

CANADA / JUDGMENT

Kopelow v. Warkentin

2005 BCCA 551

COURT

British Columbia Court of Appeal

DECIDED

10 November 2005

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2005 BCCA 551 Kopelow v. Warkentin

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kopelow v. Warkentin,

2005 BCCA 551

Date: 20051110

Docket: CA030789

Between:

Martin Larry Kopelow

Appellant

(Plaintiff)

And

Elsie Elizabeth Warkentin

Respondent

(Defendant)

Before:

The Honourable Chief Justice Finch

The Honourable Madam Justice Levine

The Honourable Mr. Justice Smith

J.C. Fairburn

Counsel for the Appellant

S. Mansfield

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

27 May 2005

Place and Date of Judgment:

Vancouver, British Columbia

10 November 2005

Written Reasons by:

The Honourable Mr. Justice Smith

Concurred in by:

The Honourable Chief Justice Finch

The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Mr. Justice Smith:

- [1] The appellant husband appeals from an order of Mr. Justice Ralph made after a trial in the Supreme Court by which he declared that the parties' marriage agreement was unfair and ordered a division of their assets pursuant to the provisions of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "Act"). The respondent wife cross appeals, seeking a larger share of property than was awarded by the trial judge. Alternatively, she seeks a larger award of spousal support. The trial judge's reasons for judgment are reported at [2002] B.C.J. No. 2534 (S.C.) (Q.L.) and are indexed as 2002 BCSC 1546. His supplemental reasons may be seen at [2003] B.C.J. No. 758 (S.C.) (Q.L.), 2003 BCSC 526.
- [2] I have set out the statutory provisions to which I will refer in a schedule at the end of these reasons.

The trial judgment

- [3] The parties separated in December 1998 after almost twelve years of marriage. A declaratory judgment was pronounced pursuant to s. 57 of the Act on December 21, 2000.
- [4] The trial judge ordered that the parties be divorced, ordered joint guardianship of their daughters (ages 15 and 13), and granted sole custody of the daughters to the wife with reasonable access to the husband. He ordered the husband to pay \$1,995.00 per month in child maintenance and \$1,500.00 per month in spousal support until the younger child

reaches the age of majority. He also directed the husband to formalize two informal trusts established for the benefit of the children and to use the trust income to fund their special and extraordinary expenses pursuant to the Child Support Guidelines Regulation, B.C. Reg. 61/98. The corpus of one trust is liquid securities held in the husband's name. The corpus of the other is the shares of Mobel Gafarnick Holdings Ltd., a real estate holding company, which are held nominally by the long-time accountant for the husband's family and their businesses, Mr. Jung, on an informal trust established in 1990 by the husband's mother (the "Mobel Gafarnick Trust").

- [5] The trial judge rejected the wife's submissions that the marriage agreement was unconscionable and that she entered into it under duress. However, adopting the approach set out by this Court in *Hartshorne v. Hartshorne* (2002), 6 B.C.L.R. (4th) 250, 31 R.F.L. (5th) 312, 220 D.L.R. (4th) 655, 2002 BCCA 587, he applied the agreement to determine whether the result was unfair in light of the current circumstances. He concluded that the result was unfair, since the husband and wife were left with assets worth 82% and 18%, respectively, of the value of their combined assets. He explained,
- [38] It is perhaps not surprising that the agreement inadequately recognized the evolving nature of the relationship of the parties, the roles and responsibilities, which they carried out after marriage and the impact on their lives of becoming the parents of two children. The agreement is unfair in that it fails to give adequate recognition to the factor of the duration of the marriage. The law has recognized in effect that the longer the marriage, the greater the likelihood that such assets will become subject to an equal division. The marriage agreement in this case, for example, does not take into account that over the 12-year marriage Mr. Kopelow devoted some time to attending to the business aspects of the pre-marriage assets and that Ms. Warkentin made an indirect contribution to this endeavour.
- [39] The agreement is also unfair in treating as Mr. Kopelow's sole property certain assets which would otherwise be family assets. Two examples are Mr. Kopelow's pre-marriage RRSP and the West 61st Avenue property which became the family home. No alternative benefit to Ms. Warkentin is provided within the agreement.
- [40] Further unfairness exists in that the agreement does not provide an adequate means by which the needs of Ms. Warkentin to become or remain economically independent and self-sufficient will be met. The present-day result of the agreement is a great disparity in the relative positions of the parties not only in the capital value of the assets but also in the future growth of that capital. Put another way, the potential growth on Mr. Kopelow's base of almost \$4 million is significantly greater than potential growth of Ms. Warkentin's almost \$1 million.

- [6] As he found the division under the agreement to be unfair, the trial judge, relying on this Court's direction in *Hartshorne*, supra, turned to the factors set out in s. 65(1) of the Act in order to answer "the ultimate question [which] is what variation to the agreement the listed factors require, in the context of the entire agreement, to make the property division fair". He said,
- [43] I have concluded that Ms. Warkentin's share of the assets must be substantially increased to better meet her need to become economically independent and self-sufficient. This is particularly so given both her age of 53 and the fact that it will be another 5 years before the younger child has completed secondary school.
- [7] Thus, the trial judge had particular regard to s. 65(1)(e) of the Act when he divided the combined assets of the parties 65% in value to the husband and 35% to the wife in order to assist the wife to achieve economic independence and self-sufficiency.
- [8] The trial judge considered further that, in addition to the property reapportionment, the wife required a temporary award of spousal support for the same purpose. He noted that she was working at a full-time and a part-time job, earning \$37,000 per year. He concluded that she will leave her part-time employment, and that her future annual income will be \$30,000. In awarding her \$1,500 per month in spousal support, he reasoned:
- [50] While for a period of years prior to the separation of the parties Ms. Warkentin was employed, the employment was with her husband's furniture company. The bankruptcy of the company at the same time as the separation of the parties placed Ms. Warkentin in difficult circumstances in returning to the workforce. At the same time she retains the major responsibility for the care of the two children and expenses associated with that beyond those provided for by Mr. Kopelow's child support and the trust fund for extraordinary expenses.
- [51] While the reapportionment of property provided for in this decision goes some considerable way to assisting Ms. Warkentin to achieve self sufficiency, it is my view that, considering the condition, means, needs and other circumstances of both parties, a spousal support order should be made. Having regard to the ages of the children and to the living expenses of both parties I conclude that Ms. Warkentin should receive spousal support in the amount of \$1,500 per month, such support to end when the younger child of the marriage reaches the age of majority.

Although it is not set out in the formal order, it is clear from his reasons that the trial judge made the spousal support order pursuant to s. 15.2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

The Hartshorne decision in the Supreme Court of Canada

- [9] After the judgment under appeal had been handed down, the approach followed by the trial judge was rejected by the Supreme Court of Canada: see *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550, 236 D.L.R. (4th) 193, 47 R.F.L. (5th) 5, 25 B.C.L.R. (4th) 1, 318 N.R. 1, [2004] 6 W.W.R. 1, 2004 SCC 22.
- [10] Justice Bastarache, writing for the majority, acknowledged that the question is whether the agreement is substantively fair in its application, but noted that the essence of the inquiry is twofold: the court must assess whether the circumstances of the parties at the time of separation were within their reasonable contemplation when they made the agreement and, if so, whether they made adequate arrangements in response to those anticipated circumstances. He continued:
- [43] . As Arbour J. and I stated at paras. 88 and 89 of *Miglin* [*Miglin v. Miglin*, [2003] 1 S.C.R. 303, 2003 SCC 24] *supra*:

We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. Although the change need not be "radically unforeseen", and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.

We stress that a certain degree of change is foreseeable most of the time . The test here is not strict foreseeability; a thorough review of case law leaves virtually no change entirely unforeseeable. The question, rather, is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application.

- [11] He identified the error in the approach propounded by this Court as the failure to recognize that the change in circumstances was contemplated by the parties and that they had planned for it in their agreement. He said,
- [45] In the present case, the majority of the Court of Appeal refers to a change in circumstances or subsequent, unforeseen circumstances as a reason why a marriage agreement that was fair at the time of its execution may no longer be fair at the time of separation. This accords with the approach adopted in *Miglin*, *supra*. But the majority of the court failed to recognize that this criterion is not a factor in the case at bar. At the time of the triggering event, both the financial and domestic arrangements between the appellant and the respondent were unfolding just as the parties had expected. With respect to their financial arrangement, they were living out their intention to "remain completely independent of the other in regard to their own property, both real and personal". There was no commingling of funds, there were

no joint accounts of significant value, and the assets that the appellant brought into the marriage remained in his name. On a personal level, as planned, the appellant and respondent had a second child and, as decided by the respondent, she did not resume her position at the law firm but remained at home to raise their two children.

- [12] Continuing, he emphasized that the court should not lightly interfere when the parties have accurately anticipated their personal and financial circumstances at the time of distribution and have truly considered the impact of their choices. He acknowledged that the considerations reflected in s. 65(1) of the Act must be taken into account, but only "in light of the personal choices made and of the overall situation considering all property rights under the marriage agreement and other entitlements". He described the proper analytical approach in this passage:
- [47] The ultimate point then is this: in determining whether a marriage agreement operates unfairly, a court must first apply the agreement. In particular, the court must assess and award those financial entitlements provided to each spouse under the agreement, and other entitlements from all other sources, including spousal and child support. The court must then, in consideration of those factors listed in s. 65(1) of the FRA, make a determination as to whether the contract operates unfairly. At this second stage, consideration must be given to the parties' personal and financial circumstances, and in particular to the manner in which these circumstances evolved over time. Where the current circumstances were within the contemplation of the parties at the time the Agreement was formed, and where their Agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff's burden to establish unfairness is heavier. Thus, consideration of the factors listed in s. 65(1) of the FRA, taken together, would have to reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances. This approach, in my view, accords with the underlying principle of the FRA, striking an appropriate balance between deference to the parties' intentions, on the one hand, and assurance of an equitable result, on the other.
- [13] Justice Bastarache also noted that spousal and child support must be considered in the fairness analysis. He said,
- [51] Before making a determination that the Agreement operated unfairly, [the trial judge] should have considered the impact of those financial awards to which the respondent was entitled under the Agreement or otherwise, including spousal and child support. Thus, an appropriate spousal support award would recognize both the economic disadvantage suffered by the respondent in sacrificing her career for her family, as well as the effects of said sacrifice which would linger following the dissolution of the marriage.
- [14] Turning to the case at bar, the trial judge failed to consider whether the circumstances at the time of the triggering event were within the reasonable contemplation of the parties at the time of the agreement and whether "the financial and domestic arrangements between the [husband] and the [wife] were unfolding just as the parties had expected". As well, he failed

to take into account the awards of child and spousal support in his analysis of whether the agreement operated unfairly. Accordingly, since we may make any order he could have properly made, we must apply correct principles in order to determine whether the marriage agreement was unfair and, if it was, how the unfairness should be addressed. The outcome of this analysis will turn on the treatment of property acquired by the husband through gift and inheritance during the marriage. To appreciate why that is so, it is necessary to understand the background.

The marriage agreement

- [15] The husband's family was in the retail furniture business for many years, operating through several corporations. The husband's father died in 1971 and, thereafter, his mother ran the businesses. Under her direction, the retail operations were merged into a single company known as Shelmar Furniture Limited (the "Furniture Company") and the financing side of the business was carried on through Shelmar Credit Acceptance Limited (the "Credit Company").
- [16] In 1973, the mother settled her interests in the family businesses on two trusts for the husband and his brother: one comprised of the shares in the Furniture Company and the other of the shares (the "Trust Shares") in the Credit Company. She appointed Mr. Jung and her brother, Mr. Diamond, as trustees. The terms of the trusts were not led in evidence at trial.
- [17] In 1979, the mother transferred her former residence on West 61st Avenue in Vancouver (the "West 61st Home") to the husband. In 1980, she provided a substantial part of the down payment and arranged financing to enable the husband and his brother to purchase an apartment building in Chilliwack (the "Chilliwack Building").
- [18] Also in 1980, the husband and wife met. They cohabited for a few months in 1981 and 1982 and then separated.
- [19] In 1983, Mr. Diamond resigned as a trustee of both trusts. The husband and his brother replaced him, joining Mr. Jung in that capacity.
- [20] The husband and wife resumed cohabitation in 1986 and soon decided to marry. The husband's mother insisted that they have a marriage agreement before she would bless the marriage. Accordingly, following approximately two weeks of negotiations between their respective lawyers, the parties executed the marriage agreement in February 1987. They were married the following day.
- [21] The recitals set out the background and purpose of the agreement:

WHEREAS

A. Martin and Elsie intend to be married on the 21st day of February, 1987.

B. Martin and Elsie each have a separate estate consisting of property, investments, and income.

C. Martin owns the property listed in Schedule "A" to this Agreement.

D. Elsie owns the property listed in Schedule "B" to this Agreement.

E. Martin has the liabilities listed in Schedule "C" to this Agreement.

F. Elsie has the liabilities listed in Schedule "D" to this Agreement.

G. Martin is a 31 year old bachelor, working with his brother, Sheldon Kopelow and his mother, Esther Kopelow, in their family business.

H. Elsie is a 37 year old spinster, employed with the City of Vancouver as an Executive Secretary.

I. Martin has by way of inheritance from his father, Hymie Kopelow, and by way of gift from his mother, Esther Kopelow, acquired a substantial portion of the properties set out in Schedule "A" to this Agreement. Accordingly, Martin's mother, Esther Kopelow, has required Martin and Elsie to enter into this Agreement prior to Martin and Elsie's contemplated marriage, as the bequested gifts were intended to be Martin's alone; therefore Martin and Elsie are entering into this Agreement:

- (i) to resolve ownership and management of all property, real or personal, communal or otherwise, owned or which may be owned by either of them, jointly or severally;
- (ii) to resolve management of, ownership in, and division of family assets and other property during their marriage; and
- (iii) to resolve ownership in and division of family assets and other property on the making of an order for dissolution of marriage, judicial separation, or a declaration of nullity of marriage.

J. This Agreement is made as a Marriage Agreement pursuant to section 48 of the Family Relations Act.

[Emphasis added.]

[22] Clause 10 of the agreement provided that property acquired by either party after the marriage would be dealt with under the provisions for division of property contained in the Act:

10. The ownership, management and division of all property or assets, real or personal, of any type of description, acquired by either Martin or Elsie after the effective date of this Agreement shall be governed by the provisions of Part 3 [now Part 5] of the Family Relations Act.

[23] The agreement provided, as well, for "sole property", which was defined as property set out in Schedules "A" and "B":

13. Martin and Elsie agree that Martin will be entitled to the sole ownership and possession of the property listed in Schedule "A" and that all such properties shall remain the property of Martin and shall be completely independent of Elsie with regard to the enjoyment, control, administration, and disposal of all such property and shall remain such, notwithstanding the occurrence of the events enumerated in section 43 [now s. 56] of the Family Relations Act.
14. Martin and Elsie agree that Elsie will be entitled to the sole ownership and possession of the property listed in Schedule "B" and that all such properties shall remain the property of Elsie and shall be completely independent of Martin with regard to the enjoyment, control, administration, and disposal of all such property and shall remain such, notwithstanding the occurrence of the events enumerated in section 43 [now s. 56] of the Family Relations Act.
- [24] By Clause 17 of the agreement, the parties waived all claims to each other's sole property as listed in the Schedules and provided for shared ownership of jointly-acquired property in proportion to their respective financial contributions. They agreed, in Clause 18 of the agreement, that any property acquired by either party for use as their matrimonial home would be owned in joint tenancy.
- [25] The parties provided further that any windfalls and personal-injury damages awards would be the separate property of the recipient. They agreed not to pledge the credit of each other and to indemnify each other against liabilities incurred. As well, they agreed that the husband would maintain certain insurance policies on his life and would designate the wife the sole and irrevocable beneficiary of the policies. They also agreed that he would assign all his interest in the policies to the wife and that, upon dissolution of their marriage, she would assume responsibility for premium payments. They agreed further that, while both were employed, they would be equally responsible for joint household and child care expenses, for maintaining the home, and for raising the children. On the other hand, should one be unemployed, the working party would bear the financial responsibilities and the unemployed one would assume home and child-care responsibilities. Finally, they provided that their agreement would not affect the right of either of them to apply for spousal maintenance.
- [26] As acknowledged in Recital I of the agreement, the husband's property listed in Schedule "A" to the marriage agreement came to him, for the most part, by inheritance from his father and inter vivos gift from his mother. It included his RRSPs, the West 61st Home, and his interest in the Chilliwack Building. As well, it included an account receivable of \$8,000 from the company now known as Mobel Gafarnick Holdings Ltd. The total value of the Schedule "A" property at the time of the agreement was \$800,000. The wife's property listed in Schedule "B" consisted of RRSPs, mutual funds, an employee savings plan, an automobile, and cash worth, in total, \$80,775.

- [27] In 1989, the wife's mother died and the wife and her brother inherited their former family home in equal shares. The wife subsequently purchased her brother's half interest, using her own funds.
- [28] The husband's mother died in 1991. Her estate redeemed the mortgage on the Chilliwack Building, thereby increasing the husband's equity by \$225,000.
- [29] As well, \$385,000 from the mother's estate was paid to the Mobil Gafarnick Trust. This money was treated by the husband and his witnesses at the trial as part of his inheritance from his mother. The trial judge initially understood that this sum was, by agreement of the parties, to be allocated as capital to the Mobil Gafarnick Trust. However, following a subsequent hearing, he issued supplementary reasons which make it clear that the \$385,000 has been treated as money advanced by the husband and owing to him by the Trust. The trial judge therefore added this amount to the value of the combined assets and divided it in the proportions he had determined would be fair.
- [30] Further, the mother's estate paid \$130,000 directly to the husband after the parties separated. The trial judge found this latter amount to be the husband's sole property and excluded it from his calculations, an approach that is not challenged on this appeal.
- [31] The trustees made no capital distributions from the trusts set up for the husband and his brother. However, they made income payments to the beneficiaries, of which the husband received \$10,000 in 1996 and \$30,000 in each of 1997 and 1998. The Furniture Company declared bankruptcy in 1998 and its shares are of no value. On the other hand, the Credit Company was transformed into a real estate holding company many years ago and it has substantial rental income. The trusts were wound up and the shares held in the trusts were registered in the names of the husband and his brother in 1998, shortly before the parties separated. At that time, the husband's Trust Shares were worth \$1,396,000.
- [32] The parties made the West 61st Home their family residence from the time of their marriage until they separated. As of the date of trial, the wife and children continued to reside in the home.
- [33] Following the birth of their first child in June 1987, the wife took a one-year leave of absence from her employment. She returned to work, but left that job on the birth of their second child in June 1989. Thereafter, she did some part-time work for the Furniture Company from about 1995 until the firm declared bankruptcy in 1998. As I have noted, the wife has been employed since the parties separated and, as of the date of trial, she held a full-time and a part-time job from which she was earning \$37,000 per year in total. However, she planned to leave her part-time job after the trial and would likely earn in the order of \$30,000 per year thereafter.
- [34] During the marriage, the wife discharged the great majority of the household and child-care responsibilities, using much of her income for household expenses. The husband worked long hours in the business and pursued other business opportunities as well.

- [35] At the time of trial, the husband's annual income was \$177,000.
- [36] The value of the husband's property listed in Schedule "A" of the marriage agreement, excluding the matrimonial home, was \$1,319,000 as of the triggering event. The home was excluded because the husband agreed it should be divided equally as a family asset by virtue of Clause 18 of the marriage agreement, which provided for joint tenancy of any home acquired for a family residence. Its value was \$343,000.
- [37] Gifts and inheritances not specified in Schedule "A" received by the husband from his mother totalled \$2,136,000. This amount was comprised of the Trust Shares (\$1,396,000), the payment made to redeem the mortgage on the Chilliwack Building (\$225,000), the \$385,000 paid to the Mobil Gafarnick Trust, and the cash received from his mother's estate (\$130,000) since the parties separated. It is common ground that, except for the \$130,000 payment, these items are governed by Clause 10 of the agreement and Part 5 of the Act.
- [38] Assets acquired by the husband from his earnings and personal resources during the marriage were valued at \$1,280,000, of which \$74,000 was contributed to the corpus of the Mobil Gafarnick Trust. It is agreed that the remaining \$1,206,000 in assets should be divided equally in accordance with s. 56(2) of the Act.
- [39] As of the triggering event, the wife's assets were valued at \$400,000. Her major asset was her former family home, which was valued at \$310,000.

The Hartshorne analysis

- [40] The first step in the Hartshorne analysis is to apply the marriage agreement. In order to do that, we must determine the proper disposition of the husband's gifts and inheritances assigned by Clause 10 of the agreement to Part 5 of the Act.
- [41] The husband submits that these assets are not family assets as defined in s. 58 of the Act or, alternatively, that they should be reapportioned entirely to him pursuant to s. 65(1).
- [42] The wife submits in limine that the husband should not be permitted to argue that these items are not family assets. She alleges that this argument is raised for the first time on appeal. However, the wife claimed in her counterclaim that the Trust Shares are family assets and the husband joined issue in his statement of defence to counterclaim. Further, counsel for the husband advised the trial judge in his opening statement that he would argue that the husband's gifts and inheritances were not family assets and counsel for the wife agreed this was an issue. Counsels' closing submissions were not transcribed and neither appellate counsel was counsel at the trial. The issue is not mentioned in the reasons for judgment but, on the trial judge's approach, it was not necessary to decide the question since he simply divided the parties' combined assets. However, in view of the pleadings and the opening statements I must assume that the issue was argued. Accordingly, I would not accede to the wife's submission on this point.

- [43] I will deal first with the Trust Shares.
- [44] The Trust Shares were settled on the husband beneficially in 1973, many years before the marriage. The underlying assets, which consist of real estate held for its income, were acquired by the Credit Company before the parties were married. The evidence is that the husband took no part in the management of the underlying properties until after the parties had separated. Although he received income from the trust during the marriage, the evidence does not disclose how he used the income. In any event, the use of such income for family purposes for a short period of time does not make the trust shares a family asset: *Stuart v. Stuart* (1996), 21 B.C.L.R. (3d) 65, paras. 14-15, 60-61 (C.A.). Further, since the husband made no contribution to the acquisition of the Trust Shares or their underlying assets, it cannot be said that the wife made a direct or indirect contribution to their acquisition: *Stuart v. Stuart*, supra, para. 63.
- [45] Moreover, the evidence shows that, although they were not listed in Schedule "A" of the agreement, neither party considered the Trust Shares to be a family asset. Mr. Jung, who prepared Schedule "A", did not list the Trust Shares because he did not consider that the husband's beneficial interest was a property interest in the shares. Throughout the marriage, the husband had little knowledge of his financial affairs, leaving them to be handled by his mother, while she was alive, and by Mr. Jung. He testified that he did not know, when he executed the agreement, that he had a beneficial interest in the Trust Shares. He testified further that he did not know he was subsequently appointed a trustee of the trust. He said he relied on Mr. Jung and signed whatever documents Mr. Jung asked him to sign. The wife confirmed that the husband knew very little about his financial affairs. She said they both considered the agreement to be "a document that his mother needed", that "it had no meaning for us", and that, after the agreement was executed, "it was filed away and forgotten". Thus, neither party considered the Trust Shares to be an element of their joint financial security.
- [46] Since the Trust Shares were not used or intended to be used for a family purpose, they are not family assets within the meaning of that term in Part 5 of the Act. Rather, they are the husband's sole property.
- [47] Turning to the redemption of the mortgage on the Chilliwack Building, the trial judge found:
- [38] that over the 12-year marriage Mr. Kopelow devoted some time to attending to the business aspects of the pre-marriage assets and that Ms. Warkentin made an indirect contribution to this endeavour.
- [48] The "pre-marriage asset" to which the trial judge referred is the Chilliwack Building. The husband derived a significant portion of his income during the marriage from the Chiliwack Building and this, together with the trial judge's finding of an indirect contribution by the wife would, in ordinary circumstances, make the husband's interest in this asset a family asset by virtue of the operation of s-s. 58(2) and (3)(e) and s-ss. 59(1) and (2) of the Act. However, these are not ordinary circumstances, since the wife expressly agreed in the

marriage agreement that the husband's interest in the Chilliwack Building was and would remain the sole property of the husband notwithstanding s. 43 (now s. 56) of the Act and waived all claims to it. Thus, she could not have had any reasonable expectation that her indirect contribution by way of "savings through effective management of household or child rearing responsibilities" would make the husband's interest in the Chilliwack Building a family asset and her antecedent agreement precludes her from advancing such a claim.

- [49] Moreover, the wife made no direct or indirect contribution to the acquisition by the husband of the increase in equity brought about by the payment of the redemption amount on the mortgage. That was a result solely of his mother's decision to benefit him in this way from her estate.
- [50] It follows, in my view, that the increase in the husband's equity in the Chilliwack Building created by the redemption of the mortgage by his mother's estate is not a family asset.
- [51] I turn now to the \$385,000 inherited by the husband from his mother and loaned by him to Mobil Gafarnick Holdings Ltd. for the Mobil Gafarnick Trust.
- [52] The husband contends that this \$385,000 is his sole property, as I understand his submission, because it forms part of a running account receivable that was listed, to the extent of \$8,000, as one of his assets on Schedule "A" to the marriage agreement. It is not disputed that the company now owes the husband \$553,000 as a result of subsequent advances made by him. The uncontradicted evidence is that this sum is an unsecured demand loan.
- [53] The \$8,000 listed as an asset of the husband on Schedule "A" remained outstanding for many years. Further amounts were advanced by the husband in the period 1993 to 1997 and, in 1997, \$67,094 was repaid. Accordingly, applying the rule in Clayton's Case (*Devaynes v. Noble* (Clayton's Case, Re) (1816), 1 Mer. 529, 35 E.R. 767 (Ch. Div.) at 798 (E.R.)), the \$8,000 initially owing was repaid in 1997 and the balance owing represents amounts loaned since 1993. Thus, the asset listed in Schedule "A" has been realized and no longer exists. I would therefore reject the husband's submission that the \$385,000 is a Schedule "A" asset simply because the first \$8,000 debt was listed in the agreement.
- [54] It is not a matter of dispute that the \$385,000 in question has been recorded as part of the total account receivable and that the \$385,000 was used by Mobil Gafarnick Holdings Ltd. to acquire its real estate holdings. Nor is it disputed that the husband has no share interest in Mobil Gafarnick Holdings Ltd. As already noted, Mr. Jung holds the shares of the company on an informal trust established by the husband's mother in 1990 for the children of the marriage.
- [55] The purpose of the Mobil Gafarnick Trust is to provide for the ongoing and long-term financial needs of the children of the marriage. This is a family purpose by virtue of s. 58(2) of the Act and, in my view, by turning the inheritance to this purpose the husband converted it from his sole property into a family asset.

- [56] In that event, the husband seeks a reapportionment of this amount entirely in his favour.
- [57] Section 56 of the Act provides for a presumptive equal division of family assets unless equal division would be unfair having regard to the factors enumerated in s. 65(1). I have concluded that it would be unfair to the husband to divide this asset equally.
- [58] There was no suggestion that either party believed before they were married that the wife would share in assets given to the husband by his parents. Indeed, they both understood that the reason the husband's mother insisted on a marriage agreement was that she wanted to ensure that the wife would not share in any such assets. The marriage agreement, Clause 10, indicates that the parties intended to share only those assets that they acquired during the marriage. Given the circumstances in which the agreement was executed, I think the parties intended Clause 10 to encompass assets that they accumulated and maintained during the marriage through their joint direct and indirect contributions. The wife made no contribution to the husband's acquisition of this inheritance and she had no expectation during the marriage that she would share in it or any other gift or inheritance from the husband's parents.
- [59] Moreover, although this inheritance was used for a family purpose, it was a purpose related exclusively to the children. It was not intended by the husband or the wife that the wife would benefit directly. On the other hand, by accepting complete responsibility for the children's special and extraordinary expenses by funding the Mobel Gafarnick Trust, the husband conferred an indirect benefit on the wife by relieving her of her obligations in respect of those expenses pursuant to s. 7(2) of the Federal Child Support Guidelines.
- [60] Further, the wife does not need to share in this inheritance in order to achieve economic independence and self-sufficiency. Her share of the family assets divided equally by agreement pursuant to Part 5 is \$603,000 and that sum, together with the \$171,500 representing one half of the value of the matrimonial home and the \$400,000 she retains as her sole property, leaves her with a capital base in the order of \$1,171,500. This sum, if conservatively managed, ensures her financial independence. She also has the insurance on the husband's life and, as well, she is gainfully employed. Any financial disadvantage accruing to her as a result of her role during the marriage and of the marriage breakdown can be addressed through an appropriate award of spousal maintenance.
- [61] For those reasons, I consider that an equal division of this inheritance would be unfair to the husband. Rather, it is my view that fairness requires that this inheritance of \$385,000 be reapportioned entirely to the husband.
- [62] Thus, applying the agreement, the husband retains his sole property in Schedule "A", which the parties agree is valued at \$1,319,000 (deducting the value of the matrimonial home, which is a family asset). He also receives the Trust Shares, worth \$1,396,000; the equity created by the \$225,000 paid by his mother's estate to redeem the mortgage on the Chilliwack Building; and the \$385,000 account receivable from the Mobel Gafarnick Trust . Further, he receives one-half of the value of the family assets acquired by him during the

marriage, valued at \$603,000, and one half of the value of the West 61st Home, in the amount of \$171,500. Thus, the total value of his assets is \$4,099,500.

- [63] The wife is left under the agreement with her Schedule "B" assets, valued at \$90,000; her inherited home, worth \$310,000; one half of the value of the matrimonial home, that is, \$171,500; and one half of the value of the family assets acquired during the marriage by the husband, valued at \$603,000. Thus, her assets total \$1,174,500 in value. As well, she is entitled to child and spousal support.
- [64] I turn to the second stage of the Hartshorne analysis, which requires two questions to be addressed - whether the parties' current circumstances were within their reasonable contemplation when they made the agreement and, if so, whether they made adequate arrangements in response to those anticipated circumstances.
- [65] The wife submits that there are current circumstances that were not within their reasonable contemplation at the time they entered into the marriage agreement. First, she submits that they did not anticipate a second child. Second, she says they did not contemplate that she would leave the workforce and would be left, at the end of the marriage, without pensionable earnings during the marriage, assets accumulated for her retirement, and "no career advancements". Next, she says they did not anticipate that she would be left in her mid-fifties with primary responsibility for the children, likely for another six or seven years while they complete secondary and post-secondary education. Finally, she submits that they did not anticipate that the husband's sole assets would appreciate more than \$4,000,000 in value and that her sole assets would appreciate only \$320,000.
- [66] I would not accede to the submission that it was beyond the reasonable anticipation of the parties that they would have two children. In Clause 24 of the marriage agreement, they provided that they would be equally responsible for "the care and upbringing of the children of the marriage" and that, should either be not employed, that party would be responsible for "the care and upbringing of the children of the marriage" and the other would be responsible for related expenses. This plural usage contradicts the wife's first point. Moreover, the wife's testimony was that she pressed the husband to marry her because she wanted "to have children" and to raise a family. Thus, the evidence does not support the wife's assertion that the parties intended to have only one child.
- [67] Similarly, I am not persuaded that the wife's leaving the workforce temporarily to assume child-care responsibilities was beyond the reasonable contemplation of the parties. Clause 24, to which I have just referred, expressly contemplates that possibility. Moreover, the possibility that the wife might be left on dissolution of the marriage without the financial security she might have earned through employment during the marriage years was contemplated in the agreement by the provisions in respect of the insurance on the husband's life, in respect of the sharing of assets acquired by them during the marriage, and in respect of the right to apply for periodic or lump-sum maintenance.

- [68] That the wife might be left with primary responsibility for the children is not something that could be said to be beyond their reasonable expectations at the time of the agreement. They anticipated having children and, as well, anticipated the possibility that their union might not persevere. A reasonable person in those circumstances would have foreseen the possibility that the wife would be left on a marriage breakdown with primary responsibility for the children of the marriage. Moreover, they each received legal advice and would have been aware of the legislative provisions for child and spousal support contained in the Divorce Act and the Family Relations Act.
- [69] Finally, it is reasonable to expect that a portfolio of assets worth \$800,000 and consisting in large part of real estate and liquid securities might increase in absolute value over time much more than a portfolio consisting of modest RRSPs, mutual funds, a savings plan, an automobile, and cash worth, in total, some \$90,000. It should be noted, as well, that the value of the husband's assets at the time of the agreement exceeded that of the wife's by a factor of 9 while, after application of the marriage agreement, the value of his assets exceeds that of hers by a factor of 4. In my view, it cannot be said that the disparity between the parties in their respective wealth was beyond their reasonable contemplation at the time of their agreement.
- [70] I turn to whether the parties made adequate arrangements in their agreement to provide for the circumstances as they have evolved.
- [71] To adopt the language of Justice Bastarache in *Hartshorne*, at para. 45, at the time of the triggering event, both the financial and domestic arrangements between the parties were unfolding just as they had expected. The assets that each brought into the marriage remained in their separate names. The assets acquired through their joint direct and indirect contributions were divided equally pursuant to s. 56 of the Act, as agreed. Assets acquired by the husband during the marriage through gift and inheritance were dealt with under Part 5 of the Act, as was provided in Clause 10 of the agreement. The matrimonial home was shared equally as was contemplated by Clause 18. Although the wife continued to discharge the household and child-care responsibilities during her periods of part-time employment, these responsibilities were handled generally as agreed in Clause 24. The disadvantages suffered by the wife on the marriage breakdown as a result of her roles as mother and homemaker during the marriage were anticipated and expressly redressed by the provision that the marriage agreement would not affect her entitlement to maintenance under the Act or the Divorce Act.
- [72] Apart from the agreement, the wife is entitled to child support of \$1,995.00 per month in accordance with the Federal Child Support Guidelines. As well, as the custodial parent, she is entitled to payment of the children's special and extraordinary expenses from the Mobel Gafarnick Trust.

- [73] In my view, the wife is also entitled to spousal support in order to achieve the objectives set out in s. 15.2(6)(a) to (c) of the Divorce Act. She bore the primary responsibility for the homemaking and child-rearing functions during the marriage. As a result, she was out of the workforce for a lengthy period of time during which she has foregone such benefits as accumulated seniority, possible promotions, and access to fringe benefits, including a pension and life, disability, and health insurance. She has re-entered the workforce at the late age of 53 and consequently suffers from the effects of competitive disadvantages and an earning capacity that has been diminished by disuse. Further, she has the custodial responsibility for the children of the marriage, which will affect her economic welfare in an indirect way that will not be completely redressed by payment of child support and special expenses. These economic consequences arising out of the marriage and its breakdown should be equitably shared by the parties.
- [74] The wife testified that she was very frugal with family expenses during the marriage and that they lived a modest lifestyle. This appears to be a consequence of their imperfect knowledge of the husband's financial circumstances, which were handled entirely by his mother and Mr. Jung. Apparently, much of the husband's income was turned to investments from which they have now benefited equally. The fact remains that the husband had, at least during the last several years of the marriage, and now has an income that will comfortably support a standard of living significantly above the average. The marriage was a long one and I think the wife is entitled to enjoy a similar standard of living without having to liquidate her assets.
- [75] This Court has recognized the Spousal Support Advisory Guidelines: A Draft Proposal, (Ottawa, Dept. of Justice: 2005), as "a useful tool to assist judges in assessing the quantum and duration of spousal support": *Yemchuk v. Yemchuk*, 2005 BCCA 406 at para. 64, and *Tedham v. Tedham*, 2005 BCCA 502 at para. 75. Applying the Guidelines' "With Children" formula to the facts of this case results in a recommended range of \$3,037 to \$4,015 in monthly spousal support.
- [76] Taking that recommended range into consideration, along with all the circumstances of this case, it is my view that the husband should pay the wife spousal support of \$3,500 per month. That amount, together with her employment earnings, will give her a fixed income of approximately \$72,000 per year and, with the additional income she will be able reasonably to generate from her share of the family assets, will allow her to maintain a standard of living that is appropriate in the circumstances. As well, it will leave the husband with income after payment of spousal and child support of roughly \$111,000 per year at his current income level. That strikes me as a reasonable balance given the length of this marriage and the other factors I have mentioned. I see no reason to limit the term of the spousal support award, as the trial judge did.
- [77] Stepping back and looking at the marriage agreement in light of the above conclusions, it is my opinion that the agreement was not unfair.

[78] Accordingly, I would allow the husband's appeal, dismiss the wife's cross appeal for reapportionment, and allow the wife's cross appeal of the award of spousal support. I would set aside the order made by the trial judge and substitute an order giving effect to these conclusions.

"The Honourable Mr. Justice Smith"

I Agree:

"The Honourable Chief Justice Finch"

I Agree:

"The Honourable Madam Justice Levine"

SCHEDULE

Family Relations Act, R.S.B.C. 1996, c. 128

PART 5 - MATRIMONIAL PROPERTY

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

(b) a declaratory judgment under section 57,

respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to

(a) an order under this Part or Part 6, or

(b) a marriage agreement or a separation agreement.

(4) This section applies to a marriage entered into before or after March 31, 1979.

57 On application by 2 spouses married to each other or by one of the spouses, the Supreme Court may make a declaratory judgment that the spouses have no reasonable prospect of reconciliation with each other.

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

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

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

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

(i) a share in the corporation, or

(ii) an interest in the trust

owned by the spouse;

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

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

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

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

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

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

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

59 (1) If property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and if the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.

(2) In section 58(3)(e) or subsection (1) of this section, an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.

60 The onus is on the spouse opposing a claim under section 56 to prove that the property in question is not ordinarily used for a family purpose.

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.

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

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

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

- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
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