
CANADA / JUDGMENT

Weintz v. Weintz

2012 BCSC 120

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 120 Weintz v. Weintz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Weintz v. Weintz,

2012 BCSC 120

Date: 20120126

Docket: E29777

Registry: New Westminster

Between:

Marilyn Sonya Weintz

Claimant

And

Donald Weintz, also known as Donald Frederick Weintz

Respondent

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Claimant:

J. Fairburn

Counsel for the Respondent:

C. Garcia

Place and Date of Trial:

New Westminster, B.C.

January 9-12, 2012

Place and Date of Judgment:

New Westminster, B.C.

January 26, 2012

- [1] The parties to this matrimonial proceeding were married in 1988 after several years of pre-marital cohabitation. The wife (the "claimant") is currently 53. The husband (the "respondent") is 58.
- [2] The parties separated in late May, 2008 and have lived separate and apart since. A section 57 declaration was made by Dillon J. on December 16, 2008. At the same time, spousal support of \$5,000 monthly was ordered.
- [3] Presently, there remains one child of the marriage as defined by the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). Kaitlin is 20 years old. She will be entering her fourth year of studies at the University of Victoria ("UVIC") in the summer semester. The parties' other child, Jonathan, is 23 and working in the hospitality industry. Although Jonathan still receives some financial assistance from the respondent, it is not suggested he is a child of the marriage within the meaning of the Divorce Act; nor has he been since separation.
- [4] At issue in these proceedings is the division of family assets, spousal support for the claimant, both prospective and retroactive, together with child support for Kaitlin who now resides with the claimant.
- [5] Each of the parties seeks a divorce.

The Background

- [6] The claimant and respondent met in the early part of the 1980s while she was employed at the Surrey Racquet Club and him as an estimator for an electrical contracting company. Both of the parties have Grade 12 education. The respondent had trade certification as an electrician.
- [7] Both had been previously married and the respondent had a child by one of his two previous wives.

- [8] Neither had meaningful assets when they began cohabitation. The date cohabitation commenced is an issue. The parties seem to agree it was at or near the time the respondent established, together with two others, a company called Can-Tec. Can-Tec was incorporated in 1986 after the respondent's former employer ceased doing business. However, the respondent's pleadings identify the commencement of cohabitation as 1983; a date he adopted as true during cross examination.
- [9] Following incorporation of Can-Tec, the claimant continued to work in the hospitality industry until she left the work force following the birth of Jonathan. The parties married in Reno in 1988 and Jonathan was born in 1989. Following his birth, the claimant became a stay-at-home mother and homemaker until approximately 1997 when she began an in-home catering business.
- [10] The evidence discloses each was an involved parent but that the claimant was primarily responsible for the running of the household and the children's day-to-day routine. The respondent worked at Can-Tec and provided the funds which sustained the household.
- [11] The parties appear to have lived frugally until their separation. In the early 1990s, they bought the current family home located at 12632 25 Avenue, White Rock, B.C. (the "family home"). It is a 1,400 square foot pan abode on a large lot. The claimant has occupied it since separation and would like to retain it. It has a current appraised value of \$950,000.
- [12] Recreational property at Big White was acquired through a holding company, A.J.D. Holdings Co. Ltd. ("AJD"), a company acquired to hold, amongst other things, the shares in Can-Tec. Other than passing reference to tax problems created by the parties' personal use, I heard no evidence of a lavish lifestyle or expensive pursuits. It appears that the profits earned within the companies had, for the most part, been reinvested in real estate assets.
- [13] In recent years, prior to separation, the parties split income through a combination of salary paid to the respondent and dividends, or modest salary paid to the claimant. The claimant protests she never received the salary or dividends "paid to her" but there is no suggestion that the income so declared was not applied to family purposes for the benefit of both.
- [14] The support order of Dillon J. was premised on an income of \$219,000 for the respondent. This figure, according to the reasons for judgment, was historically what the parties collectively drew as income in the years preceding separation.
- [15] By 1997, both children were in school full time and the claimant, together with a friend, commenced a catering business which had one customer, West Coast Energy. The contract arose through a mutual acquaintance who piloted the company's private jet.
- [16] The claimant and her partner prepared meals for the flights and delivered them to the airport. All reports indicate the product provided was of excellent quality and the claimant received accolades from the company about the quality of the cuisine provided.
- [17] The claimant achieved modest financial success by virtue of the catering business.

- [18] In 2002 the company moved head offices to the U.S. and the catering business came to a halt. No efforts appear to have been made to replace the business with another customer.
- [19] From 2002 until after separation, the claimant did not work outside the home.
- [20] All the while, the respondent devoted his efforts to the business of Can-Tec. It began with limited resources, no client base and no employees. Within a year of its formation, the respondent's current business partner, Paul DeGrace, bought into the enterprise. Currently, the shares in Can-Tec are owned by AJD. The shares in AJD are owned in equal portions by 2292 Management Ltd. ("2292"), the parties' holding company, and DeGrace Ventures Ltd., the holding company of Mr. DeGrace. The other two original partners have retired and their shares in Can-Tec bought out.
- [21] Each of the claimant and respondent owns one share in 2292. The voting share is owned by the respondent. The claimant has little, if anything to do with the operation of any of the corporations referenced herein since their incorporation. It is agreed the shares in 2292 are a family asset. The question is how to divide them.
- [22] Can-Tec is the operating company. AJD, in addition to owning the shares of Can-Tec, owns properties both here and in Mexico. 2292, in addition to 50% of the shares in AJD, owns a condominium in Penticton and a 4.55% interest in Pubco Investment Corporation which, in turn, controls the Penny Farthing Pub.
- [23] In addition to the family home, the shares in 2292, and assorted chattels in the home, the parties each had RRSPs with Wellington West Capital Inc. ("Wellington") at the time of separation. The respondent had a small non-registered account, as well. The claimant disposed of her RRSP in 2008. The respondent testified he rolled the proceeds of the Wellington RRSP into his personal pension established by Can-Tec (the "IPP") and seemingly disposed of the non-registered account. Details of the latter, as to the date and reason for disposal were not forthcoming. In addition to the IPP, the respondent has a pension with the I.B.E.W. as a result of his years working as a journeyman electrician from 1975 until, presumably, sometime in 1987. The IPP has a current value of approximately \$233,000.
- [24] The IPP was established after separation through a combination of the respondents' RRSP and a cash contribution from Can-Tec after the pronouncement of the triggering event on December 16, 2008.
- [25] By October or November 2007, the parties had separated their lives and were living separate under the same roof. In May 2008, the respondent left the marital home with Kaitlin and moved to a furnished apartment. They resided there for several months and then moved to an unfurnished apartment. This caused the respondent to take the children's furniture from the former matrimonial home.

- [26] In April 2008, the respondent made two withdrawals from the parties' joint Line of Credit with TD Canada Trust (the "LOC"). The total sum withdrawn was approximately \$28,700. The purpose, according to the respondent, was to buy cars for each of the two children. A Mercedes Kompressor was purchased for Kaitlin and a Mercedes 350 AMG for Jonathan. The respondent's mother contributed \$5,000 towards each car.
- [27] The respondent testified that each car, net of his mother's contribution cost him less than \$10,000. His evidence from his discovery was that the Kompressor cost, in total, \$15,000 to \$16,000. He could not recall the cost of the AMG but said he would produce the sales documents. If he ever did, they did not become evidence at trial.
- [28] The claimant responded to this with a withdrawal of \$70,000 from the LOC. This she used, according to her testimony, for living expenses and legal fees. She also cashed in the Wellington spousal RRSP, valued at approximately \$32,000.
- [29] Later in April 2008, the respondent deposited \$20,000 back into the LOC. The present amount owing is \$132,000. Both service one half the interest cost associated with the LOC. Prior to the withdrawals I have been referred to, the LOC stood at \$57,100. It is registered as a charge against the family home. The parties agree that for the purpose of adjusting the division of assets, the LOC should be seen as having a balance of \$64,791.
- [30] The only other debt referenced at the time of separation was a joint Visa card which has slightly in excess of \$6,000 owing on it at the end of March 2008. The respondent eventually paid this off following separation.
- [31] Finally, I note that with the exception of the personal effects and children's furniture taken from the home by the respondent, there has been no division of the contents of the family home. It is agreed that the respondent took with him assets including a motor Sea Doo, Honda motorcycle and Cadillac with an agreed upon value of \$33,920. The respondent has retained these and it is not disputed that the claimant is entitled to a compensation order for one-half their value.
- [32] The claimant retained the house contents and her vehicle. No value has been ascribed to those assets.
- [33] Other than the children's furniture and his personal effects, the remainder of the furniture appears to have remained in the home. I was provided with no information as to its value or whether the parties had reached some agreement on its division.
- [34] Following separation, the claimant remained in the home. The respondent began making modest payments to her. She describes them as \$1,000 or so paid sporadically. He swore in his August 2008 property and financial statement that he paid for all expenses associated with the family home and "\$1,000 approximately every two weeks".
- [35] In December 2008 Dillon J. ordered interim spousal support in the amount of \$5,000 monthly. From that, the claimant was to service the expenses on the family home.

- [36] Sometime in 2010, the respondent and Kaitlin moved into a home located at 15583 Thrift Avenue, White Rock. This property is owned by AJD. It has an outstanding mortgage in the amount of \$527,882 owing on it. AJD pays the mortgage. The monthly payments are slightly in excess of \$3,000. The respondent, according to his most recent financial statement, pays \$1,000 in rent to AJD.
- [37] The rent paid is said to be below market value. Jonathan has since moved into the basement suite which formerly rented for \$1,000 a month. Jonathan pays only \$500-600 a month based upon his current ability to pay. The rent, it would appear, goes to the respondent; not AJD. In addition to Kaitlin, Golda Magnusson, the respondent's girlfriend moved into the Thrift Avenue home.
- [38] Ms. Magnusson is a registered nurse with earnings of approximately \$80,000 annually. She contributes between \$500 and \$600 monthly to the running of the Thrift Avenue home. Recently, Can-Tec has begun paying her a salary, although it is acknowledged she provides no services in return. The salary of \$20,000 was acknowledged by the respondent to be nothing other than income splitting between him and Ms. Magnusson.
- [39] Kaitlin began living with the claimant over the summer of 2011 because Kaitlin now has a cat. I infer that cats are not welcome in the respondent's household because no other reason was given for Kaitlin's change of residence. Kaitlin still maintains a close relationship with the respondent and spends time with him when she returns from Victoria.
- [40] Kaitlin will return to UVIC for the summer semester. Presently she is working and intends to travel before returning to her studies. She is entering the final year of studies for her Bachelor's degree in English. She plans on becoming a teacher and requires one further year of schooling thereafter.
- [41] I was provided with no information regarding Kaitlin's endeavours to work part time or contribute to the cost of her education. The respondent says he has been funding it through a combination of methods. They share a Visa card which he pays. They have a joint chequing account into which he provides the funds. Finally, he caused Can-Tec to pay her a salary of approximately \$500 every two weeks.
- [42] The maintenance award of \$5,000 was based upon a guideline income as determined by Dillon J. of \$219,000 for the respondent and nothing for the claimant. Kaitlin was living with the respondent at the time of the application so no order of child support was sought or made. Included in the support order was a provision that the claimant was to pay for the property taxes, house insurance, telephone, hydro, gas, lawn maintenance and any other expenses with respect to the home which, to that point in time, the respondent had been paying.

[43] The Divorcemate calculations, premised upon the respective incomes as found by Dillon J., resulted in a range of support payable between \$4,500 and \$5,300 for the claimant. The sum of \$5,000 was the approximate mid-point between those two sums and accorded with the claimant's claimed expenses of some \$5,300 monthly.

[44] Dillon J. noted, as to the claimant's stay-at-home status:

However there is no need for her to stay at home anymore because neither of the children is living with her. Clearly, the expectation is that she will have to reorganize her life, find something for her to do in the employment area, gain some skills and seek employment.

[45] Following the order for support, the claimant enrolled in a baking course designed, she says, to foster a return to the catering business. After a week in the course, the claimant felt overwhelmed and withdrew so as to get a return of the not inconsequential tuition.

[46] Thereafter she obtained employed at the local Salvation Army Thrift shop as a part-time employee. She mostly works 20 or so hours per week at an hourly wage of just under \$10 an hour. On the evidence before me, there appears little opportunity of either advancement or full-time work. Her current income is approximately \$11,500 annually.

[47] She has not sought other employment. She testified she likes the job she has and feels she is unable to compete for employment. Read ins from her examination for discovery leave the distinct impression that the claimant is content to rely upon the respondent for her future economic stability rather than pursue a course of retraining or, alternatively, full-time employment with some potential for advancement and income enhancement.

[48] The claimant's health appears to be generally good such that there is no impediment to her seeking full-time employment and, despite the return of Kaitlin to live with her on a part time basis, there are no duties or responsibilities associated with the care of Kaitlin which would preclude the claimant from full-time employment.

[49] The respondent on the other hand, has several health issues which, according to him, impact his ability and his intentions to remain active in Can-Tec for the long term. His counsel characterized the respondent as "an old 58".

[50] In the mid eighties he suffered an injury to his right knee which required surgery. A motor-vehicle accident in 2010, post separation, exacerbated the effects of that surgery and presently the respondent has ongoing discomfort in the right knee which limits his ability to walk and sit for lengthy periods. He also lost the tip of his pinky finger on his right hand in the accident.

[51] He is diagnosed as pre diabetic, in part, he opines, because of the sedentary lifestyle he must lead owing to his knee limitations. Currently treatment is through dietary restraint and exercise although he is apparently going to begin a course of medication following the trial.

- [52] After 35 years in the business, the respondent has lost the drive to perform the hard work associated with the company's success. Both he and his partner discussed retirement at around age 60. Retirement plans for the respondent have been put on hold awaiting the outcome of this proceeding. However, he says he cannot see himself "doing this" for more than a year or two more.
- [53] Currently, he says he works five days a week from 7:30 a.m. until 5:00 or 5:30 p.m. The occasional weekend work day is still required. Earlier in his career, six day work weeks were the norm.
- [54] His current position is that of administrator and estimator. He testified that he and his partner are the faces of Can-Tec and, without them, the business will drop off. Mr De Grace was not called to give evidence on this point. There is no succession plan in place concerning the management of Can-Tec.
- [55] It is apparent from the tax information provided by the parties that they previously split income from the company. Dividends and/or T4 income was paid to the claimant throughout the course of the relationship prior to separation. This was the main factor leading Dillon J. to impute a further \$50,000 in income to the respondent at the time of the interim application.
- [56] Post separation the respondent has withdrawn significant funds from the shareholder's loan account in 2292. Specifically, between the date of separation and May 31, 2011, the claimant points to slightly under \$430,000 in withdrawals for which the claimant had originally took the position that a compensation order was warranted.
- [57] While I do not propose to review the whole of the transactions within the shareholder's loan account overseen by the respondent, it is apparent that there are two major transactions which require analysis and explanation.
- [58] In or about 2009, AJD encumbered a property located on Johnston Road in White Rock for \$420,000. Both principals, the respondent and Mr. De Grace, agreed that this was to be a personal loan although the company was to provide security. There are banking documents evidencing the fact that each is personally responsible for the loan and the company accountant, John Lenos, testified that the corporate solicitor had been instructed to draw up documents referencing the fact that the loan was solely the responsibility of Mr. De Grace and the respondent. Each had been repaying, from personal funds, the monthly mortgage payment.
- [59] The loan is not recorded on the books of AJD and, were it, the likely consequence would be that both Mr. De Grace and Mr. Weintz would be, according to the Canada Revenue Agency (the "CRA") rules, deemed to have received income of \$210,000 because the monies were not paid back to AJD within 12 months of the date of the withdrawal.

- [60] The respondent utilized those funds to deposit them into his shareholder's loan account with 2292 so as to bring it into a surplus position. This was to offset various withdrawals that had been made between separation and August 2010, the date of the deposit.
- [61] Further encroachments on the shareholder's loan account in 2011 whittled away at the surplus that accrued by virtue of the deposit. Most significantly, in 2011 the approximate sum of \$175,000 was withdrawn, in several installments, so as to provide for the purchase of a condominium in Cabo San Lucas. That condominium was registered in the name of Golda Magnusson, his common-law partner. The ostensible reason given for this was that previously Mr. and Mrs. Weintz had run into tax problems with CRA where investment property held in the name of one or the other of the corporate entities was used for personal purposes and CRA assessed a significant tax penalty against the parties for their personal use.
- [62] Mr. Weintz explained the transaction as leaving open to him the option of repaying the \$175,000, thereby leaving him in a small negative position in his shareholder's loan account, approximately \$12,000. Or, alternatively, according to Mr. Lenos, there will need to be a dividend declared of \$187,000 to clear the respondent's shareholder's loan account. That will result in tax payable by the respondent.
- [63] The valuator, Mr. Mynett, proceeded with his evaluation of 2292 on the basis that a dividend of \$187,000 would be declared in favour of the respondent and, accordingly, were the monies repaid; the net effect would be to enhance the value of 2292 by the same \$187,000 which Mr. Mynett concluded would be dividended to the claimant.
- [64] The decision as to which way to proceed, according to Mr. Weintz, hinges on the sale of Golda Magnusson's Chilliwack home. No further details were provided but the decision will need to be made before May 31, 2012. Otherwise, if the shareholder's loan account is not "cleared" by virtue of a dividend, CRA will deem the amount income to the respondent and, presumably, disallow any deduction to the company for the offsetting expense.

Position of the Parties

- [65] The plaintiff seeks a valuation of the shares at \$2,195,000, the midpoint between the high and the low value opined by the valuator, Mr. Mynett, and an order requiring the transfer of the claimant's share in 2292 to the respondent in exchange for the equity in the family home and an adjusting payment of \$805,000.
- [66] Assuming such a scenario, she will remain responsible for the indebtedness on the LOC. Her submission acknowledges that she, alone, is responsible for repayment of the \$70,000 withdrawn post separation. The Visa debt, she says, has not been shown to exist as at the date of separation, let alone the triggering event, and should not be considered in division.

- [67] The adjusting figure is comprised of the disparity in the value between the assets the parties will retain and takes into account the sum of approximately \$230,000 said to have been wrongfully withdrawn by the respondent from the 2292 shareholder loan account post separation together with the retention by him of the chattels valued at \$33,920 and the disposal of his non-registered account.
- [68] As to spousal support, the claimant notes the 25 year length of the relationship together with her age at separation, 50, and says the result should be an indefinite order for support based upon her current income of some \$11,500 and an imputed income to the respondent of \$236,000 premised upon the factors noted within. This, she says, should result in a support order between a low of \$5,931 to a high of \$7,900. The midpoint of \$6,920 is suggested.
- [69] In addition, owing to the change of residency of Kaitlin, the claimant suggests that effective February 2011 she is entitled to support for Kaitlin who is admittedly a child of the marriage within the meaning of the Divorce Act. Given Kaitlin's residency throughout the school year at UVIC, the model suggested is based upon the Federal Child Support Guidelines, S.O.R./97-175 table amount payable for the summer months only resulting in a monthly sum of \$782 per month on the figures suggested by the claimant.
- [70] The respondent's position is that the valuation of 2292 ought be set as at the date of the first report, May 31, 2008, not its current value, because any change in value came about not as a result of the joint efforts of the parties but as a result of the respondent's efforts in Can-Tec. In the alternative, he says the provisions of s. 65(1)(f) of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] are broad enough to allow for an unequal division of the value of 2292 thus requiring less than an equal payment to the claimant by way of a compensation order. The respondent suggests that the proper figure to adjust the disparity of the assets between them is \$350,000. This sum is premised on a valuation of the shares in 2292 at \$1.650 million and gives no recognition to the claimant for any monies withdrawn by the respondent from the shareholder's loan account since the date of separation.
- [71] The respondent agrees as to the adjustments that should take place between them for the disposal of their respective RRSPs. but not with "tax paid" dollars. Nor does he oppose a compensation order in respect of his disposal of the non-registered portion of the Wellington fund.
- [72] The claimant has made no claim against the respondent's I.B.E.W. pension, despite the fact a portion of the pension was earned prior to cohabitation. Similarly, there is no claim made by the claimant as against the current value of the IPP but, instead, only the RRSP which was "disposed of" by virtue of its being rolled into the IPP on December 31, 2008.
- [73] With respect to spousal support, the respondent says the claimant's potential to earn income is not being fully realized. At full-time employment, based upon an income of \$13.50 per hour, the respondent says the claimant should be earning \$27,000 annually. Additionally, he says further income ought to be imputed to the claimant on the basis that she will receive a lump-sum payment of \$350,000 as per his submission and that her retention of \$950,000

value in the home is unwarranted given the fact that she is, according to the respondent, a single person residing in a small home on a significant lot and that her asset base would be better utilized by downsizing and investing the surplus into an income producing asset.

- [74] The respondent submits Kaitlin's position is in flux and, if support is ordered, it ought to commence when she resumes school and be paid only for those months she resides with the claimant.

Conclusions and Analysis

- [75] The valuation of the shares in 2292 and the application of s.65 (1) to their division are the most problematic issues in this proceeding.
- [76] Relying upon *Edmunds v. Edmunds*, 2001 BCSC 466, the respondent says it is open to me to choose a valuation date nearer the date of separation where the facts warrant it.
- [77] In *Edmunds*, the parties separated in either 1994, or 1996, after 12-14 years of cohabitation. Boyle J. accepted the earlier date of separation and found the value of the wife's insurance agency, at separation, was \$50,000. In 1999 she sold her interest for \$120,000. The husband sought a compensation payment for his ½ interest at \$60,000.
- [78] In concluding the husband's interest was one half the value at separation, Boyle J stated:
- [29] Turning to the husband's argument founded upon reasoning expressed in *Gosset v. Gosset* (1997), 38 B.C.L.R. (3d) 289 (B.C.S.C.) at 298:

What the husband and the wife have, as a matter of law, is a presumptive, undivided half-interest in each family asset as a tenant-in-common, not a right to half the value of the assets, as it is often (incorrectly) phrased. (*Ghurani v. Ghurani* (1993), 46 R.F.L. (3d) 48 (B.C.C.A.) at 73).

- [30] In this case, however, at the triggering event (the trial) when entitlement arose, the wife held no shares in the insurance agency. The husband's interest was in the proceeds of sale.
- [31] The husband argues that, in any event, the wife cannot be credited with making in her own right a major contribution to the agency's capital value increase because that was in large part due to her business partner's transfer of files from an agency that partner operated in Burnaby. That is to say, the wife's effort put toward business management and development during the period after separation was not the substantial reason for the business increase.
- [32] That argument does not stand up to the evidence of the wife's partner who purchased her interest. It is apparent the business required someone of her dedication and ability to survive and prosper. She gave 100% to the enterprise. In negotiating the terms of sale the purchasing partner took into consideration as a discount factor the value of continuing business which he had contributed by moving files from Burnaby.

[79] Here the asset in question, the shares, have not been disposed of. The claimant has been an owner all along. Her interest did not arise at the triggering event but at the time 2292 was incorporated.

[80] In *Edmunds*, Boyle J. found that but for the efforts of the wife, the value of the business would not have been the \$120,000 for which it was sold. He found:

[33] The increase in value was not a market factor nor would it have occurred had not the wife worked (at a salary below her potential) to maintain and develop new and former clients.

[34] Beginning with the conclusion that separation occurred in 1994, I followed *Carr v. Carr* (1982), 30 R.F.L. (2d) 63 (B.C.S.C.) to decision:

In *Carr* ... the Court considered the appropriate date for valuation of a business asset which was a family asset. It was held that where the asset increases in value between separation and the date of trial (which was the triggering event) as a result of the skill or contributions of the owning spouse and not of the non-owning spouse, the appropriate valuation date may be the date of separation. The contribution of the owning spouse after separation justifies a reapportionment in his or her favour.

[35] The evidence I have of value at separation is \$50,000. That figure is somewhat higher than a value calculation between the partners in an (abandoned) negotiation for sale in 1994. The husband's interest will be fixed at \$25,000. I attribute the subsequent gain in value to be entirely to the wife's own account.

[81] Here the facts are different; I do not conclude the value of 2292 has increased because of the respondent working for less than market value. While his efforts and those of Mr. De Grace are no doubt significant, they are not the only factors which resulted in the increased value of the shares between separation and trial.

[82] In *Blackett v. Blackett*, [1989] B.C.J. No. 1889 (C.A.) the Court of Appeal clearly stated that the date of trial is the appropriate date for valuation when a compensation order is being contemplated. Southin J.A., delivering the judgment of the Court, said:

When an asset is determined to be a family asset, the Court must ask itself whether s. 51 should be invoked. For that purpose, it is often necessary to have some idea of the value of an asset as at the triggering event for whether or not there is to be a variation of the right given by s. 43 must be determined by the facts existing when that right came into existence. It is then, and then only, that the right can be unfair.

But when the Court considers what to do by way of a compensation order under s. 52, it is the value at date of trial which is significant for it is at that point that one spouse is having taken away a vested interest and the other spouse is paying for that vested interest.

The reason is simple. Section 43 gives the wife an undivided one-half interest in the shares -- not an undivided one-half interest in the value of the shares at the date of the triggering event or at any other date. This point was alluded to by this Court in *Norton v. Norton*, (1989), 19 R.F.L. (3d) 181 which was decided after the learned trial judge delivered his judgment.

[83] Blackett has been applied consistently in this province. Other than *Edmunds*, I have not been referred to a recent authority where the valuation date has been other than the trial date.

[84] The facts in *Edmunds* are different than those here in that the shares had been disposed of by the time of trial and the husband's ownership arose because of the effect of the triggering event.

[85] Here, the claimant was and remains a shareholder in 2292 and she is entitled, as a matter of right, to share in the enhancement of value of the shares post separation.

[86] The claimant does not dispute the entitlement of the respondent to fair compensation for his efforts. She makes no claim against the IPP created post separation and that must be seen as a benefit to the respondent flowing from his employment with Can-Tec.

[87] As to the application of s.65(1), the only factor said to have application is s.65(1)(f) which reads:

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

(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.

[88] Here the respondent is said to have preserved and improved the shares such that an unequal division is warranted.

[89] I disagree and refer again to the fact the respondent was fairly paid for the work he did. The enhancement, to the extent it resulted from his efforts was not ex gratia but in return for a fair salary and significant benefits, specifically the company's contribution to the IPP and the use of corporate property, Johnston Road, for less than fair market value.

[90] Accordingly, I conclude the proper date for valuation of the shares in 2292 to be the date of trial and the parties are entitled to share in the family assets, including the shares, equally.

The Valuation of 2292

[91] There are two valuations before me respecting the share value of 2292. The first was prepared by Mr. Mynett as at the yearend May 31, 2008, and the second, as at May 31, 2011.

- [92] Mr. Mynett treated Can-Tec and AJD as a single economic unit for valuation purposes. The balance sheets of each were combined for the purpose of assessing their worth. According to Mr. Mynett, Can-Tec has sustainable cash flow (after tax profits) of \$580,000 to \$700,000. He chose a conservative capitalization rate of 2.5. In arriving at the capitalization rate, Mr. Mynett considered, as a negative factor affecting the valuation of goodwill, the fact that Can-Tec lacked management breadth and had all its egg in two baskets, the respondent and Mr. DeGrace.
- [93] In establishing the goodwill of Can-Tec at between \$290,000-\$590,000, Mr. Mynett stated:
- During the years included in our valuation analysis, a single client - Wales McLelland Construction Ltd. - accounted for between 40-60% of Can-Tec's revenues. The loss of this client would have a significant impact on Can-Tec's profitability if Can-Tec were unable to replace those lost revenues in a timely manner. Can-Tec was managed by only two individuals: Paul DeGrace and Don Weintz. As such, Can-Tec lacked managerial breath.
- [94] Mr. Mynett's opinion is that the shares in 2292 have a current value, as at May 31, 2011, of between \$2,070,000 and \$2,320,000. The midpoint is \$2,195,000. By comparison, in 2008, the valuation of goodwill in Can-Tec was between \$198,000 and \$330,000. The global value of the shares using the same approach as used in 2011 was between \$1.24 million and \$1.43 million, the midpoint being \$1.335 million.
- [95] The significant difference in value results from the retention by Can-Tec and AJD of income earned in the intervening three years coupled with an increase in value of the redundant assets (the real estate) and the increase in maintainable cash flow after tax within Can-Tec. For reasons already stated, I reject the notion that this increase in value should accrue solely to the benefit of the respondent at the expense of the claimant. I note, as an aside, that the family home was appraised at \$635,000 in 2008 and at \$950,000 in 2011. The respondent seeks a valuation of the corporate assets as at 2008 but seems content to accept the current valuation of the home as being the proper basis upon which to proceed to divide property.
- [96] The only issue raised by the respondent as to the accuracy of the valuation performed by Mr. Mynett, saved for the submission that the earlier valuation is the one on which the Court should proceed, is that Mr. Mynett failed to recognize that a portion of Can-Tec's goodwill was personal to the two partners, Mr. De Grace and the respondent, and to reflect that in the valuation.
- [97] When the original draft report was published to both counsel in November of 2011, an exchange of correspondence took place between respondent's counsel and Mr. Mynett. In that correspondence Mr. Mynett disagreed that the goodwill he valued was personal to the respondent and his partner but proceeded on the basis that the goodwill was attached to Can-Tec's name, reputation and on the assumption, presumably, that the contacts of both principals be introduced to new owners such that there would be a succession plan allowing for the continuation of good relations between a presumed purchaser of Can-Tec and the successor owners.

- [98] Mr. Mynett testified at trial. He testified that he had no personal conversations with either the respondent or his partner so as to better understand the nature of the relationships by which Can-Tec gains its business and was unaware of any succession plan wherein another employee was groomed to assume the roles of either partner in client management. Testimony given by both Mr. Weintz and Mr. Lenos indicates that both partners envisioned retirement around age 60, albeit Mr. Weintz has put all plans on hold awaiting an outcome to this proceeding.
- [99] In cross-examination, Mr. Mynett expanded on his report to note that other than the operating company, Can-Tec, the other assets within either AJD or 2292 were valued on a liquidation basis. As to the multiplier to capitalize the valuation of Can-Tec, Mr. Mynett says he chose a conservative 40% which results in a multiplier of 2.5. He says he chose this multiplier to reflect the uncertainty of the company's succession plan.
- [100] The chosen multiplier has the result of enhancing the value of Can-Tec by \$410,000, the midpoint between the high and the low chosen for the value of goodwill. Were goodwill eliminated from the valuation of Can-Tec, 2292's share value would be lowered by \$205,000.
- [101] In determining the value of the shares in 2292, I accede to the proposition that the goodwill component of Can-Tec is overestimated by Mr. Mynett for reasons referenced within and I am therefore driven to the lower range of valuation opined by him and set the value of the shares at \$2,100,000.

Shareholder Loan Account

- [102] Another significant area of disagreement between the parties is the treatment to be accorded the respondent's shareholder's loan account in 2292. It would appear that the respondent, in addition to salary paid to him post separation, has withdrawn funds from his shareholder's loan account which has been cleared out at year end by a declaration of a dividend or, in the case of 2010, a deposit by the respondent into his shareholder's loan account of funds taken from AJD. In addition, there is the \$187,000 dividend pending on the books of 2292 to clear the respondent's 2011 negative balance.
- [103] The explanation for the origins of the deposit is that in 2009 AJD mortgaged a previously unencumbered piece of real estate located at Johnston Road in White Rock, B.C. for \$420,000. In August 2009/10, each of the respondent and Paul De Grace had cheques drawn in their favour for \$210,000. The respondent paid his cheque to the credit of his shareholder loan account thus creating a sizeable credit in his favour.
- [104] The withdrawal of funds from AJD is "unbooked". That is to say neither the liability it incurred on the mortgage or the distribution of funds to each of the respondents nor has Mr De Grace not been recorded in the company's financial records.

[105] The respondent says he is repaying the mortgage through personal funds (albeit via the vehicle of his shareholder loan account in 2292). He has not recorded the asset of his shareholder's account nor the liability, the personal assumption of one half the Johnston Road mortgage on his Property and Financial Statement.

[106] Ultimately, the claimant retreated from the suggestion that she was entitled to compensation order for one half this amount. Instead, she seeks compensation for the remaining withdrawals of \$230,000.

[107] I note that the respondent's shareholder loan account stood at \$2,490 on May 31, 2008 and \$770 as at May 31, 2011. This latter figure is premised upon the declaration of the \$187,000 dividend being credited to the respondent so as to take him out of the negative balance.

[108] The claimant says she is entitled to a compensation order in respect of these withdrawals. With respect I disagree.

[109] The ordering of a compensation order is covered by s. 66(2)(c) of the FRA. It reads as follows:

(c) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division;

[110] Here, the stated rationale is that the respondent has wrongfully deprived the claimant of her interest in the funds withdrawn from the shareholder loan account.

[111] It is not suggested that the shareholder's loan account, itself, has been significantly altered between the respective dates of May 31, 2008, and May 31, 2011. The difference between the account value as at the date May 31, 2008 and 2011 is modest.

[112] The leading case on what is now s. 66(2)(c) remains, in my view, *Newson v. Newson* (1986), 3 B.C.L.R. (2d) 1.

[113] In *Newson*, Justice Anderson, stated at page 11:

In summary, compensation or adjusting orders may be made by a trial judge pursuant to s. [66(2)(c)] of the Act having regard to the concept of "fairness" as related to the factors enumerated in s. [65]. In other words, s.[66(2)(c)] is a procedural vehicle for carrying into effect the substantive determinations made pursuant to s. [65]. Such orders may be in respect of "potential" family assets disposed of prior to the triggering event.

[114] Further, at pages 15 through 16, Anderson J.A. stated:

(1) Where a spouse has disposed of or spent "potential" family assets shortly before the end of a marriage or after separation, a compensation order may be made in respect of such disposal or expenditure.

- (2) Compensation orders are not made in respect of every disposal or expenditure. There must be proof of "unfairness" having regard to the factors enumerated in [s. 65] of the Act. For example, a disposal or expenditure that deprived the other spouse of a reasonable expectation that on the happening of the triggering event the "potential" family asset would be available for division might well be "unfair".
- (3) Depreciation or appreciation in value of "potential" family assets, resulting from market forces between the date of separation and the triggering event, is unlikely to give rise to "unfairness".
- (4) The Wagner case and the Gourlay case are cases where "potential" family assets have been disposed of or spent at or near the end of an "uneasy" marriage (but before separation). But it is only in those or similar unusual circumstances that the court ought to make compensation orders in respect of disposals or expenditures made during the marriage.

[115] Those passages were recently considered in the Court of Appeal decision in *Parminster v. Parminster*, 2011 BCCA 347. There, Madam Justice Saunders speaking for the court confirmed that compensation orders remain available where, in Mr. Justice Anderson's words:

[37] ... in the second criterion from *Newson*, there is "proof of 'unfairness'". That is, the question is not, as the judge said, whether a compensation order is unfair but rather whether division of assets without a compensation order would be unfair. The difference in the two questions is subtle but fundamental to the perspective from which one starts the analysis. The first question starts from the basis of no compensation order and determines whether that is unfair; the second question starts from the basis of a compensation order and determines whether that situation is unfair. In close cases, the results generated from those different questions may differ.

[38] The second error derives from the language of s. 66(2)(c) which, absent reapportionment under s. 65, permits a compensation order where "property has been disposed of". Perhaps it is with that language in mind that Mr. Justice Anderson voiced caution in awarding compensation orders where there has only been depreciation or appreciation of the asset. In certain cases the depreciation of an asset may be so extensive as to justify a conclusion it is, for practical purposes, "disposed of". However, such is not the case here, nor did the judge so find.

[116] Here as in *Parminster*, which dealt with the depletion of a pension via the withdrawal of monthly benefit payments, the property in question, and the shares in 2292, have not been depleted since the date of separation. Instead, as is evident from the two valuations before me, it has been significantly enhanced. How can it be said to be unfair to deny the claimant a compensation order when the value of the asset, the shares in 2292, has grown from the 2008 value of \$1430,000 to the current figure of \$2,100,000?

[117] It cannot. As such I reject any notion that the claimant is entitled to compensation for the withdrawals made by the respondent via the shareholder loan account.

Debts Chargeable as Against Family Assets

[118] The parties are in agreement that the TD line of credit balance for which they are jointly responsible is \$65,000 (rounded). The remaining sum owing is the sole responsibility of the respondent by virtue of her withdrawal of \$70,000 from the line of credit in or about 2008.

[119] I am not satisfied that the Visa debt referenced by the respondent was owing as at the date of separation, let alone the triggering event, and decline to make any orders in respect of it. The respondent says that he has since paid it and, given all of the circumstances I have referenced within these reasons, including the salary drawn by him, the substantial dividend declared in 2011, I find no unfairness in him remaining responsible for its repayment.

The Other Family Assets

[120] The family home is admittedly a family asset with a value of \$950,000. The claimant wishes to retain it and the respondent does not dispute that albeit he notes that the retention of it should come with some attribution of income.

[121] Each of the parties has effectively disposed of their Wellington West RRSPs. The value of the claimant's RRSP was \$32,000 (rounded); the value of the respondent's was \$69,000 (rounded).

[122] The non-registered account with Wellington in the name of the respondent was either a family asset or a potential family asset to which the claimant had a legitimate expectation. The date of disposal is unclear from the evidence but, regardless, the claimant is entitled to a compensation order for one half its last known value.

[123] The RRSPs are different from the other assets I am considering in that they bring with them latent tax implications. The respondent currently has an IPP valued in excess of \$200,000 but it is unclear whether he can roll any portion of that IPP out to the claimant so as to satisfy her claim for an equal division of the RRSPs as at triggering event. Given my view that this assets should be treated separate from other adjustments, the adjusting figure will be the sum of \$18,500 so as to leave each RRSP at \$50,500 as at the triggering event, I order that the respondent either roll over, by way of spousal roll over, the sum of \$18,500 from his IPP into an RRSP created by the claimant or, alternatively, he may purchase an RRSP in that amount for the claimant within 90 days from the date of these reasons thereby creating an RRSP in her name in the amount of \$18,500.

[124] The remaining family assets I find to be the Sea Doo, Honda motorcycle and Cadillac which are valued at \$33,920 (by agreement) and remain in possession of the respondent.

[125] What then to do with the division? In Blackett, Southin J.A. set out the following non-exhaustive criteria for orders dividing shares in private companies. She stated as follows:

But an order vesting the shares in a private company in one spouse upon payment of compensation by the other spouse for that interest is not the only possible disposition when the asset in issue is shares of a private company.

There are at least two other possible orders:

1. That the spouse who is the registered holder be directed to hold the shares in trust for that spouse and the other spouse according to their respective interests.
2. If the other shareholders of the company assent, that the spouse who is the registered holder be directed to transfer to the other spouse the appropriate number of shares and, thereby, effect a division.

[126] In the instant case, the claimant is already an owner of the shares and that is an order for transfer is not required.

[127] Further in Blackett, Southin J.A. stated as follows:

If the court decides upon a vesting in one spouse and compensation to the other, the question then becomes the measure of compensation.

The learned judge below appears to have been of the view that proper compensation was necessarily one-half of the amount he decided was the value at the relevant date of the interest of the husband.

I do not think that the statute is so rigid. It does not define "compensation". It does not, for instance, say that compensation must be "fair value" or "fair market value".

Section 52 [now s.66(2)(c)] is not an expropriation act but a mechanism for adjusting matters between spouses.

In deciding compensation, the court may, in my opinion, take into consideration that:

1. A compensation order under s. 52 is not an order under s. 224(2)(c) or under s. 231(4)(a) and (b) of the Company Act, R.S.B.C. 1979, c. 59. What is a proper price under one or other of those sections is not necessarily the same as proper compensation under s. 52. This respondent has not oppressed the appellant in her capacity as a putative shareholder.
2. If the husband's 49 per cent interest were sold and if he received the value estimated by the experts, his net proceeds and, therefore, her one-half, would be substantially less than the value calculated by the experts because he would have much tax to pay on the capital gain. There may be other tax considerations unknown to me.

3. The value estimated by the experts may, in large measure, exist because the directors have received much less in management fees for their work over the last five years than their work was worth.
4. Cash in the pocket is real money. Experts' "values" are mere opinions. "Ah, take the Cash and let the Credit go, Nor heed the rumble of a distant Drum".
5. The right of the spouse to an interest in the shares is not a marketable asset. An asset which, for whatever reason, cannot be offered for sale to the world at large is not of the same value as an asset, such as land, which can be.

[128] Excluding as I have, the Wellington RRSPs, and any compensation for the respondent's withdrawal from the shareholder loan account, the figure required to equally adjust the division of property payable by the respondent to the claimant is \$629,882.00 as per the attached Scott Schedule.

[129] However, as noted in Blackett, compensation does not, of necessity, equate with "fair market value". Relying on the principles in Blackett, referenced above, I order that the compensation order required to provide for the division of assets transferring the claimant's share in 2292 to the respondent be \$600,000.

[130] The purchase of the claimant's share by the respondent, even at slightly less than fair market value, provides the claimant with a more satisfactory remedy than the sale of the shares of each of the parties. The respondent will continue to generate income from which he will be obliged to pay her support. If, at some later time, the respondent sells the shares at a price considerably in excess of the price opined by the expert, it will presumably be a consideration as to whether his support obligation I order will continue beyond his retirement.

[131] I have no way of knowing whether the respondent is able to buy out the claimant's share. He will have 90 days from today's date to advise the claimant as to whether he chooses to exercise the option to buy her out. Presuming he does, he shall have 60 days from the date of exercising the option to pay to her the \$600,000 and, at that time, the claimant's share in 2292 shall be transferred to the respondent or his nominee and the respondent shall transfer his interest in the family home to the claimant.

[132] The LOC shall be the sole responsibility of the claimant from the date of transfer forward. She will save harmless and indemnify the respondent from all claims arising from it and use her best efforts to remove his name from it.

[133] The respondent will retain the chattels in his possession and the claimant the chattels in her possession, including the house contents.

[134] In the event the respondent does not choose to purchase the claimant's share on the terms set out herein, the shares in 2292 will be sold and each of the parties shall have liberty to apply to the Court for directions. In the event of the sale of 2292's shares, I will entertain an application for the sale of the family home at the same time. If the home is to be sold and the proceeds equally divided, the LOC will be paid from the net proceeds of sale.

The Parties' Incomes

[135] The claimant's entitlement to spousal support, whether on the compensatory or non-compensatory model, is not challenged. Nor could it be.

[136] The relationship was a traditional one with the claimant devoting her energy primarily towards the children and the home. The best I can do with respect to the duration of the relationship is conclude that it commenced in either 1985 or 1986 and carried on until physical separation in 2008; in total, a 22-23 year relationship.

[137] The claimant has had four years post separation to either retrain or seek employment. It does not appear to me that she has any desire to upgrade her credentials. She appears to be content working at or near minimum wage. No retraining path has been suggested which leads me to conclude that the claimant's decision is not an informed, practical approach to the factors of her age, work history and vocational background.

[138] Nonetheless, I agree with the respondent's submission that she cannot, absent health reasons or some other cogent reason, work only on a part-time basis. Since acquiring employment with the Salvation Army, she has done nothing to secure full-time employment. There is no impediment to her doing so.

[139] While the suggested income of \$13.50 hourly seems at best speculative, I take notice of the fact the minimum wage will rise, shortly, to \$10.00 an hour and that full-time employment, even at minimum wage, should produce an income of approximately \$21,000 annually.

[140] In my view, it is reasonable, now four years after separation, to impute employment income to the claimant of \$23,000 annually premised, as it is, on full employment at \$11.00 an hour.

[141] In addition, the respondent says some return on capital must be imputed as well. The respondent suggests \$30,000 annually based on investment capital of \$750,000 returning 4% per annum.

[142] Assuming payment by the respondent of \$600,000 as per the figure found by me to be proper compensation for the division of assets, I would expect the claimant, after repaying the LOC, would have \$450,000 for investment. At the 3% annual return referenced by Mr. Mynett in his report, an additional \$13,500 would be generated giving the claimant an annual income of \$36,500. I accept this as a reasonable attribution of income obviating the need for reviews in the future other than based upon a material change in circumstances.

- [143] Given my conclusions which follow, regarding the submission that the respondent be imputed income because of his housing situation, I decline to impute income to the claimant on the basis that she is imprudently utilizing capital for housing which ought to be invested to provide her with additional income.
- [144] As to the respondent's income, it is suggested that in addition to the historical salary of \$150,000 drawn by the respondent from Can-Tec, I add \$20,000 in respect of the ex gratia payment to Ms. Magnusson, \$30,000 to reflect the contribution by Can-Tec to his IPP, \$25,800 in respect of the value of below market rental of the Johnston Road home and basement suite, \$9,400 in respect of wages to pay Kaitlin (essentially her extraordinary expenses) and \$5,000 to reflect the available tax deduction associated Kaitlin's tuition expense.
- [145] While I agree Ms. Magnusson's income of \$20,000 must be seen as a benefit to the respondent, I decline to make further adjustments to his income.
- [146] The IPP contribution is no more or less than an employer's contribution to an employee's pension. I was not provided with any authority for the proposition that employer's contributions to a company pension plan ought to be added to the payor's income for the purpose of determining either spousal or child support. The IPP is no different from an employer funded pension. The respondent's future pension entitlement may or may not result in the respondent paying spousal support following his retirement from Can-Tec.
- [147] The benefit he receives from the under payment of rent to AJD is offset, retroactively, by the fact the claimant has had "rent-free" accommodation since separation and that will continue. That is to say she will have no housing expense beyond taxes, utilities, etc. in the future. The use of a capital asset by the respondent, the rental property owned by AJD, does not, in my view, result in him paying higher support to the claimant.
- [148] As to Kaitlin's expenses, there is no evidence the respondent has actually availed himself of a tax benefit by virtue of her attendance at UVIC save for an amount around \$700 in one tax year. I decline to add anything to his income in respect of this potential benefit.
- [149] Finally, with respect to the payment to Kaitlin of a wage to defray her university expenses, were that amount added to his income, the claimant would be required to contribute proportionately to Kaitlin's expenses. For so long as Kaitlin's expenses are paid via salary through Can-Tec, neither party is obliged to contribute anything monthly to her extraordinary expenses.
- [150] Hence, for the purpose of both spousal and child support, I conclude the respondent's income is \$170,000 per year.

Child Support

- [151] Kaitlin has lived with the claimant since February 2011. However, save for the summer of 2011, until recently, she resided in Victoria. Presently, she resides with the claimant but works. She anticipates returning to school in either the summer or fall of 2012 and presumably will finish her final year of studies in Arts and then enter the Professional Development Course to obtain her teaching credential.
- [152] Assuming she (1) returns to school and (2) resides with the claimant during school breaks and weekends, the respondent will pay support to the claimant on Kaitlin's behalf based on a the model suggested by the claimant; that is the table amount for summer months only amortized over 12 months. Support will become payable on the first day of the month she resumes school.
- [153] Based on the respondent's income, this amounts to \$490 per month, based upon the table amount respecting children living with a parent over the summer months.

Retroactive Child Support

- [154] Based on the fact I have found the respondent's income lower than assessed by Dillon J., coupled with the fact the claimant has been working and receiving income since late 2009 and throughout the period Kaitlin lived with her, I am not of the view that there is any need for support to be payable other than prospectively.

Spousal Support

- [155] The range of support payable under the Spousal Support Advisory Guidelines based on the incomes I have determined (\$36,500 for the claimant, \$170,000 for the respondent) and factoring in the child support payable for Kaitlin, once she resumes school, is between a low of \$3,742 and a high of \$ 4,706. The midpoint is \$4,365
- [156] Commencing in the month following payment to the claimant of the adjusting payment referenced earlier in these Reasons, the respondent will pay monthly spousal support in the amount of \$4,250 payable indefinitely.
- [157] There will be an annual exchange of the parties' relevant tax information commencing with their 2012 income tax information. Either party is entitled to apply for a variation of this order on proof of a material change in circumstances.
- [158] I anticipate a change in the income needed to be drawn by the respondent to fund the purchase of the claimant's share in 2292. Such, in my view, will be necessary to service the debt he will incur to buy out her share. I note this so as to make clear that the respondent, of necessity, will have to draw greater income to pay for the share purchase my Reasons contemplate and have been considered in determining the amount of support payable.

[159] While the respondent is retaining a valuable asset, he is left without an unencumbered residence and will have to service significant debt over the remainder of his working life.

The Divorce

[160] The parties have been separated for over a year. There is no chance of reconciliation. There will be a divorce subject to s. 12 of the Divorce Act.

Costs

[161] I am of the view success in this matter has been divided. Subject to any Offers to Settle which might change that view, each party will bear their own costs of the proceeding.

"Harvey J."

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