
CANADA / JUDGMENT

H.S.S. v. S.H.D.

2018 BCCA 199

COURT

British Columbia Court of Appeal

DECIDED

22 May 2018

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2018 BCCA 199 H.S.S. v. S.H.D.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

H.S.S. v. S.H.D.,

2018 BCCA 199

Date: 20180522

Docket: CA43852

Between:

H.S.S.

Respondent/

Appellant on Cross Appeal

(Claimant)

And

S.H.D.

Appellant/

Respondent on Cross Appeal

(Respondent)

SEALED FILE

Order sealing Appellant's Supplemental Appeal Book filed November 30, 2016 in effect. Access only by counsel and parties on record or by further order of the court.

Before:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Groberman

On appeal from: An order of the Supreme Court of British Columbia, dated
July 14, 2016 (H.S.S. v. S.H.D., 2016 BCSC 1300,
Vancouver Docket No. E132889).

Counsel for the Appellant:

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E. Walker

Place and Date of Hearing:

Vancouver, British Columbia

September 21 and 22, 2017

Place and Date of Judgment:

Vancouver, British Columbia

May 22, 2018

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Groberman

Summary:

Appeal and cross appeal from the portions of the order after trial reapportioning the property division set out in the parties' marriage agreement and awarding spousal support to Ms. D. In her appeal, Ms. D. argues that the degree of property reapportionment was erroneously small, and that the spousal support award failed to provide adequate compensatory and needs-based support. In his cross appeal, Mr. S. argues the judge erred in ordering any reapportionment at all,

as the marriage agreement did not operate unfairly and Ms. D.'s economic disadvantage could have been remedied through spousal support.

Held: appeal allowed; cross appeal dismissed. The judge did not err in finding the marriage agreement operated unfairly or in ordering reappportionment. However, the degree of reappportionment must be remitted to the trial court, as the judge erroneously considered Ms. D.'s potential inheritances, did not consider certain features of Ms. D.'s trust interests, misapprehended Ms. D.'s indirect contributions to the acquisition of property, and did not provide a clear explanation for the specific reappportionment selected. Spousal support also must be remitted because it should not be determined absent a settled view on the division of property, which now has the opportunity for a material change. Further, the judge does not appear to have considered Ms. D.'s compensatory claim to spousal support, and has not clearly explained the basis for departing from the Spousal Support Advisory Guidelines.

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] The parties appeal and cross appeal from the order made in this family litigation by Madam Justice Dardi. This litigation was fostered by many changes in the parties' lives that dramatically displaced their pre-marriage assumptions and expectations as to Mr. S.'s financial future, Ms. D.'s family wealth, and Ms. D.'s positive career and business trajectory, the last having been set aside to accommodate the significant needs of the parties' children.
- [2] Only two of the several issues at trial are contested before us: the reappportionment of Mr. S.'s assets in favour of Ms. D. pursuant to s. 65(1) of the Family Relations Act, R.S.B.C. 1996, c. 128, and the award of spousal support in favour of Ms. D pursuant to s. 15.2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). In her appeal, Ms. D. contends that the degree of reappportionment of property is erroneously small, and that the amount and duration of spousal support ordered are too low and too short to provide adequate compensatory and needs-based support. In his cross appeal, Mr. S. contends the judge erred in ordering any reappportionment at all.
- [3] I will focus my reasons on the reappportionment issue on the application of ss. 65(1)(e) and (f), and the lack of clear explanation regarding the specific share of assets selected for reappportionment. These features persuade me that the matter must be returned to the Supreme Court of British Columbia for fresh determination of the reappportionment order.
- [4] I would also remit the matter of spousal support, to be reconsidered in light of the reconsidered property division. This reconsideration should address both the appropriate award considering that Ms. D. has established a strong compensatory basis for support and the effect of the Spousal Support Advisory Guidelines on the support ordered.

Factual Background

- [5] The factual circumstances are explored in depth by the judge in the course of addressing the multiple issues before her. I will simply summarize findings that bear on the two issues before us.
- [6] The parties, both 56 years old at the time of trial, married in April 1989. Ms. D., the daughter of a businessman of significant wealth, was a successful personnel consultant. Along with her three siblings, she was a beneficiary of family trusts of considerable value. Mr. S., a young lawyer, was of modest means. In 1985, soon after his call to the bar, he founded a law firm.
- [7] Before the marriage, Ms. D.'s father asked his solicitors to prepare a marriage agreement for the parties to sign, thereby to protect his daughter's assets. The parties signed the marriage agreement after receiving independent legal advice. The marriage agreement provided, in relevant part:
1. In this agreement the following words or expressions are to have the following meanings;
"Separate Property" means:
 - (a) all Property of the parties acquired prior to the Marriage, including without limitation the Property set out in Schedules "A" and "B";
 - (b) all the inheritances and gifts received by either party throughout the course of the Marriage ; and
 - (c) all other real and personal property acquired by a party in his or her name alone after the date of the Marriage;and includes all accretions to, accumulations on, substitutions for, and income from such Property.
 8. Upon the first to occur of a Section 43 Event, the separation of the parties, or the death of either party:
 - (a) all Separate Property of each party is to remain the property of and remain with that party;
 - (b) except with respect to the Separate Property, assets which are family assets, as defined in the Family Relations Act, shall be divided equally in the event of the occurrence of a Section 43 Event or the separation of the parties.
- [8] Ms. D.'s primary assets listed in Schedule "A" were her beneficial interests in two trusts created in 1969 and 1988 by her father. Mr. S.'s primary asset listed in Schedule "B" was his interest in his law firm.

- [9] Soon after the parties married, Ms. D. founded and operated a personnel agency. Her prospects for business success were positive. While both parties were working, they contributed to a joint account.
- [10] The parties' first child was born in 1993. In the first year, Ms. D. engaged in some personnel work from home, expecting to return to her business in 1994. The child, however, developed asthma and serious food allergies requiring close attention and attendances at specialist appointments. In consequence, Ms. D., as the parent handling the increased parenting responsibilities, did not return to work as planned. She consulted occasionally in 1995, but in that year their child was found to have emerging developmental and socialization challenges, in addition to her physical health problems. Eventually, realizing the child required consistent support and structure, the possibility of Ms. D. returning to her career was abandoned. Ms. D. home-schooled this child for many years, with success.
- [11] The judge found, as to Ms. D.'s role in relation to the first born child:
- [282] As [the first child's] primary caregiver, she played an essential and critical role in [the child's] progress. The evidence amply supports a finding that to accommodate the demands associated with [the child's] significant health and developmental challenges, Ms. D. was required to relinquish her career at a critical point in her career development.
- [12] The parties' second child was born in 1996. While in secondary school, the second child suffered multiple sports-related injuries that presented long term physical and psychological consequences. These required on-going attention, thereby furthering Ms. D.'s parenting responsibilities. The judge found that although the second born child was attending university at the time of trial, "Ms. D. continues to devote time to attending to her needs".
- [13] The judge did not disparage Mr. S.'s contribution to parenting responsibilities. She found, however, that Ms. D.'s devotion to family responsibilities "freed up Mr. S. to pursue his successful law practice". The judge described Mr. S.'s success in his law practice:
- [243] Mr. S., who continued to pursue his legal career, has, by any objective standard, achieved extraordinary success in his professional endeavours. ... Mr. S. accumulated a considerable net worth.
- [14] The judge found that the parties' pre-marriage expectation that Ms. D. would build a successful career during the marriage was not realized after the first child was born. Since Ms. D. was not employed outside the home after 1995, Mr. S. thereafter paid all family expenses.
- [15] Mr. S. left the family home in 1999 and did not reside with Ms. D. after that date. The judge found that the parties were living separate and apart by no later than January 2003. In early 2003, Mr. S. committed to a purchase of residential real property in Vancouver, British Columbia.

- [16] Over the course of the marriage, the fortunes of Ms. D.'s family diminished dramatically, and in 2002 the family business came under court protection. Although the judge found that the family remained "comparatively wealthy", the comparator against which that wealth was measured is not said. In the least we know the two trusts referred to in the marriage agreement, once of considerable value, had so shrunk they did not feature in the analysis at trial.
- [17] At the same time as Ms. D.'s family fortune diminished, Mr. S. began to enjoy extraordinary success in his legal career. The judge found that Mr. S. earned \$24 million from his law practice in the eight years 2007 through 2014, and averaged \$3.615 million in annual earnings from 2010 to 2014.
- [18] Mr. S. used some of his earnings to purchase real property. In addition to his purchase in 2003 of a Vancouver residence, in 2009 Mr. S. purchased a condominium in Maui, Hawaii, in his own name, using a modest financial contribution from Ms. D. towards that purchase. The Maui property was used by Ms. D. and the children from time to time.
- [19] Mr. S. commenced a family claim in October 2013 under both the Divorce Act and the FRA. On January 9, 2015, the Supreme Court of British Columbia made a declaration under s. 57 of the FRA that the parties had no prospect of reconciliation, establishing the date of the triggering event for purposes of division of property issues. Under interim orders Mr. S. paid \$154,200 in retroactive spousal support for the eight-month period September 1, 2013, to April 30, 2014, and \$30,000 per month in spousal support thereafter.

Reasons for Judgment on Reapportionment and Spousal Support

- [20] In determining the appropriate division of property, the judge first found the marriage agreement was neither unconscionable nor made under undue influence and so was enforceable. Those conclusions are not challenged on appeal.
- [21] The judge then turned to Ms. D.'s claim for reapportionment. Ms. D. claimed an equal division of the family assets. Mr. S. contended that the terms of the marriage agreement should be upheld, as all remediation of the economic consequences to Ms. D. of the breakdown in the marriage could be effected through spousal support.
- [22] On the order of reapportionment the judge's central task was to consider s. 65(1) of the FRA in the context of the marriage agreement. Section 65(1) sets fairness as the standard against which the marriage agreement should be considered, as determined on a list of factors (a) through (f). On s. 65(1), as the judge acknowledged, *Hartshorne v. Hartshorne*, 2004 SCC 22 is the leading authority.

[23] As a first step to determining whether the marriage agreement operated unfairly, the judge valued the parties' assets as of two dates: 2002, immediately before the parties separated; and December 2014, immediately before the triggering event. The evidence did not allow her to delineate all taxation overhangs on the assets, and so the "after tax" values lack precision.

[24] In 2002, Mr. S.'s assets comprised his law practice and associated corporations, a receivable, and investment accounts. In 2014, his assets comprised his law practice and corporations, his Vancouver real property, the Maui property, and investment accounts, both registered and unregistered.

[25] Ms. D.'s assets throughout comprised the family home, registered and unregistered accounts, and, in 2002, a receivable.

[26] The judge ascribed these values:

2002

Ms. D.

\$2,496,432

Mr. S.

\$6,975,099

before tax

\$6,595,099

after tax

2014

Ms. D.

\$6,971,272

Mr. S.

\$25,320,640

before tax

\$19,560,640

after tax

[27] Later in the reasons for judgment the judge ascribed values to family assets in the names of the parties as of the date of trial:

May 2015 (Time of Trial)

Ms. D.

\$6,354,123

Mr. S.

\$26,316,516

before tax

\$20,556,516

after tax

[28] The judge addressed the issue of the parties' prospects for inheritances and Ms. D.'s trust interests. She held these were not family assets.

[29] Turning to the inheritances and trusts benefiting Ms. D., the judge found that at the time of trial Ms. D. was named in the will of her mother, Mrs. D., as a 25% residuary beneficiary. Mrs. D.'s assets at that time were valued at approximately \$600,000, and the judge noted, "Ms. D.'s mother may dispose of some or all of her assets before her death or she may change her will".

[30] At the time of trial, Ms. D. was also named as a beneficiary under three family trusts. First, she is a 25% residuary beneficiary under the "Spousal Trust" created on Mr. D.'s death in 2007 by Mr. D.'s will. That trust currently benefits Mrs. D., who is entitled to encroach upon the trust's capital and to receive all income from it. Upon Mrs. D.'s death, Ms. D. will receive her share of the assets remaining in the trust, after payment of taxes and fees. The judge found the value of this trust interest was not susceptible to prediction:

[253] Given the various contingencies I have identified, it is a difficult exercise to value Ms. D.'s interest in the Residuary Estate with much precision.

[31] Second, Ms. D is also named as one of four beneficiaries (Ms. D. and her three siblings) of a discretionary trust referred to as the "Insurance Trust". The Insurance Trust provides for distribution of trust assets on Mrs. D.'s death. A major asset of the trust is an insurance policy. By the trust's terms, distribution will be effected with the consent of a named protector to the beneficiaries in "such proportion as the Trustees may determine". Ms. D. is one of two trustees. The judge found it was unlikely that the value of the insurance policy would fall below \$12 million. The judge said that although the trust is discretionary, "Ms. D. will likely receive a tax-free distribution from the Insurance Trust of \$3,000,000". Later in her reasons for judgment, the judge refers to the value of the Insurance Trust at the time of separation as being in the range of \$1 million.

- [32] Last, Ms. D. has been named as one of four equal residuary beneficiaries of a trust settled by Mrs. D. in 2008, referred to as the "Alter Ego Trust". Mrs. D. is trustee and the sole beneficiary of any distributions of income or capital during her lifetime. The Alter Ego Trust is of relatively modest value, and receipt of its proceeds, too, will not occur unless and until Ms. D. survives Mrs. D. The judge found in that event Ms. D. will receive in the range of \$66,000.
- [33] The judge also addressed Mr. S.'s potential inheritance. She found that Mr. S. likely would share in an estate in the range of \$3 million, from which liabilities would have to be paid, and concluded Mr. S. "stands to inherit a relatively modest amount when compared to Ms. D."
- [34] After describing the values just recounted, the judge turned to consider the issue of fairness within the meaning of s. 65(1), and the reasonable expectations of the parties when they signed the marriage agreement. The judge reviewed the circumstances before her, addressing both the post-marriage circumstances that caused Ms. D. to forego her anticipated career and the other changes to the parties' relative financial strength since their marriage. She concluded that the degree to which Mr. S. had prospered was not an unforeseen circumstance, and that the reduced circumstances of Ms. D.'s family did not warrant adjustment of the marriage agreement, saying on the latter that Ms. D. stood to inherit substantial wealth on her mother's death. On the third posited unforeseen circumstance, Ms. D.'s relinquishment of her career to meet the demands of caring for the family, the judge said "[t]his constitutes a circumstance that was unanticipated when the Marriage Agreement was executed".
- [35] The conclusion of unanticipated circumstances brought the judge to the question of operational unfairness -- the question that is key to open the possibility of reapportionment under s. 65 of the FRA. She addressed each factor separately. I will only summarize her conclusions on ss. 65(1)(e), and (f) which, on my analysis, are germane to the issues before us.
- [36] Section 65(1)(e) requires the court to consider the needs of each spouse to become or remain economically independent and self-sufficient. On this the judge observed:
- [298] At the time of trial, Mr. S. was 56 years old and earning a very substantial income as a lawyer. Through his professional endeavours, he has acquired considerable wealth. On any analysis, he is economically independent and self-sufficient.
- [299] Her economic status has not developed in a way that was consistent with the intent of the Marriage Agreement. As anticipated, she received substantial distributions from her family during the marriage. However, it was not contemplated that her ability to build a career and acquire assets through her own industry would be impeded. Ms. D. is now 56 years old. The strong start she had in establishing a successful personnel firm was interrupted at a critical stage. At this juncture, she has little prospect of any similar career development.

- [37] Under s. 65(1)(e) the judge also considered Ms. D.'s interests in trusts and potential inheritances, saying that certain cases of this court allowed her, when assessing fairness, to do so. She wrote:
- [308] I conclude that in my assessment of the circumstances affecting Ms. D.'s capacity for self-sufficiency, I may consider Ms. D.'s interest in the Insurance Trust, the Spousal Trust and her mother's Alter Ego Trust and that, in all likelihood, Ms. D. will inherit substantial wealth when her mother passes away.
- [38] Section 65(1)(f) requires the court to consider circumstances relating to the acquisition, preservation, maintenance, improvement or use of property, and the capacities or liabilities of a spouse. The judge recognized that Ms. D. had enabled Mr. S. to pursue his successful career through indirect contribution, but said the contributions were greater before separation than after:
- [309] The primary parenting role Ms. D. assumed and her effective management of the household facilitated Mr. S.'s professional development and contributed indirectly to his ability to earn income. Without disparaging Mr. S.'s contribution to parenting responsibilities, it was Ms. D. who supervised the children on a daily basis. She arranged and supervised the domestic help. Her assumption of these responsibilities freed up Mr. S. to pursue his successful law practice. He was free to travel internationally for business because Ms. D. was at home discharging crucial parenting responsibilities.
- [312] I find that the significance of Ms. D.'s contribution was greater before separation than after separation. Her contribution diminished after separation. She made no direct contribution to Mr. S.'s welfare nor did she contribute by way of domestic services to his separate household. That said, after separation, Mr. S. continued to benefit from Ms. D.'s assumption of the primary parenting responsibilities.
- [39] As to Mr. S.'s acquisition of assets, the judge found Mr. S. purchased the Vancouver property without any direct or indirect contribution by Ms. D., and that he purchased the Maui property without, except for payment of the original deposit and help with insurance, any direct or indirect contribution by Ms. D. The judge found Ms. S.'s law practice increased in value after separation by over \$9,440,000, without direct contribution by Ms. D. and with indirect contribution "limited to her assumption of the primary care-giver for the children".
- [40] Last the judge found that both parties had made a significant and direct financial contribution to the acquisition of the family home.
- [41] Throughout her reasons for judgment, the judge recognized that Ms. D. had foregone her career to manage and care for the property. She summarized her approach and conclusions as to the issue of reapportionment under s. 65(1) in this way:

- [322] Distilled to its core, the essential question is whether an appropriate spousal support award would adequately recognize the economic disadvantage suffered by Ms. D. in sacrificing her career for her familial responsibilities, as well as the lingering effects of such sacrifice following the dissolution of the marriage. I am mindful of the caution in the authorities regarding the danger of double recovery presented by the legislative link between spousal support and the division of property under the FRA.
- [323] The need of Ms. D. to become economically independent has been largely, but not entirely, fulfilled by the continuous and ample financial support Mr. S. has paid her and by the spousal and child support I order in the next section of these Reasons. As a consequence of the financial support she has received and will continue to receive from Mr. S. - aside from her expenditures for legal fees associated with this proceeding - she has been able and will continue to be able to largely preserve the capital she has received from her family. In light of the animating factors in s. 65, it is fair that Mr. S. retain the bulk of his accumulated wealth pursuant to the terms of the Marriage Agreement. However, in my view, Ms. D. should be compensated for her loss of the opportunity to acquire assets through her own industry.
- [324] When they executed the Marriage Agreement, these parties entered the marriage with certain expectations on which they were reasonably entitled to rely. However, for the reasons set out above, the operation of the Marriage Agreement has proved to be unfair at the time of distribution. Ms. D. has established that intervention by the Court is warranted.
- [Emphasis added.]
- [42] In the result, the judge found that the operational unfairness of the marriage agreement required a payment by Mr. S. to Ms. D. in the amount of \$1,700,000 for property reappportionment. She said, in explanation for that sum:
- [325] Taking into account all of the s. 65(1) factors identified above, I conclude that fairness requires that the Marriage Agreement be varied by ordering that Mr. S. make a payment which provides Ms. D. \$1,700,000 net of tax, as a reappportionment of the family assets. For clarity, it is my intention that Ms. D. receives her payment on a tax-free basis. ... Apart from this variation, each party shall retain the family assets held in his or her name.
- [326] This reappportionment fairly recognizes the separateness of the parties' financial arrangement, and, most crucially, that the economic disadvantage that Ms. D. suffered as a result of unforeseen circumstances is largely addressed through the financial support Mr. S. has provided over many years and by the spousal support award I make in these Reasons. Such a variation achieves overall fairness and limits the reappportionment to that required to redress the unfairness that the change in the parties' circumstances produced.

- [43] The next relevant portion of the judge's reasons is her discussion of spousal support. The judge began by observing that the parties were married 14 years before separation, and that Ms. D. continued to experience economic disadvantage by breakdown of the marriage. The judge found Ms. D. was entitled to both compensatory and "needs-based" support, and observed that reapportionment of the assets does not preclude a spousal support order.
- [44] On the application of the SSAG and the amount of support, the judge said:
- [419] The task at hand is to set a fair income for future spousal support. for the purposes of assessing prospective spousal support, I find Mr. S.'s income to be \$3,615,286 and Ms. D.'s to be \$160,000 per annum.
- [420] In formulating the appropriate quantum of spousal support, I have considered the parties' lifestyle during the marriage. As I noted earlier, the context of this case is one of considerable wealth and involves a high standard of living. The parties generally enjoyed the lifestyle of an affluent family.
- [421] Again, recognizing that the budgetary evidence is inherently imprecise, my task is to determine Ms. D.'s reasonable expenses, keeping in mind the circumstances of the parties.
- [422] At trial, Ms. D. has claimed monthly expenses of \$58,459, excluding income taxes and expenses for the children. In my view the monthly amount she has claimed in her budget is unreasonably high.
- [427] Section 11 of the SSAG describes a "ceiling" and a "floor", which is an "attempt to define the upper and lower bounds of the typical case, for which guideline formulas can generate acceptable results." The SSAG ceiling for a payor's income is set in s. 11.1 at \$350,000 gross annual income. Where the payor's income is well above the ceiling of \$350,000, the formulas for amounts are no longer presumptive and different considerations may apply. However, this is not an "absolute" ceiling or a cap: *Smith v. Smith*, 2008 BCCA 245 at para. 31; *Hathaway* at para. 45.
- [429] The Court in *Hathaway* affirmed that when a payor spouse's income is above the "ceiling", and as long as a court exercises its discretion on a principled basis, the determination of an appropriate amount of spousal support may be a matter of pure discretion. On the other hand, the Court of Appeal also confirmed that it may be appropriate to order spousal support in an amount that reflects the SSAG formula. The "litmus test" is whether the spousal support award complies with the objectives of s. 15.2 of the Divorce Act: at para. 50.
- [430] In the final analysis, the ultimate determination of the appropriate amount of spousal support in high income cases is a matter of judicial discretion that is governed by the factors and objectives set out in s. 15.2(4) and (6) of the Divorce Act.
- [432] The SSAG calculations based upon a with-child formula using an income of \$3,615,286 for Mr. S. and \$160,000 for Ms. D. produces a range of \$92,641 to \$108,772, with a mid-point of \$100,706.

- [435] Balancing all of the relevant factors, I award spousal support to Ms. D. of \$40,000 per month, commencing July 1, 2016. In my view, this award addresses both the compensatory and non-compensatory aspects of her claim and reflects the objectives of the Divorce Act.
- [45] As to the duration of spousal support, the judge held:
- [450] In all the circumstances, I have concluded that Ms. D. is entitled to spousal support until no later than December 31, 2021. Ms. D. will have received voluntary and substantial financial support for more than 10 years after separation and court-ordered support for more than eight years following the commencement of these proceedings.
- [451] By the end of 2021, the parties will each be 62 years old. ...

Discussion

I. Standard of Review

- [46] To succeed on appeal in a family law matter, an appellant must demonstrate "a material error, a serious misapprehension of the evidence, or an error of law by the trial court": *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12. This standard of review applies equally to all family law matters: *Van de Perre v. Edwards*, 2001 SCC 60 at para. 14; *Usova v. Harrison*, 2011 BCCA 209 at paras. 25-26; see, with specific reference to division of assets, *Rumian v. Rumian*, 2006 BCCA 264 at paras. 6-7.
- [47] It is important at the outset to acknowledge that our role as an appellate court is a deferential one. In *Hickey*, Justice L'Heureux-Dubé, for the Court, explained the restrained, deferential stance we should take in family cases, in the context of the support issue engaged in that case:
- [12] There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge.

II. The Property Reapportionment Issues

- [48] The appeal and cross appeal raise two issues regarding the division of property:
- i. whether the judge erred in concluding the marriage agreement operated unfairly at the time of distribution (issue on cross appeal); and
 - ii. if not, whether the size of the reapportionment award was appropriate having regard to all of the circumstances (issue on appeal).

[49] Before addressing those issues directly, it is useful to set out the relevant legal framework for division of property under the FRA.

[50] The parties agree Ms. D.'s application for a capital distribution to her engages s. 65 of the FRA and not the similar provisions of the Family Law Act, S.B.C. 2011, c. 25.

[51] Section 65 is the reapportionment provision. It is found within Part V of the FRA, which has as its purpose division of family assets. It is in Part V that the provision for marriage agreements, the definition of family assets, and the presumption of equal interest in family assets are located.

[52] Section 65 provides:

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.

[Emphasis added.]

[53] Hartshorne is the leading case on the application of s. 65(1) in the case of property covered by a marriage agreement. Therein Justice Bastarache delivered comprehensive reasons setting out the underlying principles of, and appropriate approach to, reapportionment in the case of a marriage agreement. He observed that British Columbia's legislation with respect to marriage agreements differed from that of other provinces by setting a lower threshold -- "fairness" -- for judicial intervention in such agreements.

[54] Recognizing this court's decision in *D.K.N. v. M.J.O.*, 2003 BCCA 502, Justice Bastarache held that marriage agreements must be "substantively fair" at the time when reapportionment applications are made. He wrote:

- [43] The essence of this inquiry is whether the circumstances of the parties at the time of separation were within the reasonable contemplation of the parties at the time the agreement was formed, and, if so, whether at that time the parties made adequate arrangements in response to these anticipated circumstances
- [44] Thus, the determination that a marriage agreement operates fairly or unfairly at the time of distribution cannot be made without regard to the parties' perspectives. Thus, central to any analysis under s. 65(1) of the FRA is consideration of how accurately the parties predicted, at the time of contract formation, their actual circumstances at the time of distribution, whether they truly considered the impact of their decision and whether they adjusted their agreement during the marriage to meet the demands of a situation different from the one expected, either because the circumstances were different or simply because implications were inadequately addressed or proved to be unrealistic.

[Emphasis added.]

- [55] Justice Bastarache concluded that determination of the essential issue -- accordance of the parties' circumstances at distribution with their reasonable contemplation of the same when the agreement was formed -- should be addressed in the following two steps.
- [56] First, the court must apply the marriage agreement, considering entitlements both under the agreement and from other sources, including spousal and child support. While Hartshorne instructs the court to consider entitlement to spousal support at this stage, it is well settled that property division should be addressed before the quantum of support is fixed: *Toth v. Toth* (1995), 13 B.C.L.R. (3d) 1 (C.A.); *Metzner v. Metzner* (1997), 34 B.C.L.R. (3d) 314 (C.A.), cited in Hartshorne at para. 55. In other words, the court must consider the opportunity for an award of spousal support at the first stage, but should not settle on the quantum or duration of support. Doing so the court must bear in mind the risk of double recovery explained in *Toth* by Madam Justice Prowse:

In discussing the relationship between maintenance and the division of property under Pt. 3 of the FRA, it is useful to note that s. 51(e) and (f) of the FRA [here s. 65(1)(e) and (f)], relating to reapportionment of property, incorporate concepts which are also found in the maintenance provisions of both the Divorce Act, 1985 and the FRA. Thus, property division and maintenance are closely intertwined. One advantage of this legislative tie is that s. 51 [here s. 65] may be utilized in the division of property to reflect the relative abilities of the parties to become or remain economically independent and self-sufficient (s. 51(e)) [here s. 65(1)(e)], and the respective capacities and liabilities of the parties (s. 51(f)) [here s. 65(1)(f)]. These concepts are also relevant to determinations of spousal maintenance. The potential pitfall presented by this legislative link between property and maintenance, however, is the danger of double recovery where, for example, property is reapportioned under s. 51 [here s. 65] and then further reapportioned by an award of lump sum maintenance.

[Emphasis added.]

- [57] Second, the court must consider the s. 65(1) factors (a) to (f) to determine whether the marriage agreement operates unfairly. The critical question in assessing the operational unfairness of the marriage agreement is whether the current circumstances were within the contemplation of the parties at the time the agreement was made. The burden lies on the party seeking reapportionment to establish the agreement's division of property would be unfair considering the s. 65(1) factors, and if the current circumstances were previously contemplated, the burden on the proponent of unfairness, says Hartshorne, is heavier. I understand this to mean that where the current circumstances were not as contemplated at the time of making the marriage agreement, the burden to establish unfairness on the path to reapportionment is somewhat lighter. As the Supreme Court held in Hartshorne at para. 47, this "accords with the underlying principle of the FRA, striking an appropriate balance between deference to the parties' intentions, on the one hand, and the assurance of an equitable result, on the other".
- [58] On finding that the marriage agreement operates unfairly, s. 65(1) empowers the court to divide the family property into shares. Where such a division cannot remedy the unfairness found, s. 65(2) allows the court to order that other property be vested in the other spouse.
- [59] Justice Bastarache concluded his discussion on the correct approach to s. 65 in this way:
- [67] However, in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement, particularly where independent legal advice has been obtained. They should not conclude that unfairness is proven simply by demonstrating that the marriage agreement deviates from the statutory matrimonial property regime. Fairness must first take into account what was within the realistic contemplation of the parties, what attention they gave to changes in circumstances or unrealized implications, then what are their true circumstances, and whether the discrepancy is such, given the s. 65 factors, that a different apportionment should be made.
- [Emphasis added.]
- [60] With the above framework in mind, I turn to the substantive reapportionment issues before us.
- (i) Did the judge err in concluding that the marriage agreement operated unfairly at the time of distribution?
- [61] In his cross appeal, Mr. S. raises one issue. He contends the judge erred in ordering him to pay a lump sum to Ms. D., and says that Ms. D.'s loss of ability to contribute to her own self-sufficiency should not have been remedied through intervention in the marriage agreement when spousal support would have sufficed. His submission largely relies on analogizing the facts of this case to those in Hartshorne, in which the majority of the Supreme Court of Canada declined to find a marriage agreement unfair, and held that any economic disadvantage that Ms. Hartshorne suffered could be compensated through spousal support.

- [62] I see no error in principle or serious misapprehension of the evidence that would allow this court to interfere with the judge's conclusion the marriage agreement operated unfairly in the current circumstances. The judge meaningfully reviewed each of the criteria listed in s. 65(1) of the FRA. She concluded that "these parties entered the marriage with certain expectations on which they were reasonably entitled to rely", and that those expectations were far from met. In my view, that conclusion is unassailable.
- [63] Mr. S. relies on the result in *Hartshorne* as supporting his cross appeal. However, I do not consider *Hartshorne* to be analogous to this case. Here the judge found that when the parties married they expected Ms. D. to pursue her career by developing her own business, but the opposite occurred and Ms. D.'s "strong start in establishing a successful personnel firm was interrupted at a critical stage", leaving her with "little prospect of any similar career development". This is unlike *Hartshorne*, in which the parties always understood the wife would relinquish her career development in favour of assuming parenting and household management responsibilities.
- [64] Nor do I accept Mr. S.'s submission that this situation -- one in which the most significant element of unfairness relates to s. 65(1)(e) -- can only be remedied by spousal support. Here Mr. S. refers to the majority's statement at para. 64 in *Hartshorne* that "any economic disadvantage suffered [could] be compensated by spousal support". I do not understand that statement to be a general proposition, but rather is a reflection of the particular case before the court. Indeed, in *Tedham v. Tedham*, 2005 BCCA 502 at para. 64, Justice Prowse acknowledged that "the fact that there has been a reapportionment does not mean that there should not be an award of spousal support". Further, in *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal ref'd, [2009] SCCA No. 41, Madam Justice Rowles expanded on *Tedham*:
- [78] *Tedham* noted that while Toth cautioned against the danger of double recovery through both property division (specifically reapportionment) and spousal support, there is an equally real danger that a spouse will be inadequately compensated from property division alone
- [65] Thus, I conclude the judge made no error warranting appellate intervention in finding the marriage agreement created unfairness in its operation, or in making an order reapportioning assets in addition to ordering payment of spousal support.
- [66] It follows that I would dismiss the cross appeal.
- (ii) Was the reapportionment order appropriate having regard to all of the circumstances?
- [67] In her appeal, Ms. D. makes several submissions to support her contention that the reapportionment award of \$1,700,000 is significantly short of the appropriate amount. She contends that a larger award should have been ordered, being half the parties' respective assets as of the triggering date.
- [68] I understand Ms. D. to say the judge erred:

1. in focusing upon the date of separation rather than the triggering date (some twelve years after separation);
2. in viewing her indirect contributions to Mr. S.'s accumulated assets -- freeing him from constant parenting responsibilities and thus allowing him freedom to apply himself diligently to his law practice -- as less significant than direct contributions, and in failing to recognize that these contributions continued after separation;
3. in wrongly considering her potential inheritances and contingent trust interests as relevant to the s. 65(1) analysis;
4. in failing to trace funds from Mr. S.'s law practice, which was a family asset, to the Vancouver and Maui interests, in treating those interests as deriving entirely from Mr. S.'s contributions, and in minimizing Ms. D.'s contributions to them; and
5. in holding spousal and child support received and to be received had largely satisfied Ms. D.'s need to become economically independent and so discounting the reapportionment payment.

[69] Mr. S. disputes each of Ms. D.'s submissions. He says the judge was entitled to consider the marriage effectively over on separation in 2003 and to discount Ms. D.'s role in the growth of his assets after that date. He denies the judge improperly weighed indirect contributions as less significant than direct contributions; he says the judge did not discount the reapportionment award because of Ms. D.'s prospective inheritances and contingent trust interests; he denies Ms. D. is entitled to share in his real property purchased after separation; he denies Ms. D. contributed to the Maui property after her initial assistance in its purchase and says she has not contributed to the Vancouver property; he says no error was made in considering support paid and to be paid; and he says in law the presumptive equal division of assets that applies absent a marriage agreement is not applicable to this reapportionment under s. 65(1).

[70] I will focus my analysis on three features of the reasons for judgment: first, the judge's reliance on Ms. D.'s potential inheritance from her mother and her contingent trust interests in discussing s. 65(1)(e); second, the judge's treatment of indirect contributions made to the acquisition of family assets in discussing s. 65(1)(f); and third, the judge's lack of explanation for the value of reapportionment selected.

[71] Before addressing these, I note that I do not start from the presumption of equal sharing advocated by Ms. D. Had the Legislature intended that result, it would have said so.

Section 65(1)(e)

- [72] I turn now to the relevance of potential inheritances and the contingent trust interests in this case to s. 65(1)(e), which contemplates "the needs of each spouse to become or remain economically independent and self sufficient". I will first review how those two considerations have been treated in the jurisprudence before turning to the application of that law to this case.
- [73] Potential inheritances here essentially refer to bequests that have been or may be made in a will by an individual who is still alive.
- [74] I consider it settled that it is inappropriate for a court, in considering the financial resources of a family law litigant, to delve into the question of potential inheritances: *Graham v. Graham* (1984), 59 B.C.L.R. 27 (C.A.).
- [75] In *Graham*, the husband brought an application pursuant to the then R. 28 of the Rules of Court seeking to examine his father-in-law on various matters, including contributions by the in-laws to family assets, the existence of a present bequest, trusts in favour of the wife, and the wife's expectation of an inheritance. The chambers judge held that a potential inheritance was not property within the meaning of the FRA. He reached the same conclusion in respect of contingent interests, although he allowed questions relating to trusts in favour of the wife and the source of contributions to family property.
- [76] In brief reasons for judgment, Mr. Justice Taggart for the court rejected the appeal. Concerning the possibility of the wife inheriting in the future, he said at 28:
- How it can be said that the possibility of a parent making a bequest to a child is a matter now in question in the action I cannot understand. I think those contingencies are clearly not matters within the provisions of R. 28(1) and, clearly, they are not matters comprehended by the matters in issue between the parties which arise out of the provisions of the Family Relations Act.
- [77] By that statement I understand the court to say that the testamentary plans of strangers to family litigation do not bear on issues between the parties. Not only is this proposition solidly based in the concepts of relevance and materiality, it avoids consequential decisions built on the sandy foundation of speculation, prevents undue expansion of the court's field of inquiry, and respects the privacy and autonomy of strangers to the litigation.
- [78] This conclusion from *Graham* has not been doubted in our jurisprudence: see *Nowak v. Nowak*, 2014 BCCA 409 at para. 109, leave to appeal ref'd, [2014] SCCA No. 561; *Todd v. Freeman*, 2005 BCCA 519 at para. 38; *D.I. v. S.I.*, 2011 BCSC 1788 at para. 94.
- [79] The law as it relates to contingent trust interests is more complicated, reflecting a variety of models of beneficial interests. Much of the jurisprudence was developed in cases requiring the identification of contingent trust interests as family assets, but certain cases under s. 65(1) also bear on this question.

- [80] In my view, generally speaking, trust interests that are contingent and discretionary should not inform the analysis under s. 65(1)(e), though that analysis may admit of contingent trust interests that are not dependent on the exercise of another person's discretion. As I will explain, this distinction ensures the interests at issue are relevant because it avoids speculation and tracks the extent to which a party will actually derive or enjoy the benefit of those interests.
- [81] Likely *Whittall v. Whittall* (1987), 19 B.C.L.R. (2d) 202 (S.C.) provides the first considered view of this question. Justice Prowse (then L.J.S.C.) addressed the statement in *Graham* discussed above in the context of a husband who was the beneficiary of a fixed share of trust assets. After referring to *Graham*, she said at 212:

The "contingencies" or "contingent interests" referred to in that case are not of the same character as the interests of the husband under the J.W. Trust. Here we do not have the mere possibility of a bequest in the future; we have an actual trust established in which the husband has an interest. Whether his interest is vested or contingent does not alter the fact that it is of no less significance than the contingent interest of a spouse in a pension plan.

I conclude that it is unnecessary to distinguish between vested and contingent interests in a trust in order to determine whether the interest in the trust is capable of being a family asset. *Zaitzow* and *Ritter* do not state otherwise. A contingent interest is an interest, and that is all that is required to bring one within the language of s. 45(3)(a)(ii). The question of whether an interest in a trust is vested or contingent is one, not of entitlement, but of valuation.

- [82] A number of authorities since *Graham* have addressed contingent interests, vested interests, fixed interests, and discretionary interests for purposes of determining their character as family assets: *Delesalle v. Delesalle*, 2006 BCCA 445; *Nowak; M.(H.R.) v. B.(D.M.)*, 2004 BCSC 147; *Purtzki v. Saunders*, 2016 BCCA 344.
- [83] In *Purtzki*, Madam Justice Kirkpatrick comprehensively considered these decisions in the context of a trust of unclear character in order to determine whether it was a family asset. The trust, devised by the father, had as its principal asset the family home. It had no income. Until the time of termination of the trust, the trustees had discretion to encroach upon the capital. When the trust ended, the trust assets were to be distributed to the father and, were he to have died, in the same manner as if the trust assets had been part of the residue of his estate. The issue was whether, as the father contended, the trust was so discretionary that he did not "own" an interest for purposes of division of property, or, as the mother contended, the trust was "fixed". In her analysis, Justice Kirkpatrick observed:
- [64] Strictly speaking, the object of a discretionary trust may lack a "proprietary" or "possessory" interest in the property of a trust. In *M. (H.R.)*, the court referred to the decision of the House of Lords in *Gartside v. I.R.C.*, [1968] 1 All E.R. 121. *Gartside* concerned the meaning of the term "interest in possession" under the Finance Act. Lord Wilberforce said this of a beneficiary's interest in a discretionary trust (at 134):

No doubt in a certain sense a beneficiary under a discretionary trust has an "interest": the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. But that does not mean that he has an interest which is capable of being taxed by reference to its extent in the trust fund's income: it may be a right with some degree of concreteness or solidity, one which attracts the protection of the court of equity, yet it may still lack the necessary equality of definable extent which must exist before it can be taxed.

[65] Similarly, the authors of Underhill and Hayton: Law of Trusts and Trustees, 18th ed. (London: LexisNexis, 2010) at 98, describe the nature of a discretionary trust as follows:

Where a beneficiary has no such absolute current right to direct the trustees to pay him an ascertainable part of the net income or capital he has 'no interest in possession', only being interested under a discretionary trust. Typically, this is the case where a beneficiary will receive income only if the trustees positively decide to carry out their duty to distribute income by favouring him rather than another member of the class of potential beneficiaries. There is also the atypical case where a beneficiary must receive the income unless the trustees exercise distributive (or dispositive) powers to divert the income elsewhere or to withhold it : the discretion-conferring distributive powers prevent an interest in possession arising (eg where B is a life tenant subject to dispositive powers).

[66] A discretionary trust is distinct from a fixed trust. The authors of Underhill and Hayton at 98, describe a fixed trust as follows:

Where a beneficiary has a current fixed entitlement to an ascertainable part of the net income or net capital, if any, of the trust fund after deduction of sums paid by the trustees in the exercise of their administrative powers of management, the beneficiary has a fixed interest which ranks as 'an interest in possession' under the trust.

[67] Unlike a fixed trust, the beneficiaries of a fully discretionary trust and their entitlements (distinct from the potential beneficiaries and their potential entitlements) cannot be ascertained at the time of settlement. A discretionary trust may also come in a variety of forms. Under an "exhaustive" discretionary trust, the trustee must distribute the whole of the income or capital, or both, but retains the power to choose who among the potential beneficiaries should receive distributions, and in what amount. Under a "non-exhaustive" discretionary trust, the trustee has the added power to choose whether or not to make any distribution at all.

[84] Justice Kirkpatrick concluded that the judge below had not erred in finding that the character of the father's interest in the trust at issue and his use of the trust property made that interest a family asset. In particular, she noted:

[68] The judge found as a fact that the trustees of the Home Trust "will do as the Father wishes", including transferring the trust asset to him or permitting him to mortgage it. Although not stated in these words, it is clear that the judge considered the Home Trust to be

discretionary in name only. In that sense, I agree with the Mother that, although the terms of the Home Trust Agreement suggest that it is discretionary, in reality the Home Trust functions more closely to a fixed trust in that the Father has always enjoyed the unfettered use of the entirety of its only significant trust asset. The judge's conclusion is, in my opinion, a compelling finding of fact that, absent palpable and overriding error, we must not disturb on appeal ...

[85] Justice Kirkpatrick then moved to valuation (the issue identified by Justice Prowse in Whittall), considering whether an "if and when" order was appropriate. She said, again referring to the character of the trust:

[74] I agree that an "if and when" order is not suitable in this case. The reality is that the Father has always treated the trust asset as his own, and there is a virtual certainty that the legal interest in the asset will be transferred to him in the future.

[Emphasis added.]

[86] I take from this discussion that whether an interest in a trust qualifies as a family asset turns on how the substance of that interest is appropriately characterized and, in particular, the extent to which that interest can be described as being "owned". Generally speaking, this may be determined by whether the trust is discretionary or fixed. However, as the question is one of substance and not form, sufficient certainty that the trust assets will be transferred to the purported owner can fulfill this criterion. The enquiry, in other words, does not end with the analysis of discretionary words in the trust deed, but rather requires consideration of the possibility events will unfold as if the trust were fixed.

[87] I recognize that these cases do not address s. 65, but it seems to me that if an interest is incapable of being a family asset because it is not sufficiently "owned" by a party, that is, "certainty" that the party will derive its benefits is missing, the interest is equally beyond use for s. 65(1) purposes.

[88] Of the cases that deal with trust interests and s. 65(1) directly, the most relevant to this question are Hefti v. Hefti (1998), 57 B.C.L.R. (3d) 171 (C.A.), Beese v. Beese, 2008 BCCA 396, and Kahn v. Kahn, 2008 BCSC 396. The judge, (who did not have the benefit of Purtzki) in addressing the implications of Ms. D.'s trust interests, relied on these cases to find that the "weight of the authorities establish[es] that in applying s. 65(1)(e) and (f) and in assessing a spouse's ability to become and remain economically self-sufficient the Court may consider prospective gifts or inheritances". In her conclusion, the judge also rejected the decision in MacColl v. MacColl, 2012 BCSC 643. I respectfully do not agree, and will address each of the above four cases in turn.

- [89] In Hefti, the husband had inherited two Swiss accounts several years before he and his wife separated. The issue squarely before the court was whether these accounts were family assets. Mr. Justice Finch held they were, while Chief Justice McEachern disagreed. However, Chief Justice McEachern concurred in the result, which reapportioned these accounts pursuant to s. 65(2) of the FRA. He did so in agreement with the following statement made by Justice Finch:
- [34] In my view, even if the three inherited accounts did not qualify as family assets under s. 43 they would still be available for reapportionment to redress any unfairness found to exist on the criteria set out in s. 51 [here, s. 65]. Assets falling under this provision would not, of course, be subject to the prima facie equal division provided for by s. 43(2). But they could be used in whole or in part, for example, to assist a spouse in becoming or remaining economically independent or self-sufficient (s. 51(c) [here, s. 65(1)(e)]). In view of my conclusion that the inherited accounts are family assets it is unnecessary to consider this provision further.
- [90] Beese concerned two lots that were inherited and vested before the parties separated. Justice Prowse held that this inheritance was properly included in the analysis of self-sufficiency under s. 65(1)(e), but she struck a note of caution against exploring such assets too deeply, especially for the purposes of s. 65(2), as doing so might subvert the Legislature's clear intention to distinguish between family property and other assets:
- [51] Because I have concluded that the trial judge erred in his analysis under s. 65(1) of the FRA, it is unnecessary to say much about the application of this Court's decision in Hefti. Suffice it to say that it is apparent from Hefti, and from the wording of s. 65(2) of the FRA, that the court can take "other property" of a spouse into account under s. 65(2) in order to give effect to a reapportionment under s. 65(1), having regard to the factors set out in the factors set out in s. 65(1)(a) to (f). However, recourse to other property to effect a reapportionment under s. 65(1) should be approached with caution, and should only be effected where it is not otherwise possible to redress unfairness under s. 65(1). Otherwise, the distinction which the legislature has clearly drawn between family assets and other assets will be diluted, if not eradicated. That is what happened here where s. 65(2) was utilized to effectively divide Mr. Beese's inheritance as if it were the equivalent of a family asset.
- [Emphasis added.]
- [91] The clear rule established in Hefti and Beese is that inheritances that have vested -- that is to say, those that are not potential and not dependent on the exercise of discretion by others -- may appropriately be taken into consideration in s. 65(1)(e).
- [92] At the same time, neither of those cases addresses the particular issue raised in the case of a contingent, discretionary trust, where entitlement may be a speculative matter.

- [93] Nor does Kahn address this question, although it is closer to this case. Mr. Kahn had received a bequest of \$500,000 from his father before the triggering event, but the bequest had not been distributed to him at the time of trial. Mr. Kahn also owned shares in the family business that had a value in excess of \$700,000. In addition, Mr. Kahn was a residual beneficiary of his father's estate and so was entitled to a share in the estate upon his mother's death. He was also a beneficiary of several discretionary trusts that could not be distributed until after his mother's death. The terms of the discretion are not explored in the judgment. The assets therefore fell into two categories: present and vested assets valued at more than \$1.2 million, and interests in contingent trusts that had not yet vested.
- [94] In his reasons, Mr. Justice McEwen described the FRA, correctly in my view, as intending to reach "property over which either party has any form of direct or indirect ownership, or rights akin to ownership". He said:
- [46] In essence, it is clear that the Family Relations Act is drafted so as to capture in the concept of "ownership", property nominally held in corporations or trusts, if that property would be a family asset if the spouse owned it. This is obviously intended to extend the reach of the Act to property over which either party has any form of direct or indirect ownership, or rights akin to ownership.
- [47] While the concept of ownership under the Act is extended and the legislation is clearly intended to overcome claims that various kinds of indirect holding will shelter from division assets that would otherwise qualify as family assets, it does not extend to property that belongs to someone else and that simply may be acquired by one spouse or the other at some time in the future at the election of that other person.

[Emphasis in original.]

- [95] Justice McEwen then turned to consideration of fairness, applying the s. 65(1) factors:
- [64] The defendant owns property he has acquired through inheritance or gift of a nominal value exceeding \$1.2 million. As I have already indicated, these are not "family assets", but their ownership is a "circumstance" that is relevant to the overall assessment of fairness to the parties coming out of the marriage.
- [66] The expectation of significant distributions of wealth in the future is another extrinsic circumstance relating to the acquisition of property that has an impact on the assessment of fairness. The "capacity ... of a spouse" alluded to in s. 65(1)(f) must also be considered. While a conventional example of a relevant "capacity" might include specific business or professional skills that give rise to an expectation of prosperity or continued prosperity, the sort of expectation the defendant has in this case is inseparable from the choices he makes or is likely to make in terms of the employment of his own particular skills and abilities. As such, I do not think it inappropriate to consider the likelihood of inheriting such sums of money as tantamount to the ability to earn considerable sums of money, in assessing fairness under s. 65(1)(f).

- [68] In summary, in applying those considerations to the facts in this case, I think it must be recognized that the defendant's ownership of significant assets outside the pool of family assets is a circumstance that has an impact on what is available to ensure the economic independence and self-sufficiency of both parties, and is also an issue related to the capacity of each spouse to move on from the marriage as an independent entity.
- [96] While Khan might be taken as standing for the proposition that prospective gifts or inheritances may be considered in a s. 65 analysis (as the judge here did), I would decline to endorse that portion of it. Justice McEwen considered "expectation of significant distributions of wealth in the future" in his discussion of s. 65(1)(f), but no support was offered for this choice. Further, and acknowledging he did not have the benefit of *Purtzki*, I note he did not address the issue raised in that case -- whether the trust effectively assures the beneficiary he or she will receive the benefit posited so as to have the character of an asset effectively owned by the litigant.
- [97] Last, for completeness, is *MacColl*. In that case, Mr. Justice Halfyard, considering an inheritance that could not be enjoyed until after the death of the mother, said:
- [85] The court made it clear in *Beese v. Beese* (in paras 21, 34 and 51) that only the factors in s. 65(1) of the Family Relations Act can be considered when deciding whether equal division of the family assets would be unfair to one of the spouses. In my opinion, the effect of this judgment is that an inheritance received by a spouse (before or after separation), which is not a family asset, cannot be taken into account by a trial judge when deciding the issue of unfairness.
- [98] I have already explained my view of the holding in *Beese*. Accordingly, no more need be said about *MacColl*.
- [99] I conclude that trust interests that are contingent and discretionary generally should not inform the analysis under s. 65(1) of the FRA, as consideration of the mere possibility that an asset will be distributed to the party is not probative of economic independence or self-sufficiency. As with potential inheritances, speculative property distributions some time hence are not matters comprehended by s. 65(1) of the FRA. That being said, sufficient certainty that a party will actually enjoy the benefit of his or her interest in trust assets can bridge this gap. This conclusion is consistent, as I see it, with the objectives of certainty and finality in family litigation: *Hallgren v. Fry*, 2013 BCCA 15 at para. 8.
- [100] How does this analysis apply to the case before us?
- [101] The judge gave weight to Ms. D.'s potential inheritances and trust interests as follows:
- [307] In my view, a spouse's expectation of the receipt of significant wealth in the future may be considered in assessing a spouse's capacity to become economically self-sufficient.

- [308] I conclude that in my assessment of the circumstances affecting Ms. D.'s capacity for self-sufficiency, I may consider Ms. D.'s interest in the Insurance Trust, the Spousal Trust and her mother's Alter Ego Trust and that, in all likelihood, Ms. D. will inherit substantial wealth when her mother passes away.
- [102] With respect to Ms. D.'s potential inheritances, I am of the view that her potential to inherit under her mother's will is not relevant to the analysis of her self-sufficiency under s. 65(1)(e). Indeed, it raises the issues sought to be avoided by Graham; as the judge observed, "Ms. D.'s mother may dispose of some or all of her assets before her death or she may change her will".
- [103] Turning to the contingent trust interests at issue, I will consider only the judge's treatment of the most significant trust interests, the Spousal and Insurance Trusts. While the Alter Ego trust is relevant, its terms are not known to us, and its value is on a scale that is not overly material in light of the much larger sums captured by the other trusts.
- [104] The Spousal Trust, while contingency laden, has the certainty of providing Ms. D. a 25% entitlement on ultimate distribution at the time of her mother's passing. It appears to be similar to the trust in *Nowak*, and Ms. D.'s interest in it may appear to be one capable of being an asset "owned" for purposes of the FRA. However, the judge found that it was difficult to value Ms. D.'s interest in it with much precision, finding the trust subject to Ms. D.'s mother's right to capital encroachments and to receive all income from the trust during her lifetime. Given that conclusion, one cannot assess the significance of the judge's mention of it in relation to the self-sufficiency of Ms. D. I observe, further, that an interest that may not generate a distribution for many years is unlikely to affect a s. 65(1) analysis performed at the date of trial.
- [105] The Insurance Trust presents similar issues. It is an "exhaustive" discretionary trust in the sense described by Justice Kirkpatrick in *Purtzki*. However, the reasons contain no discussion of the issue of substantive ownership or entitlement, or the degree of certainty that attaches to a distribution in Ms. D.'s favour. The judge said Ms. D. is "likely" to receive about \$3 million on distribution, but did so without consideration of the degree of discretion afforded the trustees or the role of protector in the trust: see *Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds., Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012, Toronto) at 134–138 for a discussion of the genesis and role of protectors. Moreover, in the context of a family that appears to have integrated interests, I consider that one cannot assume unanticipated family needs, wants, or even good fortune, would not persuade the trustees to divide trust assets unequally, using their discretion, under the guidance of the protector. Absent some discussion of the characteristics of the trust, and in light of the uncertainty of the valuation the judge assigned to this interest, one cannot determine on these reasons for judgment whether it was open to the judge to give weight to this trust as part of her consideration of s. 65(1)(e).

- [106] On these conclusions concerning the potential trust interests and the potential of an inheritance from Mrs. D., I cannot say that the judge's order of reapportionment would have been the same had the correct approach been applied. That is, these errors were material to the outcome. On that basis alone, I consider the order for reapportionment in the amount of \$1.7 million cannot stand, and the issue of reapportionment must be remitted to the trial court.

Section 65(1)(f)

- [107] Section 65(1)(f) considers "any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse". It has been referred to as a "basket clause": *Piskor v. Piskor*, (1981), 27 B.C.L.R. 230 at 233 (C.A.); *Janis v. Janis*, 2016 BCCA 364 at para. 65. Its language belies its scope; cases applying it have captured a number of considerations, from contributions made during a period of cohabitation prior to a marriage to preservation of an asset wholly through the efforts of one spouse: see *Piskor*; *Nowak*; *Kopejtko v. Kopejtko* (1985), 49 R.F.L. (2d) 26 (B.C.C.A.).
- [108] While the particulars of direct contribution to an asset are significant considerations in s. 65(1)(f), the jurisprudence has recognized that indirect contributions should not be subordinated in family law analyses. In *Stein v. Stein*, 2008 SCC 35, Justice Abella in dissent explained the approach to contributions of paid and unpaid work in the context of family law, in a passage I do not consider controversial:
- [25] The overriding principle is, as the legislation stipulates, fairness. Fairness in family law takes scrupulous account of the economic consequences of choices made by the spouses in the allocation of family responsibilities. This philosophical trail started in Laskin J.'s dissent in *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, and found a clearing in Dickson J.'s majority opinion in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436. The jurisprudential apex was *Moge v. Moge*, [1992] 3 S.C.R. 813.
- [26] The product of this revolution in family law was the principle that the decision either to perform unpaid work on behalf of the family at home, or remunerative work outside the home, should receive equal recognition in assessing the economic consequences for a separating family. The acknowledgement that both forms represent equal contributions to the family's economy, was an attempt to rectify the traditional economic disadvantage and dependance that had attached to the spouse, usually the wife, who had performed a domestic, unremunerated role. Fairness in family law came to mean, among other things, accommodating the reduced earning capacities of someone who had removed herself from the paid labour market on behalf of the family, and who, as a result, found re-entry several years later problematic.

- [109] In my respectful view, this approach is not fully reflected in the reasons for judgment. In her reasons, the judge referred to Ms. D's contributions to the family property as indirect and concluded:
- [309] The primary parenting role Ms. D. assumed and her effective management of the household facilitated Mr. S.'s professional development and contributed indirectly to his ability to earn income. Without disparaging Mr. S.'s contribution to parenting responsibilities, it was Ms. D. who supervised the children on a daily basis. She arranged and supervised the domestic help. Her assumption of these responsibilities freed up Mr. S. to pursue his successful law practice. He was free to travel internationally for business because Ms. D. was at home discharging crucial parenting responsibilities.
- [312] On the totality of the evidence, I find that the significance of Ms. D.'s contribution was greater before separation than after separation. Her contribution diminished after separation. She made no direct contribution to Mr. S.'s welfare nor did she contribute by way of domestic services to his separate household. That said, after separation, Mr. S. continued to benefit from Ms. D.'s assumption of the primary parenting responsibilities.
- [110] The concern with the above is that in her comment on Ms. D.'s indirect contributions to the accumulation of wealth by Mr. S. after separation, the judge did not recognize that Mr. S.'s post-separation exceptional earnings were built on the base created during cohabitation, and that the greatest contribution of Ms. D. to his wealth creation during cohabitation was her assumption of primary, and comprehensive, parenting responsibilities. The reasons for judgment, further, reflect neither the increase in Ms. D.'s responsibilities with the expanding needs of the second child, nor the attendant continuing freedom given to Mr. S. to advance his legal career after separation while Ms. D. continued to deploy her efforts to the family.
- [111] For the foregoing reasons, consideration of s. 65(1)(f) must be returned to the trial court for a fresh assessment, and on this basis, also, the reapportionment must be set aside.

Absence of Reasons

- [112] Apart from the errors I have discussed in relation to ss. 65(1)(e) and (f), I also consider the reapportionment is opaque and not susceptible to an understanding of the share reapportioned. On this point, the judge said:
- [323] However, in my view, Ms. D. should be compensated for her loss of the opportunity to acquire assets through her own industry.
- [324] When they executed the Marriage Agreement, these parties entered the marriage with certain expectations on which they were reasonably entitled to rely. However, for the reasons set out above, the operation of the Marriage Agreement has proved to be unfair at the time of distribution. Ms. D. has established that intervention by the Court is warranted.

- [325] Taking into account all of the s. 65(1) factors identified above, I conclude that fairness requires that the Marriage Agreement be varied by ordering that Mr. S. make a payment which provides Ms. D. \$1,700,000 net of tax, as a reapportionment of the family assets. For clarity, it is my intention that Ms. D. receives her payment on a tax-free basis. Mr. S. shall have 90 days from the date of these Reasons to make the payment. Apart from this variation, each party shall retain the family assets held in his or her name.
- [113] The suggestion of counsel is that the amount of \$1.7 million roughly equalizes the value of the parties' assets at the time of separation. I say "roughly" because if it aimed to equalize asset value without consideration of the beneficial interest in the Investment Trust, it is low, and if it aimed to equalize assets including that interest, it is high. In any case, the judge did not explain her award in this fashion. Further, if the judge intended equalization as the measure, the assessment is against a date long before the triggering event, which generally does not bear on property issues under the FRA. In *Kumagai v. Campbell Estate*, 2018 BCCA 24 at paras. 75–76, Madam Justice Smith explained the import of the date of the triggering event for both the FRA and the Family Law Act.
- [114] If instead, the reapportionment was intended, in the words of s. 65(1), to be a "share" of the property covered by the marriage agreement "fixed by the court", one cannot determine the value of the balance of the property so divided -- in other words, one cannot determine on what date, and hence which value, the judge was dividing.
- [115] Alternatively, if the amount was intended to reflect the loss of income and business growth foregone by Ms. D., to tie into the basis for the finding of unfairness, it is not expressed in any terms that allow for an appreciation of the scale of earnings foregone or businesses not built, while bearing in mind that the issue is one of fairness and that reapportionment is not a damages award.
- [116] All of this puts the order effectively beyond meaningful appellate review, both as to quantum and as to the principles applied in determining the respective shared interests. For this reason, too, I would set aside the reapportionment order and remit the issue of reapportionment to the trial court.
- [117] Taking these three reasons for interfering with the order together -- the judge's application of s. 65(1)(e) and s. 65(1)(f), and the absence of grounding discussion of the amount determined by the judge -- I consider the reapportionment order must be set aside and that the appropriate remedy to redress the operational unfairness of the marriage agreement must be considered anew by the Supreme Court of British Columbia.

III. Spousal Support

- [118] It is apparent that in this case, spousal support must be reconsidered because it should not be determined absent a settled view on the division of property, which now has the opportunity for a material change: Hartshorne at paras. 54-59; Toth at para. 57; Metzner at para. 40. With that said, I would have remitted the issue of spousal support in any event, in light of my views on some of the grounds of appeal advanced by Ms. D.
- [119] Ms. D. contends that the judge erred in substantially departing from the ranges suggested in the SSAG absent a reasonable basis or explanation for doing so. She says this had the result of ordering an amount and duration of spousal support that were, respectively, too low and too short.
- [120] With respect to the amount, Ms. D. submits the judge failed to make a compensatory award for the loss of her career going forward. She also submits the judge's non-compensatory award failed to account for her reasonable needs in the context of the parties' particular circumstances, namely their wealth and associated lifestyle.
- [121] With respect to duration, Ms. D. contends that the judge's spousal support award should not have been time-limited. She submits that, notwithstanding the marriage was just short of the SSAG's classification of a long-term marriage, the unique circumstances of her case -- in particular, the parties' constant mutual reliance up to the date of trial -- justified an indefinite award.
- [122] Mr. S. submits that the judge properly exercised her discretion in awarding spousal support. On the amount, Mr. S. contends that, considering all the circumstances, and in comparison to other high income cases, the trial judge would have erred in awarding spousal support in the prescribed SSAG ranges. He says that the SSAG ranges greatly exceed the amounts "conceivably needed to fund [Ms. D.'s] reasonable needs", and that the judge's skepticism regarding Ms. D.'s report of her needs was reasonable. He adds that Ms. D.'s assets are growing, not depleting. With respect to duration, he repeats that the trial judge did not err in the exercise of her discretion.
- [123] In my view, the submissions above raise two central issues:
- i. whether the judge erred in failing to adequately consider Ms. D.'s compensatory basis for spousal support; and
 - ii. whether the judge erred in departing from the amount and duration of spousal support set out in the SSAG.
- (i) Did the judge err in failing to adequately consider Ms. D.'s compensatory basis for spousal support?

[124] In *Moge v. Moge*, [1992] 3 S.C.R. 813, Justice L'Heureux-Dubé definitively explained the modern approach to spousal support, describing the legal theory of what is termed compensatory support, saying for example at 848:

Conversely, marriage and the family often require the sacrifice of personal priorities by both parties in the interests of shared goals. the purpose of spousal support is to relieve economic hardship that results from "marriage or its breakdown". Whatever the respective advantages the parties of a marriage in other areas, the focus of the inquiry when assessing spousal support after the marriage has ended must be the effect of the marriage in either impairing or improving each party's economic prospects.

[Emphasis in original.]

See also Chutter, paras. 50–52.

[125] Where the basis for a compensatory award is established, it should continue until compensation is achieved, even if there is a degree of self-sufficiency in the recipient: *Tedham v. Tedham*, 2005 BCCA 502 at para. 60. Further, compensatory support compensates prospectively for the continuing disadvantage experienced by the recipient.

[126] The judge acknowledged -- and indeed, Mr. S. conceded -- that Ms. D. had a spousal support claim on compensatory grounds. As one example, she said:

[403] Applying the governing legal principles, I conclude that Ms. D. has a strong claim to compensatory support. Clearly, she has been economically disadvantaged and Mr. S. advantaged by the marriage. Ms. D.'s assumption of the primary parenting role in the marriage required her to relinquish her promising career opportunities in order to devote herself to providing care and stability to the family. She assumed primary responsibility for addressing N.'s developmental and health challenges. As a consequence, she has been and continues to be out of the workforce. Mr. S. must compensate Ms. D. for her foregone career opportunities.

[127] Despite recognizing that Ms. D. had established a strong compensatory basis for spousal support, the judge's determination of support was restricted to a needs-based analysis. Indeed, the entirety of the reasons under the sub-heading "Quantum of support" is devoted to discussion of the non-compensatory (needs-based) elements of the spousal support award. The sole exception is the final paragraph, which adverts to the relevant factors *seriatim* as follows:

[434] I have also taken into account the objectives and factors set out in the Divorce Act, the fact that Mr. S. is paying child support and S.'s post-secondary and medical expenses; Ms. D.'s strong compensatory claim; the needs and means of the parties, including the parties' stated current expenses; the marital pre-separation and post-separation standard of living; as well as the ages of the parties and the disparity in their income-earning capacities.

[128] I appreciate the highly contextual and discretionary nature of the judge's task, and also the number of considerations at play in the analysis. I do not suggest that the judge should have painstakingly reviewed each of them.

[129] However, I cannot locate Ms. D.'s compensatory claim to spousal support in the analysis of amount, and conclude the judge erroneously lost sight of this basis for spousal support. Consequently, the questions of amount and duration of spousal support must be remitted to the trial court.

(ii) Did the judge err in departing from the amount and duration of spousal support set out in the SSAG?

[130] The SSAG "incorporates both compensatory and non-compensatory principles in their calculation of their ranges": *Marquez v. Zapiola*, 2013 BCCA 433 at para. 32. Their legal force as a useful advisory tool, developed "with a view to bringing more certainty and predictability to the determination of spousal support under the Act", is well-settled: *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 62-64; see also *Fisher v. Fisher*, 2008 ONCA 11.

[131] There is, however, a tension between this informal status and the obvious utility of the SSAG that is not easily resolved. For example, in *Redpath v. Redpath*, 2006 BCCA 338 at para. 38, this court held that the SSAG need not "as a matter of law be used by a judge in determining support", and then acknowledged that they "may indicate whether a proposed award is "in the range" of what should be a pattern of predictable maintenance awards across the province and across Canada". Madam Justice Newbury suggested:

[42] Cases such as *Hickey*, however, were decided prior to the introduction of the Advisory Guidelines. Now that they are available to provide what is effectively a "range" within which the awards in most cases of this kind should fall, it may be that if a particular award is substantially lower or higher than the range and there are no exceptional circumstances to explain the anomaly, the standard of review should be reformulated to permit appellate intervention.

[Emphasis added.]

[132] Similarly, in *Lightle v. Kotar*, 2014 BCCA 69, Mr. Justice Willcock said:

[62] While there is no necessity for a trial judge to set out the grounds for departure from the SSAG (*Beninger v. Beninger*, 2009 BCCA 458), where there is no apparent cause for doing so and reasons are not given, there is less justification for deference to the exercise of the trial judge's discretion.

[133] Acknowledging again that the determination of spousal support should be remitted below as a corollary of my decision on property division, I raise some concerns with the judge's departure from the SSAG in this case.

- [134] Chief among these is the unclear explanation for the particularly radical deviation from the spousal support range applicable to the parties' incomes set out in the SSAG. Mr. S.'s income far exceeds the "ceiling" of \$350,000 set out in the SSAG. Although awards in the context of incomes beyond that point are made with a measure of discretion, the exercise of that discretion should be measured; it should be reasoned and justified.
- [135] This lack of clarity finds its first exposure in the judge's discussion of Ms. D.'s reasonable expenses, which adopted a needs-based approach. In discussing the amount of spousal support, the judge took the view that Ms. D.'s claimed monthly expenses of \$58,459 were "unreasonably high", and consequently held that the relevant SSAG range of approximately \$100,000 per month in spousal support "greatly exceeds the amount required to fund [Ms. D.'s] reasonable needs as assessed within the context of this case". However, and with respect, the reasons do not really explain what is unreasonable about Ms. D.'s expenses, nor do they explain what would be reasonable in the context of the parties' circumstances and the marital standard of living. The simple fact is that the cost of Ms. D.'s lifestyle presents sums with which most are entirely unfamiliar. For example, paying \$4,000 per month for a housekeeper may seem, in a vacuum and without analysis, a large sum -- indeed, it drew critical comment from the judge -- but it may well be reasonable having regard to the standard of domestic assistance to which Ms. D. has become accustomed, and to what an appropriate market wage is for a full-time, reliable housekeeper. Simply stating the size of such expenses does not assist.
- [136] Moreover, consideration of the marital standard of living in this way is particularly significant in light of this court's discussions in *Chutter and Bell v. Bell*, 2009 BCCA 280. In *Chutter*, Justice Rowles held that the fact the recipient has received substantial assets does not defeat the claim, and explained the significance of this standard:
- [90] If the appellant must encroach upon her capital to maintain a standard of living comparable to that which she enjoyed during the marriage, then arguably she is suffering hardship from the breakdown of the marriage and experiencing the loss of marital standard of living, since her capital would deplete over time and eventually she would be in a worse position than had the marriage continued. If that is so, whether the respondent has the means to assist her financially to live a lifestyle closer to what they shared as a couple is a relevant question (*Allaire*, at para. 21; *Hodgkinson*).
- [137] In *Bell*, Mr. Justice Lowry quoted the paragraph above and elaborated:
- [23] It appears to me that in this case, where one spouse enjoys a large income while, in relative terms, the income of the other is much less, it can be assumed one is able to enjoy a significantly higher standard of living than the other even though there was an equal division of substantial family assets. Neither spouse should be required to encroach on capital to address the difference in the standard of living provided by each of their incomes. The most appropriate way to ameliorate the difference would appear to be with spousal support, as the parties recognized when they made their agreement in 2006.

- [24] It may be that, as the judge said, Ms. Bell has sufficient capital and income to meet her needs and is economically self-sufficient, but she has not, in the absence of spousal support, been compensated for being disadvantaged in terms of her standard of living as a result of the breakdown of the marriage. It appears to me that, having misapprehended Mr. Bell's income, the judge did not appreciate the extent to which Ms. Bell has been disadvantaged in the loss of the standard of living his income provided and the difference in that regard implicit in their relative incomes now. The intervention of this Court is then justified.
- [138] Using this as an example, and acknowledging that the reasons must be read as a whole, it is a reasonable inference that the judge's deviation from the SSAG came largely by her critical view of Ms. D.'s needs and absent sufficient consideration of the extent to which maintenance of the marital standard of living would require Ms. D. to deplete her assets.
- [139] Whether or not this inference is in fact accurate, the paucity of discussion on the compensatory component of spousal support and deviation from the SSAG range largely insulates the award from meaningful appellate review. By this I mean that the reasons simply state -- and a reviewing court must simply accept -- that both Ms. D.'s reasonable needs (whatever they may be) and her lost career are adequately rolled into the final award.
- [140] Turning briefly to duration, I have similar concerns. To the extent that the considerations relevant to amount and duration overlap, this is unsurprising. Moreover, contrary to Chutter, it appears that the order's time-limited nature contemplates Ms. D. will draw on her capital assets after cessation of spousal support to maintain an approximate version of the lifestyle she has enjoyed. This does not reconcile with the concession made at trial that she will never return to work, and it does not reconcile with the compensatory basis for spousal support.
- [141] It follows I would set aside the spousal support order and remit that issue to the Supreme Court of British Columbia for fresh determination.

Conclusion

- [142] Gathering these issues together, I would allow the appeal, and in consequence set aside paras. 3, 6, and 8 of the order appealed dated July 14, 2016. I would dismiss the cross appeal. I would remit the issues of the degree of reapportionment of assets and the amount and duration of spousal support to the trial court for fresh determination.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Mr. Justice Groberman"

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