

CANADA / JUDGMENT

# J.P.E. v. L.G.E.

2003 BCSC 1262

## COURT

Supreme Court of British Columbia

## DECIDED

13 August 2003

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2003BCSC1262 IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: J.P.E. v. L.G.E. 2003 BCSC 1262 Date: 20030813 Docket: 13422 Registry: Prince George Between: J.P.E. Plaintiff And L.G.E. Defendant Before: The Honourable Mr. Justice Chamberlist Reasons for Judgment Counsel for the plaintiff: F.F. Fatt Counsel for the defendant: D.W. Lindsay and J.L. Anderson Dates and Place of Trial: January 13, 14, 15, 16, 17, and January 21, 2003 Contempt Application and Re-opening Application: Prince George, B.C. July 2 and 18, 2003 New Westminster, B.C.

## INTRODUCTION

- [1] This family litigation involves a final determination of the issues arising from the breakdown of a 27-year marriage.
- [2] The issues presented to the court include the guardianship of the two remaining children of the marriage, identification of family assets, valuation of those family assets, apportionment of family assets and spousal support. The application to re-open the trial brought by the defendant on June 9, 2003, and the application to find J.P.E. in contempt, deal primarily with the valuation of family assets. I propose to deal with that application under valuation of assets.
- [3] J.P.E. (hereinafter referred to as "J.P.E.") and L.G.E. (hereinafter referred to as "L.G.E.") were married on October 7, 1972, at Penticton, British Columbia.
- [4] There is some disagreement on when they commenced cohabitation, L.G.E. testifying that they began cohabitation in April, 1972, while J.P.E. says they commenced cohabitation on October 7, 1972, being the date of marriage. There is also controversy on when they ceased to cohabit, J.P.E. stating that they ceased cohabitation on May 10, 2000, while L.G.E. says they ceased to cohabit on [ ], 2000. In my view, nothing turns on whether or not these parties to a long-term marriage cohabited prior to marriage. Neither is there anything significant about the date of separation in resolving the issues the court is called upon to deal with. The confusion might arise from the fact that J.P.E. and L.G.E. lived under the same roof from approximately 1985 to the date of separation, but did not share the same bed. Over that period of time, J.P.E. resided in a basement bedroom. He maintains that as a result of marital difficulties with his wife he moved out on May 10, 2000, and although present at the

former matrimonial home after that date, up to and including [ ], 2000, he says that it was not his residence.

- [5] It is common ground that on [ ], 2000, L.G.E.'s birthday, an argument occurred between the parties and their twin daughters, F.B.E. (hereinafter referred to as "F.B.E.") and B.B.G.E. (hereinafter referred to as "B.B.G.E.") then both 15 years of age. As a result of that argument, F.B.E., B.B.G.E. and J.P.E. moved out of the former matrimonial home and into rental accommodation. F.B.E. and B.B.G.E. have continued to reside with J.P.E. to date of trial, with limited contact with their mother.
- [6] J.P.E., born [ ], 1946, was married at 26 years of age. At the time of trial, he was 56 years of age. L.G.E., born [ ], 1949, was 23 years of age at the date of marriage, and aged 53 at date of trial. It was a first marriage for both of them. They met when L.G.E. was either 21 or 22 years of age in Vancouver, British Columbia. At the time, she was working for the B.C. Telephone Company. She had grown up in Penticton, British Columbia, but had moved to Vancouver to attend Columbia College, after working as a nanny in Calgary for some six months. I am not sure from the evidence if she completed the Geography and English courses she was taking to complete her Grade 12 graduation requirements. In any event, during or after her attendance at Columbia College she waitressed, and then obtained a position with the B.C. Telephone Company.
- [7] She was employed with the B.C. Telephone Company for some years, starting with Directory Assistance, then monitoring new trainees and then training operators for the Company. She then applied for a position in customer service dealing with residential telephone accounts in the collection department. She received various promotions within that organization.
- [8] J.P.E. and L.G.E. had discussions about raising a family and agreed that their family unit would be of the then traditional type with a stay-at-home mother and the father as breadwinner. L.G.E. candidly testified that she wanted to stay at home with the children and "otherwise I would not have married him". J.P.E. does not take exception to this arrangement having been discussed and agreed upon between the parties.
- [9] Up until February 11, 1977, both parties were employed in Vancouver. J.P.E. suggests that as a result of overtime available to L.G.E. she sometimes earned more money than him. L.G.E. became pregnant for the second time with their oldest surviving son, J.E.Jr., in 1976, and she worked up to February 11, 1997, when she went on maternity leave. After J.E.Jr was born, and at the expiration of her maternity leave, she ended her employment with the B.C. Telephone Company. At that time, the parties were living in a townhouse in Richmond, British Columbia. Both parties were determined to pay off debt as quickly as possible and this they did by their combined determined effort.
- [10] In the meantime, J.P.E. was working long hours and also taking night courses towards a C.G.A. qualification. His previous post secondary education had included attendance at the [ ] in Calgary where he had completed a three-year Diploma course as a mechanical engineering technologist. After graduation, he commenced work for a major plumbing and

heating contractor where he worked from age 22 until he was approximately 36 years of age. That company was then sold to Dominion Construction and he continued employment with them. As part of his work with his employer J.P.E. designed computer programs and the comptroller thought he should learn accounting. As a result, in addition to his daytime employment, he enrolled in a five-year C.G.A. course which he attended in the evenings. He did not complete the fifth year of the accounting program.

- [11] J.P.E. had been close throughout his life to his father, J.E.Sr. J.E.Sr had retired from his work and, in 1974, had moved to X[ ], British Columbia, where he was born. J.E.Sr apparently could not live with the inactivity retirement offered him and as a result had looked for a business opportunity in X[ ]. In 1977, J.E.Sr purchased a business known as "H.[ ] Ltd." with a provision that the then owner would manage it for him. This arrangement did not work out and as a result, some two to three years later, J.E.Sr approached J.P.E. with a view to J.P.E. and L.G.E. relocating to Prince George, taking an equity position in the muffler business and managing it. L.G.E. was at first opposed to the idea of moving to Prince George. However, she finally agreed. At the time, she was concerned with the amount of time J.P.E. was away from home and the long hours he was keeping at work which would have included his attempts at obtaining his C.G.A. designation. She thought that owning their own business would result in her husband having more quality time with their son, J.E.Jr., who, at that time, was approximately three years of age.
- [12] As a result, J.P.E. moved to Prince George in April 1978, with L.G.E. and J.E.Jr following them in June or July the same year. J.P.E. paid \$100,000 to acquire his interest in H.[ ] Ltd, part of which had been obtained from the proceeds of a loan, and the balance from their own monies. On arrival in Prince George, they rented a home on U.[ ]. This home had been acquired by J.E.Sr with the monies paid by his son to acquire the interest in the muffler business.
- [13] The E.s found the longer winters in Prince George to be a challenge and the job of managing the muffler shop to be taxing. J.P.E. worked in the business, as he does now, for long hours, approaching 12 to 13 hours per day and six or seven days per week. As they had done with their previous obligations, they worked hard to pay down the monies borrowed to acquire the interest in the muffler business, partly because of the prevalent high interest rates in 1980. In part, this was due to L.G.E.'s prudence when it came to managing and expending money. J.P.E. described his wife as being a prudent person and a saver, while he was more prone to borrowing money when needed.
- [14] In 1984, they acquired the former matrimonial home at M.[ ]. The house was in foreclosure at the time and it was purchased for \$124,000, which J.P.E. testified was a very good deal.

- [15] J.P.E. said his relationship with L.G.E. started to deteriorate at that time because of his focus on work and because they did not travel as they had hitherto done. Travel had been a part of their relationship and indeed J.P.E. and L.G.E. travelled extensively during their marriage. In his view, the former matrimonial home was something that his wife wanted. He described her at that time as enjoying renovation work and having the innate ability to see the possibilities that renovations could bring about.
- [16] L.G.E. at that time had become interested in the concept of Montessori education. In 1982, when J.E.Jr was four years of age, she attended a nine-month Montessori course in Portland, Oregon. Prince George at that time also had a Montessori program in which L.G.E. was involved. Her primary interest in Montessori was not necessarily for training to obtain employment. Rather, she wished to learn about this education format and perhaps in the future possess her own private school. At one time the parties looked at a property in Prince George as a site for a Montessori pre-school facility. As she had done with J.E.Jr for the nine months in Portland, Oregon, she also involved F.B.E. and B.B.G.E. in the Montessori program. Consistent with her prudence with respect to family expenses, L.G.E. was employed as a housekeeper in Portland to help defray expenses.
- [17] When the twins were three months of age, she attended with them in Houston, Texas for infancy training, while J.E.Jr stayed at home in Prince George with his grandparents and J.P.E.. L.G.E. attended in Texas for two three-month segments taking Montessori educational courses, but did not receive any diploma.
- [18] L.G.E.'s interest in the Montessori concept continued and, in 1988, when the twin girls were three years of age, she attended at Maria Montessori's home in Milan, Italy, with all three children. This extended pilgrimage lasted 11 months. J.P.E. made trips to Milan to visit his wife and children. Over the 11-month period, some eight trips were taken. Although I accept that finances were no doubt tight for the family at this time, somehow J.P.E. was able to afford the expenses associated with the attendances. J.P.E. also saw this as an opportunity for the children to learn a new language and to learn about a different culture. I did not get the impression that it was not enjoyable for J.P.E. although he did not feel it was necessary for the children's development.
- [19] All three E. children had been placed in the French Cadre program in Prince George. In 1991-1992, L.G.E. took F.B.E. and B.B.G.E. for an extended trip across Canada when the girls were approximately seven years of age. F.B.E. and B.B.G.E. were registered for school in Quebec. At this time, J.E.Jr was at Simon Fraser University and J.P.E. was essentially in Prince George by himself although various trips were made. J.P.E. travelled to Quebec some three to four times, and L.G.E. and the girls visited Prince George on many more occasions.
- [20] In anticipation of their return, J.P.E. renovated the room his son, J.E.Jr., had occupied in the former matrimonial home, at a cost of \$30,000. The renovation turned out to be a disaster in that the girls never moved into the room. Shortly after their return to Prince George from Quebec, the parties separated.

- [21] Since separation, the twins have been primarily cared for by their father. They presently reside in rental accommodation owned by [ ] B.C. Ltd., immediately across from H.[ ] Ltd. J.P.E. has been the primary caregiver for the children and they have accessed their mother as they have wished to from time to time. That access has not been regular and given the proximity of the children at their now principal residence to her residence, it does not amount to a lot of access. Nevertheless, there has been access as determined by them and there is no evidence that J.P.E. has frustrated their access.
- [22] During the marriage, J.P.E. and L.G.E. were actively involved in the community, including being patrons of the arts and sponsors of many charitable concerns. Either through H.[ ] Ltd or directly, they sponsored the Northwest Theatre Group, 4-H, and regularly had a pumpkin giveaway from the business premises on Halloween. For all intents and purposes to an outsider's view, they had a successful, long-term, traditional marriage at the date of separation, although they had not shared a common bed for some years prior to separation. That is not to say, however, that there was animosity or differences between them and this aspect of their marital relationship must be tempered with the fact that whilst L.G.E. and the children were in Quebec in 1998 or 1999, J.P.E. proceeded to expend some \$30,000 on home renovations, which renovations were completely lost on L.G.E. because they were contrary to her wishes to have an ensuite bathroom incorporated into what had formerly been J.E.Jr.'s bedroom.
- [23] Meanwhile, J.P.E. continued to be actively involved in the business owned by himself and his father and from all accounts, including the evidence of his father, J.P.E. has successfully managed the operation for over 20 years.
- [24] By any assessment of the evidence placed before me regarding L.G.E.'s abilities, there is no doubt that she is a determined, high-energy, bright and articulate person. However, I believe she has put her life on hold pending the outcome of this litigation. In part that may be because of the lifestyle that she enjoys and the type of person she is. She has been in receipt of interim spousal support in the amount of \$3,200 pursuant to Master Baker's order of June 19, 2001. That order at date of trial had been in place for some 18 months.
- [25] J.P.E. has continued to manage the H.[ ] Ltd business and has commenced a relationship with a person who now maintains the books of record at the business and who is paid some \$40,000 for that work. Prior to her employment by H.[ ] Ltd, the in-house accounting had been performed by a relative and when that relative completed his employment with H.[ ] Ltd, the bookkeeping and accounting had been performed by J.P.E. until the new bookkeeper was hired. Both J.P.E. and his father, J.E.Sr., testified at trial this person is extremely competent and well worth the \$40,000 salary being paid to her. THE FAMILY ASSETS

- [26] Aside from the personal assets, savings accounts, R.R.S.P.s and the principal personal asset, being the former matrimonial home at M.[ ], the family assets include shareholdings in the E. group of companies. There are four companies involved in this grouping. They are: E.1[ ] Ltd, E.2[ ] Ltd, [ ] B.C. Ltd., and H.[ ] Ltd.
- [27] E.1[ ] Ltd has Class A and Class B shares issued. The Class A represent voting shares and the Class B represent non-voting shares. L.G.E. owns all the issued non-voting shares, while J.P.E. owns all the issued voting shares. At the time of trial, E.1[ ] Ltd held three rental properties.
- [28] E.2[ ] Ltd is a holding company in which J.P.E. possesses 100% of all the issued shares. This holding company holds 51% of the Common shares in H.[ ] Ltd. comprised of 98 Common shares and 490 Preferred shares. His father, J.E.Sr., holds 102 Common shares and 510 Preferred shares, representing 51% ownership in all the issued shares of H.[ ] Ltd.
- [29] The fourth company, [ ] B.C. Ltd., is a company in which J.P.E. holds 49% of the issued shares, represented by 98 Common shares and 735 Preferred shares. His father, J.E.Sr., holds 51% represented by 102 Common shares and 765 Preferred shares. This numbered company owns three rental properties.
- [30] For greater clarity, I have attached a diagram marked Appendix I to these Reasons disclosing the corporate ownership of the E. group of companies.
- [31] I indicated at the outset of these Reasons that I would deal with the application of the defendant to re-open and the defendant's application to have J.P.E. found in contempt. As this application deals primarily with valuation of the family assets at date of trial, I will proceed to deal with that application at this time.
- [32] The defendant's application was filed on May 29, 2003, and was brought by the defendant to re-open the trial so that evidence of the disposition of one of the rental properties owned by E.1[ ] Ltd could be brought to the attention of the court. In part, this was due to the court having been left with the possibility of transferring the rental house which had been sold in specie to L.G.E.. The rental property in question is located immediately adjacent to the former matrimonial home. It transpires that J.P.E. determined to dispose of the subject rental property when it was vacated by its then tenants as at April 30, 2003, as a result of his concerns about the condition of the property after the tenants' departure and his concern about the cost of bringing it up to rentable condition. In his opinion it could not be rented until those repairs were done, and he was consequently concerned about the revenue that stood to be lost.
- [33] Without consultation with either his litigation lawyer in these proceedings or L.G.E. he determined to sell the property and provide an exclusive listing with respect to its marketing. The house thus was not marketed pursuant to any multiple listing which would have given it the most exposure to the market. By letter of May 6, 2003, Kenneth Arnold Goss, a sales associate with Re/Max Center City Realty, provided comments with respect to

estimations of Mr. Goss in the range of \$15,000 to \$25,000 to bring the house up to good to excellent condition.

- [34] A Property Disclosure Statement dated May 7, 2003, was executed by J.P.E. on behalf of the Corporation and an estimate of value by market analysis provided by the realtor indicating a suggested list price of \$129,900 to \$135,500 and a probable final sale price in the range of \$127,000 to \$134,000. The same day, the Exclusive Listing Contract was entered into by J.P.E. on behalf of E.1[ ] Ltd. The same day the Contract of Purchase and Sale was executed by J.P.E. on behalf of E.1[ ] Ltd, selling the property for \$130,000 with a completion date of May 15, 2003, and a possession and adjustment date of May 17, 2003. The Exclusive Listing Contract discloses a listing price of \$134,900. The initial offer made by the purchasers was \$128,000 which was countered by E.1[ ] Ltd at \$130,000 and accepted by the purchasers on that basis. I infer from the contract and sale that the proposed purchasers were already involved with a transaction through Re/Max Center City Realty as the terms and conditions of their offer included this provision: \$1,000 deposit to be transferred from offer on (Bouch 4443) to M.[ ]
- [35] The possibility that the sale had been completed as envisioned by the Contract of Purchase and Sale only came to light as a result of enquiries made by L.G.E. who, of course, resided next door. Mr. Lindsay, counsel for L.G.E., on being apprised of the possibility of sale, immediately contacted Mr. Fatt, counsel for the plaintiff, who then obtained particulars of the sale from his client. Those particulars were immediately forthcoming.
- [36] I am satisfied that the net proceeds of the sale were in fact applied by J.P.E. to debts associated with the E. group of companies and that as a result the net proceeds of the sale have been fully accounted for.
- [37] J.P.E. says that he always had the right to dispose of the property without consultation with L.G.E. and without leave of the court. The applicant submits that J.P.E. must be found in contempt of court because his activities in disposing of the rental property are contrary to a restraining order prohibiting him from disposing of this asset. J.P.E. submits that the court order in place permitted the disposition of the rental outfit. In the alternative, he says that if it did not, then he had a reasonably held belief that he could dispose of it, and thus lacked the necessary mens rea or intent to be found guilty of contempt of court.
- [38] The order in question is the same order of Master Baker referred to previously being the order of June 19, 2001. Included in the orders made by the court that day were various consent orders.
- [39] Paragraph 3 of that order provides as follows:

3. The plaintiff be restrained from causing, allowing or permitting any company in which he holds shares and over which company he has control, whether legal or de facto, to dispose of, encumber, sell or similarly deal with the [sic] its assets except in the ordinary course of business until further order of this Honourable Court or written consent of both the parties hereto; BY CONSENT
- [40] It is on the basis of the particular wording of "in the ordinary course of business" that the plaintiff submits that he did not have to obtain further order or obtain the written consent of L.G.E..
- [41] With respect to that assertion, I must point out that there is simply no evidence before me either on this application, or at trial, that this Company, E.1[ ] Ltd, was ever in the business of buying and selling rental units. The only evidence before me at the trial was that this Company had acquired by purchase, rental properties. There was no evidence that the Company had ever disposed of any of the rental properties it had accumulated over time. I therefore find that the selling of this rental home was not in the ordinary course of business by E.1[ ] Ltd as contemplated in Master Baker's order of June 19, 2001. In addition, the possibility that I might be able to utilize this property in specie because of its proximity to the former matrimonial home in the apportionment or reapportionment of family assets was put before me by Mr. Fatt on behalf of J.P.E..
- [42] While I may have negatively commented on that possibility, it was nevertheless a possibility that ought to have been left to me with respect to the apportionment issues and the income earning ability of L.G.E.. As a result of the plaintiff's actions, that possibility no longer exists. That is not to say, however, that the action of J.P.E. in having disposed of the property should render him contemptuous of the court's authority and orders. I had placed before me the decisions of this court and our Court of Appeal in *Hama v. Werbes*, [1997] B.C.J. No. 2120 and 2000 BCCA 367 respectively. In addition, I have had occasion to consider the decision of our Court in *Ludlo v. McMillan*, 2001 B.C.S.C. 268. At para. 43 of the *Ludlo* decision, Drost, J. said this: Because ... the sanctions for contempt are fines or imprisonment, and imprisonment is a severe penalty, courts must use their powers "sparingly and always with reference to the interests of the administration of justice": *Staples v. Isaacs and Harris* [1939] 2 W.W.R. 541 (B.C.S.C.). And because the liberty of the alleged contemnor is at stake, the conduct of a contempt hearing must follow the same rules of evidence and have the same standard of proof as the criminal hearing; that is, proof beyond a reasonable doubt: *Vance v. Vance* (1984), 50 B.C.L.R. 373 and *Hama v. Werbes*, 2000 BCCA 367, [200] B.C.J. No. 1168, Vancouver Registry CA026302.
- [43] I have considered the affidavit material filed by J.P.E.. While I question the propriety of his decision to rely on "the ordinary course of business", I cannot say in light of the evidence provided by him that I am left in no doubt as to his guilt. In fact, if this were a criminal case, I would apply the criteria of *R. v. W.(D)*, [1991] 1 S.C.R. 742 and find that a reasonable doubt exists. I therefore do not find that the case against him is made out beyond a reasonable doubt and therefore I must find that the applicant has failed to establish beyond a

reasonable doubt that he "wilfully" disobeyed Master Baker's order or in any way attempted to interfere with the business of the court.

- [44] That is not the end of the matter, though. I find that he was in breach of Master Baker's order by disposing of the rental home. On a balance of probabilities, I find that it could not be said that it was a sale in the ordinary course of business as he knew full well E.1[ ] Ltd had not disposed by sale of any of its assets. In his affidavit filed July 11, 2003, he states: Although I believe I sold the property for the maximum realistic price, for the purpose of this application, I am prepared to state that the theoretical price range, in broad figures, may be set at \$130,000 to \$140,000.
- [45] With respect, there is no admissible evidence before me to substantiate a valuation in that price range. This property was sold remarkably quickly without having it exposed as broadly as possible to the buying public. It was in fact sold in-house to an existing client of the real estate firm with whom he had listed the property.
- [46] Kenneth Goss, in his correspondence dated May 6, 2003, made the following comments: This house will need a lot of clean up to bring it up close to "move in" condition or the list price will have to reflect the amount of work that it needed. It was left just filthy after the tenants left (strong dog odour). The house needs painting throughout. The window coverings were hung by tape and removed paper on Gyproc when they were taken down. Most of the flooring needs to be updated (the kitchen floor was painted over cushion flooring). A new covering will also be needed for the sundeck. This home needs anywhere from \$15,000-\$25,000 work to bring it up to good to excellent condition.
- [47] Interestingly, the residential data input form completed by Ken Goss and dated May 7, 2003 only contains these comments under "remarks" after giving the physical dimensions of the property: Good home, good location. Needs cleaning & lots of T.L.C. It is notable that this remark contains no reference to expenses of \$15,000 to \$25,000 in work required.
- [48] Mr. Goss, although a well-known realtor, is not a qualified real estate appraiser. His evidence as to value is not admissible because of his lack of qualifications and his obvious conflict of interest. At trial, both sides provided their own full and comprehensive expert reports which dealt with valuing the family assets. Both qualified business valuers equated the book values of the real property to their fair market values as of the valuation date.
- [49] Ms. Newman on behalf of Deloitte & Touche, valuers for the defendant, stated that she assumed the book value represents the fair market value for all assets and liabilities except for real property. Notional disposal costs, being principally latent selling costs and corporate taxes, were deducted to arrive at fair market value. L.G.E.'s business evaluator, Margaret C. McFarlane of BDO Valuation Inc. basically agreed with the valuation of Ms. Newman of Deloitte & Touche with the one exception that she did not deduct latent selling costs and corporate taxes associated with disposition of the rental properties owned by E.1[ ] Ltd.

- [50] J.P.E.'s evaluator, at Schedule 13A utilized the assessed value of \$154,300 on the assumption that the property tax assessment was equal to the market value. In utilizing that figure she concluded that shares in E.1[ ] Ltd had a nil value and that the shareholder's deficit was \$20,000 as at December 31, 2001. This estimate of value, in my view, is the value that should continue to be utilized by the Court in the valuation of assets and therefore the shareholder deficit of \$20,000 will not be increased as the result of the disposition of M.[ ] by the actions of J.P.E. in May 2003.
- [51] I will deal with the issue of costs relating to the trial and these most recent applications at the conclusion of these Reasons. IDENTIFICATION OF FAMILY ASSETS
- [52] There is essentially no contest as to whether or not the various shareholdings in the E. group of companies are indeed family assets. J.P.E. has implicitly and explicitly agreed that the shareholdings in the various companies are family assets. There is, however, disagreement with respect to three assets and one liability. The three assets that the parties disagree on are L.G.E.'s investment with C.I.B.C. Wood Gundy Account No. [ ] in the amount of \$2,822.85 and the defendant's investment with the Prince George Savings and Credit Union [ ] and [ ] with the same Credit Union having accounts respectively of \$683.52 and \$747.67.
- [53] With respect to these latter two accounts, I am satisfied on a balance of probabilities that the beneficial ownership of those accounts is with F.B.E. and B.B.G.E. respectively and should not be included as family assets. Similarly, with respect to the defendant's investment with C.I.B.C. Wood Gundy in the amount of \$2,822.85, this account would not be a family asset as it represents monies deposited after the date of separation, and there is no evidence that the monies were generated from a family asset.
- [54] J.P.E. has claimed a deficit in his line of credit with the H.S.B.C. Account No.: [ ], in the amount of \$68,855.53 as being a family debt. I am satisfied, from the evidence given at trial by J.P.E., that this debt is primarily comprised of monies used by him for legal fees and spousal maintenance occurring after the date of separation and therefore is not a family debt because it was not incurred for a family purpose.
- [55] The major controversy in the valuation of assets is the valuation of H.[ ] Ltd and the 40% interest of E.2[ ] Ltd. in that company. The plaintiff's expert, Jane Newman of Deloitte & Touche LLP, estimated the value of the holding corporation at \$400,000. Margaret C. McFarlane of the firm BDO Valuation Inc. estimated the value to be \$470,000. The primary controversy between them centres on whether or not the term insurance cost policies on J.E.Sr and J.E.Jr's lives ought to be deducted as an appropriate expense when determining the fair market value of an operating entity. The annual premium for the life insurance for Mr. J.E.Sr and J.E.Jr are \$7,450 and \$1,680 respectively. Ms. McFarlane concluded that the term insurance is not a necessary operating expense and therefore ought to be added back in. Ms. Newman filed a responding or a rebuttal estimate of value after receiving Ms. McFarlane's estimate of value. She noted that Ms. McFarlane had added back term insurance premiums of \$15,316 for 2001 and \$9,130 for preceding years. In her rebuttal report she

states at para. 3.1: It is common valuation practice to add back the premiums for whole life insurance but term insurance premiums are usually not adjusted for. ... another point to note is that the company is the beneficiary of the policies. Also, an arms-length buyer of the shares may be required by the Bank to carry term insurance if bank financing is involved to purchase the shares and in that case premiums would also be deductible for tax purposes.

- [56] I believe this latter explanation is speculative at best. One would think that a prospective purchaser of H.[ ] Ltd business would view the term insurance for both key members as being redundant, i.e., not necessary for the business to earn income. The concept of insurance may be something that a prudent purchaser will consider in determining operating expenses based on his or her particular circumstances. The definition of value used by Deloitte & Touche in their estimate would seem to preclude the possibility that these expenses ought not to be added back in to obtain the bottom line value of the company.
- [57] In her definition of value Ms. Newman said: Definition of Value: In arriving at our estimates of value, we have been guided by the concept of fair market value which is generally defined as the highest price, expressed in terms of money or monies worth available in an open or unrestricted market between informed and prudent parties acting at arms-length and under no compulsion to transact.
- [58] It seems to me that the use of "unrestricted" does not take into account persons who are restricted by availability of monies to complete the transaction and who must resort to outside lenders.
- [59] This annual expense in the most recent years, utilizing a price/earnings ratio of 6:7 as utilized by both valuers, would yield an increase of up to \$65,000 to the value of H.[ ] Ltd, or approximately a \$30,000 increase in the value of E.2[ ] Ltd.
- [60] Similar comments were made in Ms. McFarlane's report with respect to the calculation by Ms. Newman in her calculation of maintainable earnings. She opined that Deloitte & Touche had omitted a number of adjustments to financial statement income in calculating the maintainable earnings of H.[ ] Ltd. In addition to the term insurance premium adjustment, Ms. McFarlane also cited rental expense adjustments.
- [61] Basically, Ms. McFarlane chose maintainable earnings of \$90,000 per year compared to Ms. Newman's selection of \$71,000. Other than the issue of the term insurance expenses, I am unable to say which assessment of value I prefer. I am, however, satisfied that the value of H. [ ] Ltd, for the purposes of this family litigation, should be found to be greater than the \$400,000 opined by Ms. Newman, but not necessarily at the \$470,000 opined by Ms. McFarlane, but that the final amount should be weighted towards Ms. McFarlane's estimate as I agree with her assessment regarding the deductibility of term insurance in calculating maintainable earnings. I therefore fix a value of \$450,000 on the shares of J.P.E. in his holding company.

- [62] The business valuator's estimates of value of the shares in E.1[ ] Ltd do not differ. They both agree that the shares have a nil value, given the deficiency between debt and debt value (assessed value) of the three rental properties held by that Corporation. This is perhaps the interesting aspect of the disposition of this property. There was indeed a deficit in the company without the actions of J.P.E. in May of this year. I have considered the increased deficit and whether that would be a family debt. I have reviewed the evidence and I have concluded that there was no evidence before me at trial that would establish the deficit in this company as being a family debt to be allocated between the parties. That being the case, I do not feel there is any adjustment to be made relative to the increased deficit as between the parties. The shareholders are both due monies from the company. Both shareholders' Loan Accounts were used by them for family purposes. L.G.E.'s shareholder's loan account in the Corporation is due in part to the acquisition of the Mercedes Benz vehicle which she is to retain. She will have to deal with the vagaries of the real estate market in Prince George just as any other investor must do.
- [63] Both parties agree that there is a shareholders' deficit of \$19,000, (ignoring the disposition of the M.[ ] property in May, 2003). The shareholders' deficit was, of course, predicated on paying out the shareholders' loans due to J.P.E. and L.G.E. in the respective amounts of \$3,033 and \$24,635. Relative to these Shareholders' loan accounts, given the fact that this was an enterprise in which they each held 100 shares and L.G.E. desired an interest in this company and that the shareholders' loan account in some respects represents monies which were borrowed to cover purchase of the Mercedes, it seems to me that it would not be unfair to have these shareholders' loans treated, for all purposes, to be family assets notwithstanding that they are payable to each of the spouses in different amounts and for different purposes.
- [64] The two appraisers differ on the valuation of J.P.E.'s shareholdings in [ ] B.C. Ltd. The essential difference appears to be costs associated with disposition. Ms. McFarlane considered that someone may purchase the shares. I am of the view that disposition costs should be included and I accept the valuation of Ms. Newman in the amount of \$115,000.
- [65] The only other controversy regarding value of family assets is the 1998 Mercedes vehicle in the possession of L.G.E.. L.G.E. estimated the value of the vehicle in her original financial statement as being \$38,500 and in her most recent financial statement indicated it having a value of \$24,450. I accept her evidence at trial that the vehicle is in need of repair. I accept the value for the purpose of this litigation of that family asset as being \$31,450.
- [66] The household furnishings were appraised on a liquidation sale value of \$18,770. Most of those items are still in the former matrimonial home. I accept that when J.P.E. and the twins left the former matrimonial home, they left with the barest of necessities, and that most of the value in the family furnishings still remain in the former matrimonial home.

- [67] At trial the issues of CPP benefits and Airmiles accumulated by J.P.E. by utilizing his personal and corporate charge cards were referred to. J.P.E. indicated he had 110,000 Airmiles at the date of trial and more at date of separation. There is no doubt that the Airmiles were used for family purposes and are therefore family assets. As a result I order that Mr. J.P.E. transfer or cause to be transferred to Mrs. L.G.E. 55,000 Airmiles for her own use absolutely. In addition, there appeared to be no disagreement with respect to division of Canada Pension Plan benefits. I therefore order that pensionable earnings and/or credits which have accumulated in each party's Canada Pension Plan shall be equalized in accordance with the Canada Pension Plan (Canada) with the effective date being the date of the s. 57 declaration under the Family Relations Act being Tuesday, May 22nd, 2001.
- [68] As a result, I find the following to be family assets visible amongst J.P.E. and L.G.E. in accordance with the provisions of the Family Relations Act, namely: SCHEDULE OF ASSETS ASSET PARTICULARS DEFENDANT'S VALUE SOURCE DOCUMENT COMMENTS M.[ ] Former Matrimonial Home \$135,000.00 Report of Oct. 16, 2002 Defendant to Retain 1998 Mercedes Defendant's vehicle \$ 31,450.00 Defendant's Property Financial Statement " Shareholder Loan - Defendant E.1[ ] Ltd \$ 13,834.00 " Defendant's Investment CIBC Wood Gundy #[ ] \$ 74,481.85 Statement Oct. 31 & Nov. 29, 2002 " Defendant's Investment CIBC Wood Gundy #[ ] \$ 81,714.53 Statement Oct. 31, 2002 " Defendant's Investment CIBC Wood Gundy [ ] Chequing Account #[ ] \$ 4.31 Statement Oct. 31, 2002 " Defendant's Investment P.G.S.C.U. [ ] \$ 23.26 Statement Dec. 11, 2002 " Defendant's Investment P.G.S.C.U. [ ] \$ 517.02 Statement Dec. 11, 2002 " Defendant's Investment P.G.S.C.U. [ ] \$ 1,236.80 Statement Dec. 11, 2002 " Defendant's Investment P.G.S.C.U. [ ] \$ 141.83 Statement Dec. 11, 2002 " Defendant's Investment P.G.S.C.U. [ ] \$ 1,136.68 Statement Dec. 11, 2002 " Defendant's Investment P.G.S.C.U. [ ] \$ 1,136.68 Statement Dec. 11, 2002 " Defendant's Investment P.G.S.C.U. [ ] \$ 894.62 Statement Dec. 11, 2002 " Defendant's Investment P.G.S.C.U. [ ] \$ 1,341.92 Statement Dec. 11, 2002 " Defendant's Investment P.G.S.C.U. [ ] \$ 1,161.70 Statement Dec. 11, 2002 " Defendant's Investment P.G.S.C.U. [ ] \$ 3,914.10 Statement Dec. 11, 2002 " Defendant's Investment P.G.S.C.U. [ ] \$ 1,722.00 Statement Dec. 11, 2002 " Defendant's Investment P.G.S.C.U. [ ] \$ 500.00 Statement Dec. 11, 2002 " Defendant's Investment P.G.S.C.U. [ ] \$ 1,155.00 Statement Dec. 11, 2002 " Defendant's Investment Royal Bank #[ ] \$ 137.48 Statement Jan. 3, 2003 " Defendant's Investment Royal Bank #[ ] \$ 137.48 Statement Jan. 3, 2003 " Defendant's Investment Royal Bank #[ ] \$ 8,674.39 Statement Jan. 3, 2003 " Defendant's Investment HSBC #[ ] \$ 28,946.34 Statement Dec. 12, 2002 " Defendant's Investment HSBC #[ ] \$ 2,051.35 Statement Dec. 12, 2002 " Defendant's Bank account Royal Bank #[ ] \$ 3,302.16 Statement Jan. 3, 2003 " 1995 Mustang Plaintiff's vehicle \$ 12,650.00 Agreed value Plaintiff to retain 1990 Bayliner Boat \$ 6,000.00 Agreed value Plaintiff to retain Plaintiff's shareholder loan [ ] B.C. Ltd. \$ 1,450.00 Agreed value Plaintiff to retain Plaintiff's shareholder loan E.1[ ] Ltd. \$ 13,834.00 Agreed value Plaintiff to retain E.2[ ] Ltd. Owns Plaintiff shares In H.[ ] Ltd \$450,000.00 Plaintiff to retain E.1[ ] Ltd. Owns 3 rental properties NIL Expert's Reports Plaintiff & Defendant to retain shares [ ] B.C. Ltd. Owns 3 rental properties \$115,000.00 Plaintiff to retain Plaintiff's RRSP Berkshire #[ ] \$ 59,993.12 Statement Dec. 31, 2002 Plaintiff

to retain Plaintiff's RRSP HSBC # [ ] \$ 71,991.17 Statement Jan. 3, 2003 Plaintiff to retain Plaintiff's Investment HSBC # [ ] \$ 12,168.11 Statement Jan. 3, 2003 Plaintiff to retain Household Furnishings as per estimate \$ 18,770.00 Defendant to maintain for purposes of calculation TOTAL: \$1,156,471.90

- [69] An equal division of these assets would equate to some \$578,235.95 each. It is common ground that J.P.E. desires to maintain his interest in E.2 [ ] Ltd and his interest in the numbered company. Likewise it is proposed that L.G.E. keep the former matrimonial home, the Mercedes vehicle and all investments and R.R.S.P.s in her name. She also would like to keep all household furnishings having a value of \$18,770. J.P.E. would also like to have many of the household items.
- [70] If L.G.E. were also to keep the household furniture and the household furnishings presently in the former matrimonial home, she would have approximately \$413,385.50 worth of value. Given the total value of the family assets at \$1,156,471.90 this would still require a further equalization payment to her of approximately \$164,850.45. On this calculation she would hold her home clear title, some \$31,000 in R.R.S.P.s and approximately \$345,000 (\$180,000 in investments in her own name and \$164,850 to come) as monies available to earn income. Based on a 5%-6% return on investment, she would have almost \$20,000 a year in investment income from the \$345,000 available to her to be invested.
- [71] J.P.E. would, on the other hand, have a corresponding additional debt of approximately \$165,000 to cover an equalization payment, but he would continue to enjoy the fruits of having become an accomplished business man. He will also at some time, based on the insurance arrangements put in place by he and his father, in all probability, given the age of his father, enjoy future benefits of majority ownership in H. [ ] Ltd.
- [72] The issue, therefore, is whether or not this contemplated equal division of the family assets would be unfair. The default position for the apportionment of family assets found in s.56 of the Family Relations Act R.S.B.C. 1996, provides that each spouse is entitled to an undivided one half interest in each family asset as a tenant-in-common. Notwithstanding that default position, s.65 of the Family Relations Act permits a court to reapportion a spouse's interest if an equal division would be unfair. The relevant subsections and paras of s. 65 are the following: 65(1) If the provisions for division of property between spouses under s.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) and other circumstances relating to the acquisition, preservation, maintenance, improvement or use of the property or the capacity or liabilities of the spouse, the Supreme Court, on application, may order that the property covered by s.56, Part 6 of the marriage, or the marriage agreement, as the case may be, be divided to share as fixed by the Court.
- [73] The onus is on the person seeking reapportionment to establish that an unequal division of the family assets would be unfair having regard to the factors enumerated in s. 65. (See *Toth v. Toth* (1995), 13 B.C.L.R. (3d) 1 B.C.C.A.).
- [74] The defendant submits that given her age at trial, being 53 years old, and her time out of the work force (since 1977) it is unreasonable to expect that she could now be able to earn an income that would be commensurate with someone of her age who has not been out of the workforce.
- [75] I accept that L.G.E. must have been the primary caregiver of the three children of the marriage up to the parties' separation in 2000. While J.P.E. suggests that he shared the responsibilities, the fact remains that he also worked by his own testimony, extended hours over extended weeks. In the *Toth* decision Prowse, J. quoted with approval from *Moge v. Moge*, [1992] 3 S.C.R. 13 (S.C.C.) this extract at para. 67: The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution, which, in my view the Act promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse. Significantly, it recognizes that work within the home has undeniable value and transforms the notion of equality from the rhetorical status to which it was regulated under a deemed self-sufficiency model, to a substantive imperative. Insofar as economic circumstances permit, the Act seeks to put the remainder of the family in as close a position as possible to the household before the marriage breakdown (pp.385-6).
- [76] Similarly, Taylor, J.A. in *Toth v. Toth* held at para. 39: ... will be whether in the context of the division of family assets it can be said in the words of s. 51(e) that the allocation of child-raising and housekeeping functions more heavily, or wholly, to one spouse has in the particular case resulted in that spouse being less financially "independent" and self-supporting" on the break-up of the marriage than would be the case had those tasks been wholly undertaken by the other, or equally shared between them. Only to the extent that it can be said to be likely that the more domestically-burdened spouse would but for the unequal sharing of that burden, have acquired employment advantages no longer available can this factor play a part in the allocation or apportionment of family assets.

- [77] In the case at bar I accept that L.G.E. was required to interrupt her efforts at pursuing her career because she had the burden of raising her children. This was due to not only her desire to be a stay-at-home mother, but also the desire of J.P.E. that his children be raised in a traditional home. This view by J.P.E. is not only demonstrated by his testimony, but also by his actions in remaining in the former matrimonial home for many years in the basement so that he would be there for his children.
- [78] I have concluded that on all of the evidence that L.G.E. will in all probability be unable to support herself because she devoted her married life to caring for her children. I accept that had she been able to devote the whole time to developing her own career, she would likely now have a higher earning capacity than she presently possesses.
- [79] As I understand the discussion in *Toth v. Toth*, it is simply not enough to merely consider the earning capacity of the spouse who is not self-sufficient. It is required that I consider what would have been the case if J.P.E. had taken up all, or half, of the domestic responsibility while his children were younger and required regular attention. It is inescapable on the facts of this case that J.P.E. has an enhanced future earning capacity because child care and housekeeping requirements did not totally fall to him and it is inescapable that half of the child rearing also did not fall to him.
- [80] I find that in the circumstances of this case, an equal division would be unfair. Having said that, I do not feel that it is appropriate to reapportion all family assets in L.G.E.'s favour.
- [81] The inability of L.G.E. to fulfill her income earning capability, given her age and some 12 years to traditional retirement age, will adversely affect primarily her retirement years. I therefore have concluded that L.G.E. has satisfied the onus upon her that an equal division would be unfair having regard to all the circumstances. I therefore order that J.P.E.'s R.R.S.P.s described in para. 68 as being plaintiff to retain totalling some \$144,000 be re-apportioned 65%-35% in favour of L.G.E.. This will be accomplished by a spousal roll-over with no adverse tax consequences to either party. Other than that each party shall keep the asset identified for that purpose and Mr. J.P.E. shall forthwith make the equalization payment of \$164,850.00 to Mrs. L.G.E.. SPOUSAL MAINTENANCE
- [82] Interim spousal support in the amount of \$3,200 has been paid by J.P.E. to L.G.E. pending trial.
- [83] In the courtroom I believe I referred to L.G.E. as being eccentric. I did not mean to emphasize that in any derogatory manner, but merely to point out that her activities regarding her lifestyle and her conduct with the children are not traditional. Webster's New Compact Format Dictionary defines "eccentric" as: Not placed, or not having the axis placed, centrally; not circular (in orbit); irregular, odd, whimsical. By this definition, L.G.E. is "eccentric" in many ways. Some examples include her decision to no longer give presents to the girls at Christmas time, or on their birthdays. Her lifestyle denotes someone who is, by this definition, eccentric.

- [84] L.G.E.'s eccentricity is further demonstrated by the fact that she has not had a stove in her kitchen for a number of years, although she explains this away by saying that her eating requirements do not necessarily involve having a stove to cook on.
- [85] Following the separation of the parties in 2000, L.G.E. obtained part of her food requirements from excess food requirements from restaurants in the Prince George area. She also developed a concept of organic gardening involving egg shells which she obtained from restaurants. She did sell some of her egg shell inventory over time, but has generally made them available to parties who share her love of organic gardening.
- [86] To contribute towards J.E.Jr.'s graduation ceremonies from high school she started up a cardboard recycling business, and following his graduation continued that business placing the proceeds in bank accounts, in trust, for her twin girls. Her daily ritual following separation includes rising early in the morning and completing a journal relating to how she is feeling and what she is doing. Early in the morning she meditates and otherwise occupies herself around the house and garden.
- [87] In June 2001, she became involved with a concept known as "mystery shopping". This involved her evaluating and writing up reports for gas stations. She testified that she would be reimbursed with gas for her efforts.
- [88] Aside from her recycling egg shells and the mystery shopping, she also became involved with what she described as a multi-level marketing business, but sales are almost negligible with net sales of \$569 with expenses of \$3,560. She has earned some monies as a facilitator or a coordinator with workshops involving a concept known as "human touch". I gather that she stays primarily at home, although she does leave to pay bills and go to restaurants. In addition, she attends and coordinates workshops. She has not delivered any applications for employment, although she has met with a career counsellor and attended at the College of New Caledonia to view posted job openings. She feels that she will need to retrain to obtain future employment.
- [89] To some extent, it appears that L.G.E. has put her life on hold while this litigation has proceeded through the court, originating with J.P.E.'s commencement of the action in May 2001. Over the two and a half years that the parties lived separate and apart up to the time of trial, she had only done minimum maintenance around the former matrimonial home consisting primarily of having the two furnaces in the home repaired. The appraisal of the former matrimonial home placed before the court is indicative of L.G.E. having placed herself in a holding pattern pending the outcome of this litigation.
- [90] The B.C. Assessment for 2002 assessed the home at \$164,700. The real estate appraiser appraised the home as at October 16, 2002, at \$135,000 as is, based on the condition of the home. I accept that certain aspects of the condition of the home existed at the time of separation. For example, the kitchen was in the process of being gutted to allow for a major refit. The appraiser calculated almost \$32,000 being required to bring the house up to average condition, which included some \$12,000 for the kitchen. In his addendum of his

report at p.2 he said this: Comments on the assessment: The B.C. Assessment office has the 2002 assessment (which is an indication of value for the effective date of June 30, 2001) as \$164,700. The assessment appraisers attempt to gain access to every property within five years however, some dwellings have not been visited in over 20 years. It is not known if the assessment office is aware of the current condition of the subject property. The assessment appraisers assume that normal care, maintenance, and updating will occur. In this case, the subject dwelling is in an advanced state of deferred maintenance and has unfinished areas. A conversation with the assessment office indicated that they had not been inside the subject property for some time. The 2002 assessment is considered to reflect a value well in excess of current market value.

- [91] J.P.E. submits that any spousal support ordered should be for a limited duration. L.G.E. submits that given her age, the duration of the marriage, and the fact that she is unlikely to obtain self-sufficiency, that she must be paid permanent support for an indefinite period of time. I have already commented in the preceding paragraphs on my view of L.G.E.. There is no doubt that she is an artistic and capable person, but, she has not been required to work outside the home, by agreement between the parties.
- [92] The Divorce Act R.S.C. 1985, c. 3 (2nd Sup.) sets out the relevant considerations and factors to be considered in connection with the question of spousal support. Section 15.2(4) and (6) set out the factors and objectives of spousal support: Factors
- (4) In making an order under sub-section (1) or an interim order under sub-section (2), the Court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
  - (b) the functions performed by each spouse during cohabitation; and
  - (c) any order, agreement or arrangement relating to support of either spouse. Objectives of Spousal Support Order
- (6) An order made under sub-section (1) or an interim order under sub-section (2), that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its break down;
  - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
  - (c) relieve any economic hardship of the spouses arising from the break down of the marriage; and

- (d) insofar as practical, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [93] As has been set out by many authorities, all of these factors must be considered. The most obvious factor is the E.s enjoyed a marriage that lasted over some 27 years. While the latter years may not be considered to be traditional, there was, however, an intent by both parties that they appear to the outside world as members of a traditional familial unit. I have described the roles that both J.P.E. and L.G.E. played in the marriage in terms of the development of J.P.E.'s business and the care of their three children.
- [94] If J.P.E. were to continue in the footsteps of J.E.Sr he will have many income earning years available to him past the age of 65. While L.G.E. has been described in positive terms by both J.P.E. and J.E.Sr., she is nevertheless a 53 year old woman whose career path has been somewhat marginalized by the contractual arrangement made between herself and J.P.E. that she would stay at home and care for the children, and he would be the bread winner. The provisions of the Divorce Act which I have cited require that I recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown.
- [95] In *Moge* at pp. 860-861 the Supreme Court of Canada said this: Although the promotion of self-sufficiency remains relevant under this view of spousal support, it does not deserve unwarranted pre-eminence. After divorce, spouses would still have an obligation to contribute to their own support in a manner commensurate with their abilities. (Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part 1)", *supra*, at p.171). In cases where relatively few advantages have been conferred or disadvantages incurred, transitional support allowing for full and unimpaired reintegration back into the labour force might be all that is required to afford sufficient compensation. However, in many cases a former spouse will continue to suffer the economic disadvantages of the marriage and its dissolution while the other spouse reaps its economic advantages. In such cases, compensatory spousal support would require long-term support or in an alternative settlement which provides an equivalent degree of assistance in light of all of the objectives of the Act. ("Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", *supra*, at pp.171-72). And at pp. 869-870: Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement ... . Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution ... .
- [96] I am of the opinion that L.G.E. has suffered economic disadvantage, both from the marriage and as a result of the breakdown. I mentioned earlier that she appears to be lost. She has checked out various job postings at the College of New Caledonia, but she recognizes that

she will need retraining. She is eccentric. This is not a demeaning quality, but is a quality that she developed over her married life with J.P.E.. She became totally dependent on him, and although working as a volunteer and as a facilitator in what she thinks are well-meaning pursuits, she has, none the less, suffered an economic disadvantage from the break down of the marriage and will continue to do so. The skills that she developed as a housewife and patron of the arts will not assist her in becoming self-sufficient without further training. Her age, and the competitive market that exists at this time, will place her at a great disadvantage.

- [97] As a result, an order for spousal support is mandatory in the circumstances of this case. While L.G.E. has the obligation to become self-sufficient, that factor under the Divorce Act is no greater than any other factor or consideration in determining spousal support. The fact is that J.P.E. was able to pursue an equity position with his father in H.[ ] Ltd in part because when he and L.G.E. were younger they both were determined to reduce debt and pay off their home in Vancouver which provided them in part with the capital required to invest with Mr. J.E.Sr. J.P.E. will be able to continue with that venture with his father.
- [98] Because J.P.E. will be able to continue earning a substantial income, there is really no reason why each of them should not enjoy lifestyles comparable to that which they did prior to the marriage break down. Given the longevity of the marriage, the respective ages of the parties, and my finding of economic disadvantage accruing to L.G.E., I conclude that spousal support for an indefinite period is warranted.
- [99] In doing so I must reject the position of J.P.E., that spousal support should only be for a fixed period of time. I am of the view that J.P.E.'s position is simply not sustainable given the factors I have indicated. I do, however, see a need for a review to ascertain the efforts of L.G.E. to obtain self-sufficiency. This is in no large part due to the fact that she has not made any job applications since separation, and has not taken any steps to take any retraining that would otherwise have made her more suitable to potential employers. As a result I order that spousal support may be reviewed in four years time.
- [100] Thus, the only question is the appropriate order for quantum of spousal support. An award of spousal support is to be made on the means and needs of both parties so that they are placed in a position as close as possible to that enjoyed before the marriage break down. As set out in *Moge v. Moge*, marriage is to be regarded as a joint endeavour, with the longer the marriage the greater the presumptive claim upon its dissolution to equal standards of living.
- [101] In *M.(J.W.) v. M.(D.J.)* 2002 BCSC 1357, Romilly, J. had occasion to deal with the breakdown of a 27 year marriage. The plaintiff and defendant were both 52 years of age. At the time of trial the plaintiff's gross income for 2001 was approximately \$143,000, but he saw his income declining for the year 2002. In fact his income had declined for the previous four years. Assets totalling some \$440,000 were reapportioned by Justice Romilly 70%-30% in favour of the wife.

[102] As I have done in this case, he then went on to consider spousal maintenance. At paras. 62 and 63 of that decision Justice Romilly said this:

62. The appropriate standard of living to be considered, if means are available, is a reasonable standard, having in mind the marital standard of living, taking into account the financial result of the determination of property issues: *Touwslager v. Touwslager* (1992), 62 B.C.L.R. (2d) 247 (B.C.C.A.). Moreover, spouses are entitled to enjoy lifestyles that are comparable to each other's, particularly when the marriage was a long one: *Dithurbide v. Dithurbide* (1996), 23 R.F.L. (4th) 127 (B.C.S.C.). However, entitlement to a continuation of lifestyle will be found only if the means are available: *Escaravage v. Escaravage* (1995), 14 R.F.L. (4th) 256 (B.C.C.A.).
63. In determining the quantum of maintenance, I must have regard to the "means" of not only the plaintiff, but also the defendant. The defendant is currently earning modest employment income. It is apparent that she is not self-sufficient and, given her age and time out of the paid workforce, she is unlikely to become self-sufficient in the future. That said, the plaintiff urges the Court to nevertheless find that the defendant is capable of working full-time and of earning \$25,000 per year in employment income. For the reasons stated above with regard to the needs of the defendant and the uncertainty of the duration of those needs, I must reject the plaintiff's argument. As it stands now, I am not prepared to impute more employment income to the defendant for the purposes of determining spousal maintenance.
- [103] Originally J.P.E. received a salary of \$100,000. After a corporate reorganization, he was paid \$75,000 salary and a dividend was paid to his holding company in the amount of \$25,000. The dividend paid in 2001 was in excess of this amount, and in 1998-1999 he received other dividends which he could not explain. These dividends were \$3,293 in 1998 and \$10,000 in 1999. In addition J.P.E. receives tax free compensation in the amount of \$1,000 for catalytic converters and recycling proceeds of some \$1,500. He also receives company benefits by being able to charge against the company for meals, telephone, vehicle expense, dry cleaning and school supplies. The gross amount for tax benefits probably equate to an additional \$30,000 per year. In addition, H.[ ] Ltd, by agreement, has retained earnings which would otherwise accrue to him as income. Adjustments are made fairly regularly to the cash flow out of his holding company. If one were to gross up his income for tax purposes, a taxable amount of income could be said to approximate at least \$140,000.
- [104] I am satisfied that L.G.E. requires \$3,500 net per month or \$42,000 net per year to live the standard of life similar to that enjoyed by them when they were together. According to the Price Waterhouse Coopers 2002 Matrimonial Tax Tables she would require gross income of approximately \$4,550 per month to meet her living expenses. Her investment income should yield her approximately \$1,600 gross per month. I have referred to Mrs. L.G.E. having put her life on hold. There is no evidence of any medical incapacity that would prohibit her from working at this time. I am troubled by the fact that she has done very little over the past several years to upgrade. I doubt that she will upgrade given her age. There are however other employment opportunities that would be available to Mrs. L.G.E.

even on a minimum wage basis. She has volunteered as a cook and this experience, which she indicates she enjoys, could also provide income to her. I am therefore going to impute income to Mrs. L.G.E. of \$1,000 per month. This will still leave a shortfall of \$1,950 per month which will be needed to be paid on account of spousal support by Mr. J.P.E.. In coming to this amount I have also considered the tax tables with respect to Mr. J.P.E.'s income, including the fact that it will be necessary for him to no doubt commit to additional debt in excess of \$165,000 to meet the equalization payment I have ordered being made by him.

- [105] As a result, the order will be that spousal support will be paid by Mr. J.P.E. to Mrs. L.G.E. in the amount of \$1,950 per month commencing on the 1st day of the month in which the equalization payment is made. Until the equalization payment is made the interim order of Master Baker at \$3,200 per month shall continue. If there is to be some financing between the parties with respect to the payment of the equalization payment then the issue of the spousal maintenance award I have made herein can be addressed by counsel.
- [106] I wish to address the issue of the family furnishings in the former matrimonial home. Some articles were taken by Mr. J.P.E. and the girls when they moved out but I am unable to put a value on them. The items in the former matrimonial home have been valued by Mrs. L.G.E. and I heard some evidence with respect to the dining room suite. Obviously some of the articles have sentimental value, especially the Christmas decorations provided by Mr. J.E.Sr and his wife. Those items are the only items I can say should be delivered up to Mr. J.P.E.. Their value is not great. The other family assets have a value of \$18,000 plus. The table, artwork and Inuvuit and Inuit carvings also have value. I do not know if any of the carvings have significance to one another and should not be separated. I know very little about the artwork.
- [107] I propose that Mr. and Mrs. L.G.E. should have one last opportunity to deal with these family assets by agreement. If they cannot agree then I will hear further submissions with respect to the distribution of those family assets. In the meantime I have calculated the equalization payment due to Mrs. L.G.E. on the assumption that she will retain all the family furnishings as they are in her possession and she has expressed the desire to keep them all. I have not deducted for the value of the Christmas decorations. GUARDIANSHIP
- [108] The infant children of the marriage, twins F.B.E. and B.B.G.E., birthdates of [ ], 1985 and presently aged 18 years reside with their father and have been with him since the parties separated. They will shortly be adults. Mrs. L.G.E.'s concern for them is that they should have a joint guardian in the event something happened with Mr. J.P.E.. No serious issue is raised with respect to custody. In the circumstances of this case I order that the plaintiff have sole custody of these infant children with Mrs. L.G.E. and J.P.E. to have joint guardianship of the girls. Joint guardianship shall be defined as follows:
- (1) the parents are to be joint guardians of the estate of the children;

- (2) in the event of the death of either parent, the remaining parent will be the sole guardian of the person of the children;
  - (3) the custodial parent, who has the primary responsibility for the day-to-day care of the children, will have the obligation to advise the other parent of any matters of a significant nature affecting the children;
  - (4) the custodial parent will have the obligation to discuss with the other parent any significant decisions which have to be made concerning the children, including significant decisions concerning the health (except emergency decisions), education, religious instruction and general welfare of the children;
  - (5) the parent who does not have custody will have the obligation to discuss the foregoing issues with the custodial parent and each parent shall have the obligation to try to reach agreement on those major decisions;
  - (6) in the event that the parents cannot reach agreement with respect to any major decision despite their best efforts the custodial parent shall have the right to make such decision;
- COSTS

[109] There has been divided success on the issues raised in the litigation as it stood as at date of trial. In these circumstances it is appropriate that each party bear their own costs of the litigation up to and including the conclusion of the trial in January of this year. The defendant however shall have the costs of the motions heard in July. It was an appropriate and indeed proper position for the defendant to take so that the court would not be embarrassed by the possibility of making an award that could not be carried out because of the disposition of one of the assets which I was invited to deal with by the plaintiff in specie.

[110] In summary:

- 1) CPP benefits shall be equalized in accordance with the Canada Pension Plan (Canada) with the effective date being the date of the s. 57 declaration under the Family Relations Act being Tuesday, May 22nd, 2001.;
- 2) Mr. J.P.E. shall transfer to Mrs. L.G.E. 55,000 Airmiles;
- 3) The family assets shall be divided as set out in para. 68;
- 4) Mr. J.P.E. shall forthwith pay an equalization payment to Mrs. L.G.E. in the amount of \$164,850.00. Mr. J.P.E.'s RRSP's shall be reapportioned 65/35% in favour of Mrs. L.G.E. utilizing the spousal rollover provisions;
- 5) Mr. J.P.E. shall pay spousal support in the amount of \$1,950.00 in accordance with para. 105;
- 6) The parties are at liberty to make further submissions with respect to the contents of the former matrimonial home;

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- 7) Mr. J.P.E. to have sole custody of the children of the marriage, F.B.E. and B.B.G.E., birthdates [ ], 1985;
  - 8) Mr. and Mrs. L.G.E. to have joint guardianship of the children with the terms set out in para. 108 of these reasons; and
  - 9) Costs are awarded as set out in para. 109 of these reasons. "E.G. Chamberlist, J." The Honourable Mr. Justice E.G. Chamberlist Text edited by CanLII (image removed).
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