
CANADA / JUDGMENT

Gain v. Gain

2010 BCSC 1832

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 1832 Gain v. Gain

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gain v. Gain,

2010 BCSC 1832

Date: 20101220

Docket: E092124

Registry: Vancouver

Between:

Stephen Clare Gain

Plaintiff

And

Joji Annabel Gain

Defendant

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Plaintiff:

G.J. Lecovin, Q.C.

Counsel for the Defendant:

F. C. Lowther

Place and Dates of Trial:

Vancouver, B.C.

July 5-8, and

August 10-11, 2010

Place and Date of Judgment:

Vancouver, B.C.

December 20, 2010

Introduction

- [1] This family law proceeding was commenced by the plaintiff Stephen Clare Gain ("Mr. Gain") in July 2009. Mr. Gain seeks an order of divorce, spousal maintenance and an equal division of family assets. The defendant Joji Annabel Gain ("Mrs. Gain") opposes the claim for spousal support. Mrs. Gain, in turn, counterclaims for an order of divorce and a reapportionment of family assets in her favour.

Background

- [2] Mr. Gain is 59 years old. Mrs. Gain is 53 years of age. The parties were married on September 28, 1985, when they were 34 and 29 years old respectively. Neither party had been married before. They were married approximately 24½ years by the time of their separation in July 2009. There are no children of the marriage.
- [3] Mrs. Gain immigrated to British Columbia from the Philippines in 1978. She had a college education and when she arrived in British Columbia, she worked part-time at various jobs and eventually secured a position with BC Tel (the predecessor to Telus) in 1980.
- [4] Mr. and Mrs. Gain met in church in 1985. Mr. Gain was a student at bible college at that time. They were married shortly thereafter. Around that time, Mr. Gain obtained his Bachelor of Theology degree and was acting as an assistant pastor with little or no income. Both parties anticipated that Mr. Gain would go on to an occupation in the church and assume the burden of being a sole provider for their family. Unfortunately, he was not successful in obtaining gainful employment in that field.
- [5] Throughout his working career, Mr. Gain had an assortment of jobs. Between bouts of unemployment, part and full-time jobs obtained by Mr. Gain from time to time included working as a courier for Royal Bank of Canada and at an auto sales company delivering cars to the United States. In 1998, he graduated from the pharmacy technician program at Sprott-Shaw Community College although, again, he was unsuccessful in obtaining employment in that field.

- [6] At some point, Mr. Gain was given an aptitude test which indicated that his best vocation would be as a bus driver. He eventually pursued that career path and while he was unsuccessful in obtaining a job with public transit authorities in the Lower Mainland, he was eventually employed as a school bus driver by Cardinal Coach Lines Ltd. in 2002.
- [7] At the time of the trial, Mr. Gain continued to be employed by Cardinal. In his position, he is laid off during the school holidays, which include the summer, Christmas, Easter and spring breaks. His yearly income over the years from 2004 to 2008 ranged from \$15,800 to \$22,100. He obtains no benefits in his position, which is of some concern to him given his medical conditions as discussed below, and given that Mrs. Gain unilaterally removed him from her Blue Cross coverage at the time of the separation. Mr. Gain reported taxable income for 2009 of \$30,060, although he advised that this level of income was unusual given extra work that he performed at that time. For the year 2010, his gross pay to mid-June 2010 is \$15,820, and he estimates his taxable income for this year will be \$22,000.
- [8] Mrs. Gain's original intention was to live the life of a pastor's wife, assisting Mr. Gain in his church endeavours. Mrs. Gain was disappointed about her husband's lack of success in fashioning a career in the church or in obtaining steady and gainful employment. Mrs. Gain says that she continually pushed him to secure full-time employment. Even now, Mrs. Gain considers that Mr. Gain can work at a second job in addition to his work at Cardinal. She also speculates that he is working at other jobs during the summer and over the Christmas holidays, but she was unable to substantiate this and Mr. Gain denied it. On this point, I accept the evidence of Mr. Gain as to his employment figures, a matter which is supported by the Canada Revenue Agency documentation.
- [9] Eventually, Mrs. Gain became the bread-winner of the family. After Mrs. Gain began to question her husband's calling to the ministry, Mrs. Gain appears to have focussed her attention on her own career. She took night classes and applied for various other positions within Telus. She acknowledged that she, along with Mr. Gain, basically abandoned their church related activities, particularly when she began to work on Sundays. She has continued to be successfully employed by Telus over the last 30 years and as of 2009, was working as a network technician. While working, she was regularly entitled to bonuses and shift differential pay which resulted in her earning total income of \$72,470 in 2008. Her taxable income for 2009 was \$63,590, a decrease that arose from medical difficulties that she had starting at that time.
- [10] Mr. and Mrs. Gain purchased their first home in Vancouver and then went on to purchase or rent two further homes at various times in Surrey, B.C. It appears that at least until 2009, the purchased homes were jointly owned by Mr. and Mrs. Gain and were financed in part through mortgages executed by both of them.
- [11] In addition, Mr. and Mrs. Gain also participated in the purchase of an investment property with certain members of Mrs. Gain's family, commencing in 1991. Mr. and Mrs. Gain put up one-third of the purchase price (arising from a sale of one of their homes) with the

remaining monies coming from Mrs. Gain's brother, Bonifacio Domingo, and sister, Victoria Domingo ("Ms. Domingo"). The various family members fixed up this property and rented it out, although it does not appear that it was an economic success and ultimately, the parties were required to subsidize the financing of the property. The property was eventually sold and the parties realized a profit of approximately \$30,000. Mrs. Gain agreed to provide the Gains' portion of the profit in the amount of \$10,000 to her brother, a matter which Mr. Gain appeared to acquiesce in.

- [12] In 2004, Mr. and Mrs. Gain decided to purchase a condominium that was being constructed at #201 - 4178 Dawson Street, Burnaby, B.C. (the "Dawson Street condo"). In 2006, they completed that purchase. Title was originally registered in both names.
- [13] It appears that within one year of their marriage, Mr. and Mrs. Gain ceased having any sexual relations. Both parties confirmed that they slept in their respective Lazy-Boy chairs. Mr. Gain contended that Mrs. Gain withdrew from him.
- [14] Mrs. Gain was always the one in the relationship to take charge of their financial affairs. Mr. and Mrs. Gain operated various bank accounts: Mrs. Gain had various accounts in her name only, and both of them had a joint account into which Mr. Gain's earnings were deposited. Mrs. Gain's salary did not go into this joint account.
- [15] Mrs. Gain always earned more than Mr. Gain during the course of their marriage. Mrs. Gain confirmed that when Mr. Gain was not working, she was paying all of the bills and when he did have employment, he contributed to some of the bills. The evidence was unclear as to who paid the expenses relating to the household (such as mortgage, strata fees, cable, hydro, etc.). Nevertheless, I am satisfied that both parties made contributions in that regard, although I accept that Mrs. Gain made more of a contribution given her greater financial resources. Overall, it does appear that Mrs. Gain took on the major financial burden during the marriage. When Mr. Gain was not working, Mrs. Gain would apparently cover expenses that he was responsible for, but would later, when he did obtain employment, demand payment of the missed payments.
- [16] Their relationship began to deteriorate in early 2009. At that time, Mrs. Gain found out about Mr. Gain's Visa bill, which at that time had an outstanding balance in excess of \$20,000. This account was in Mr. Gain's name only. She was shocked by the size of the bill at that time and told him that it was better to pay off the balance each month. Mr. Gain introduced Visa statements from December 2005 until the date of the separation in July 2009, and gave evidence that various charges arose from purchases for the joint benefit of him and Mrs. Gain. These included vehicle expenses, meals, travel expenses to Seattle (to visit Mrs. Gain's sister) and various household items. Neither party advanced any calculation as to the total amount of the purchases which were "joint." In any event, a review of the statements indicates what one could term "normal" expenditures in day-to-day living. The balance owing on the Visa as of February 2010 was \$22,350. At the commencement of the trial, Mr. Gain advised that he was paying the minimum payment required, approximately \$300 per

month, and had stopped using the card. I was advised during the trial in August 2010 that \$21,887 from the sale proceeds from the Dawson Street condo was used to pay off this credit card by agreement of the parties, as discussed below.

- [17] The Dawson Street condo was transferred by Mr. Gain into Mrs. Gain's name in February 2009. There was considerable conflicting evidence regarding how and why that transfer occurred. The Dawson Street condo remained in Mrs. Gain's name only until its sale in early 2010, and net sale proceeds of \$167,658 were paid into the trust account of Henderson Heinrichs pending the outcome of these proceedings. I was advised that since that time, each party has received \$10,000 and also, as discussed above, the Visa bill in Mr. Gain's name was paid off. All of these payments were made on a "without prejudice" basis pending the decision of the court on the property division issues.
- [18] Mr. Gain says that he was told by his wife that they needed to obtain a new mortgage in February 2009, and that he was to attend a law office for the purpose of signing documents to arrange for that. He did attend at a law office and signed various documents but it appears that he did not appreciate that the documents he signed at that time had nothing to do with a mortgage and instead, removed him as a registered owner of the Dawson Street condo effective February 27, 2009. Mrs. Gain, in turn, refinanced the property immediately after the transfer. Essentially, he contends that he was "tricked" into transferring the property.
- [19] Mrs. Gain's evidence was conflicting as to why the transfer took place. She says that the transfer of the Dawson Street condo was Mr. Gain's idea and arose from Mr. Gain mentioning in 2008 that he wanted to sell the condominium, a matter that Mr. Gain denied. She says she did not want to sell since she was going to have surgery in January 2009. Mrs. Gain also says that she was aware of Mr. Gain's Visa bill and said to him that it would be better to have the property in her name in order to refinance the Dawson Street condo and get a new mortgage at a better rate of interest. There also appears to have been an intention to shield the Dawson Street condo from Mr. Gain's creditors. She indicated that he changed the hydro over to her name in early 2009, and she also took over payment of the strata fees in March 2009. Finally, she says she considered that the transfer of the property by him was a "gift."
- [20] The relationship between Mr. and Mrs. Gain further worsened in June 2009. At that time, Mr. Gain learned from Mrs. Gain that he had been removed from title to the Dawson Street condo. In addition, Mr. and Mrs. Gain began to discuss who would be responsible for the Visa debt that had been incurred, although there did not appear to be any consensus as to how that would be paid. There was an allegation by Mrs. Gain that Mr. Gain had ceased contributing towards payment of household expenses commencing in February 2009. However, Mr. Gain states that this was because there was a fraud on his bank account around that time and he had no money after for an extended period of time.
- [21] As the Dawson Street condo was arguably one of their larger assets, it was clearly a point of friction later in their relationship and during the trial. Mrs. Gain took the position that Mr. Gain did not deserve to have an interest in the property since she was the one paying for the

mortgage. Mrs. Gain says that by March 2009, she was paying for all of the expenses relating to the Dawson Street condo and he was paying only for his food. This position was tempered after the commencement of the proceedings in that she took the position (before Master Tokarek relating to the spousal support issue) that he should make a contribution relating to the Dawson Street condo.

- [22] Eventually, Mr. Gain left the home and briefly lived in his car and then a hotel. He did move back into the Dawson Street condo where the parties appeared to both reside until its sale in mid-January 2010. The parties agree that the date of separation is July 2009. Since the sale of the Dawson Street condo, Mrs. Gain has been living with her sister, Ms. Domingo. Mr. Gain has secured his own apartment, although he says that it is far inferior to the Dawson Street condo that he formerly shared with his wife.
- [23] Both parties gave evidence as to their characterization of their marriage. Mr. Gain maintains that up until the time of separation, they had a very supportive relationship. Mrs. Gain contended during the trial and in argument that theirs was a marriage "in name only" and that they were simply "room-mates." I do not accept the contention of Mrs. Gain in this regard; I prefer the evidence of Mr. Gain on this point. In my view, Mrs. Gain has only recently asserted this to be the case and has done so as a result of these proceedings and in support of her argument on reapportionment of the family assets. However Mr. and Mrs. Gain conducted themselves in their relationship, it was a marriage and a partnership lasting over 24½ years.
- [24] Mr. Gain faces significant medical challenges. He suffers from diabetes, high blood pressure and high cholesterol. As early as 1995, he was diagnosed with ankylosing spondylitis, a degenerative condition involving curvature of the spine. Mr. Gain advises that his medical conditions prevent him from doing various types of work, such as jobs where standing for long periods of time is required. It also appears that he has been recently diagnosed with an enlarged heart. There is some suggestion in the medical evidence that Mr. Gain's difficulties may be linked to his diet, and he himself admits that he struggles to do what he can in the way of diet and exercise to control his conditions.
- [25] When she was served with this action in July 2009, Mrs. Gain removed Mr. Gain from her medical plan at Telus. Her feeling was that he should be responsible for himself since he left the marriage. She did not warn him that he was to be removed and assumed that he was going to be without medical insurance for some time.
- [26] Mrs. Gain presently has her own medical challenges. In 2009, she was diagnosed with cancer, which eventually led to her stopping work at Telus in November 2009. She then began collecting short-term disability payments of approximately \$3,140 per month. She eventually had a double mastectomy in early 2010. She is currently being treated for depression.

- [27] On May 5, 2010, Mrs. Gain received confirmation that her claim for long-term disability benefits of \$3,589 per month had been approved. She would otherwise have been earning approximately \$61,513 from her position at Telus. I understand that these disability payments will be receivable by her for one year. In addition to this amount, Mrs. Gain receives a further amount of \$389 per month from the Telecommunications Workers' Benefit Plan ("TWBP"). The total, including \$2,000 per year from dividend income, amounts to an annual income of \$49,736. At the time of the trial, Mrs. Gain was continuing to receive her disability benefits. She has applied for a Canada Pension Plan disability allowance, although she does not know whether that is going to increase or decrease the amount that she currently gets through TWBP. Her debts include her own Visa account (which is now up to about \$19,000 to pay for legal bills). She also has an MBNA MasterCard which is now down from \$1,455 to \$1,200. Mrs. Gain's Form 89 financial statement indicates total monthly expenses of \$4,689 (including the interim spousal support payment obligation of \$1,600), for a total annual expense of \$56,268. With respect to her household expenses, Mrs. Gain's 2009 Form 89 indicated a monthly payment of \$200 to her mother which was reduced to \$100 per month in her 2010 Form 89. She acknowledged that she started making this payment in 2009, but has since stopped. She had not previously given her mother this type of money before the separation and, in my view, it was likely commenced for the purposes of this litigation.
- [28] Mr. Gain's financial statement indicates total monthly expenses of \$3,459 (including \$600 per month for the Visa bill), for a total annual expense of \$41,510. His current assets include a 1993 Toyota Corolla worth \$2,900, a balance in his bank account of \$5,000 (which he maintains is required to support him during the time he is laid off during the summer), and an RRSP of approximately \$5,000. In addition to his former Visa debt of \$22,350, his further debts include a line of credit of approximately \$6,000 to finance legal fees.
- [29] Mr. Gain indicates that he is just keeping above water and will not be able to service his debts and expenses unless he receives spousal support from his wife. He maintains that his standard of living is now much lower than it was, in that his current accommodations are in a run-down, older building and his furniture basically consists of a Lazy-Boy chair.
- [30] Mrs. Gain also gave evidence concerning the security of her tenure with Telus. In May 2009 and March 2010, Mrs. Gain was forwarded an offer from Telus with the option of taking either a lump sum separation allowance based on her years of service or, alternatively, remaining an employee of Telus. Mrs. Gain elected to remain with Telus and, in any event, she gave evidence that she was not qualified for this program given her disability for which she is receiving benefits. Mrs. Gain says that she would like to return to work when she is able, although she does not know when that will be. Mrs. Gain also gave evidence concerning whether certain downsizing activities at Telus would ultimately result in her losing her job, and she indicated that she would "definitely" lose her job if she eventually returned to Telus. I do not accept this evidence as it is speculative and self-serving at best.

- [31] Mrs. Gain was cross examined on her current attitude in asserting that the family assets should be reapportioned in her favour and that she should not be required to pay spousal maintenance to Mr. Gain. She acknowledged that if she had become a minister's wife, or the wife of a missionary, and he was the sole provider, she would have expected him to share with her his income and savings during their marriage.

Issues

Divorce

- [32] Evidence was presented by the parties as to the requirements under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), as amended. In particular, the parties are agreed that the date of separation was July 2, 2009, and, accordingly, the requirements under the Divorce Act, s. 8(2)(a), for a separation in excess of one year have been met.
- [33] In the circumstances, I am satisfied that there should be an order of divorce and that order is granted on the usual terms.

Division of Assets

The Legislation

- [34] The relevant provisions of the Family Relations Act, R.S.B.C. 1996, c. 128, ("FRA") for the purpose of this analysis, are contained in Part 5, headed "Matrimonial Property". The key provisions in this case are ss. 56 and 58 which provide, in part, as follows:

56(1) Subject to this Part and Part 6 [Division of Pension Entitlement], each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

- (a) a separation agreement,
- (b) a declaratory judgment under section 57,
- (c) an order for dissolution of marriage or judicial separation, or
- (d) an order declaring the marriage null and void

respecting the marriage is first made.

- (2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.
- (3) An interest under subsection (1) is subject to
 - (a) an order under this Part or Part 6, or
 - (b) a marriage agreement or a separation agreement.

...

58(1) Subject to section 59, this section defines family asset for the purposes of this Act.

(2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

(3) Without restricting subsection (2), the definition of family asset includes the following:

(a) if a corporation or trust owns property that would be a family asset if owned by a spouse,

(i) a share in the corporation, or

(ii) an interest in the trust

owned by the spouse;

(b) if property would be a family asset if owned by a spouse, property

(i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself or herself, or

(ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;

(c) money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;

(d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;

(e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.

(4) The definition of family asset applies to marriages entered into and property acquired before or after March 31, 1979.

[35] As noted above, s. 58(2) of the FRA defines a family asset as "[p]roperty owned by one or both spouses and ordinarily used by a spouse... for a family purpose." Whether something constitutes a family asset will depend on whether it was "ordinarily used for a family purpose." The nature of the use to which an asset is put is a finding of fact.

[36] The relevant provisions of the FRA with respect to the issues of reapportionment and compensation are ss. 65 and 66 which provide, in part, as follows:

65(1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

(a) the duration of the marriage,

(b) the duration of the period during which the spouses have lived separate and apart,

(c) the date when property was acquired or disposed of,

- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

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

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

...

66(1) In proceedings under this Part or Part 6 or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 65, or under Part 6 and may make orders that are necessary, reasonable or ancillary to give effect to the determination.

- (2) Without limiting subsection (1), the court may do one or more of the following in an order under this section:
 - (a) declare the ownership of or right of possession to property;
 - (b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;
 - (c) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division;
 - (d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts;
 - (e) order that property forming all or part of the share of either or both spouses be transferred to, or in trust for, or vested in a child;
 - (f) order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property and may order that the spouse waive or release in writing any right, benefit or protection given by section 23 of the Chattel Mortgage Act, R.S.B.C. 1979, c. 48, or section 19 of the Sale of Goods on Condition Act, R.S.B.C. 1979, c. 373;
 - (g) if property is owned by spouses as joint tenants, sever the joint tenancy.

- [37] Under s. 56 of the FRA, each spouse is entitled to a presumptive one-half undivided interest in each family asset as a tenant in common upon the happening of one of the events set forth in s. 56(1), commonly known as a "triggering event." In this case, the triggering event is the granting of the order of divorce in accordance with these reasons.
- [38] The opening words of s. 56 make it clear that the presumptive one-half undivided interest under s. 56(2) is "Subject to this Part" (which includes s. 65), and s. 56(3) also states that such an interest is "subject to (a) an order under this Part...." Thus, the undivided one-half interest as a tenant in common to which a spouse is presumptively entitled upon the happening of a triggering event is subject to an order for reapportionment under s. 65(1).
- [39] Further, where the court determines that an equal division of family assets would be unfair having regard to the factors set forth in s. 65(1), the court may make an order under s. 65(2) that other property of one spouse (in other words, property that is not a family asset) may be vested in the other spouse to address that unfairness. This provision has been interpreted in *Hefti v. Hefti* (1998), 57 B.C.L.R. (3d) 171, 40 R.F.L. (4th) 1, (C.A.), as also permitting a compensation order to be made to adjust for any unfairness.
- [40] The fact that one party may have borne a heavier financial burden in the payment of household expenses while parties were living together is not generally seen as a factor to be taken into account on reapportionment, as it is seen as just one of a myriad of good and bad decisions parties make while they live together: *Girard v. Girard* (1983), 42 B.C.L.R. 305, 33 R.F.L. (2d) 79 (C.A.); *Newson v. Newson* (1986), 3 B.C.L.R. (2d) 1, 2 R.F.L. (3d) 137 (C.A.). However, a marked disparity in the contribution to the acquisition and maintenance of the family residence is generally thought to be of a different character. Unlike household expenses, such expenditures come within the factors to be considered under s. 65(1)(f).
- [41] Once the court has divided the family assets under Part 5 of the FRA, it must go on to consider the mechanism by which the division of property is to be achieved, pursuant to s. 66(1).

The Disputed Assets/Debts

- [42] Mr. Gain claims all his assets are family assets:
- (a) Half of the proceeds from the sale of the Dawson Street condo: \$83,829;
 - (b) 1993 Toyota Corolla: \$2,900;
 - (c) Royal Bank Account: \$2,200;
 - (d) RRSP: \$4,905.

With the exception of the proceeds from the Dawson Street condo, Mrs. Gain is content to allow Mr. Gain to retain 100% of those family assets in his name.

[43] Mr. Gain also claims from Mrs. Gain half of his Royal Bank Visa debt of \$22,350. Mrs. Gain disputes that and says, alternatively, that she should only be responsible for 20% of that amount.

[44] Mrs. Gain's assets include:

- (a) Half of the proceeds from the sale of the Dawson Street condo: \$83,829;
- (b) Various bank accounts: \$7,982 (including a chequing account: \$2,946; Royal Bank account: \$210; Royal Bank savings account: \$766; TFSA: \$4,060);
- (c) RRSP: \$12,493;
- (d) Telus shares (both voting and non-voting): \$55,055;
- (e) Telus options: unknown value;
- (f) Piano: \$3,860;
- (g) Pension plan with Telus: value discussed below.

Mr. Gain takes the position that her other assets should include her disability pension and lump sum separation allowance.

[45] Mrs. Gain also claims from Mr. Gain one-half of certain debts, being a homebuyer's loan which was used to fund the purchase of the Dawson Street condo (\$6,068) and the amount claimed to be owing to her sister, Ms. Domingo, in the amount of \$23,000 plus interest. Mr. Gain disputes that there is a loan owing to Ms. Domingo.

[46] Mrs. Gain takes the position that the only family assets in her name are the proceeds from the Dawson Street condo, the RRSP and the Telus pension plan, all of which she seeks to have reapportioned in her favour. She is seeking 80% of the net sale proceeds of the Dawson Street condo after payment of the Domingo debt, which would result in a payment of approximately \$28,200 to Mr. Gain. Alternatively, she is seeking 90% of the sale proceeds if the Domingo debt is not a valid debt. She is seeking 100% of the RRSP and pension.

[47] Further, she seeks a reapportionment of the remaining assets in her favour if they are family assets. Alternatively, she says Mr. Gain is entitled to no more than 20% of their value. Mr. Gain takes the position that all of her assets are family assets and are to be shared equally.

Discussion

[48] The triggering event under s. 56 of the FRA is the order for divorce which I have ordered above. As such, the time of the trial is the critical date for valuation of the undivided one-half interest in the family assets: *Frydrysek v. Frydrysek*, 2002 BCCA 428 at paras. 19-28; *Gilpin v. Gilpin*, 50 B.C.L.R. (2d) 251, 29 R.F.L. (3d) 250 (C.A.). The British Columbia Court of Appeal held in those cases that this is the proper approach unless fairness dictates otherwise.

[49] In this case, the parties proceeded on the basis of the values set out in their respective Form 89 financial statements for Mr. Gain (sworn April 1, 2010) and Mrs. Gain (sworn June 18, 2010). Accordingly, I will use these values, which were incorporated into the Scott Schedule, which was produced for the purposes of the trial by both parties. This is the most fair approach notwithstanding that the value of these assets may not be the same at this time: FRA, ss. 65 and 66; *May v. Yanitski* (1992), 40 R.F.L. (3d) 190 at 202, 32 A.C.W.S. (3d) 278 (S.C.):

Had the parties' R.R.S.P.s not been dissipated by the husband, each would in my view, have been entitled to a 50 percent interest therein. Mr. Yanitski himself testified that the wife's original \$16,000 would have been worth \$31,000 at the time of trial, and that his R.R.S.P. account had been in the amount of \$3,400. Thus, each party would have had at least an additional \$17,500 in R.R.S.P. funds. The taking of this "potential family asset" should be reflected in some way. If authority is needed for this proposition, I refer to *Newson v. Newson* (1986), 2 R.F.L. (3d) 137, 3 B.C.L.R. (2d) 1, 27 D.L.R. (4th) 738 (C.A.), where Anderson J.A. noted at pp.149-150 [R.F.L.]:

In my view, compensation, vesting or adjusting orders can be made pursuant to ss.51 and 52 (2) (c) of the Act in respect of 'potential' family assets disposed of or spent by the other spouse prior to the triggering events enumerated in s.43. The substantive jurisdiction to make such orders is to be found in s.51 of the Act. Firstly, the judge may take into account, pursuant to s.51(b) the 'duration of the period during which the parties have lived separate and apart'. Secondly, he may take into account 'the date when property was acquired or disposed of' (s.51(c)). Thirdly, he can take into account 'any other circumstances relating to the acquisition, preservation, maintenance or improvement or use of property' (s.51(f)).

All of these powers give the judge a power to reapportion and to make compensatory or adjusting orders, where the 'potential' family assets have been spent or disposed of prior to the triggering event....

[50] The onus of proving that any property is not ordinarily used for a family purpose is on the spouse opposing such a claim: FRA, s. 60. Mrs. Gain contends that certain of her assets, being the bank accounts, the Telus shares and options and the piano, are not family assets. The onus of proof with respect to those assets therefore rests with her.

[51] Firstly, with respect to the bank accounts, the evidence established that these accounts, with the exception of the Royal Bank savings account, were maintained by Mrs. Gain for normal banking activities. She used them for purposes that included the deposit of pay cheques and payment of bills, household expenses and the mortgage. As such, these accounts were used for family purposes. The chequing account was used to pay the mortgage, phone bills, her own credit cards, her food and items for the house. Her Telus salary was also deposited into this chequing account. The Royal Bank account was used to pay a line of credit although there is nothing owing on the line of credit. The TFSA was established with monies from the chequing account or the line of credit.

- [52] Accordingly, s. 58(3)(c) of the FRA expressly provides that these monies, being in accounts with a savings institution, are a family asset.
- [53] The Telus shares were purchased from Mrs. Gain's salary. She has been buying these through the employee payroll reduction plan. She says these are not a family asset. She wants them for retirement and for emergency purposes. In particular, she notes that she can convert the Telus shares to her RRSP and she wants to retain that option for future use in retirement.
- [54] The Telus options in Mrs. Gain's name are already vested. She can buy the shares or, alternatively, get the cash payment. Her intention is to exercise the option and transfer the shares to her RRSP for her retirement. Mrs. Gain acquired the options from 2001 to 2003 through her employment during the marriage. They are a financial benefit available to her and prior to the separation, were intended for the couple's joint financial security in the future.
- [55] Mr. Gain cites ample case law supporting the proposition that shares and options, and in particular, Telus shares and options, are family assets: *Hoffart v. Hoffart*, 2006 BCSC 152 at paras. 35-36, 43-44, 71-72; *D.A.M. v. M.A.M.*, 2004 BCSC 89 at paras. 49-50; *Z.J.C. v. S.Y.M.L. and M.C.L.*, 2003 BCSC 1707 at para. 33; *S.C. v. A.D.*, 2009 BCSC 1749 at para. 43. Mrs. Gain in turn cites *Bindley v. Muliner*, 2001 BCCA 380. However, this case is clearly distinguishable since the shares in that case were all acquired before the marriage whereas here, Mrs. Gain acquired them all during her marriage.
- [56] Finally, the evidence established that Mrs. Gain purchased the piano with her funds (which would otherwise have been used to fund family expenditures). While only she played the piano, I can only assume that it was played for not only her enjoyment, but the enjoyment of Mr. Gain when he was present in their home. As such, in my view, the piano was used for a family purpose and is a family asset.
- [57] The RBC Savings Account (balance \$766) in Mrs. Gain's name was opened in January 2010, after the parties had separated. I find that it is not a family asset for that reason. Even if it was a family asset, I would have considered it fair to reapportion it in favour of Mrs. Gain since the money has come solely from her disability payments post-separation and has been used by her in part to pay the interim spousal support to Mr. Gain.
- [58] Accordingly, I find that all the assets specifically listed in paragraphs 42 and 44 above, with the exception of Mrs. Gain's Royal Bank saving account, are family assets. I will deal with the disability pension and lump sum separation allowance separately below.

Reapportionment

- [59] The major focus of Mrs. Gain's argument was to the effect that the court should reapportion all or most of her assets in her favour. She cites the length of the marriage, her need to become or remain economically independent and self-sufficient, and her health, relying on

ss. 65(1)(a), (e) and (f) of the FRA. Further, she asserts that she has contributed the lion's share in respect of the accumulation of the family assets, and this does in fact appear to be the case. She contends that Mr. Gain has failed to equally contribute and implies that he has chosen to be unemployed or, alternatively, employed in non-remunerative occupations, which has prevented him from contributing equally. Finally, she says that given the way in which they lived their lives, theirs was a marriage "in name only."

[60] In submissions at the end of the trial, Mrs. Gain conceded that she is prepared to allow Mr. Gain to have \$25,000 from the proceeds from the Dawson Street condo. She also concedes that she is responsible for some of the Visa debt although she has not taken the time to go through the bills and figure out how much that is.

[61] Mrs. Gain relies on the following cases in support of reapportionment: *Wundele v. Wundele* (1994), 99 B.C.L.R. (2d) 1, 8 R.F.L. (4th) 325 (C.A.); *Leski v. Leski*, [1998] B.C.J. No. 1588 (S.C.); *Johnstone v. Johnstone* (1981), 33 B.C.L.R. 368, 26 R.F.L. (2d) 18 (S.C.); *Fister v. Fister*, [1990] B.C.J. No. 2480 (S.C.); *McCallum v. McCallum*, [1995] B.C.J. No. 1260 (S.C.); *F.M.L. v. K.R.L.*, 2003 BCSC 1269; *R.L.M. v. L.A.M.* 2007 BCSC 1233. In particular, Mrs. Gain relies on *Johnstone* at 388-389 (as cited to B.C.L.R.) where Justice Dohm (as the then was) stated:

One of the presumptions of the Act is that during the course of a marriage the spouses will acquire assets, obligations (or liabilities) and experiences. The family is treated as an economic unit with the general presumption that all aspects of the economic unit are shared equally upon the break-up of the marriage. This presumption is enacted in s. 43. The assumption on which the equal division presumption is based is that both parties contribute equally to the economic assets of a marriage whether the contribution is measured in terms of money, labour, housekeeping or by any other activity normally anticipated in a functioning marriage. No greater importance is to be put on any particular contribution or type of contribution. There are however some considerations which can permit the court to move away from the presumption of equal division of assets. These are set out in s. 51.

In essence these provisions deal with situations in which the basic assumption of equal contribution has not operated. Additionally s. 51(f) imports a consideration of the role of each spouse in the changes in family assets. In general the assumption behind a normal functioning family economic unit is that it will acquire and develop assets, at times beginning from nothing. Along with the other subsections of s. 51, cl. (f) is concerned with circumstances in which it would be unfair to make an equal division. The conduct between the parties is not relevant, but what can be relevant are the activities of each spouse in developing the assets. If one spouse conscientiously and carefully works to develop the assets, whether by contribution of money or labour or time and the other by whatever contribution he or she is capable of or does make, actively decreased and devalues the assets it would be unfair to divide them equally. This consideration does not relate to the salaries earned by the spouses, but to their contributions, considering their abilities, opportunities, capabilities, etc. It should be noted that the assets can be very extensive. For example s. 46 allows business assets of one spouse to be brought into family assets as a result of indirect contributions by the other spouse. Other assets might include

an education - if one spouse puts the other through school and also managed to acquire certain assets - again it would be unfair to divide the assets equally by considering only the tangible assets. Similarly if one spouse chooses to collect antiques with part of the family income and the other chooses to ski or gamble on horses or "collect" experiences, it would be unfair to divide the accumulated assets equally at the end of the marriage. If spouses each contribute positively to the development of the family assets s. 51(f) will not apply. If, on the other hand, one spouse tries to build up the assets and the other to acquire "experiences" this must be a factor to consider whether or not it would be unfair to divide the assets equally. This involves taking the broader view of assets as described above and making a fair apportionment starting from the presumption of an equal division.

[Emphasis added.]

- [62] With respect, I do not consider that the above cases assist Mrs. Gain. All of the cases where reapportionment was ordered involved factors such as a shorter marriage (Fister), extraordinary contributions through inheritance or gift (Wundele, McCallum, R.L.M.) or not only a complete lack of contribution but active dissipation of family assets (Leski, Johnstone, F.M.L., R.L.M.).
- [63] I now consider the factors listed in s. 65(1) of the FRA. The marriage here was a long one, being almost 25 years. This factor alone suggests equality rather than inequality: S.B.M. v. N.M., 2003 BCCA 300, para. 25. The assets were accumulated over those many years in that neither party brought substantial assets into the marriage.
- [64] Mr. Gain took educational courses and worked when he could. While he was certainly not as successful as Mrs. Gain in his employment (whether by effort or chance), he certainly did contribute to the marriage. Unlike the husbands in Leski, Johnstone and R.L.M., he did not deplete assets owned by the parties in pursuit of his own interests. In particular, his income was used to pay for their joint expenses and this allowed Mrs. Gain to use her income for other expenses perhaps more directly related to the family assets, such as the mortgage. The latter circumstance does not mandate unequal sharing: Girard v. Girard (1983), 42 B.C.L.R. 305 at 315-316, 33 R.F.L. (2d) 79 (C.A.).
- [65] They each contributed to the marriage and the assets accumulated in the marriage in their own way. While the contributions may not necessarily seem equal from a monetary point of view, the case law supports a broad approach rather than a detailed analysis of the amount and type of those contributions (termed by some as a "forensic accounting"); W.H.P. v. S.L.A., 2003 BCSC 530 at para. 29; Y.U. v. A.S., 2004 BCSC 1763 at paras. 44-47.
- [66] Despite the contention of Mrs. Gain, I do not accept that this was a marriage "in name only" as was found in Johnstone. Mrs. and Mr. Gain functioned as a couple during most of their relationship until late 2008, when their relationship began to deteriorate. Though their relationship did not have some of the hallmarks of a close union, that does not detract from the fact that their marriage worked from both points of view and for a very long time. It seems that this contention is being made only recently and in support of the

reapportionment argument.

[67] Further, while Mrs. Gain cites her need to be self-sufficient and her health problems on this point, Mr. Gain quite legitimately makes these same points with respect to himself, without seeking a reapportionment of the family assets in his favour. Mr. Gain cites *Richardson v. Richardson* (1984), 59 B.C.L.R. 162 para. 30, 43 R.F.L. (2d) 312 (C.A.), in support of the proposition that a temporary inequality of economic well-being is not a proper basis for departing from equality in sharing. However, in this case, while Mrs. Gain is currently away from work collecting disability payments, she still enjoys a decent income which substantially exceeds that of Mr. Gain. It is also apparent that an equal division will not prejudice the economic well-being of either party, leaving aside the usual consequences parties suffer upon divorce. In fact, Mrs. Gain is younger, has the better job with substantial benefits, and clearly has better prospects in terms of re-establishing herself in the future.

[68] In all of the circumstances, including those discussed below with respect to the particular assets, I am not persuaded that equal sharing of the family assets would be unfair.

[69] I now deal with the specific assets in detail.

(a) Dawson Street Condo Proceeds (Both)

[70] The matrimonial home was purchased in 2004 and owned in joint-tenancy. In 2009, the property was transferred into Mrs. Gain's name only. Evidence was led at trial relating to the circumstances under which that transfer took place, with Mr. Gain alleging that he was tricked into doing so. Mrs. Gain says that he "gifted" his half to her with no intention of asserting a claim to it, a claim that was essentially abandoned at trial. I find that the parties completed this transfer for the purpose of refinancing the property (in both names) when it was apparent that Mr. Gain had the substantial Visa bill outstanding. I do not accept that Mr. Gain intended to "gift" this asset to Mrs. Gain with no intention of making a claim under the FRA.

[71] In any event, the Dawson Street condo was used for a family purpose and, as agreed at trial, is a family asset.

[72] After the adjustment for the amount advanced by Ms. Domingo to Mrs. Gain, as discussed below, the proceeds shall be divided equally. The balance held by Henderson Heinrichs is \$167,658, less \$41,887.70 paid out during the trial, leaving a balance of \$125,770.30.

(b) RRSPs (Both) and RRSP Debt (Mrs. Gain)

[73] Mrs. Gain has an RRSP at President's Choice in the amount \$12,493 which she bought with her Telus shares when she withdrew or sold some shares in 2004. Mr. Gain has an RRSP of \$4,905.

- [74] RRSPs are by definition family assets: FRA, s.58(3)(d). The parties agree that they are family assets. The RRSPs in the name of Mr. Gain shall be set off as against Mrs. Gain's RRSP, which leaves a net balance in her name of \$7,588.
- [75] Mrs. Gain is also liable for a homeowner's loan in the amount of \$6,068. This was withdrawn from her RRSP to purchase the Dawson Street condo. The parties are agreed that this is a family debt and should be accounted for with Mr. Gain paying Mrs. Gain one-half of this sum, being \$3,034. Since this money came out of Mrs. Gain's RRSP, it must be returned to it. This will have the effect of increasing Mrs. Gain's RRSP by that amount and since it is a family asset, Mr. Gain would receive one-half of that amount, being \$1,517. Accordingly, Mrs. Gain will complete a tax free spousal rollover to Mr. Gain in the net amount by transferring the sum of \$2,277 (\$3,794 less \$1,517) to him.
- (c) Toyota Corolla (Mr. Gain)
- [76] The car was purchased by Mr. Gain in 2008. Mrs. Gain had contributed to this car by payment of certain ICBC proceeds (from an earlier accident) towards this car so she considers that she is entitled to part of the proceeds. She acknowledged that he did most of the driving when they went out. The vehicle was ordinarily used for family purposes and the parties agree that it is a family asset. This vehicle will be retained by Mr. Gain and he will compensate Mrs. Gain for one-half of its value, being \$1,450.
- (d) Bank Accounts (Both)
- [77] As I have found above, the balances in the bank accounts held by the parties are family assets. The total in the name of Mr. Gain is \$2,200 and the total in Mrs. Gain's name is \$7,216. Accordingly, Mrs. Gain will pay to Mr. Gain the sum of \$2,508 to equalize these assets.
- (e) TELUS Common Shares and Non-Voting Shares (Mrs. Gain)
- [78] I have found that these shares are family assets and they will not be reapportioned. The interest of the non-owning spouse is an interest in the asset, not in the value of the asset itself. According to the court in *Frydrysek* at para. 24, citing *Blackett v. Blackett* (1989), 40 B.C.L.R. (2d) 99 (C.A.), a party is entitled to 50% of the asset, not the value of the asset.
- [79] Thus, Mrs. Gain will transfer 50% of the shares to Mr. Gain, provided that if the shares cannot be transferred in specie, Mrs. Gain will pay Mr. Gain one-half of the value of those shares as at the date of this order.
- (f) Telus Options to Buy Shares (Mrs. Gain)
- [80] The options are a family asset and amounts received in respect of such options post separation should be shared: see *Family Law Sourcebook for British Columbia*, 3rd ed., looseleaf (Vancouver: CLE Society of B.C., 2002) §4.48; *Hoffart v. Hoffart*, 2006 BCSC 152, at paras. 36 and 71.

[81] Little evidence was adduced at trial concerning the terms on which the options might be exercised. As Mr. Gain notes, it is doubtful that one-half of the options can be transferred into Mr. Gain's name. Accordingly, similar to that ordered in *Kennedy v. Stoughton*, [1996] B.C.J. No. 1808, there will be a declaration that Mrs. Gain holds one-half of those options in existence at the date of separation in trust for Mr. Gain's benefit. Mrs. Gain will give Mr. Gain one week written notice prior to exercising any of those options. At that time, Mr. Gain will provide to her any funds relating to the exercise of one-half of those options. Provided that any such required funds are paid by Mr. Gain, Mrs. Gain shall exercise her one-half of the options and transfer to him one-half of the shares received by her. If Mrs. Gain elects to receive cash in lieu of these options, upon receipt Mrs. Gain shall immediately pay one-half of such proceeds to Mr. Gain. If there are any tax consequences to Mrs. Gain arising from the exercise of such options, Mr. Gain shall compensate Mrs. Gain for half that amount within seven days after receipt of written confirmation of the amount by assessed tax filings.

(g) Telus Pension (Mrs. Gain)

[82] Mrs. Gain's pension rights arose principally during her years of marriage with Mr. Gain. The only evidence concerning the value of the Telus pension plan came from Mr. Gain. It appears that the parties had jointly retained an actuary to value the pension and the actuary advised both parties by telephone of his views on the value of the pension. Mr. Gain stated what the actuary had concluded. Mrs. Gain strenuously objected to any evidence on this matter.

[83] It is clear that Mr. Gain sought to introduce this evidence for the purpose of proving the value of the pension. To that extent, it is inadmissible. As such, I am proceeding on the basis that there is no evidence concerning the value of Mrs. Gain's pension with Telus for the purpose of these proceedings.

[84] As stated above, Mrs. Gain wants the pension reapportioned entirely in her favour. She says that because she worked so hard to get it, it has nothing to do with Mr. Gain and it is her "sweat and blood".

[85] There is, however, authority that the court, in considering reapportionment, should have with regard to the value of all of the assets in issue: *Family Law Sourcebook* §4.69. Mrs. Gain has resisted the introduction of any evidence concerning the value and the court therefore has little basis upon which to consider the reapportionment argument from this perspective. As stated above, the onus lies on her to establish the basis for reapportionment.

[86] A pension is by definition a family asset: FRA, s.58(3)(d). The parties are agreed that the Telus pension is a family asset. As discussed above, in my view, an equal sharing of this asset would not be unfair.

[87] The Telus pension benefits shall be equally divided pursuant to Part 6 of the FRA.

(h) Piano (Mrs. Gain)

- [88] The piano was purchased by Mrs. Gain in September 2008 so she could use the piano during her recovery from surgery. She calls this her personal property. She moved the piano out prior to the sale of the Dawson Street condo. Mr. Gain does not know how to play the piano. The piano was kept in the family home and used by Mrs. Gain there.
- [89] I have found that the piano is a family asset. Mrs. Gain shall retain the piano and pay Mr. Gain one-half of its value, being \$1,930.
- (i) Disability Benefits (Mrs. Gain)
- [90] Throughout the trial, Mr. Gain was seeking a final order for spousal support. Only when written arguments were received post-trial did he then claim that the disability benefits which Mrs. Gain is receiving are family assets. Mr. Gain takes the position that from May 2009 onwards, Mrs. Gain has received \$3,589 per month by way of disability "pension." As this is a family asset, he submits that these payments should be divided equally from that date and Mrs. Gain credited with the spousal maintenance paid.
- [91] He relies in that respect on the Family Law Sourcebook §4.43 and *Smith v. Smith* (1986), 1 R.F.L. (3d) 219, 37 A.C.W.S. (2d) 105 (B.C.S.C.). It is clear that there is considerable uncertainty in the law as to how to characterize these payments in the context of a division of assets. In *Smith*, Madam Justice Southin found a Canada Pension Plan allowance and a long-term sick leave benefit to be family assets. However, Southin J. (as she then was) was clear in pointing out that where the respondent was receiving maintenance, her "tentative view [was] that she cannot expect to have half the benefits and the maintenance as well" (*Smith* at 222, as cited to R.F.L.).
- [92] Mrs. Gain gave evidence at trial that it was her intention to return to work as soon as possible. As such, like in *Smith*, I do not consider that this is a long-term situation.
- [93] In *Wood v. Wood*, 2000 BCSC 1647, Mr. Justice McEwan addressed the division of assets where the husband was receiving long-term disability payments at the date of separation. The wife claimed that these were family assets and she was entitled to half of them to be set off against the value of other assets. McEwan J. held:
- [9] The only encouragement for this particular characterization of the issue seems to be found in *Meier v. Meier* (1995), 17 R.F.L. (4th) 41 B.C.C.A., there at paragraph 15 Madam Justice Southin had the following to say on the matter:
16. Counsel for the appellant conceded before us, saying he was bound to do so by the decision of this Court in *Jiwa v. Jiwa* (1992), 72 B.C.L.R. (2d) 96, that the rights of the appellant to these payments are family assets. Having considered that judgment, I think he was right to make the concession although this Court may some day wish to consider that issue if a case should arise where the facts are as they are here and not as they were there. I say that because these amounts being received by the appellant are intended to replace a lost income stream. If she had not been ill, she would be receiving not these amounts but her salary from her employer until she reached retirement age when, presumably, she would then get her

Canada Pension and whatever other pension might be available to her.

- [10] Under Section 58 of the Family Relations Act the definition of "family asset[s]" - that is, of assets presumptively subject to equal division upon the breakdown of the marriage - includes:
- (d) a right of a spouse under an annuity or pension, homeownership or retirement pension plan.
- [11] I do not think I am in any position on the material before me to distinguish this case from the line of cases before it, which clearly find that pensions of this kind are, within the terms of the statute, "assets". Such a distinction will have to await the specific consideration of the Court of Appeal anticipated in Madam Justice Southin's remarks, or a case in which this court will be moved to articulate an exception that presently eludes me. I think, moreover, it is pointless to found a judgment of this court on a novel - and therefore dubious - reading of the law, when there is a clear and workable - if inelegant - alternative.
- [12] That is found in s. 65 ...
- [13] In the present case it is clear that, putting the characterization issue aside for a moment, the parties have come out of this marriage with some assets to be divided and with the means, by way of disability pensions on the one hand, and earned income on the other, to make their way more or less independently, subject to perhaps some adjustment by way of spousal maintenance.
- [14] If, without the "assistance" of the Family Relations Act, one were to attempt to equate the situations of the parties - comparing like to like - one would obviously have to weigh the future value of the anticipated income stream from Mrs. Wood's employment against the actuarially derived value of Mr. Wood's pension. On the other hand, one could simply treat what each party is getting as income were it not for the definition problem imposed by the Act.
- [15] As I have said, the outcome of an analysis predicated on the characterization of the disability pensions as "assets" is that the parties have about \$278,000 in taxable assets after deduction of Mrs. Wood's post-separation inheritance and savings, and \$498,000 represented by the disability. Mrs. Wood's presumptive half of these assets is about \$388,600. Allocating everything the parties own to her, she is still \$110,000 "short", or into Mr. Wood for more than one fifth of his pension income as well. This is not to mention "arrears" on his past receipts, which also come up in Mrs. Wood's materials.
- [16] This is manifestly unfair, in my view, under at least the criteria set out in s. 65(1)(e) and (f), specifically the need of each party to be economically self-sufficient, and of the capacity of Mr. Wood to otherwise make his way in the world.

[17] Although I have said I do not think I can deal with the matter, it seems obvious to me that typical disability pensions are not, analytically, assets notionally earned or income forborne during the marriage, but amount to a form of insurance against individually remote contingencies. Mr. Wood's illness triggered the scheme, not the notional sacrifices of the parties during marriage. It is payable as long as he is ill: in effect, he "earns" it as he goes by virtue of his suffering.

...

[19] ... I am not inclined to go further than to say that I am satisfied that on the basis of fairness, a reapportionment of at least the disability pensions to Mr. Wood is required, and I make that order. Respecting the tangible assets, I am satisfied that Mrs. Wood's \$20,000 inheritance, RRSPs and pension contributions since the separation are not family assets and are therefore excluded.

[94] I prefer to take the same approach as the court did in Wood, namely, that if these disability payments are family assets, I would have no hesitation in ordering that they be reapportioned entirely to the benefit of Mrs. Gain. In light of the fact that these payments represent a replacement for the income stream that she would be otherwise earning and that Mr. Gain has sought (and will obtain) relief in the form of spousal support based on that notional income, I consider any other outcome to be unfair in accordance with ss. 65(1)(e) and (f) of the FRA.

(j) Lump Sum Separation Allowance (Mrs. Gain)

[95] Telus has recently been making efforts to downsize certain of its operations, including the department where Mrs. Gain worked. In May 2009 and March 2010, Mrs. Gain received offers from Telus which offered to provide her a lump sum separation allowance if she voluntarily resigned. The offer was to either receive \$112,269 with a normal pension at age 65 or \$76,012 with the ability to apply for a pension at her earliest eligibility. Consistently, Mrs. Gain has elected Option 2, which means that she has elected to stay with Telus.

[96] Mr. Gain takes the position that this allowance is a family asset and the court should fashion a remedy to account for any funds received if Mrs. Gain should elect to receive this allowance.

[97] In D.A.M. v. M.A.M., 2004 BCSC 89, Mr. Justice Fraser considered a situation where following a marriage of 29 years, the husband accepted a voluntary departure package from Telus which resulted in payment of a lump sum (para. 30). The court found that the amount paid was not a family asset, but rather, a form of income which essentially replaced his income stream between the retirement and when his pension payments would begin. Given the nature of the payment made and the fact that it was in lieu of future income, the court dealt with this issue in the context of spousal support (para. 55). Because of the length of the marriage, Fraser J. determined that the spouses should be on an equal footing and ordered 50% of the severance amount paid as lump sum spousal support in lieu of what would

otherwise have been his spousal support obligations over the relevant period.

[98] I agree with the approach of the court in D.A.M. and propose to deal with the potential of Mrs. Gain receiving this amount in the context of spousal support.

(k) Family Debts

[99] A court may consider the existence of current debts in determining the value of family assets or re-apportioning the assets pursuant to s. 65(1)(f) of the FRA: Family Law Sourcebook §4.128.

[100] There are two debts in issue, one incurred by Mr. Gain and one allegedly incurred by Mrs. Gain.

[101] Mr. Gain had a Visa debt of \$21,887 as of the trial date. The evidence established that this debt was incurred for a family purpose, namely for expenses such as food, gas, car repairs, entertainment and the like. As set out above, it was paid out on July 20, 2010, in that amount.

[102] Mr. Gain contends that this should be declared a debt incurred by one party, for family purposes, and should be borne equally by them. Further, he points out that since it has been already paid out of joint monies, no further order would be necessary.

[103] Mrs. Gain disputes that this is a family debt or, alternatively, contends that this debt should be allocated to Mr. Gain only. She admitted in her evidence that many of the expenses were incurred in part for her benefit; these included certain restaurant bills, household items, lottery tickets and car expenses when they were using the car for their joint purposes.

[104] I agree with the submissions of Mr. Gain on this issue. This debt was incurred for family purposes. Mrs. Gain provided no detailed submission concerning what expenses she specifically benefitted from and, accordingly, I accept the evidence of Mr. Gain that all of the expenses related generally to their joint expenses or expenses incurred solely by him but for normal day to day living expenses. Accordingly, the amount of \$21,887 will be set off as against the net sale proceeds from the Dawson Street condo as has already been completed by the parties and no further adjustment is necessary.

[105] The second debt is asserted by Mrs. Gain. She says that she borrowed the sum of \$23,000 from her sister, Ms. Domingo, in June 2004, and is required to pay her back with interest. Mrs. Gain also says that she borrowed this money in order to arrange for the purchase of the Dawson Street condo. Mr. Gain did not learn that Ms. Domingo had given Mrs. Gain a cheque for \$23,000 until after this action had been commenced. Mrs. Gain did not refer to this debt in her financial statement sworn August 25, 2009, and it was only disclosed in her later Form 89 produced for the purposes of the trial.

- [106] The facts surrounding this payment are not straightforward. A cheque from Ms. Domingo to Mrs. Gain was produced indicating a payment of \$23,000 on June 3, 2004, which appears to have been cashed June 8, 2004. However, the initial deposit of \$11,745 due on the purchase of the Dawson Street condo was paid by Mrs. Gain on June 2, 2004. A second deposit in that same amount was later paid on January 22, 2005. The sale closed in February 2006 when a further amount of approximately \$4,300 was paid.
- [107] Ms. Domingo gave evidence at the trial and stated that her sister said that she needed the money for a down payment. In response, Ms. Domingo says she lent her the money received from her own Toronto-Dominion Bank line of credit. Ms. Domingo said that she "expected" full repayment with interest when the condo was sold. She confirmed that she had received no payments from her sister. Ms. Domingo was not certain as to the amount of interest that would have accrued on this amount under her line of credit but said that it was "roughly" \$4,000. During Mrs. Gain's examination, she produced a summary of Toronto-Dominion Bank's historical prime rates from 2004 onward. It is not clear to me what I am to make of these rates since it was not clear what interest rate Ms. Domingo was paying Toronto-Dominion Bank under her line of credit. She produced no documentation to substantiate any such borrowings or interest charged over the relevant time frame.
- [108] A spouse that argues that a debt is owed to his or her family member bears the onus of proof: Family Law Sourcebook §4.149.
- [109] The court in *Locke v. Locke*, 2000 BCSC 1300 at para. 20, sets out certain factors that are to be considered when determining if money advanced by family members should be considered a gift or a debt:
- (a) Are there any contemporaneous documents evidencing a loan?
 - (b) Is the manner for repayment specified?
 - (c) Is there security held for the loan?
 - (d) Are there advances to one child and not others, or advances of unequal amounts to various children?
 - (e) Has there been any demand for payment before the separation of the parties?
 - (f) Has there been any partial repayment?
 - (g) Is there any expectation, or likelihood, of repayment?
- [110] I come to the following conclusions when I consider these factors in relation to the facts in this case:
- (a) There are no documents evidencing a loan. Mr. Gain was not told by either of them about these monies being received from his sister-in-law until after this action had commenced, some four years later;

- (b) The alleged manner of payment is vague in that Mrs. Gain (only) was to repay it when she was able or when the Dawson Street condo was sold per Mrs. Gain's updated financial statement from June 2010 (the previous Form 89 did not disclose any such debt owing although Mrs. Gain alleges that she "forgot to put it in since [she] could not pay it until the property was sold");
 - (c) There was no security for the "loan";
 - (d) Ms. Domingo gave similar amounts as gifts to her other siblings without expectation of repayment. She gave her brother her share of the proceeds of the investment property in the amount of approximately \$10,000. Mrs. Gain did the same thing. Ms. Domingo also gave their brother further monies to purchase his condo and she did not expect repayment. Mrs. Gain also gave another sister \$22,000 from savings. She also gifted her mother a small monthly amount. I accept the contention of Mr. Gain that the Domingo family was in the habit of gifting monies to each other on a regular basis;
 - (e) Despite the alleged agreement with respect to repayment, Ms. Domingo said that she understood that the Dawson Street condo had been sold and that it was held "somewhere." She was vague on the details, when one would have otherwise expected her to be keenly aware of the circumstances in terms of ensuring repayment when the sale had taken place some months earlier. No demand for payment has been made;
 - (f) No partial repayments have been made;
 - (g) As I discuss below, based on the circumstances, I find it unlikely that Ms. Domingo expected full repayment.
- [111] Mrs. Gain cites *May v. Yanitski* in support of her contention that this is a valid family debt and that the amount should be deducted from the Dawson Street condo proceeds in her favour. In that case, at 195-196, the court found that amounts advanced by siblings were valid debts:

Mr. May's testimony leads me to infer that the funds were an advance on his sister's future inheritance rather than an investment that must be repaid at a later date. Of course, family financial arrangements are often matters of trust and unspoken understanding rather than express terms and conditions. It is for this reason, and because of the obvious opportunities for abuse, that the court carefully scrutinizes such arrangements: see, e.g., *Wiens v. Wiens* (1991), 31 R.F.L. (3d) 265 (B.C.S.C.) at 271; *Pinnette v. Pinnette*, (1987), 6 R.F.L. (3d) 212 (Man. Q.B.). The burden of proof is all the greater where there is a presumption of advancement from father to child as in the case of the first two transfers of funds listed above. I do not find that the presumption of advancement has been rebutted or that either a loan or investment has been established. Therefore, for purposes of the property division under the Family Relations Act, the advances made in 1981, 1983 and 1987 from the "family estate" will not be deducted from the present value of the matrimonial home.

I reach a different conclusion concerning the amounts later advanced to Ms. May by her brother and sister. They differ from the earlier advances in that they were not made effectively by Ms. May's parents but by her siblings (giving rise to no presumption of advancement), and they were made in response to Ms. May's particular and pressing needs for funds when the true state of her finances was becoming clear. These advances were listed in her filed property statement under "Debts and Other Liabilities," whilst the earlier advances were not. I conclude that they are bona fide debts, although strictly speaking they are not charges against the parties' interests in the family home. The loans have now been documented (although this was not done at the time they were made) in that Ms. May has signed what appear to be the German equivalent of promissory notes, evidencing her obligation to repay the amounts advanced with interest at a specified rate.

- [112] Alternatively, she seeks a reapportionment of the net sale proceeds to account for this amount as a "gift" pursuant to s. 65(1)(d) of the FRA, citing Leski, Fister and McCallum, where amounts advanced by relatives supported a reapportionment in respect of the asset that was purchased as a result.
- [113] Firstly, the circumstances of the dates of the cheque from Ms. Domingo and the fact that no \$23,000 down payment was made by Mrs. Gain in June 2004 puts their joint contention of a loan in doubt. The facts relating to the down payments simply do not support the evidence of both Mrs. Gain and her sister that \$23,000 was advanced as part of the down payment required to be made for the Dawson Street condo in June 2004. Even assuming that Mrs. Gain paid the first down payment of \$11,745 in anticipation of getting the advance, what happened to the remaining \$11,255? It does not seem credible that Mrs. Gain would have received this advance for that purpose when the next down payment was not due until some seven months later in January 2005. This is particularly so where Ms. Domingo was paying interest on this amount under her line of credit. There is no evidence from Mrs. Gain as to what this "excess" money was used for.
- [114] In these circumstances, the facts are closely parallel to those considered in McCallum at paras. 17-27. In that case, the father alleged that he had advanced certain sums to the husband; however, there was no documentation, no demand for payment was ever made and no payments were made. The wife knew nothing of any such "debt" owing. The court found that there was no enforceable obligation owing.
- [115] The fact that Mr. Gain knew nothing of this advance is also troubling, although I appreciate his evidence that Mrs. Gain was not particularly forthcoming about financial matters. In any event, he does not appear to have had much interest in financial matters.
- [116] In all of these circumstances, I have serious doubts about the credibility of both Mrs. Gain and Ms. Domingo on this issue. I am not persuaded that there is any debt obligation owing to Ms. Domingo. I am, however, prepared to reapportion the sum of \$11,745 to Mrs. Gain relating to the first advance which did appear to go towards the purchase of the Dawson Street condo on the basis that this amount had been gifted to her by Ms. Domingo.

Spousal Support

Interim Spousal Support

- [117] On April 15, 2010, Mr. Gain obtained an order from Master Tokarek that Mrs. Gain pay interim spousal support in the amount of \$1,600 per month, payable in two instalments of \$800 on the same dates that Mrs. Gain receives her disability pay cheques. Mrs. Gain complied with that order and made five payments of \$800 each, for a total of \$4,000, although I was advised at the time of the trial that no payments had been made for July 2010.
- [118] During the trial, Mrs. Gain made an application seeking to set aside that interim order under s. 17 of the Divorce Act or, alternatively, vary it, on the basis that there had been a material change in circumstances relating to her decreased income. On August 12, 2010, I refused to set aside the order but did order that Mrs. Gain's obligation to pay spousal support would be reduced to \$800 per month effective August 1, 2010.
- [119] This issue remains a live one despite these interim orders because Mr. Gain seeks a final order of support under both the FRA and the Divorce Act. In defence of Mr. Gain's application for a final order for spousal support, Mrs. Gain seeks an order that no spousal support should have been ordered at all. Accordingly, she seeks an order that the amounts paid be repaid by Mr. Gain or, alternatively, that the amounts paid be credited to Mrs. Gain in the asset division process.
- [120] Mr. Gain does not dispute the fact that the interim spousal support orders are not determinative of the issue of spousal support at trial; however, he disputes the jurisdiction of the court to order repayment or provide for reapportionment of the amounts paid in the event that I find that support was not payable or was payable in an amount less than what was paid.

Spousal Support under the FRA

- [121] The provisions for spousal support are found in ss. 89 and 93 of the FRA, which provide, in part:

89(1) A spouse is responsible and liable for the support and maintenance of the other spouse having regard to the following:

- (a) the role of each spouse in their family;
- (b) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other;
- (c) custodial obligations respecting a child;
- (d) the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves;

(e) economic circumstances.

(2) Except as provided in subsection (1), a spouse or former spouse is required to be self sufficient in relation to the other spouse or former spouse.

...

93(1) Subject to the Divorce Act (Canada), a court may make an order on application, or if the court makes or refuses an order for judicial separation or dissolution of marriage or a declaration that a marriage is null and void, requiring a party to the proceeding to discharge his or her liability

...

(b) under section 89 or 90, as the case may be, by paying to the person designated in the order the amount the court considers reasonable.

...

(4) If a spouse will be living separate and apart from the spouse against whom the application is made, the court may, as it considers appropriate, adjust the amount of its order under subsection (1)(b) to take into account the needs, means, capacities and economic circumstances of each spouse, including the following:

(a) the effect on the earning capacity of each spouse arising from responsibilities assumed by each spouse during cohabitation;

(b) any other source of support and maintenance for the applicant spouse;

(c) the desirability of the applicant spouse having special assistance to achieve financial independence from the spouse against whom the application is made;

(d) the obligation of the spouse against whom application is made to support another person;

(e) the capacity and reasonable prospects of a spouse obtaining education or training.

(5) An order under this section may also provide for one or more of the following:

(a) payment periodically, annually or otherwise, and either for an indefinite or limited period or until the happening of a specified event;

(b) payment of a lump sum directly or in trust on terms provided;

(c) charging of property with payment under the order;

(d) payment of support in respect of any period before the order is made;

(e) payment for expenses arising from and incidental to

(i) the prenatal care of the mother or child, or

(ii) the birth of a child.

[122] In addition to these provisions, the court must bear in mind the analysis in the authorities, including *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, which recognize that the duration of the marriage or period of cohabitation, although not expressly referred to as a relevant factor in the spousal support provisions of the FRA, has been recognized as a relevant consideration in applying these provisions.

[123] In general terms, a shorter-term marriage will usually attract a shorter-term award. This result is consistent with the view that the shorter the period the parties live together, the less intertwined their financial lives are likely to be, and the more likely they are to be able to resume their pre-marital status without suffering a significant economic loss. Clearly, the general proposition is subject to the facts of each case.

Spousal Support under the Divorce Act

[124] Section 15.2 of the Divorce Act provides:

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

- (2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).
- (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.
- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[125] In determining the quantum and duration of spousal support in this case, it is also necessary to bear in mind the three models of spousal support described in Bracklow, namely: compensatory, contractual and non-contractual (needs-based).

[126] Mr. Gain's claim to spousal support was advanced only on the basis of non-compensatory principles or need in that it is clear that the marriage did not give rise to any economic disadvantage to him as discussed in *Moge v. Moge*, [1992] 3 S.C.R. 813, and Bracklow.

[127] Mr. Gain relies on *Chutter v. Chutter*, 2008 BCCA 507 in support of his needs-based claim for support. In that case, the court discussed the basis upon which this type of claim is to considered:

[54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (Bracklow, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (Bracklow, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

"Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

- [56] The Ontario Court of Appeal in *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256, held that self-sufficiency, a spousal support objective primarily related to non-compensatory support (*Bracklow*, at paras. 41-42), was a relative concept informed by the standard of living previously enjoyed by the parties:
- [21] self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of \$68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.
- [57] In *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 41, 48-49, 16 R.F.L. (6th) 430, Prowse J.A. referred to *Myers* and further held that in the context of a long-term marriage involving a sharing of resources, the concept of "need" should take into account the relative standards of living of the spouses following the marriage breakdown. In *Yemchuk*, the husband had appealed the decision of the trial judge dismissing his claim for spousal support on the basis that he had not established any need. While Prowse J.A. found that the husband was entitled to spousal support on compensatory grounds, she also went on to state that the trial judge's treatment of the husband's need for support had been "unduly restrictive":
- [41] I am also satisfied that the trial judge erred in viewing Mr. Yemchuk's "need" for support from too narrow a perspective. He treated "need" as solely a question of whether Mr. Yemchuk could meet his stated expenses with the income available to him. After attributing \$800-\$1,000 per month to Mr. Yemchuk, the trial judge found that Mr. Yemchuk could meet his expenses and, therefore, was not entitled to support.
- [58] In *Tedham v. Tedham*, 2005 BCCA 502, 20 R.F.L. (6th) 217, Prowse J.A. referred to *Yemchuk* as illustrative of the fact that the courts, at least in longer marriages, are measuring need against the marital standard of living (para. 55), and followed *Allaire* in finding that the objective of self-sufficiency must be viewed in the context of the marital standard of living (para. 60).

[Emphasis added.]

- [128] The importance of the marital standard of living in lengthy marriages (such as in this case) has been emphasized in many cases, including *Tedham v. Tedham*, 2005 BCCA 502, where this court referred, with approval, to the following passage from the reasons for judgment of Madam Justice L'Heureux-Dubé, speaking for the court in *Moge* at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement [citations omitted]. Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As

marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution [citations omitted].

[Emphasis added.]

[129] Mrs. Gain disputes that spousal support is appropriate in the circumstances, citing *May v. Yanitski and S.J. v. J.J.*, 2005 BCSC 1180. In *May v. Yanitski*, the wife had significantly greater income, while the husband was ill and currently unemployed. The wife supported their daughter. The court did order spousal support for a short period of time to allow the husband to re-establish himself. In *S.J.*, Mr. Justice Joyce denied spousal support to the husband on non-compensatory principles, based on his findings that there was no significant disparity in the standard of living of the parties, the wife had significant debt to service and the husband had a nominal deficit in his budget.

[130] Mr. Gain currently has a very modest income estimated to be \$22,000 for 2010. He discloses yearly expenses of approximately \$34,300 (which does not now include any Visa payments). His standard of living is significantly below the lifestyle he enjoyed during the marriage. Presumably these living conditions will improve upon release of the funds arising from the Dawson Street condo sale. Nevertheless, I do not think it is realistic to expect that his employment prospects will improve before his retirement given his health issues and his age and abilities.

[131] On the other hand, even with her disability, Mrs. Gain is earning substantially more (\$49,736) and, in fact, more than double what he is earning. She indicates yearly expenses of \$35,868, not including any spousal maintenance claim or payment to her mother. Importantly, her prospects are immeasurably better than that of Mr. Gain in the event that she is able to return to her employment at Telus, a circumstance I find likely.

[132] I am satisfied that Mr. Gain is entitled to spousal support based on non-compensatory principles.

Application of the Spousal Support Advisory Guidelines ("SSAG")

[133] The SSAG were issued in final form in July 2008: *Spousal Support Advisory Guidelines* (Ottawa: Dept. of Justice, 2008). According to the *Spousal Support Advisory Guidelines: Report on Revisions* (Ottawa: Dept. of Justice, 2008) at 1-2, there are no changes from the draft SSAG issued in 2005 relating to the basic formulas for determining spousal support or to the issues surrounding variation and review of orders for spousal support. The most recent *Spousal Support Advisory Guidelines: A new and Improved User's Guide to the Final Version* (Ottawa: Dept. of Justice, 2010) makes some minor changes and suggestions but does not change the basic formulas.

- [134] In determining the appropriate level of spousal support on an initial application, this court has said that the SSAG should be used as a guide in determining both the quantum and duration of support, assuming that entitlement has first been established: Chutter, at paras. 98 - 107; Yemchuk v. Yemchuk, 2005 BCCA 406; Redpath v. Redpath, 2006 BCCA 338; Tedham; McEachern v. McEachern, 2006 BCCA 508. Although the SSAG are guidelines and not law (Yemchuk; Beninger v. Beninger, 2007 BCCA 619), Redpath has extended that view to state that an award which substantially differs from the range set by the SSAG might constitute an error of law in the absence of a reasonable explanation for the difference.
- [135] The SSAG are intended to guide the court in the determination of the appropriate award. The SSAG support that in "long marriages" there will generally be indefinite support which will provide the spouses with something approaching equivalent standards of living after marriage breakdown: SSAG at 7.2; Chutter, at para. 118. Nevertheless, it is ultimately for the court to determine, based on all the circumstances of the particular case, the appropriate amount and duration of spousal support.
- [136] Based on the income levels indicated above (\$49,736 for Mrs. Gain and \$22,000 for Mr. Gain), the SSAG indicate a range from a low of \$849, mid-point of \$991 and high of \$1,082.
- [137] Having considered all the circumstances, I have fixed the sum of \$1,000 per month to be paid by Mrs. Gain to Mr. Gain on an indefinite basis commencing January 1, 2011. In view of the amounts paid, or to be paid, under the interim support order, the amount of the final award and the expenses borne by the parties from April 2010 to this date (including payments on Mr. Gain's Visa), there will be no adjustment for the amounts paid by Mrs. Gain from April 15, 2010.
- [138] The potential of Mrs. Gain electing to receive the lump sum separation allowance remains. The evidence from Mrs. Gain indicates that she has firmly rejected any offer from Telus to take them up on this offer, if it is still open to her. Accordingly, there is no entitlement at this time, if there ever will be, which requires the court to address whether a remedy is appropriate and, if so, what remedy is fair.
- [139] Mr. Gain submits that Mrs. Gain should not be permitted to make a unilateral decision to retire because if she had elected to do so before the trial, he would have requested a re-division of assets. In my view, having made the order for spousal support in favour of Mr. Gain, if Mrs. Gain should elect to receive this allowance in the future, then that would be a change in the means of Mrs. Gain upon which either party might apply to vary that order under s. 17 of the Divorce Act.
- [140] Accordingly, I order that if Mrs. Gain elects to receive this separation allowance in the future, Mrs. Gain will advise Mr. Gain of that fact in writing within two weeks of doing so, and provide him with the relevant documentation setting out the terms upon which the termination is to take place. In addition, if Mrs. Gain should return to work at Telus, she shall notify Mr. Gain of that event. In either of those events, either party will be at liberty to apply to vary the spousal support order based on this change of circumstances under s. 17

of the Divorce Act. Additionally, and, in any event, I would order that either party may apply for a review of this aspect of the order in accordance with s. 15.2(3) of the Divorce Act arising from these circumstances.

Summary

[141] A summary of my orders is as follows:

1. Family Assets

[142] A declaration that the following assets are family assets:

- (a) The proceeds from the sale of the Dawson Street condo;
- (b) Mr. Gain's 1993 Toyota Corolla;
- (c) Mr. Gain's Royal Bank Account;
- (d) Mr. Gain's RRSP;
- (e) Mrs. Gain's bank accounts, as described in paragraphs 51 and 52 above;
- (f) Mrs. Gain's RRSP;
- (g) Mrs. Gain's Telus shares (both voting and non-voting) and Telus options;
- (h) Mrs. Gain's piano;
- (i) Mrs. Gain's pension plan with Telus;

[143] A declaration that the balance in Mrs. Gain's Royal Bank savings accounts is not a family asset.

2. Orders and Declarations That:

- (a) Net proceeds from the sale of the Dawson Street condo will be distributed as follows: the sum of \$11,745 will be paid to Mrs. Gain and the balance, with accrued interest, will be divided equally between Mr. and Mrs. Gain.
- (b) RRSPs in the names of each of Mr. and Mrs. Gain shall be divided with a spousal rollover of \$2,277 from Mrs. Gain to Mr. Gain.
- (c) A compensation order to Mrs. Gain in the amount of \$1,450 in relation to the car.
- (d) A compensation order to Mr. Gain in the amount of \$2,508 in relation to bank accounts.
- (e) Mrs. Gain will transfer 50% of the Telus shares to Mr. Gain or alternatively, pay one half of their value as at this date to Mr. Gain.
- (f) A declaration that Mrs. Gain holds one-half of the Telus options in existence at the date of separation in trust for Mr. Gain's benefit. Mrs. Gain will give Mr. Gain one week written notice prior to exercising any of those options. At that time, Mr. Gain will provide to her any funds relating to the exercise of one-half of those options. Provided that any such required

funds are paid by Mr. Gain, Mrs. Gain shall exercise her one-half of the options and transfer to him one-half of the shares received by her. If Mrs. Gain elects to receive cash in lieu of these options, upon receipt Mrs. Gain shall immediately pay one-half of such proceeds to Mr. Gain. If there are any tax consequences to Mrs. Gain arising from the exercise of such options, Mr. Gain shall compensate Mrs. Gain for half that amount with seven days after receipt of written confirmation of the amount by assessed tax filings.

- (g) Mrs. Gain's pension with Telus is to be divided pursuant to the legislation, with a commencement date of September 28, 1985 and an entitlement date of July 1, 2009.
- (h) The Canada Pension Plan credits of Mr. and Mrs. Gain are to be divided pursuant to the legislation with a commencement date of September 28, 1985 and an entitlement date of July 1, 2009.
- (i) A compensation order to Mr. Gain in the amount of \$1,930 in relation to the piano.

Spousal Support

[144] Mrs. Gain shall pay the sum of \$1,000 per month to Mr. Gain. If Mrs. Gain elects to receive a separation allowance in the future, Mrs. Gain will advise Mr. Gain of that fact in writing within two weeks of doing so, and provide him with the relevant documentation setting out the terms upon which the termination is to take place. If Mrs. Gain should return to work at Telus, she shall notify Mr. Gain of that event. In either of those events, either party will be at liberty to apply to vary the spousal support order based on this change of circumstances under s. 17 of the Divorce Act. Additionally, either party may apply for a review of this aspect of the order in accordance with s. 15.2(3) of the Divorce Act arising from these circumstances.

[145] The parties are at liberty to speak to the matter of costs.

"Madam Justice Fitzpatrick"

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