle is now worth $20,000. It is a given that vehicles reduce in value. It would have been fairly easy to produce a book value for the car (or for the plaintiff's car for that matter). Given I have neither, I will accept the evidence of the parties and value the MDX at $20,000 as I have valued the Saab at $4,000.

- The defendant's bank account - Coast Capital Credit Union #******51. This value should be determined at the time of separation as the husband has been drawing down on this account. That value is $5,836.73.

[34] The companies are family assets, but the value is significantly disputed.

[35] The parties agree that the following are not family assets:

- Raymond James Account #1E1****0 – is held in trust for Christa.

- The defendant's investments – Raymond James Account # 2*****A-0 - $20,085.00 which obtained post-separation.

- Christa's vehicle – 2003 VW Golf - $15,000.

- The plaintiff's inherited shares – TorStar – Raymond James Account # ****40A-0 - $51,069.10

- The money anticipated from the plaintiff's mother's estate - $127,109.34.

- The defendant's Joint account with his mother, Anna McDonald Investors Group # *****04 – valued at $97,476.81.

- The defendant did not list the plaintiff's pension from Air Canada on his Scott Schedule.

[36] I am assuming that there is no claim on that small pension. The fact he has made no claim on the pension, is a matter to consider when assessing spousal support as the wife will have the sole income from that pension.

[37] The following are assets which are not agreed to be family assets:

- The Plaintiff's investment account at Phillips, Hager & North # *****92 – valued at $311,080.00. These are funds from the Air Canada retirement package and from an Inheritance. The plaintiff submits that if these are family assets, they should be reapportioned to her.

- The Plaintiff's RRSP – Phillips Hager & North # 2****38 - $308,688.00. It is not disputed that this is a family asset, but the plaintiff submits should be reapportioned to her.

- London Life Insurance Policy # 83*****-7 - $27,092.26. This is a policy on Christa's life. The value is of March 05 and the plaintiff took over the payments after this. The plaintiff says she is keeping this for Christa. She could cash it in, as it is not in Christa's name, however, I accept her evidence

that the value of the life insurance policy is being held for Christa and I do not consider this an asset which goes on the balance sheet.

- The defendant's bank account – PC Financial # 00******203 - $11,022.08. This was the balance from the Shareholder's loan (above). The account was opened post separation. This is not a family asset as the Shareholder's loan is accounted for above. To include this would permit the plaintiff to "double dip".

- The Defendant's Royal Bank account # ***** 5075*** - $5,294.49. This account was opened to permit Emperor to have access to a Royal Bank account for doing business in smaller communities that do not have an HSBC bank. This account is accounted for in Emperor and is not a family asset.

[38] All the household items and antique furniture were left in the family home. The husband does not make a claim for any compensation for any of these items. There is no value given to the antiques other than they are expensive. The husband spent $30,000 to refurnish his apartment; however, he makes no claim for reimbursement.

[39] The parties have no debt.

Issues

1) Divorce

2) Value of the Emperor companies

3) Define the disputed family assets

4) Division of the assets and whether the assets should be divided equally or reapportioned to the wife.

5) Determine the income of the husband

6) Amount of Spousal Support

1) Divorce

[40] The divorce is granted.

2) The Value of the Emperor companies

[41] Two well-qualified experts, Gary Mynett and William McMann testified regarding the value of the Emperor companies. Although I obviously am required to choose one opinion over the other, there is a clear rationale for accepting one opinion in terms of the methodology applied and in the context of what analysis was requested, which I will set out momentarily. The fact that I accept the opinion of Gary Mynett is no reflection on the expertise or ability of Mr. McMann.

[42] The fiscal year for the Emperor companies is March 31st. The defendant is the sole shareholder. The plaintiff is an officer and director. Mr. Mynett provided opinions regarding the value of the companies as of March 31, 2004, and March 31, 2005. Mr. McMann provided opinions regarding the value as of March 31, 2004, and September 2005.

[43] The values for March 2004 are as follows: Mr. Mynett opined the companies were worth $1,185,000 and Mr. McMann opined that they were worth $1,051,360. Neither opinion included the shareholder's loan or the management fees owing to the husband. Thus the two are very close in their opinion.

[44] The main difference between the two opinions was the treatment of the contingent tax liability. There was a debt written off some years ago, which I will address in more detail momentarily, which probably should not have been written off. The question is what, if any, amount should be attributed to this potential liability. The Corporation ended up owing money to the Holding company. The amount as of March 31, 2004, was $422,801 U.S. This debt had been written off as noted; however, if the corporation started to earn money it had to pay the money back to Holdings and Holdings therefore had to pay tax on it. It accomplished this by paying a management fee to the husband and he paid the taxes, and then put the money back into the company. It is unknown when or if this liability will come to fruition. As a result, Mr. Mynett took the tax liability, which by this time was $145,479, divided it in half and credited $73,000 as a liability. If there is no contingent tax liability, then the company would be worth $73,000 more. If all of the liability is owing it would be worth $73,000 less.

[45] Mr. McMann, in his original valuation, concluded that the tax liability would be $165,000 and deducted that from the value of the company. Mr. McMann also was given a wrong value for property in the Corporation. He had been told the value was $175,000 when in fact the property sold for $210,000.

[46] There are two main approaches to valuation: the earnings approach which involves determining the discretionary cash flow amount, which is the amount which may be taken out of the company without hurting the company, to which a multiplier is applied and a value arrived at. In order to choose a multiplier, the expert will look at the positive and negative factors which apply to the business. For example gross profit is considered, amongst other things. Both experts applied this approach on the first valuation.

[47] Mr. Mynett applied the range of multipliers between 3.4 to 3.8, and Mr. McMann applied a multiplier of 3.3. Given how close the opinions are it will be difficult to argue that either is wrong. However, this is not the end of the valuations. Mr. McMann's valuation for September 2005 was $856,253 and Mr. Mynett's valuation for March 31, 2005, was $1,420,000.

[48] Mr. Mynett was asked to give a valuation for March 31, 2005. He applied the same valuation technique as he had the first time.

[49] Mr. McMann, on the other hand, used a net asset based approach in which the company's assets are restated to market value and the liabilities are deducted from that. The result is a much lower valuation. In using this approach, Mr. McMann concluded that the company lost all of the good will that it had up to that point. Mr. Mynett had estimated the good will between $325,000 to $479,000.

[50] Mr. McMann was asked only to do a valuation up to September 2005. He was asked to consider the shorter period for the valuation of the six months, between March to September 2005. The problem with this is that this company

fluctuates in terms of business dramatically over a twelve month period. Taking a "snapshot" of six months, which is what he was asked to do, cannot provide a true value of this company. Indeed, the husband's evidence supports this conclusion in terms of how the company fluctuates in terms of its business, as did the financial statements.

[51] Further, Mr. McMann did not, in his report, take into account the truck driver's strike in July 2005. I will refer to this again momentarily. Business suffered somewhat but the fact that this was a short-term loss was not factored in. Mr. McMann took what is referred to as the EBITDA, "Earnings before interest, tax, depreciation and amortization". He concluded that the EBITDA was low in 2005 and that the earnings approach was not a suitable method of valuation. However, he did not include adjustments which appeared in the earlier report such as consulting, amortization, compensation to the family and the strike. The sales and profitability fluctuate significantly month to month, and looking at six-month periods, even comparing the same months, can lead to misleading results if this valuation approach is used. The earnings approach takes into account adjustments to unusual and non-recurring events, and for salaries paid and personal expenses that are run through the company.

[52] Mr. Mynett and Mr. McMann also disagree on a salary that would be paid to the husband for his position in the open market. Mr. McMann opines that he would be paid $225,000 and Mr. Mynett opined that it would be around $200,000.

[53] Mr. McMann, in his opinion, pointed to the fact that gross sales were well up but profit was not. Freight costs went up as did the cost of buying. Mr. McMann did not consider the truckers' strike as a one-time event, even though it had never occurred before with this group. Further, he did not mention the effect of this strike in his report. Mr. McMann said that he did not believe that based on how he saw the business performing in the six months to September 2005, plus the strike, that it would permit him to have a level of earnings that when he capitalized it would result in a value in excess of the net asset value, so he changed to the net asset approach.

[54] In my view, looking at the level of earnings for only six months was fatal to the validity of his opinion. When the big picture of the company is looked at, it is clear that six months will not give a valid valuation to this company. The company is healthy and making money in the long run. Indeed, in spite of trying to undervalue the company in his evidence, the husband had spent significant amounts of money on renovations, had increased his management staff in order to compete in the changing market, paid substantial bonuses to his employees and has increased his own salary. He has major contracts with large food suppliers. I acknowledge that he has lost the contract with Costco USA; however, the evidence is that the food industry fluctuates a great deal and, as he has stated, a lost contract with one company will no doubt be replaced by another contract with someone else.

[55] Considering all the evidence, I accept the opinion of Mr. Mynett and the company is valued at $1,420,000.

3) Disputed family assets

[56] The wife seeks to have her account, which contains her retirement package from Air Canada and an inheritance, declared not to be a family asset. These have been invested and not used by her until after separation. Alternatively, she seeks to have these reapportioned to her pursuant to section 65 of the ***Family Relations Act***.

[57] All the assets of this family were considered family assets by them regardless of whose name the asset belonged. When this money was received and invested I infer that it was considered along with everything else to be a family asset. Given the Air Canada payout was earned during the course of the marriage, it is clearly a family asset. see ***Mitchell v. Mitchell***, 2002 BCCA 327.

4) Reapportionment

[58] There is a presumption of an equal division of assets and reapportionment unless reapportionment is granted pursuant to section 65 of the ***Family Relations Act***. The relevant sections are as follows:

> **Judicial reapportionment on basis of fairness**
>
> 65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
>
> (a) the duration of the marriage,
>
> (b) the duration of the period during which the spouses have lived separate and apart,
>
> (c) the date when property was acquired or disposed of,
>
> (d) the extent to which property was acquired by one spouse through inheritance or gift,

(e) the needs of each spouse to become or remain economically independent and self sufficient, or

(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

(2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

(3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

[59] The onus is on the person who seeks reapportionment to show that equal distribution would be unfair. There is some law to the effect that the value should be as of the triggering event and any other value involves reapportionment. I have used primarily the trial date or valuations close to the trial date, except for the companies which were valued March 31, 2005, unless the asset had been depleted. If this means that by choosing these dates, other than the triggering event, I have reapportioned the value of some of the assets on that basis, then so be it. I have already set out my rationalization for selecting certain valuation dates, to do otherwise would be in my view unfair. See ***Blackett v. Blackett*** (1989), 63 D.L.R. (4th) 18 (B.C.C.A.)

[60] The total assets are as follows based on what I have defined as family assets and on the value that I have ascribed to them is $3,534,145. On an equal division

each party would receive $1,767,072. The wife presently has or had in her possession, if one includes the Bowen Island money, $1,571,422; and the husband has $1,929,449. Still in joint accounts is $33,273.95, which is $16,637 when divided in half. The wife retains $179,000 of assets which are not family assets. The parties agree that the Canada Pension Plan should be pooled and divided.

[61] I will first address the request for reapportionment of specific assets; namely, the RRSPs in the name of the wife, the Air Canada payout and the inheritance. The applicable provisions are in section 65 (d), (e), and (f). I have concluded that there is no argument to specifically reapportionment the Air Canada payout or the RRSPs, that is apart from a general argument on reapportionment which I will address shortly. The money was clearly family money which was obtained over the lifetime of the marriage.

[62] On the other hand, the argument that the inheritance of approximately $200,000 should be reapportioned does have substance to it. The wife inherited the money in 2001, and the separation occurred in 2003. There is no question that had the marriage endured this money would be used for family purposes; however, it was inherited a relatively short time before the marriage ended and has been invested ever since. It is money that the wife received from her mother, and, in my view, given section 65 and in particular subsection (d), in these circumstances it seems appropriate that this sum be reapportioned to the wife in its entirety. The evidence of the wife is that the amount of inheritance was around $200,000. The total sum of that investment would have been $330,000, which is left from what appears in the account; however, I have no evidence tracking what was deposited.

Therefore the only evidence that I have is that the inheritance was $200,000 and that is what I reapportion to the wife.

[63] The next question is whether a percentage of the total assets should be reapportioned in favour of the wife. She seeks reapportionment in the range of 65 percent in her favour. The Court of Appeal has held that spousal support and asset division are closely related. The apportionment of assets is often used to ensure that the spouse with less opportunities will be able to retrain and become self-sufficient. See ***Toth v. Toth***, [1996] B.C.J. No. 1993 (C.A.) .

[64] The Spousal Support ***Guidelines*** have gone a long way to address the difficulty of compensatory support as well as equalizing living standards between the parties. There will rarely be enough money for parties to continue in their previous lifestyle; however, after a long marriage it is common to consider an equalization of lifestyles at least at the outset. In this case the wife will receive the house, substantial assets and will have $379,000 more than her husband has in terms of non-family assets. Further, he has no home and will be required to borrow or sell his assets in order to finance a home. His major asset is the business, which he intends to retain in order to generate income to support himself, Christa and the wife. Apart from the company, the husband will be left with $247,072 in capital assets after he makes the necessary equalization payment. The wife will have $572,072 from the marriage assets plus 379,000 in her own assets plus the house.

[65] The wife claims that she has been disadvantaged by the marriage and she clearly has in terms of earning income. However, she also has been significantly

advantaged by the marriage, as she would never have been able to accumulate these extensive capital assets if she had not entered the marriage. I have read ***Toth***, *supra*, ***Bracklow v. Bracklow***, [1999] S.C.J. No. 14 (S.C.C.), ***Tedham v. Tedham***, [2005] B.C.J. No. 2186 (B.C.C.A.) and ***Moge v. Moge***, [1992] S.C.J. No. 107 (S.C.C.). None of these cases address a case such as the one here where both parties leave the marriage with substantial assets, and the husband has a significant income and is able to support the wife and indeed does not dispute that she is entitled to indefinite support.

[66] The wife has done well with her investments. If she sells her house she will be able to purchase a very high-end townhouse or condominium in North Vancouver for half the value of the house she owns. She will then have in excess of $1 million to invest and generate income for her. She wishes to live in the house until Christa is "on her way"; however, Christa is now 22 years old and there seems no rationale to preserve a house of this nature for a 22-year-old. In all of the circumstances it would be unfair to the husband if I reapportioned the family assets. He would then be forced to sell the family business in order to purchase a home and then everyone would suffer, as he would no longer generate the kind of income the family is accustomed to receiving. I conclude that it would not be unfair to divide the assets equally. Each party will keep the assets he or she currently holds rather than divide the assets *in specie*. The total value of the family assets, having removed the $200,000 inheritance, is $3,334,145. The husband will make an equalization payment to the wife of $279,014. This may be made by way of a cash payment or a transfer of shares or an RRSP rollover. If the parties cannot agree on a manner in

which the equalization payment is to be made, they may return to court for direction. The assets held jointly will be divided equally. Sun Life Financial CI funds, to which no value is attributed, will be divided equally.

5) The husband's income

[67] The next issue it to determine the husband's income for the purpose of calculating spousal support. The husband's income from the company in 2005 was $245,000 and in 2004 was $327,000, and in earlier years less than that. This includes the personal expenses he ran through the company, as well as money paid as income splitting with Christa and the wife. He testified that he intends to pay himself the same in 2006 and I conclude, and it is not greatly disputed, that the husband's income from employment is reasonably found to be $245,000.

[68] However, there is a potential other source of income which the wife seeks to access. Mr. Mynett described an amount he attributed to a "discretionary cash flow". This is an amount which may be taken out of the company and paid to the shareholders without the company losing money. Mr. Mynett opined that this amount was $280,000. The wife submits that this amount should be taken out of the company each year and paid to the husband as a shareholder and therefore the husband's income should be $525,000. The difficulty with this argument is that this money has never been taken out of the company. The company has overcome some very difficult financial times, no doubt in part because this sum was not removed on an annual basis. The company is valued on the basis of this money staying in the company. One cannot predict what would happen to this company if

this amount of money was paid to its shareholders annually. This opinion of Mr. Mynett regarding the discretionary cash flow was in the context of valuing the company on the earnings approach to valuation. He was not asked the effect on valuation or in fact the effect on the company if this money was withdrawn. I do not have sufficient evidence to conclude that this additional money could be withdrawn each year without the company suffering. I do not accept this argument.

6) Quantum of spousal support

[69] The final issue, then, is the quantum of spousal support. The applicable sections are ss. 15.2 (4) and (6) of the ***Divorce Act*** and are as follows:

> **Factors**
>
> 15.2 (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.
>
> **Objectives of spousal support order**
>
> 15.2 (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[70] This is obviously a long-term marriage. The plaintiff argues that it was a traditional marriage; however, in my view it was more of a mixed model of marriage. The wife worked part time three days a week and looked after Christa on the other days. However, her work often took her out of town. Her husband worked long hours and daycare and a nanny were relied upon for child care when the parents were not available. The wife did not earn a large salary and it was certainly secondary to the husband's salary. She was likely deprived of opportunities and promotions plus the ability to build a pension. The husband does not have a pension either, as he is self-employed. The wife spent more time looking after Christa and the household. As noted, the wife obtained significant advantage from the marriage in terms of obtaining capital assets. The husband received a similar advantage. No doubt he could not have built the company to the extent that he did without the assistance of the wife in terms of her looking after the home and family. However, the husband also received an economic advantage in terms of the ability to earn an income. This company generates a significant income. The wife on the other hand has suffered an economic disadvantage from reducing her work to part time. The application of the Spousal Support ***Guidelines*** will serve to remedy this disadvantage when one also considers the extensive assets that she has.

[71] Capital loss can be addressed by either a reapportionment or by spousal support. I have concluded in this case that the most appropriate route is through spousal support because of the fact that the husband's main capital asset is

completely tied up and the fact that it does generate income which can support both parties.

[72] In terms of financial obligations towards Christa, the father has been paying for all of her tuition and books in the amount of approximately $12,500 per year, plus part of her car insurance and a living allowance. Although there was some suggestion that the parties should split these expenses, to simplify things, I have concluded that the father will continue paying these expenses until Christa completes her degree in 2007. The mother's share of Christa's expenses are borne by Christa living at home with her mother for the summer months without Christa contributing to room and board.

[73] Each party has suffered economic hardship to a degree from the breakdown of the marriage. The husband took nothing when he left and has had the cost of furnishing his rental apartment. The wife suffers as she no longer has the monthly income in the amount that she has been accustomed to receiving and will no doubt have to reduce her lifestyle. There is also the issue of self-sufficiency by the wife. She has a university education and she has considerable skills in teaching adults. She has been spending a great deal of time volunteering in the community yet has no interest in working to support herself. In ***Moge***, Madam Justice L'heureux-Dubé stated that judges could take judicial notice of the prevailing circumstances when assessing spousal support. When ***Moge*** was written, women who had been in a 30-year marriage at the time had entered the marriage in the 1950s and 60s. Times are changing again. It is not unusual these days for women to re-enter the workforce in their 40s and 50s. This generation of woman who have been

well-educated are not all struggling as they once did with these issues. I am not suggesting that someone who has had little education or job skills can easily step into a workforce after many years of absence. However the wife has significant skills, is well-educated, and has only been out of the workforce for six years. She is, in my opinion, quite capable of finding employment. She may look at some jobs with disdain, such as working in a department store, but she has made no effort to see if she can find employment, for example, with the other major airline in the west or in the field of adult education.

[74] I acknowledge there is no requirement to achieve self-sufficiency for every spouse involved in a divorce. This section says that one of the factors is the promotion of self-sufficiency insofar as is practicable. The husband is not disputing that the wife should receive indefinite spousal support. The support is in part to compensate her for her loss of opportunity and capital loss in her earning capacity. In ***Moge*** the court says the following at paragraph 52:

> All four of the objectives defined in the Act must be taken into account when spousal support is claimed or an order for spousal support is sought to be varied. No single objective is paramount. The fact that one of the objectives, such as economic self-sufficiency, has been attained does not necessarily dispose of the matter. Carruthers C.J.P.E.I observed in Mullin v. Mullin (1991), supra, at p. 148:
>
> > All of these objectives must be considered. There is nothing in the legislation to suggest that any one or two of these objectives should be given greater weight or importance than any other objective. Section 17(7) of the Act recognizes that each former spouse shall attain economic self-sufficiency, insofar as practicable, within a reasonable period of time, but it does not say that such economic self-sufficiency is the dominant consideration.

As Perras J. has put it in Crowfoot v. Crowfoot (1992), 38 R.F.L. (3d) 354 (Alta. Q.B.), at pp. 356-57:

> Each model has certain assumptions but is basically grounded in the Divorce Act, 1985, S.C. 1986, c. 4. The problem with selecting one model over others is that one then approaches the case from a preconceived point of view: the point of view being dictated by the assumptions associated with the model. The difficulty arises, then, in trying to either fit the model to the facts or fit the facts to the model, and in so doing, causing an injustice to the parties.
>
> ...
>
> It is against the legislative backdrop or scheme as set out in the Divorce Act, 1985 that one must measure and arrive at a reasonable figure for support. It may be that, having done so, a final quantum can be quickly translated into an easy rule of thumb, like one third or two fifths or parity. But such translations are coincidental and ought not to be turned into unfailing universal formulas; nor should a support order necessarily be thought of as having been achieved as if one applied a particular model. Both counsel have in their submissions urged upon the court a particular approach. I decline to follow either submission in this respect but, rather, prefer to adhere to the scheme proposed by the legislation, namely, to be mindful of the factors and objectives as set out in s. 15 of the Divorce Act, 1985 and of the principles as enunciated in the case law.

...

[69] Although the promotion of self-sufficiency remains relevant under this view of spousal support, it does not deserve unwarranted pre-eminence. After divorce, spouses would still have an obligation to contribute to their own support in a manner commensurate with their abilities. (Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", supra, at p. 171). In cases where relatively few advantages have been conferred or disadvantages incurred, transitional support allowing for full and unimpaired reintegration back into the labour force might be all that is required to afford sufficient compensation. However, in many cases a former spouse will continue to suffer the economic disadvantages of

> the marriage and its dissolution while the other spouse reaps its economic advantages. In such cases, compensatory spousal support would require long-term support or an alternative settlement which provides an equivalent degree of assistance in light of all of the objectives of the Act. ("Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", supra, at pp. 171-72.)
>
> ...
>
> [94] Since this appeal involves an application for a variation order, here an order for the termination of support by Mr. Moge to Mrs. Moge, s. 17(4) of the Act applies.

[75] I should add that the evidence of the wife's problem with mental health seems to be more or less resolved, as she has testified that this is no longer a debilitating problem that would affect her employment. Counsel had the opportunity to make further submissions based on the recent decision in ***Leskun v. Leskun***, 2006 SCC 25, however chose not to. In my view the evidence did not support spousal support in the context of that decision. Indefinite spousal support is not opposed, in any event. Further, if the wife invests her capital assets she should be able to generate a significant investment income.

[76] The husband submitted that I should attribute $37,000 income to the wife, taking into account her present investment income and her pensions, which earn her approximately $10,000 a year and another $27,000. In my view the wife could earn more than $37,000, even if one simply attributed minimum wage. However, this is the amount thought reasonable by the husband and therefore I will accept it.

[77] The wife seeks support in the amount of $17,000 based in part on her expenses. The husband's net income is about $6,000 short of this request. The

wife's expectations are too high. Her expenses are significantly inflated. A single person with no mortgage could live quite comfortably on less than half of this amount, keeping in mind it is based on after-tax dollars. I am not emphasizing means and needs when saying this. She needs far less. However, fairness dictates that she receive significantly more than her basic needs. When I take into account the four factors outlined in section 15.2(6) and apply the ranges found in the spousal support guidelines provided to me by counsel, I conclude that a permanent spousal support order of $6,500 per month should be awarded. The plaintiff should easily be able to generate $3,000 to $4,000 per month through work or investment income. If she chooses not to work, then she will have to take other steps to generate income. There is a request that this be retroactive to August 1, 2005, which is when the husband reduced the amount paid. In my view this was a reasonable request and the order will be made retroactive to August 1, 2005.

[78] The husband may apply for a review of the spousal support order upon reaching the age of 65 years.

[79] I add that if the parties find errors in my arithmetic and agree to make changes, they may do so or they may come back to me.

[80] The issue of costs is adjourned by consent.

The Honourable Madam Justice Bennett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20080227
Docket: E050928
Registry: Vancouver

Between:

Patricia Jean McDonald

Plaintiff

And:

Robert George McDonald

Defendant

Before: The Honourable Madam Justice Bennett

Corrigendum to Reasons for Judgment

(In Chambers)
February 27, 2008

Counsel for the Plaintiff	T.L. Jackson
Counsel for the Defendant	B. Ingram
Place of Hearing:	Vancouver, B.C.

[1] **THE COURT:** On June 23rd, 2006, I released Reasons for Judgment in this case which dealt primarily with the division of assets and spousal support. At the end of the Reasons, I invited the parties to check my arithmetic and bring the matter back if I had made any error.

[2] In February, 2008, the parties came back before me as they had discovered an error in calculation the previous July. Unfortunately, it was an error of substance for which I must apologize to the parties.

[3] I had ordered an equal division of assets of which there was in excess of $3 million, with some reapportionment to the wife for an inheritance. As the husband had retained more of the assets, I ordered that he make an equalization payment of $279,014. Instead, the correct calculation is an equalization payment of $131,954.99, which means the wife will have approximately $149,000 less in assets than I had originally calculated.

[4] The wife acknowledges the error and submits that I took the amount of assets that she would have in her possession when I considered whether to reapportion any of the remaining family assets as well as what to allocate as spousal support. The wife seeks a reapportionment of the assets to account for the error or alternatively increased spousal support.

[5] The husband submits that the principle on which the case was decided was an equal division of assets less an inheritance which was reapportioned to the wife. If I am going to reopen the case, the husband submits that I should take into account

the fact that his wife's house has now increased in value by $250,000 over the past year and that his business has decreased in value.

[6] I do not think it appropriate for me to consider new values with respect to the assets. However, both parties are correct in their submissions. I did apply an equal division of assets and I did examine the assets each held in determining whether to reapportion assets and in assessing spousal support.

[7] I did not reapportion the assets, in part because to do so would require the husband to sell his business to buy a house. The business is what funded the daughter's university education as well as what funds spousal support. That situation has not changed other than the daughter has completed her degree. I also looked at the assets the wife had over and above what the husband had in terms of non-family assets, which was considerable.

[8] The effect of this sum of money, given that the assets are in excess of $3 million, is insignificant given the balance that I was attempting to achieve and the division of assets in this case. Although the error in calculation is unfortunate, after a review of my Reasons and reflecting on the balance sought to be achieved, I have concluded that there will be no variation of the judgment in terms of reapportionment or increased spousal support.

[9] Next I turn to the question of how the equalization payment will be made. In my judgment I left it to the parties to determine whether they wished to have this sum paid in cash or through a spousal RRSP rollover, keeping in mind the tax

consequences. They have not agreed on a process and asked that I determine the issue.

[10] The husband would like to transfer RRSP funds, which would put the tax consequences in the wife's hands. The wife naturally wishes cash, which means she has no tax consequences.

[11] I have concluded that the husband will make the payment in cash and not by way of a spousal rollover. Although he has very little in the way of liquid assets, he will either have to borrow money or cash in the RRSPs. The rationale for this is that the husband has the business asset and to require the wife to shoulder the tax consequences would result in a disproportionate division.

[12] The wife seeks to have the interest rate on her judgment increased from the court ordered interest rate to 13.94 percent, which she submits that she could have earned had she been able to invest the money. The ***Court Order Interest Act*** provides a discretion to me to vary the interest from that set in the ***Act*** pursuant to the Registrar's rates. The law is clear that such a variation is exceptional. In ***Gillis v. Kralj***, [1992] B.C.J. No. 246, Low J. held that "the court should be slow to make exceptions under s. 8." This decision has been followed by others in this court: ***Nicolls v. B.C. Cancer Agency***, [1999] B.C.J. No. 2010 at para. 45. I also respectfully agree. I have not been given any cogent reason to vary the interest rate. The parties rely on this rate; it is reasonable and easy to fix. I would not give effect to the request to vary the interest rate.

[13] Finally, the wife seeks post-judgment interest on her costs award. The parties negotiated a costs settlement and finally agreed that the wife should receive costs on Scale B until trial and then double costs for the trial to the sum of $82,000. The bill of costs was submitted by the plaintiff to the defendant on June 1st, 2007. The wife is not suggesting that the delay in the preparation of the bill of costs lies at the feet of the husband. The husband agrees that he should pay interest and submits that it should be from sometime after June 1, 2007 to give him a period of time in which he needed to consider the bill of costs. The plaintiff initially thought that the defendant was objecting to pay interest as the costs were paid in October but no interest was paid.

[14] The bill of costs had been negotiated, so I do not see that the defendant needed a great deal of time to consider his position. Therefore, the interest on the costs will be payable from June 1st until the date the costs were paid.

[15] Now, with respect to costs on this application, because the result has been divided to a degree, my inclination is that each party bear their own costs, but if counsel wish to make submissions I will be happy to hear you.

[16] MS. JACKSON: That's appropriate, My Lady.

[17] THE COURT: Thank you.

[18] MR. INGRAM: My Lady, I am appearing on behalf of Ms. Lang and I have no knowledge whatsoever about this case, and she has asked me to try and reserve for her an opportunity to address costs relating to this ruling today.

[19] THE COURT: What I am going to do is, I am going to order the parties bear their own costs. If there is any issue from Ms. Lang's perspective, she can notify Ms. Jackson within 14 days of today's date. Otherwise the order will be the parties bear their own costs. Thank you very much.

E Bennett J

The Honourable Madam Justice Bennett