
CANADA / JUDGMENT

Dobson v. Dobson

2016 BCSC 1874

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 1874 Dobson v. Dobson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dobson v. Dobson,

2016 BCSC 1874

Date: 20161013

Docket: E064287

Registry: Vancouver

Between:

Malgorzata Dobson

also known as Margaret Dobson

Claimant

And

Simon Richard Meikle Dobson

Respondent

And

Health Pro Holdings Corporation

Respondent by Counterclaim

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

The Claimant Malgorzata Dobson

also known as Margaret Dobson:

Appearing in person on her

own behalf and on behalf of the

Respondent by Counterclaim

Health Pro Holdings Corporation

Counsel for the Respondent

Simon Richard Meikle Dobson:

James L. Straith

Place and Dates of Trial:

Vancouver, B.C.

October 5-7, 14-16, 19 and 22, 2015;

February 25, April 20-22 and 27, 2016;

Further written submission received from the Claimant May 9, August 29, 2016 and from the Respondent May 16, Sept. 1, 2016

Place and Date of Judgment:

Vancouver, B.C.

October 13, 2016

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Introduction

- [1] The parties seek court orders regarding the division of property following the breakdown of their marriage. Both parties are medical doctors and for ease of reference I will refer to them simply as the claimant and respondent or Ms. Dobson and Mr. Dobson, intending no disrespect.
- [2] The claimant was born in 1952 and is 63 years old. The respondent was born in 1953 and is 62 years old. They have two grown children now adults with their own careers.

- [3] The parties met while in medical school in the United Kingdom. They married in late 1978. Eventually they moved to Canada.
- [4] On May 16, 1997 the parties entered into a marriage agreement (the "Marriage Agreement"). The parties have different versions of the events leading up to the Marriage Agreement although both agree it was preceded by a violent argument between the two of them.
- [5] In essence the Marriage Agreement provided that the family home would be the claimant's alone if the marriage broke down; plus she would have sole ownership of her incorporated medical practice, Dr. Margaret Dobson Inc. ("MDI"). Other than these two assets, the Marriage Agreement provided that upon marriage breakdown the division of assets would be governed by Part 3 of the Family Relations Act, R.S.B.C. 1996, c.128 [FRA] analyzed on the basis that the family home and MDI assets did not exist.
- [6] The parties' two children were born in 1986 and 1990. At the time of the Marriage Agreement they were ages 10 (turning 11 later that year) and 7 respectively.
- [7] The claimant seeks a declaration that the Marriage Agreement governs the division of property of the parties and equal division of family assets not governed by the Marriage Agreement.
- [8] The respondent states that the Marriage Agreement was not made in fair circumstances and would operate unfairly having regard to the parties' personal and financial circumstances and the matter and the manner in which the circumstances evolved over time. He seeks equal division of family assets. He however has agreed that MDI will not be treated as a family asset.
- [9] The claimant submits that the parties separated in April 2006 although the respondent had not yet left the family home. The respondent argues that the parties separated in late December 2006 and he then left the family home. He points out that their Visa card, which he largely funded, paid for half the cost of the claimant's mother's funeral in August 2006 and for the parties' holiday to the Dominican Republic in November 2006.
- [10] I find the respondent's evidence as to the date of separation to be more consistent with the parties' conduct. This finding is to the benefit of the claimant because it will entitle her to a greater share of the respondent's pensions prior to separation. I find the separation date to be the end of December 2006.
- [11] The claimant commenced this family law proceeding on December 14, 2006.
- [12] On January 25, 2007 Master Bolton made an order declaring that there was no reasonable prospect of reconciliation between the parties, pursuant to s. 57 of the FRA. In that order Master Bolton also granted the claimant exclusive occupancy of the family home located on Rockridge Road in West Vancouver ("the family home"). The claimant has continued to reside in that home throughout this proceeding.

- [13] The highly contested property at issue includes the family home and shares in the claimant's other corporation, Health Pro Holdings Corporation ("HPHC"). HPHC owns a commercial strata property from which the claimant operates her medical practice through the vehicle of MDI.
- [14] The parties agree that the value of the family home as at the time of trial is \$3,400,000; and that the value of property owned by HPHC would be \$1,250,000 if unoccupied; and \$1,100,000 as occupied by MDI.
- [15] Also at issue are some assets inherited by the respondent, including his inheritance from his parents who died after the parties' separation.
- [16] The claimant also seeks an order for spousal support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and the Family Law Act, S.B.C. 2011, c. 25 [FLA] which is opposed by the respondent.
- [17] The parties are in agreement that the pensions each earned during the marriage should be divided equally for the marriage period by way of directions to the plan administrators.
- [18] A divorce was granted at the end of oral submissions in the proceeding, on April 27, 2016.

Key Dates

- [19] For ease of reference the key dates are:

December 23, 1978

The parties married.

October 1986

First child born.

February 1990

Second child born.

July 1991

The parties moved to West Vancouver from England.

1995

The parties purchased the family home on Rockridge, West Vancouver through combined resources.

May 16, 1997

The parties entered into the Marriage Agreement.

December 2006

The parties separated; claimant starts this proceeding.

January 25, 2007

Court makes declaration pursuant to FRA, s. 57.

October 2015

Trial commences.

April 27, 2016

Divorce granted during completion of oral submissions.

General Comments

- [20] The parties were married for 19 years before the Marriage Agreement; another nine years before separation; and a further ten years before the trial of this action concluded. That means the parties' financial affairs and lives have been intertwined for some 38 years.
- [21] Trying to untie the strands of their financial affairs over these years has proven extremely difficult.
- [22] Both parties tendered multiple binders of documents and financial records. This information was not well-organized. I have considered all of the evidence but will not re-state it all in these reasons. I reached my findings of fact based on what I consider to be the best evidence available at trial keeping in mind principles of hearsay and my assessment of the parties' credibility.
- [23] Before I begin to set out my findings of fact, I will comment on credibility and the applicable legal principles, and then set out the issues.

Credibility

- [24] I reached some conclusions regarding credibility of the parties that on occasion came into play when weighing the evidence.
- [25] Let me start with the respondent. I found the respondent to be a careful and respectful witness. He appeared restrained and did not gratuitously make negative statements about the claimant or try to exaggerate his evidence. The claimant, who was representing herself, often said quite provocative things when cross-examining him. However, despite this the respondent kept a quiet, even tone. I find that he did his best to be objective and truthful in his evidence.
- [26] I turn now to the claimant. I have taken into account the pressure on the claimant given that she was representing herself in this litigation and the fact that this kind of case is emotionally distressing for any litigant; she was very worried about the financial consequences to her.

- [27] Even taking those things into account, I was left with the impression that the claimant's perspective was quite warped by a sense that she was and remains a victim, albeit a heroic one in her mind. She did not appear to me to experience or remember events objectively. Where it suited her purpose, I found that the claimant often exaggerated and overstated her evidence.
- [28] The claimant appeared unusually suspicious of the motives and actions of other people in her life. She made reckless accusations and cast aspersions widely and frequently. These included suggestions that: persons often "ransacked" her house and her office, including taking and messing up her documents; the respondent was once inappropriate with the nanny because she saw him having dinner with her when the claimant came home from work, and that the same nanny stole a diamond ring from her; the respondent's previous lawyer took her documents and did not return them; her mother's death after falling occurred because she was pushed by someone down a cliff.
- [29] There was no doubt that many times during the trial the claimant tried to insinuate that the respondent was responsible for very nasty conduct, in the likely hopes that it would prejudice the Court against the respondent and create sympathy towards her.
- [30] I have chosen not to detail each dispute or bare allegation in the evidence. When it came to a contest in the evidence, I preferred the respondent's evidence over that of the claimant. Frequently the claimant's evidence was inconsistent with the documentary evidence. When self-serving assertions were made by the claimant without corroborating evidence, I was unable to give them much or at times any weight due to my observation that the claimant had a tendency to exaggerate and to distort the facts.

Legal Principles

Property Division

- [31] The FRA was the governing statute at the time this proceeding was commenced. It has been since repealed and replaced by the FLA.
- [32] Pursuant to s. 252 of the FLA, the FRA continues to apply to the division of property in this case. The parties agree with this proposition.
- [33] It appears to be uncontested that the Marriage Agreement was a marriage agreement pursuant to s. 61 of the FRA. That section provides that such an agreement is binding, whether or not there is consideration for it: s. 61(4).
- [34] The general scheme of property division between spouses set out in s. 56 of the FRA starts with a presumptive equal division of the family assets, in this case in existence at the time of the s. 57 declaration, namely January 25, 2007. This is commonly known as the "trigger date".

- [35] The binding nature of the Marriage Agreement, pursuant to s. 61, changes that division. Here it changes the division by carving out the family home and MDI for the claimant's sole use, not to be taken into account in respect of the division of remaining assets.
- [36] The FRA provides in s. 65 that the court may reapportion the division of property in a way other than the presumptive equal division of family assets, or in a way that is different than provided for in a marriage agreement, if it would otherwise be unfair.
- [37] In considering unfairness, the relevant factors for consideration are set out in ss. 65(1) and (2) as follows:
- (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.
- [38] Both parties rely on the leading case regarding enforcement of marriage agreements and the interplay with s. 65 of the FRA, *Hartshorne v. Hartshorne*, 2004 SCC 22 [Hartshorne]. In that case, the marriage agreement was between two lawyers. The Court held at para. 67:

Once an agreement has been reached, albeit a marriage agreement, the parties thereto are expected to fulfill the obligations that they have undertaken. A party cannot simply later state that he or she did not intend to live up to his or her end of the bargain. It is true that, in some cases, agreements that appear to be fair at the time of execution may become unfair at the time of the triggering event, depending on how the lives of the parties have unfolded. It is also clear that the FRA permits a court, upon application, to find that an agreement or the statutory regime is unfair and to reapportion the assets. However, in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement,

particularly where independent legal advice has been obtained. They should not conclude that unfairness is proven simply by demonstrating that the marriage agreement deviates from the statutory matrimonial property regime. Fairness must first take into account what was within the realistic contemplation of the parties, what attention they gave to changes in circumstances or unrealized implications, then what are their true circumstances, and whether the discrepancy is such, given the s. 65 factors, that a different apportionment should be made. [Emphasis added.]

- [39] The principles regarding marriage agreements and the FRA and as set out in *Hartshorne* were summarized by Gray J. in *S.L.C. v. C.J.R.C.*, 2014 BCSC 1814 beginning at para. 422, citing *L.E.M. v. D.M.I.*, 2013 BCSC 450 at paras. 79-102 [*L.E.M.*].
- [40] I have also reviewed and considered the authorities referred to by the claimant: *Verkaik v. Verkaik*, [2009] O.J. No. 686 (S.C.), *aff'd* 2010 ONCA 23; *Butty v. Butty*, 2009 ONCA 852 [*Butty*]; and *Z.J.S. v. S.D.S.*, 2004 BCSC 935.
- [41] Here the respondent did not plead that the Marriage Agreement was unenforceable as unconscionable at common law, due to duress or other factors.
- [42] I note that the respondent's counsel until just before the start of trial was the same lawyer who witnessed his signature on the Marriage Agreement and provided independent legal advice to him before the respondent signed the Marriage Agreement. When the claimant identified she would be seeking to call the lawyer as an adverse witness at trial, that lawyer withdrew from the case and new counsel took over.
- [43] In any event, the respondent's position is such that it is not necessary to consider common law principles of unconscionability in relation to the Marriage Agreement. The respondent's argument is that the Court should reapportion the property division pursuant to s. 65 of the FRA in a way other than as set out in the Marriage Agreement, as it "was not made in fair circumstances and would operate unfairly having regard to the parties' personal and financial circumstances, and in particular, the manner in which the circumstances evolved over time": amended statement of defence, para. 6(c).
- [44] The burden is on the respondent to establish the unfairness of the Marriage Agreement in order to justify reapportionment pursuant to s. 65 of the FRA: *L.E.M.* at paras. 94-96. As noted in the passage from *Hartshorne* set out above, unfairness is not established simply because the division of property under a marriage agreement is different than the presumptive equal division that would exist under the FRA if there were no marriage agreement.
- [45] In final submissions, counsel for the respondent argued that it is unnecessary to spend much time on the question of the unfairness at the time the agreement was entered into, if the Court concludes that the Marriage Agreement is presently unfair in light of the parties' circumstances as they evolved after the Marriage Agreement. In other words, the latter position was the respondent's focus.

Family Assets

- [46] It is important when considering the parties' assets to distinguish between what is a family asset subject to presumptive equal division under the FRA, and what is not.
- [47] Family assets are defined by s. 58 of the FRA to include property owned by either spouse and "ordinarily used" by a spouse or a minor child of either spouse "for a family purpose". That includes, under s. 58(3): (c) money in an account with a savings institution if that account is ordinarily used for a family purpose; (f) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan; and (e) a right, share or 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.
- [48] Where the claim to a family asset is based on the ordinary use of that asset, the party disputing that it is a family asset has the onus of proving that the property was not ordinarily used for a family purpose: FRA, s. 60.
- [49] The parties did not address their submissions to any authorities in support of what was or was not a family asset; rather, they simply made conclusory statements that an asset either was or was not a family asset.
- [50] It appears that the parties were operating under the assumption that the majority of the assets accumulated during the marriage were family assets subject to a few exceptions. However, some assets were in dispute.
- [51] The main asset owned by the claimant under dispute is HPHC, a company that holds the property from which she runs her medical practice. The claimant's position is that HPHC is not a family asset; the respondent's position is that it is. Relevant to this dispute are ss. 58(3) and s. 59 of the FRA. In summary, in order to prove that HPHC is a family asset the respondent is required to show that the property owned by HPHC would be a family asset if owned by the claimant; or that he made direct or indirect contributions to HPHC.
- [52] Also at issue are shareholder loans owed to the claimant by HPHC. The authorities suggest that if the shares of HPHC are a family asset, so too would be the shareholder's loan: see *Joki-Hollanti v. Joki-Hollanti*, [1990] B.C.J. No. 585 (S.C.), 1990 CanLII 974, and *Ahn v. Ahn*, 2007 BCSC 1148 at paras. 66-70.
- [53] The respondent's inheritance from his uncle during the marriage, and held in a Lloyds Bank account, raises issues as well. The respondent's position is that it is not a family asset.
- [54] The parties also disagree on the status of the respondent's ownership of an interest in a property in England, 10 Wilmot Place, purchased by his parents. The respondent's position is that it is not a family asset, and the claimant's position is that it is a family asset.

- [55] The respondent's inheritances from his parents who died post-separation were received after the s. 57 declaration. There is no question that they are not family assets. The claimant made no argument and called no evidence to suggest that they were family assets.
- [56] Assets of the parties that are not family assets, which are sometimes called other assets or non-family assets, are not subject to the presumptive equal division but may be considered in a claim for reapportionment of property.

Spousal Support

- [57] Claims for spousal support are available to litigants under ss. 160-162 of the FLA or s. 15.2 of the Divorce Act. These provisions are substantially similar and any differences between them are immaterial: *Hutchen v. Hutchen*, 2014 BCSC 729 at para. 38.
- [58] The claimant made submissions advancing a claim for spousal support pursuant to both statutes. I pause to note that the claimant has not pleaded either of these statutes as the foundation for her claim for spousal support.
- [59] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, the Supreme Court of Canada said support obligations can arise on three different bases - contractual, compensatory, and non-compensatory - and that any or all may factor into any particular case.
- [60] As provided in the Divorce Act, any orders for spousal support should (1) recognize any economic advantages or disadvantages arising from the marriage and its breakdown; (2) apportion between the spouses any financial consequences arising from the care of their children; (3) relieve any economic hardship of the spouses arising from the breakdown of the relationship; and (4) promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [61] With these objectives in mind, the Court must look at the "condition, means, needs and other circumstances of each spouse" to determine an appropriate spousal support order.

Issues for Determination

- [62] The key issue at trial concerned the fairness of the Marriage Agreement and whether it should govern the division of assets or not. There are also questions as to the division of other assets.
- [63] The following are the issues I find it necessary to determine:
- a) What were the factual circumstances surrounding the entering into of the Marriage Agreement?
 - b) What were the parties' financial circumstances at the time of entering into the Marriage Agreement?

- c) What were the circumstances that evolved after the Marriage Agreement was entered into, including at the time of the s. 57 declaration (January 2007), and what are the circumstances now?
- d) Would division of property in accord with the Marriage Agreement be unfair?
- e) What is an appropriate division of property?
- f) Is the claimant entitled to spousal support?
- g) Are any other orders appropriate?

Facts

Background

- [64] The claimant was born in Poland in 1952; the respondent was born in Britain in 1953. The claimant moved to Britain in early 1974 and began attending medical school where she met the respondent.
- [65] When the parties married in December 1978 they both brought some property into the marriage. The claimant sold the house she owned and invested the money into the home owned by the respondent in Newcastle. He had rented out units in the home before they got married. After their marriage, the parties renovated the house and it became their family home.
- [66] Both parties qualified as medical doctors in 1979.
- [67] After the marriage, the parties combined their financial affairs.
- [68] In 1985 the claimant passed her certification to become a specialist in family practice. The respondent passed his specialization exams in pediatrics.
- [69] In 1985 the couple moved to Texas at the initiative of the respondent who began working in the area of infectious diseases with a leading medical institution. There the claimant also got a research position in family practice. The claimant's research position was unpaid work but she felt it was good experience.
- [70] The parties' first child was born in Texas.
- [71] In 1987 the parties returned to Britain. The respondent took up a position in infectious diseases in Oxford. The parties sold their home in Newcastle and bought a home near Oxford, financed in part by a mortgage.
- [72] The claimant enlisted her mother to assist the family which she did, helping supply them with nannies.
- [73] The claimant began to work as a family practitioner in Oxford.

- [74] In July 1991 the parties moved to Vancouver after the respondent was offered a position with the University of British Columbia. The claimant testified that the parties first expected to move approximately one year earlier, and the claimant gave up her job to enable this to happen so for a period of time in England her income was suspended, although she got some temporary work.
- [75] In 1991, the parties used the proceeds of sale of their home in the UK, and some profits from futures currency trading, towards the purchase of their first home in Canada, on Rose Crescent in West Vancouver. This home purchase was also financed by a mortgage.
- [76] The claimant testified that her mother also gave them a large sum of money towards the purchase of the Rose Crescent property, which the respondent denies. I prefer the respondent's evidence in this regard given the lack of any supportive documentation and the tendency of the claimant to overstate her evidence.
- [77] Both parties discovered they had to take exams in order to qualify as doctors in Canada. Both passed their exams.
- [78] In 1994 the claimant opened her own medical practice as a sole family practitioner. A year later she incorporated MDI. Her uncontradicted evidence is that she has enjoyed a successful medical practice and is an excellent general practitioner.
- [79] In approximately 1995, the claimant's mother came to live with them in West Vancouver to assist with childcare.
- [80] Also in 1995, the parties sold their home on Rose Crescent and bought a more expensive home on Rockridge Road, also in West Vancouver. The claimant's mother provided some money towards renovations, as did the respondent. A mortgage was taken in the amount of approximately \$189,000, and the purchase price was approximately \$835,000.
- [81] In October 1996 the claimant had a back operation. She was off work for two months but back to work by Christmas 1996.

Circumstances of Marriage Agreement

- [82] At the end of April 1997, the parties had an altercation. There are two different versions of what happened but both agree that at the end of it the respondent slapped the claimant hard in the face, leaving her bruised.
- [83] The respondent felt very sorry for what he had done. The couple began to attend marriage counselling. Things then improved for a while in the marriage.

Claimant's Version of Marriage Agreement Circumstances

- [84] The claimant says the impetus for the Marriage Agreement came after she learned that the respondent's brother had given to his wife shares of the company, Richard Irvin & Sons Limited ("Richard Irvin"). According to the claimant's understanding (which was incorrect),

this was a family company owned by the respondent and his brother. The claimant says that after learning about the brother's transfer to his wife, the respondent told her that rather than give her shares in the company he would give her something else. That something else was his share of the family home, for her future security.

- [85] The claimant says the respondent told her he would obtain a lawyer to draw up the agreement.
- [86] The claimant says that after about a week, the respondent came to her and said he could not find a suitable lawyer and asked her if she knew any lawyer to draw up the contract. She had a lawyer for her incorporated medical practice and asked for a referral. Her lawyer referred her to a lawyer within the same firm, a family lawyer, Paul Albi.
- [87] Mr. Albi testified at trial.
- [88] Mr. Albi drafted the Marriage Agreement. He forwarded it to the respondent by cover letter dated May 8, 1997. Mr. Albi's cover letter set out that his instructions were that the respondent had agreed to the concept contained in the draft agreement and had also agreed to attend marriage counselling.

Respondent's Version of Marriage Agreement Circumstances

- [89] The respondent says the impetus for the Marriage Agreement came from the claimant. They were attending counselling following the altercation, and the letter from Mr. Albi enclosing a marriage agreement came as a complete surprise to him.
- [90] The respondent says that the claimant threatened to end the marriage if he did not agree to the Marriage Agreement.
- [91] The respondent did not know any lawyers but ended up seeing a lawyer by the name of Henning Wiebach. Mr. Wiebach recommended the respondent not sign the agreement as in his opinion it was unfair.
- [92] Mr. Wiebach wrote a letter to Mr. Albi dated May 15, 1997. Mr. Wiebach noted that the marriage had developed difficulties recently and the respondent was under considerable stress and was desperate to preserve his marriage. He wrote: "considering the terms and effect of the marriage agreement it is our considered opinion that it would be an act of professional negligence for any solicitor to provide [the respondent] with such a certificate of independent legal advice in connection with the proposed agreement having regard to all the circumstances".
- [93] Mr. Albi gave evidence that when he received the letter in which Mr. Wiebach stated that he refused to witness the Marriage Agreement, he passed the letter on to his client, the claimant. The claimant challenges that evidence.

- [94] The respondent then contacted another lawyer, Ron Perrick. Mr. Perrick had acted on the parties' house transfer years earlier.
- [95] Mr. Perrick was called by the claimant as an adverse witness at trial. He testified that he met with the respondent who said he wanted to sign the Marriage Agreement. Mr. Perrick testified that he gave the respondent advice not to sign the agreement. However the respondent insisted on signing it.
- [96] Mr. Perrick testified that he suggested to the respondent that he try to negotiate some of the terms with the claimant but the respondent did not wish to do so and instead wanted to sign it.
- [97] Mr. Perrick then drafted a letter from the respondent to Mr. Perrick in which the respondent acknowledged having received advice not to sign the agreement. The respondent signed the said letter which also stated that he was satisfied it was an agreement he wished to conclude.
- [98] The respondent testified that he was so worried about the bringing up of their children without his presence in the home, who were still young, that he went along with the agreement even though he received legal advice that it was unfair. He believed the claimant's threat that there would be a divorce if he did not sign it.
- [99] The respondent's evidence was that what he received in return for signing the Marriage Agreement was the continuation of the marriage. At the time he still wanted the marriage to continue. He also felt that he was the better parent and did not want to leave the raising of the children to the claimant. He was concerned that if they split up she would obstruct his access to the children.
- [100] The respondent's evidence was that the Marriage Agreement had nothing to do with his brother's transfer of Richard Irvin shares to his brother's wife, which had occurred years earlier.
- [101] The respondent's evidence was that shares in Richard Irvin were passed down from his grandfather to his mother, who then passed them to her three children: the respondent, his brother, and his sister. He inherited 100,000 of these shares at age 21. Although it is a private company, there are other shareholders besides his immediate family members. If the company was doing well, it would pay dividends, and he would receive no more than GB £6,000 per year. After the parties married, these dividends were used for general spending by them. The shares or dividends were held in a Lloyds Bank portfolio account which eventually ended in the number 5 (dealt with below as Lloyds Portfolio 5).

Preferred Version

- [102] I prefer the respondent's evidence as to the circumstances leading up to the Marriage Agreement.

- [103] The claimant's evidence is contrary to common sense and inconsistent with the evidence of Mr. Albi and Mr. Perrick as to the circumstances surrounding the Marriage Agreement. It makes no sense that the respondent would offer to give his interest in the house to her instead of Richard Irvin shares, when according to the claimant's position in this case the shares were a family asset and she was entitled to half in any event. The Marriage Agreement did not provide that the Richard Irvin shares would be treated as the respondent's sole property and so was not documenting any trade-off of "house versus shares".
- [104] I believe the respondent's evidence that there was no conversation near in time to the Marriage Agreement about the Richard Irvin shares or what his brother did with his shares.
- [105] The timing of the Marriage Agreement came soon after the hitting incident and I find that was the impetus for it. I find that the respondent was deeply ashamed of what he had done, in hitting the claimant. He therefore was willing to give her whatever she wanted as a result. The Marriage Agreement was just part of his penance.
- [106] I find that the respondent believed the claimant's threat that he had to sign the Marriage Agreement to keep the marriage together.
- [107] The respondent was very worried that if the marriage did break down, his access to the children would be limited and obstructed by the claimant, and they would be raised in an unhealthy atmosphere without his influence.
- [108] The evidence also leads me to conclude that the hitting incident gave the claimant a feeling of moral superiority and victimhood and the feeling that she had the right to demand what she wanted. The claimant may also have been worried about the marriage falling apart as clearly the couple had not been functioning as a happy couple, and she wanted to make sure she would have the family home for her and the children if it did.
- [109] Nevertheless, I find that the claimant extracted the respondent's agreement to the Marriage Agreement as a form of emotional blackmail, threatening that the marriage would be over and she would divorce him if he did not sign it.

Marriage Agreement Content

- [110] The Marriage Agreement as proposed by the claimant's lawyer was thus entered into by both parties, without any negotiated changes or changes made at the request of the respondent.
- [111] Recital E of the Marriage Agreement stated that "[b]oth parties are established physicians and each is economically independent and self-sufficient".
- [112] Recital H of the Marriage Agreement stated that the parties intended, by the agreement "to provide for the financial security of [the claimant]".

[113] Recital C of the Marriage Agreement stated that:

The parties are entering into this Agreement:

(iii) to resolve ownership in, and division of, family assets and other property including without restricting the generality of the foregoing, the Rockridge Home and the MDI shares referred to in recital F, on the making of an Order for dissolution of marriage, a section 44 declaration under the Family Relations Act, R.S.B.C. 1979, c. 121, as amended ("Act"), or a declaration of nullity of marriage.

[114] As noted in the above quoted excerpt, the terms of the Marriage Agreement referenced the 1979 Family Relations Act (the "1979 FRA").

[115] The relevant provisions for division of property in the 1979 FRA were substantially similar to that of the FRA in place at the time this proceeding was commenced and reviewed above in the "legal principles" section of this judgment.

[116] Under the terms of the Marriage Agreement, the respondent agreed to transfer his interest in the family home to the claimant. The parties agreed that the home would thereafter be the claimant's sole property during the marriage and notwithstanding the occurrence of any of the events enumerated in s. 43 of the 1979 FRA (the predecessor to s. 56 of the FRA) - i.e. on marriage breakdown including the triggering event of a declaration of no reasonable prospect of reconciliation. The family home was defined to include all proceeds from the sale of the family home, any assets acquired with the proceeds of sale and any income derived from those assets.

[117] The Marriage Agreement also provided that the MDI shares would be the claimant's sole property during the marriage and remain so afterwards.

[118] The Marriage Agreement provided that in the event of the occurrence of any of the events enumerated in s. 43 of the 1979 FRA, (the predecessor to s. 56 of the FRA and thus including the triggering event of a declaration of no reasonable prospect of reconciliation) with the exception of the family home and the MDI shares, the division of assets would be governed by the provisions of Part 3 of the 1979 FRA.

[119] Part 3 of the 1979 FRA included provisions substantially the same as under the FRA in force at the time of the parties' marriage breakdown and outlined earlier in this judgment, namely, definitions as to what is a family asset, presumptive equal division of family assets, the binding nature of marriage agreements, and judicial reapportionment of property where equal division or division under the marriage agreement would otherwise be unfair (s. 65 of the FRA was the successor to s. 51 of the 1979 FRA).

[120] The Marriage Agreement provided that the division of assets upon marriage breakdown would be made excluding completely from consideration the claimant's ownership of the family home and MDI shares, and would be based on the assumption that those assets do not exist (clause 3 of the Marriage Agreement).

- [121] The Marriage Agreement provided that upon the marriage breakdown events occurring, the parties would agree on the division of the other assets and failing agreement refer the matter to a sole arbitrator. I pause to point out that neither party sought to refer the issue of division of assets to an arbitrator after the eventual marriage breakdown.
- [122] The Marriage Agreement contained a clause whereby each party acknowledged having read the agreement and having been independently advised of its legal effect, entered it voluntarily.
- [123] Each party signed the Marriage Agreement and obtained a certificate of independent legal advice.
- [124] Mr. Perrick signed the solicitor's certificate of independent legal advice with respect to the respondent. This stated amongst other things that the respondent did not appear to sign the agreement as a result of any undue stress, fear, duress, improper understanding, undue influence, or false inducement and, in fact, signed it with "an apparent willingness and understanding which evidenced to me that he signed the Agreement because he felt it was fair and in his best interests to do so".
- [125] On the same page as the certificate of independent legal advice, the respondent confirmed that Mr. Perrick gave him legal advice and that his observations of him were correct.
- [126] I find and it is not disputed that the respondent received legal advice and understood the implications of the Marriage Agreement before signing it. In other words, he signed it despite receiving and understanding advice that it was unfair to him.

Financial Circumstances at the Time of the Marriage Agreement

- [127] The parties did not do a listing of assets at the time of the Marriage Agreement or exchange any financial information.
- [128] However, both had generally combined their financial resources and there is no suggestion that the claimant was hiding assets from the respondent.
- [129] Recital G of the Marriage Agreement stated that:

Each party has a general knowledge of the financial affairs of the other and neither requires comprehensive financial disclosure from the other for the purposes of this Agreement.

- [130] The fact is that neither party made an attempt to analyze the value of their assets and to understand what share of the total value was represented by the family home. This was largely irrelevant to them as they were not attempting to make any kind of fair division of assets; they were simply agreeing to give the claimant what she wanted.

Family Home

- [131] It was clear that at the time of the Marriage Agreement the family home was the parties' most valuable asset. It had been purchased in 1995 for \$835,000 with a mortgage of \$189,000. The mortgage against it was stated to be in the amount of approximately \$180,000 owing as of the date of the Marriage Agreement. No appraisal of the home was made at the time, but the 1997 assessed value for property tax purposes was \$763,000.
- [132] A transfer of Mr. Dobson's undivided one-half interest in the family home to Ms. Dobson was registered on June 25, 1997. It described the market value of Mr. Dobson's one-half interest to be \$600,000. This would put the total value of the home at \$1.2 million, which counsel for Mr. Dobson argues is likely an accurate estimate as of 1997 since the parties had done some renovations to the home. This contention is difficult to accept absent appraisal evidence or any explanation as to how that number was arrived at.
- [133] The claimant argued at trial that the \$600,000 on the property transfer represented the total value of the home, and that Mr. Dobson's one-half interest was therefore only worth \$300,000 in 1997. I note that if someone looked at the property assessment and deducted the outstanding mortgage the net value of the home was close to \$600,000 in rough terms. However, this would not normally be the way a property is valued on a transfer. It may be that whoever put the figure in the transfer wanted to choose a very conservative number.
- [134] What evidence there is does support the conclusion that there was substantial equity in the home at the time of the Marriage Agreement, of close to \$600,000, which equity had been contributed to by both of the parties through their previous property sales. It was also Mr. Dobson's evidence that his income was the main source for the mortgage payments that had been made on the family home and this was not seriously challenged. He had therefore contributed more of his income towards the asset than had Ms. Dobson.
- [135] Given that there was no evidence of any agreement as to the value of the family home at the time of the Marriage Agreement, I do not consider the figure in the property transfer to be any kind of admission against interest or proof of the value of half of the home or 100% of the home.
- [136] At best it might be estimated that the value of one-half of the home could have been in the range of \$300,000 to \$600,000.
- [137] As for other assets, both parties had some financial assets.

Canada Life Policies

- [138] The parties each had Canada Life insurance policies at the time of the Marriage Agreement. The exact cash surrender values at the time of the Marriage Agreement are not in evidence, but it is not disputed that these assets were family assets. The evidence suggests that the respondent's policies were worth almost twice as much as the claimant's by the date of separation in 2006, at which time his policies totalled approximately GB £103,032 and hers

totalled approximately GB £55,568. It can be inferred from the evidence that this proportion was roughly the same in 1997 but the cash surrender values would have been less on the assumption that the values grew over time.

- [139] The parties also had a joint Lloyds Bank account (the "Joint Lloyds Account"). This account dated back to approximately 1991 when they moved to Canada and they combined their existing accounts into one. It was from this account that they paid the premiums on the Canada Life insurance policies. The respondent's evidence was that he was the one who put money into the Joint Lloyds Account. There is no suggestion that there was any significant balance in the account as at the time of the Marriage Agreement.
- [140] As for other assets held at the time of the Marriage Agreement, there are two worth mentioning: (1) the respondent's ownership of 100,000 shares of Richard Irvin and (2) the respondent's inheritance from his uncle Richard Meikle.

The 100,000 Richard Irvin Shares

- [141] The 100,000 Richard Irvin shares were treated as a family asset, given that the dividends were used for family purposes. This suggests they likely would have been divided under a presumptive equal division pursuant to the FRA had the parties in fact separated around the time of the Marriage Agreement. The parties appear to agree on this.
- [142] The claimant introduced some documents at trial that indicated as of March 2006, the respondent's 100,000 Richard Irvin shares were shown as having a market value of 85 pence per share, and paid a dividend of two pence per share for a total of GB £2,000 in 2007.
- [143] This is a private company and the market value information is inconclusive.
- [144] Regardless, as mentioned the claimant did not consider the Richard Irvin shares to be the respondent's to keep; she considered them a family asset subject to equal division.

Estate of Richard Meikle

- [145] As for other assets, just a few months before the Marriage Agreement the respondent's uncle, Richard Meikle, passed away near the end of November 1996. The respondent was informed in December 1996 that he would receive a barometer, fishing rods, and GB £10,000 from the estate.
- [146] Later, the respondent learned he would be getting more assets from his uncle's estate, due to some steps taken by his mother which resulted in a "deed of variation" in March 1997. In any event, the respondent ended up getting more furniture and more financial assets.
- [147] The respondent ended up receiving from his uncle's estate financial assets worth approximately GB £151,336, some in cash and some in stocks, paid in tranches over a time period with the last payment in 1999.

- [148] The evidence was unclear as to whether the respondent and claimant knew what the respondent was expecting to receive from his uncle's estate at the time of the Marriage Agreement. However, the implication from the claimant's evidence is that as at the time of the Marriage Agreement she knew he was receiving an inheritance from his uncle that would place him in a much stronger position financially than she was in.
- [149] The claimant in cross-examination stated that the respondent received approximately \$700,000 from his uncle's estate, more than GB £300,000. This appears to be a misreading of some of the documents by her. However, according to her evidence the exchange rate was about 2.3 at the time the respondent inherited, which means the GB £151,336 he received would have been worth approximately \$348,000.
- [150] At the same time, the claimant's evidence was that she was not renouncing her own claim to a share in that estate if the marriage continued. In other words, her receipt of 100% of the family home under the Marriage Agreement was not an express trade-off for the respondent being able to keep 100% of his uncle's inheritance.
- [151] I will come back to this, but the respondent's evidence was that he put all or some of the financial assets received from his uncle's estate in a Lloyds Bank Private Banking portfolio in Guernsey, based on the bank's recommendation, in approximately 1998 or 1999. He combined in that account some stocks and shares he had been gifted earlier from his grandfather that had not gone into the purchase of the family's previous home in England.
- [152] This appears consistent with the claimant's understanding. She believed the respondent put the money he received from his uncle's estate in a Lloyds Bank portfolio and had around \$380,000 in that account when they separated. He also had some money and shares in that account left to him by his grandfather. Her evidence was that they planned to use it in retirement.
- [153] The respondent is claiming that the said Lloyds Bank Private Banking portfolio, which was paid out to him years later and after separation, is not a family asset or alternatively, if it is, it should be allocated solely to him. I will address this asset again later as Lloyds Portfolio 3.

MDI

- [154] The respondent does not argue that the provision in the Marriage Agreement preserving MDI as the claimant's sole asset was contrary to the way assets would have been divided on marriage breakdown if the FRA applied. The value of MDI as at the Marriage Agreement was really not an issue, as it was merely the vehicle through which the claimant billed her medical services and deducted expenses against income.

Analysis re: Marriage Agreement and Family Home

- [155] The provision in the Marriage Agreement giving the claimant sole ownership of the family home, and removing it from consideration when dividing other assets, was significantly different than what would have occurred under the FRA had it governed at the time of the marriage breakdown.
- [156] Both spouses had combined assets and financial resources during the course of the marriage and so both of them contributed to the family home. Both were stated in the Marriage Agreement to be self-sufficient, which they were.
- [157] Had the marriage broken down at the time of the Marriage Agreement, under the FRA the most likely result is that both would have been entitled to an equal share of the family home as well as an equal share of other family assets, without reapportionment.
- [158] Nevertheless, the respondent's loss of an equal share of the family home, at a minimum net value of approximately \$300,000, did not leave him without his own resources. He had or was immediately about to receive an inheritance from his uncle. This inheritance had not been used for family purposes, and had the parties' marriage ended at the time of the Marriage Agreement, likely would not have been considered a family asset. The value of the inheritance on the evidence was in the range of just over \$300,000.

Contemplation for the Future

- [159] At the time of the Marriage Agreement, neither party appeared to have contemplated what the future would be like if they stayed together and the marriage did not break down. There was simply no discussion of this.
- [160] It also is important to rule out the notion of a prospective future inheritance from the respondent's parents playing any role in the parties' considerations at the time of the Marriage Agreement. This was not discussed and was not raised by the claimant in her evidence as a factor in consideration at the time of the Marriage Agreement. Likewise the claimant's future inheritance from her mother, who was financially well-off according to the claimant, was not taken into account.

Conclusion re: the Circumstances of the Marriage Agreement

- [161] I find there was no procedural unfairness at the time the Marriage Agreement was entered into. The respondent was able to obtain legal advice and to understand the content of the agreement.
- [162] The Marriage Agreement terms varied significantly from what would have been the result under the statutory regime. Instead of an equal division of family assets, which likely would have been applicable under the FRA, the Marriage Agreement gave the parties' most significant family asset, the family home, to the claimant alone.

- [163] I find that the circumstances of the recent physical altercation and marriage counselling more likely than not led to very short-term thinking on the part of the parties, namely, what would happen if the marriage broke down in the near future. The respondent was willing to commit to trying to make the marriage work, by going to counselling, plus he was willing to agree that if the marriage broke down the claimant would have the family home. The claimant was willing to stay with the respondent and see if the marriage would survive, but only if he agreed to give her the family home. I find that neither party was thinking about the long term and what would happen if the marriage survived the more immediate pressures.
- [164] There was substantial emotional pressure being applied to the respondent by the claimant, which allowed her to extract an agreement which was on its face unbalanced and deprived the respondent of an equal share of the parties' most significant family asset.
- [165] However, had the marriage broken down immediately, the respondent would not have been left significantly disadvantaged by giving up his share of the equity in the family home as he had roughly equal financial resources due to his inheritance from his uncle.
- [166] While the Marriage Agreement did not expressly provide for the respondent's sole ownership of his inheritance from his uncle, it was the likely result of how that property would have been treated had the marriage ended soon after the agreement was entered into.
- [167] In the result, although I am very troubled by the emotional pressure placed by the claimant on the respondent, I do not find the substance of the Marriage Agreement unfair in its effect as at the time it was entered into.

Circumstances Following Marriage Agreement Until Separation

- [168] The marriage did not break down immediately following the Marriage Agreement, but continued on for another approximately nine years before the parties decided to separate.
- [169] During that time, the parties' children grew up from their young ages of almost 11 and 7 at the time of the Marriage Agreement, to almost 20 and 18 years of age at the time of separation at the end of 2006.
- [170] Following the execution of the Marriage Agreement, the respondent transferred his interest in the family home to the claimant. Thereafter the claimant remained the sole owner on title to the family home.
- [171] Despite this, all of the respondent's income went into family expenses, including paying for the mortgage on the family home.
- [172] The family home mortgage amount was approximately \$180,000 at the time of the Marriage Agreement. The respondent's evidence, supported by bank statements, established that his income continued to pay the mortgage payments until it was paid off in approximately

2003.

- [173] The total the respondent paid towards the mortgage debt on the family home, from January 1997 to the time the mortgage balance was paid off in 2003, was \$248,379. Subtracting the payments the respondent made from January 1997 to May 1997 of approximately \$11,332, this means the total of the mortgage payments made by the respondent on the family home with respect to the original purchase of it, after the May 1997 Marriage Agreement and until the date of separation, was approximately \$237,000.
- [174] In 2006 the claimant's mother had been gardening at the parties' home in a part of the yard that has a steep drop when she fell and injured herself. After some time rehabilitating in hospital, she died unexpectedly, possibly from a blood clot, on August 1, 2006. The respondent remembers that the claimant was quite angry around this time.
- [175] In December 2006, the respondent was served with this proceeding, commenced by the claimant. Because one of the children was coming back home from university for Christmas, the parties agreed that the respondent could stay in the home until the end of December, which he did. He moved out on December 28.
- [176] The respondent's income and savings paid for the education of the parties' two children from 2006 onward, including medical school education in the UK. The claimant admits that the respondent paid approximately \$334,000 for the children's university and medical school expenses. The majority of this was from 2007 forward.

Circumstances after Separation

- [177] On January 25, 2007, the court made a declaration pursuant to s. 57 of the FRA that there was no reasonable prospect of reconciliation. That is the "triggering event" for determining family assets under s. 56(1)(b) of the FRA.
- [178] It is helpful to consider what would have been the situation in relation to division of family assets at that time, absent the Marriage Agreement, and what is the situation as at trial or as close to trial as is known based on the available evidence.

Family Home

- [179] The assessed value of the family home for property tax purposes in 2006 was \$1.485 million.
- [180] The parties agree for the purposes of trial that the value of the home is \$3.4 million.
- [181] Given the respondent's contribution to the family home and family expenses and the combination of the parties' financial resources, absent the Marriage Agreement I find that the family home would have been considered a family asset under the FRA as at January 2007 -- the "trigger date" -- and as at trial.

MDI

- [182] The respondent does not claim that MDI is a family asset, and so the fact that the Marriage Agreement excludes it from consideration or division is not a significant factor to consider in determining whether to enforce the Marriage Agreement.
- [183] Nevertheless it would be wrong to ignore that MDI has value in it.
- [184] The MDI financial statements as of December 31, 2006 showed retained earnings of \$117,516; shareholder advances of \$23,263 (meaning amount due to claimant); and amount due from HPHC of \$21,612.
- [185] The balance sheet for MDI produced for income tax purposes for the year end 2014 contains very little detail. As of December 2014 it appears that the amount due to it from HPHC was \$20,597. It suggests the company had retained earnings that year of \$31,672 and had amounts due to corporate shareholders of \$43,290 (the latter presumably is meant to be amounts due to the claimant).

Scotiabank GICs

- [186] The claimant's Form F8 financial statement sworn February 13, 2008 is the financial statement produced by the claimant closest in time to the parties' separation which was at the end of 2006.
- [187] In that financial statement, the claimant identifies that she had a GIC with Scotiabank which she cashed in January 2008 for approximately \$12,930.
- [188] In her same financial statement the claimant identified holding other Scotiabank GICs in the amounts of \$23,306 and \$6,097.
- [189] As of the claimant's financial statement sworn February 4, 2015, the only Scotiabank GIC listed is valued at \$6,855. This would suggest that by that time she had cashed in the GIC worth \$23,306 but she was not questioned and gave no evidence about this.
- [190] There is not sufficient evidence to identify the GIC as a family asset.

TD -- Spousal RRSP

- [191] The claimant as of September 2015 held a "spousal RRSP" investment with the Toronto-Dominion Bank ("TD"), in mutual funds. A statement she produced in a binder marked Ex. 44 at trial identified the market value as at September 30, 2015 as \$14,088. This was contributed to by the respondent and pre-existed separation, as it was formerly an investment in a fund known as the Bulldog Fund. It is a family asset.

Bulldog Fund -- Spousal RRSP

- [192] The claimant alleges that the respondent had an RRSP invested in a fund known as the "Bulldog Fund", worth \$1.3 million approximately, which he has not disclosed. She argued this was so based on a single page document apparently produced by Bulldog Fund that did not appear to be an account statement and certainly not an account of the respondent's. She then claimed that she gave documents to her former lawyer to prove this and he then lost the documents. Her evidence on this was not credible.
- [193] The respondent explained that he invested a small amount of money in a spousal RRSP, in the claimant's name, during the marriage. By December 31, 1997 it was worth a total of \$10,756. The respondent's documents in relation to the investment were part of Ex. 55, tab 40 at trial, and included in the group of documents was the single page relied upon by the claimant to make her out-of-context allegations.
- [194] But this was also one of several examples where the respondent appeared to have produced explanatory documentary evidence but his counsel did not ask him about it in direct examination, leaving the Court to put the pieces of the puzzle together. On review, these documents produced by the respondent and marked as an exhibit at trial include a letter from a law firm dated September 14, 2000 identifying that the Bulldog Fund would be wound up, and that TD would offer a full range of alternative products.
- [195] I infer that what became of this spousal RRSP is that it was rolled into the TD Spousal RRSP. It was never a \$1 million plus asset owned by the respondent and hidden by him, as suggested by the claimant.

Scotiabank RRSP

- [196] The claimant listed an RRSP with Scotiabank as one of her assets in her Form F8 financial statement sworn February 4, 2015, with a value of \$223,445.
- [197] The claimant was contributing to this RRSP before the marriage breakdown. She claims to have only added \$50,469 towards this investment by way of contributions from 2007 through 2015 (Ex. 44). As an RRSP that existed before the separation, it is a family asset.

Household Contents

- [198] The claimant kept the majority of the household furniture and contents upon the parties' separation. These were family assets. They were appraised and valued at approximately \$84,000.

BP and BT Shares

[199] The claimant holds 3610 British Petroleum ("BP") and 1334 British Telecom shares ("BT"). The value of these shares fluctuates with the market. Just like the Richard Irvin shares, neither party obtained a valuation. The claimant appeared to accept that a conservative estimate of value would be GB £1,000. The respondent does not advance a claim to a division of these shares.

Joint Lloyds Account

[200] At the time of separation there was a joint Lloyds Bank account in both parties' names ending in number 175, which was used mainly as the source for paying Canada Life premiums for the policies held in the names of the two parties. I referred to this account earlier as the Joint Lloyds Account. The respondent paid funds into this account from time to time.

[201] The balance in this account appears to have been GB £552.43 as at December 21, 2006.

[202] The respondent continued to deposit money in this account in order to maintain both parties' premiums on their Canada Life insurance policies until July 2011.

[203] The claimant withdrew GB £902.68 from this account to pay for a vacation in June 2012.

[204] As of the beginning of August 2014 the balance in the account was GB £2,362.78 which the respondent estimated to be in the range of the equivalent of \$4,000.

[205] As a bank account ordinarily used for family purposes, the balance of the account would be a family asset: FRA, s. 58(3)(c).

[206] The Joint Lloyds Account remains open but the balance as of today was not in evidence. What was proven is that any balance is solely due to deposits into the account by the respondent since separation.

Canada Life Policies

[207] As mentioned, by the date of separation the cash surrender value of the respondent's Canada Life policies was approximately GB £103,032 and the claimant's was approximately GB £55,568. It is not disputed that these are family assets.

[208] The respondent's evidence is that he continued to pay the premiums on the policies after separation including on the claimant's policies.

[209] In 2011, the claimant cashed in the Canada Life policies in her name with a value of approximately \$125,000 and used the money elsewhere. She concedes this family asset has to be accounted for in the division of assets.

[210] The respondent's Form F8 financial statement identified that he has four Canada Life policies, two of which required continuing premiums which he has paid, and two of which do not. The total cash surrender value of those policies appears to be GB £127,620 as of 2012 and there was no suggestion that this value has diminished.

Scotiabank Accounts

- [211] If not mentioned in this judgment, I have not considered material the amounts expended by each party or taken from bank accounts in the almost 10 years since separation. The parties did not provide me with sufficient tools to engage in an accounting exercise tracking these expenditures and it would be disproportionate to do such an accounting when compared to the already considerable resources expended on this case.
- [212] During the marriage the parties had a joint savings bank account with Bank of Nova Scotia ("Scotiabank") ending in numbers 5627 into which the respondent's payroll income was deposited. The mortgage payments would be automatically deducted from this account.
- [213] The parties also had set up automatic payments of \$3,000 from the joint savings account twice per month for a total of \$6,000 to a joint chequing account with Scotiabank to pay for expenses.
- [214] As of February 2007, the claimant closed both of the joint bank accounts with Scotiabank.
- [215] During the marriage, the respondent also had a savings account with Scotiabank in his own name in which he deposited his income received from Medical Services Plan of B.C. ("MSP") billings and on-call billings. He transferred money from this account to pay for family expenses. The balance would therefore be considered a family asset.
- [216] After the parties separated, as of the end of January 2007 the respondent began depositing his payroll into this account as well.
- [217] This account, ending in number 81, had a balance of \$10,590 as at December 31, 2006. The same account had a balance of \$10,739.40 as of July 31, 2015.
- [218] Since separation there have been different Scotiabank savings accounts used by the respondent; the names and terms of the accounts have changed over time.
- [219] The respondent's Form F8 financial statement sworn September 24, 2014 formed part of the Trial Record and it was put to him in direct that he swore it to be true. The respondent had gone through the statement and updated it as of the summer of 2015 with his handwritten notes, and I accept his evidence in this regard to the extent it was not contradicted or updated with more recent information.

- [220] In this financial statement the respondent identified that he had an additional Scotiabank account in his name ending in number 29, which had a balance of \$41,791 as of December 29, 2006; and a balance of \$12,629.52 as of June 30, 2015. His evidence was that this account was funded by his income.
- [221] The respondent had transferred the equivalent amount of approximately \$100,000 out of this account in June 2006 to a Lloyds Bank account in order to have funds in British pounds sterling available to fund his daughter's UK education expenses. Since he was paying family expenses with this account, it would normally be considered a family asset.
- [222] The same Form F8 identifies that the respondent also had with Scotiabank:
- a) a mutual funds account in his own name with a balance of \$139,012 as of June 30, 2015;
 - b) a tax free savings account ("TFSA") with a balance of \$49,212 as at June 30, 2015; and
 - c) an additional savings account with a balance of \$5,287 as of June 30, 2014.
- [223] The respondent's evidence is that he opened the above accounts after separation which I take to mean after the s. 57 declaration since it followed soon after separation. These are therefore not family assets. These Scotiabank financial assets total approximately \$193,511.
- [224] The respondent also holds a Scotiabank RRSP with a value of \$16,874 as of June 30, 2014. His evidence was that he opened that "a bit before separation". His counsel did not ask more questions to establish whether the majority of contributions to it were before or after separation. As an RRSP owned before separation, it is a family asset.

Lloyds Portfolio 5 -- Richard Irvin Shares

- [225] The respondent's inheritance of 100,000 Richard Irvin shares, received during the marriage, was considered a family asset by both parties because the dividends were used to fund family expenses.
- [226] These shares were held in a Lloyds Bank portfolio account ending in number 5, which I earlier identified as Lloyds Portfolio 5.
- [227] The respondent's evidence is that this private company ceased paying dividends several years ago, probably around 2008, and was not doing well financially. He did not know how to value the shares but thought they were likely only worth pennies as when he investigated liquidating the shares in 2013 he believes they were only valued at 16 pence per share. The Lloyds Portfolio 5 statements showed merely a nominal value assigned by the bank to the shares and not a true market value.
- [228] The respondent received the share certificates for the 100,000 Richard Irvin shares back in his possession in Canada when Lloyds Bank informed him that it was getting out of the business of managing investment portfolios for Canadians and shut down the account in approximately the summer of 2015.

[229] In the summer of 2006, unconnected to any impending separation, the respondent transferred approximately \$100,000 from his Canadian savings account with Scotiabank to Lloyds Portfolio 5, held as British pounds sterling. I described this transfer earlier. The purpose of this was to have funds available to fund the education of the parties' daughter who was going to be attending medical school in the UK (later used to fund both daughters' educations in the UK), and to have funds available to continue paying the Canada Life insurance premiums. Used for family expenses, this account would be considered a family asset.

[230] As of the summer of 2015, some GB £21,970 cash also remained in the account and this was returned to the respondent when Lloyds Bank closed the account.

[231] The source of this money was the respondent's bank account before separation used for family purposes, and as such the cash returned to him should be considered a family asset.

Controversial Assets

[232] The larger assets that one could question as being family assets are:

- a) HPHC;
- b) inheritances received by the respondent and generally held in Lloyds Bank; and
- c) the respondent's interest in 10 Wilmot Place.

HPHC and Debt

[233] The claimant decided in 2003 to buy a commercial property to be the base for her medical practice, considering it a smart investment rather than to continue paying rent.

[234] She incorporated HPHC in 2003, and it purchased a commercial strata unit in North Vancouver in November 2003. It then charged rent to MDI for the space, and MDI ran the claimant's medical practice out of the premises. This arrangement continues to this day.

[235] The purchase of the HPHC property was financed in part by \$40,000 from the parties' joint bank account, plus a mortgage loan secured by a mortgage on the family home.

[236] The source of the \$40,000 is in dispute. The claimant's position is that it was money her mother gifted her, but that it was given by her mother in cash to the respondent who then put it in his bank account and transferred it from his bank account to their joint account.

[237] The respondent disputes this version of events and denies that the claimant's mother was the source of the \$40,000 paid towards the purchase of the HPHC property. On his evidence, as of 2003 he had a separate Scotiabank savings account in which he regularly deposited payments he received for "on-call" duties, which payments were made outside of his regular salaried duties. It was his practice to fund the parties' joint Scotiabank account with payments from his income, and in 2003 he transferred \$40,000 into the joint account. The claimant then used these funds in order to help purchase the HPHC property.

- [238] I accept the respondent's evidence as more likely than the claimant's evidence and as consistent with bank records. It would make no sense for the claimant's mother to give her \$40,000 in cash, as opposed to by bank transfer, and then instead of giving it to her directly, to give it to the respondent; nor is it likely if that happened that the respondent would have put it in his own savings account first before transferring it to the joint bank account if it was intended for the claimant all along.
- [239] Once the family home was mortgaged again to fund the HPHC property purchase, the mortgage payments initially were paid out of the joint account as they had been before. The respondent's income was the main source of money in the joint account during this period and funded these mortgage payments from January to July of 2004, at \$2,084 per month for a total of \$14,588.
- [240] After that the mortgage payments were directed to an account that the claimant funded.
- [241] Thus the respondent contributed roughly \$40,000 plus \$14,588 to the purchase of the HPHC property, which I will round up to approximately \$55,000.
- [242] The purchase price of the HPHC property was \$561,897.39 after adjustments. Since the respondent's cash contribution was early on, it can be seen as close to a 10% contribution at the commencement of the purchase of the property.
- [243] In addition, the respondent's history of making payments on the mortgage on the family home, after the Marriage Agreement, totalling approximately \$237,000, directly contributed to the equity in the home which allowed it to be leveraged by the claimant to purchase the HPHC property. This is another way in which the respondent made a considerable contribution to the purchase of the HPHC property.
- [244] I find that the property owned by HPHC would be a family asset if owned directly by the claimant, and that the shares of HPHC are a family asset due to the respondent's substantial contribution to the acquisition of the property.
- [245] Once the respondent ceased to be the source of mortgage payments, the claimant funded all of the expenses with respect to the HPHC property, including mortgage payments, strata fees, property taxes, and the like. She has tallied paying approximately \$195,376 by way of property taxes and \$318,183 by way of strata fees, from 2003 to 2015. However, in her analysis the claimant does not account for the rental income paid to HPHC by MDI.
- [246] The claimant also claims to have paid approximately \$508,000 worth of mortgage payments in relation to mortgages placed on the family home to fund the purchase of HPHC and ongoing expenses of HPHC. The evidence suggests that not all of these payments related to the purchase or maintenance of HPHC as opposed to personal expenses.
- [247] The parties agree for the purposes of trial that the value of the HPHC property as of trial is \$1,250,000 if not occupied by MDI; and \$1,100,000 if occupied by MDI.

- [248] HPHC does little more than hold the property out of which MDI operates the medical practice. The true value of HPHC is the value of the commercial strata property, less related debt.
- [249] It is very difficult to determine what amount of debt relates to the property owned by HPHC. In addition to the original, paid off mortgage against the family home, the claimant obtained a second mortgage and drew down on two lines of credit against the family home for financing HPHC, her medical practice, and other personal purposes including legal expenses in relation to this proceeding.
- [250] All of the loans secured against the family home were loaned by Scotiabank. As of December 31, 2014 the debt totalled \$470,703.
- [251] On February 5, 2015 the claimant obtained an order of Kent J. allowing her to take out further debt against the family home, up to \$250,000, without prejudice to the claims in this case. The claimant did so.
- [252] A statement produced by Scotiabank as of October 2015 indicated that the total debt secured against the home had risen to approximately \$789,000.
- [253] Nevertheless, the interest on the debt incurred by the claimant as against the family home is treated as a tax-deductible business expense of HPHC.
- [254] A balance sheet of HPHC as of December 31, 2014 identifies as liabilities \$20,597 due to related parties (MDI) and \$667,185 due to shareholder (the claimant).
- [255] It appears as though all or the majority of the loans taken on the family home are treated for accounting purposes by the claimant as loans from the claimant to HPHC, and due from HPHC to her. However, the claimant has agreed that some of the lines of credit were to pay for her legal expenses in this proceeding and her living expenses. She did not identify how much in this regard, but her revenues within MDI have been over \$300,000 in recent years and so it is difficult to see how it is that loans were needed to finance the practice or the property.
- [256] In my view it is fair to assume that at a maximum the loans related to HPHC would be that shown on the December 31, 2014 balance sheet. This is an approach which favours the claimant because it gives her the benefit of the doubt even though she has not clearly identified which loans relate to personal living expenses including legal fees in relation to this proceeding.
- [257] In my view the claimant's argument that she has paid all the expenses on HPHC does not go far, given that the financial statements take account of amounts due to the shareholder.

- [258] The evidence is less than ideal but in my view a conservative approach to valuing HPHC would be to consider that MDI will continue to occupy the property, and to take the value of \$1.1 million for the property less the amount shown on the financial statement as due to shareholder as of the end of December 2014 of \$667,185 for a net value of \$432,185. I have not considered amounts due to MDI in either MDI or HPHC, as basically it is an accounting wash.
- [259] The remainder of the claimant's debt can be considered personal debt which she has secured with the family home. The evidence was difficult to sort in this regard but a fair estimate would be that she incurred personal debt, in the range of another approximate \$100,000, on top of the debt incurred for HPHC taken into account in valuing HPHC.

Shareholder Loan Due to Claimant

- [260] As mentioned, HPHC owes the amount of \$667,185 to the claimant. The claimant strenuously objected to this being considered an asset, let alone a family asset. I find that it is a family asset. The only available inference is that the respondent's early contributions to HPHC clearly took the form of the claimant's loans to HPHC, as well as her borrowings against the family home that were loaned to HPHC. HPHC has equity in the value of the property it owns sufficient to pay this amount; it is not a mere paper asset.

Lloyds Bank Accounts

- [261] There were several Lloyds Bank accounts -- some holding cash, some holding shares. One was a joint account; the other the respondent's alone. The account numbers were changed by the bank over time. The claimant appeared to be confused by the history of these accounts and so harboured suspicions that the respondent was using accounts at Lloyds Bank to hide assets or that he had not made proper disclosure. The respondent did his best to explain in his evidence the history of these accounts.
- [262] I am satisfied that the respondent has been transparent about his banking with Lloyds Bank, and did not use accounts at the bank to hide assets.

Lloyds Bank Chequing Account in name of Respondent

- [263] As of July 2007 the respondent opened a chequing account in his own name with Lloyds Bank because he was worried that the claimant would unilaterally close their joint account (as she had done with a Scotiabank joint account). The account number ends with "68". I will refer to it as Lloyds Bank 68.
- [264] The respondent deposited money in this account from time to time to fund Canada Life premium payments, his children's education expenses, and his own expenses when travelling to the UK. The account was opened after the "trigger date" of January 2007 and is not a family asset.

- [265] Later the respondent deposited his partial receipt of the proceeds of sale of 10 Wilmot Place into this account.
- [266] As of June 2015 the balance of the account was less than the proceeds of sale of 10 Wilmot Place, due to deductions he made for potential taxes and payments in respect of his sister's children. The balance of the account as of June 2015 was GB £182,396. To avoid double-counting it with the proceeds of 10 Wilmot Place, dealt with below, I will not consider it a separate asset.

Lloyds Portfolio 3 -- Inheritance from Respondent's Uncle

- [267] During the marriage the respondent had a Lloyds Bank portfolio account in the respondent's name alone in which he had placed part of the inheritance he had received from his uncle, plus some shares he had received from his grandfather even before the marriage. This became a managed investment portfolio.
- [268] I will call this "Lloyds Portfolio 3" because as of 2007 the account ended in the number 3 (Lloyds Bank changed account numbers from time to time making it somewhat difficult to follow the history of the accounts; it appears to have been started as an account ending in 1).
- [269] An account statement identifies that the portfolio value as of November 30, 2007 was US \$248,377.
- [270] As of 2015 Lloyds Bank informed the respondent that it would no longer manage investment portfolios for Canadians and so the account was liquidated and the proceeds sent to him in the amount of US \$219,217 as of August 28, 2015.
- [271] Neither party called evidence that the Lloyds Portfolio 3 had been used to fund family expenses during the marriage. The claimant's evidence is that the two of them planned to use this account some day for retirement but her evidence did not provide me with sufficient detail to allow me to draw a conclusion that this had ever been discussed between the two of them.
- [272] I return to the claimant's evidence that the Marriage Agreement was thought by her to be fair because the respondent would have his inheritance from his uncle. I conclude that the parties did not intend at that time that the respondent's inheritance from his uncle would be a family asset. There is no evidence to suggest that this intention ever changed or that there would be a reason for this intention to change: there is no evidence to suggest that the inheritance was ordinarily used for a family purpose.
- [273] I conclude that the Lloyds Portfolio 3 is not a family asset.

[274] Alternatively, if the Lloyds Portfolio 3 was considered to be a family asset, I would nonetheless reapportion it solely in the respondent's favour if the Marriage Agreement was otherwise upheld, as to not do so would be unfair for the same reasons -- i.e. if the Marriage Agreement is enforceable in part because of the respondent having received the inheritance from his uncle, it would be unfair to then divide the inheritance instead of leaving it as an asset for the respondent's own use.

10 Wilmot Place

[275] Some years prior to the parties' separation, but after the Marriage Agreement, in approximately 1998 or 1999, the respondent's father and mother purchased a property in London, England at 10 Wilmot Place, to have a place to stay in order to be near to their daughter (the respondent's sister), who was battling breast cancer. When they purchased the property, they put it in their three children's names, including the respondent, as joint tenants.

[276] The respondent's sister died in 1999, and her husband subsequently passed away.

[277] The respondent and his brother have treated one-third of the property as belonging to their sister's three children but this was never formalized. Instead, the owners of the property on title as joint tenants were the respondent and his brother.

[278] The respondent's evidence is that he and the claimant never stayed at 10 Wilmot Place. The claimant's evidence is that they did stay there. I prefer the respondent's evidence. His explanation that it was purchased by his parents so that they could stay near his sister, and that it was rented after she died, is credible.

[279] The respondent's evidence is that 10 Wilmot Place was sold in 2015, which was after the death of both of his parents. The documentary evidence in this regard did not include original title documents much to the complaint of the claimant (although she did not establish that title documents of the kind we are familiar with in our land title system exist). However, the limited evidence available identifies that the property was sold for GB £450,000.

[280] The respondent's share of the proceeds from the sale of 10 Wilmot Place in 2015 was approximately GB £224,000 net after deduction of professional fees.

[281] Although the respondent has held some money back to pay for possible tax consequences, there is no evidence he will be required to pay taxes in the UK in relation to the sale proceeds.

[282] In addition, the respondent feels a moral obligation to pay some of his share to his sister's three children. This gifting will reduce his share but is a voluntary personal choice of how he uses his assets.

[283] I find that the proceeds of sale of 10 Wilmot Place are not a family asset.

Respondent's Inheritances Post-Separation

[284] In the meantime, the respondent's parents passed away, first his father in May 2013 and then his mother in October 2014. The majority of the respondent's father's estate went to the respondent's mother.

[285] In addition to the proceeds from 10 Wilmot Place, the respondent either has received, or is expected to soon receive an inheritance from his mother of:

- a) 36,667 Richard Irvin shares, at an unknown value;
- b) GB £150,000 on the sale of her home;
- c) potentially a share of an additional GB £50,000 in relation to the same sale; and
- d) GB £185,000.

[286] In addition, the respondent is expected to receive or has received GB £90,000 plus another GB £9,000 in relation to an inheritance from his father.

[287] These amounts total a rough maximum of GB £484,000, not including the additional Richard Irvin shares. I note that the evidence on this was vague and largely based on hearsay emails from the respondent's brother.

[288] The respondent's inheritances from his parents were received well past the parties' separation and the date of the s. 57 declaration. They cannot be considered family assets.

Other Assets

[289] Each party has a motor vehicle of no significant value and neither makes a claim against the other's vehicle.

[290] Each party harboured suspicions that the other party had not disclosed their full assets, particularly inheritances. These suspicions did not reach the level of proof.

[291] The claimant alleged that around September 2006 a large amount of money disappeared from their joint bank account and has been unaccounted for. The respondent's evidence was that the claimant knew he was transferring money to an account with Lloyds Bank in the summer of 2006 to help pay for the oldest daughter's education.

[292] I find that the claimant's bare allegations do not support any conclusion that the respondent has taken monetary assets and hidden them.

[293] The respondent is owner of an insurance policy with a financial institution, John Hancock Financial Services. The parties' oldest daughter is a named beneficiary of the policy. It has a cash surrender value. The respondent's evidence is that the asset was purchased during the marriage to provide a source of funds for the daughter's education. He considers the asset to be his daughter's to do with as she pleases and he will not receive any benefit from it. I accept that this is the respondent's intention. He has a long history of providing for his

daughters and I am satisfied he will carry through on this intention and will not receive any personal benefit from this financial instrument. For that reason I have not taken it into account.

Incomes

- [294] Relevant to the financial issues in this case is the question of the incomes of the two parties.
- [295] The claimant was evasive about her true income over the years. She asserted that her income was simply that shown on her personal tax returns, net after deductions.
- [296] Given that she has a professional corporation, MDI, into which her professional earnings are paid as a medical doctor, the income earned by MDI also has to be considered.
- [297] Having compared the tax returns of the claimant and the financial statements of MDI, and having looked at her MSP billings, it appears that the claimant has earned at least \$150,000 annually over the last three years when her income and the income left in MDI is considered together. For example:
- a) Her 2012 income tax return line 150 income was \$150,698. In that year MDI earned net income of \$55,891 (gross revenue of \$297,848 less salaries of \$153,489 and other expenses). That year MDI added another \$56,021 to retained earnings for a 2012 total of retained earnings of \$66,658.
 - b) Her 2013 line 150 income was \$112,378.51. MDI's revenue was \$317,739 with net income of \$39,927.
 - c) Her 2014 line 150 income was \$100,071. It appears that the total revenue of MDI was \$339,618 with net income of \$32,170.
- [298] It has to be remembered that the net income of MDI is arrived at by deducting the rent paid to HPHC, the salaries paid to employees and some expenses for which the claimant received a personal benefit, such as automobile expenses. The rent paid to HPHC appears to have gone up exponentially over the years, presumably to enable HPHC to pay down the debt or expenses associated with the purchase and maintenance of the property and to enable the claimant to effectively split the revenues generated by her medical services between herself, MDI, and HPHC. For example in 2012 the rent was \$15,928; in 2013 it was \$30,700; and in 2014 it was \$91,455.
- [299] The gross revenues generated by the claimant through her medical services are also reflected in MSP billings. As of 2013/2014, her MSP billings were \$283,874. While the claimant does have legitimate expenses to pay out of her earnings, she is also able to structure her income as between herself, MDI, and HPHC in a tax-advantageous way.
- [300] As for the respondent, his income was in the range of just over \$100,000 in the years leading up to the Marriage Agreement.

- [301] In 2003 he began getting on-call payments, for the Medical On-Call Availability Program("MOCAP"), which significantly increased his income. He also received an increase in salary in 2005.
- [302] In the last few years the respondent earned in the range of \$300,000 annually, give or take a few thousand dollars, when combining all of his sources of professional income. He does not have associated expenses of running a practice.
- [303] I do not find that there was a great earnings differential between the parties during the marriage. The respondent did earn more than the claimant typically, but not by a significant amount and he paid more of the family expenses. Since separation his earnings have risen and there is a greater income gap between the two of them. However, the claimant still earns a good living and enough to support her economic self-sufficiency.

Fairness and Marriage Agreement

- [304] As mentioned, the respondent has the onus pursuant to s. 65 of the FRA to establish that the division of property under the Marriage Agreement would be unfair. The question is, has he proven that it would be unfair to treat the family home as the sole property of the claimant and not a family asset, without compensation to him through reapportionment?
- [305] Before I embark on this analysis, I must pause to comment on the conundrum created by the language of the Marriage Agreement and its interplay with s. 65 of the FRA.
- [306] The Marriage Agreement prohibits consideration of the family home and MDI, as sole assets of the claimant, in determining appropriate division of property; yet, s. 65 of the FRA requires consideration of these things in order to determine whether division under the agreement would be unfair. I pause to reiterate that the respondent does not contest the enforceability of the Marriage Agreement, but seeks reapportionment on the basis of unfairness pursuant to s. 65.
- [307] So there are two fairness questions here:
- a) Would it be unfair to apply the terms of the Marriage Agreement and ignore its impact in allocating valuable property to the claimant, when assessing the fairness of the presumptive equal division of other family assets under s. 65?
 - b) Is the Marriage Agreement, by treating the family home as the sole property of the claimant and not a divisible family asset, unfair?
- [308] I have concluded that at a minimum the answer to (a) is yes. The family home is not a trivial asset. Even if the Marriage Agreement was otherwise enforced and the home was treated as the claimant's asset, it would be unfair to not take this into account in determining what would be fair division of other family assets. This is so given the duration of the marriage, the extent of the respondent's contribution to the family home, and its significant value.

Table of Assets at Trial

[309] In order to consider whether the Marriage Agreement is unfair, it is useful to summarize my findings regarding the parties' assets as at trial. When considering the values of the various assets, I have kept in mind that the values of financial assets such as RRSPs which are invested in publicly traded equities, have to necessarily be seen as a rough approximations. It is fair to assume that the parties' market-based financial assets will fluctuate in value roughly in parallel and so the fact that I do not have exact figures when comparing assets as of the date of this judgment will not lead to significant unfairness.

[310] In summary, the parties' assets are set out in the following table:

Parties' Assets as at Trial (Estimated Value)

Other Currency

Canadian Dollars

Family home - Claimant:

\$3,400,000

MDI retained earnings - Claimant:

\$31,672

Scotiabank - Claimant's* GICs:

*Claimant disposed of \$12,930 possibly more

\$6,855

TD Spousal RRSP - Claimant:

\$14,088

Scotiabank RRSP - Claimant:

\$223,445

Household contents - Claimant:

\$84,000

HPHC - Claimant:

Strata property if occupied by MDI, less amount due to shareholder as of Dec. 31/14 (debt secured against family home, booked as debt owed to Claimant)

i.e. \$1,100,000 less \$677,185

\$432,815

Shareholder loan due to Claimant from HPHC:

\$667,185

BP and BT Shares - Claimant:

Respondent agrees these need not be taken into account

GB £1000

Lloyds Joint Account:

unknown but contributions by Respondent

Canada Life policies* - Respondent:

*Claimant disposed of \$125,000 worth of policies in her name

GB £127,620

Scotiabank - Respondent's accounts:

#81

\$10,739

#29 (was \$41,791 as at Dec. 29/06)

\$12,629

Mutual funds

\$139,012

TFSA

\$49,212

Savings

\$5,287

RRSP

\$16,874

Lloyds Portfolio 3 - Respondent's inheritance from uncle:

US \$219,217

Lloyds Portfolio 5:

100,000 Richard Irvin shares

unknown

Cash

GB £21,970

10 Wilmot Place proceeds - Respondent:

GB £224,000

Respondent's inheritances from parents:

36,667 Richard Irvin shares

unknown

Cash

GB £484,000

Comparison of Parties' Non-Family Assets

[311] It is worthwhile to consider the non-family assets held by each party.

[312] The claimant's interest in the family home, which would not be a family asset if the Marriage Agreement was upheld, can roughly be valued as worth \$3.4 million gross.

[313] Accounting for associated debt is tricky. If one estimated the non-HPHC related debt to be \$100,000 and concluded that this is the only debt to be taken into account when valuing the family home (with other debt accounted for in the valuation of HPHC as discussed above), the net value of the family home would be \$3.3 million, all staying as the property of the claimant if the Marriage Agreement was applied.

[314] Even if the full debt secured against the property was considered of approximately \$789,000 as of October 2015, there is an approximate net equity of \$2,611,000 remaining as the sole property of the claimant if the Marriage Agreement was applied.

[315] It has to be kept in mind that this was equity directly contributed to by the respondent before the Marriage Agreement, and with approximately \$237,000 contributed by him by way of mortgage payments made for approximately six years following the Marriage Agreement.

[316] The claimant made contributions to the family home as well. She paid the expenses of the property after separation. However, if she was not living there she would have needed to pay rent somewhere else. The respondent had to pay rent over the years since separation as he had to find accommodation elsewhere.

[317] Some consideration has to be given to the growth in value of the family home, which is largely attributable to the nature of the investment as real estate in West Vancouver. The rise of value of this investment vastly exceeds the return on other investments held by either party over the same time frame. Neither party suggested that they anticipated that property values would rise as much as they have in this region.

[318] While neither party has testified that they anticipated such an extreme rise in property values at the time of the Marriage Agreement, the respondent has directed me to no authorities which have found that a division of assets under a marriage agreement is unfair simply because one party's assets turned out to be a better investment.

[319] In *Hartshorne* the Court at para. 43 cited para. 89 of *Miglin v. Miglin*, 2003 SCC 24 as follows:

We stress that a certain degree of change is foreseeable most of the time. The prospective nature of these agreements cannot be lost on the parties and they must be presumed to be aware that the future is, to a greater or lesser extent, uncertain. It will be unconvincing, for example, to tell a judge that an agreement never contemplated that the job market might change, or that parenting responsibilities under an agreement might be somewhat more onerous than imagined, or that a transition into the workforce might be challenging. Negotiating parties should know that each person's health cannot be guaranteed as a constant. An agreement must also contemplate, for example, that the relative values of assets in a property division will not necessarily remain the same. Housing prices may rise or fall. A business may take a downturn or become more profitable. Moreover, some changes may be caused or provoked by the parties themselves. A party may remarry or decide not to work. Where the parties have demonstrated their intention to release one another from all claims to spousal support, changes of this nature are unlikely to be considered sufficient to justify dispensing with that declared intention. That said, we repeat that a judge is not bound by the strict *Pelech* standard to intervene only once a change is shown to be "radical". Likewise, it is unnecessary for the party seeking court-ordered support to demonstrate that the circumstances rendering enforcement of the agreement inappropriate are causally connected to the marriage or its breakdown. The test here is not strict foreseeability; a thorough review of case law leaves virtually no change entirely unforeseeable. The question, rather, is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application.

[Emphasis added.]

[320] The respondent has assets which are not family assets as follows:

- a) the amount he received on the closing of the Lloyds Portfolio 3 account, US \$219,217 as of August 28, 2015 (this was the managed account where he placed the inheritance from his uncle and which appears to have decreased in value over time);
- b) his share of the sale proceeds of 10 Wilmot Place, GB £224,000; and

- c) his share of inheritances from his parents, GB £484,000 plus 36,667 Richard Irvin shares of unknown but probably not significant value.

[321] Leaving aside the 36,667 Richard Irvin shares which given the thin evidence cannot be assumed to have more than nominal value, the above assets belonging solely to the respondent total US \$219,217 plus GB £708,000.

[322] The parties did not provide any submissions at trial or evidence regarding what currency conversion rates the Court should use in valuing assets held at the time of trial. Following a memorandum from this Court, the parties have agreed that the Court may rely on the conversion rates published by the Bank of Canada on its website.

[323] I will apply the average noon exchange rate for the month of September 2016 as published by the Bank of Canada on its website, as that is the full month closest in time to the publication of this judgment, as follows:

- a) the conversion of the respondent's US \$219,217 at a rate of \$1.3109 which amounts to \$287,371.56;
- b) the conversion of the respondent's GB £708,000 at a rate of 1.7222 which amounts to \$1,219,317.70;
- c) the total of the above two amounts is \$1,506,689 rounded to the nearest dollar.

[324] The respondent therefore has non-family assets of just over \$1.5 million in his own name.

Is Allocating the Family Home to the Claimant Fair?

[325] The central issue is whether allocating the family home as being the sole asset of the claimant, without reapportioning other assets, would be unfair.

[326] It is clear that applying the Marriage Agreement by allocating the home to the claimant only and not otherwise reapportioning assets would leave the claimant in a much stronger financial position than the respondent. Even taking into account his inheritances and roughly valuing them at around \$1.5 million for comparison purposes, she would be substantially better positioned, with the home valued at between \$3.3 million or \$2.6 million net.

[327] This disparity has not taken into account the additional assets solely owned by the claimant -- her GIC savings of approximately \$6,855 and retained earnings in MDI of \$31,672.

[328] It is of course not correct to compare the respondent's non-family assets to the value of the family home as if comparing apples to apples: the respondent contributed to the family home; the claimant did not contribute to the respondent's non-family assets.

- [329] But it also has to be remembered that when the respondent signed away his equity in the home, that equity was worth only in the range of \$300,000 to \$600,000. To be sure, he contributed another significant amount by continuing to pay the mortgage, approximately another \$237,000, and then after separation, by paying another \$334,000 for the education expenses of the parties' children.
- [330] An important factor here is the claimant's evidence that she relied on the Marriage Agreement in ordering her own financial affairs and thus will be seriously disadvantaged if it is not followed. I do not accept this as entirely reasonable, given that she threatened divorce as her bargaining chip to have the respondent sign the Marriage Agreement and she subsequently accepted that he would continue to pay mortgage payments.
- [331] I do not have the evidence to determine why this proceeding languished for so long, leaving the respondent's assets tied up. There is insufficient evidence to conclude that the respondent was precluded from purchasing real estate himself.
- [332] It is to be remembered that both parties are highly educated and entered into the Marriage Agreement knowing its effect.
- [333] The claimant has ordered her life on the basis that she would have the family home as her asset. It would be extremely disruptive to her to divide the asset now. If an order was made dividing the family home or ordering a compensation payment for half its value, it is likely that both the family home and the HPHC commercial property would have to be sold, given how the claimant has leveraged the debt on the family home.
- [334] To some extent, the respondent allowed this state of affairs by not challenging the Marriage Agreement earlier and remaining passive while the claimant mortgaged the family home to purchase the property for HPHC.
- [335] If the Marriage Agreement was to be ignored, and the family home was considered a family asset and divided, other family assets would likely have to be reapportioned in the claimant's favour to even out the parties' positions and not leave the claimant overwhelmed by debt.
- [336] On the other hand, if the Marriage Agreement was followed and the family home treated as the claimant's asset, it is possible to divide the other family assets equally and leave both parties in a reasonable position.
- [337] In my view the respondent's payment of the mortgage on the family home after the Marriage Agreement can be taken into account by giving him an equal share of HPHC and an equal share of the HPHC shareholder loan owed to the claimant.
- [338] I turn now to HPHC.

Treatment of HPHC

- [339] The claimant's evidence is that she used the family home to leverage the purchase of HPHC because she relied on the Marriage Agreement and her understanding that the family home was hers to use how she liked. She argues that since HPHC was financed by the family home, it must be ignored in the division of assets upon marriage breakdown and left as her sole asset, on her interpretation of the Marriage Agreement.
- [340] I do not accept the claimant's interpretation of the Marriage Agreement. The Marriage Agreement only excludes from consideration the family home itself, and any proceeds of sale of the home or assets acquired with the proceeds of sale or income derived therefrom.
- [341] The family home has not been sold. The HPHC property was not purchased with proceeds of sale of the family home.
- [342] The Marriage Agreement says nothing about ignoring debt or contributions to pay down debt used to acquire other assets when analyzing the division of assets upon marriage breakdown.
- [343] There is no doubt that the respondent's direct contributions to the purchase of the HPHC property (the \$40,000), and his significant payment of mortgage debt on the family home which allowed the claimant the leverage to obtain financing for the purchase of the HPHC property, are such that HPHC is a family asset. In my view it would be unfair to ignore the respondent's contributions.
- [344] Given that the claimant has been more involved in the institution and operation of HPHC, and the maintenance and upkeep of the HPHC property, if all other things were equal and the family home was divided equally, HPHC might be an asset that would be partially reapportioned in her favour. If the family home was divided equally, the respondent's payment of the mortgage on the family home would otherwise be recognized and his contribution to HPHC would be worthy of less recognition.
- [345] However, if the family home is treated as the claimant's alone based on the Marriage Agreement, I find that it would be fair to apply the presumptive equal division of HPHC and the shareholder loan due from HPHC to the claimant, given the respondent's contribution to the acquisition of the HPHC asset.
- [346] Looking at the market value of the HPHC property if occupied by MDI, which is \$1.1 million, less the amount owed to shareholder of \$667,185 as of the December 31, 2014 balance sheet, leaves an approximate value of HPHC of \$432,815 as noted above.
- [347] On this analysis, if HPHC was equally divided, one-half of the shares of HPHC would be worth \$216,407.50. One-half of the amount due to shareholder (the amount due to the claimant) is \$333,592.50. These two amounts total \$550,000.

- [348] With the windfall rise in the value of the family home, the claimant has more than enough equity to be able to pay the respondent for one-half of the value of HPHC and one-half of the value of the amount owed by HPHC to her, totalling \$550,000.
- [349] I conclude that it would not be unfair to allow the claimant to retain sole ownership of the family home, but this is only on the basis of recognizing the respondent's contribution to HPHC and the shareholder loan by dividing these latter assets equally.
- [350] I have therefore concluded that the Marriage Agreement is not unfair in allocating the family home and MDI to the claimant's own use solely. However, it would be unfair to not recognize the large windfall received by the claimant in this regard due to the rise in property values. It would be unfair not to recognize that due to the family home being her asset, the claimant does have the ability to make a compensation payment to the respondent for his equal share of HPHC and his equal share of the shareholder loan due from HPHC to the claimant.
- [351] I will therefore order the claimant to make a compensation payment of \$550,000 to the respondent for HPHC and the shareholder loan due to her, and these assets will then otherwise remain in her own name.
- [352] In my view fairness also requires that if the Marriage Agreement is upheld such that the claimant retains the sole benefit of the family home, the respondent's solely held non-family assets should remain his own.
- [353] I have concluded that the respondent should continue to be sole owner of his proceeds of the liquidation of the Lloyds Portfolio 3 (US \$219,217); the proceeds of 10 Wilmot Place (GB £224,000); and inheritances from his parents (totalling approximately GB £484,000), all of which total just over \$1.5 million.
- [354] The Richard Irvin shares that the respondent received as an inheritance from his mother many years after separation are not a family asset and remain the property of the respondent.
- [355] The respondent's other Scotiabank non-registered financial assets total approximately \$193,511 (the mutual funds, TFSA, savings). They do not qualify as family assets as they were all acquired after the "trigger date". They should continue to be the respondent's sole property.
- [356] I am satisfied that if the respondent receives an equal share of HPHC and the shareholder loan due to the claimant from HPHC, and retains his own solely held non-family assets, the Marriage Agreement can otherwise be enforced as fair.
- [357] I have concluded that the claimant should continue to be the sole owner of the family home, her MDI retained earnings, and GIC at Scotiabank, all as though non-family assets, and HPHC, subject to her payment of a compensation payment of \$550,000 to the respondent.

Division of Financial Family Assets

Financial Family Assets

- [358] Leaving aside HPHC for a moment, the family assets in the claimant's name include: the TD spousal RRSP (\$14,088); Scotiabank RRSP (\$223,445); and household contents (\$84,000), for a total of \$321,533. If the Canada Life policies she cashed in worth \$125,000 are added in, the total value is \$446,533.
- [359] The family assets in the respondent's name include his Scotiabank accounts ending in #81 and #29 of \$10,739 plus \$12,629 respectively and an RRSP worth \$16,874, for a total of \$40,242. In addition, the respondent holds the Canada Life policies of GB £127,620. If the conversion rate of 1.7222 was used for the Canada Life policies, this equals a value of \$219,787. The GB £21,970 cash that was in the Lloyds Portfolio 5 which was returned to the respondent is also a family asset. If converted at a rate of 1.7222, this equals a value of \$37,837.
- [360] Added together, the respondent's financial family assets total \$297,866.
- [361] In other words, the claimant holds \$148,667 more of the financial family assets than does the respondent. In part this is likely due to the respondent's payment of so many family expenses, including the children's education costs.
- [362] I find it would be unfair to divide the financial family assets as currently held, unequally, given the respondent's contribution to family expenses over the years. I find that it would be fair to order that the claimant make a compensation payment to the respondent for this difference in the financial family assets in the amount of \$74,000.
- [363] The respondent also holds 100,000 Richard Irvin shares as a family asset and he agrees to simply divide those by transferring to the claimant 50,000 shares, which I will so order.

Joint Lloyds Account

- [364] While the Joint Lloyds Account is a family asset, it would be unfair to divide the balance of the Joint Lloyds Account ending in number 175, since the respondent is the one who kept depositing money to the account after separation in order to maintain their other assets, the Canada Life policies. This account should be closed and the balance if any paid to the respondent.

Conclusion re: Division of Property

- [365] The claimant is ordered to pay the respondent a compensation payment totalling \$624,000, comprising the \$550,000 compensation payment regarding the HPHC-related family assets, and the \$74,000 compensation payment regarding the financial family assets. The respondent is ordered to transfer 50,000 Richard Irvin shares to the claimant. The parties otherwise are entitled to keep for their sole use the assets currently in their own names. This means that the claimant will retain sole ownership of the family home.
- [366] The claimant will still be significantly ahead of the respondent in terms of assets, even taking into account his inheritances on his side of the ledger to which she did not contribute. However, the respondent does have a greater income-earning capacity.
- [367] I find that this division will enable the spirit of the Marriage Agreement to be maintained and so will treat the claimant fairly and in accord with her expectations that she could rely on her ownership of the family home, but the respondent will also not be treated unfairly and will receive some compensation for his contributions during the marriage.

Pensions

- [368] The respondent retained an actuary to provide an opinion as to the pension benefits accrued during the marriage by the respondent, and this report was tendered at trial without objection. He chose two valuation dates, April 1, 2006 or December 29, 2006, and valued the claimant's share of the pensions. As mentioned, I find that the parties' separation date was the end of December, 2006 and so that is the scenario most relevant.
- [369] The parties agree that Canadian pensions will be divided equally during the marriage period by way of directions to the administrators to split the benefits equally during the period of the marriage, which I find to be from December 23, 1978 to December 31, 2006. Counsel for the respondent seeks the "standard" order. I will leave it to the parties to agree on the terms of the "standard" order, and if they cannot agree they can apply for directions.
- [370] The respondent earns pensions through his work, the claimant does not. The respondent therefore has an additional pension asset greater than that divided with the claimant, for the years post-separation.
- [371] Unfortunately the parties provided no submissions on what process to follow to divide pensions earned by both of them with the National Health Service ("NHS") when they lived in England. If the parties cannot reach agreement on the NHS pensions they have liberty to apply for directions.

Taxes

[372] Counsel for the respondent argued that this Court should take into account the fact that the family home is an asset that, if sold by the claimant, will have significantly less tax consequences than other assets that have been received by the respondent by way of inheritance.

[373] There was insufficient evidence to take tax consequences into account.

Spousal Support

[374] The parties both had independent careers as medical doctors before and after the marriage.

[375] The claimant did not sacrifice her career in order to advance the respondent's or to take on a greater share of family responsibilities than did he in any meaningful way during the marriage. It is true that the claimant made some accommodations so that she could move locations with the respondent in order for his career to advance, but these were always joint decisions. There is no evidence to suggest this was detrimental to her career or earning capacity in the long run.

[376] All of the claimant's alleged sacrifices for her husband or young children could have been mentioned in the Marriage Agreement if they were truly material and needed to be taken into account.

[377] But instead, the Marriage Agreement, drafted by the claimant's lawyer at the claimant's initiative, stated at Recital E:

Both parties are established physicians and each is economically independent and self-sufficient.

[378] I find that over the entire course of their marriage, both parties gained from the moves made for the respondent's career, and both contributed roughly equally to parenting the children, with the normal give and take that is often shared by two parents with demanding careers. The parties were equal partners in the marriage.

[379] The claimant made a number of statements during the course of the trial that suggested she has a need for spousal support because of health reasons. I found her evidence in this regard to be too vague and uncorroborated to give it much weight. While it is true that she is a medical doctor, she is not an independent expert witness qualified to give opinion evidence. She should have called independent expert opinion evidence if she wanted the Court to consider that she is disabled in a way that impacts on her ability to earn income. I note that she claimed to have a very busy medical practice.

[380] The claimant argued that she is heavily in debt, due to legal bills she incurred in this litigation. However, the respondent has also had to incur legal bills because of this litigation. Any issue as to the legal fees incurred by the parties ought to be dealt with as a matter of costs. I do not consider the claimant's debt to entitle her to spousal support.

[381] The claimant has not been disproportionately disadvantaged by the marriage breakdown. The claimant's standard of living has been equal to or superior to that of the respondent.

[382] I find that the claimant is self-sufficient and independent, and she has been since before and after the marriage breakdown. I find that she did not suffer disproportionate adverse financial consequences from the marriage or its breakdown or bear a disproportionate share of the burden of caring for the children during the marriage. I find no basis for spousal support.

Other Orders Sought

[383] At the close of trial, the claimant sought a restraining order and a restriction of contact order against the respondent. There is absolutely no credible evidentiary basis that such an order is necessary.

Costs

[384] The parties are at liberty to seek a further hearing before me on costs if they cannot otherwise reach agreement.

"The Honourable Madam Justice S. Griffin"

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