Case Name:

P.S.O.B. v. L.M.B.

Between
P.S.O.B., Plaintiff, and
L.M.B., Defendant

[2007] B.C.J. No. 1695

2007 BCSC 1138

160 A.C.W.S. (3d) 301

Vancouver Registry No. E061636

British Columbia Supreme Court
Vancouver, British Columbia

Cole J.

Heard: April 10 - 13, 16 - 20, 23 - 27 and 30, and
May 2 - 3, 2007.
Judgment: July 30, 2007.

(119 paras.)

Family law -- Marital property -- Equalization -- Exempt acquisitions and deductions -- Inheritances or gifts -- The mother's inheritance was not a family asset, as it was not ordinarily used for a family purpose; alternatively, it would be inequitable to divide it equally, as the father was a solicitor and had intentionally arranged his affairs to make her spend the money as if it were a family asset.

Family law -- Custody and access -- Custody -- Joint custody -- The parties were awarded joint custody and guardianship of the three children, who would spend alternate weeks with each parent, with the primary residence to be with the mother.

Family law -- Maintenance and support -- Child support -- quantum -- Payor's annual income -- Over $150,000 -- The father was ordered to pay $1,000 in monthly child support for the three children, based on his annual income of $160,000 and the mother's of $50,000.

In this family law proceeding where the parties, who had three children, separated after an 11-year marriage, the issues included divorce, custody and guardianship of the children, spousal support, the determination and reapportionment of family assets, and a determination of the parties' income -- HELD: The divorce was granted as the parties had lived separate and apart for one year -- The father had a significant problem with his anger and the way he treated the mother -- There would be joint custody and joint guardianship of the children, who would spend alternating weeks with each parent -- Primary residence of the children would be with the mother, who would have residual decision-making power -- The mother's inheritance was not "ordinarily used for a family purpose" or alternatively, it would be inherently unfair to have it deemed to be a family asset because of the use of the funds in the circumstances; the father, a solicitor, encouraged her to use the money to supplement the family income and received legal advice, prior to moving back into the matrimonial home -- Furthermore, the father, in a well-orchestrated plan, altered his financial dealings to force the defendant to draw from her inheritance -- The mother was ordered to transfer her shares in the limited companies to the father upon his paying the settlement funds -- The equalization payment owing to the mother totalled $297,523, and the parties were each responsible for one-half of the total taxes owing of $82,000 -- The mother was not intentionally unemployed, and was using her property in a reasonable way to generate her annual income of $50,000 -- The father's income was fixed at $160,000 -- Weighing all the factors, the father was ordered to pay $1,000 per month in child support -- A retroactive order was not appropriate -- The mother had not demonstrated any financial need for spousal support at this time.

Statutes, Regulations and Rules Cited:

Family Relations Act, s. 58, s. 65

Federal Child Support Guidelines, s. 9

Counsel:

Counsel for Plaintiff: T.L. Jackson.

Counsel for Defendant: M.R. Ellis.

COLE J.:--

Introduction

1 This is a family law proceeding. The plaintiff husband is 42 years of age. The defendant wife is 43 years of age. They commenced living together in 1994 and were married on October 28, 1995. There are three children, David, born January 13, 1997, age 10; Alexander, born April 15, 1998, age 8; and Robert, born December 16, 2002, age 4.

2 The plaintiff and the defendant ceased cohabiting on January 1, 2006. On June 14, 2006 there was a declaration that there was no possibility of reconciliation. The issues are:

- divorce;
- custody and guardianship of the infant children;

- maintenance and support of the infant children including retroactive support;
- spousal support;
- a determination of family assets;
- reapportionment of the family assets; and
- a determination of income of the parties.

3 The parties have lived separate and apart for one year and I grant the divorce.

Background

4 When the parties were married, they lived in a home owned by a company controlled by the plaintiff's mother. The plaintiff then received from his mother $640,000 in 1996 and that was used to purchase the present matrimonial home. In or about 1997, the plaintiff received a further $60,000 from his mother which he has invested.

5 When the parties were married, the defendant worked in marketing and sales and earned between $45,000 and $50,000 a year. Prior to the birth of their first child, the defendant stopped working and has been a stay-at-home mother ever since. She did work for a few hours a week managing a small company belonging to the plaintiff's father but that ceased after the birth of their second son.

6 The plaintiff is a lawyer who practised law with his father and then went on his own, operating as a sole proprietorship. In 2003 he incorporated his law practice.

7 In 1999 the defendant's father loaned the parties $195,000, secured by a mortgage against the matrimonial home. This was a non-interest bearing loan used to renovate the matrimonial home. That loan was gradually paid down between 1999 and 2004. Her father passed away and she received an inheritance of $1,048,601 plus proceeds of a life insurance policy of $30,000. The balance owing on the mortgage of $150,312.50 was forgiven by the defendant's father's estate.

8 In January of 2006, the plaintiff decided to separate from the defendant but continued to live in the matrimonial home and occupy the matrimonial bed. The plaintiff said there was an agreement that because they could not afford to keep the matrimonial home, it would be sold and they would both buy smaller homes close together. The defendant acknowledges that that was the proposal put forward by the plaintiff, but she says that she has decided it is in the best interests of the children for her to reside in the matrimonial home with the children because the separation has been difficult for the children.

9 Since the plaintiff decided to leave the marriage, there have been financial difficulties, mainly because:

* The plaintiff was not paying the expenses that he had paid prior to separation, including the expenses for the children, the children's medical needs, and the defendant's counselling.
* He unilaterally reduced the support he was providing to the plaintiff to $1,200 per month commencing in January 2006.
* In March 2006, without consultation with his wife, he traded in his Mercedes automobile and purchased a 2005 Volvo for $33,869, incurring monthly expenses of $606.97 per month. This, according to the defendant, is totally out of character with the plaintiff's financial dealings as he detests

paying interest. The plaintiff had ample funds in investments to pay cash for the vehicle but chose not to do so.

* In April of 2006, the plaintiff unilaterally decided that he was going to take every Monday off work and advised the defendant that he would then be looking after the children on Mondays. This change has, according to the plaintiff, meant a reduction in his income.
* The plaintiff unilaterally prepaid the children's private school tuition for the school year 2007/2008.

10 The defendant made an application to have the plaintiff removed from the matrimonial home. A judicial case conference was held before Madam Justice Loo on June 14, 2006. There was a declaration pursuant to s. 57 of the ***Family Relations Act***, R.S.B.C. 1996, c. 128. The defendant agreed to advance to the plaintiff the sum of $625,000 on a without prejudice basis for the plaintiff to purchase a new home, and there was an order that she have exclusive occupation of the matrimonial home commencing June 17, the day after she was supposed to advance funds to the plaintiff. There was a schedule of access drawn up that provided access on a 4-week rotation:

> Week 1: the plaintiff to have the children from Sunday at 8:30 a.m. to Tuesday at 8:30 a.m.;
>
> Week 2: the plaintiff to have the children from Friday at 8:30 p.m. to Monday at 8:30 a.m.;
>
> Week 3: the defendant to have the children the entire weekend; and
>
> Week 4: the plaintiff to have the children from Friday at 5:30 p.m. to Monday at 8:30 a.m.

11 There was also a provision for summer access and a Section 15 Report was ordered and the parties agreed that Dr. Rebecca England would prepare the report.

12 The defendant advanced the $625,000 to the plaintiff and on July 20, 2006, he purchased a property nine blocks from the matrimonial home for the sum of $1,240,000. He obtained a $350,000 mortgage and liquidated assets to pay for the balance of the matrimonial home.

13 There were problems with the parties communicating and agreeing on access and Madam Justice Baker, on September 15, 2006, ordered that the plaintiff have the children each week commencing Saturday, September 16 at 7:00 p.m. until Tuesday at 5:00 p.m., and the defendant have care of the children from Tuesday at 5:00 p.m. through to Sunday at 7:00 p.m..

14 On February 28, 2007, Dr. England provided a Section 15 Report recommending that the children spend one week with each parent.

Custody and Access

15 Many witnesses were called by both parties and gave their view of what wonderful parents the plaintiff and defendant were. I am satisfied that both the plaintiff and the defendant are good parents, they love the children, and the children want to spend time with both of them.

16 The defendant raises concerns that unless the children are with her on a full-time basis, things will fall through the cracks and the children will not be able to participate in extracurricular activities or complete their homework. For example, Alex was required to leave the school choir as he was not being reminded to attend when he was staying with his father. Also, David no longer takes piano lessons because the plaintiff refused to provide a piano or take him over to his parents' place to practise.

17 One of the difficulties is that there are two different parenting styles. The plaintiff is organized but very rigid in terms of changing the children's schedules. The defendant's style is one of apparent disorganization with the children's changing needs taking priority. The psychological testing of the plaintiff, conducted by Dr. England, determined that:

> The pattern of the clinical scales is descriptive of someone who may harbour resentment towards other[s], justify their anger in terms of the behaviour of others, are argumentative, expect a great deal of attention and affection from others and ... hard to get along with. They may express suspiciousness and tend to be self-centred.

18 Further on the author noted that the:

> Subscale analysis shows an elevation which suggests the endorsement of attitudes conducive to aggressive behaviour. Such individuals have a tendency to become easily frustrated, and to react with anger when criticized.

19 Parts of the psychological testing on the defendant could not be relied upon because of the elevation of the validity scales or the lie scale which do not allow for an accurate psychological assessment on the Minnesota Multiphasic Personality Inventory.

20 On the Personality Assessment Inventory however, it is noted:

> ... her interpersonal style would appear to be described as generally stable and positive, however her interpersonal style would appear to be strongly influenced by a need to be accepted by others, which may dominate her interactions. She is likely to avoid conflict and may relinquish individuality for harmony in relationships. Other[s] may take advantage of her strong need to be liked. Subscale analysis shows an elevation which suggests a self-centred and pragmatic approach to relationships. Interest and motivation for treatment is somewhat below average in comparison to adults who are not seen in a therapeutic setting.

21 I was most impressed with the evidence of Dr. van den Breckel, a paediatrician and a friend of the defendant, who has children aged 4, 7, and 9. She was not called as an expert, but I give her evidence significant weight because she was impartial and objective. She describes the plaintiff as a good dad, describes the defendant as an excellent, involved parent, who is child-centred in her thinking and actions. She describes how she first met the defendant in 2002 and they socialized together as a family with their spouses on five or six occasions, along with the children. However, the plaintiff did not attend approximately 15 other family social occasions although invited to do so. Dr. van den Breckel describes how the defendant is involved with the children at school and with their extracurricular activities. She describes that on the first occasion she met the plaintiff they were at her home for dinner and she felt uncomfortable because of the way the plaintiff treated the defend-

ant. During dinner the plaintiff interrupted the defendant, was dismissive of the comments that she made, and there was a lack of respect for the defendant's contribution to the conversation. She described the plaintiff as being dismissive but not overly angry. It was the lack of respect that bothered her.

22 Dr. van den Breckel also described how the children had changed, how Robbie was physically and verbally abusive towards her own son, how Robbie was having difficulty separating from the defendant and how tearful and clingy he was.

23 She said David has also changed, especially as he talks back to the defendant in an angry and dismissive way.

24 Since the plaintiff moved out of the home, she says that the children are doing reasonably well but that David is still angry and dismissive.

25 I am satisfied that the plaintiff has a significant problem with his anger and in the way he treats the defendant. His dismissive, superior attitude has affected the children, and this is reflected in the Section 15 Report. When the defendant was observed with the children, Robbie said that "I hate you", both to Alex and to his mother, and at one point David poked his mother, telling her to go away. Dr. England concludes:

> Each of the children at times were either rude, sulky or aggressive with her, and this may be an issue which could benefit from some counselling so that she does not hold herself out as someone for who it is acceptable that anyone treat in a disrespectful manner.

26 It is hoped with the divorce being concluded and the financial matters settled that the plaintiff's treatment of the defendant will improve. If it fails to improve and continues to detrimentally affect the children, then the custody and access arrangements must be re-examined. Under the ***Divorce Act***, R.S.C. 1985, c. 3 (2nd Supp.) and considering the principles set out in ***Gordon v. Goertz***, [1996] 2 S.C.R. 27, the best interests of the children is not only paramount but the only consideration. The present access arrangements have some difficulties. The children are losing out on some of their activities, and I am satisfied that this can be remedied by having the defendant have a somewhat greater control than the plaintiff of the children's activities.

27 Although the Section 15 Report did not have the benefit of the evidence provided by the numerous witnesses called at the trial, I am satisfied that the children are doing well under the access scheme and that the children are benefiting by spending as much time as possible with each parent. Because of the close proximity of the two houses and the school, I am satisfied that it is in the best interests of the children that they spend one week on and one week off with each parent.

28 I am therefore going to order that there be joint custody and joint guardianship of the children. The guardianship order will be on the Joyce model with the primary residence of the children being with the defendant. If the parties cannot agree on the extracurricular activities or any other matters pertaining to the children, then, after due consultation, the defendant will make the decision and the plaintiff has the right under the ***Family Relations Act*** to apply to court for directions. That way, I am satisfied that the defendant will have more security and the balance of power will be more evenly distributed.

29 The children's extracurricular activities for each year beginning in September must be decided between the parents by August 1 (except for the current year which will be August 15 because of the date of this judgment), and the defendant will be responsible for drawing up the schedule that is agreed to. For those matters that the plaintiff and defendant do not agree with, the defendant will add those to the schedule and the plaintiff will then have an opportunity to apply to the court for directions prior to the school year commencing in September.

30 When the children spend the week with their father, he will either pick them up after school on the Friday or, if not after school, at the defendant's home at 4:00 p.m.; the following Friday the mother will pick the children up at 4:00 p.m. at the plaintiff's home or if the children are in school, then at the school.

31 The plaintiff and defendant will share the summer holidays; the plaintiff will draw up a schedule that will provide him with two weeks with the children alternating with two weeks with the defendant.

32 This Christmas the plaintiff will have the children for the first portion of the school break, and this arrangement will alternate each year so the plaintiff has them for the first portion on odd-numbered years, with the plaintiff having them on even-numbered years. The children will be exchanged at 12:00 noon on Christmas Day.

33 The plaintiff will have the children for the first half of the spring break on odd-numbered years and the defendant will have them on even-numbered years. The plaintiff shall have the children on their birthdays on odd-numbered years and the defendant on even-numbered years. The plaintiff will have the children on Father's Day, the defendant will have the children on Mother's Day, and the same for the plaintiff's and defendant's birthdays.

34 There will be no restriction in terms of the children being taken out of the province. Each party will give the other notice and will provide places where the children can be contacted.

Assets

35 The position of the plaintiff is that all assets are family assets and should be divided equally. The position of the defendant is that her inheritance is not a family asset and if it is declared to be so, it should be reapportioned in her favour. If the defendant's inheritance is not a family asset or is reapportioned in her favour, the plaintiff says that the balance of the assets should be reapportioned 85% in his favour.

36 The parties have agreed that the R.E.S.P.'s, the family trust for the children, and the defendant's trust account for the children should be held in trust by the plaintiff and the defendant for the benefit of the children.

37 The parties also agree that the R.R.S.P.'s should be divided equally. Their value in December of 2006 was approximately $400,000. Because those assets have no doubt increased in value, they should be divided *in specie*.

38 There is a dispute in respect in respect to the furnishings. Although the plaintiff has received a substantial amount of the furniture, he still wants a roll top desk, a Petley Jones painting, a burgundy couch, a Persian carpet, a blue chair and a dining leather chair.

39 The defendant wishes to keep the Persian carpet and blue chair and although these were items owned by the plaintiff prior to meeting the defendant, I am satisfied that a fair distribution of

the remaining furniture in dispute would be to give the plaintiff all of the furniture listed save and except for the blue chair and the Persian carpet.

The Defendant's Inheritance

40 The defendant's father passed away in March of 2004 and from the defendant's share of the estate the mortgage registered against the matrimonial home was discharged. That had a value of $150,312.50. The defendant received proceeds from a life insurance policy of $30,000 in the spring or summer of 2004. Those funds were spent on personal and family items. In the summer of 2004 the plaintiff left the defendant and moved into his parents' home. This was not the first time the plaintiff had left; the marriage has had a long history of conflict and the parties have attended marriage counselling over many years. Prior to moving back into the matrimonial home in September of 2004, the plaintiff consulted legal counsel.

41 In October of 2004, the defendant received the first instalment of her inheritance in the amount of $449,678.50. That was deposited in an investment account with Leith Wheeler. The second instalment was received in January 2005 in the amount of $448,610.79.

42 The defendant consulted the plaintiff with respect to her inheritance, and he suggested it be used to supplement the family income. She sought advice from the plaintiff's corporate accountant, and the corporate accountant consulted the plaintiff before advising the defendant.

43 Starting in approximately February of 2005, the defendant withdrew at least $2,500 per month; between February 2005 and May 2006 she withdrew a total of $60,000. That includes $13,164 to top up her R.R.S.P.'s, $30-$40,000 to cover the children's private school, household expenses and children's activities, approximately $20,000 for a nanny, and a lesser amount to pay for household items and donations. Her evidence was that she basically took money on an as-needed basis.

44 At the time of the triggering event, there was approximately $1,065,000 left of the inheritance, which was more than the defendant had in February of 2005 because of the favourable rate of return she was receiving on her investments. Following the triggering event, $625,000 was advanced on a without prejudice basis to the plaintiff for his home purchase, but this amount should be added back to the account to ascertain the value of the inheritance for the purposes of the analysis. There should also be an adding back of the $10,000 she spent in legal fees.

45 The defendant contemplated purchasing a vacation property with her brother, but that never came to fruition. She considered paying for renovations to the kitchen which never took place. She said she fully intended to share her inheritance with the plaintiff but also said:

> I would have been more than happy to have shared my inheritance with him, and I had fully intended on doing so. However, when someone's walked out on [you] three times, and you have three kids, none of -- when -- never when you've expected it -- I hadn't worked in ten, eleven years. I mean, I was advised to tuck it away in an account until I knew what was happening with our marriage.

46 The plaintiff argues that the defendant said she was happy to share her inheritance with the plaintiff because he had shared his with her for a decade. That, however, is misquoting the defendant's evidence. The question was:

Q. Well, Mrs. [B], certainly, he expected you, and he told you he expected you to share your inheritance with him because he'd shared his with you for a decade, isn't that right?
A. Yes.

47 The defendant admitted that she intended her family to benefit from the inheritance. Her evidence was: "I wanted to enhance our life."

48 Section 58 of the ***Family Relations Act*** defines family assets as follows:

> *Family asset defined*
>
> 58(1) Subject to section 59, this section defines family asset for the purposes of this Act.
>
> (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:
>
> (a) if a corporation or trust owns property that would be a family asset if owned by a spouse,
>
> (i) a share in the corporation, or
> (ii) an interest in the trust
>
> owned by the spouse;
>
> (b) if property would be a family asset if owned by a spouse, property
>
> (i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself or herself, or
> (ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;
>
> (c) money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;
> (d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;
> (e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.
>
> (4) The definition of family asset applies to marriages entered into and property acquired before or after March 31, 1979.

49 In ***Evetts v. Evetts***, [1996] B.C.J. No. 2614, 85 B.C.A.C. 19, (C.A.), Lambert J.A. stated at para. 23:

> I think it would be unwise to try to establish any rules for the determination of whether a capital asset will be considered to be a family asset. However one or two guidelines are readily revealed from the cases. The fact that income from a capital asset is used occasionally for a family purpose does not of itself make the capital asset a family asset, *Stuart v. Stuart*, [1996] B.C.J. No. 526. The fact that capital from the asset is used from time to time, when required, for a family purpose may be an indication that the asset is a family asset, *Brainerd v. Brainerd*, [1989] B.C.J. No. 1223. But the distinction between income being used for a family purpose and capital being used for a family purpose is not, in itself, determinative, *Starko v. Starko*, [1986] B.C.J. No. 2341. So the fact that only income is used for family purposes does not necessarily mean that the capital asset itself is not used for a family purpose. The use of the asset to provide financial security and protection against erosion of income or other family misadventure in the future may constitute a present ordinary use for a family purpose, *Tezcan v. Tezcan, [1990] B.C.J. No. 498; Folk v. Folk*, [1994] B.C.J. No. 2616. The fact that the words "ordinarily used ... for a family purpose" are the governing words in the statute means that the use pattern must be examined in each case to determine whether, in the ordinary course, the present use commitment to meet a present or future need includes a use for a family purpose. Ordinary use for a family purpose is not inconsistent with ordinary use for other purposes.

50 Lambert J.A., with Prowse J.A. concurring, concluded that the assets of the company were ordinarily used for a family purpose and stated at para. 25:

> In this case, over almost the whole period of the marriage, the income from F.G.E. Holdings and the amount of the capital appreciation were entirely withdrawn in each year and were used by Mr. Evetts to support himself within his family. A major part of these amounts was used to make Mr. Evetts' contribution to the household expenses. Part of the capital asset itself may also have been used, if required, to meet Mr. Evetts' share of household expenses. Additionally, capital from the asset was used, when required, for any major commitment to the acquisition of family assets, as in the case of the joint acquisition of the family home.

51 The plaintiff argues that the defendant has used both the income and the capital from her inheritance. The defendant says she has not encroached on the capital because the life insurance policy was not part of the estate. The defendant is correct in that the life insurance policy was outside the estate. However, for the purposes of determining if the defendant used her "inheritance" for a family purpose, I find that the life insurance proceeds should be considered as part of her inheritance in a more global sense. Also, part of the inheritance was the forgiveness of the $150,312.50 mortgage on the matrimonial home, which was deducted from the amount that she otherwise would have received from her share of the estate. Therefore, I find that the defendant spent both part of the capital (approx. $180,312) and a portion of the income (approx. $60,000) but not all of the income.

52 Although the defendant spent both some capital and income from her inheritance, I am not satisfied that the monies were "ordinarily used for a family purpose". If I am wrong, I am of the view that it would be inherently unfair to have the defendant's inheritance deemed to be a family asset because the use of the funds (except for the forgiveness of the mortgage) was orchestrated by the plaintiff in two ways.

53 First, the plaintiff encouraged the defendant to use her money to supplement the family income and I am satisfied he did so well knowing what the law was in relation to inheritances in family matters. Although the plaintiff is a corporate solicitor, he sought legal advice prior to moving back into the matrimonial home. I am satisfied that the plaintiff well knew what the law was when he encouraged the defendant to spend her inheritance and when he advised the company accountant about how to respond to her inquiries as to whether or not she should spend the capital or income.

54 Second, the plaintiff altered his financial dealings to force the defendant to draw from her inheritance. In my view, this was all a well-orchestrated plan by the plaintiff who, according to the defendant, is a strategic thinker and an accomplished negotiator. The plaintiff has intentionally increased his debts by purchasing a Volvo car which costs him $606.97 per month, a move that he did not consult the defendant on, and which is out of character for him because, according to the defendant, he hates paying interest. He also decreased the amount of money available to the family when he unilaterally decided not to work on Mondays. He was able to purchase a home for $1.24 million although he had initially maintained that the family could not afford to keep their original matrimonial home and that he wanted the defendant to sell in order for them to buy two more modest homes. The plaintiff also intentionally withheld the payment of family expenses that the defendant had incurred even though his expenses have decreased since the defendant was no longer required to pay the mortgage on the matrimonial home that was discharged by the defendant's father's estate.

55 It was the plaintiff that had all the power and control in this relationship. According to the defendant's evidence, which I accept, the plaintiff "had all the control over everything that related to financial." It was the plaintiff who chose the school and chose the house they would live in: "He ultimately had the final say on anything that was beyond groceries". He then refused to pay for many of the family bills including at one time the private school fees.

56 By withholding payment of expenses, reducing his work hours, and increasing his monthly debt obligations, the plaintiff forced the defendant to draw from her inheritance to pay for family expenses. In total, but for the calculated scheming of the plaintiff, the defendant would not have used her inheritance on a regular basis. In my view, in such circumstances, it would be unfair to consider such an asset to be a family asset. This is especially so when the marriage was in a fragile state, on the eve of separation, and the plaintiff returned to the matrimonial home after the death of the defendant's father but before she received the bulk of her inheritance.

57 I am satisfied that the defendant has discharged the onus on her and I am satisfied that the inheritance is not a family asset.

58 If I am wrong, the defendant says I should reapportion the inheritance in her favour.

59 Section 65 of the ***Family Relations Act*** says:

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.

60 I am satisfied that this was not a short marriage and that the period of time the spouses have lived separate and apart is not significant. However, s. 65(1)(d) applies, and the fact that the inheritance was acquired relatively recently further militates in the favour of the defendant. I am also satisfied that there is a substantial need for her to become economically independent and self-sufficient, especially as she has largely been out of the workforce for 10 years.

61 The plaintiff argues that the true value of the assets provided by the plaintiff's family is actually $1.5 million whereas the value of the assets provided by the defendant's family is $1 million. The plaintiff says that the land value of the matrimonial home is 85% of the total value and therefore that the land has a current value of $1,083,000. In addition, the plaintiff received $60,000 in addition to the matrimonial home. The plaintiff also argues that the value in the form of saved housing expense would, over a 10-year period at $3,000 per month, amount to a savings to the family of $360,000.

62 The plaintiff's argument is interesting but not very helpful. Purely because the value of land in Vancouver has increased substantially over the last 10 years does not, in my view, have any real significance in terms of reapportionment. If the money provided by the plaintiff's parents was put

into an investment and the investment turned out to be worthless, would that militate against reapportionment? Furthermore, the $3,000 per month rent is what the defendant felt she would be required to pay to have suitable alternate accommodation in rental premises. This does not reflect the value of rent back 10 years ago; it does not consider the cost of taxes, insurance, and upkeep. In addition, this fails to take into account the fact that the parties received an interest-free loan of $200,000 from the defendant's father and the fact that the mortgage for the renovations was forgiven by the defendant's father's estate.

63 Taking into account all the factors set out in s. 65 of the ***Family Relations Act***, the defendant has satisfied me that an equal division of property would be unfair and I reapportion the entire amount of the inheritance in favour of the defendant. The plaintiff has not satisfied me that an equal division of the balance of the family assets would be unfair and I decline to reapportion those assets in favour of the plaintiff.

Value of the Plaintiff's Law Firm

64 One of the assets held by the plaintiff's law corporation is marketable securities which as at December 31, 2005 showed a value at cost of $135,849. The shareholder capital is nominal at $300, and there is due to shareholders $225,806.

65 Since the marketable securities were liquidated in July of 2006 to allow the plaintiff to purchase his home, those marketable securities were valued at $201,089. Using the increase in the marketable securities from December 2005 ($135,849) until their sale in July 2006 ($201,089) would increase the net value of the law firm from $225,806 to $291,046. This, however, does not take into account any work-in-progress which even the company's accountant accepts as an asset of the law corporation.

66 The work-in-progress recorded by the plaintiff on a software program he uses for accounting indicates that as of the end of December 2005 his work-in-progress was $78,162. The plaintiff, however, says that that figure is unreliable, much of the plaintiff's work is on a flat fee basis, some of it is discounted, and the plaintiff does not know what the value of his work-in-progress actually is.

67 The plaintiff's accountant said that work-in-progress is usually not included in the balance sheet because it is too difficult to value.

68 Neither the plaintiff nor his accountant is of any great assistance to the court in determining the value of the work-in-progress. It is not in the plaintiff's interest to have any value attached to the work-in-progress for obvious reasons. However, I am satisfied that it is an asset that must be taken into account, and I am satisfied that the only available information is from the plaintiff's records which indicates that the value at the end of December 2005 was $78,162.

69 Accepting that this is not a scientific exercise, I round that figure off for contingencies to $70,000 and I take into account that taxes would have to be paid on that at the rate of 40% which would give a net value to the work-in-progress of $42,000 ($70,000 x 40% = 28,000).

70 Upon the plaintiff paying to the defendant all settlement funds required under my order, there will be an order that the defendant transfer all her shares in the limited companies to the plaintiff.

Due to Shareholders: $291,046

Work-in-progress 42,000

Total Value of Law Corp. $333,046
========

Conclusion with respect to Assets

71 In addition to the law corporation, the plaintiff cashed in unregistered investments of approximately $190,000 to purchase his new matrimonial home.

72 In addition to those assets, the plaintiff also owns a boat which I am satisfied is worth approximately $15,000 and which the parties agree is a family asset.

73 The value of the plaintiff and defendant's vehicles is agreed upon to be approximately equal.

74 The family assets to be divided are therefore as follows:

the matrimonial home, value agreed upon: $1,275,000.00
personal investments of the plaintiff:
190,000.00
value of the plaintiff's law corporation:
333,046.00
value of the plaintiff's boat:
15,000.00
GROSS ASSETS:
(Not including R.R.S.P.'s which the parties have agreed to divide equally) 1,813,046.00
Less amount owing for taxes:
82,000.00
NET VALUE OF ASSETS:
$1,731,046.00

Dividing assets equally, each party would receive: $865,523.00

75 The parties will receive as follows:

	Plaintiff	Defendant
personal investment	$190,000.00	
law corporation	333,046.00	
plaintiff's boat	15,000.00	
matrimonial home		$1,275,000.00

TOTALS:	**538,046.00**	**1,275,000.00**

Difference between value of plaintiff's assets and defendant's assets:	-736,954.00.

76 Therefore, the plaintiff is owed $327,477.

77 There is owing to the defendant the amount of $625,000, which loan the plaintiff must repay to the defendant. There will be an equalization payment of $297,523 from the plaintiff to the defendant.

78 Both the plaintiff and defendant are responsible to pay one-half of the taxes owing in the amount of $82,000.

79 There is one minor issue and that is the plaintiff's airline points that accumulated during the marriage. It is only fair that those be divided equally as at the triggering event.

The Defendant's Income

80 The defendant has, in effect, been out of the employment market for 10 years. She has completed a certificate course in marketing from Ryerson University in Toronto and has taken other marketing oriented courses during the time she was married. Her position is that she needs to be home with the children while they have gone through the difficult separation and when the youngest child is in school, she wants to return to the workforce but has no plans.

81 The plaintiff's position is that the defendant is intentionally unemployed (s. 19(1)(a) of the Guidelines), and is not reasonably using property to generate income that she otherwise could (s. 19(1)(e) of the Guidelines).

82 The plaintiff says that the defendant has the capacity to work full-time and earn an income of approximately $50,000 per year, that she could earn approximately $110,000 from her investments, and that she should earn approximately $6,000 per year by either renting out her basement suite or taking in students.

83 In respect to renting out the basement suite, that is what the plaintiff is doing but he takes the position that there is really no income because it purely covers part of the taxes, insurance and utilities. Since both the plaintiff and the defendant have at least a potential of earning the approximate sum of $6,000 per year from the basement suite and assuming that it really is a break even proposition as suggested by the plaintiff, I am not going to take into account that income for either party.

84 The return on the defendant's investments from April 2005 to April 2006 had a rate of return of approximately 15%. According to the plaintiff, the defendant should have borrowed the $625,000 and forwarded that money to the plaintiff for the purchase of his home instead of cashing in her inheritance. With a cost of approximately 6% to borrow $625,000, she could be earning a return of 15% which would mean a net return of 9% on the $625,000, or $56,250 per year. In addition, the remaining balance of her investments, the plaintiff says, should generate another approximate $50,000.

85 Certainly the defendant's investment income must be taken into account when determining her income, but I do not agree that the defendant should have borrowed the money in order to allow the plaintiff to purchase a home. The defendant advanced the money to the plaintiff on a without prejudice basis as it is clear that that was the price she had to pay in order to have him leave the matrimonial home.

86 Furthermore, the suggestion that the defendant will continue to earn 15% fails to take into account that there is a 1% management fee on any return and that for the first half of 2006, her rate of return on her investment was only 2.6%.

87 As of June 30, 2006, the defendant's Leith Wheeler account was $361,722 and that generated for the following six months approximately $25,320.54, or $50,641 on an annualized basis, which is less than $15%.

88 The break up of the marriage and the manner in which the plaintiff has treated the defendant has placed a great deal of stress upon her. Three witnesses called by the defendant, Susan Foot, Dr. van den Brekel and Brian Finley, all testified that the defendant's condition over the past year has deteriorated and, in particular, that she has lost significant weight, appears to be under stress, and is easily distracted. Coupled with the fact that she suffers from attention deficit disorder, it has made the defendant's life quite difficult. Her ability to answer questions at trial seem to be consistent with someone with attention deficit disorder.

89 I am satisfied that the defendant is not qualified to return to marketing type work at this time because she has no computer skills and the type of marketing work she did before meant working some evenings and weekends. With the plaintiff looking after the children at least 50% of the time, this is going to afford the defendant ample opportunity to put in place a plan for her to return to the workforce which, in my view, will require updating her skills.

90 The youngest child will commence Grade 1 in September of 2008. By that time, the defendant should be in a position to either commence full-time work or be in the process of completing her education and training to allow her to enter the workforce.

91 I am satisfied that the plaintiff is not intentionally unemployed and that she is using her property in a reasonable way to generate income. I find that her income from her investments at this time amounts to approximately $50,000 per year.

92 I also decline to impute any employment income for the defendant.

The Plaintiff's Income

93 The plaintiff is a sole practitioner who specializes in business and commercial law. He operated as a sole proprietorship up until 2003 when he incorporated. The calculation of the plaintiff's income is complicated because he admits that he paid insufficient taxes over the years because he underreported his income. He also did not withdraw all the net corporate income but used it to increase the investment portfolio held by the law firm. Furthermore, he paid his wife an income by way of dividends from 2003 of about $40,000 to 2006 of $15,200. He stopped making dividend payments to the defendant when he moved out of the matrimonial home.

94 The following is a chart prepared by the plaintiff showing revenues, expenses and income for the years 2003 to 2006. The plaintiff says that when his net corporate income is imputed to him, his 2006 income, for the purposes of the Child Support Guidelines, should be $130,000.

Year	Gross Revenues	Expenses	Net Corporate Income (less dividends paid)	Wages/ dividends to P.O.S.B.	Wages/ Dividends to L.M.B.	Combined Income of the Parties
2003	$277,376	$227,017	$39,458	$85,599	$40,000	$125,000
2004	$294,095	$261,007	$28,993	$160,000	$41,820	$201,000
2005	$309,332	$291,142	$22,366	$138,750	$36,480	$175,230
2006	$229,872	$130,649	$61,611	$16,250 +	$15,200	$56,450
				$15,000 = **$41,250**		

95 The plaintiff argues that the decrease in gross revenues from 2005 to 2006 was due to his decision to take off every Monday to look after the children. That decrease is difficult to reconcile with his billing records which indicate that in 2005 he had 1,260 hours recorded, which equated to $265,207. In 2006 his hourly time records increased to 1,336 hours and that translated into $279,649.

96 I have already dealt with the plaintiff's claim that his timekeeping is not accurate. He does work on a fixed fee basis on occasion and sometimes reduces his final bill. However, the decease cannot be explained by looking at his revenue because his hours recorded time increased from 2005 to 2006. Furthermore, in 2006, the plaintiff was the president of a civic political party that was engaged in an election and for approximately four months prior to the November 2005 election, he was involved in many meetings and admitted that he worked two to three hours per day on the campaign. The defendant says that the plaintiff's 2005 income should be used for the purposes of determining what he would pay in 2006 from the time he left the family home. His 2005 income, including net corporate income and a bonus of $65,000 totals $194,742. In addition, there should be added back into his income expenses which have been allocated as business expenses but were really income to the plaintiff. These include medical, dental and counselling benefits of $250, $40 for cell phone, $40 for home phone, $225 for parking, $25 for Starbucks, $150 for personal portion meals and entertainment, $300 car expense, for a total of $1,030 per month. Adding that back would bring his total 2005 income to $207,201.

97 Current financial information should be used when calculating income. However, in my view, the plaintiff's information is not accurate and the surrounding circumstances must be examined.

98 Although the plaintiff has not documented his expenses paid for by the company, save and except for the medical, dental, counselling benefits, I am satisfied that some of the expenses are no doubt legitimate, such as some of the car expenses, but certainly not 40% of the total expenses as claimed by the plaintiff. In my view, $10,000 should be added back into his income to reflect benefits he personally received.

99 Because of the increase in the hourly recorded time from 2005 to 2006, I do not agree with the figure of $140,000 income for 2006 as claimed by the plaintiff. I think a more accurate estimation would be $150,000 per year, which is the amount that the plaintiff told Dr. England, the author

of the Section 15 Report. Adding the $10,000 expenses to the $150,000 that the plaintiff admitted he earned, I fix his income for 2006 at $160,000.

Child support

100 Since the children will be spending equal time with both parents, s. 9 of the ***Federal Child Support Guidelines*** applies. That section reads as follows:

> Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the spouses;
> (b) the increased costs of shared custody arrangements; and
> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

101 The approach to be taken in applying s. 9 was set out by Bastarache J. in ***Contino v. Leonelli-Contino*** 2005 SCC 63 where at para. 39 he stated as follows:

> The specific language of s. 9 warrants emphasis on flexibility and fairness. The discretion bestowed on courts to determine the child support amount in shared custody arrangement calls for the acknowledgment of the overall situation of the parents (conditions and means) and the needs of the children. The weight of each factor under s. 9 will vary according to the particular facts of each case.

102 The straight set off amount for Guideline income for the plaintiff of $160,000 is $3,045 and for the defendant, with an income of $73,800, it is $1,424, meaning a set off of $1,621.

103 The plaintiff claims $1,251 per month for child related expenses and that does not include $6,000 per year for R.E.S.P. contributions. Most of those expenses relate to the children's tuition, school supplies, and school uniforms. The defendant claims approximately $2,433 per month for the children, again claiming the same expenses for school uniforms, tuition and school supplies.

104 The plaintiff's housing expenses are approximately $2,100 per month higher than that of the defendant because the defendant is living in the matrimonial home that is debt free and the plaintiff has a mortgage of approximately $350,000. The plaintiff attributes $4,094 to the increased cost of shared custody by apportioning 50% of his increased housing costs to the three children. This is made up by monthly expenses including 100% of the children's expenses of $1,251, 50% of housing, utilities, transportation and health costs of $2,343 and 100% of the R.E.S.P. payments of $500. Unfortunately, the defendant did not provide the court with a similar breakdown of expenses.

105 When considering ss. 9(c), the Supreme Court of Canada in ***Contino*** at paras. 69-70 listed three criteria that are helpful when analyzing s. 9(c), that is:

> (a) the actual spending patterns of the parents;
> (b) the ability of each parent to bear the increased costs of shared custody which entail consideration of assets, liabilities, income, level of income disparities; and
> (c) the standard of living of the children in each household.

106 While the parties were together, the spending was controlled to a great extent by the plaintiff who has a frugal lifestyle. That lifestyle has changed since the separation. The plaintiff has purchased a home which he cannot afford and purchased a car which increases his monthly cost of living. The defendant since she received her inheritance has subsidized the family and although she is not as frugal as the plaintiff, she is not careless with her money either.

107 In respect to the ability of each parent to bear the increased cost of shared custody, I have already commented on the expenses claimed by both parties and how they are excessive and overlapping. Although the plaintiff has increased costs because of his new home of some $2,100 per month in mortgage payments, his income is double that of the defendant.

108 The standard of living of the children, I am satisfied, is similar in both homes.

109 The defendant says that for the purposes of spousal and child support, I should calculate the present income from the Leith Wheeler account on a $50,000 annualized basis. The other source of her income will be approximately $297,523 she will receive as equalization payment. That in my view would attract interest of approximately 8% a year which will translate into an annual income of $23,800 for a total of $73,800.

110 The defendant's expenses are declared to be $100,716 per year. Those expenses however include the children's private school fees of approximately $5,000 per year, reserved for vacation $750 per month, which in my view, is excessive as is the $300 per month for the children's gifts and $746 per month for the children's activities plus entertainment and recreation for the children of $195 per month.

111 In my view, the defendant's expenses are close to $75,000.

112 The plaintiff's expenses are also exaggerated. He claims in his copy of financial statement of April 11, 2007, income of $130,000 and expenses of $177,864. With an income of $160,000, I am satisfied that he will be required to pay approximately $15,000 more in income tax and if he borrows the $297,523 at a rate of 6% (that is the figure that the plaintiff says that the defendant could borrow money at), that would be approximately $17,000 more per year, making the total expenses almost $210,000. There are many obvious expenses, in my view, which are inflated or simply not necessary. Certainly, the plaintiff cannot afford to save $12,000 per year for R.R.S.P.'s or $6,000 R.E.S.P.'s. The school tuition and donations to the church, $250 per month and $180 per month respectively, are also not affordable. The private health plan of $250 per month is paid for by his company, as are 40% of transportation costs for which he says the gross amount is $878 per month. The plaintiff claims as part of his expenses $1,200 per month for child support and for the purposes of calculating child support that must be taken out. The cost of the Arbutus Club is $215 per month which cannot be maintained. Overall I am satisfied that the plaintiff's overall expenses should reasonably total $150,000 per year.

113 After considering and weighing all the evidence and considering s. 9 of the ***Federal Child Support Guidelines***, I am satisfied that the plaintiff should pay to the defendant child support in the amount of $1,000 per month.

114 The extracurricular activities agreed upon by the parties or chosen by the defendant shall be shared in proportion to their respective incomes but I make no order in respect to the payment of fees in the Arbutus Club, because in my view, the parties cannot afford that extraordinary expense.

In respect to the future cost of private school, again, those are extraordinary expenses that the parties cannot afford and I make no order.

Retroactive Child Support

115 The defendant claims since the plaintiff moved out of the matrimonial home, he has only paid $1,200 per month in child support. I accept the fact that the plaintiff has had the children for approximately 40% of the time since June of 2006, has prepaid the children's private school education, has paid $6,000 for R.E.S.P.'s in 2006, and has incurred some expenses for the children through the Arbutus Club (although not the $6,156 he claims as some of that is his own expense), I do not consider that a retroactive order is appropriate.

Spousal support

116 Even with the reapportionment of the assets or the finding that the inheritance is not a family asset, the defendant is in need of spousal support, her gross income is $73,800 and after payment of taxes, her income is to be approximately $55,000, leaving a shortfall of about $20,000. With the child support payments of $12,000 per year, the actual shortfall will be $8,000. The defendant, however, has the ability as does the plaintiff of renting out the basement suite which would generate approximately $6,000. I am satisfied that the defendant is entitled to support because of the length of marriage and the economic disadvantages she has incurred because of her care of the children but I am not satisfied that the defendant has shown a financial need at this time. If my valuation of the law practice or the rate of return on the defendant's investments is not accurate, then the issue of spousal support must be re-examined. I therefore make no order for spousal support at this time.

Retroactive Spousal Support

117 The plaintiff has failed to make timely disclosure of his income. He originally claimed that he only earned approximately $70,000 a year. The defendant says that his failure to disclose his income and the fact that the defendant's application for interim spousal support could not be heard in September of 2006 (due to lack of court time) means that she should receive retroactive support from June 2006 when the plaintiff moved out of the matrimonial home and discontinued paying her the monthly stipend through his law firm. $15,200 was paid to her for the period of January 2006 to June 2006.

118 In addition, the defendant did not have the benefit of the interest to be earned on the $625,000 she loaned to the plaintiff. All those factors would warrant making an order for retroactive spousal support, but under the present financial circumstances of the plaintiff, some of which are his own doing, there is no ability for the plaintiff to pay retroactive spousal support.

119 If there are any matters arising under my order or if the matter of costs is not agreed upon, the parties can speak to those matters.

COLE J.

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