

CANADA / JUDGMENT

Cook v. Cook

2021 BCCA 194

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 194 Cook v. Cook

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Cook v. Cook,

2021 BCCA 194

Date: 20210514

Docket: CA46830

Between:

Bernice Marie Cook

Respondent

(Claimant)

And

Donald Mark Cook

Appellant

(Respondent)

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated

March 16, 2020 (Cook v. Cook, 2020 BCSC 389,
New Westminster Docket E053048).

Counsel for the Appellant

(via videoconference):

S. Glanzberg

Counsel for the Respondent

(via videoconference):

D.R. Greig

Place and Date of Hearing:

Vancouver, British Columbia

March 25, 2021

Place and Date of Judgment:

Vancouver, British Columbia

May 14, 2021

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Hunter

Summary:

The appellant challenges orders unequally dividing the parties' family property. He argues the trial judge erred in finding an equal division of family property to be unfair and the respondent to be entitled to compensatory spousal support. Held: Appeal allowed. The trial judge erred in law in finding that it would be significantly unfair to equally divide family property because of a financial disparity arising from an inheritance, an excluded asset under the Family Law Act. Financial advantage alone, unrelated to the economic characteristics of a spousal relationship, does not justify departing from the standard division of assets directed by the Act. The evidence also did not support the making of orders redistributing assets in order to provide the respondent with a capital sum as compensatory support. The parties shared the economic benefits and burdens of the marriage and its dissolution, and a lump sum award should not be made in the guise of support for the purpose of redistributing assets.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] This is an appeal from orders unequally dividing the parties' family property, made pursuant to the provisions of s. 95 of the Family Law Act, S.B.C. 2011, c. 25, for reasons indexed at 2020 BCSC 389.
- [2] Subsection 95(1) of the Act provides that the Supreme Court may order an unequal division of family property if it would be significantly unfair to equally divide the property, having regard to factors enumerated in s. 95(2), including, among others:
- a) the duration of the relationship between the spouses;
 - b) the terms of any agreement between the spouses ...;
 - c) a spouse's contribution to the career or career potential of the other spouse;
 - ...
 - i) any other factor, other than consideration referred to in subsection (3) [the need for spousal support], that may lead to significant unfairness.
- [3] Subsection 95(3) provides that if the objectives of spousal support described in the Act have not been met in making a spousal support order, the court dividing family property may consider the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses.
- [4] The trial judge found an equal division of family property would be significantly unfair in this case (satisfying the criteria for redistribution under s. 95(1)), and he found the respondent to be entitled to compensatory support (satisfying the threshold criteria for redistribution under s. 95(3)).
- [5] The appellant says there would be no significant unfairness in the equal division of family property, and there is no basis for an award of compensatory spousal support in this case. The parties were similarly situated after their separation as retired persons with comparable incomes (primarily their pensions), they had divided their family property equally, and the only disparity between them arose out of the appellant's receipt of an inheritance as the marriage was ending. He argues the discretion afforded to trial judges by the Family Law Act does not permit judges to substitute subjective conceptions of fairness for the regime established by the legislation. In particular, he argues, the legislation is not intended to rectify disparity arising solely from excluded property. That is reflected in the express limit on the court's discretion in s. 96:

96 The Supreme Court must not order a division of excluded property unless

- (a) family property or family debt located outside British Columbia cannot practically be divided, or
- (b) it would be significantly unfair not to divide excluded property on consideration of
 - (i) the duration of the relationship between the spouses, and
 - (ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

Background

- [6] The parties married on December 13, 1980, in their early 20s. They separated 36 years later, on January 9, 2017.
- [7] Ms. Cook worked for the federal government for many years, taking maternity leaves in 1982, 1984 and 1987 when the parties' children were born. She was primarily responsible for caring for the children during the marriage and worked part time when they were young. From 1999 until she retired, in 2014, she worked full time. Because she had worked part time, she had not been able to take advantage of some promotional opportunities. She had no post-secondary education, save for public administration courses for two weeks each summer after her return to full-time work.
- [8] She received three inheritances during the marriage totalling slightly over \$100,000; the last of those came in 2007. The funds from the inheritances were deposited to family accounts and thereby transformed into family property. No attempt was made at trial to identify proceeds of these inheritances as excluded property. There was no examination of whether there was an intention or agreement to treat the transferred inheritance as excluded property, as would be necessary to categorize the proceeds as such: *V.J.F. v. S.K.W.*, 2016 BCCA 186; *Pisarski v. Piesik*, 2019 BCCA 129; and *Namdarpour v. Vahman*, 2019 BCCA 153.
- [9] For thirty-five years, Mr. Cook was employed in the finance departments of car dealerships. He retired in September 2016. As a rule, his income "was almost always double" Ms. Cook's income.
- [10] Prior to trial, the parties executed a document referred to as "Admissions and Consent" which set out agreed facts and agreements effecting a division of chattels; a spousal rollover to equalize the parties' Investor's Group Savings Funds; and division of their respective employment sponsored pension plans pursuant to Part 6 of the Family Law Act. The parties sold their family home in the summer of 2016. The agreement described an interim equal division of the net proceeds of the sale of that property.
- [11] At the time of the trial, Ms. Cook was living at the Mount Baldy ski resort in a house built by the parties on land they purchased in 2006. That house remained in joint tenancy. In 2019, its assessed value was \$450,000, approximately \$170,000 was owed on a mortgage, and there was \$280,000 of equity in the property.

- [12] Ms. Cook was working part time at the ski resort in the winter, and at a wine shop in the summer. Her annual employment income was about \$13,000.
- [13] Subsequent to the parties' separation, Ms. Cook received an inheritance of approximately \$111,000 from her mother's estate.
- [14] After separation, Mr. Cook lived at a cottage on Tie Lake in the East Kootenays in the summer, and at his daughter's home in Abbotsford in the winter. The trial judge described Mr. Cook as "unemployed by choice". For a period after the parties' separation, he was disabled by health problems but he was considering a return to some part-time work in the car business at the time of trial.
- [15] Mr. Cook received inheritances from his parents in 2014 and 2015, amounting together to \$425,000, as well as a one-half interest in the cottage at Tie Lake (the other half was bequeathed to Mr. Cook's sister). The parties agreed the cottage had a value of \$700,000; the appellant's interest was worth \$350,000.
- [16] The trial judge described the evidence with respect to post-separation incomes as follows:
- [39] In her financial statement filed August 8, 2019, Ms. Cook deposes to having an income of \$65,807 including \$51,981 in pension income and \$13,826 income from part-time employment at a winery in Oliver, B.C. She also deposed to having a net loss in seasonal rental of a portion of the Mt. Baldy home of \$896.07. In 2018, Ms. Cook's income was assessed at \$67,613 and in 2017 her income was assessed at \$63,449 with similar proportions of income from pensions and part-time employment. Ms. Cook was 60 years old at trial. Prior to retirement, Ms. Cook was earning \$84,631 in 2013 and \$78,744 in 2014, retiring at the end of 2014.
- [40] In his financial statement filed October 30, 2017, Mr. Cook deposed to an income of \$39,709 consisting of pension income. In the three previous years, Mr. Cook was employed at Toyota and earned between \$138,732 and \$144,145. As of trial, Mr. Cook was 61 years of age.
- [17] He noted, at para. 47, "that the equalized pensions of the parties and their pensions from employment are similar".
- [18] Turning to consideration of property, the trial judge described the interim division effected by the parties, the status quo, as follows:

Ms. Cook

Proceeds from sale of [family] home \$209,000

Savings 70,000

One half of Mt. Baldy 140,000

Inheritance post separation 111,000

Agreed settlement on incidental chattels 24,000

Total \$554,000

Mr. Cook

Proceeds from sale of [family] home \$209,000

Savings 70,000

One half of Mt. Baldy 140,000

Financial inheritances from parents 425,000

Tie Lake Cottage inheritance (one-half) 350,000

Total \$1,194,000

[19] The appellant had agreed to compensate the respondent for the increase in the value of excluded assets in the interval between their inheritance and the date of separation. Even after making appropriate adjustments for that compensatory payment, the judge found, at para. 51, "Mr. Cook still has a financial advantage of \$557,350 over Ms. Cook".

[20] He considered the discretion to depart from an equal division of family property to be available where, having regard to the factors set out in s. 95, equal division would be "objectively unjust, unreasonable or unfair in some important or substantial sense": *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 42.

[21] Further, after considering *Moge v. Moge*, [1992] 3 S.C.R. 813; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420; *W. v. W.*, 2005 BCSC 1010; *Chutter v. Chutter*, 2008 BCCA 507; and *Parton v. Parton*, 2018 BCCA 273, the trial judge held it was open to him to make an award of compensatory spousal support on a lump sum basis or to order an unequal division of family property to recognize and account for the economic disadvantages incurred by Ms. Cook. She had made sacrifices in assuming primary childcare and household responsibilities, and economic advantages were conferred on Mr. Cook by that sacrifice.

[22] Applying those principles, he held:

[60] As indicated above, Mr. Cook walks away from this thirty-eight year relationship with a \$652,000 advantage over Ms. Cook. Following payment for the growth in his excluded property he still has a financial advantage of \$557,350 over Ms. Cook; he has almost two times the wealth of Ms. Cook.

[61] I find that, in these circumstances, equal division of family property would be significantly unfair. I also find Ms. Cook is entitled to compensatory support. The factors underlying both findings are similar; of particular importance is the duration of the relationship and Ms. Cook's contributions to the household and childrearing.

- [62] As indicated by the Supreme Court of Canada in Moge, and quoted in Chutter: " the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standard of living upon its dissolution". That presumptive claim is not rebutted in this case.
- [63] The question is whether the disparity in the parties' financial circumstances is more appropriately dealt with through reapportionment under s. 95 or an award for compensatory spousal support. The following quote from Parton is particularly instructive:
- [42] in some cases property division may address all or most of the objectives of spousal support and thus eliminate or reduce the need for a spousal support award, but in others it may not. This is particularly so where entitlement to spousal support is based predominantly on compensatory principles

I am satisfied that an award for unequal division of family property is the appropriate solution in this case.

- [23] He ordered Mr. Cook to transfer his one-half interest in the Mount Baldy property to Ms. Cook, who would, thus, receive all of the \$280,000 equity in the property. He also ordered Ms. Cook "to receive 75% of the \$140,000 in savings". These orders would result in Ms. Cook receiving assets valued at \$770,325 and Mr. Cook receiving assets valued at \$977,675.
- [24] The orders made resulted in Ms. Cook receiving 70% of the \$838,000 in family property (\$594,000, consisting of one-half of the proceeds of the sale of the house (\$209,000), 75% of the savings (\$105,000) and the equity in the Mount Baldy property (\$280,000)).
- [25] Mr. Cook received 30% of the family property (\$244,000, consisting of one-half of the proceeds of the sale of the house (\$209,000) and 25% of the savings (\$35,000)), before adjustments for the increase in value of the excluded assets prior to separation.

Grounds of Appeal

- [26] The appellant says the trial judge made two palpably erroneous findings of fact:
- a) that there was "\$140,000 in savings" available for division; and
 - b) that the parties acknowledged the interim division of the proceeds of the sale of the family home was not a division for family law purposes.
- [27] Further he argues the judge erred in law by:
- a) finding the equal division of family property would be significantly unfair;
 - b) finding the parties did not have an equal standard of living upon the dissolution of their marriage; and
 - c) finding Ms. Cook to be entitled to compensatory spousal support.

[28] Finally, he argues the reasons for judgment are inadequate, and the trial judge apparently failed to consider relevant evidence.

Argument and Analysis

[29] The trial judge in this case divided family property unequally for two reasons:

- a) To effect what he considered to be a more fair division of property; and
- b) To give the respondent a lump sum sufficient to provide her with compensatory spousal support.

[30] The appellant challenges the first basis for the award on the ground that it is an error of law to attempt to redress a disparity in assets arising solely from the value of excluded assets. He challenges the second basis for the award on the ground that there is no basis for a compensatory spousal support order. These are the substantive grounds of appeal.

[31] In Parton, Dickson J.A., for the Court, described the standard of review in a case involving similar issues:

[32] The standard of review for findings of fact is highly deferential. An appellate court will interfere with a trial judge's factual conclusions only if there is an obvious (palpable) and material (overriding) error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 5, 6, 8, 10. In *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114, Justice McLachlin, as she then was, explained this well-established principle, emphasizing that appellate intervention is justified only if the judge has made a "manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it": p. 121.

[33] A trial judge's determination of the form and quantum of a support order is a discretionary decision to which a deferential standard of appellate review is also applicable. A support order should not be overturned on appeal unless the reasons for judgment disclose an error in principle, a significant misapprehension of the evidence, or the award is clearly wrong: *Robinson v. Robinson*, 2012 BCCA 497 at para. 16. In addition, where an award is substantially above or below the range provided for in the SSAG, in the absence of exceptional circumstances to explain the anomaly, appellate intervention may be justified: *Redpath v. Redpath*, 2006 BCCA 338 at para. 42.

[32] Before turning to the substantive grounds of appeal, I deal briefly with two preliminary matters.

Misapprehension Regarding Savings of \$140,000

[33] Exhibit 1 at the trial was the "Admissions and Consent" document, containing an agreed statement of facts and a proposed consent order including the following provision:

- e) The Respondent shall transfer to the Claimant \$13,000 from his Investor's Group fund, by way of a spousal rollover, in full satisfaction of the difference in values of the parties Investor's Group savings funds, and the parties shall each hereafter keep their own Investors Group portfolios free of all claims by the other;
- [34] This term is reproduced in its entirety in the final order made by the trial judge. The Investor's Group funds were RRSPs. The agreement to equalize RRSPs resulted in each party having approximately \$70,000 in RRSPs.
- [35] The appellant says the judgment refers to each party having \$70,000 of "savings" but does not recognize these were the RRSPs the parties had agreed to equalize before trial. He says the trial judge could not have intended to reapportion the RRSPs, given the agreement reflected in the entered consent order. On the other hand, if he was not referring to the RRSPs, the appellant says the judge made a palpable factual error, as there were not "\$140,000 in savings".
- [36] While the judge appears to have made inconsistent orders in adopting the language of the consent order drafted by the parties and, at the same time, making an order reapportioning the Investor's Group funds, I am of the view, for reasons set out below, that it is not necessary to address the effect of that error. In my view, there was no basis for an order dividing the RRSPs in a manner other than as the parties had agreed.

Whether Interim Division of Sale Proceeds Was a "Division"

- [37] The appellant says the trial judge erred when he wrote (at para. 15): "in the Admissions and Consent the parties acknowledged the 'interim division' of sale proceeds of the family home was not a division for family law purposes".
- [38] The argument, sensibly, was not pressed in oral submissions. The statement of agreed facts in Exhibit 1 provided:
- 18) There is no formal written agreement between the parties about whether the interim "division" of the sale proceeds from the Pitt Meadows property constituted any kind of final division for family law purposes.
- [39] The appellant says the proceeds of the sale of the family home were divided for family law purposes, all that was missing was a "formal written agreement". However the division was clearly described as an interim measure. Further, whereas the parties had elsewhere agreed (as in clause "e" cited above) that some matters were settled "in full satisfaction" of claims and certain assets could be kept "free of all claims by the other", that was not the case for the net proceeds of the sale of the home.
- [40] In my view, the alleged error is not made out.

Significant Unfairness

- [41] I turn, now, to the substantive issues on appeal. The appellant, citing Jaszczewska at para. 41, says family property should not be divided unequally unless equal division would lead to unfairness that is "compelling or meaningful having regard to the factors set out in s. 95(2)" of the Family Law Act.
- [42] He argues that the factors set out in s. 95(2) do not support a reapportionment of assets in this case. Two such factors which the judge considered to be critical, the duration of the relationship and Ms. Cook's contributions to the household and to childrearing, had nothing to do with the inheritance that created the only disparity. In the circumstances, he says, there is no cause to disturb the fundamental principle that the parties should share equally in the fruits of their labour but retain assets held outside the marriage.
- [43] The principles upon which the appellant relies are canvassed in *Venables v. Venables*, 2019 BCCA 281. In that case, Justice Griffin, writing for the Court, reviewed the legislative history of the property division provisions in the Family Law Act. She described the policy embodied in the provisions as follows:
- [85] The category of "family property" in s. 84 of the FLA recognizes that many modern relationships are like a partnership or joint venture, with give and take and various forms of contribution, including indirect contribution through child care, household management and other means, and so presumptively any acquisition or growth in assets during that relationship should be shared equally upon the relationship ending. Because of the wide variety of indirect contributions made during a spousal relationship, a spouse is not required to directly contribute to family property in order to be entitled to a presumptive equal share in it.
- [86] The category of "excluded property", established by s. 85 of the FLA, carves out certain types of property from the family property category. It is meant to cover property a spouse acquired to which the other spouse did not contribute, because either the property was acquired before the relationship or it came about by inheritance or certain other specified means (gifts from a third party, settlement of a claim, insurance proceeds, discretionary trusts and property derived from excluded property).
- [87] The excluded property regime reflects the reality that many modern relationships do not last a lifetime and the perspective that, since the other, non-acquiring spouse had nothing to do with the acquisition of the excluded property, it is presumptively fair that the non-acquiring spouse should not share in the other's excluded property upon the relationship ending.
- [Emphasis added.]
- [44] It is difficult to reconcile the trial judge's conclusion, in the case at bar, that significant unfairness is produced by the disparity that is the result of an inheritance, with the view that it is presumptively fair that excluded assets are not to be divided.

- [45] It must be borne in mind that the property provisions of the Family Law Act were drafted to create more certainty by identifying two categories of property and a starting point for what would typically happen on separation of spouses: Venables at para. 84.
- [46] That certainty is undermined by substituting another concept of fairness for that established by the Act. Even under the prior legislation, the Family Relations Act, R.S.B.C. 1996, c. 128, the case law emphasized that courts should not apply "abstract concepts of fairness" when dividing family assets. In *Pasch v. Blackmore*, 2011 BCCA 420, Justice Groberman, for the Court, held:
- [15] The provisions of the Family Relations Act do not invite a court to apply abstract concepts of fairness to the division of family assets. Section 56 of the Act sets out the presumption that family assets are to be divided equally. While s. 65 allows a court to depart from equal division, it does not give the court free rein to find the "fairest" possible division of property. Instead, it requires equal division unless the court finds that such division would be "unfair" having regard to the enumerated factors. The interpretation of s. 65(1) was considered by this Court in *S.B.M. v. N.M.*, 2003 BCCA 300. Donald J.A., speaking for the Court, said:
- [23] ... The question is not whether an unequal division would be fair The Legislature created a presumption of equality -- a presumption that can only be displaced by a demonstration that an equal division would be unfair. So the issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair. He must decide, in accordance with the language of s. 65(1), that an equal division would be unfair before he considers apportionment. Otherwise, although an equal division would be fair, a reapportionment could be ordered on the basis that it is more fair, and that, in my opinion, is not what the statute intends.
- [47] In *Pasch*, the trial judge had concluded that the equal division mandated by the provisions of the Family Relations Act was unfair (the then-prevailing, and less onerous, standard for reapportionment) because the generosity of one spouse's parents in making an interest-free loan had permitted the parties to purchase the matrimonial home. The home had increased substantially in value over the course of a 4-year marriage. The judge reapportioned the property in a manner that reflected the contribution of the parents to what he considered to have been a "windfall" for the unrelated spouse. But there was no doubt the parents had advanced a loan rather than taken an equity interest in the property. The reapportionment reflected the trial judge's conception of fairness rather than consideration of the factors enumerated in the Family Relations Act. The reapportionment did not withstand appellate review.

- [48] The principle that animated the judgment of this Court in *Pasch* is still valid. We ought not to find unfairness in the outcome contemplated by the legislation and that is, therefore, presumptively fair. Under the current Family Law Act regime, "[t]he starting point in the division of property analysis already applies significant exclusions": V.J.F. at para. 10, citing *Slavenova v. Ranguelov*, 2015 BCSC 79 at para. 60. An unequal starting point suggests that an unequal end point is similarly contemplated by the statutory regime.
- [49] As noted above, the factors that may be considered in order to identify "significant unfairness" in an equal division of property include "any other factor that may lead to significant unfairness", other than insufficient compensatory spousal support, which is specifically addressed in s. 95(3). While this confers considerable discretion on a trial judge, the discretion must be exercised judicially, and it has been narrowly defined by this Court. In *Singh v. Singh*, 2020 BCCA 21, Justice Garson observed, at para. 136, that the general provision referring to "any other factor" was preceded by a list of specific items, and applied the rule of statutory construction that limits the general term "to the genus of the narrow enumeration that precedes it". She held:
- [138] [If] the rule applies, the class cannot be any factor "that may lead to significant unfairness" as this would violate the second requirement as set out by Sullivan. The other factors enumerated in s. 95(2) suggest consideration of aspects of the relationship between the spouses, including its duration, the terms of any agreement, as well as the characteristics of family assets and debt and how the spouses have influenced their value. One of the considerations in s. 95(2)(g) includes an analysis of a spouse's good faith or motive. These factors are broad. Nevertheless, in my view, they all relate to a limited class, namely, the economic characteristics of a spousal relationship.
- [Emphasis in original.]
- [50] In my opinion, the trial judge erred in law in finding that it would be significantly unfair to equally divide family property because of a disparity arising from events unrelated to the parties' marriage. Financial advantage alone, unrelated to the economic characteristics of a spousal relationship, does not justify a departure from the usual rule. Unless necessary to give effect to an order for compensatory support, neither the unequal division of family property, nor the division of excluded assets, was called for by the Act.

Spousal Support

- [51] Subsection 95(3) of the Family Law Act clearly contemplates orders for the division of property as a means of providing compensatory spousal support where the objectives of the Act cannot be achieved by an order for periodic payments. Such an order hinges upon findings that compensatory support is warranted and that allocation of a lump sum for the purpose will more effectively serve the objectives of the Act than an order for periodic payments: *Parton* at para. 47. After a judge determines that a spouse is entitled to spousal support, the Spousal Support Advisory Guidelines can assist the judge to determine the

quantum and duration. Though the Guidelines are not mandatory, the judge can use the resource to calculate an appropriate lump sum support award based on the parties' incomes. See, e.g., *Venables v. Venables*, 2018 BCSC 1736.

- [52] The judge in this case, after concluding that the family property should be divided unequally because of unfairness in light of the s. 95(2) factors, also held that unequal division could be ordered to effect a lump sum payment of compensatory support. The lump sum amounted to \$175,000 (\$140,000 representing Mr. Cook's share of the equity in the Mount Baldy property and \$35,000 representing 25% of the total \$140,000 in savings). That amount appears to have been settled upon by determining what net allocation of property appeared to be fair. It was not apparently determined by reference to the net present value of a fixed stream of income for the respondent, and there was no attempt to calculate lump sum spousal support based on Guidelines incomes and the Spousal Support Advisory Guidelines calculation for a lump sum award.

Needs and Means

- [53] The appellant says the trial judge did not compare the parties' respective standards of living and there was no evidentiary basis for finding they are not equal. From the appellant's perspective, Ms. Cook enjoys a standard of living superior to his. He says his income is comparable to the respondent's income and it should not be assumed that he will encroach upon his capital so as to enjoy a higher standard of living than the respondent.
- [54] It is true there was no evidence Mr. Cook's standard of living has been materially affected by his inheritance, of which he had made little personal use. Like Ms. Cook, he was retired and receiving a pension. Prior to the trial he had loaned \$231,000 to the parties' son Cameron; built a garage on Cameron's property at a cost of approximately \$20,000; and purchased a \$19,500 travel trailer. It was his intention to keep the Tie Lake cottage and leave it to his children.
- [55] However, all of that is irrelevant. Despite his express intention to give effect to "the presumptive claim to equal standards of living" upon dissolution of the marriage, the trial judge did not conclude there was a basis for non-compensatory support (which would have required an assessment of comparative standards of living: see *Chutter* at paras. 51-53). Rather, he concluded, given the duration of the relationship and Ms. Cook's contributions to the household and childrearing, that she was entitled to compensatory support.
- [56] The distinction between compensatory and non-compensatory support must be borne in mind. As this Court noted in *Parton*:
- [39] In *Chutter*, Justice Rowles described the underlying goals of compensatory and non-compensatory spousal support, namely, equitable sharing of the economic consequences of a marriage or its breakdown (compensatory support) and narrowing the gap between the needs and means of the spouses (non-compensatory support). In doing so, she explained that compensatory support provides redress for economic disadvantage arising from the

marriage (such as diminished earning capacity and sacrificed career opportunities to take on child care responsibilities) or the conferral of an economic advantage upon the other spouse (such as contributions to enhanced career development).

- [57] There is authority for taking excluded assets, specifically inheritances, into account in some circumstances, in making lump sum non-compensatory support orders. In *H.S.S. v. S.H.D.*, 2018 BCCA 199, Saunders J.A., for the Court, reviewed the jurisprudence under the Family Relations Act, including in particular *Hefti v. Hefti* (1998), 57 B.C.L.R. (3d) 171 (C.A.), *Beese v. Beese*, 2008 BCCA 396, and *Kahn v. Kahn*, 2008 BCSC 396, and concluded (at para. 91) that the clear rule established in *Hefti* and *Beese* is that inheritances may be taken into consideration in determining whether provisions for division of property between spouses are unfair, having regard to the needs of each spouse to become or remain economically independent and self-sufficient. Care must be taken in doing so, however, "[o]therwise, the distinction which the legislature has clearly drawn between family assets and other assets will be diluted, if not eradicated" (at para. 90 quoting from para. 51 of *Beese*).
- [58] However, unlike non-compensatory support, an order for compensatory support does not hinge upon the respective means and needs of the parties.

Compensatory Support

- [59] The trial judge concluded there were grounds for an order for compensatory support. In my opinion, there was inadequate consideration of the basis for that claim. A lump sum award should not be made in the guise of support for the purpose of redistributing assets. While a lump sum award will have the effect of redistributing assets, that is not its purpose.
- [60] In *Parton*, the Court addressed spousal need by awarding lump sum spousal support that, in effect, divided the value of the husband's excluded assets, which included inherited assets, between the two parties. In that case, the Court held:
- [47] In some cases, a lump sum spousal support award is preferable to an order for periodic payments. When deciding whether to make such an award, the court should weigh the advantages and disadvantages of a spousal support order in lump sum form compared to those of an order made in the more common periodic payment form. In *Davis v. Crawford*, 2011 ONCA 294, the Ontario Court of Appeal discussed the relevant factors for consideration and, in doing so, emphasized the need to distinguish the purpose of a lump sum spousal support award from the effect of such an order. As the Court noted, any lump sum spousal support order will, in effect, involve the transfer of property from one spouse to another, although the redistribution of assets is not the purpose of spousal support:
- [60] It is well accepted - and undisputed - that a lump sum award should not be made in the guise of support for the purpose of redistributing assets: *Mannarino; Willemze-Davidson v. Davidson* (1997), 98 O.A.C. 335 (C.A.), at para. 32. Moreover, the governing legislation does not recognize redistribution of assets as one of the purposes of a spousal support award.

- [61] That said, a lump sum order can be made to "relieve [against] financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home)": Family Law Act, s. 33(8)(d).
- [62] In any event, the purpose of an award must always be distinguished from its effect. Any lump sum award that is made will have the effect of transferring assets from one spouse to the other. The real question in any particular case is the underlying purpose of the order: Willemze-Davidson at para. 32.
- [63] Similarly, it is well accepted that an important consideration in determining whether to make a lump sum spousal support award is whether the payor has the ability to make a lump sum payment without undermining the payor's future self-sufficiency.
- [48] The factors discussed in Davis generally apply in this province when lump sum spousal support is considered. In Robinson v. Robinson, 2011 BCSC 1489, for example, after quoting extensively from Davis, Justice Watchuk awarded \$330,000 in lump sum spousal support. In explaining her reasoning, Justice Watchuk noted that a lump sum award is appropriate in circumstances where the payor spouse has insufficient income to pay spousal support on an ongoing basis, but has capital assets with which to make a lump sum payment. She also noted that lump sum spousal support may contribute to self-sufficiency and assist the recipient spouse to achieve an appropriate standard of living. This Court upheld her decision in reasons indexed as 2012 BCCA 497.
- [Emphasis removed.]
- [61] As I have noted, whatever economic advantage the appellant now enjoys (or might enjoy by spending his inheritance) over the respondent has nothing to do with maternity leave, contributions to the household, or the fact he earned more than her throughout the relationship. Her prospects at trial had not been diminished by the marriage or its dissolution. The parties "bought back" Ms. Cook's pension when she returned to the workforce. Then she worked another 16 years full time, before retiring five years before the trial. Upon separation, the parties had comparable incomes and divided their family property equally. The marriage and separation, in short, had not provided him an economic advantage, nor caused Ms. Cook an economic disadvantage.
- [62] The appellant relies upon this Court's description of the entitlement to compensatory support in Chutter:
- [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (Bracklow, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in

assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success.

[Emphasis added.]

[63] The exercise of weighing a claim for compensatory spousal support reflects the ideological foundation for the support: the intention to share the economic benefits and burdens of marriage and dissolution. The measure of that support was described succinctly by Groberman J.A. in *Zacharias v. Zacharias*, 2015 BCCA 376, as follows:

[54] Where entitlement to compensatory support is established, and the marriage has been a long one, the marital standard of living is often a reasonable measure of appropriate compensation. It represents the standard that the parties themselves established as a result of each individual's sacrifices and advantages during the union, and will often represent the standard that they could have expected to maintain if the marriage had not broken down.

[55] In saying this, I do not imply that this measure will always be determinative of the amount of spousal support. All of the factors set out in s. 17(7) [of the Divorce Act] must be considered by a judge in fixing appropriate spousal support. As was said in *Moge* at 866-67:

The exercise of judicial discretion in ordering support requires an examination of all four objectives set out in the Act in order to achieve equitable sharing of the economic consequences of marriage or marriage breakdown. This implies a broad approach with a view to recognizing and incorporating any significant features of the marriage or its termination which adversely affect the economic prospects of the disadvantaged spouse.

[56] It should be remembered, as well, the payee spouse, no less than the payor, is entitled, if possible, to maintain a standard of living similar to that enjoyed during a long marriage. Where the resources of the parties are not sufficient to allow both to enjoy that standard, it will usually be reasonable to equalize the deficit and allocate resources so as to allow each party to enjoy a similar standard of living.

[57] That said, there is no specific formula that can be applied to these cases, and specific factors unique to individual cases may justify other measures of support.

[64] In my view, the evidence did not support the making of orders redistributing assets in order to provide the respondent with a capital sum as compensatory support. There is no evidence the respondent was disadvantaged by marriage or its dissolution or, conversely, that the appellant enjoys advantages as a result of the marriage for which he should compensate the respondent. While some conceptions of fairness would call for the equal division of the inheritance that came into the appellant's hands as this long marriage came to an end, so as to effect equal outcomes, doing so is not consistent with the scheme of property division embodied in the Act. There is nothing compensatory about the orders made in this case. It cannot be said to have been made further to the objectives of spousal support described in the Act.

Disposition

[65] It follows from what I have said that it is unnecessary to address the appellant's argument that the reasons for judgment are insufficient.

[66] In my view, the orders unequally dividing the family property in this case reflect manifest error. I would allow the appeal, set aside the order requiring Mr. Cook to transfer his one-half interest in the Mount Baldy property to Ms. Cook, and set aside the order that Ms. Cook "receive 75% of the \$140,000 in savings". In their place, I would order the family property to be divided as agreed to by the parties in the consent order, and otherwise equally.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Fenlon"

I agree:

"The Honourable Mr. Justice Hunter"

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