
CANADA / JUDGMENT

W.M.M. v. H.S.M.

2007 BCSC 1629

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1629 W.M.M. v. H.S.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

W.M.M. v. H.S.M.,

2007 BCSC 1629

Date: 20071108

Docket: Vernon

Registry: 38779

Between:

W.M.M. also known as W.M.M.

Plaintiff

And

H.S.M. also known as H.S.M.

Defendant

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Plaintiff:

K.R. Fiddes

Counsel for the Defendant:

R.D. Braun

Date and Place of Trial:

October 23-26, 2007

Vernon, B.C.

Introduction

- [1] This litigation involves a husband and wife who were together for either 32 or 35 years, depending on the date they separated. The issues that brought them to trial were whether certain assets should be characterized as family assets, and whether there should be a reapportionment of some assets due to their having been acquired through inheritance or gift. There was, as well, a minor issue regarding spousal support.

The Facts

- [2] The parties were born, were raised, and met each other in Germany. When they met, the plaintiff was 19 years old and had young son, S1, from a previous relationship. The defendant was 27 years old and had two children from a previous marriage. The defendant's children were: S2, who was 2 years old; and W, who was 5 years old. The parties lived together for a short while, and then they married on January 21, 1979.
- [3] When they married the plaintiff had already worked as a hair stylist for a few years, and the defendant made his living as a mechanic. After their marriage the plaintiff stopped working outside the home. She devoted herself to caring for the couple's three children. The defendant continued to work in his trade.
- [4] The defendant brought a one-half interest in some logging property into the relationship. In or around the end of the 1970s the parties and the plaintiff's parents and her brother were interested in immigrating to Canada. In the fall of 1979 the defendant sold his interest in the logging property to his brother. In May 1981 the defendant used 15,000 DM from the proceeds of that sale to make a down payment on a motel business in Kenora, Ontario. He had earlier used the balance of the proceeds, approximately 30,000 DM, to invest in what the parties called a farm property in Germany. The defendant deliberately hid the 30,000 DM from the German tax authorities in order to avoid paying taxes on that portion of the sale proceeds. The plaintiff's father assisted in the purchase of the farm property. He facilitated a bank loan to acquire the property.
- [5] The parties invested time, materials, and effort in the farm property. Their plan was to turn it into a place where the defendant could fix and sell automobiles.
- [6] In early 1982 the defendant's mother, who was reasonably wealthy, gave the defendant a property located in the German town of Walpersdorf. The parties never used that property for any family purpose. In April 1982 the defendant sold the Walpersdorf property for 129,000 DM. By then, the parties' plans to move to Canada were well established and, in addition to making the deposit on the Kenora motel a year earlier, the defendant had opened

an account at the CIBC bank in Kenora. He deposited the proceeds of the Walpersdorf sale into that account.

- [7] By early 1983 the farm property was still not ready for use. The parties and the plaintiff's family wanted to make their move to Canada though, and so in January or February 1983 they sold the farm property. That sale brought them 125,000 DM. The defendant deposited that sum in the Kenora CIBC bank account.
- [8] The parties and their three children arrived in Canada in early 1983. They settled in Kenora. Unfortunately, in the meantime the motel business had been sold to someone else. Undaunted, the parties used some of the money in the CIBC account to buy and renovate a house in which they, their three children, the plaintiff's parents, her brother and his girlfriend all lived. The defendant started up a business repairing things mechanical. The plaintiff, after having been out of the workforce for many years, took jobs at fast food restaurants. She devoted her income from those jobs to S1's university education. The plaintiff left the fast food industry when a job came available for her at an agency that provided community living assistance to disabled persons.
- [9] In or around 1990 the plaintiff, her brother and sister-in-law, and her parents began to form a desire to move from Kenora to Vernon, B.C. They were motivated by the fact that the plaintiff's sister lived in Vernon, and by Vernon's mild climate. The defendant resisted the idea - he was content to stay in Kenora. Notwithstanding the defendant's reluctance to move, the plaintiff, her brother, and her parents went together on the purchase of nine acres of bare rural land near Vernon. They each contributed \$20,000 to the land's \$60,000 price, and they each took a one-third interest in the property. The plaintiff raised her \$20,000 share by granting a mortgage on the parties' family home in Kenora. Despite his resistance to the idea of moving to Vernon, the defendant joined his wife in signing the mortgage.
- [10] In the early 1990s the plaintiff and her family built a triplex on the Vernon property. The plaintiff contributed \$65,000 to the cost of building the triplex. She borrowed that money from a bank, and secured the loan with a construction mortgage on her one-third interest in the Vernon land.
- [11] The plaintiff moved to Vernon in 1994 or 1995. The plaintiff stayed behind in Kenora. The plaintiff then left Vernon to return to Kenora. She stayed with the defendant in Kenora for a year. During that year the plaintiff worked as a home-care aide for the Red Cross in Kenora. She earned on the order of \$10 per hour. She enjoyed that work. She used that income to pay the mortgage on the Vernon property (by this time her son S1 had graduated from University and was working in Vernon as a school teacher).

- [12] Finally, in late 1995 or early 1996, the defendant capitulated to the plaintiff's wishes and he agreed to move to Vernon with her. He closed up his repair shop. The parties sold their house in Kenora, and used the proceeds of sale to pay off the debt the plaintiff had incurred to buy and build in Vernon. About \$43,000 remained after those debts were paid. The parties divided those net proceeds. The plaintiff took \$20,000 as her own, and the defendant kept \$23,000 for himself.
- [13] In May 1996 the parties began to live permanently in Vernon. The plaintiff had earlier tried to find work in Vernon, but there was none to be found. Unfortunately for the defendant, in the fall of 1996 he was diagnosed with cancer. In December 1996 he underwent surgery and radiation therapy. The defendant testified that he was concerned that he might die from the cancer or from the surgery. The treatments removed the defendant's cancer, but left him with permanent weakness in his right arm. He has, since then, been totally disabled from any occupation.
- [14] During the years preceding the move to Vernon, the defendant's mother had given him gifts of cash in varying but substantial amounts. The defendant was not forthright with the plaintiff about these gifts. He tended to squirrel the money away in bank accounts about which the plaintiff knew nothing. The defendant did, however, regularly use the money he received from his mother for family purposes. For example, he used some of that money to finish the basement of the portion of the Vernon triplex that he and the plaintiff occupied. He also bought furniture, appliances, and outdoor power equipment with that money.
- [15] In June 1994 the defendant's mother gave the defendant a partial interest in some real estate located in Schwabach, Germany. The defendant's son, W, received the other part interest in this property. In October, 1996, just months before the defendant's cancer surgery, he and W sold the Schwabach property. The defendant received \$266,000 CDN from this sale. In early December 1996 the defendant deposited the \$266,000, plus an additional sum from other monies that had come to him from his mother, for a total of \$280,000, in what the parties referred to as the CIBC trust or investment fund. I will refer to it as the investment fund or the investment account.
- [16] The parties differ in their understanding of the original purpose of the investment account. The defendant says that he intended to give that money to his two children, S2 and W. The plaintiff says that she understood that the investment fund would provide for the parties' current and future economic needs. She thought that it was, in essence, a retirement fund. The parties do agree, however, that they arranged for \$1,500 to be withdrawn every month from the investment account and deposited to their joint savings account. The plaintiff used the \$1,500 to run their household.

- [17] This was a straight-line withdrawal from the investment fund - the \$1,500 was withdrawn regardless of the fund's economic performance. The investment account did well some months and poorly in others. There were many times when the fund did not generate enough income to cover the full \$1,500 withdrawal. On those occasions, the parties eroded the fund's capital in order to meet their household expenses.
- [18] In addition to real estate, the defendant's mother regularly gave him gifts of cash as well. According to the defendant, before his mother passed away her cash gifts to him gifts totalled some \$95,000. Also, according to the defendant, he spent some of that money on improvements to the family homes first in Kenora and later in Vernon. He also used it to buy furniture and appliances, and to maintain and repair the residences.
- [19] The defendant testified that it was always his mother's wish that the gifts she gave during her lifetime to the defendant and his brother (who remained in Germany) should remain their property, but that upon her death whatever remained in her estate should go to her grandchildren. In the case of the defendant's family, the defendant's mother defined her grandchildren as S2 and W, but not S1. The defendant's mother valued blood relationship above marriage, and so she did not count the plaintiff's son S1 as a grandchild.
- [20] The defendant's mother passed away in 2000. She did not leave a Will. The defendant testified that he and his brother equally divided their late mother's estate and that in total he received on the order of \$230,000 to \$240,000 CDN. The defendant testified that he placed much of that money in what he called the inheritance account at a CIBC bank in Vernon. He testified that he felt that the money in that account belonged to S2 and W. Nevertheless, the defendant used the inheritance account freely for household expenses. He bought tractor tires, one or more mattresses, furniture, and appliances with money he drew from the inheritance account. In July 2002 the defendant moved \$20,000 from the investment account to the inheritance account. Then in January 2003 the defendant reversed the flow when, after the investment account had lost some value due to market fluctuations, he moved \$60,000 from the inheritance account back into the investment fund.
- [21] The defendant also withdrew \$50,000 from the inheritance account. For reasons unknown, that withdrawal is noted on the account's bank book as a "bill payment". It came clear in the course of the trial that what actually happened was that the defendant used the \$50,000 to buy a Canada Savings Bond. The bond bears interest at 4.25 percent. The plaintiff did not know about this bond, and the defendant did not disclose its existence in the course of the litigation. It was only under cross examination at trial, and when the defendant flatly refused to answer any questions relating to the bond's interest income he could not deny receiving, that the fact of the bond was revealed.
- [22] The plaintiff's father passed away in May 2003. The plaintiff's mother required help and assistance after that. The plaintiff's mother lives in one of the triplex's suites. As 2003, 2004, and 2005 passed, the plaintiff devoted much time to looking after her mother. The parties' relationship had been under strain for many years before this, but it was effectively

destroyed during this period of years. Finally, in April 2006 the plaintiff went to see a lawyer about a divorce, and after doing so she told the defendant that she wanted to end their marriage.

- [23] The defendant's response to this news was swift and decisive. He instructed the CIBC to terminate the monthly \$1,500 transfers from the investment account to the parties' joint household account. He had a Power of Attorney prepared, and sent that to his son W in Germany. The defendant liquidated the investment fund's holdings and converted it all to cash. He then instructed the CIBC to give him a bank draft for the cash, totalling approximately \$225,000, and sent the draft off to W in Germany. What happened to the funds after that cannot be known with certainty. The defendant maintains that W has told him that he kept half of the funds and has sent the other half to his sister S2. S2 lives somewhere in the U.S.A.
- [24] In addition to cash, the defendant also inherited about 250 grams of gold in various forms including bars and coins from his mother's estate. The defendant maintained that all this gold had been in the M family since the 1700s. This cannot be true. That is because, according to the evidence of both parties, the defendant took two gold coins from the collection, one of which was a Kruegerrand, and had a necklace made from them. He gave the necklace to the plaintiff as a gift. Although no evidence was led on the point, I am prepared to take judicial notice of the fact that the Krugerrand is a gold coin minted by the State of South Africa, and I am further prepared to take judicial notice of the fact that in the 1700s the nation of South Africa did not exist. In the 1700s that area of the world was claimed by the Dutch East India Company; the area did not gain independence from Great Britain's colonial grip until 1910. Therefore, the defendant's story that all the gold he got from his late mother comprised heirlooms from his family dating back to the 1700s must be, to put it bluntly, untrue. In any event, the defendant took care to put this gold beyond the plaintiff's reach as well. Shortly after hearing of her desire for a divorce, the defendant travelled to Germany and took the gold with him. Its whereabouts now cannot be known with certainty.
- [25] The defendant maintains that nothing remains in the inheritance account. He acknowledges owing RRSP accounts # xxxx-xxx-3 worth approximately \$22,000 and #xxxxxxxxxxxxxxxx463 worth approximately \$2,200, a money market account #xxxx783 worth about \$791, and chequing account #xxxx/xxx2736 with approximately \$937 in it. Despite his refusal to disclose or give evidence about it, it is clear that the defendant also owns a Canada Savings Bond worth approximately \$50,000.
- [26] The plaintiff used to have the \$20,000 she derived from the sale of the parties' house in Kenora in 1996. She spent about \$5,000 of that sum on landscaping for the Vernon house, and she used the rest after separation for her living expenses and to pay her lawyer. Nothing remains of that fund.

- [27] The plaintiff retains her one-third interest in the Vernon triplex. The parties agreed that the current value of the triplex as a whole is on the order of \$900,000. The parties also agreed that it is very difficult, if not impossible, to value the plaintiff's fractional interest in the property. That is because the triplex itself is, if not unique, then at least very unusual, and there are probably very few purchasers who would be attracted to it. The plaintiff's mother and brother hold the other one-third interests in the property's title.
- [28] Neither party has employment. The defendant is undoubtedly disabled from any employment. The plaintiff maintains that she has looked for work, but no one is willing to hire a woman in her late 50s. In any event, she spends a good deal of her time caring for her elderly and ailing mother.
- [29] The defendant is now 63 years old. His income derives from a disability pension paid to him by the German state. The pension is paid in Euros, and currently converts to approximately \$850 per month. The defendant also receives a disability benefit from the Canada Pension Plan of \$455 per month. Finally, the defendant has an income of approximately \$2,200 per year from the Canada Savings Bond. The defendant lives in a rental apartment and his monthly expenses are on the order of \$2,200. The defendant regularly withdraws money for living expenses from an account his brother keeps in Canada.
- [30] The plaintiff is 57 years old. She has no source of income other than whatever spousal support she receives from the defendant. The plaintiff continues to live in the triplex. Her monthly expenses total approximately \$1,600.

Date of Separation

- [31] According to the defendant, the parties separated in May 2003, shortly after the plaintiff's father died. He says that from that day forward, the plaintiff effectively lived with her mother in her mother's part of the triplex.
- [32] The plaintiff says otherwise; while she acknowledges having spent a certain amount of time with her mother, she nevertheless continued to sleep and to prepare and take her meals with the defendant in the parties' part of the triplex. The plaintiff maintains that it was not until she told the defendant that she wanted a divorce that they separated.
- [33] The plaintiff's son, Mr. K, gave evidence on this issue. He testified that he visited the plaintiff's home in the triplex two or three times per week between 2003 and 2006. He said that he did not notice any significant change in the parties' relationship during that time. It has to be said, however, that his experience in the household was limited to social visits. From this exposure Mr. K cannot have known with certainty whether or not the parties remained committed to each other as a married couple.
- [34] The evidence was clear that the defendant and the plaintiff continued to live on the \$1,500 per month (or \$1,200, since the investment fund had lost value at some point, and the monthly household stipend was reduced) right up to April 2006, and that they ceased to live

on that sum after the plaintiff told the defendant she wanted a divorce. The evidence was also clear that the plaintiff was the homemaker in their family unit - she did the cooking, cleaning, and laundry. It seems to me more likely than not that, although the parties' relationship grew increasingly strained as the years passed by, they continued to rely on each other and to support one another despite their gradual estrangement. I think it is also more likely than not that absent the plaintiff's decision to terminate the marriage, the parties would have carried on in the same way indefinitely. It follows that I find, on the balance of probabilities, that the parties did not separate in a legal sense until in or around April 2006.

Divorce

[35] The parties have been separated for more than one year. There is no prospect of reconciliation. There will be an order that they be divorced, subject to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), effective on the 31st day following pronouncement.

Family Assets

Statutory Framework: Family Relations Act, Sections 58, 59 and 60

[36] The Family Relations Act, R.S.B.C. 1996, c. 128, establishes a class of property called family assets. The provisions of the Act most relevant to this litigation are:

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

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

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

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

(i) a share in the corporation, or

(ii) an interest in the trust

owned by the spouse;

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

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

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

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

- (d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;
 - (e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.
- (4) The definition of family asset applies to marriages entered into and property acquired before or after March 31, 1979.

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

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

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

Items Not in Dispute

- [37] The parties agree that the plaintiff's one-third interest in the triplex is a family asset. They also agree that the \$15,000 that the plaintiff used post-separation was a family asset.

Items in Dispute

- [38] The plaintiff asserts that essentially all of the money and property that the defendant received from his mother during her lifetime and after her death became a family asset because it was, at various times and in various amounts but always regularly, used for family purposes. The defendant says that the money and real estate he received from his mother was not a family asset. In particular, he maintains that the money he received after his mother died was intended for S2 and W. He says he deposited that money to the inheritance account for that purpose. The defendant argues that it was necessary for him to make good his depredations on the inheritance account, and that the investment account therefore became a substitute for the inheritance account. That money was and is, according to him, not a family asset.
- [39] Subsection 58(2) of the Family Relations Act works to make any asset ordinarily used for a family purpose a family asset for the purposes of the Act. What "ordinarily used for a family purpose" means has been the subject of much judicial commentary. In the context of a capital asset such as, for example, an investment fund, Lambert J.A. said in *Evetts v. Evetts* (1996), 85 BCAC 19:

- [23] I think it would be unwise to try to establish any rules for the determination of whether a capital asset will be considered to be a family asset. However one or two guidelines are readily revealed from the cases. The fact that income from a capital asset is used occasionally for a family purpose does not of itself make the capital asset a family asset (*Stuart v. Stuart*). The fact that capital from the asset is used from time to time, when required, for a family purpose may be an indication that the asset is a family asset (*Brainerd v. Brainerd*). But the distinction between income being used for a family purpose and capital being used for a family purpose is not, in itself, determinative (*Starko v. Starko*). So the fact that only income is used for family purposes does not necessarily mean that the capital asset itself is not used for a family purpose. The use of the asset to provide financial security and protection against erosion of income or other family misadventure in the future may constitute a present ordinary use for a family purpose (*Tezcan v. Tezcan*; *Folk v. Folk*). The fact that the words "ordinarily used...for a family purpose" are the governing words in the statute means that the use pattern must be examined in each case to determine whether, in the ordinary course, the present use commitment to meet a present or future need includes a use for a family purpose. Ordinary use for a family purpose is not inconsistent with ordinary use for other purposes. (emphasis added)
- [40] In the present case, the parties' pattern of use of the investment fund and of the money the defendant received during and after his mother's life was characterized by regular expenditure for family purposes. In the case of the investment fund, the parties dedicated \$1,500 per month to household expenses, and that was the case for the nearly ten years between December 1996 when the fund was created and spring 2006 when the defendant moved it out of the country. That pattern of use clearly and unequivocally identifies the investment fund as a family asset.
- [41] The monies the defendant received from his mother during her lifetime are now all gone, but it is still worth noting the defendant's use of those monies when they were in his hands. By his own evidence he regularly used those monies to make renovations and improvements to the family homes. He also used it to buy furniture and appliances.
- [42] That pattern did not change when he received the inheritance funds from his mother's estate. The defendant opened the inheritance account with approximately \$134,000 in April 2001. At trial, the defendant testified that he used significant sums from the inheritance account for family purposes. For example, on April 20, 2001 he used \$6,000 to buy parts and tires for the parties' tractor, and on May 2, 2001 he took \$2,500 out of the account to invest in the family house. In January 2003 the defendant moved \$60,000 out of the inheritance fund into the investment fund. He made that transfer because the investment fund had lost some value due to market fluctuations. The defendant made numerous other withdrawals from the inheritance account during the period for which he disclosed the account's records, vis: 2001 to 2005. These withdrawals were sums varying from \$500 to \$5,000. As noted earlier, in February 2002 the defendant withdrew \$50,000 from the inheritance account and invested that sum in a Canada Savings Bond.

- [43] In my opinion, the defendant treated the inheritance fund in exactly the same fashion as he had treated the money he had received from his mother during her lifetime. That pattern of use was for family purposes, and the inheritance account was, therefore, a family asset. It follows that the undisclosed Canada Savings Bond is also a family asset, deriving as it did from the inheritance account.
- [44] As for the defendant's argument that the investment fund and the inheritance account were really his children's property, I note that on the defendant's own evidence his mother wished to give cash to her grandchildren only upon her death - he testified that she wanted her sons to have the gifts she gave during her lifetime. The defendant's assertion that the investment fund, which was created while his mother was still alive, was intended for her grandchildren contradicts his own evidence and it cannot be given credence.
- [45] I also reject the defendant's argument that the money he put in the inheritance fund really belonged to his children. While it might be true that the defendant's mother wanted her grandchildren, S2 and W, to take some cash from her estate, it is also true that she did not actually bequeath anything to those grandchildren. In fact, she died intestate and her sons inherited everything. There were, therefore, no specific gifts to W and S2, and the defendant had no legal obligation to treat the proceeds of the estate as if they belong to them. The evidence indicates that, whatever the defendant might choose to say now about those funds, at the time he received them he thought they were his to do with as he pleased. After all, by the year 2000 when their grandmother died, both W and S2 were grown adults - there were no impediments to block the defendant from transferring the estate funds immediately and directly to his children. Yet the defendant did not give the money to his children. Instead, he kept it and used it to, among other things, buy tractor tires and to top up the parties' investment fund. It is, therefore, quite clear that the defendant appropriated the estate funds to himself and used them for his own and the plaintiff's benefit.
- [46] I find, therefore, that the investment fund and the Canada Savings Bond, as well as the defendant's RRSPs, are family assets. Given the length of the marriage and the fact that the defendant earned his entitlements to the German and the Canadian disability benefits during the marriage, I find also that the defendant's disability benefits are also family assets.

Division of Assets

Statutory Framework: Family Relations Act, Sections 56 and 65

- [47] The starting point for a discussion of division of family assets is the Act's decree that equality is the default:

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

- (a) a separation agreement,
- (b) a declaratory judgment under section 57,

- (c) an order for dissolution of marriage or judicial separation, or
- (d) an order declaring the marriage null and void

respecting the marriage is first made.

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

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

- (a) an order under this Part or Part 6, or
- (b) a marriage agreement or a separation agreement.

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

[48] However, the presumption of equal division may be displaced if the circumstances warrant. The Act says:

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

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

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

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

(3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

- [49] In the present case the defendant argues that if the investment fund and the inheritance account (and those assets that were acquired out of that account) are family assets, they should be apportioned in his favour. He says that those assets came to the parties by way of gift or inheritance from his late mother, and that by virtue of s. 65(1)(d), he should be entitled to the greater share of those assets.
- [50] The plaintiff argues otherwise. She points out that for nearly ten years the parties used the investment fund to cover some of their household expenses. She says that the money in the inheritance account was used in no different fashion, and that as soon as it came into the defendant's possession it began to be used for family purposes. According to the plaintiff, there was no period of time during which the inheritance money could be said to have been kept separately or devoted to purposes other than family purposes. There are, so the plaintiff says, no grounds on which an argument could be made that the inheritance money should be apportioned in any way other than equally.
- [51] On this issue, the comments made by Prowse J.A. in *Lodge v. Lodge* (1993), 44 RFL (3d) 365 (B.C.C.A.) at page 375, are apt:

The significance of inheritance as a factor in a reapportionment diminishes according to the length of time that the marriage subsists following the receipt of the inheritance.

- [52] The parties were married throughout the time that they used the investment fund for their household expenses. The investment fund provided for part of their household expenses for nearly ten years. That was not an insignificant period of time. It was long enough, I think, to overwhelm any significance of the fund's origin. It would not, in my opinion, be unfair to divide the investment fund equally between the parties.
- [53] However, the inheritance account and the assets that derive from it were in the defendant's hands and were used for family purposes for a shorter period of time. The defendant received the inheritance in early 2001, and it was used for family purposes for roughly five years. That said, this shorter period of time does not, in my view, overwhelm the presumption for equal division. That is because as soon as the defendant received the inheritance he began using it for family purposes - spending, for example, \$6,000 on the family tractor in the same month that the inheritance came into his hands. It is clear that however the defendant would like to characterize that inheritance now, when he got it he spent it for the benefit of himself and the plaintiff. It would not, under these circumstances, be unfair to divide the inheritance equally between the parties.

Compensation

- [54] The defendant has removed the investment fund from this court's jurisdiction. Any order I might make vesting a one-half interest in that fund in the plaintiff would probably be empty. By the same token, it would be difficult for the defendant to receive value from the one-half interest to which he is entitled in the plaintiff's one-third interest in the Vernon triplex.

[55] The fairest way to deal with these parties' interest in the assets held by the other is to order that the defendant's interest in the triplex be vested in the plaintiff's name, and that she not be required to account to the defendant for the \$15,000 she used post-separation; and to further order that the defendant's interests so vested be offset by vesting in the defendant's name the plaintiff's interest in the remaining family assets, including the investment fund, the RRSPs in the defendant's name, the Canada Savings Bond, and the disability pensions. That assignment of the parties' assets achieves a nearly equal division and does not require one party to chase after assets that have been moved out of the country, and it has the virtue of not requiring the other party to move for an awkward sale of part or all of the Vernon triplex.

Spousal Support

[56] The considerations for spousal support are mandated by s. 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.):

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

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

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

[57] Further, the court should take into account the Spousal Support Advisory Guidelines: *Redpath v. Redpath*, 2006 BCCA 338. According to the Spousal Support Advisory Guidelines, given the plaintiff's income of nil, the defendant's income of \$17,800 per year, the length of the marriage, and the parties' ages, the support to be paid by the defendant to the plaintiff lies in the range of \$550 to \$750 per month. The Spousal Support Advisory Guidelines recommends that support should be paid for an indefinite period.

[58] Having given due regard for the Spousal Support Advisory Guidelines, and having assessed the parties' needs and means, I am satisfied that the proper order for spousal support in this case is \$600 per month to be paid by the defendant to the plaintiff on November 1, 2007 and on the first of every month thereafter.

Costs

[59] Given the defendant's failure to disclose a significant family asset, and his general lack of success on both the character of assets and the apportionment issues, and given the plaintiff's general success on those issues, the plaintiff is entitled to her costs on Scale B.

"P.J. Rogers, J."

The Honourable Mr. Justice Rogers

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