

CANADA / JUDGMENT

Krupa v. Krupa

2008 BCSC 414

COURT

Supreme Court of British Columbia

DECIDED

11 April 2008

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2008 BCSC 414 Krupa v. Krupa IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Krupa v. Krupa, 2008 BCSC 414 Date: 20080411 Docket: 64464 Registry: Kelowna Between: Mary Evelyn Krupa Plaintiff And Eugene Alexander Krupa and Anne Krupa Defendant Before: The Honourable Madam Justice Ross Reasons for Judgment Counsel for the Plaintiff M.E. (Meg) Shaw, Q.C. Counsel for the Defendant Eugene Alexander Krupa Ronald J. Smith Counsel for the Defendant Anne Krupa Daniel E. Spelliscy Date and Place of Trial/Hearing: October 22-26, 29-31, November 1-2 and December 10-12, 2007 Kelowna, B.C.

INTRODUCTION

- [1] This is an action to address the corollary relief pursuant to a divorce. The plaintiff, Mary Evelyn Krupa, and the defendant, Eugene Alexander Krupa, were married in August 1980, separated in June 2003 and were divorced by order of April 10, 2007. The Krupas have four children: Joel, born April 23, 1987, Joy Anne, born October 11, 1988, Timothy, born August 12, 1991, and Jeffrey, born June 23, 1995. Joel and Joy Anne have graduated from high school and are continuing their education at the University of British Columbia Okanagan.
- [2] Eugene's mother, Anne Krupa, is joined as a defendant and is a plaintiff by counterclaim. Mary Krupa claims that a home registered in Anne Krupa's name is a family asset. Anne Krupa seeks to recover two debts that she alleges Eugene and Mary owe her.
- [3] The issues to be addressed are:
- (a) Division of Family Assets - the parties seek division of several properties, income from property, and various other assets. Some of the property at issue is located in Alberta. One issue is the application of Alberta law to these properties. There is also an issue of whether a home registered in Anne Krupa's name is held in trust for Eugene and is a family asset.
 - (b) Custody, Guardianship and Access - these matters were determined by consent.

- (c) Child Support - Mary Krupa seeks an order for the payment of retroactive child support going back to the time of separation. Each party seeks an order for the payment of retroactive special and extraordinary expenses going back to separation. Each party seeks to have income imputed to the other. In addition, the parties seek an order for prospective child support.
- (d) Spousal Support - Mr. Krupa seeks spousal support from Mary Krupa.
- (e) Debt - the issue to be determined on the counterclaim is the debt claim brought by Anne Krupa. Mary Krupa disputes the existence of the debts and Eugene Krupa supports his mother with respect to this issue.

BACKGROUND

- [4] The parties were married on August 23, 1980, in Edmonton, Alberta. They had separated by June 30, 2003. At the time of separation, the parties were living in Kelowna, British Columbia, where they continue to reside. The parties were divorced by order dated April 10, 2007, which is the triggering event.
- [5] The plaintiff, Mary Krupa, is 49. Mary Krupa is a business woman who operates her business, Morningstar Enterprises Ltd. ("Morningstar"). Ms. Krupa has a B.Sc. degree which she obtained in 1981 and a teaching certificate which she obtained in 1982.
- [6] The defendant, Eugene Krupa, is 51. Mr. Krupa has a degree in Agriculture which he obtained in 1978, and a Bachelor's, Master's and Ph.D. degree in Education. Mr. Krupa is currently employed as a professor teaching a course at the University of British Columbia Okanagan and at the University of Alberta, Edmonton. In addition, Mr. Krupa obtains income through various contracts in the field of public health, community prevention and early child development. Mr. Krupa performs this contract work through the company Krupa Research & Development ("Krupa R&D").
- [7] The parties met and started dating in 1976 when they were both attending the University of Alberta. Mr. Krupa graduated with a B.Sc. in Agriculture in 1978 and started work. Ms. Krupa continued with her studies. When the parties married, Mary Krupa was still completing her degree, graduating in 1981. Ms. Krupa had no debts and small savings from her summer jobs. Mr. Krupa had more substantial savings made up of funds that had been given to him by his parents.
- [8] In 1981, Eugene's father, Joseph Krupa, transferred 160 acres, or a quarter section, of farmland to Eugene and Mary Krupa as joint tenants. The transfer was registered October 22, 1981. There are two issues in relation to the transfer. The first issue is whether the transaction gave rise to a \$60,000 debt that Eugene and Mary owed to Eugene's parents, Joseph and Anne Krupa, as alleged by Anne Krupa in these proceedings. The second issue is whether Joseph Krupa intended by the transfer to benefit only Eugene or Eugene and Mary.

- [9] Joseph Krupa had purchased the 160 acres together with an adjoining 80-acre parcel in 1946. He received some financial assistance from his father for the purchase. Joseph Krupa farmed the land with his brother Dave, who also had 240 acres. Joseph Krupa later acquired another 160 acres from a neighbour.
- [10] Under the prevailing tax regime at the time, farmland could be transferred between generations without capital gains tax if certain conditions were met. The transfer had to be at valuation day, or V-day, values. At least one transferee had to engage in active farming. The parties agree that the V-day value for the 160 acres was \$25,000. They also agree that the fair market value of the 160 acres in 1981 was \$143,000.
- [11] At least in part to meet the active farming requirement, Eugene Krupa applied for a loan from the Alberta Agriculture Development Corporation ("AADC"). These loans were offered at low rates of interest, in this case 6%, as part of a program to assist young farmers to get started. At this time, apart from such special programs, interest rates were extremely high. The application notes the following loan purposes: LOAN PURPOSES:
1. Pay Joseph Krupa of Gibbons re: NE 28-57-24-4 \$25,000
 2. Land improvements re: clearing, road, drainage, natural gas, water system and granaries 20,000
 3. Purchase machinery re: tractor, cultivator and harrows 15,000
 4. Towards legal costs 400 \$60,400
- [12] The loan was approved, registered against the title to the 160 acres, and the funds advanced. Upon receiving the loan, Mr. Krupa transferred \$25,000 to his father who immediately transferred the funds back. Those funds were then invested in a GIC at 19% for a five-year term. Upon maturity, Eugene and Mary used the proceeds to pay the balance of the AADC loan. They used the remainder to purchase a home in Namao, Alberta.
- [13] There was a gas well located on this farmland property, which resulted in two leases: one for the well and one for an access road. The revenue from the gas well lease went to Joseph and Anne Krupa and the revenue from the road lease went to Eugene and Mary.
- [14] A short while after Eugene and Mary received their quarter section, Joseph Krupa transferred a second quarter section to his son Wayne and Wayne's wife Paula as joint tenants. Joseph and Anne Krupa retained an 80-acre parcel.
- [15] The three parcels of land, totalling 400 acres, were farmed as a unit. The venture maintained a bank account in the name of Krupa Agricultural Products. The signatories to that account were Joseph, Anne, Eugene and Wayne Krupa. The farm income was divided into thirds with each of Eugene and Mary, Wayne and Paula, and Joseph and Anne allocated one-third of the income. Each year Joseph and Anne declared one-third of the farm income on their income tax returns. However in fact, the one-third share of Joseph and Anne Krupa was left in the farm account and then divided equally with Eugene and Mary receiving half and Wayne and

Paula receiving half. In the result, the net farm income was divided between Eugene and Mary, and Wayne and Paula in equal shares.

- [16] Eugene and Mary constructed a home on their 160 acres, using their savings and receiving substantial financial assistance from both of their families. Between 1983 and 1987, Mary Krupa taught school in Edmonton and Eugene Krupa taught at the school in Legal, quite close to their home.
- [17] Eugene and Mary decided to move closer to Edmonton and to that end purchased land in Namao in 1986. They constructed a home on that site and moved in 1987. They received generous financial assistance with respect to this venture from both of their families. Mary Krupa contributed an inheritance she received from her father's estate to assist with the purchase. They subdivided and sold the six-acre parcel of farmland on which their home was built in the 160-acre parcel, and applied the proceeds of that sale to the cost of buying and building upon the Namao site. Eugene and Mary retained the remainder of the 160 acres, which continued to be farmed as part of the Krupa family farm.
- [18] Joel was born on April 23, 1987. The following year, on October 11, 1988, Joy Anne was born. Mary Krupa, after taking maternity leave, resumed teaching half-time. Eugene Krupa had enrolled in graduate school, earning first a M.A. and then a Ph.D., which he ultimately completed in 1994. During this period, Mr. Krupa also worked part-time and received a scholarship.
- [19] Joseph Krupa died in 1986, leaving his estate to Anne Krupa. Following the death of her husband, Anne Krupa made a generous gift to Wayne Krupa, providing \$40,000 so that he could buy back his public school pension. In 1987, Anne Krupa then made a gift to Eugene, transferring the remaining 80-acre parcel of farmland from her name to herself and Eugene Krupa in joint tenancy. For some time after this transaction, the farm income, however, continued to be allocated into thirds and divided in half as before.
- [20] During this period, Eugene and Mary collaborated on two textbook projects for which they continue to receive royalty income from McGraw-Hill and Thomson. Eugene was working for the University of Alberta, Faculty of Medicine in the area of health promotion. Mary left teaching in 1990 after suffering a miscarriage. On August 12, 1991, Timothy was born.
- [21] Mary Krupa began working with a non-profit organization, Teen Aid. She then became involved with a non-profit organization, the Foundation for the Love of Children. She started first as a volunteer, then became an employee and eventually progressed to hold the position of executive director. This was the start of what has become a very successful career involving fund raising and special projects.
- [22] In 1993, Anne Krupa decided that she was no longer prepared to pay income tax on funds that she was not receiving. After that time, the farm income was allocated to Eugene and Mary, and Wayne and Paula in accord with their respective shares of the farmland.

- [23] On June 23, 1995, Jeffrey was born. The parties were both very occupied with their careers and family, which had now expanded to four young children. In the period from 1987 to 1996, they had child care in the home to assist when Mary Krupa was working out of the home. Anne Krupa also assisted with child care. There were, however, difficulties in the marriage. Eugene testified that in 1994 Mary told him that she was going to lead a separate life. He stated that there was little affection or intimacy between them after that. It was his perception that Mary became obsessed with her work. Eugene and Mary decided that a sabbatical might assist with their struggles.
- [24] In 1996, Eugene and Mary moved to Kelowna. At the time of the move, the children were aged nine, eight, five and one year. At first, it was contemplated to be a short-term experiment, but ultimately they decided to stay. They rented out their Namao property and moved into rental accommodations in Kelowna. Once in Kelowna, Ms. Krupa quickly became involved with the Mission Creek Greenway project. Mr. Krupa continued with the University of Alberta, travelling for this work about one week per month. In addition, he received income from consulting work in the fields of public health, community prevention and early child development. They worked on another textbook together, again resulting in royalty income. Both parties were very busy with their careers and with their children.
- [25] As had been the case in Alberta, the Krupas had full-time child care in the home. In addition, Anne Krupa made regular trips out and assisted with child care during her visits. Mr. Krupa maintained an office in the home and did much of his work from there, which permitted him to assist with child care.
- [26] Ms. Krupa's involvement in the Greenway project was very successful. The success of that project led to another project, the Peregrine Falcon project, another major undertaking in which she played a central role.
- [27] From the start of their marriage until 1997, the couple maintained a single joint banking account into which they deposited their salaries and farm income and out of which the family expenses were paid. Each spouse contributed to RRSPs. They maintained a joint investment account with Greenline. Apart from the Krupa Agricultural Products account relating to the family farm, there were no other accounts.
- [28] In 1998, Ms. Krupa incorporated Morningstar, a company involved with public relations, communications and fund raising. The company had a modest start, but has become very successful, a reflection of Ms. Krupa's considerable talent, creativity and energy.
- [29] In 1999, Ms. Krupa drew a salary of \$15,200 from Morningstar and left nearly \$30,000, before tax, in the company. It was her testimony that in 1999 she left the funds in the company to have capital to build the company. In each subsequent year, Ms. Krupa chose to leave funds in Morningstar after payment of her salary. This marked a departure from the complete sharing that had been the couple's financial arrangement until that time.

- [30] The parties' marital difficulties continued. Mr. Krupa testified that he believed that from 1998, Ms. Krupa had significant emotional ties to another person. In addition, he discovered while going through some papers he found at their home that she had been keeping funds in Morningstar. He testified that up to that time he was depositing all of his income into the family joint account. However, in 2000 he set up a new account into which he deposited his earnings.
- [31] Ms. Krupa testified that she discovered in 2000 that Mr. Krupa was having an affair. Ms. Krupa testified that following this discovery, she felt that she needed to maintain funds in Morningstar in order to provide for her children in the event that the parties' marriage failed.
- [32] Whatever the reasons, it is clear that the parties' trust in each other was rapidly eroding. The parties became increasingly secretive with respect to their financial affairs. Mr. Krupa refused to discuss the farm income with Ms. Krupa, telling her it was none of her business. Ms. Krupa did not share information with respect to the financial performance of Morningstar with Mr. Krupa. In testimony, each claimed that his or her movement away from sharing was done in response to the discovery that the other partner was no longer fully committed to the relationship and no longer fully sharing all financial resources.
- [33] In 2001, Ms. Krupa increased the salary she drew from Morningstar to \$43,600. However, a significant portion of Morningstar's pre-tax earnings was still left in the company.
- [34] Despite the erosion of trust, the marriage continued. The parties went to a counsellor at their church and started to look for property to purchase for a residence in Kelowna. As part of this effort, the parties took out a line of credit secured against the Namao property. The line of credit secured by a mortgage and assignment of rent was in place December 2, 2002.
- [35] Ms. Krupa testified that in July 2002, she discovered while doing laundry that Mr. Krupa had opened a separate bank account. The balance in that account was \$58,000. It was her testimony that this discovery shocked her. It provided further confirmation to her that she would likely be on her own. Ms. Krupa testified that in 2002 she chose to draw only \$27,000 salary from Morningstar despite pre-tax earnings in the company of \$166,159. She stated that after her discovery of the bank account, she decided to leave as much money as possible in the company to serve as a source of funds for her and the children in the event the marriage failed.
- [36] Despite these difficulties, the parties continued to look for a property together. In 2003, it appeared that they had identified a suitable property. Ms. Krupa testified that, in anticipation of making an offer on the property, she phoned their banker to confirm how much was available on the line of credit. Mr. MacDonald advised her that \$15,000 had been taken out early in 2003. This proved to be the triggering event for the end of the marriage. Ms. Krupa testified that this news frightened her as the line of credit was in both the parties' names. It was her testimony that she had no knowledge that the line of credit was being used. In consultation with Mr. MacDonald, she made the decision to withdraw \$15,000 from

the line of credit and then to close the line of credit out.

- [37] Mr. Krupa's explanation for the use of the line of credit was that Ms. Krupa had not been making any deposits into the family joint account in 2003. She refused to contribute despite his requests that she do so. He therefore decided to use the line of credit to fund family expenses.
- [38] Ms. Krupa then decided to take what she assessed as half of the balance in the parties' joint investment account. At that time, the account had a balance of \$120,000. Ms. Krupa withdrew \$76,000. Ms. Krupa determined this amount based on her estimate that the couple's van and trailer were worth approximately \$30,000. Mr. Krupa would then have an approximately equal share made up of the value of the van and trailer and the \$44,000 left in the account.
- [39] Ms. Krupa took the funds she had withdrawn and purchased a property at Mission Springs in Kelowna. She told Mr. Krupa that she wanted to separate.
- [40] Mr. Krupa, in the meantime, closed the joint bank account. He told Ms. Krupa to put the family expenses on the family credit card. However, she later learned that he had taken his name off of the joint credit card. Mr. Krupa advised the renters of the Namao property to remove Ms. Krupa's name from the rent cheque and to redirect their rent cheques to him. As a result, Mr. Krupa has received and retained all the rent from the Namao property since May 1, 2003. However, in Ms. Krupa's 2003 income tax return, rental income that she did not receive was attributed to her. Mr. Krupa agreed that he directed the accountant to prepare the returns in this fashion.
- [41] Mr. Krupa arranged for the harvest of trees on the Namao property. He did not advise Ms. Krupa that he had done so. He retained all the proceeds of sale, but instructed the accountant to allocate approximately half of the proceeds to Ms. Krupa on his 2004 income tax return.
- [42] Mr. Krupa also contacted at least one of the publishers and had the royalty payments with respect to one of the textbook projects redirected to him. Starting with the 2004 payments, Ms. Krupa continued to receive 50% of the McGraw-Hill payments, but received no payments from Thompson. All of the Thompson royalties were directed to Mr. Krupa and retained by him.
- [43] The parties had been receiving lease payments from Baytex Energy with respect to an access road on the Alberta farm property. Eugene Krupa testified that he applied a payment in June 2003 for the prior three years to pay down the line of credit on the Namao property. The payments for 2004 and 2005 were directed to Eugene and Mary Krupa care of Anne Krupa. Mr. Krupa testified that he deposited the 2004 cheque into his personal account. It was his testimony that the 2005 cheque went into the farm account. He stated that was where the funds were supposed to have been deposited. However, that does not appear to have been consistent with the past practice and was not consistent with what he had done

with the funds the year before. It is clear that he did not account to Mary Krupa for any portion of the 2004 or subsequent payments.

- [44] From the time of the separation, Mary Krupa did not receive any farm income. Following separation, Mr. Krupa made or caused to be made a number of payments from their portion of farm income to Anne Krupa. These included \$1,140 in 2003, \$7,560 in 2004, \$2,040 in 2005 and \$7,740 in 2006. In addition, by cheque dated June 4, 2003, Eugene advanced \$60,000 to his mother. It was his testimony at trial that this represented repayment of a loan. On examination for discovery, Mr. Krupa agreed that his mother did not demand repayment. "Demand" he said, would be too strong a word. He agreed that he and his mother had discussions after the separation and together agreed that transferring some money to his mother would be a way to removed it from the family assets and protect it. When this evidence was put to him at trial, his response was that he hadn't been listening to the question in the discovery.
- [45] Mr. Krupa agreed that he had no discussion with Mary Krupa about this payment. Anne Krupa deposited the cheque in a term deposit account and in December 2005, returned \$62,650 to Eugene, representing the principal amount plus accrued interest.
- [46] Mary Krupa moved into the Mission Springs property she had purchased at the end of June 2003. All four children moved with her. The household goods were divided, although Mr. Krupa takes issue with the division. Mary Krupa kept the 1987 Toyota and Mr. Krupa kept the new Honda Odyssey van and trailer.
- [47] Mr. Krupa testified that following the separation, "the idea came" that perhaps his mother could get involved in purchasing a house in Kelowna as she was interested in investing. He would then live in the house and pay rent and "we would see what happened". Anne Krupa agreed with this plan. Mr. Krupa eventually found a suitable house. Anne Krupa provided the down payment and mortgage financing. She is the registered owner.
- [48] Until the parties separated, the family accountant prepared their tax returns and allocated income from the various sources in a way that was most advantageous to the parties. The sources of income were:
- (a) farm income from Krupa Agricultural Products;
 - (b) farm income from Eugene and Mary Krupa;
 - (c) royalty income from textbook projects through Morningstar Resources, a proprietorship in Alberta;
 - (d) rental income from the Namao property;
 - (e) lease payments from Baytex Energy access road;
 - (f) Mr. Krupa's employment income;

- (g) Mr. Krupa's business income from Krupa R&D; and
 - (h) Mary Krupa's employment income from Morningstar.
- [49] In 2004, Ms. Krupa incorporated MacArthur Ventures Ltd. ("MacArthur") a holding company. The shares in Morningstar were rolled into MacArthur. Ms. Krupa is the sole shareholder of MacArthur.
- [50] At the time of separation, the parties undertook some counselling to assist them in reaching an agreement with respect to a schedule for the children. No such agreement was ever formalized. The pattern after separation was that the two younger children were with Ms. Krupa during the week and with Mr. Krupa on the weekends. The two older children were with Ms. Krupa, but visited on occasion with Mr. Krupa. They made their own arrangements to see him. Ms. Krupa testified that there was a lot of strain and disruption with respect to these arrangements.
- [51] In February 2007, the arrangements with respect to the two younger children changed somewhat. Timothy now spends alternate weeks with each party. As of June 2007, Jeffrey spends one weekend each month with Ms. Krupa and is with Mr. Krupa some weekdays during that week. He is with Mr. Krupa for the balance of the weekends and with Ms. Krupa during the week. The result is that there is now a shared custody arrangement in place with respect to the two younger children.
- [52] With respect to child maintenance, Ms. Krupa testified that while Mr. Krupa has paid some of the special expenses of the children, she has been left with the lion's share of those expenses. For example, Mr. Krupa refused to pay any share of the tuition for Kelowna Christian School. Joel is in his third year of university at the University of British Columbia Okanagan. He hopes to enrol in law school in September. Mr. Krupa has not contributed to his tuition and expenses. Joy Anne is enrolled in a nursing program. Mr. Krupa has not contributed to her tuition and expenses in relation to that program. Joy Anne has two more years to complete in Kelowna, which will then be followed by a final year out of Kelowna.
- [53] Ms. Krupa testified that Joel required dental surgery. Mr. Krupa refused to contribute to the costs. She paid the amount not covered by insurance. When Ms. Krupa applied for a refund representing the amount covered by insurance, some \$1,200, she discovered that the dentist had sent the refund to Mr. Krupa. Mr. Krupa cashed the refund cheque and refused to give any of the amount to Ms. Krupa.
- [54] Joel required laser eye surgery. Mr. Krupa refused to make any contribution with respect to that surgery. Ms. Krupa paid the entire amount.
- [55] Except for some contribution to special and extraordinary expenses, Mr. Krupa paid no child support in 2003 and 2004. In 2005, he paid \$1,360 per month for a total of eight months. Apart from some contributions to special and extraordinary expenses, he has paid no child maintenance since 2005. DEBT TO ANNE KRUPA

- [56] I will deal first with the counterclaim brought by Anne Krupa in these proceedings.
- [57] Anne Krupa asserts that the 160 acres of farmland was not given, but sold, to Eugene and Mary. The first component of the alleged debt claimed by Anne Krupa is \$60,922 which she asserts represents the unpaid purchase price for the 160 acres. The second component of the alleged debt claimed is \$44,018, which is said to represent Eugene and Mary's portion of the balance of Anne Krupa's share of the farm income.
- [58] Anne Krupa acknowledged that she and her husband had been very generous to their children over the years. She agreed that they had given gifts totalling many thousands of dollars to Eugene and Mary over the years. However, it was her testimony that unlike those advances, the two amounts at issue in these proceedings were loans and not gifts and were understood by all concerned from the outset to be loans.
- [59] I will deal first with the loan that is alleged to have arisen from the transfer of the 160 acres. Anne Krupa described how her husband Joseph came to own the farmland. She described how Joseph's parents provided financial assistance to Joseph and his brother to help them get started. The parents provided the down payment for 240 acres for each son. Then in 1959, Joseph purchased another 160 acres, bringing his holdings to 400 acres. Due to health issues, Joseph Krupa did not farm the land himself. He had a farm equipment dealership and operated a garage with a partner. Later, he worked as a school caretaker and then worked at Woodwards until his retirement.
- [60] With respect to the transfer of the 160-acre parcels to Eugene and Mary and Wayne and Paula, Anne Krupa agreed that when the decision was made to transfer the land, they wanted to avoid paying capital gains tax. In order to do this the land had to be transferred at V-day values and at least one son had to qualify as an active farmer.
- [61] She agreed that the \$25,000 noted as the purchase price for the 160 acres on the AADC loan application form was the V-day value that was chosen to avoid paying capital gains tax. She also agreed that when Eugene and Mary received the proceeds of the AADC loan, they paid \$25,000 to Joseph Krupa, who immediately returned it to them.
- [62] Anne Krupa stated that Joseph gave Eugene and Mary the money back because he wanted them to get ahead. She also agreed that Wayne and Paula never paid and have never been asked to pay for the land given to them.
- [63] Anne Krupa agreed that Eugene and Mary invested the \$25,000. It was her testimony however, that the agreement was that the \$60,000 proceeds of that investment was a loan that was to be paid back to Joseph and Anne without any additional interest as consideration for the 160 acres. It was her testimony that when the investment matured, repayment was mentioned but ignored by Eugene and Mary.

- [64] With respect to the second component of the debt Anne Krupa alleges, it was her testimony that the agreement was that first she and Joseph, and then after his death, she alone, was always to receive one-third of the farm income. The income that she did not receive was distributed to Eugene and Mary in the form of a loan, payment of which she now demands from Eugene and Mary. It was her testimony that from 1981 to 1998 Eugene and Mary's share of this debt was 50%, but that it rose to 60% in 1998.
- [65] She also testified, having reference to a schedule prepared for purposes of the litigation by Eugene, that there had been a payment by Eugene and Mary in about 1999 of \$10,000 on account of this debt. She testified that she could not recall the year, but did recall receiving the payment in two separate cheques totalling \$10,000 around that time.
- [66] Eugene Krupa testified and described the plan for the transfer that he worked out with his father. He stated that the plan was that the V-day value would be used on the AADC loan application in order to take advantage of the tax exemption. When the loan proceeds were received, he would pay \$25,000 to his father, who would immediately return it. It would be invested at 19% and upon maturity be used to pay off the AADC loan. Eugene could use the balance of the funds to purchase the equipment needed for the farm and to do some improvements.
- [67] Eugene stated that his father had imposed some conditions when he transferred the land. The land was to be looked after and passed along to his children. Eugene stated that his father had said that Eugene should remember the \$60,000 when he and Anne were old and needed a hand. Eugene stated he understood that he was to give whatever was necessary to help his parents. He said that the agreement through the years was that "basically" when Anne Krupa needed or asked for the \$60,000, she would be given access to it. It was Eugene's testimony that Mary Krupa was aware of this obligation. Later in his testimony, Eugene stated the arrangement was that Joseph Krupa expected he and Mary to return up to the value of the land if he ever asked.
- [68] With respect to the farm income, Eugene stated that on several occasions, when the farm income was being divided or discussed, his father "basically" said remember this when we need this or want it.
- [69] With respect to the issue of a payment in 1999, Eugene's testimony was that he knew that they had paid some amount before. His recollection was that the amount was \$10,000.
- [70] Wayne Krupa gave evidence with respect to the transfer of the other 160-acre parcel and the distribution of farm income. Wayne Krupa testified that he was aware of the AADC loan application that his brother had made. It was done at least in part to satisfy the requirement for the tax exemption that at least one of the transferees qualify as an active farmer. He recalled that Eugene asked him if he wanted to apply for such a loan and he said that he was not interested.

- [71] It was his testimony that his parents did not require him to pay anything for the 160-acre parcel and that he did not do so. However, the understanding from the time of transfer was that if his parents ever needed money, he would contribute any amount that they needed.
- [72] It was Wayne Krupa's testimony that the income from Krupa Agricultural Products was split into thirds under the original arrangement, with Joseph and Anne then splitting their third between Wayne and Eugene after paying their income tax. Wayne recalled that at some point after his father's death, Anne Krupa decided that she shouldn't be paying tax on income she didn't receive. From that point on all the farm income was split equally between Eugene and Mary, and Wayne and Paula. That distribution changed in 1998 when Eugene told him that he should get a larger share, based upon his larger land holdings. Thereafter the income was divided 60% to Eugene and Mary, based upon the 160-acre plus 80-acre holding, and 40% to Wayne and Paula, based upon the 160-acre holding. Anne Krupa received no income from the farm except for some gifts.
- [73] It was Wayne Krupa's testimony that he and his brother made the decisions about how to allocate and pay out the farm income. He testified that in 2003 Eugene directed him to start making payments to Anne Krupa from Eugene's share of the farm income and he did so. It was Wayne's testimony that he has never paid any of his 40% share of the farm income to Anne Krupa. He has continued to receive his 40% share of the income.
- [74] I note that Eugene Krupa's income tax returns reflect his share of Krupa Agricultural Products income to be 60%.
- [75] Mary Krupa denies that there is any debt owing to Anne Krupa. It was her testimony that the 160 acres was given to the parties as a gift, that there was never any suggestion of a loan. With respect to the proceeds of the investment, it was her testimony that there was never any suggestion that the money would be repaid at any time to Eugene's parents. It was her testimony that the purpose of the grant was to permit the parties to take the money and invest it to take advantage of the high rates of returns. Finally, she testified that there was never any suggestion that Joseph and Anne Krupa's share of farm income was advanced as a loan to be repaid. She denied that there was any such arrangement. Mary Krupa was not aware of any payments made on account of such loans and in particular of any payment of \$10,000.
- [76] The leading case in British Columbia dealing with the issue of characterization of advances made by parents to their children has been *Wiens v. Wiens* (1991), 31 R.F.L. (3d) 265, [1991] B.C.J. No. 274 (QL) (S.C.). In that decision, Harvey J. stated that in the absence of clear evidence confirming the loan and the manner in which repayment is to be made, advances from parents are to be construed as gifts.
- [77] In *Locke v. Locke*, 2000 BCSC 1300, Wilson J. summarized the factors to be considered by the courts in the characterization of such advances at para. 20 as follows:
1. whether there were any contemporaneous documents evidencing a loan;

2. whether the manner for repayment is specified;
3. whether there is security held for the loan;
4. whether there are advances to one child and not others, or advances of unequal amounts to various children;
5. whether there has been any demand for payment before the separation of the parties;
6. whether there has been any partial repayment; and
7. whether there was any expectation, or likelihood, of repayment.

[78] In *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, the court concluded that the presumption of advancement with respect to gratuitous transfers from parent to child is limited to transfers involving minor children. There is a presumption of resulting trust with respect to gratuitous transfers from a parent to an adult child. That presumption can be rebutted by evidence that the transfer was a gift. Justice Rothstein, speaking for the majority, described the approach to be taken as follows at para. 55: Where a gratuitous transfer is being challenged, the trial judge must begin his or her inquiry by determining the proper presumption to apply and then weigh all the evidence relating to the actual intention of the transferor to determine whether the presumption has been rebutted. It is not my intention to list all of the types of evidence that a trial judge can or should consider in ascertaining intent. This will depend on the facts of each case.

[79] In *D.L.M. v. J.A.M.* 2008 NBCA 2, the New Brunswick Court of Appeal considered *Pecore* and then applied the Locke factors in considering whether transfers to an adult child were a loan or a gift. I conclude that the factors identified in Locke continue to be relevant matters to consider in ascertaining intent.

[80] Considering these factors, I have concluded that with respect to each claim advanced by Anne Krupa, the presumption of resulting trust has been rebutted. I find that in each case, the intention was to make a gift and not a loan. As a result, neither claim is made out.

[81] I note that there are no contemporaneous documents or indeed any documents evidencing the alleged loans. No manner of repayment was specified. The most that could be said is that the children were to help their parents financially if they requested or needed assistance. This amounts to a moral claim on the children's conscience, but not to terms of repayment evidencing a debt. No security was specified or held.

[82] It is clear that it was very important to both Joseph and Anne Krupa to give equal benefit to each of their sons. However, there is no allegation that Wayne Krupa owes anything with respect to his land or with respect to his share of the farm income. No demand has been made to him to pay anything with respect to either the land or the income. He has never made any payment for the land and has consistently taken his 40% share of the farm income.

- [83] There was no demand for payment prior to separation. Eugene and Anne Krupa allege that there was a partial payment in 1999. Mary Krupa denies this. I accept Mary Krupa's evidence in this regard. The evidence with respect to such payment was vague and not supported by documents. No such payment had been demanded of or made by Wayne Krupa.
- [84] Finally, with respect to the issue of expectation of repayment, I find that the expectation was that the children would help their parents in the event of financial need. However, there was no expectation that Eugene and Mary would pay for the 160 acres or that they would return any portion of one-third of the farm income. Eugene and Mary were treated in the same fashion as Wayne and Paula. I did not accept Eugene and Anne Krupa's testimony to the contrary.
- [85] In the result, the counterclaim of Anne Krupa is dismissed. FAMILY ASSETS Alberta Law
- [86] The parties agreed that the division of the family assets situated in Alberta would be governed by the relevant Alberta legislation. Shirley A. McNeilly provided an opinion describing the provisions of the Alberta legislation. The parties accepted this opinion as an accurate statement of Alberta law, but differed in their positions with respect to the application of these provisions to the circumstances in the case at bar. Ms. McNeilly's opinion , as stated in a letter to Eugene Krupa's counsel, is as follows: LEGISLATION Sections 7 and 8 of the Matrimonial Property Act govern the division of matrimonial property. These provisions state: Distribution of Property 7(1) The Court may, in accordance with this section, make a distribution between the spouses of all the property owned by both spouses and by each of them.
- (2) If the property is
- (a) property acquired by a spouse by gift from a third party,
 - (b) property acquired by a spouse by inheritance,
 - (c) property acquired by a spouse before the marriage,
 - (d) an award or settlement for damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses, or
 - (e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses, the market value of that property at the time of marriage or on the date on which the property was acquired by the spouse, whichever is later, is exempted from a distribution under this section.
- (3) The Court shall, after taking the matters in section 8 into consideration, distribute the following in a [manner] that it considers just and equitable:
- (a) the difference between the exempted value of property described in subsection (2), referred to in this subsection as the "original property", and the market value at the time of the trial of the original property or property acquired

- (i) as a result of an exchange for the original property, or (ii) from the proceeds, whether direct or indirect, of a disposition of the original property;
 - (b) property acquired by a spouse with income received during the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii);
 - (c) property acquired by a spouse after a decree nisi of divorce, a declaration of nullity of marriage or a judgment of judicial separation is made in respect of the spouses;
 - (d) property acquired by a spouse by gift from the other spouse.
- (4) If the property being distributed is property acquired by a spouse during the marriage and is not property referred to in subsections (2) and (3), the Court shall distribute that property equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8. Matters to be considered 8 The matters to be taken into consideration in making a distribution under section 7 are the following:
- (a) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
 - (b) the contribution, whether financial or in some other form, made by a spouse directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or by one or both spouses and any other person;
 - (c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse to the acquisition, conservation or improvement of the property;
 - (d) the income, earning capacity, liabilities, obligations, property and other financial resources
- (i) that each spouse had at the time of marriage, and (ii) that each spouse has at the time of the trial;
 - (e) the duration of the marriage;
 - (f) whether the property was acquired when the spouses were living separate and apart;
 - (g) the terms of an oral or written agreement between the spouses;
 - (h) that a spouse has made
- (i) a substantial gift of property to a third party, or (ii) a transfer of property to a third party other than a bona fide purchaser for value;
 - (i) a previous distribution of property between the spouses by gift, agreement or matrimonial property order;
 - (i) a prior order made by a court;

- (k) a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;
- (l) that a spouse has dissipated property to the detriment of the other spouse;
- (m) any fact or circumstance that is relevant. By virtue of s.7(2), when dividing property that was acquired by a spouse by gift from a third party or by inheritance, the market value of that property on the date of marriage or the date the property was acquired (whichever is later) is exempt from distribution between the spouses. The spouse that received that gift or inheritance keeps the market value of the property at that date as his own separate property. As stated in s.7(3) the difference between the exempted value of the property (referred to as "original property") and the market value of the original property at the time of trial is distributed between the spouses. The difference in value is distributed in the manner that the Court considers just and equitable, taking in to consideration the factors set out in s. 8. The distribution is equal, subject to s.8 factors, under s.7(4) if the property was not property acquired by gift or inheritance. Ms. McNeilly also stated: A summary of the questions and answers dealt with in this opinion is as follows:
 - 1. How is property that was acquired by a spouse by gift from a third party or by inheritance distributed on marriage breakdown?
 - a. Pursuant to s. 7(2) of the Matrimonial Property Act it is exempt from distribution.
 - 2. How is an increase in value of that property distributed on marriage breakdown? Pursuant to s. 7(3) of the Matrimonial Property Act the difference between the exempted value and the market value at the time of trial is distributed between the spouses in the manner the Court considers just and equitable taking in [to] consideration the factors set out in s. 8.
 - 3. How is property that is not exempted from distribution by subsections 7(2) and 7(3) distributed on a marriage breakdown? Pursuant to s. 7(4) of the Matrimonial Property Act the distribution is equal, subject to s. 8 factors.
 - 4. If there was a gift or inheritance to Eugene Alexander Krupa from his father and Eugene Alexander Krupa then transferred the property to himself and Mary Evelyn Krupa does Eugene Alexander Krupa retain the exemption?
 - a. If Eugene Alexander Krupa can prove that in placing the property in joint names he did not intend to create a beneficial interest to Mary Evelyn Krupa, he retains the full exemption.
 - b. If Eugene Alexander Krupa cannot prove that he did not intend to create a beneficial interest to Mary Evelyn Krupa, he retains only one half of the exemption.
 - c. If the gift or inheritance was to Eugene Alexander Krupa and Mary Evelyn Krupa jointly, there is no exemption.

5. If there is insufficient value in the exempt property, can the remainder of the exemption be traced to another asset and if so, would the exemption be reduced by half again if the property to which the exemption was traced was again placed in joint names. The remainder can be traced to another asset and would not be reduced by half again. Alberta Property
- [87] The parties have an interest in three properties located in Alberta:
- a. 154 acres, in the name of Eugene Krupa and Mary Krupa. This property was originally 160 acres. A six-acre parcel including a house built by Eugene and Mary, was subdivided and sold in about 1987. The parties agree that the current value of the remaining 154 acres as being \$356,048.00.
 - b. An 80-acre parcel of land transferred in 1987 by Anne Krupa to herself and Eugene Krupa as joint tenant. The parties have agreed to an historical value of the 80 acres of \$40,000 as of 1987 and have agreed to a current value of \$184,957
 - c. An 11-acre property including a home built by the parties in Namao, Alberta which is currently in the name of Eugene Krupa and Mary Krupa. The parties have agreed to a current value of the Namao property of \$695,000. 154 Acres
- [88] Mary Krupa took the position that there should be no exemption with respect to the 154 acres because the property had been given to the parties jointly. Eugene Krupa took the position that there should be an exemption applied of one-half of the original market value of \$160,000 less the purchase price of \$25,000. With respect to the notion of a deduction to reflect the purchase price, I have found that there was no sale. Rather, the 160-acre parcel was a gift from Joseph Krupa. The sole issue is, therefore, whether the circumstances of this gift give rise to an exemption under Alberta's Matrimonial Property Act, R.S.A. 2000, c. M-8.
- [89] Joseph Krupa, the defendant's father, transferred the property to the parties in 1981. At the time of transfer, the parcel was a quarter section or 160 acres. The parties agree that the value of the property at the time of transfer was \$143,000. The parties sold a parcel of this property in order to purchase the property in Namao, Alberta. The parties agree that the present value of the remaining 154 acres is \$356,048.
- [90] It was Anne Krupa's testimony that the original intention was to transfer the two 160-acre parcels into the names of Eugene and Wayne. She did not have a clear recollection of how it came to pass that the land was transferred into the names of Eugene and Mary, but was firm in her evidence that this was never her intention.
- [91] Eugene Krupa's brother Wayne also received 160 acres from his father. Wayne recalled that prior to the transfer Joseph Krupa first told him that he would like to transfer the farm to the brothers. Anne Krupa later told him that this was what the parents wanted to do and that if they ever needed a hand, the boys would help them out. Wayne recalled that his father told him at a later date that Eugene and Mary wanted the land put in both their names. His father said that he had decided to do that and so would also put the land into the name of Wayne and his wife, Paula.

- [92] Eugene Krupa testified that while his father agreed to transfer the land into the names of Eugene and Mary, the transfer was on certain conditions; namely, that Eugene was to be the steward of the land and that the land was transferred to him to be transferred in turn to his children. However, Mr. Krupa testified that he plans to sell this parcel of farmland after the conclusion of the litigation. The reason he gave is that the present fair market value of the land is far beyond its value as agricultural production. This suggests to me that Mr. Krupa does not consider that he obtained the land on conditions from his father, specifically the condition that it be kept in the family and passed on to his children, or that he is bound by any such conditions. He clearly is of the view that his desire to profit from the land is not constrained by any such condition.
- [93] It was Eugene's position that Joseph Krupa, both at the time of and before he transferred the 160 acres to Eugene and Mary, intended to give the property to his son Eugene, as he intended to give another 160-acre parcel to his son Wayne. He wished to give the property to his sons the same way he received gifts of lands from his father.
- [94] I note first that Joseph Krupa did not receive the 160 acres as a gift of land from his parents. Rather, as Anne Krupa described in her testimony, Joseph's parents provided financial assistance to Joseph and his brother to help them get started. The parents provided the down payment for 240 acres for each son. Then in 1959, Joseph purchased another 160 acres, bringing his holdings to 400 acres.
- [95] With respect to Joseph Krupa's intention concerning the transfer, I find that his original intention was to transfer the land to his sons Eugene and Wayne. However, I find that the operative intention for the purposes of this litigation is the intention at the time of the transfer. I find that at the time of transfer Joseph Krupa's intention was to do what he did; namely, to transfer the property to Eugene and Mary, just as he later transferred the other parcel to Wayne and his wife, Paula.
- [96] I agree with the submission of counsel for Mary Krupa that Joseph Krupa's actions with respect to the transfer are unequivocal and unambiguous. The act of transferring the land jointly to Eugene and Mary, together with the documentary evidence of that transfer, requires no further evidence of intention. In any event, there was no evidence of declarations of Joseph Krupa at the time of transfer to suggest that he did not intend to transfer the land to Eugene and Mary jointly. With respect, it seems to me that counsel's submission to the contrary confuses Joseph Krupa's reasons with his intentions. His reason for the transfer of the property into the names of his sons and their wives might well be that he was responding to a request. However, it is clear in my view that he intended to do what he did.
- [97] Anne Krupa testified that despite the fact that she was not on the title, she held a beneficial interest in the 160 acres when it was transferred to Eugene and Mary. She testified that it was not her intention to benefit Mary or to transfer to Mary and that she does not know how it came to pass that the 160 acres was transferred to Eugene and Mary jointly. I have found

Anne Krupa's testimony to be less than credible in a number of respects. I did not accept her evidence with respect to the alleged loans. On the subject of the transfer, I found her testimony suspect and distorted by her efforts to benefit her son in the litigation. Anne Krupa struck me as a strong woman of definite opinions which she was not reluctant to express. That being the case, it seems to me that if she held the interest in the land she attested to and if the transfer was made contrary to her intentions, it is very unlikely that the first expression of this dissatisfaction would occur more than 20 years later and in the context of this litigation.

- [98] In any event, s. 7(2)(a) of the Matrimonial Property Act provides for an exemption for property that was acquired by a spouse by gift from a third party. In the case at bar, I find that both spouses acquired the property by gift from a third party. Accordingly, as Ms. McNeilly notes, under Alberta law, where the gift was to Eugene and Mary jointly, there is no exemption.
- [99] With respect to the division of the value of the 154 acres, Ms. McNeilly's opinion states that it would be an equal division under s. 7(4) of the Matrimonial Property Act subject to a consideration of the factors under s. 8. In my view, these factors support an equal division between the parties. In particular, I note that this was a long marriage. In the course of this long marriage, both spouses made substantial contributions to the marriage and the welfare of the family. Mary Krupa contributed as a homemaker, parent and wage earner. Both parties made both financial contributions and contributions of their labour in relation to the land, including paying off the AADC loan, improving the land with physical labour and borrowed money, and building a home on the original 160 acres.
- [100] In the result, I find that the 154-acre parcel is a family asset. There is no exemption pursuant to the Matrimonial Property Act to be applied. Mr. Krupa has testified that he intends to sell the 154-acre parcel. Counsel submits that the value to be divided should reflect the costs of sale and capital gains that would be payable on a sale. However, I did not find Mr. Krupa to be a credible witness, particularly with respect to his testimony concerning financial issues. Accordingly, the value to be accounted for will not reflect sales commission or tax. Eugene and Mary Krupa will share equally in the \$356,048 present value of the land.
- [101] There will be an order that Ms. Krupa will transfer her interest in the 154 acres to Mr. Krupa. There will be an order vesting Mr. Krupa with ownership of the 154 acres. Finally, there will be a compensation payment to Ms. Krupa in the amount of \$178,024. 80 Acres
- [102] Anne Krupa transferred the 80-acre parcel into her name and Eugene Krupa's name as joint tenants in 1987. The parties agree that the value of the 80 acres at the time of transfer was \$40,000. The parties agree that the present value of the 80 acres is \$184,957.

- [103] It should be noted here that the transfer of the 80-acre parcel was acknowledged to be a gift. Therefore the case of Pecore and presumption of a resulting trust is not applicable. The issues regarding this parcel of land are whether it was a gift to Eugene or to Eugene and Mary, and the amount of the gift.
- [104] It was Anne Krupa's testimony that she transferred the land into joint names with Eugene as part of her estate planning to avoid capital gains tax. She did not include Wayne because she had given him \$40,000 to buy back his pension and it was important to her to maintain a fair balance between the benefits she gave to each of her children. It was her intention to benefit Eugene and his children. Eugene Krupa's evidence was to the same effect.
- [105] Anne Krupa testified that she did not recall any discussion with Mary Krupa concerning this issue in 1987. She did recall a discussion in 2002 at Christmas at which Mary said that she wanted Anne Krupa to take her name off the land and that Mary wanted her name on it. Anne Krupa's response was words to the effect of, "it is my land and I want my name on it".
- [106] Mary Krupa testified that Anne Krupa gave the 80-acre parcel to both Eugene and Mary. Anne Krupa had made a gift of money to Wayne Krupa at about the same time to permit him to buy back his pension and made the gift of land to Eugene and Mary. It was her testimony that the land was given to them both. It was her understanding that only Eugene was on title with Anne because Anne wanted to stay on the title and there could only be two names on title. Mary testified that Eugene told her that now they would get 60% of the farm income because they owned more of the land. It was never suggested that the land belonged only to Eugene.
- [107] Wayne Krupa testified that he received a gift from his mother in 1987 in the form of cash to permit him to buy back his pension. He testified that the gift was in the range of \$40,000.
- [108] It is Mary Krupa's submission that the evidence of Anne Krupa as to her intention not to benefit Mary Krupa should not be believed, and that Anne Krupa intended at the time of the transfer of the 80 acres, notwithstanding the fact she remained on the title as a joint tenant, to benefit Eugene Krupa with the entire 80 acres, which he would receive as joint survivor on her death. In the meantime, Eugene Krupa conducted himself as the sole owner of the 80 acres. Mary Krupa submits that she and Eugene considered the 80 acres as part of their family assets and that Eugene advised that the 80 acres was his and Mary's. Counsel for Ms. Krupa notes that the distribution of farm income was modified so that Eugene and Mary were allocated 60% of the income, an allocation that reflected ownership of 240 of the 400 acres, or the entire 80 acres.
- [109] Eugene Krupa's position is that there should be an exemption pursuant to Alberta law. Counsel for Mr. Krupa submits that Mr. Krupa received only a 50% interest in the property and, accordingly, the appropriate exemption is \$20,000 or one-half of the original value.

- [110] I have concluded that it is appropriate to apply an exemption pursuant to the Alberta legislation in relation to the 80 acres. While the 80 acres is clearly a family asset, it was gifted to a spouse. The provisions of s. 7(2)(a) of the Matrimonial Property Act are engaged. I find that Anne Krupa's intention was to gift the land to her son and not to Eugene and Mary jointly. If she had intended to gift the land to Eugene and Mary, they both would have been put on the title.
- [111] However, I have also concluded that the substance of the transaction was that Anne Krupa gave the complete beneficial interest in the land to Eugene. Her decision to remain on title was taken to avoid tax. It is clear to me that it was very important to Anne Krupa that she maintain an even hand in the benefits she gave to her sons. She had given Wayne Krupa approximately \$40,000 and I find she wanted to give an equivalent gift to Eugene. However, \$40,000 is the value of the entire 80-acre parcel at the time of transfer. If she had only given a 50% interest, she would not have given an equal benefit to Eugene. Moreover, the subsequent division of farm income is consistent with ownership of the entire 80-acre parcel, not merely 50% of the parcel.
- [112] Accordingly, I find that the 80-acre parcel is a family asset. From the \$184,957 present value will be deducted the value at the time of transfer, \$40,000, representing the exemption to which Eugene Krupa is entitled. The remaining value is \$144,957. Considering the factors in s. 8 of the Matrimonial Property Act, I am satisfied that Eugene and Mary Krupa should share equally in the distribution of the value after application of the exemption.
- [113] There will be an order that Mary Krupa has no interest legal or beneficial in the 80 acres registered in the names of Eugene and Anne Krupa. There will be a compensation payment to Ms. Krupa in the amount of \$72,478. Namao Property
- [114] The Namao property was jointly acquired and Mary and Eugene Krupa are the joint registered owners. There is no issue of an exemption with respect to the Namao property. Considering the applicable factors in s. 8 of the Matrimonial Property Act, there should be an equal division. The parties agree that the present value of the Namao property is \$695,000. In the event of a sale of the property, commissions would be approximately \$22,000, leaving \$673,000. The Namao home is subject to a line of credit in the amount of approximately \$26,000. I find that the line of credit is a family debt. Deducting the line of credit produces a net amount of \$647,000. The capital gain on the sale would be \$244,700. Deducting the capital gain tax would result in a net realization on the sale of \$594,000. I find it likely that the property will be sold and accordingly it is appropriate for the value to be divided to reflect the commissions and tax consequences.

- [115] There will be an order that Ms. Krupa will transfer her interest in the Namao property to Mr. Krupa. There will be an order vesting Mr. Krupa with ownership of the Namao property. Finally, there will be a compensation order in Ms. Krupa's favour in the amount of \$297,000. Mary Krupa shall be entitled to attend the Namao property and remove all items inherited from her family and one-half of the remaining household items that are in storage. Income from Alberta Property Farm Income - Krupa Agricultural Products
- [116] As stated earlier, I have concluded that Eugene and Mary do not owe Anne Krupa any money in relation to a share of farm income. Anne Krupa is not entitled to one-third of the farm income. Rather, just as Wayne and Paula are entitled to 40% of the income, which share they have been receiving throughout the relevant period; Eugene and Mary are entitled to 60% of the income.
- [117] There are two problems with the farm accounts relevant to the issues in this litigation. First, between June 2003 and the date of trial, \$25,260 was advanced from the farm account to Anne Krupa at Eugene's direction, ostensibly in relation to the alleged debt. The second problem is that since separation, Mary Krupa has received none of the farm income. She is entitled to 30% of the net farm income. Eugene Krupa must account to her for her share of the income of Krupa Agricultural Products.
- [118] From my review of Eugene Krupa's income tax returns with years 2003-2006, I conclude that the amounts to be accounted for in this regard are as follows: 60% 30% 2003 \$ 5,063.14 \$ 2,531.57 2004 \$13,959.97 \$ 6,979.99 2005 \$ 5,705.68 \$ 2,852.84 2006 \$ 5,752.19 \$ 2,876.10 2007 \$21,600.00 \$10,800.00 Total: \$26,040.50
- [119] The figures for 2007 are derived from the payments of farm income to Eugene Krupa in 2007 in the amounts of \$6,800, \$2,400, \$9,000. In addition, Mr. Krupa confirmed that \$3,400 from his share of farm income was advanced to Anne Krupa in 2007.
- [120] There will be a compensation order to Mary Krupa in the amount of \$26,041 in relation to the Krupa Agricultural Products income. Ms. Krupa will have no further interest in or entitlement to income from Krupa Agricultural Products. Namao Income
- [121] Mr. Krupa has retained all of the income from the Namao property since May 2003. He will account to Ms. Krupa for her share of that income. The income tax records reflect the following as Ms. Krupa's share of the rental income for which Mr. Krupa must account: 2003 \$ 5,471.86 2004 \$ 5,796.78 2005 \$ 6,594.98 2006 \$ 6,010.51 2007 \$ 7,500.00* Total: \$31,374.13
*no figures available - estimate based upon rent increase.
- [122] In addition, in 2004 Mr. Krupa retained Ms. Krupa's share of the farm income from the Namao property in the amount of \$1,282.50 for which he is to account.

- [123] There will be a compensation order in the amount of \$32,657 in favour of Ms. Krupa in relation to income from the Namao property up to the end of 2007. Mr. Krupa will provide Mary Krupa with her share of the rental income for 2008 until the date of the transfer of ownership. Baytex Lease Payments
- [124] Pursuant to a surface lease granted on the farmland, the parties were to receive \$750 a year from Baytex Energy. As noted earlier in the reasons, since separation the payments have been directed to Mr. Krupa, who has not provided Mary Krupa with her share. Mr. Krupa testified that he applied the 2003 payment to reduce the Namao line of credit. This was of benefit to both parties. However, he must account to Ms. Krupa with respect to the balance of the Baytex payments, and amount of \$375 per year for four years totalling \$1,500.
- [125] There will be a compensation order in the amount of \$1,500 in favour of Ms. Krupa in relation to the Baytex payments. Ms. Krupa will have no further interest in or entitlement to the Baytex payments. British Columbia Property Mission Springs
- [126] At the time of separation, Mary Krupa withdrew \$76,000 from the Greenline joint investment account and withdrew \$15,000 from the joint line of credit. She used these funds as the down payment for the Mission Springs property, taking out a mortgage to complete the purchase. She has lived in the Mission Springs residence since June 30, 2003. Eugene Krupa has never lived in the residence, and had no involvement in the purchase. He is not registered on the title. Mary Krupa has made all of the payments for taxes, mortgage payments and upkeep.
- [127] Mary Krupa's position is that the Mission Springs residence is not a family asset, but in the alternative, if it is found to be a family asset, she seeks a complete reapportionment in her favour. In the further alternative, counsel submits that Eugene Krupa has, through an elaborate ruse with his mother Anne Krupa, used his share of the family funds received at the time of separation, plus additional ongoing family funds from the joint farm income, additional family funds from the joint Namao rent income and through the benefit of using funds for his own use that should have been directed to child support, acquired a trust interest in the Landie Road property, which is in the name of Anne Krupa.
- [128] Mary Krupa submits that as of the date of the triggering event, Anne Krupa held either all of the interest, or a substantial interest, in the Landie Road property for the benefit of Eugene Krupa, and that interest should be declared to be a family asset as it arose from the use of family assets and from funds regarding which the Eugene Krupa was under an obligation to act as Mary Krupa's trustee. Mary Krupa submits that to not find a trust interest would unjustly enrich Anne Krupa and Eugene Krupa, and would prejudice Mary Krupa.
- [129] For his part, Eugene Krupa submits that the Mission Springs residence is a family asset and the equity should be shared equally. However, he submits that the Landie Road property is not a family asset. The Landie Road property is the property that was purchased shortly after separation by Anne Krupa in which Mr. Krupa resides. It is owned by Anne Krupa and

Mr. Krupa asserts that he has no interest, beneficial or legal, in the property. In addition, he submits that the family assets that went to Anne Krupa cannot be traced into the home since she deposited and kept those funds in separate accounts.

- [130] The parties agree that the present value of the house Mary Krupa purchased after separation at Mission Springs is \$546,000. The mortgage at the time of trial was \$133,904, leaving equity of approximately \$412,000.
- [131] In *Montalban v. Montalban*, 2007 BCSC 1266, 41 R.F.L. (6th) 412, Madam Justice Martinson stated the principles to be applied as follows at para. 61: An asset acquired in whole or in part from the disposition of a family asset, and still held at the time of the triggering event, can become a family asset even though it is not used for a family purpose: *Billingsley v. Norton v. Norton* (1989), 19 R.F.L. (3d) 181 (B.C.C.A.), *Tratch* at ¶ 58; *Casano v. Casano* (1985), 49 R.F.L. (2d) 174, 35 A.C.W.S. (2d) 355 (B.C.S.C.) The court has the discretion to refuse to trace where appropriate.
- [132] In *Billingsley v. Billingsley* (1991), 58 B.C.L.R. (2d) 329 (C.A.), a husband purchased a house after the parties separated but before the triggering event with funds which originated from eventually acknowledged family sources. The Court of Appeal found that the house was a family asset as of the triggering date, but then turned to s. 51 of the Family Relations Act, R.S.B.C. 1979, c. 121, and considered whether the division should be in equal shares under the then s. 43(2) pursuant to the factors in (a) to (f) inclusive of s. 51 (now s. 65) of the Family Relations Act.
- [133] The Court of Appeal held at para. 20 that such a division would be unfair having regard to the following:
- a. the timing of the purchase of the house (in *Billingsley* the house was purchased 3 years after separation, but from funds which were family funds but which the husband did not disclose until after the purchase);
 - b. the house was not acquired for a purpose involving a family of which the wife was a member;
 - c. the wife never used the house at anytime;
 - d. the husband was the only person who preserved, maintained, and used the property from the date of its acquisition to the date of the triggering event;
 - e. the cash used to purchase the property came from eventually acknowledged family sources, but the husband only used a small amount of the wife's share of family funds.

- [134] In the result, the Court of Appeal held that the property purchased by the husband was a family asset, but found that it would be unfair to award the wife a one-half share, and therefore reapportioned the asset in favour of the husband. However, the court awarded the wife compensation with respect to one-half of the value of the funds from family assets used by the husband for the purchase of the property.
- [135] I have concluded that the Mission Springs residence, being an asset acquired in part from the disposition of a family asset and still held at the time of the triggering event, is a family asset. However, I have concluded, having regard to the factors enumerated in s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "Act"), that an equal division would be unfair. In particular, I note that the residence was purchased after separation and was never used for a family purpose involving Mr. Krupa. Mr. Krupa has never lived in the home and has never preserved or maintained the home or contributed to its upkeep.
- [136] Finally, it is the case that the Landie Road property is registered in Anne Krupa's name, and that she segregated the funds she received from Eugene Krupa from the funds used in connection with the purchase. However, Mr. Krupa acknowledged in examination for discovery that at the time Mary Krupa told him that she was moving out, he had discussions with his mother and decided to transfer money to her to remove it from the family assets and protect it. I have concluded that the Landie Road property was purchased by Anne Krupa as part of a design to secure for Mr. Krupa a suitable residence that would not be a family asset, which he might well purchase after the litigation. In those circumstances, it would be in my view wholly inequitable for Mr. Krupa to share in the equity of the Mission Springs residence as a family asset. Accordingly, I reapportion 100% of the interest in the Mission Springs residence to Mary Krupa.
- [137] Ms. Krupa will, however, account to Mr. Krupa for one-half of the family assets that were used in the purchase, in this case, one-half of the \$76,000 taken from the Greenline joint account, or \$38,000. There will be a compensation order in favour of Mr. Krupa in the amount of \$38,000. Landie Road
- [138] Mr. Krupa resides in a property located at Landie Road in Kelowna that is registered in the name of Anne Krupa. Mary Krupa takes the position that Anne Krupa holds the property in trust for Mr. Krupa, that he is the true owner. It is her position that Eugene and Anne Krupa have colluded to obscure the true ownership and to defeat any claim against the property as a family asset. Eugene and Anne Krupa take the position that the true owner is Anne Krupa, the registered owner, and that Eugene rents the property from her. Eugene Krupa insists that he has no legal or beneficial interest in the Landie Road property.

- [139] The parties agree that the present value of the house registered in the name of Anne Krupa and purchased after the parties separated is \$854,000. The purchase price was \$212,000. The agreement for purchase and sale was dated July 30, 2003. The purchase price was made up of a \$1,000 deposit paid by Eugene Krupa. Anne Krupa then reimbursed him some months later. Anne Krupa paid a down payment of \$55,903.02. The balance came from the proceeds of a mortgage taken out by Anne Krupa with the Toronto Dominion Bank.
- [140] Anne Krupa testified that after the parties separated, Eugene told her that he needed a house close to the schools with sufficient room for the children. She understood that he could not qualify for a mortgage because of the marital split and litigation. She decided to purchase the home as an investment. She put the home solely in her name because if she put it in her and Eugene's name, she would have to do something of equal value for Wayne and she could not afford to do that.
- [141] It was Anne Krupa's testimony that shortly after the parties separated, she demanded payment of the \$60,000 loan from Eugene. She stated that the loan was long overdue and she thought that it was time that she had the money back. Eugene advanced her \$60,000 by cheque dated June 4, 2003. She deposited the cheque in a term deposit at Capital Savings. The funds used for the down payment came from a different account. As noted earlier, I have concluded that Eugene and Mary Krupa were not indebted to Anne Krupa and therefore the payment of the \$60,000 was not on account of any debt.
- [142] Then in December 2005, Anne and Wayne Krupa took out a loan in the amount of \$62,650. This represented the value upon maturity of the \$60,000 term deposit. Ms. Krupa testified that Eugene needed the funds at this time, but the term deposit was not yet redeemable. The proceeds of the loan were advanced to Eugene. The loan was then repaid once the term deposit matured.
- [143] In April 2005, Anne Krupa secured a line of credit in the amount of \$395,000 with TD Canada Trust. The funds were used for an extensive renovation to the Landie Road property. In total, Anne Krupa has spent \$303,362.34 on the Landie Road property, exclusive of interest. Eugene Krupa has paid rent, albeit at intermittent intervals. Mr. Krupa has lived in the residence since its purchase. He has directed the renovations. He and his mother have kept meticulous records of purchases in relation to the property and Anne Krupa has reimbursed him for all of these purchases.
- [144] In addition to the \$60,000 advanced to Anne Krupa, since separation Mr. Krupa has advanced \$25,620 to his mother ostensibly as partial payment of Eugene and Mary's portion of the one-third share of farm income owing to Anne Krupa. I have found that there is no such debt.

- [145] At all times since the purchase in 2003, Anne Krupa has been the registered owner of the Landie Road property. The accounts for the utilities were originally in Eugene Krupa's name, but earlier this year that was changed and the account was put in Anne Krupa's name. Anne Krupa denied that this change had anything to do with the litigation. Anne Krupa also pays for the insurance on the home.
- [146] I have concluded that the Landie Road property is not a family asset. However, Mr. Krupa must account to Mary Krupa for her share of the funds advanced to Anne Krupa in June 2003 and the balance retained in Mr. Krupa's bank account as of June 30, 2003. These amounts are \$60,000 and \$14,431 for a total of \$74,431, of which Ms. Krupa's share is \$37,215. There will be a compensation order in favour of Ms. Krupa in the amount of \$37,215. Other Assets Royalty Income
- [147] The parties continue to be entitled to royalties arising from the two textbook projects. This entitlement is a family asset. It appears that Mr. Krupa contacted one of the publishers and directed the royalty payments with respect to one of the textbook projects be redirected to him. Starting with the 2004 payments, Ms. Krupa continued to receive 50% of the McGraw-Hill payments, but received no payments from Thompson. All of the Thompson royalties were directed to Mr. Krupa and retained by him.
- [148] Mr. Krupa is to account to Ms. Krupa for her share of the Thompson royalty payments. Mr. Krupa's counsel calculated this amount to be \$2,843. There will be a compensation order in the amount of \$2,843 in favour of Ms. Krupa. In addition, Mr. Krupa is directed to make the necessary arrangements with the publishers and sign any documents necessary so that henceforth Ms. Krupa will receive her share of the royalties directly from the publisher.
RRSPs
- [149] Both Mary and Eugene Krupa have RRSPs. The only deregistration that has occurred since separation was in 2004. In that year, Eugene Krupa purchased a spousal RRSP in his favour, using Ms. Krupa's social insurance number to effect the transaction. He did not tell Ms. Krupa about the transaction. She also contributed to an RRSP and was later penalized for over-contribution.
- [150] The value of Ms. Krupa's RRSP account was \$288,195 as of October 22, 2007. The value of Mr. Krupa's RRSP account as of October 3, 2007, was \$278,815. The plaintiff has contributed \$46,000 to her RRSP between the date of separation and the 2006 income tax return date, while Mr. Krupa has only contributed \$27,957 in that time to the RRSP account registered in his name.
- [151] Counsel for Ms. Krupa submits that the RRSPs should be valued as at the triggering date of April 10, 2007, and equalized based upon the values at that date. In *Gilpin v. Gilpin* (1990), 50 B.C.L.R. (2d) 251 (C.A.), Mr. Justice Anderson stated at 255 that "having regard to the issue of fairness that unless there be reason to the contrary the valuation date for family assets including the matrimonial home should be chosen as of the date of trial".

- [152] While the differences in contributions between the date of separation and the triggering date is a factor to be considered in selecting a valuation date, I have concluded that a fair balance will be best achieved by selecting the date of trial as the valuation date for all the assets. Accordingly, the RRSP accounts will be equalized with a rollover of \$4,690 from Ms. Krupa to Mr. Krupa's account. Pensions
- [153] The parties each have an Alberta Teachers' pension. According to the most recent information provided, the value of Ms. Krupa's pension is \$10,773.42 and the value of Mr. Krupa's pension is \$15,035.03. Mr. Krupa also has a pension with the University of Alberta. According to the most recent information provided, the value of that pension is \$58,151. The two Alberta Teachers' pensions are to be divided pursuant to the provisions of the Act. The University of Alberta pension will be divided with the entitlement date being April 10, 2007. In addition, the Canada Pension Plan credits of both parties are to be divided pursuant to the legislation with the commencement date being the date of the marriage and the entitlement date being April 10, 2007. Morningstar and MacArthur
- [154] Ms. Krupa is the sole shareholder and president of MacArthur. MacArthur is the holding company which holds 100% of the shares of Morningstar. Ms. Krupa started Morningstar following the move to Kelowna. Over the years, the company has prospered because of her leadership. Morningstar presently has five full-time and one part-time employee, including Ms. Krupa. The company provides communication services to companies and organizations including advertising, corporate identities and logos, fund development, marketing promotion, public private partnerships, public relations, research and strategic planning.
- [155] A valuation report prepared by Donald Spence described Morningstar's projects as generally falling into three types. The first are commercial projects, which involve assisting with advertising campaigns, company branding and media and public relations activities. This type of project is typical of the work of an advertising/media relations firm. The second type of project is the fundraising projects. In these projects, Morningstar works with not-for-profit organizations to assist with fundraising activities for single projects or to assist with the set up of self-funding programs. The final type of project is described as the Robert Bateman Gettoknow project. Ms. Krupa formed a relationship with Robert Bateman in the late 1990s. Through Morningstar, Ms. Krupa worked with Mr. Bateman on a number of projects to further his work to help children learn about and respect wildlife. These projects include an art and writing contest and Bateman calendars that are sold to corporate sponsors across Canada.
- [156] The parties agreed and I find that MacArthur and Morningstar are family assets. The first issue with respect to the valuation of these assets is the valuation date. I agree with the submission of counsel for Mr. Krupa that the date of trial is the most appropriate date and that the valuation information that is closest to that date is the valuation dated December 30, 2006.

- [157] Kevin Crookes provided an expert opinion that the en bloc fair market value of the shares of both companies as at December 31, 2006, is in a range of \$983,000 to \$1,020,000. One issue with this valuation is an adjustment that Mr. Crookes made to normalize the earnings before interest taxes, depreciation and amortization ("EBITDA"). Mr. Crookes made the adjustment to adjust for what he describes as a one-time abnormal fluctuation, resulting in an increase in the 2006 earnings of \$185,397.
- [158] Donald Spence stated that in his opinion the normalizing adjustment was not appropriate. His report dated October 1, 2007, dealt with issue as follows at paras. 11-14: In the 2007 GT Report, Mr. Crookes highlights that revenue recorded by Morningstar during fiscal 2006 substantially increased to \$1.5 million from \$864,000 during fiscal 2005 and the gross profit percentage (or 'gross margin') recorded during fiscal 2006 was lower than the gross margin generated in the fiscal years 2002 through 2005 as shown below:
- | | 2006 | 2005 | 2004 | 2003 | 2002 |
|----------------------------------|-------|-------|-------|-------|-------|
| Gross Profit Margin, as recorded | 47.8% | 61.5% | 69.5% | 68.5% | 75.1% |
- Mr. Crookes was unable to explain the decrease in the gross margin presumably due to his limited scope of review (i.e. no discussions with Ms. Krupa nor access to the financial records of the Companies) and artificially adjusted the fiscal 2006 results to reflect a gross margin of 60% (more consistent with prior years). This resulted in an artificial increase in the 2006 earnings of \$185,397 as calculated at Schedule 3 of the 2007 GT Report. The impact of this increase in 2006 earnings is an increase in maintainable EBITDA adopted by Mr. Crookes (Mr. Crookes' maintainable EBITDA are simple average and weighted average arithmetic calculations) of \$50,000 to \$60,000. However, based on our discussions with Ms. Krupa, the significant increase in revenue generated during fiscal 2006 and the decrease in gross margin in 2006 was primarily due to a significant increase in low-margin "media buys" made on behalf of clients. We understand Morningstar agreed to do the "media buys" on a short-term basis to maintain client relations with primarily two customers. We have been advised by Ms. Krupa that the "media buys" generated a markup of 0% to 10% of the cost to purchase the media. To isolate the revenues and expenses attributed to these unusually large media buys we assumed Morningstar generated a profit margin of approximately 5% of the total 2006 "media buys", as set out below: (in 000's, except percentages)
- | | 2006 As Reported | Attributed to Media Buys | Normal Operations |
|-------------------------------|------------------|--------------------------|-------------------|
| Revenue | \$ 1,518 | \$ 441 | \$ 1,077 |
| Cost of Sales | 793 | 419 | 374 |
| Gross Profit | \$ 725 | 22 | \$ 703 |
| Gross Profit Margin, adjusted | 47.8% | 5.0% | 65.3% |
- A similar analysis of prior years can be summarized as follows:
- | | 2006 | 2005 | 2004 | 2003 | 2002 |
|-------------------------------|------|------|------|------|------|
| Gross Profit Margin, adjusted | 65% | 71% | 76% | 71% | 76% |
- Based on the analysis above, it appears that the gross margin generated from normal operations during fiscal 2006 was in excess of Mr. Crookes' normalized gross margin conclusion of 60% and not materially different from the gross margin generated during prior years. Accordingly, the adjustment made by Mr. Crookes to increase the gross profit during fiscal 2006 overstates the earnings of Morningstar, particularly as it relates to "Normalized EBITDA". Had Mr. Crookes not artificially increased 2006 earnings, his conclusion would have been lower by approximately \$130,000 to \$140,000... [footnotes omitted]

- [159] The approach taken by Mr. Spence with respect to this issue is consistent with the evidence of Ms. Krupa with respect to the media buys. I find that the normalizing adjustment to the 2006 earnings was not appropriate. Accordingly, the range of fair market value of the shares absent the adjustment is \$843,000 to \$890,000.
- [160] A second difference between the opinions of Mr. Spence and Mr. Crookes concerns the impact that portion of revenue that is not reasonably commercially transferable to a third party, either because it is non-recurring in nature or because it is tied to the personal relationship between Ms. Krupa and Mr. Bateman, has on the value. Mr. Spence was of the view that this factor should result in a significant reduction in the fair market value of the shares. Mr. Crookes acknowledged that the business is highly dependent upon Ms. Krupa and that its revenue is generated mainly from one-time projects. He assumed, however, that the company's track record of profitability could be maintained if the current managers sold the business and a new management team was installed.
- [161] I have concluded that the business is not as fragile as Ms. Krupa suggested in her evidence. The vulnerabilities she outlined and those referred to by Mr. Spence suggest that the lower value in Mr. Crooke's opinion is the appropriate choice. Accordingly, I find that the fair market value of the shares of Morningstar and MacArthur is \$843,000.
- [162] Ms. Krupa's counsel submits that the shares should be valued taking into account the tax treatment on a sale. Counsel for Mr. Krupa submits that as there is no evidence that Ms. Krupa intends to do other than continue to operate the business, tax on a sale should not be taken into account. I agree with the submission of counsel for Mr. Krupa and make no deduction for tax.
- [163] Finally, counsel for Ms. Krupa seeks a reapportionment of Morningstar and MacArthur of 65% in favour of Ms. Krupa. Counsel submits that Ms. Krupa's sole support is derived through Morningstar. The service provided by Morningstar is uniquely dependent on Ms. Krupa and her ability to keep the business going. Ms. Krupa is now 49 years old. She does not have employment, but must provide services and generate her own income through the business. She does not have a pension plan as does Mr. Krupa through his employment with the University of Alberta. Ms. Krupa has been the major contributor to the support of the children in their day to day care and their special and extraordinary expenses for the last three and a half years with little contribution from Mr. Krupa. Ms. Krupa's evidence is that notwithstanding little support from Mr. Krupa, she created the business Morningstar. It is submitted that this company has been successful due to their determination and talents. Ms. Krupa's evidence is that there was no direct family contribution to the creation of Morningstar.

- [164] I have considered the factors enumerated in s. 65 of the Act and conclude that an equal division of Morningstar and MacArthur would not be unfair. In particular, I have regard to the length of the marriage and the financial contributions of Mr. Krupa to the family that indirectly assisted Ms. Krupa in developing her business in the early years. During the marriage these parties were in every sense equal partners. An equal division reflects their relationship during those years and is consistent with the principles of the Act.
- [165] There will be an order vesting ownership of Morningstar and MacArthur in Ms. Krupa. There will be a compensation order in favour of Mr. Krupa in the amount of \$421,500.
Krupa R&D
- [166] Krupa R&D is the company through which Mr. Krupa performs his contract work. He has estimated the value of the assets of the company at \$3,000. There will be an order vesting ownership of the shares in Krupa R&D in Eugene Krupa. There will be a compensation order in favour of Mary Krupa in the amount of \$1,500. Vehicles, Household Goods and Other Assets
- [167] At the time of separation, Mr. Krupa retained the 2000 Honda Odyssey van and the 1992 Coleman tent trailer. Ms. Krupa ascribed a value of \$30,000 to these items at the time. Ms. Krupa retained the 1990 Toyota Celica to which she ascribed a value of \$3,000.
- [168] Mr. Krupa asserts that the household goods that form the Kelowna residence have not been finally divided or that the current state of affairs is unfair to him. Ms. Krupa asserts that the household goods from the Kelowna residence have been fairly divided. She agrees that she took a greater share, largely to provide for furniture for the children.
- [169] The parties own some Cytovax (SPI) shares which both agree should be equally divided. There will be an order that the Cytovax shares will be equally divided.
- [170] There are two Lyman prints to be divided. There will be an order that Ms. Krupa will retain the Mountain print and Mr. Krupa will receive the Moose print.
- [171] With respect to the balance of the accounts, vehicles, household goods and furnishings, I direct that each party will retain sole ownership and exclusive possession of the goods in their respective possession. There will be no compensation order. In my view, while there may have been an imbalance in the division of the furnishings, this was evened out by the imbalance in the value of the vehicles each retained on separation. cUSTODY,
GUARDIANSHIP AND ACCESS
- [172] The parties have consented to an order for joint custody and guardianship of Jeffrey and Timothy and to a schedule for shared parenting for these two younger children. The terms of the agreement, which will be embodied in the order of the court, are set out in Appendix A. CHILD SUPPORT

- [173] From the time of separation until 2007, all four children have resided with Ms. Krupa. Commencing in February 2007, Timothy began an alternate week schedule that amounts to shared custody for the purposes of child support. In June 2007, Jeffrey also began a four week schedule that amounts to shared custody for the purpose of calculation of child support. The two older children continue to reside with Ms. Krupa. Mr. Krupa has made only sporadic and modest contributions to child support. Ms. Krupa claims retroactive child support from the time of separation. Income - Eugene Krupa
- [174] There is an issue with respect to Mr. Krupa's income. Both parties agree that the line 150 income as reported on his income tax returns is not an accurate reflection of his available income for the purposes of child support. The parties differ with respect to the determination of his income. Ms. Krupa's position is that Mr. Krupa's income must be increased to reflect:
- that Mr. Krupa is intentionally under-employed or unemployed (s. 19(a) of the Federal Child Support Guidelines, S.O.R./97-175 (the "Guidelines"));
 - that he has diverted income (s. 19(d) of the Guidelines);
 - that Mr. Krupa failed to provide income information when requested and when under a legal obligation to do so (s. 19(f) of the Guidelines); and
 - that Mr. Krupa unreasonably deducts expenses from income (s. 19(g) of the Guidelines).
- [175] Section 9 of Schedule III of the Guidelines states that where a parent's net self-employment income is determined by deducting an amount for salaries, benefits, wages or management fees, or other payments paid to or on behalf of persons with whom the parent does not deal at arms length, that amount should be included in income.
- [176] The following table summarizes Mr. Krupa's line 150 income as reported in his tax returns, the income that the plaintiff proposes be imputed for each year and the income Mr. Krupa concedes reflects his available income for purposes of child support: Line 150 Income
Proposed Imputed Income Available Income 2003 \$65,576.63 \$ 99,528.79 \$92,391 2004 \$65,268.71 \$102,627.90 \$94,028 2005 \$61,179.91 \$101,629.04 \$70,482 2006 \$64,466.87 \$100,498.56 \$80,704 2007 \$116,600.00 \$80,704
- [177] There were several noteworthy features with respect to the expenses claimed by Krupa R&D. Mr. Krupa acknowledged that he charged his legal fees incurred in relation to this litigation as a business expense, possibly in the management and administration category. He was paid a mileage allowance as part of the contracts with Interior Health. Moreover, the motor vehicle expenses and travel claimed were largely in relation to trips to Edmonton that were not undertaken as part of the work of Krupa R&D. He was not able to say with any degree of certainty what made up the "other" expenses, but believed that it would include meals out of town while on his trips to Edmonton. Significant portions of the salaries were amounts allocated to his children. There was no evidence of any work done by the children. In addition, Mr. Krupa transferred these amounts to his own bank accounts. He later

characterized these transactions as loans.

- [178] Between 1996 and 2002, the contract work performed through Krupa R&D was a substantial and increasing component of Mr. Krupa's income. The income from that source dropped off substantially after the parties separated while expenses attributed to the company increased. Mr. Krupa explained that in recent years he decided to back off the contract work and explore opportunities for full-time employment in the Okanagan because he was tired of all the travel. However, the expenses claimed in 2005 and 2006 included trips to Australia, London, Berlin, California, Hong Kong and Africa. He suggested that these trips were connected to his contract work, but this seems inconsistent with his stated desire to concentrate on finding full-time employment in the Okanagan.
- [179] Mr. Krupa suggested that the decline in contract work was offset by an increase in income from employment. However, that is not what is reflected in his tax returns, which show income from employment as follows: 2003 \$49,887.50 2004 \$56,813.50 2005 \$47,165.04 2006 \$56,612.97
- [180] During the same period the business income reported in his tax returns was as follows: 2003 \$ 3,342.22 2004 (\$14,769.13) 2005 (\$ 6,637.18) 2006 (\$11,303.69)
- [181] Subsection 19(1)(g) of the Guidelines provides for the imputation of income where "the spouse unreasonably deducts expenses from income". I am satisfied that is the case with respect to Mr. Krupa's reported income from Krupa R&D. Attached as Appendix B is a schedule setting out what I find Mr. Krupa's business income to be after adding back the portion of the expenses claimed by Krupa R&D that I have concluded were unreasonably deducted from income. Imputed Income
- [182] Counsel for Ms. Krupa submits that employment income of \$80,000, the equivalent to a salary for a full-time professor, should be imputed to Mr. Krupa for 2005, 2006 and 2007. Counsel for Mr. Krupa does not take issue that an award for retroactive child support is appropriate, but submits that it is inappropriate to impute income for purposes of an order for the payment of retroactive child support. In counsel's submission the imputation of income would be inconsistent with the policy reflected in *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37, [2006] 2 S.C.R. 231 [DBS].
- [183] The objectives of the Guideline, which are stated in s. 1, are:
- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
 - (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
 - (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

(d) to ensure consistent treatment of spouses and children who are in similar circumstances.

[184] In DBS, the majority stated at para. 127 that While the Divorce Act provides courts with discretion in deciding whether or not a child support award should be ordered, the same cannot be said for the quantum of this award. Both s. 15.1(3) for original orders, and s. 17(6.1) for variation orders, stipulate that a court making an order "shall do so in accordance with the applicable guidelines". Therefore, so long as the date of retroactivity is not prior to May 1, 1997 - i.e., when the Guidelines came into force - the Guidelines must be followed in determining the quantum of support owed.

[185] Subsection 19(1)(a) of the Guidelines provides that the court may impute income where the spouse is intentionally under-employed or unemployed, absent circumstances not applicable in the case at bar. I am satisfied that it is appropriate and consistent with both the Guidelines and the decision of the Court in DBS to impute income where the spouse has been found to have been intentionally under-employed or unemployed in the context of a retroactive award. I am also satisfied that Mr. Krupa has been intentionally under-employed during the years 2005 - 2007 inclusive. As Huddart J.A., speaking for the court in *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43, stated at para. 18: Under s. 19(1)(a) of the Guidelines, the important question is whether the payor spouse has demonstrated an intention to be underemployed, with the consequence that his children do not benefit from his potential earning capacity. This does not mean a parent must work the long hours Ms. Barker puts in to earn her significant income. It does mean that a parent who chooses to work less than a regular work week must justify that choice by the needs of the children or suffer the loss personally. He cannot effectively transfer part of the cost of that choice to his children.

[186] The next question is what combination of employment and business income would reflect Mr. Krupa's earning capacity. In Appendix C, I calculate the income from employment and business reflecting the amounts adjusted for expenses unreasonably deducted. The rounded total for 2002 is \$83,000. The same process yields \$80,000 for 2003 and \$73,000 for 2004. I conclude that the average of these amounts, \$79,000, is an appropriate figure to represent Mr. Krupa's earning capacity from employment and business income for the years 2005 - 2007 inclusive.

[187] Both counsel attributed the net farm income and net Namao rental income to Mr. Krupa. However, since I have concluded that Mr. Krupa must account to Ms. Krupa for her share of that income, it is not appropriate to include that portion as part of his income. Appendix D sets out the calculation of income for the purposes of child support for the years 2003 - 2007 reflecting all of these adjustments. The totals are: 2003 \$89,832.23 2004 \$89,667.06 2005 \$90,204.23 2006 \$89,270.98 2007 \$97,300.00 Income - Mary Krupa

[188] Mr. Krupa takes the position that income should be imputed to Ms. Krupa to account for all the funds that were retained in Morningstar and MacArthur, including adding back an amount in relation to amortization. In my view, that is not the appropriate course to take.

First, from separation until 2007, the children have been with Ms. Krupa and with the limited exception of a few payments in 2004 Mr. Krupa has not paid child support. For those years, imputing income to Ms. Krupa would not make more child support available to the children. It would simply have the effect of reducing the amount Mr. Krupa has to contribute with respect to extraordinary expenses. Ms. Krupa's income has been available to the children during those years. Therefore, imputing income to her would not further the objectives of the legislation.

[189] Further, the funds at issue are family assets and have been retained in Morningstar and MacArthur. As a result of the disposition made in this litigation with respect to the division of family assets, Mr. Krupa has received an equal share of those assets. It would be inappropriate to treat those same funds as income in Ms. Krupa's hands for purposes of the calculation of child support. It is, however, appropriate to account for Ms. Krupa's share of the farm income and Namao rent. Accordingly, I find Ms. Krupa's income for purposes of child support determined from her line 150 income and the amounts for farm income and Namao income set out above for the years 2003 - 2007 inclusive to be as follows:

- (a) 2003 - $\$43,512.79 + \$2,531.57 - \$46,044.36$;
- (b) 2004 - $\$51,397.46 + \$6,979.99 + \$5,796.78 + \$1,282.50 = \$65,456.73$;
- (c) 2005 - $\$90,404.92 + \$2,852.84 + \$6,594.98 = \$99,852.74$;
- (d) 2006 - $\$73,168.21 + \$2,876.10 + \$6,010.51 = \$82,054.82$; and
- (e) 2007 - $\$75,000^* + \$10,800 + \$7,500 = \$93,300$ (*2007 income estimated to be approximately the same as the previous year). Retroactive Support

[190] In DBS, Bastarache J., speaking for the majority, emphasized that each case must be determined on its own particular facts, balancing the interest of the payor parent in certainty with the need for fairness to the child and flexibility. The court should consider the reason for any delay in seeking support, the conduct of the payor parent, the past and present circumstances of the child, including the needs at the time support should have been paid, and whether a retroactive award might entail hardship.

[191] The parties agree, and I find, that all four children remain children of the marriage. Mr. Krupa does not take issue that an award of retroactive child support, based upon Guideline income, for four children is appropriate in the circumstances. His contention is that the amount he owed Ms. Krupa for child support is offset by the amounts she should have been paying him in spousal support. I will deal later with the issue of spousal support.

[192] I find, considering the reason for any delay in seeking support, the conduct of the payor parent, the past and present circumstances of the child, including the needs at the time support should have been paid, and whether a retroactive award might entail hardship, that an order for child support retroactive to the date of separation is appropriate in the circumstances.

- [193] In particular, I find that there was no delay on the part of Ms. Krupa in raising the issue. Mr. Krupa had effective notice from the date of separation that child support was an issue. Mr. Krupa's views with respect to the spousal support to which he believes he is entitled, and his anger at Ms. Krupa over her conduct with respect to the earnings of Morningstar, do not justify withholding child support. While the children were not in need this is not in itself a basis to deny an application for a retroactive award. Finally, there is no evidence that such an order would result in any hardship.
- [194] In determining the quantum of retroactive child support, the shared custody arrangement for the two younger children must be considered. From February 2007, Timothy has been in a shared custody regime in which he spends more than 40% of his time with Mr. Krupa. Jeffrey has been in a similar situation since June 2007. When dealing with shared custody situations beyond this threshold, a court is to apply s. 9 of the Guidelines which states:
9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
 - (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [195] The Supreme Court of Canada in *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217 [Contino], clarified the approach to be taken by courts in the application of this provision. The first step in the analysis, after a court is satisfied that the 40% threshold has been met, is to consider the Table amounts for each parent. In this case the respective incomes of the parties for the year 2007 are approximately equal, hence the Table support in relation to the children in the shared custody arrangement would be off-set.
- [196] However, as the majority stated in *Contino*, the simple set-off serves as the starting point and not the end point of the analysis. The set-off amount must be viewed in light of an examination of the continuing ability of the recipient parent to meet the needs of the child or children. A court must consider the budgets and child care expenses of each parent. It must be mindful of the fact that the total cost of raising children in shared custody situations may be greater. It must recognise that many costs are fixed. A court should consider the evidence with respect to budgets and child care expenditures of both parents and should apportion the expenditures between the parents in accordance with their incomes.
- [197] Considering the factors identified in s. 9 of the Guidelines and the considerations outlined by the Court in *Contino*, in the present case I have concluded that the appropriate order is that neither party will pay child support to the other with respect to the child or children who are in the shared custody arrangement. In reaching this conclusion, I have considered

Ms. Krupa's submissions that given the history of Mr. Krupa not paying child support and withholding joint income, and retaining funds such as the dental insurance refund, it is unlikely he will cooperate and be voluntarily responsible for his share of the children's expenses, and also that Ms. Krupa seeks ongoing child support for Jeffrey and Timothy pursuant to the Guideline amount. Mr. Krupa's history with respect to payment of child support has been very poor; however, I am not prepared to conclude that he will not obey an order of the court.

[198] An order for retroactive child support will be made based on the Table amounts corresponding to Mr. Krupa's income for Guideline purposes, set-out in Appendix D, and based on the number of children residing primarily with Ms. Krupa. There will be an order that Mr. Krupa pay retroactive child support to the date of separation as follows:

- (a) 6 months 2003 - \$1,740 per month for 4 children = \$ 10,440
- (b) 2004 - \$1,739 per month for 4 children = \$ 20,868
- (c) 2005 - \$1,746 per month for 4 children = \$ 20,952
- (d) 4 months 2006 - \$1,733 per month for 4 children = \$ 6,932 8 months 2006 (based on Table amounts in force May 1, 2006) - \$2,019 per month for 4 children = \$ 16,152
- (e) 2 months 2007 - \$2,175 per month for 4 children = \$ 4,350 4 months 2007 - \$1,830 per month for three children = \$ 7,320 6 months 2007 - \$1,410 per month for two children = \$ 8,460
- (f) 3 months 2008 - \$1,410 per month for two children = \$ 4,230 Total: \$99,704 From this must be deducted the amount paid, that being \$1,360 for eight months, a total of \$10,880, for a total amount of retroactive child support of \$88,824. Extraordinary and Special Expenses

[199] Both parties have submitted claims in relation to special and extraordinary expenses for the period from separation to trial. The special and extraordinary expenses claimed by Ms. Krupa total \$58,916.46 to June 2007. Mr. Krupa's claims total \$56,411.23 to the end of 2006.

[200] The first difficulty encountered is that the claims of neither party correspond to the amounts reflected in the Form 89 Financial Statements that the parties have sworn and filed to date in these proceedings. Ms. Krupa filed three Form 89 Financial Statements in these proceedings, dated March 2004, July 2005 and July 2007. The following chart summarizes the differences between the amounts claimed under this category in the Form 89 with the claim made at trial: Mary Krupa Form 89 Trial \$ 271.49 (2003) March 2004 \$ 4,950.00 \$10,975.89 (2004) July 2005 \$ 4,950.00 \$15,089.84 (2005) July 2007 \$17,468.16 \$22,181.37 (2006) \$10,397.87 (6 mo. 2007)

- [201] Mr. Krupa also filed three Form 89 Financial Statements dated June 2004, September 2005 and August 2007. The following chart sets out the differences between what was reflected in the Form 89 and claimed at trial for 2003, 2004 and 2005: Eugene Krupa Form 89 Trial June 2004 2003 \$11,379.25 Joel \$ 4,056.06 Joy Anne 3,066.50 Timothy 6,056.00 Jeffrey 2,490.00 Total \$15,668.56 2004 \$20,285.56 September 2005 Joel \$ 4,593.20 Joy Anne 3,743.50 2005 \$14,952.49 Timothy 7,046.20 Jeffrey 2,805.20 Total \$18,188.10
- [202] Mr. Krupa's August 2007 Form 89 Financial Statement contained a restatement of special and extraordinary expenses that correspond to neither the earlier Form 89 statements or to the claim at trial. The Form 89 now stated: Summary Name & DOB 2003 2004 2005 2006 2007 (incomplete) Joel Russell Krupa April 23, 1987 (now 20) Grade 10&11 Grade 11&12 Grade 12 & Uni 1 Uni 1&2 Uni 2&3 Total 1,573.94 5,342.23 2,676.83 3,935.32 7,128.74 Joy Anne Helen Krupa October 11, 1988 (now 18/19) Grade 9&10 Grade 10&11 Grade 11&12 Grade 12 & Uni 1 Uni 1 & Uni 2 Total 2,155.01 1,611.16 605.16 4,790.45 6,206.74 Timothy Eugene Krupa August 12, 1991 (now 16) Grade 6&7 Grade 7&8 Grade 8&9 Grade 9&10 Grade 10&11 Total 2,632.57 5,946.92 5,021.63 2,470.38 1,456.60 Jeffrey Daniel Alexander Krupa June 23, 1995 (now 12) Grade 2&3 Grade 3&4 Grade 4&5 Grade 5&6 Grade 6&7 Total 1,453.16 2,165.40 1,913.59 2,717.29 2,086.28 *Med/Dent Insurance for 4 3,246.40 3,246.40 3,246.40 3,619.20 3,619.20 Grand Total 11,061.08 18,312.11 13,463.61 17,532.64 20,017.46 *Med/dent ins. = MSP + extended medical 2003 1296 + 2856 = \$4,058 x 1/5 = 811.60 or 3246.40 2004 2005 2006 1296 + 3228 = 4524 x 1/5 = 904.80 or 3619.20 2007 This is consistent with neither the earlier Form 89 claims nor with the amounts claimed at trial. The claim at trial with respect to 2006 was \$9,793.93.
- [203] There are additional curiosities. In the August 2007 Form 89, Mr. Krupa claims \$1,500, \$3,000 and \$3,000 for Joel for post-secondary expenses for 2005 - 2007 described as "through RESP and special fund". He made similar claims of \$1,500 and \$3,000 for 2006 and 2007 for Joy Anne. It is clear on the evidence that Mr. Krupa did not contribute to Joel and Joy Anne's post-secondary expenses during those years, nor did he purchase RESPs during those years. The "special fund" appears to relate to his belief that Ms. Krupa's mother had set aside funds for the children's post-secondary education. There was no evidence of the existence of such a fund. Of course, even if there were such a fund, it is hard to see how that would translate into an extraordinary expense for which Mr. Krupa could be reimbursed.
- [204] As an aside, I note that Anne Krupa did very generously establish RESPs for the children's post-secondary education. However, she has not been prepared to use them for that purpose. Her evidence at trial on this point was that "it is not my problem". I take this as a sad reflection of how all the parties have allowed the breakdown of the marriage and ensuing litigation to poison their relations and erode the former spirit of generosity and mutual respect.

- [205] The claims of both parties contain many items that are not extraordinary expenses under the Guidelines. For example, Ms. Krupa includes a claim for \$3,000 in relation to a car for Joel. The car was the one that she took on separation and then later transferred to Joel who was and is living at home with her. While Joel may very well benefit from having a car to drive to his classes, there was no need to transfer ownership of the car to him to achieve this benefit. Mr. Krupa's claim includes items such as rental fees for videos, movie tickets and gifts.
- [206] In the circumstances, I have concluded that I am not prepared to make an order for retroactive special and extraordinary expenses in favour of either party. Child Support Going Forward
- [207] Mr. Krupa will continue to pay child support of \$1,410 per month for two children. The parties will split the special and extraordinary expenses 50/50. The parties will send their complete income tax returns with attachments to the other party by May 30 of each year. Absent further order of the court, the child support obligations will be based upon the greater of the line 150 income or the income imputed by the Court in these reasons. Spousal Support
- [208] Mr. Krupa seeks an order for spousal maintenance in the amount of \$1,013 calculated at the mid-range of the Spousal Support Advisory Guidelines. In addition, Mr. Krupa seeks an order for retroactive maintenance. In support of the claim, counsel for Mr. Krupa emphasizes the length of the marriage and the disparity in incomes between the parties. Counsel notes that the question of need must be addressed in light of the length of the marriage and the disparity in income. Counsel submits that as this was a long marriage, Mr. Krupa has a strong claim to enjoy an equal standard of living on the dissolution of the marriage.
- [209] Counsel submits on behalf of Ms. Krupa that Mr. Krupa has not established entitlement to any spousal support, either prospective or retroactive.
- [210] An application for spousal support is dealt with in s. 15.2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) which provides, in part: Spousal support order 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 ... 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. ... Terms and conditions
- (3) The court may make an order under subsection (1) ... 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. Factors
- (4) In making an order under subsection (1) ... 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 subsection (1) ... 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.

[211] All objectives in s. 15.2(6) must be taken into account, and no single one is paramount: *Moge v. Moge*, [1992] 3 S.C.R. 813. The Supreme Court of Canada in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, recognized three conceptual grounds for entitlement to support: compensatory, non-compensatory or needs-based, and contractual.

[212] In *Moge*, Madam Justice L'Heureux-Dubé described the purpose of spousal support under the Divorce Act as follows at 848-49: the purpose of spousal support is to relieve economic hardship that results from "marriage or its breakdown". Whatever the respective advantages to the parties of a marriage in other areas, the focus of the inquiry when assessing spousal support after the marriage has ended must be the effect of the marriage in either impairing or improving each party's economic prospects.

[213] In *Rattenbury v. Rattenbury*, 2000 BCSC 722, Romilly J. described the compensatory ground of entitlement for spousal maintenance in the following terms at para. 102: Compensatory maintenance is premised on the notion that the financial costs to a spouse of economic opportunity lost as a result of a joint decision for one spouse to remain at home and raise children should be borne equally by the spouses upon marriage breakdown.

[214] In *Bracklow*, Madam Justice McLachlin, as she then was, described the contractual basis in the following terms at para. 38: The contractual or consensual basis for support finds its source in s. 89(1)(b) of the Family Relations Act, which counsels courts to "hav[e] regard to . . . (b) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other", and s. 15.2(4) of the Divorce Act ("In making an order under subsection (1) . . . , the court shall take into consideration . . . (c) any order, agreement or arrangement relating to support of either spouse"). Consensual

considerations may either create or negate an obligation to support, under appropriate circumstances.

- [215] The non-compensatory basis for entitlement is described as needs based in that same decision as follows at para. 43: But while the focus of the Act may have shifted or broadened, it retains the older idea that spouses may have an obligation to meet or contribute to the needs of their former partners where they have the capacity to pay, even in the absence of a contractual or compensatory foundation for the obligation. Need alone may be enough.
- [216] Considering these factors in the circumstances of the present case, I conclude that Mr. Krupa is entitled to neither a retroactive nor prospective order for spousal support. There is no suggestion of any order, agreement or arrangement between the parties for the payment of spousal support by Ms. Krupa. Mr. Krupa is self-sufficient. He has not established any need.
- [217] During the marriage, Mr. Krupa was supported and encouraged by Mary Krupa to continue his post-secondary education. By contrast, Ms. Krupa put aside her own desire to pursue graduate studies. Her teaching career was interrupted after she suffered a miscarriage. She then started and developed what became a very successful business arising out of her volunteer activities. While doing this she remained the homemaker. While both parties were active and involved parents, Ms. Krupa was throughout the marriage the parent charged with organizing the family and making the complex schedules of parents and four active children work.
- [218] The focus of both parties, particularly in the early years of the marriage was on Mr. Krupa's education and career. Mr. Krupa's attitude to and support for his wife's endeavours were lukewarm. He testified that he did not stand in the way of her working. However, Mr. Krupa also stated that the fact that Ms. Krupa was pursuing a career and the time and energy she devoted to her career was one of the continuing sources of conflict in their marriage.
- [219] I conclude that Mr. Krupa did not experience economic disadvantage during the marriage. Nor has he experienced economic disadvantage in the wake of its dissolution. His lifestyle has not deteriorated since the separation. Because Ms. Krupa was stockpiling the earnings of Morningstar within the company, Mr. Krupa did not enjoy the benefits of those funds during the marriage. He will now receive his share of those funds through the division of the asset.
- [220] Mr. Krupa has benefited from the considerable generosity of his parents while he was attending school and throughout his adult life. Remarkably and regrettably, in the wake of the separation, he has chosen a very different course with his own children, having chosen to make only the sporadic and minimal contributions to their maintenance that I have described earlier in these reasons. Until 2007, all four children were living with Ms. Krupa. She has borne the financial consequences of the limitations and demands arising from custody of the children that are discussed in *Moge*, in addition to bearing the majority of

the direct costs. In this respect, it is Ms. Krupa who has born the economic disadvantages of the breakdown of the marriage.

[221] This is not a case of economic hardship. Both parties are gainfully employed and are earning good incomes. The division of assets will leave both financially secure. While Mr. Krupa's present earnings are less than those of Ms. Krupa, this is in part the result of his decision to be selective in his search for employment, focusing his efforts on finding work about which he is passionate. In addition, Ms. Krupa's present level of income is vulnerable in that her present client base and profitability is largely dependent upon her relationship with Mr. Bateman.

[222] In the result, Mr. Krupa's claim for retroactive and prospective spousal support is dismissed. Neither spouse will pay spousal support to the other. SUMMARY

[223] In the result, I have made the following orders: Family Assets

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

- (a) the 154-acre property at Legal Alberta registered in the joint names of Eugene and Mary Krupa;
- (b) the 80-acre property at Legal Alberta registered in the joint names of Anne and Eugene Krupa;
- (c) the property located in Namao Alberta registered in the names of Eugene and Mary Krupa;
- (d) the property at Mission Springs, Kelowna registered in the name of Mary Krupa and reapportioning 100% of the interest in the property to Mary Krupa;
- (e) the entitlement to royalty income arising from the McGraw Hill and Thompson textbook projects;
- (f) the RRSP's registered in the names of Eugene and Mary Krupa;
- (g) the Alberta Teachers pension to which Eugene and Mary Krupa are entitled;
- (h) Eugene Krupa's pension with the University of Alberta;
- (i) Eugene and Mary Krupa's Canada Pension Plan credits;
- (j) Morningstar Enterprises Ltd. and MacArthur Ventures Ltd.
- (k) Krupa R&D
- (l) shares in Cytovax (SPI);
- (m) two Lyman prints; and
- (n) household goods, furnishings, vehicles and bank accounts in the names of Eugene and Mary Krupa.

[225] A declaration that the property located at Landie Road, Kelowna registered in the name of Anne Krupa is not a family asset. The claim of Mary Krupa for an interest in the Landie Road property is dismissed.

[226] Orders that:

- (a) Ms. Krupa will transfer her interest in the 154 acres to Mr. Krupa; an order vesting Mr. Krupa with ownership of the 154 acres and a compensation order to Ms. Krupa in the amount of \$178,024.
- (b) Mary Krupa has no interest legal or beneficial in the 80 acres registered in the names of Eugene and Anne Krupa and a compensation order to Mary Krupa in the amount of \$72,478.
- (c) Mary Krupa will transfer her interest in the Namao property to Eugene Krupa, an order vesting Mr. Krupa with ownership of the Namao property, a compensation order in Ms. Krupa's favour in the amount of \$297,000 and an order that Mary Krupa shall be entitled to attend the Namao property and remove all items inherited from her family and one-half of the remaining household items that are in storage.
- (d) A compensation order to Ms. Krupa in the amount of \$26,041 in relation to the Krupa Agricultural Products income and an order that Ms. Krupa will have no further interest in or entitlement to income from Krupa Agricultural Products.
- (e) A compensation order in the amount of \$32,657 in favour of Ms. Krupa in relation to income from the Namao lands up to the end of 2007 and an order that Mr. Krupa will provide Mary Krupa with her share of the rental income from the Namao property for 2008 until the date of the transfer of ownership.
- (f) A compensation order in the amount of \$1,500 in favour of Mary Krupa in relation to the Baytex payments and an order that Mary Krupa will have no further interest in or entitlement to the Baytex payments.
- (g) A compensation order in the amount of \$38,000 in favour of Eugene Krupa in relation to 50% of the funds from the Greenline account used to purchase the Mission Springs property.
- (h) A compensation order in the amount of \$37,215 in favour of Mary Krupa in relation to 50% of funds advanced to Anne Krupa in June 2003 and the balance in Eugene Krupa's bank account as of June 30, 2003.
- (i) A compensation order in the amount of \$2,843 in favour of Mary Krupa in relation to the Thompson royalty payments and an order that Eugene Krupa make the necessary arrangements for Mary Krupa to receive her share of the royalties directly from the publisher.
- (j) RRSP's in the names of each of Eugene and Mary Krupa shall be divided with a spousal rollover of \$4,690 from Mary Krupa to Eugene Krupa.

- (k) Registered pensions, being the Alberta Teachers' Pensions for each of Eugene and Mary Krupa and the University of Alberta Pension in the name of Eugene Krupa be divided pursuant to the legislation, with a commencement date of August 23, 1980 and an entitlement date of July 1, 2003.
 - (l) Canada Pension Plan credits of Eugene and Mary Krupa be divided pursuant to the legislation with a commencement date of August 23, 1980 and an entitlement date of July 1, 2003.
 - (m) Vesting ownership of Morningstar and MacArthur in Ms. Krupa and a compensation order in favour of Mr. Krupa in the amount of \$421,500.
 - (n) Vesting ownership of Krupa R&D in Eugene Krupa and a compensation order in favour of Mary Krupa in the amount of \$1,500.
 - (o) Cytovax (SPI) shares be equally divided.
 - (p) Mary Krupa will retain the mountain Lyman print and the Eugene Krupa will receive the moose Lyman print.
 - (q) With respect to the balance of the accounts, vehicles, household goods and furnishings, Eugene and Mary Krupa will each retain sole ownership and exclusive possession of the goods in their respective possession. Custody, Guardianship and Access
 - [227] A declaration that there are four children of the marriage: Joel, born April 23, 1987; Joy Anne, born October 11, 1988; Timothy, born August 12, 1991; and Jeffrey, born June 23, 1995.
 - [228] An order for joint custody and guardianship and shared parenting for Timothy and Jeffrey in the terms set out in Appendix A. Child Support
 - [229] An order for retroactive child support from July 1, 2003 in the amount of \$88,824 payable by Eugene Krupa to Mary Krupa.
 - [230] An order that Mr. Krupa will pay \$1,410 per month child support for Timothy and Jeffrey. The parties will split the special and extraordinary expenses 50/50. The parties will send their complete income tax returns with attachments to the opposite party by May 30 of each year. Absent further order of the court, the child support obligations will be based upon the greater of the line 150 income of the income imputed by the court in the these reasons. Spousal Support
 - [231] An order dismissing Eugene Krupa's claim for spousal support. Neither Mary Krupa nor Eugene Krupa will pay spousal support to the other. Counterclaim of Anne Krupa
 - [232] The claim of Anne Krupa is dismissed. COSTS
 - [233] The parties are at liberty to make submissions with respect to the issue of costs. "Ross J."
- APPENDIX "A" Terms of Agreement

1. Timothy Krupa will be entitled to make arrangements regarding his time with either parent, including holiday times.
2. The Plaintiff and Defendant shall have joint custody of Jeffrey Krupa and Timothy Krupa.
3. Guardianship - guardianship terms as follows will be incorporated into the Order. The Plaintiff and Defendant shall have joint guardianship of the children, namely: Timothy Eugene Krupa, born August 12, 1991; and Jeffrey Daniel Alexander Krupa, born June 23, 1995, and joint guardianship shall include:
 - a. the parties are to be the joint guardians of the estate of the Children;
 - b. in the event of the death of either parent, the remaining parent shall be the sole guardian of the person of the Children;
 - c. Each parent shall have the obligation to advise the other parent of any matters of a significant nature affecting the Children;
 - d. Each parent shall 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;
 - e. Each parent shall have the obligation to try to reach agreement on those major decisions;
 - f. In the event that the parents cannot reach agreement with respect to any major decision, the parents shall attend mediation, and in the event the parents cannot reach agreement, despite their best efforts, each parent shall have the right, under s. 32 of the Family Relations Act, to seek a review of any decision which that parent considers contrary to the best interests of the Children;
 - g. each parent shall have the right to obtain information concerning the Children directly from third parties, including, teachers, counsellors, medical professionals and third party care givers.
4. Schedule for Parenting Time for Jeffrey Krupa
 - a. School Holidays as set out in the attached Schedule for Jeffrey.
 - b. General approach for Jeffrey Krupa
 - i. The access will go on a four week rotation. ii. Three weeks: Sunday night at 7 pm - Friday 6 pm with Mary Krupa and iii. Friday night 6 pm - Sunday night 7 pm with Eugene Krupa iv. Fourth Week: Friday night at 6 pm - Sunday night 7 pm with Mary Krupa
 - v. Sunday night at 7 pm - Sunday 7 pm with Eugene Krupa
 - h. On school days, if Jeffrey chooses, he will stop at Eugene's house after school and Mary will pick Jeffrey up after she gets off work, which is between 4:15 pm and 5:15 pm.

5. The four week rotation shall start in January, 2008, with the Plaintiff on January 6, 2008 and then the Defendant's week four is January 13, 2008. In September, 2008, the Plaintiff shall start with week 1 on August 31, and the Defendant's week four is September 21, 2008.

PARENTING SCHEDULE FOR SCHOOL HOLIDAYS FOR JEFFREY

1. Springbreak 1st half for the springbreak school holiday shall be spent with the DEFENDANT 2nd half of the springbreak school holiday shall be spent with the PLAINTIFF. The exchange of the children shall be on the Saturday mid way in the school holiday at 8 pm.
2. Easter The Easter long weekend each year shall be shared each year, with Jeffrey to be with the DEFENDANT for the 1st half of the weekend and with the PLAINTIFF for the second half. In the years when the Easter long weekend is not within the springbreak holiday, the exchange of Jeffrey shall be at 8 pm on the Thursday evening before Good Friday, and the second half will be from 8 pm on the Saturday to Monday at 8 pm, when the regular access shall resume.
3. Victoria Day Shall be with the DEFENDANT in even years and with the PLAINTIFF in odd years. The exchange shall be at 8 pm on the Friday and return shall be at 8 pm on the Monday, with the regular access schedule resuming.
4. Summer Jeffrey shall be with each of the PLAINTIFF and the DEFENDANT for one month in the summer: He shall be with the PLAINTIFF from July 1st to July 31st on even years, and from August 1st to 31 in odd years. Jeffrey shall be with the DEFENDANT from July 1st to July 31st in odd years and from August 1st to August 31st in even years.
5. Thanksgiving Long weekend shall be alternated each year with Jeffrey being with the DEFENDANT in odd years and Jeffrey shall be with the PLAINTIFF in even years. The exchange shall be at 8 pm on the Friday and the return is to be at 8 pm on the Monday with the regular four week access schedule resuming.
6. Remembrance Day Jeffrey shall be with the DEFENDANT for each Remembrance Day.
7. Christmas School holiday, shall be shared equally by the parents, and Jeffrey shall be with the DEFENDANT for the 1st half of the Christmas school holiday in even years, and with the PLAINTIFF for the 1st half of the Christmas school holiday in odd years, commencing in 2007. The pick up and drop off of Jeffrey shall be at the home or homes where the Children are residing in Kelowna, unless otherwise agreed to in writing between the parties. The exchange of the children shall be mid way in the school holiday at 8 pm.
8. Telephone The Children shall be entitled to have reasonable and generous telephone access as they desire with either of the parents.
9. Views of the Child In the event Jeffrey requests access to a further meeting with Mr. Peterson to give a further "View of the Child", neither parent shall unreasonably withhold their consent, and each parent shall be responsible for one half of the cost of the report.

10. Other The PLAINTIFF and DEFENDANT shall use the Family Wizard Website for assistance with the parent schedule and communications between the parties, and each party shall pay their own cost for the Wizard usage.
11. Professional Day School Holidays Will go to the parent who has access on that day.
12. For Christmas 2007 The DEFENDANT will pick up Jeffrey at or after 8 p.m. on December 29th, and shall return Jeffrey on January 7th at 7 p.m. 2008. APPENDIX "B" Business Income Add back expenses unreasonably deducted 2002 (\$ 9,070.08) L 135 \$ 6,000.00 management and admin 3,525.24 motor vehicle 12,058.00 salaries 1,000.00 travel 1,000.00 telephone 200.00 internet 1,938.79 other \$34,792.11 2003 L 135 \$ 3,342.22 \$ 3,382.24 management & admin. 3,817.20 motor vehicle 10,896.28 salaries 3,729.37 travel 800.00 telephone 250.00 internet 1,198.13 convention + 2,659.95 other \$26,787.17 \$26,787.17 expenses unreasonably deducted + 3,342.22 L 135 \$30,129.39 = Business Income: \$30,129.39 2004 L 135 (14,769.13) \$ 7,019.16 management & admin. 3,617.94 motor vehicle 9,369.66 salaries 3,653.12 travel 800.61 telephone 250.00 internet 2,955.21 convention + 3,712.64 other \$31,378.34 \$31,378.34 - (14,769.13) \$16,609.21 = Business Income: \$16,609.21 2005 L 135 (\$6,637.18) \$ 3,385.79 motor vehicle 1,862.00 salaries 4,330.68 travel 750.00 telephone 230.00 internet 465.61 other \$11,024.08 \$11,024.08 + (6,637.18) \$ 4,386.90 = Business Income: \$4,386.90 2006 L 135 (\$11,303.69) \$ 3,190.23 motor vehicle 954.74 salaries 3,648.58 travel 1,400.00 telephone 100.00 internet 635.21 other \$ 9,928.76 \$ 9,928.76 + (11,303.69) \$ (1,374.93) = Business Income: \$(1,374.93) APPENDIX "C" Employment and Business Income Employment Business as adjusted Rounded Total 2002 47,940.38 34,792.11 \$ = 83,000 2003 49,887.50 30,129.39 = 80,000 2004 Average 56,813.50 16,609.21 = 73,000 \$ 79,000 APPENDIX "D" Income for Guideline Purposes 2003 L 150 \$65,576.63 26,787.17 add on expenses unreasonably \$92,363.80 deducted from business income
 - 2,531.57 deduct plaintiff's share of farm income \$89,832.23 2004 L 150 \$65,268.71 31,378.34 add on expenses unreasonably deducted \$96,647.05 \$ 6,979.99 deduct plaintiff's share of farm income \$ 89,667.06 2005 \$79,000.00 imputed business & employment income 1,756.42 interest income 13,189.95 rental income 5,705.68 farm income \$98,652.05 deduct plaintiff's share of: \$ 2,852.84 farm income 6,594.98 rental income \$90,204.23 2006 \$79,000.00 imputed business & employment income 1,384.38 interest 12,021.02 rental income 5,752.19 farm income \$98,157.59 deduct plaintiff's share of: \$ 2,876.10 farm income 6,010.51 rental income \$89,270.98 2007 \$79,000.00 imputed business & employment income 10,800.00 50% farm income 7,500.00 50% rental income \$97,300.00

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Prepared on 27 October 2026 · Esheria