IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Oliver v. Oliver,***
2011 BCSC 1126

Date: 20110818
Docket: E0
Registry: Vancouver

Between:

Bobbi Jean Adair Oliver

Plaintiff

And

James Douglas Oliver

Defendant

Before: The Honourable Madam Justice Fenlon

Reasons for Judgment

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Place and Date of Trial:	Vancouver, B.C. January 31, 2011 February 1-4,7-9,15-18, 25, 2011 April 6,7, 2011
Place and Date of Judgment:	Vancouver, B.C. August 18, 2011

I. INTRODUCTION 3
II. ISSUES 4
III. ANALYSIS 4
A. Division of Family Assets 4
1. Identification of Family Assets 4
a) Mrs. Oliver's Investment Accounts with VPCU 6
(i) VPCU Term Deposits 8
(ii) VPCU Silver Shield Savings Account 9
b) Trust Account for Kelly Nixon 10
c) The $50,000 Loan to Kelly Nixon 11
d) CIBC Investment Accounts 12
e) Chattels 15
f) The $10,000 Overdraft 15
2. Valuation of Assets 16
a) The Family Home 16
b) The Companies 17
3. Reapportionment of Family Assets 20
a) Should assets be reapportioned to Mrs. Oliver? 23
(i) Mrs. Oliver's need to become economically self-sufficient 23
(ii) Oral agreement regarding the matrimonial home 24
b) Should the Assets be Reapportioned in favour of Mr. Oliver? 27
(i) Mr. Oliver invested his inheritance and other sums in the family home 28
(ii) Dissipation of Assets 28
(iii) Payment of Legal Fees 29
B. Spousal Support 29
1. How long were the parties married? 29
2. What is the income of each party? 32
a) Mrs. Oliver's income 32
b) Mr. Oliver's income 34
3. Is Mrs. Oliver entitled to spousal support? 37
4. Amount of Support 40
C. Divorce Order 42
D. Fine under s. 92 of the *Family Relations Act* and Costs 43

IV. SUMMARY OF ORDERS.. 43

I. INTRODUCTION

[1] What began as a promising mid-life marriage ended in protracted, costly litigation that has taken a significant physical and mental toll on both parties.

[2] When Bobbi Oliver and James Oliver met in 1991, they were in their mid-40s and each had two children from a previous marriage. Both were financially comfortable. After dating for two years, the couple decided in 1993 to combine their households and to create “their own Brady Bunch” with their children who ranged in age from 8 to 17 years. They purchased a home together on 26th Avenue in Surrey and married in May 1994.

[3] Shortly after the marriage, Mrs. Oliver found working and meeting the demands of running the combined household challenging. With Mr. Oliver’s concurrence, she left her employment and became a full-time homemaker. Mr. Oliver provided for the family by continuing to operate his construction business, Oliver Builders Ltd.

[4] Mr. Oliver moved out of the family home for a time from 2000 until 2004, although the couple continued their relationship. He moved back in to the family home in 2004, leaving again in February 2006, this time for good -- the date he says marked the end of the marriage. Mrs. Oliver says that even though they were physically separated, they continued their relationship and did not actually end the marriage until January 2009.

[5] On July 23, 2009, a declaration of no prospect of reconciliation between the parties was granted under s. 57 of the *Family Relations Act*, R.S.B.C. 1996, c. 128.

II. ISSUES

[6] The issues I must determine fall into two main categories: division of family assets and spousal support.

a) Division of Family Assets

i. Are Mrs. Oliver's savings accounts and term deposits family assets?

ii. What is the value of the Oliver group of companies?

iii. Should the family assets be reapportioned to either party?

iv. What is the impact of a 1992 oral agreement that the parties made concerning the family home and the Oliver group of companies?

b) Support Issues

i. When did the parties separate?

ii. What are the parties' incomes?

iii. Is Mrs. Oliver entitled to spousal support?

iv. What amount of support, if any, should be ordered?

III. ANALYSIS

A. Division of Family Assets

1. Identification of Family Assets

[7] Before turning to valuation and reapportionment, it is necessary to identify the family assets to be divided. The parties agree that the following are family assets:

- the former family home on 26th Avenue in Surrey;
- Mr. Oliver's shares in the Oliver group of companies: Oliver Builders Ltd., Jimbo Investments Inc. ("Jimbo"), OBL Projects, and JSS Holdings (collectively the "Oliver group of companies");
- Mrs. Oliver's shares in Jimbo;
- Mrs. Oliver's chequing account at the Vancouver Police Credit Union (VPCU) account number ***94;
- shareholder loans owing to Mr. Oliver from the Oliver group of companies;
- the parties' joint account at VPCU, ***39;
- the parties' joint account at VanCity, ****47;
- the parties' respective RRSPs at CIBC, VPCU, and BMO Nesbitt; and
- the parties' respective vehicles.

[8] The parties agree that Mrs. Oliver's inheritance from her father is not a family asset because she inherited after the s. 57 declaration was made on July 23, 2009. Her inheritance consists of the following assets:

- VPCU account ****49 containing the proceeds of the sale of Mrs. Oliver's father's condominium in the amount of $585,000;
- VPCU account ***94 in the amount of $232,000;
- BMO account ****-****-*30 in the amount of $9,200;
- RBC account ****-***69 in the amount of $11,000;

The parties also agree that the following are not family assets:

- Mrs. Oliver's Coast Capital Savings account *****96;
- Mr. Oliver's 12-foot boat trailer;
- Mrs. Oliver's municipal pension plan;
- Mr. Oliver's carpenters' union pension; and
- Mr. Oliver's VanCity account ***56.

[9] The assets in dispute are:

(a) Mrs. Oliver's investment accounts with the VPCU;

(b) an account Mrs. Oliver holds in trust for her daughter Kelly Nixon;

(c) a disputed $50,000 "loan receivable" from Kelly Nixon;

(d) Mrs. Oliver's investment accounts with CIBC; and

(e) the household chattels each party has in his or her possession.

[10] With respect to debts, Mr. Oliver agrees that he is responsible for payment of the Canada Revenue Agency arrears of $30,000. Mrs. Oliver agrees that she is responsible for the VPCU line of credit on ***94 of $90,000 which she has now paid from a term deposit. What remains in issue is responsibility for a $10,000 overdraft on the parties' joint VanCity account ****47. While Mrs. Oliver agrees that this account is a family asset, she takes the position that Mr. Oliver should be solely responsible for the overdraft on that account. I turn now to the disputed assets and debt.

a) Mrs. Oliver's Investment Accounts with VPCU

[11] Mrs. Oliver's position is that her savings and investment accounts were largely brought into the marriage and are not family assets. Section 58 of the *Family Relations Act* defines family assets as follows:

> 58(2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.
>
> (3) Without restricting subsection (2), the definition of family asset includes the following:
>
> ...
>
> (c) money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;

Under s. 60 of the *Family Relations Act*, Mrs. Oliver, as the party asserting that property is not a family asset, has the burden of proving that the property in issue is not ordinarily used for a family purpose.

[12] Mr. Oliver argues that the investment accounts at the VPCU are all family assets because the VPCU ***94 account was ordinarily used for family purposes. To support this contention, counsel for the respondent meticulously traced transfers between Mrs. Oliver's various accounts and argued that if money was transferred from one of her savings accounts into the joint family account to cover family expenses, or from a joint family account to a VPCU savings account, that source account or recipient account was "tainted" and became a family asset.

[13] Having reviewed these transactions, I have concluded that Mrs. Oliver's VPCU savings and investment accounts are not family assets for the following reasons. First, Mr. Oliver paints the ***94 VPCU account with too broad a brush. I find that bank accounts at the VPCU are arranged differently from accounts at larger banks. A client is given one account number, and under that account number there may be multiple chequing accounts, savings accounts, term deposits, RRSPs and other products offered by the credit union. Mrs. Oliver had six separate accounts bearing the same account number, ***94: a Silver Shield savings account, a chequing account which she has admitted is a family asset, term deposits, shares in the VPCU, and an RRSP account which she again admits is a family asset.

[14] To the extent that Mr. Oliver's tainting argument relies on the fact that one of the ***94 sub-accounts was used for family purposes, it is not persuasive. Each of

the VPCU accounts under number ***94 must be considered as a separate account for the purpose of this analysis.

(i) VPCU Term Deposits

[15] Mr. Oliver submits that the term deposits in the VPCU ***94 account are family assets because Mrs. Oliver transferred interest from those term deposits into her chequing account which she admits she used for family purposes. However, the occasional use of interest from an investment to cover family expenses does not necessarily make the capital in the investment a family asset: *Stuart v. Stuart* (1996), 73 B.C.A.C. 30 at paras. 60-61.

[16] In determining whether the VPCU term deposits were used for a family purpose, I also take into account the origin of the term deposits. Mrs. Oliver sold the Kamloops Street home she had owned before the marriage and deposited about $130,000 into term deposits. She left those term deposits in her VPCU account generally untouched, allowing the interest to be reinvested in new term deposits as a sufficient amount of interest accrued. The only principal she withdrew from the term deposits was $50,000 to provide her daughter Kelly with a down payment on a condominium in February 2008. She also moved some of the term deposits to and from her children's accounts from time to time but she kept the value of those term deposits intact and added to their value with her other savings or interest.

[17] Further, there is no evidence that either party planned to use Mrs. Oliver's savings in order to provide for their retirement or for their needs at any point in the future. To the contrary, Mr. Oliver testified that he did not know or care how much money Mrs. Oliver had in savings at the start of their relationship and never expected Mrs. Oliver to use her savings. He always regarded Mrs. Oliver's savings as "hers to do with as she pleased". Mrs. Oliver's acknowledgement on examination for discovery that she intended to share the VPCU ***94 savings and her CIBC investment accounts with Mr. Oliver if they were still married upon his retirement does not establish an intention to use her savings as a means of support.

[18] Finally, Mr. Oliver argues, in reliance on *Graff v. Graff* (1987), 19 B.C.L.R. (2d) 234 (C.A.), that any savings Mrs. Oliver acquired from her income during the marriage should be deemed to be family assets because they were made “at the expense” of the family. However, there is no evidence to support a finding that Mrs. Oliver acquired savings by taking money that the family needed. In *Lye v. McVeigh* (1991), 56 B.C.L.R. (2d) 158 (C.A.), the Court of Appeal found that the setting aside of income to put into savings that are not used for a family purpose does not make those savings a family asset.

[19] In summary on this issue, I find that the term deposits in account number ***94 are not family assets.

(ii) VPCU Silver Shield Savings Account

[20] Mr. Oliver relies on three types of transactions in support of his submission that the Silver Shield savings account is a family asset: first, transfers between the ***94 chequing account and the Silver Shield account; second, transfers from the Silver Shield account to the parties’ joint account at VPCU ***39; and third, payments from the Silver Shield account to cover family expenses. He submits that because the two chequing accounts at VPCU are family assets, any transfers between those accounts and the other sub-accounts at the VPCU turned the other accounts into family assets. I will address each category of transaction in turn.

[21] With respect to payments from the Silver Shield account to cover family expenses, Mr. Oliver points to the account statement for December 2005 which shows debit card purchases at Walmart, Save-On-Foods, London Drugs and Hygrove Design Company, expenditures which were for a family purpose. However, I find that activity in the account is the exception rather than the rule. Further, when similar purchases in the preceding month are taken into account, they total about $1,300, the exact sum transferred from the parties’ joint chequing account to the Silver Shield account on December 25, 2005. I find that Mrs. Oliver would occasionally use her savings account to cover family purchases, but then carefully

transferred sums from the joint account (***39 VPCU) to reimburse herself for those expenses.

[22] As for transfers between Mrs. Oliver's VPCU chequing account and the Silver Shield account, the statements show that Mrs. Oliver's pension income was deposited into her Silver Shield savings account each month. She would then use those funds to pay for her personal expenses as necessary through a transfer to the joint VPCU chequing account ***39 or her VPCU chequing account ***94. She would also transfer money from the Silver Shield account into her term deposits from time to time. As an example of the former, Mr. Oliver points to a $2,000 transfer from the Silver Shield account to the ***94 chequing account on May 5, 2004. The other activity in the chequing account at that time indicates that Mrs. Oliver made a payment of $1,822 to Revenue Canada to cover her taxes (a personal expense) and wrote other personal cheques, for example to her daughter Kelly and to a rowing association, for a total of about $2,000. In short, this is yet another example of Mrs. Oliver methodically covering her own and her children's expenses from her own funds.

[23] Finally, I note that funds in the Silver Shield account were largely from Mrs. Oliver's pension, gifts from her father, and her income tax refunds.

[24] Taking all of these considerations into account, I find that the Silver Shield Savings Account is not a family asset.

b) Trust Account for Kelly Nixon

[25] I turn now to Mrs. Oliver's VPCU account number ***58, which she holds in trust for her daughter Kelly Nixon. Mrs. Oliver used this trust account to reduce her income tax.

[26] Mr. Oliver submits that the $50,000 Mrs. Oliver transferred to the trust account in 2009 is traceable to family assets, primarily the VPCU Silver Shield

account. He argues further that the account is not in fact Kelly Nixon's because Mrs. Oliver still has control over it.

[27] Assuming for the purpose of this analysis that the trust account belongs to Mrs. Oliver, I find that the account contained child support payments from Kelly's father and other gifts Kelly received from family members, as well as money Mrs. Oliver transferred from savings that she had accumulated from her income and from gifts from her father. All of the funds came from the Silver Shield savings account other than the proceeds of the sale of Mrs. Oliver's rowing shell ($6,397) in December 2009. The parties agree that the shell was a gift from Mr. Oliver to Mrs. Oliver and was her personal property. Finally, I note that there is no suggestion that the trust account was ever used for a family purpose.

[28] In these circumstances, I find that the Kelly Nixon trust account is not a family asset.

c) The $50,000 Loan to Kelly Nixon

[29] On February 27, 2008, Mrs. Oliver wrote a cheque for $50,000 from her VPCU ***94 chequing account to Kelly Nixon to help her daughter purchase a condominium. Mrs. Oliver says this was a gift. Mr. Oliver submits it was a loan which is a family asset. Mr. Oliver relies on the cheque register in which Mrs. Oliver recorded the cheque to Kelly as "mortgage loan". Again, I need not decide whether it was a gift or a loan, because I find that the cheque was written on the ***94 account but was entirely funded from Mrs. Oliver's Silver Shield savings account and VPCU term deposits. The bank statements for February 2008 show a clear trail of transfers from those two accounts into the chequing account so that the $50,000 cheque would be covered. Having found that the savings account and term deposits are not family assets, but rather Mrs. Oliver's personal property, I do not find that the money transferred to her adult daughter, even if characterized as a loan, constitutes a family asset.

d) CIBC Investment Accounts

[30] There are two CIBC investment accounts in issue. The first, number ***-***04 contained approximately $58,500 at the end of 2010. This account was opened in about May 2005 with funds from Mrs. Oliver's term deposits when an investment advisor convinced her that her term deposits were not earning a sufficient rate of return. The only other sources of deposits into this account were:

- $10,000 from VPCU ***39 (one of Mrs. Oliver's dividend payments from Jimbo Investments) in August 2006;
- $10,000 from the Silver Shield savings account in August 2006; and
- $30,000 from the Silver Shield savings account in February 2007.

Thus, the only "problematic transfer" for Mrs. Oliver, in terms of asserting that this is not a family asset, is the $10,000 payment from the parties' joint VPCU ***39 account in August 2006. However, that sum was "repaid" to the joint VPCU ***39 account by November 2006. The isolated transfer of one dividend payment from the joint VPCU account especially in light of the subsequent repayment, is not in my view sufficient to characterize the CIBC investment account as a family asset.

[31] Mrs. Oliver has made three withdrawals from her CIBC investment account. On two occasions, she transferred $10,000 from her CIBC investment account to her CIBC Wood Gundy RRSP which she has acknowledged is a family asset. Those transfers occurred on May 12, 2005 and February 19, 2007. The third withdrawal of $5,000 she deposited to her tax-free savings account on January 26, 2009. I do not find the isolated use of a portion of Mrs. Oliver's managed investment account to make a contribution to her RRSP establishes that the investment account was ordinarily used for a family purpose: *Kordysz v. Kordysz*, [1999] B.C.J. No. 360 (S.C.) para. 12.

[32] The second CIBC investment account is the tax-free savings account number ***-**10. Mrs. Oliver opened that account in January 2009 with the $5,000 transfer from her other CIBC investment account described above. It has not been used since for any purpose and, given that its source is an investment account which I have found is not a family asset, I find that the tax-free savings account is not a family asset.

[33] In characterizing Mrs. Oliver's disputed accounts as property that is not a family asset, I have taken into account not only the specific examples and arguments addressed above, but also the manner in which these parties dealt with their finances throughout their marriage. Each party brought assets into the marriage, and each maintained his or her own accounts. Mr. Oliver regarded Mrs. Oliver's savings as hers to do with as she pleased; Mrs. Oliver kept her savings separate and for her own use. In the same manner, Mr. Oliver retained his income from the companies for his use and neither party sought permission from the other to spend their funds. The parties throughout their marriage established a clear pattern of financial responsibility, with each covering their own expenses and the expenses of their children. I find Mrs. Oliver meticulously tracked expenses that she incurred for her own children and made sure that, when those payments came out of the joint family account, she repaid those expenses from her savings or the children's child support payments from their father. Similarly, if Mrs. Oliver used her own funds to cover an expense for Mr. Oliver's children, Mr. Oliver would repay her and *vice versa*.

[34] When parties organize their finances and living arrangements in a particular way with the intention of keeping their personal assets separate from family assets, the Court will characterize the personal assets as "other assets": *Lye v. McVeigh*; *Kordysz v. Kordysz*. In *Lye v. McVeigh*, the husband and wife arranged their finances so that they both contributed equally to joint expenses while their individual finances were kept separate. Taylor J.A. found at para. 12:

> The only liquid assets "ordinarily" used for family purposes were those which each party chose to place in the joint account for such purposes. This, it seems, was the way in which both parties wanted their affairs to be handled.

In that case, the Court found that each party's separate accounts, although used to fund the joint account as necessary, were other assets and not family assets.

[35] For most of the marriage, Mrs. Oliver used the joint account at the VPCU (***39) for all expenses for which she wrote cheques whether personal, for her children, for Mr. Oliver's children, or for family expenses. She used that account as the family chequing account or "clearing house".

[36] That system predominated throughout the marriage save for a few years at the commencement of the relationship. Before 1995, Mrs. Oliver also wrote cheques on her VPCU chequing account ***94 and funded that account with contributions from the VPCU joint account ***39 and elsewhere. After 1995, however, the bank statements show that Mrs. Oliver frequently transferred funds from her ***94 chequing or Silver Shield account into the ***39 chequing account to cover "her" expenses, often on the same day that she paid one of her credit card bills. In short, by 1995, the parties' joint VPCU account ***39 had become the main way that Mrs. Oliver paid all bills, whether joint, or personal. I find that Mrs. Oliver wrote cheques from the joint VPCU account ***39 to avoid carrying more than one chequebook. She then did the accounting to divide the personal expenses from the family expenses and reimbursed the family joint account to cover her expenses.

[37] Similarly, if Mrs. Oliver used her credit cards to pay for expenses, she would transfer money from appropriate accounts to cover whatever expenses were on the credit card. For example, if she paid for an expense for her children on the family MasterCard which was paid from the joint VPCU account, she would transfer funds from her ***94 chequing or Silver Shield account to the joint VPCU account in order to cover those MasterCard expenses.

[38] Mr. Oliver also testified that he managed his finances independently and separately from Mrs. Oliver. His salary was deposited into his VanCity account number ***56 and he transferred funds as needed from this account into the joint VanCity account from which he paid family expenses such as the mortgage and house insurance. Mr. Oliver also used his Oliver Builders Ltd. shareholders account to pay personal and family expenses.

[39] In summary on this issue, I find the parties intended to keep the savings they brought into or accumulated during the marriage as their own, and maintained a clear separation between joint assets and personal assets. Something more than the occasional use established on the evidence is required to convert those personal assets into family assets.

e) Chattels

[40] The parties do not agree on whether the chattels still in the former family home are family assets. Mr. Oliver moved out in February 2006. Mrs. Oliver has been living in the home since then and has acquired some art and furnishings. Mr. Oliver submits that if the separation date is found to be later than February 2006, then he should be entitled to anything purchased by Mrs. Oliver up to the date of separation. He also argues that he is entitled to some of the assets he left behind.

[41] The parties divided the contents of the family home between them when Mr. Oliver moved out. While Mrs. Oliver received the lion's share of those chattels, I find the parties were content with that division at the time and I would not revisit it now. Given my finding on the separation date (addressed later in these Reasons), items purchased by Mrs. Oliver after February 2006 are hers alone.

f) The $10,000 Overdraft

[42] Mrs. Oliver seeks an order that Mr. Oliver pay 100% of the overdraft on the parties' joint VanCity account number ****47. That account was established in 1992, primarily in order to pay the mortgage on the family home. Throughout their

relationship Mr. Oliver managed that account and usually ran an overdraft of about $2,000. Since the parties separated, the overdraft has reached its maximum of $10,000. Mrs. Oliver submits that, even though this account is a family asset, she should not be responsible for the debt because it was Mr. Oliver's decision to let it increase.

[43] Much of the debt on this account was incurred by Mrs. Oliver post-separation for medical and dental expenses, as well as car repair bills. Mrs. Oliver also paid her children from that account to help with yard work after she herniated a disc and was no longer able to garden. Mrs. Oliver had previously paid for those expenses on a secondary RBC Visa card which Mr. Oliver covered through his company. Mr. Oliver agrees that he permitted Mrs. Oliver to use the joint VanCity account for her personal expenses after he did not renew her secondary Visa card.

[44] Mrs. Oliver says the account would not be in the maximum overdraft position except that Mr. Oliver did not deposit reimbursements he received from his medical insurance plan for her prescriptions and other healthcare expenses. I find, however, that he did not reimburse the account because he did not have enough cash flow from the companies to cover all of the family expenses he continued to pay post-separation.

[45] The expenses that resulted in the overdraft were either payments Mr. Oliver agreed to cover for Mrs. Oliver post-separation or were expenses for the family home and its maintenance. I therefore conclude that the $10,000 overdraft is a debt that is the responsibility of both parties and should be paid from the proceeds of the sale of the family home.

2. Valuation of Assets

a) The Family Home

[46] The parties agree that the family home must be sold and that the net appraised value is approximately $1,250,000.

b) The Companies

[47] The Oliver group of companies has been valued on numerous dates, with appraisals ranging from $189,000 to $489,000. The parties agree that Mr. Oliver is to retain the shares in the companies.

[48] Ronald Tidball prepared valuations of the Oliver group of companies for Mrs. Oliver, as did Robert Mackay for Mr. Oliver. Those valuations are summarized below:

Report based on Financial statements dated	Ronald Tidball's Report - Value of Companies	Robert Mackay's Report - Value of Companies after deduction of distributive tax	Robert Mackay's Report - Value of Companies without deduction of distributive tax
October 31, 2008	$489,903		
October 31, 2009		$291,500-$317,000	$380,500
August 31, 2010	$282,968	$189,000-$206,000	$248,500
October 31, 2010	$278,000	$209,000-$228,000	$275,500

[49] The two experts used different approaches to valuing the company; Mr. Tidball used a going concern approach while Mr. Mackay used a liquidation approach. Nothing turns on the particular approach taken, however, because the two methods yield similar valuations: Mr. Tidball found the companies to be worth $278,000 in October 2010 and Mr. Mackay found a value of $275,500. The real difference between the experts is whether distributive taxes should be deducted from the value of the company.

[50] Mr. Tidball holds the opinion that deduction of distributive taxes is inappropriate for two reasons. First, because the company is a going concern and is not about to be liquidated; and second, because taxes can be deferred by keeping money in the company even if Mr. Oliver stops operating it.

[51] Mr. Mackay is of the view that it is appropriate to take distributive taxes into account because Mr. Oliver is 65 and plans to work only until age 70. He estimates distributive tax to be $47,000 to $66,500 depending on which year the tax is assumed to be payable.

[52] There is no absolute rule as to whether tax consequences should or should not be taken into account in the valuation of assets or in the determination of the amount of a compensation order: *Halpin v. Halpin* (1996), 27 B.C.L.R. (3d) 305 (C.A.) at para. 65. In that case, Huddart J.A. cited with approval the following statements by McKinlay J.A. in *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208, (C.A) at 215:

> If the evidence satisfies the trial judge, on a balance of probabilities, that the disposition of any item of family property will take place at a particular time in the future, then the tax consequences (and other properly proven costs of disposition) are not speculative, and should be allowed either as a reduction in value or as a deductible liability.

[53] Taking into account Mr. Oliver's age, his plan to retire in five years at age 70, and the likelihood that he will need to draw proceeds from the winding up of the company in order to support himself in retirement, I find that the tax consequences are not speculative, are imminent, and should be taken into account in valuing the companies. I do not, however, accept Mr. Mackay's valuation in its entirety for two reasons. First, he acknowledged that he applied the maximum income tax rate in calculating the distributive taxes. I find that rate to be too high because $30,000 per year could be taken from the company as a dividend at a marginal tax rate; further, Mr. Oliver will not necessarily be in the highest tax rate when he draws money out of the companies given his reduced income on retirement. Second, Mr. Mackay assumes distribution of the sale proceeds of the company in one lump sum at five, seven or ten years. While I find that Mr. Oliver is likely to retire in five years, I find it unlikely that he will withdraw all of the assets from the company immediately upon his retirement. Rather, he will do so over a number of years, likely a period of five to ten years. Recognizing that I do not have a precise calculation to reflect these

considerations, I am satisfied nonetheless that it is appropriate to value the Oliver group of companies at $250,000 as of the date of trial.

[54] Should that valuation date be used? Mrs. Oliver submits that the companies should be valued as of the triggering event rather than the date of trial for two reasons. First, she argues that Mr. Oliver has intentionally depleted the assets of the companies by choosing to draw down and use up retained earnings which in the earlier valuations constituted a significant part of the companies' assets. While I accept that Mr. Oliver controls the companies and their finances, and while he did distribute retained earnings, I find he did so in order to provide himself and Mrs. Oliver with income when the annual revenues of the company fell after 2008.

[55] Second, Mrs. Oliver asks the Court to use the earlier valuation date because Mr. Oliver has turned down work during the past two years. Mrs. Oliver points to valuation reports prepared by Mr. Mackay for Mr. Oliver on his first divorce. Those reports demonstrate that between 1990 and 1994 the gross revenues of Oliver Builders Ltd. fell 50% and the revenues dropped by $3 million. Mrs. Oliver says there is a trend here -- the gross revenues from Oliver Builders Ltd. fell 41% in 2010 or almost $2.3 million. In short, Mrs. Oliver submits that Mr. Oliver has intentionally reduced work volume to minimize the gross revenues of the companies in order to decrease their value at trial -- a value he can then recover as soon as the litigation is completed.

[56] I find that Mr. Oliver has taken on a lower volume of work over the past two years due to the significant stress and distraction of these proceedings, effects which both parties sincerely and believably described during their evidence. Further, there has been an economic downturn since 2008 and I accept Mr. Oliver's testimony that he has not bid on some work because, in the competitive and almost desperate construction sector, the margins were low and it would not have been profitable for him to undertake that work.

[57] In summary on this issue I conclude that the companies, like the other family assets, should be valued as of the date of trial and that the value of the companies is $250,000.

3. Reapportionment of Family Assets

[58] Both parties apply for reapportionment of the family assets. Mrs. Oliver seeks 100% reapportionment of the former family home in her favour and 100% reapportionment of the companies to Mr. Oliver in accordance with an oral agreement she alleges the parties made at the outset of their relationship. She proposes that all other family assets be divided equally.

[59] Mr. Oliver asks to be awarded 75% of the former family home and 50% of the remaining assets including the companies, with Mr. Oliver to keep the companies on his side of the ledger.

[60] The starting point is that each spouse is presumptively entitled to 50% of the family assets. Section 65 of the *Family Relations Act* allows for reapportionment if an equal division would be unfair having regard to the following six factors:

> (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.

[61] Mr. Oliver argues that any reapportionment should take into account the substantial inheritance Mrs. Oliver received from her father in the amount of $840,000. However, that inheritance was received after a triggering event, the s. 57 declaration on July 23, 2009. Fairness under s. 65 of the *Family Relations Act* is to

be determined as of the date of the triggering event, because it is on that date that each party's one-half interest in the family assets is vested: *Blackett v. Blackett* (1989), 63 D.L.R. (4th) 18 (B.C.C.A.); *Adamcewicz v. Adamcewicz Estate* (1990), 25 R.F.L. (3d) 44 (B.C.S.C.). In *Blackett*, the British Columbia Court of Appeal stated at 22:

> When an asset is determined to be a family asset, the Court must ask itself whether s. 51 [now s. 65] should be invoked. For that purpose, it is often necessary to have some idea of the value of an asset as at the triggering event for whether or not there is to be a variation of the right given by s. 43 [now s. 57] must be determined by the facts existing when that right came into existence. It is then, and then only, that the right can be unfair.

[62] Accordingly, in assessing the parties' arguments that each should be entitled to reapportionment, I must consider the six factors in s. 65 and apply them to the circumstances of the parties on July 23, 2009. The assets in existence at that time and their values were as follows:

Asset	Value as of July 23, 2009 (triggering event)	Type of Asset
Matrimonial Home	$1,233,808 (net value, based on estimated sale price of $1,325,000)	Family Asset
The Companies	$350,000	Family Asset
Shareholder's Loan owing to Mr. Oliver	$50,000	Family Asset
Mrs. Oliver's chequing account at VPCU Account #***94	$365	Family Asset
Mrs. Oliver's savings account at VPCU Account #***94	$2,967	Other
Mrs. Oliver's term deposits in VPCU Account #***94	$145,879	Other
Mrs. Oliver's account in trust for Kelly Nixon at VPCU Account #***58	$34,957	Other
Mrs. Oliver's investment account at CIBC #***-***14	$54,232	Other

Mrs. Oliver's CIBC Tax-Free Savings	$6,342	Other
Mrs. Oliver's Coast Capital Savings Account #*****96	$3,037	Other
Mrs. Oliver's 2004 VW	$7,000	Family Asset
Mrs. Oliver's 1984 Kaschper	$200	Family Asset
Mr. Oliver's 1967 Chevelle	($18,000 - $35,000) $25,000	Family Asset
Mr. Oliver's boat and trailer	$1,500	Other
Mr. Oliver's VanCity Account #***56	$1,985 (net)	Other
Joint VPCU Account no. ***39	$46,325	Family Asset
Joint VanCity Account no. ****47	($2,098)	Family Asset
Mrs. Oliver's CIBC RRSP	$125,941	Family Asset
Mrs. Oliver's VPCU RRSP	$51,124	Family Asset
Mr. Oliver's CIBC RRSP	$318,000	Family Asset
Total Value of Parties' Assets (family and other) as of the Triggering Event:	**$2,456,564**	
Total Value of Family Assets:		**$2,205,665**

I have used a value for the companies of $350,000 as of the triggering event. That number is based on Mr. Mackay's October 31, 2009 valuation but roughly adjusted to take into account distributive taxes at a lower rate than those calculated by Mr. Mackay. (Mrs. Oliver's valuator did not prepare a valuation for the companies in 2009. He estimated the value of the companies in October of 2008 to be $489,903.) Mr. Mackay's 2009 valuation, taking into account all of the distributive taxes at either five, seven or ten years, ranges from $291,500 to $317,000. The value of the companies without deduction of distributive tax according to Mr. Mackay was $380,500.

[63] Based on the valuations above, as of the triggering event the parties would each have family assets worth $1,102,832.50 on an equal division. In addition,

Mrs. Oliver had non-family assets worth $247,414 giving her $1,350,246 in total. In contrast Mr. Oliver had non-family assets in the amount $3,485, or $1,106,317 in total. I turn now, using those numbers, to the question of whether assets should be reapportioned in favour of either party.

a) Should assets be reapportioned to Mrs. Oliver?

[64] Mrs. Oliver submits that it would be unfair to divide the family assets equally for two main reasons: first, her need to become and remain self-sufficient and economically independent (s. 65(1)(e)); and second, because the parties made an oral agreement in 1992 that the family home would always belong to her as long as she did not touch Mr. Oliver's business (s. 65(1)(f)).

(i) Mrs. Oliver's need to become economically self-sufficient

[65] Mrs. Oliver has not worked since about 1994 when the parties agreed that she should stay home to care for their four children and to run the household. She has been out of the workforce since then and is now 65 years old. Mrs. Oliver has a number of health problems, including a herniated disc, clinical depression, and glaucoma that has proved difficult to control. I find that Mrs. Oliver will not find employment at this point and will have to rely on her pension income and income from investments. However, Mrs. Oliver's claim to a reapportionment must be assessed not only in light of her circumstances, but also in light of Mr. Oliver's circumstances. In short, both parties' need to become and remain economically self-sufficient must be considered.

[66] Mr. Oliver is age 65. He has another five years before retirement at age 70 to set aside savings for his retirement. Mr. Oliver has had some serious health problems, including cancer, pituitary and thyroid tumours, diabetes incipitus and stroke. Unlike Mrs. Oliver who will have pension income from her CPP and her former husband's police pension totalling $2,000 per month, Mr. Oliver has only a small carpenters' union pension and his CPP pension totalling $1,000 per month.

Unlike Mrs. Oliver, he does have the ability to earn a significant income from the Oliver group of companies.

[67] Taking into account only each party's need to become and remain economically independent, I would not find it unfair to divide the family assets equally. Although Mrs. Oliver was not employed, she had a larger pension and about $250,000 more in assets than Mr. Oliver at the date of the triggering event.

(ii) Oral agreement regarding the matrimonial home

[68] Section 65(1)(f) permits the Court to consider "any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property...". Mrs. Oliver relies on an oral agreement the parties made about the time the family home was purchased to the effect that the home would be hers if the relationship ended as long as she did not touch Mr. Oliver's business. While acknowledging that the agreement is not an agreement within the meaning of s. 62 of the *Family Relations Act* because it is not in writing, Mrs. Oliver argues nonetheless that it is a factor that should be taken into account in assessing the fairness of an equal division of assets. Mrs. Oliver argues that the parties should be held to their bargain: she should keep 100% of the proceeds from the sale of the family home, and Mr. Oliver should keep the Oliver group of companies.

[69] Mr. Oliver admits that the parties had an agreement, but he says it had nothing to do with what would happen on the breakdown of their marriage. He says they agreed that if he died, the house would be hers and his estate would get the business.

[70] I find that the parties did make the oral agreement described by Mrs. Oliver. There was some confusion on both sides initially about precisely when the agreement and the down payment on the home were made, but ultimately the parties agree that Mrs. Oliver sold the home she had owned prior to the marriage and covered the $100,000 deposit on the family home, which Mr. Oliver in the interim paid by drawing on his shareholders account with Oliver Builders Ltd.

[71] I do not accept Mr. Oliver's evidence at trial that the agreement he and Mrs. Oliver made in 1992 related to what would happen upon his death. At his examination for discovery on July 29, 2009, Mr. Oliver testified as follows:

> 217 Q Okay. Now, getting back to the initial money, the down payment. When my client was surprised that you were asking her for money, did you tell my client:
>
> "The house will always be yours as long as you never touch my business."
>
> Do you remember saying that?
>
> A It was said in the beginning and probably a number of times after that, but as things [p]rogressed and we did renovations and money was put into the house and then I paid down the mortgage with my dad's inheritance, it became apparent that if something ever happened, all my savings and everything would go to Bobbi.

Further, on the same discovery, Mr. Oliver gave the following evidence:

> 219 Q Well, I appreciate you got married shortly thereafter, but back in November of 1992 you weren't yet married; right? And would it be fair to say that at that time your intention was that the house was going to be Bobbi's and the business was going to be yours if something happened --
>
> A At that point.
>
> 220 Q -- between the two of you? At that point?
>
> A That was what I said.

[72] Mrs. Oliver is a fiscally prudent and cautious manager. She invested conservatively and, having been divorced twice before, was cautious about remarriage and losing her security. When she met Mr. Oliver she owned her own home; she was residing at her father's much larger home on Nithsdale Street while he resided in her smaller Kamloops Street property. Mrs. Oliver was working, receiving child support for her two children, and was able to fully support herself. I accept Mrs. Oliver's testimony that she would not have sold her Kamloops Street home and invested the money in the family home without some assurance from Mr. Oliver that the home would be hers.

[73] Mr. Oliver too had been through a failed marriage. He was in the process of divorcing his first wife when he met Mrs. Oliver and was all too aware of the risk a division of assets posed to his business. The bargain the parties struck made sense for both of them.

[74] When the house was purchased, it was registered in Mrs. Oliver's sole name and she adamantly refused to budge from that arrangement in 2004 when a financial advisor suggested a tax deductible mortgage mechanism that would have required the matrimonial home to be registered in joint names.

[75] I do not accept Mr. Oliver's argument that any agreement they had about the house ended when he transferred 50% ownership in Jimbo, the corporation used as the holding company for the Oliver group of companies, to Mrs. Oliver in 2004. Their agreement had everything to do with who would end up with the assets at the end of their marriage, and nothing to do with arrangements made during the marriage to reduce taxes.

[76] Is this oral agreement a significant enough "other" factor under s. 65(1)(f) to justify reapportioning 100% of the house to Mrs. Oliver leaving her with $1,792,151 and Mr. Oliver with $664,413 as of the triggering event? An informal agreement can be a relevant consideration in determining whether an equal division of assets would be unfair under s. 65 of the *Family Relations Act*: *Montalban v. Montalban*, 2007 BCSC 1266. But it is also the case that such agreements do not have the force of a s. 61 agreement: *Phelps v. Adams*, 2003 BCSC 530 at paras. 21-22:

[77] The agreement relied on by Mrs. Oliver must be considered in context. At the time the agreement was made, the two assets were roughly equivalent in value. It reflected, in one sense, an intention to divide their assets equally, with Mrs. Oliver to keep the home on her side of the balance sheet and Mr. Oliver to have the business on his once the dust settled. Further, two significant events that occurred subsequently were neither contemplated nor addressed by the parties at the time the oral agreement was made.

[78] First, the relative values of the two assets diverged markedly by the date of the triggering event. The equity in the house was $1,233,800, while Mr. Oliver's companies were worth about $350,000.

[79] Second, I find that Mr. Oliver used about $180,000 from the inheritance he received from his father to pay down the mortgage on the family home in 2004 and 2005. I find he also used part of his inheritance to renovate the family home in 2005 and even after he moved out of the home in 2006. While Mr. Oliver was unable to prove the precise amount invested with supporting documents, I find that he likely contributed a further $20,000 from his inheritance to those renovations.

[80] In summary on the issue of the oral agreement, it is a factor I take into account under s. 65(1)(f), but it is one which I find does not justify reapportioning the entire value of the house to Mrs. Oliver.

b) Should the Assets be Reapportioned in favour of Mr. Oliver?

[81] Mr. Oliver submits that the house should be reapportioned 75% to him with an equal division of all of the other assets, leaving him as of the date of the triggering event with $1,414,769 and Mrs. Oliver with $1,041,794. He gives four reasons in support of that position:

- First, because he has a greater need to become self-sufficient given Mrs. Oliver's inheritance from her father;
- Second, because he put some of his inheritance into the house by paying down the mortgage and by renovating;
- Third, because Mrs. Oliver dissipated some family assets post-separation; and
- Fourth, because Mrs. Oliver charged some of her legal fees to a credit card paid by Mr. Oliver.

[82] I have already addressed the parties' relative needs to become self-sufficient and would decline to reapportion to Mr. Oliver on that basis. I will address the three remaining arguments for reapportionment below.

(i) Mr. Oliver invested his inheritance and other sums in the family home

[83] I have found that Mr. Oliver put about $200,000 into the home between 2003 and 2006. Mrs. Oliver in turn, put $100,000 into the home in 1993 from the sale of her Kamloops Street property. Both parties thus contributed financially to the equity in the family home. While Mr. Oliver invested more cash, Mrs. Oliver contributed more time and energy maintaining the home and the yard in good condition. I do not find that Mr. Oliver's financial contributions justify reapportioning the house in his favour

[84] Mr. Oliver also argued that the house should be reapportioned to him because he continued to make the mortgage payments and pay the property taxes after the parties separated. However, he did not have to pay rent for his accommodation post separation and did not pay formal spousal support until an order I made on February 9, 2011 during trial. In these circumstances, this factor does not support reapportionment of the home to Mr. Oliver.

(ii) Dissipation of Assets

[85] The dissipation of assets alleged by Mr. Oliver relates to the $50,000 gift or loan to Kelly Nixon to help her purchase a condominium, money Mrs. Oliver put into a trust account for Kelly Nixon, as well as the use of other accounts that I have found to be other assets.

[86] Dissipation occurs when one spouse disposes of potential family assets shortly before the end of a marriage or after separation. If the assets are found to be other assets, as in the case before me, there is no basis for a finding of dissipation.

(iii) Payment of Legal Fees

[87] Mrs. Oliver admits that she charged some of her legal bills to a secondary credit card paid for by Mr. Oliver. She agrees that she must reimburse him for that expense which amounts to $14,744.55.

[88] In summary on the issue of reapportionment to either party, having considered all of the arguments and the circumstances as a whole, I find that, as of the date of the triggering event, it is not unfair to divide the family assets equally. There is accordingly no basis for reapportionment under s. 65 other than Mrs. Oliver reimbursing Mr. Oliver for her legal fees of $14,744.55.

B. Spousal Support

[89] Mrs. Oliver seeks permanent spousal support from Mr. Oliver, or in the alternative, a lump sum award. In assessing this claim, I must address four issues:

(a) How long were the parties married?

(b) What is the income of each spouse?

(c) Is Mrs. Oliver entitled to spousal support? and

(d) What amount of support, if any, is payable?

1. How long were the parties married?

[90] The parties agree that they commenced living together on February 19, 1993, and married on May 28, 1994. They do not agree on the date of separation. Mr. Oliver says that they ceased living together in February 2006 when he left the family home for the second and final time. Mrs. Oliver acknowledges that Mr. Oliver was not living in the family home after February 2006, but she says that they continued to operate as a married couple until January 2009 when she decided to end the relationship because she felt as though she had been treated like the “weekend girl”.

[91] In my view, in terms of spousal support in the circumstances of this case, not a great deal turns on whether this was a 13-year or 16-year relationship. Having considered the evidence before me, however, I conclude that the parties ended their marriage in February 2006. I make that finding for the following reasons.

[92] First, Mrs. Oliver's position on the date of the separation has not been consistent. She sent Mr. Oliver two draft separation agreements before these proceedings were commenced. She identified the separation date in one as September 2006 and in the other as February 2006. Mrs. Oliver explained the dates as arising from errors on the part of her former counsel.

[93] Second, Mrs. Oliver declared her marital status as "separated" on her income tax returns from 2006 to 2008. Third, the writ of summons and statement of claim filed on November 19, 2008 state that the parties had been living separate and apart since February 2006. An amended writ of summons and statement of claim filed on March 12, 2009 states that cohabitation ended in February 2006 at para. 11 and that the parties had been living separate and apart since November 18, 2008, at para. 15. It was only in the further amended writ of summons and statement of claim filed on November 26, 2010 that Mrs. Oliver described the parties as living separate and apart since January 2009. Again, these various dates were explained by Mrs. Oliver on the basis that her previous counsel made errors in drafting the earlier versions of the pleadings.

[94] Fourth, Mrs. Oliver's will dated April 7, 2009, refers to the parties as having been separated since September 2006.

[95] Finally, the parties did not cohabit after February 2006. Mrs. Oliver argues that the parties continued to have a married relationship nonetheless because they continued to go on vacations together and were sexually intimate. She points out that Mr. Oliver continued to buy her gifts such as lingerie and jewellery as late as February 2010.

Determining when a marriage ends involves considering a number of factors including sexual relations, joint social ventures, and communication and discussion of family problems: *McKenna v. McKenna* (1974), 19 R.F.L. 357 (N.S.C.A.). Another factor is cohabitation. Parties are often found to be living separate and apart under the same roof, but it will be a rare case where they will be considered to be in a married relationship while choosing to reside long-term in separate residences. As Orsborn J. observed in *Stanley v. Stanley*, 2011 NLTD (G) 4, 94 R.F.L. (6th) 185, at para. 46:

> Cohabitation requires, if not a degree of permanence, some element of continuity and consistent physical togetherness and some indication that the place of cohabitation is indeed the base from which each of the cohabiting parties live their respective lives.

[96] In *G.A.W. v. C.M.P.*, 2010 BCSC 532, the parties separated in 2000 but did not divorce until 2007. In the meantime, they maintained occasional sexual relations, the husband stayed occasionally in the wife's townhouse, which he sought an interest in, and they went on two vacations together with their child. Savage J. framed the issue by asking this question at para. 29:

> Did the nature and frequency of the parties continuing contact constitute either a continuation of the marriage or cohabitation with reconciliation as its primary purpose over the requisite period?

Savage J. found that the nature of the contact between the parties did not support "resumption of the married state": para. 30.

[97] Cohabitation of spouses is a foundational element of marriage. The importance of this aspect of marriage is underscored by the definition of marriage breakdown in s. 8 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.):

> 8(2) Breakdown of a marriage is established only if
>
> > (a) <u>the spouses have lived separate and apart</u> for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; or
> >
> > ...

> (3) For the purposes of paragraph (2)(a),
>
> > (a) spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other;
>
> [Emphasis added.]

[98] In general, when parties choose to live in separate residences (other than temporarily because of work or educational demands), they lack one of the foundational elements of a marriage. Absent a mutual intention to reconcile, they may continue to have a relationship of sorts, but it will not be a marriage.

2. What is the income of each party?

a) Mrs. Oliver's income

[99] Mrs. Oliver has CPP income of $415 per month or $4,980 per year. This amount will increase once the parties' CPP credits are divided.

[100] In addition, Mrs. Oliver receives a municipal pension in the amount of approximately $1,600 per month which is her portion of her former husband's police pension. Her current income from this source is $19,140 per year. That is expected to decrease to $17,040 per year in September 2012. For the purposes of determining support at this time, her total pension income per year is $24,120 per year.

[101] As of April 4, 2011, Mrs. Oliver has about $740,500 remaining in savings. This takes into account legal fees in this proceeding of about $200,000. In addition she will receive about $1 million from the division of the family assets. Once the house is sold, and Mr. Oliver stops operating his business, the family assets will largely consist of cash, exclusive of the vehicles totalling about $32,000. It is likely that both parties will need to spend some significant portion of their share of the family assets in order to purchase a new home. For the purpose of calculating the income of each party, I assume that they will spend $600,000 of their family assets to provide housing for themselves. I acknowledge that this is an arbitrary figure and

that it is open to the parties to rent, to purchase a condominium for less than this, or to purchase a home that is more expensive than that allocation.

[102] Making that assumption, Mrs. Oliver will have $400,000 from her share of the family assets to invest giving her a total of $1,140,000 in investments.

[103] Mrs. Oliver submits that she can earn approximately 2 - 2.5% return on her investments. She relies on the expert report of Robert Carson regarding interest rates on investments. Mr. Carson indicated a short-term rate of return on low-risk investments (such as those Mrs. Oliver has historically invested in) of 2 - 2.5% increasing to 3.524% after two or three years.

[104] Mr. Oliver relies on the expert opinion of Douglas Hildebrand, who is of the opinion that the current short to mid-term rate of return is approximately 5.5%, with a long-term rate of approximately 6%. Mr. Carson agrees with a long-term rate of 6%.

[105] Mr. Hildebrand's short-term rate of return of 5.5% assumes a mixed portfolio of bonds and blue chip stocks. While I accept Mr. Hildebrand's opinion, I find Mr. Carson's prediction to be more applicable to the particular circumstances of this case, given that Mrs. Oliver is a very low-risk investor who has always put her savings into term deposits except for one foray into investing in a stock portfolio which in her words was a "disaster". Given the ranges in Mr. Carson's report, I assume a rate of return of 3%, which will yield income of $28,500 on an investment of $1,140,000. In total, then, taking into account her pension income of $24,120, I find Mrs. Oliver will have income of $52,620 per year.

[106] I decline to impute income to Mrs. Oliver either on the basis that she has not reasonably utilized her capital assets to generate income or on the basis that she is intentionally underemployed. Mrs. Oliver has always invested conservatively, and it is not unreasonable for her to continue to do so, especially at this stage of her life. Nor do I find Mrs. Oliver to be capable of working at this point -- Mrs. Oliver's sarcastic response to a question about her work plans on examination for discovery ("working at Costco") is no basis for imputing income to Mrs. Oliver.

b) Mr. Oliver's income

[107] Mr. Oliver's non-family assets amount to $7,705 (his VanCity ***56 term deposit). In addition to this he will have about $1 million from the division of family assets. Deducting $600,000 for a home, and allowing him a deduction of a further $200,000 for his legal fees, (an amount roughly equivalent to that taken into account for Mrs. Oliver), he will have $207,000 in investment funds. Legal fees are not generally considered when assessing income and spousal support issues in part because an award of costs may offset a parties' expenditures, and because a party who has incurred excessive legal fees could end up being indirectly compensated for those fees in the form of greater support from the other spouse. However, in the exceptional circumstances of this case, where each party has incurred roughly the same significant legal fees, and where those fees are incidentally in evidence before the Court, I am of the view that it is appropriate to work with the parties' actual assets as of the date of trial to determine their investment income. I emphasize that in most cases such evidence is neither desirable nor appropriate.

[108] At a rate of return of 3%, Mr. Oliver's savings will yield investment income of $6,210 per year. In addition, Mr. Oliver has a Canada Pension of $950 per month, or $11,208 per year. That number will likely decrease once the CPP credits are equalized. The more difficult question is how much is to be attributed to Mr. Oliver as income from his companies.

[109] Where a party earns income through a closely-held corporation, income generally will be determined based on what is available to that party from the pre-tax corporate income of his corporation.

[110] Mr. Mackay's report looks at pre-tax corporate income of the companies and provides the total income available to Mr. Oliver as if Mrs. Oliver had not been in the picture and receiving a $50,000-$60,000 dividend each year. In that sense, the report is consistent with the legal principles to be applied in determining income. The report was necessary, according to Mr. Oliver, because the Line 150 Income on his

tax return reflects more than the pre-tax corporate income available to him in a given year. He says that he pulled out most of the retained earnings in the companies to cover the parties' increased costs upon separation and to make up for lost income during the severe recession that occurred in 2008. Mr. Oliver says it would be inappropriate for the Court to simply look to his Line 150 Income to determine income because he was depleting the company savings at a level that is not sustainable.

[111] The typical problem facing a trial judge where the payor controls a corporation is whether pre-tax corporate income the payor has left in the company from year to year should be treated as income. Here we have the unusual situation of a payor arguing that income taken from retained earnings as dividend income should be excluded in determining his income. I accept Mr. Oliver's submission that he could not continue to deplete the company's retained earnings at the rate he has been over the past four years, and in particular since the recession in 2008. I also accept that the company needs cash on hand to fund construction projects both on start-up and until holdbacks are released. But I find, based on the evidence of Mr. Oliver, Mr. Eyton (the company's accountant), and Mr. Mackay, that the company's financial situation fluctuates from year to year and that Mr. Oliver has historically used the company's retained earnings to supplement his income in lean years.

[112] Further, to accept Mr. Mackay's income figures which effectively filter out use of retained earnings, while at the same time accepting the valuation of the companies on an asset value approach post-payment out of those retained earnings, would be to entirely exclude the value of the retained earnings from consideration in these proceedings.

[113] I am of the view that the actual compensation Mr. Oliver chose to withdraw from the companies, including the dividends that depleted retained earnings, should be treated as income. It follows that Mr. Oliver's income is his Line 150 Income adjusted in accordance with Schedule III of the *Federal Child Support Guidelines*, SOR/97-175 to deduct the gross up on the dividend income and to add back

Mrs. Oliver's dividend income which was simply a means of income splitting that ended in November 2010.

[114] The following chart summarizes Mr. Oliver's income on this basis as well as the reduced income proposed by Mr. Mackay:

Year	Income - from Mr. Oliver's Income Tax Return Line 150 (includes gross up on dividends)	Income Received by Mr. Oliver from Companies (dividends not grossed up), including dividends received by Mrs. Oliver	Mr. Mackay's report - Income available to Respondent from the Companies in each year without depleting retained earnings (Ex. 26, Tabs 9 and 10)	Income adjusted in accordance with Schedule III of the Guidelines
2007	$181,425	$170,175 +$45,000 =**$215,175**	$150,000	
2008	$315,200	$281,450 +$60,000 =**$341,450**	$335,000	$281,450
2009	$246,629	$229,129 +$60,000 =**$289,129**	$195,000	$229,129
2010	N/A	$207,400 +$55,000 =**$262,400**	$142,000	$207,400

Where a spouse's income fluctuates markedly from year to year, s. 17 of the *Federal Child Support Guidelines* provides that the Court may consider more than the most recent annual income:

> S.17(1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non recurring amount during those years.

[115] Considering Mr. Oliver's income for the past three years, the currently depleted retained earnings of the company, and recognizing that the task at hand is to set a fair income for support payable in future, I set Mr. Oliver's income at the average of the two most recent years available, 2009 and 2010, which yields an income of $276,000.

[116] I decline to impute additional income to Mr. Oliver based on his deduction from corporate income of expenses such as Giant's hockey tickets ($1,140 per year), meals which may not have been true business expenses, and sponsorship of his children's baseball teams.

[117] Mr. Oliver's income is therefore $294,630 ($6,210 investment income + $11,400 CPP + $1,020 carpenter's pension + corporate income of $276,000).

3. Is Mrs. Oliver entitled to spousal support?

[118] Spousal support may be ordered under s. 15.2 of the *Divorce Act* and ss. 89 and 93(1) of the *Family Relations Act*. In assessing entitlement to support, I must use the conceptual framework provided by the Supreme Court of Canada in *Moge v. Moge,* [1992] 3 S.C.R. 813 and in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 and consider the objectives set out in s. 15.2(6):

> (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.

[119] There are three models of support: compensatory, non-compensatory, and contractual. These models are not mutually exclusive and there is no single basis of

support or objective under the *Divorce Act* that supersedes another. The doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlie an order for spousal support: *Chutter v. Chutter*, 2008 BCCA 507, at para. 49.

[120] Mrs. Oliver began her career as a police officer, and subsequently worked as a bank teller, a private detective for ICBC, and then part-time at a library. When she met Mr. Oliver she was between jobs and Mr. Oliver's brother-in-law helped her obtain a part-time position as a sales representative with a food broker. She continued in that position until about the summer of 1994 and has not worked since.

[121] Mr. Oliver argues that Mrs. Oliver could quite easily have resumed part-time work as a sales representative or at a library when the parties' marriage ended, and so has not been disadvantaged in any way by the marriage. Further, Mr. Oliver argues that there was no reason arising out of the marriage to cause Mrs. Oliver to stay out of the workforce. He says that Mrs. Oliver's daughter, Kelly Nixon, was eight years old at the time the parties began living together, and it was only she who required significant care and attention. Mr. Oliver suggests that the other three children, Mr. Oliver's daughter Jaimi Oliver, who was 14 years old, Mrs. Oliver's son, Scott, who was also 14, and Mr. Oliver's son Scott, who was 17 years old, were "self-sufficient, requiring little, if any day-to-day care." Further, he says that his son Scott moved out of the parties' home after one or two years and his daughter left after about five years. In summary, Mr. Oliver says that there was no need for Mrs. Oliver to be a full-time homemaker and she could have resumed working on a part-time or full-time basis at any point during the marriage.

[122] I find that Mrs. Oliver is entitled to spousal support on a compensatory basis. While she was not working at the time Mr. Oliver met her, she had consistently worked in the past, and I find it likely that she would have resumed work on at least a part-time basis. She did just that when the parties first cohabited, working part-time four to five days a week as a sales representative for a food broker. Mrs. Oliver described vividly and convincingly how exhausting she found caring for the four

children and their large home. In addition to doing laundry, shopping, and cooking, she drove the children to and from school and to various activities. She described explaining to Mr. Oliver in 1994 that if she was going to continue to work he would have to hire a housekeeper because she was worn out. I find that both parties agreed that she should stay at home rather than hiring outside help.

[123] For the next twelve years Mrs. Oliver cared for the parties' home and children rather than working outside of the home. During that time she did not contribute to a pension or keep up or improve marketable skills. She is unlikely to obtain work at this point given her age, health and lengthy absence from the workforce.

[124] To address two of Mr. Oliver's particular arguments, I do not agree that three teenagers aged 14 to 17 can be considered to be self-sufficient and of no consequence in assessing the role Mrs. Oliver played in the marriage. Nor do I accept that Mrs. Oliver had to care for her own two children in any event, so that caring for Mr. Oliver's added nothing to the tasks she took on, or her ability to work part-time. It was the magnitude of the demands at home that prevented her from working during the marriage. In any event, quite apart from the work load she shouldered, the parties agreed on Mrs. Oliver's role as a stay at home wife and mother, and it is not now open to Mr. Oliver to resile from that arrangement. He testified that he did not expect Mrs. Oliver to work outside the home and he expected and agreed to support her.

[125] I also find that Mrs. Oliver is entitled to non-compensatory support. Non-compensatory support is payable where one party has been disadvantaged by the marriage breakdown and is not economically self-sufficient. It is sometimes described as needs-based support. Need is not measured by bare necessity, but should also take into account the ability of a spouse to achieve a lifestyle and income commensurate with her lifestyle during the marriage: *Chutter*, at para. 60.

[126] Mr. Oliver submits that Mrs. Oliver does not need support because she will have assets on an equal division of about $1 million as well as her inheritance from

her father totalling close to another $850,000. Although that inheritance cannot be taken into account in addressing the issue of reapportionment, it can be taken into account in considering whether spousal support is payable: *Leskun v. Leskun*, [2006] 1 S.C.R. 920 at para. 29. I also take into account the pension and investment income Mrs. Oliver receives.

[127] I have determined that Mrs. Oliver will, on division of the family assets, have an income of $52,620 per year. During the marriage the parties had a comfortable standard of living that significantly exceeded what Mrs. Oliver will be able to provide for herself on the basis of this income. In addition, Mrs. Oliver had extended health care coverage through Mr. Oliver's employee health care plan and the companies paid for Mrs. Oliver's vehicle repairs, insurance, licensing and fuel throughout the parties' marriage.

[128] In conclusion on this issue, I find that Mrs. Oliver is entitled to support on both a compensatory and non-compensatory basis.

4. Amount of Support

[129] Under the *Spousal Support Advisory Guidelines,* based on a 13-year marriage, Mrs. Oliver's income of $52,620, and Mr. Oliver's income of $294,630, Mrs. Oliver would be entitled to indefinite monthly support ranging from a low of $3,933 to a high of $5,244.

[130] The *Spousal Support Advisory Guidelines*, while a significant consideration, are not to be applied without regard to all of the circumstances of each case, and in particular, the factors in s. 15.2(6) of the *Divorce Act*. In this case, there is a significant disparity between the assets of the two parties, both of whom are at retirement age. The *Spousal Support Advisory Guidelines* necessarily address only income disparity. As long as Mr. Oliver is working, there will be a significant income disparity between the parties. However, once he stops working in about five years (and even assuming some increase in the value of his company), he will have a substantially smaller asset base than Mrs. Oliver with which to support himself in

retirement. In addition, while Mrs. Oliver has pension income of $2,000 per month, Mr. Oliver has pension income of only $1,000 per month.

[131] At Part 9.6 of the *Spousal Support Advisory Guidelines*, the authors note as follows:

> 9.6 Property Division and Debts
>
> Underpinning the Advisory Guidelines is a basic assumption that the parties have accumulated the typical family or matrimonial property for couples of their age, incomes and obligations, and that their property is divided equally under the matrimonial property laws. Significant departures from those assumptions may affect where support is fixed within the ranges for amount and duration.
>
> An absence of property to be divided might suggest an award at the higher end of the range. If the recipient receives a large amount of property, the low end of the range might be more appropriate. <u>Similarly, if the recipient holds sizeable exempt or excluded assets after division, that too might militate in favour of the lower end of the range</u>.
>
> [Emphasis added.]

[132] To this I would add: where parties are at or approaching retirement and one party has a more pressing need to become and remain economically self-sufficient than the other taking into account exempt or excluded assets, which need cannot be addressed through reapportionment as in the case at bar, that factor should be considered in setting both the amount and duration of spousal support.

[133] Mr. Oliver has supported Mrs. Oliver for the past five years in the absence of an order for support until the one made during trial in February 2011. From February 2006 until December 2010, Mr. Oliver contributed to Mrs. Oliver's support as follows:

- $2,000 each month for the mortgage, insurance and property taxes on the family home which Mrs. Oliver occupied;
- Payment of Mrs. Oliver's RBC credit card bills until the card expired in March 2009;

- Cheques from Oliver Builders in the amount of $820 per month;
- Payment of Mrs. Oliver's car insurance, car maintenance and gas;
- Payment of Mrs. Oliver's medical and dental expenses; and
- Dividend payments in quarterly instalments of $15,000, totalling $45,000 in 2007, $60,000 in 2008, $60,000 in 2009 and $55,000 in 2010.

[134] In light of the age and particular circumstances of these parties, and the separation date of February 2006, I find that Mrs. Oliver is entitled to a further two and a half years of support at the lower end of the *Spousal Support Advisory Guidelines* of $3,933 per month commencing August 1, 2011 and ending January 31, 2014. That sum should be paid as a lump sum of $70,390.

[135] Mr. Oliver has paid $3,000 a month under the February 9, 2011 interim support order on a without prejudice basis. He should make a further payment of $5,598 [(3,933 - 3,000) x 6]. I do not find that Mr. Oliver "overpaid" *de facto* support prior to the February 2011 order in all of the circumstances.

[136] In the result, Mr. Oliver will have a larger share of net disposable income for the next two and a half years, followed by a further two and a half years without spousal support obligations (or more if he chooses to work past age 70), to build his savings and provide for economic self-sufficiency in retirement.

C. Divorce Order

[137] The parties have been separated since February 2006. There is no prospect of reconciliation between them. All other evidentiary requirements having been satisfied, I order that the parties are divorced from each other, the divorce to take effect 31 days from the date of these Reasons for Judgment.

D. Fine under s. 92 of the *Family Relations Act* and Costs

[138] Mr. Oliver seeks a fine of $5,000 against Mrs. Oliver for failing to produce documents in a timely way, as well as special costs of applications made to compel Mrs. Oliver to produce documents. In my view, those issues should be adjourned and addressed when the parties' make submissions on costs generally.

IV. SUMMARY OF ORDERS

1. The parties are divorced from each other;

2. The following assets are family assets:

    - the former family home on 26th Avenue in Surrey;

    - Mr. Oliver's shares in the Oliver group of companies: Oliver Builders Ltd., Jimbo Investments Inc. ("Jimbo"), OBL Projects, and JSS Holdings;

    - Mrs. Oliver's shares in Jimbo;

    - Mrs. Oliver's chequing account at the Vancouver Police Credit Union (VPCU) account number ***94;

    - shareholder loans owing to Mr. Oliver from the Oliver group of companies;

    - the parties' joint account at VPCU, ***39;

    - the parties' joint account at VanCity, ****47;

    - the parties' respective RRSPs at CIBC, VPCU, and BMO Nesbitt; and

    - the parties' respective vehicles.

3. The following assets are not family assets:

- VPCU account ****49 containing the proceeds of the sale of Mrs. Oliver’s father’s condominium in the amount of $585,000;
- VPCU account ***94 in the amount of $232,000;
- BMO account ****-****-*30 in the amount of $9,200;
- RBC account ****-***69 in the amount of $11,000;
- Mrs. Oliver’s Coast Capital Savings account *****96;
- Mr. Oliver’s 12-foot boat trailer;
- Mrs. Oliver’s municipal pension plan;
- Mr. Oliver’s carpenters’ union pension;
- Mr. Oliver’s VanCity account ***56.
- Mrs. Oliver’s investment accounts with the VPCU;
- an account Mrs. Oliver holds in trust for her daughter Kelly Nixon;
- a disputed $50,000 “loan receivable” from Kelly Nixon;
- Mrs. Oliver’s investment accounts with CIBC; and
- the household chattels each party has in his or her possession.

4. The family home valued at approximately $1,248,000 is to be listed for sale on the following basis:

a. the parties have joint conduct of sale;

b. the parties will retain a mutually agreed upon real estate agent;

c. in the event of a disagreement, either party is at liberty to apply to the Court for directions; and

d. Mrs. Oliver will make the family home available for showings and open houses between the hours of 9:00am and 8:00 p.m. upon 24 hours notice.

5. The Oliver group of companies is valued at $250,000.

6. The family assets are to be divided equally between the parties.

7. Mrs. Oliver's application for reapportionment of family assets is dismissed.

8. Mr. Oliver's application for reapportionment of family assets is dismissed.

9. Mrs. Oliver is to pay Mr. Oliver $14,744.55 as reimbursement for his payment of her legal fees.

10. The overdraft on the parties' joint VanCity account ****47 is to be paid from the proceeds of the sale of the family home.

11. Mrs. Oliver's income is $52,620.

12. Mr. Oliver's income is $294,630.

13. Mr. Oliver will pay Mrs. Oliver a lump sum of spousal support in the amount of $75,988.

14. Mr. Oliver's applications for a fine under s. 92(1) of the *Family Relations Act* and special costs are adjourned generally to be heard at the same time as the parties' submissions on costs.

15. The parties may speak to any issues arising out of the implementation of these orders.

The Honourable Madam Justice L.A. Fenlon