THE VALUATION LAW REVIEW

Volume 23, Issue 1
October 2017

Family Law Decision

The Valuation Law Review is a joint publication of the Canadian Institute of Chartered Business Valuators and Terry Hainsworth and this issue summarizes family law decisions of interest to business valuators.
The Valuation Law Review is not intended to provide legal advice and readers should not act on information in the publication without seeking particular advice on matters that are of concern to them. Readers are cautioned against relying upon the decision summaries contained therein, which are edited and in outline form only, and are directed to the full report of the reasons of the Court. While every effort is made to include cases that are of precedential value, it is impossible to include every case relevant to valuation issues that may face a reader. Further, legal decisions rendered since the publication of this edition of the Valuation Law Review may change the law set out in this Valuation Law review. Readers are directed to carry out their own further research to ensure the accuracy and completeness of the Valuation Law review entries.

Editor: Terry Hainsworth, B.A., LL.B., OAFM, Q.arb

For subscription information please contact:

The Canadian Institute of Chartered Business Valuators
277 Wellington Street West, 8th Floor
Toronto, Ontario M5V 3H2
Telephone: (416) 977-1117
E-mail: admin@cicbv.ca

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the CICBV.

© Copyright CICBV 2017

THE CANADIAN INSTITUTE *of*
CHARTERED
BUSINESS
VALUATORS™

Page 3
Halliwell v. Halliwell
- joint family venture not found. Equalization and a compensatory support award provided wife with an equitable distribution
- “comparable” approach to value using similar EBITDAs inappropriate. Companies were not similar and EBITDA approach failed to account adequately for the continuity of the business
- hindsight evidence. Unresolved litigation on the valuation date
- valuation of shares. Identical companies but one having substantial amounts due to shareholders. No difference in valuation approach
- tax discount. Whether payable on husband’s retirement or husband’s death. Evidence
- income attribution to shareholder. Considerations
- Spousal Support Advisory Guidelines. Incomes over $350,000. Range of awards
- double-dipping. Restricted to assets which are self-liquidating

Page 6
Duffus v. Frempong-Manso
- Child Support Guidelines. Income initially under-stated. Court declined to grant wife relief other than costs
- CBV’s testimony discounted. Reasons given by court
- husband found to be sole shareholder of corporation. Court rejected allegation of partnership
- personal services corporation. Attribution of income. Gross up

Page 8
Sweezey v. Sweezey
- Child Support Guidelines. SS. 21(1)(f) and 18. Payments made to non arms-length persons. Onus of proof
- Child Support Guidelines. SS. 21(1)(f) and 18. Payments made to non arms-length persons. Particularity
- attribution of corporate income. Considerations

Page 11
Hausmann v. Klukas
- Child Support Guidelines. Whether payment can be made through a family trust. Factual considerations

Page 12
Parrett v. Parrett
- double-dipping. General principles
- double-dipping. Both parties retired. Imputing income to dependent spouse

Page 13
Purtzki v. Saunders
- trusts. Whether “discretionary”
- trusts, valuation
- trusts, immediate or “if and when” division

Page 15
Strober v. Strober
- “ultimate issue” and testimony of expert
- expert’s assumptions. Matter left to experts and not to be dictated by the court

Page 16
Tremblay v. Tremblay
- estate freeze. Actual ownership as opposed to parties’ intentions
- trusts. Whether “discretionary”.

Considerations
- funds in holding company. Liquidity discount. Discount for income tax consequences. Gifts. Ontario. Determination of beneficiaries of the gift
- Costs. The stone-walling tactics of the husband exposed him to an order for costs, requiring a substantial contribution to the cost of the wife's valuator

Page 19
Thomas v. Thomas
- valuation of assets. Date for valuation. Both parties continuing to withdraw funds and trade stock market accounts following separation
- valuation of shares. Impact of prior transaction
- gifts. Saskatchewan. "Advance on inheritance" not an exemption
- interim support varied by trial judge did not create a "double-dip." Reasons
- valuation date. Discretion of court
- support entitlement. Continuing income disparity

Page 22
Mason v. Mason
- Federal or provincial legislation: there is no real distinction respecting entitlement to spousal support in Ontario's Family Law Act and the Federal Divorce Act
- an agreement respecting child support did not, on the facts, create an issue estoppel respecting spousal support
- if a trial judge elects to apply the Spousal Support Advisory Guidelines, he or she must either follow them or explain why they should not apply
- a wife may be awarded spousal support on compensatory grounds notwithstanding a large equalization payment
- in applying the Spousal Support Advisory Guidelines, courts should not arbitrarily default to mid-range amounts

Page 26
Woodburn v. Woodburn
- an advance payment, on consent, will not preclude the court from ordering further payments to carry the case under Rule 24(12) of the Ontario Family Law Rules
- payments to carry the case. Considerations

Page 27
M. M. v. R. M.
- expert testimony. Court declined to qualify long-standing Chartered Accountant of one of the parties to give expert testimony
- expert testimony. Disqualified expert may assist counsel in cross-examination and preparation of argument

Page 28
Rea v. Rea
- costs to carry the case. Considerations

Page 29
Rosati v. Reggimenti
- qualifications of expert. Legal change. Two-fold test.
- qualification of expert. Disqualification. Onus of proof

Page 31
McKenzie v. McKenzie
- assessment of costs following trial. Fees of expert

Halliwell v. Halliwell, 2016 ONSC 182

a) Background

The parties were married in 1983. They separated in 2009, approximately 26 years later.

The husband was a qualified civil engineer. In the early years of the marriage, he had employment with third parties. However, by the mid-90's, he began to form his own companies which were involved in the shoring of surrounding lands for deep excavations on large construction projects. He also had management services companies and real estate companies out of which his businesses operated. He was a 50% shareholder in the operating companies. With respect to the operating companies, he was the specialist, and his "business partner" was the financial backer.

The wife, generally, was a homemaker and a mother. She obtained a real estate licence but allowed her licence to lapse approximately 7 years before the separation. She provided some assistance to the husband in the administration of his businesses. Following the separation, she did some volunteer work and worked part-time as a clerk in a friend's dress shop. The court made several salient observations about the parties' demeanor. He found that the trial had been protracted by reason of the husband's failure to provide timely and accurate disclosure. He found the husband's attitude to be over-bearing. Finally, he found that the wife exaggerated her contributions to the husband's business enterprises.

The court was faced with numerous issues, which included:

1. whether the wife had established a joint family venture;
2. the value of the husband's businesses which included:
    - the methodology of valuing the holding company;
    - the approach to the valuation of the operating companies;
    - the choice of the multiple;
    - hindsight evidence;
    - treatment of the 2008 dividend/bonus;
    - the tax discount;
3. incomes
    - the husband's income;
    - the wife's income;
4. The *Spousal Support Advisory Guidelines*, including:
    - assessment of support under the Divorce Act;
    - the role of the Guidelines;
    - incomes over $350,000;
5. Double-dipping

b) Joint Family Venture

The concept of a "joint family venture" was set out in the Supreme Court of Canada's decision of *Kerr* v. *Baranow*, 2011 SCC 10. It can provide a claimant with a money or proprietary award where the claimant's contribution is linked to the family's generation of wealth. In situations pertaining to married couples, two questions must be asked:

1. Do the elements of a joint family venture exist?; and
2. Does the equalization scheme set out in the *Family Law Act*, combined with support, provide fair compensation for the non-titled party?

On the facts of the case, the court found that a joint family venture was not established. The wife was compensated for the services that she performed to a level which amounted to a form of income-splitting. Moreover, the equalization scheme of Ontario's Family Law Act, when coupled with a compensatory support award, would provide the wife with an equitable distribution.

c) Valuation

1) The Management Companies
The shares were beneficially owned by the wife and their two grown-up children. Its only asset was an account receivable from the management company controlled by the husband. The business valuators agreed that the account receivable should be adjusted in and added back to the husband's net family property.

The court did not deal with the value of the other non-operating companies as the business valuators had agreed on the proper approach to valuing those corporate entities.

2) The Approach to Valuation
The husband's valuator used a "comparable" approach to value. In it, he compared various companies listed on the American Stock Exchange with EBITDA's similar to the operating companies. Such an approach, however, was flawed. The companies were not necessarily comparable in terms of their size, product mix, and markets served. The use of an EBITDA approach to earnings may not take into account the capital expenditures necessary for a business to continue to operate.

3) The Choice of the Multiple
As a consequence, the court preferred the wife's valuator's selected multiple of approximately 2.7 times maintainable earnings.

4) Hindsight Evidence
The company had completed a substantial project in 2008 but became embroiled in litigation following its completion. The litigation was ultimately resolved in 2013. The court refused to bring into account the outcome of the litigation in 2013, holding that it would be "hindsight evidence."

The husband and his partner had declared substantial dividends and management bonuses in 2008. The bonus and dividends were not, however, paid out. They were treated as being ongoing shareholders' loans. The husband's valuator took the position that they would impact upon the multiple to be employed to the two operating companies.

By contrast, the wife's valuator stated that the companies were identical, in form and reality. They had the same management team. They had the same level of expertise and used the same engineers in both companies. There was no real start-up discount to be applied to one of the companies because its expertise and infrastructure had been developed by the other corporation. Thus, they warranted relatively identical multiples.

5) The Tax Discount
The husband's valuator assumed that the husband would sell his businesses within two months and "cash out" once he attained the age of 65 years. The wife's valuator assumed that it would take much longer to sell the businesses (approximately two years). If he prudently invested his money, it would last him until he died, obviating the necessity of "cashing out" at age 65.

As there was no evidence that the husband would necessarily "cash out" at 65 and as there was evidence that the husband continued to expand the businesses, the wife's approach to valuation was accepted.

With respect to the account receivable regarding one of the management companies, the husband's valuator failed to account for the refundable dividend tax.

d) Incomes of the Parties

1) The Husband's Income
The court noted that taking money out of the company is a matter of choice made by the directors and shareholders of the company. The courts must look to those choices in determining income for support purposes with a discerning eye that draws a fair balance between the complicated considerations of business viability with a person's duty to maximize available income for support purposes. Amongst the considerations that the court will take into account with respect to business viability will be company banking covenants, economic upturns and downturns, the degree of competition within a particular market, the degree of capitalization required for a particular company and future growth, and the shareholdings of the parties.

The husband's valuator would not attribute the income of the operating companies to the husband. This was because the husband did not have a controlling interest in the companies. He would, consequently, restrict his income determination to the amounts paid up or generated by the corporations in which the husband had a majority interest. This position was rejected by the courts for numerous reasons including the fact that the operating companies were growing in value, were very profitable, and had the ability to expand into new business ventures. To ignore the profits generated by the operating companies would shut the wife out of receiving support commensurate with the growing income of the husband.

However, the wife's approach did not take into account the need of the corporation to finance its ongoing capital requirements, the "boom or bust" nature of its Calgary market, and the fact that the husband did not have a majority interest in the operating companies.

In this respect, the court held that both accounting experts were very professional, objective, and neutral in their assessments. Although they differed in methodology and opinions, they were each very helpful in advancing the positions that they took. These observations must be made against the backdrop of the courts applying the average income of the husband over the preceding three years (2013-15). That average amounted to $882,730 as opposed to $1,925,000 estimated by the wife's valuator.

2) The Wife's Income
The court noted that the wife devoted herself to volunteer employment. The court felt that she should derive an income from her volunteering that would yield an income of

approximately $35,000 per annum.

e) The *Spousal Support Advisory Guidelines*

1) Assessment under the Divorce Act
The court took the position that spousal support must be determined in accordance with the statutory provisions set out in section 15.2 of the *Divorce Act*. Unlike the *Divorce Act*, the *Spousal Support Advisory Guidelines* are not statutory authority. They are guidelines designed to advise on a reasonable range of spousal support and a reasonable duration for spousal support in various circumstances. While they are advisory, the courts are nevertheless required to consider them in deciding spousal support. Consequently, the court used the *Spousal Support Advisory Guidelines* as one indicator of what might be a fair and reasonable amount of support.

2) Incomes over $350,000
The court reviewed a number of cases which dealt with incomes over $350,000. The court noted that in long term marriages, the income distribution should be between 37.5% and 50% of the gross income difference between the spouses.

On that analysis, the court awarded the wife 38.1% of the income differential (based on the husband's imputed income of $1,000,925 and the wife's imputed income of $35,000).

f) Double Dipping
The court applied the "business asset" rule set out in *Boston* v. *Boston* [2001] 2 S.C.R. 414. Business assets continue to have a real and intrinsic value despite the fact that their quantification may have been determined on future income. They are not self-liquidating but can continue to generate income and may possibly increase in value. In the court's view, double recovery does not exist where the asset is not self-liquidating.

Duffus v. Frempong-Manso, 2015 ONSC 7051

a) Background
The parties were the parents of a 15-year-old daughter. Following a lengthy trial in 2012, the respondent was ordered to pay $1,887.50 monthly child support based on his annual income of $285,652.

In 2013 and again in 2014, the respondent brought motions to change the quantum of child support. He alleged his income had fallen to $140,000 in 2013 and $152,000 in 2014. In describing the husband, the trial judge found that he was evasive and non-compliant with respect to his disclosure obligations. Amongst other things, he filed several contradictory financial statements. He failed to disclose his interest in a numbered company known as 1858910 Ontario Inc. and, thereafter, claimed that he was only a 50% shareholder in the corporation. Indeed, it appeared that he had probably understated his 2011 income (found to be $285,652) by approximately $61,740 because he failed to report the $61,740 in 2011.

b) Understatement of Income
The court found that the respondent's 2011 income was, in all likelihood, understated by $61,740.

The court declined to adjust his income, however, for two reasons:

a) The respondent had been ordered to pay $60,000 in arrears of child support and the court was uncertain as to how these arrears had been calculated; and

b) The mother had not asked the court to re-calculate the amount originally ordered by the court. She was, consequently, bound by her own pleadings. The court did note, however, that there was no evidence before it that the child's needs were not met and that it would deal with the respondent's untruthfulness on the question of costs.

c) The CBV's Income Determination

The respondent had hired a CBV to prepare an income determination report. The CBV testified that he relied, primarily, upon the information provided to him by the respondent, the respondent's business associate, and an accountant who prepared the financial statements for 1858910 Ontario Inc. The CBV admitted that he had looked at the general ledgers and adjusting entries to the corporation but did not spend a lot of time doing so. He specifically admitted that:

a) He had not reviewed any of the respondent's former sworn financial statements delivered in the proceedings;
b) He was unaware of the request to admit, and the respondent's response to the request to admit;
c) He had not reviewed a "consulting agreement" between the respondent and Charlotte Myall;
d) He had not reviewed any backup documents for any of the corporate expenses and in particular, receipts and invoices or bank statements.

As a consequence, the court said that it had little confidence in the report prepared by the CBV.

d) Ownership of 1858910 Ontario Inc.

It will be remembered that until January of 2014, the respondent had not disclosed his interest in the numbered company. After that date, he alleged that he was a 50% owner of the corporation with his friend, Charlotte Myall. The court rejected his allegation that he and Ms. Myall were partners in the corporation based on the following findings:

a) No corporate document showed that Ms. Myall held an interest in the corporation;
b) The corporate income tax returns showed that only the respondent took income from the corporation;
c) The corporate tax returns were filed by the respondent;
d) There was no evidence that any share transfer had actually occurred;
e) Ms. Myall had never received any dividends from the corporation;
f) Ms. Myall had never received any management or other fees;
g) The respondent was always the controlling mind of the corporation; and
h) He used the corporate bank account to pay his own personal expenses.

The court found that the husband was the sole shareholder of 1858910 Ontario Inc.

e) Attribution of Corporate Income to the Respondent

1858910 Ontario Inc. was, primarily, a personal services consulting company. The court found that:

a) It had no need to retain earnings;
b) There was no evidence of corporate indebtedness;

c) As the respondent had not shown any invoices or other documents to justify his "advertising and promotion" expenses, they were attributed back to him. His home office expenses were attributed back to him as he did not see clients at his home office;
d) His expense for amortization was disallowed;
e) His automotive and travel expenses were disallowed in part.

The court then "grossed up" the personal expenses disallowed by 49.3%.

f) Shareholder Loans

The respondent was in the habit of borrowing money from his company, repaying the shareholder's loan, and borrowing it again. The C.B.V. testified that in this fashion, the shareholder loans would not be included in the shareholder's income.

In 2012, the shareholder borrowed $78,074 from the company and in 2013, $95,749.

The court ordered that both of these amounts be added to the respondent's income for the years in question. The court made this determination based on the following factors:

a) The respondent had full ownership and control of the company;
b) The shareholder loans were never documented;
c) There was never any proof of interest paid on the loans;
d) There was no set repayment for any of the loans;
e) The court found that the respondent did not treat the advances from the corporations as legally binding loans; and
f) The repeated advances indicated that the company had enough liquidity to pay out funds to the respondent whenever he pleased.

The court determined that the respondent's income for 2012 was $337,667 and for 2013 $418,869.

As the respondent did not put forth any evidence that support should be re-adjusted due to the impact of s. 4 of the Guidelines (income over $150,000), he was ordered to pay the table amount for each of those years.

Sweezey v. Sweezey, 2016 ABQB 131

a) Background

The parties married each other in 2006. They separated four years later. During that time, they had two children.

Mrs. Sweezey earned approximately $90,000 annually, working shifts for a forestry company. As a result, she had substantial daycare expenses.

Mr. Sweezey had always been a trucker. Following the separation, he and his girlfriend incorporated a trucking company, known as "CTS." Both drove trucks for the company. The girlfriend did the paperwork for the company.

In 2012, the court made an order imputing $110,000 income to Mr. Sweezey and awarding child support on that basis. A year later, in 2013, the parties entered into a comprehensive agreement resolving all issues between them. The imputed income of

$110,000 was maintained and each party had the right to apply to vary the quantum of child support based on their future incomes.

b) The Motion to Change

In late 2014, Mr. Sweezey applied to reduce the amount of child support. He alleged that he had been overpaying child support. He maintained that his income was as follows:

2012	$50,880
2013	$50,249
2014	$55,845

At the time of the hearing, he was $40,000 in arrears of support. Mrs. Sweezey, undaunted, brought a cross-application to increase support. She also sought an order requiring Mr. Sweezey to contribute towards the childcare costs retroactive to January 1, 2013. She argued that the salary paid to Mr. Sweezey's girlfriend was excessive and many of the payments made by the corporation had a personal component. Thus, she argued that Mr. Sweezey's income was understated pursuant to s. 18(1) and (2) of the *Child Support Guidelines*.

c) The Issues

1) Sections 18 and 21(1)(f) of the Child Support Guidelines

Section 18(1) allows the court to attribute corporate income to a shareholder if the court believes that his or her income is not properly reflected in the personal income tax returns filed. It enables the court to pierce the corporate veil or to "claw back" personal or unreasonable expenses into the corporation's profits. Section 18(2) requires the court to claw back into the corporate income unreasonable benefits paid to persons who deal with the corporation on a non-arms' length basis. Section 21 requires a shareholder who "controls" a corporation to deliver copies of the financial statements for the most recent three years and a statement showing all of the benefits paid to persons or other corporations who do not deal with the corporation at arm's length.

The court set out to explain the interplay between these two provisions.

Earlier, another judge had made a very extensive production order requiring the husband to produce a number of documents which included:

a) the corporate general ledgers;
b) copies of all cellular telephone bills;
c) copies of all repair and maintenance invoices;
d) copies of all invoices for fuel and travel expenses;
e) copies of the insurance policy covering each vehicle;
f) copies of all expense receipts or invoices;
g) copies of all shareholder advances and any monies re-paid to each shareholder; and
h) copies of records from a third party company with which the husband's company subcontracted concerning the number of days each that Mr. Sweezey, his girlfriend, or other employees drove trucks for the contractor.

2) Who Bears the Onus of Proof

Section 21(1)(f) of the Guidelines imposes an immediate and mandatory obligation upon a respondent shareholder spouse who controls a corporation to provide copies of the financial statements and the statement showing the payments or benefits made to non-arm's length parties. It is based on the assumption that the shareholder spouse is the one who is privy to this information.

The assumption is also consistent with the cultural shift in litigation identified in Hryniak v. Maudlin, 2014 SCC 7 which falls for the promotion of timely and affordable access to litigation. It is inefficient and unreasonable for a shareholding spouse to put the other party to the expense of the questioning or hiring experts to be in a position to conduct a section 18 analysis.

Although section 21(1)(f) appears to be limited, on its face, to shareholders who control a corporation, a court may look beyond the share structure of a closely-held corporation where it appears that it may have been designed in part to shelter a shareholding spouse from child support. Therefore, minority shareholders should expect the corporate veil to be pierced.

3) What is required for the shareholder spouse to discharge the obligation

Section 21(1)(f) requires the delivery of three years' financial statements as well as the breakdown showing the payments or benefits received by any party who does not deal at arm's length with the corporation. This ensures that the other spouse and the court are provided with sufficient information to determine the pre-tax amount of profits of the corporation under section 18(2).

As a general rule, the spouse should provide at least the following information:

a) the nature of the payment or expense;

b) its calculation;

c) why it was a reasonable corporate expenditure;

d) documentation to support the above explanations.

4) The factors to be considered in attributing corporate income

The court will consider numerous factors in the attribution of corporate income. A non-exhaustive list might include:

a) the nature of the corporation's business;

b) the historical spending patterns of the corporation;

c) the role the shareholder plays in the corporation;

d) whether the shareholder spouse is its sole shareholder;

e) the degree of control the shareholder spouse exercises with his other shareholders;

f) the benefits received by non-arm's length persons;

g) whether the benefits or payments to the non-arm's length persons perform services that the corporation would otherwise have to pay for;

h) whether the company's pre-tax income is required to manage its business or to ensure its ongoing financial viability.

d) The Outcome

The court went on to consider the expenses of CTS and, by and large, arbitrarily reduced certain of those expenses, taking into account the personal benefit that was

derived by Mr. Sweeney for certain expenses (largely, the use of automobiles by himself and his girlfriend) and a reduction in the girlfriend's remuneration. It also deducted certain advertising and promotion expenses which were not proven.

As a result, the court found that Mr. Sweezey's income had, in fact, increased over the years from the $110,000 originally imputed to him.

The court pronounced a retroactive award and fixed his ongoing income at $159,000.

Hausmann v. Klukas, 2016 BCSC 853

a) The background

The parties separated in 2000, following a 10 year marriage. At the time, there were three children of the marriage. Following their separation, the parties had a long history of litigation, court actions, and appeals.

The last court order was an order pronounced on December 20, 2011. The respondent did not appeal the final order.

Rather, he applied to vary the final order. Part of the relief sought by him was permission to pay his child support through a family trust. In dismissing his variation application, the court stated that "if [payment through the trust] can be arranged through the parties, they may do so. However, I do not order such an arrangement which should be agreed upon...The Court of Appeal, in upholding the dismissal, stated "It behooves the parties to engage in an attempt to reach a mutually advantageous arrangement as suggested by the trial judge."

Between 2011 and 2015, there were numerous changes warranting a variation. One of the three children had ceased to be a "dependent child." All of the children had reached the age of majority. Of the two remaining children, one of the children qualified for a disability pension while the other attended school in another province. The respondent's income had dropped dramatically.

In 2015, the respondent created a family trust. It was a discretionary trust and he was its sole trustee. He proposed funding it by dividends from his companies and indicated that he would place approximately $10,000 monthly into the trust to be applied against his child support obligation.

The court ordered him to pay child support directly to the claimant (albeit in a reduced amount). The court rejected his proposition that amounts paid out of the family trust be credited against his support obligation. The decision was not based on any general application of the law but on the specific facts governing the case which included:

a) the respondent disregarded the admonitions of the variation judge and the Court of Appeal to attempt to find a mutually advantageous arrangement. Rather, the respondent acted alone;
b) he attempted to make a payment directly to his oldest daughter without informing the claimant about the payment. This had the effect of placing the child in the middle of the parental dispute;
c) the claimant opposed the method of payment; and
d) the litigation history had revealed that the respondent was very proactive in attempting to reduce his child support obligations in the past.

Parrett v. Parrett. 2016 BCCA 151

a) Background

The parties were married in 1971. At the time, the wife was employed as a dental assistant and the husband was in his third year of law school.

Over the years, they had four children. The wife became a homemaker following the birth of their first child, and the husband carried on a successful law practice. He was appointed to be a Supreme Court of British Columbia judge in early 1990.

The parties separated in 2001 and, following that, the wife took a course which enabled her to obtain part-time employment at approximately $22,000 annually. While on the bench, the husband paid spousal support to the wife.

The husband retired as a judge in 2015. As a result of his retirement, the wife became entitled to a share of his pension earned between the time of his appointment (1990) and the time of their separation (2001) together with interest. As a result, $146,000 was put into her RRSP and she received, after tax, $90,950 cash. The husband's annuity was reduced by $20,903 annually to take into account the division of pension benefits which occurred upon his retirement.

The husband applied to terminate spousal support on the basis that both parties were now fully retired and, with the division of his pension, their assets had been equalized. Hence, he argued that a continuation of support would amount to a "double dip."

b) Double Recovery

The court cited from *Boston* v. *Boston*, 2001 SCC 43, that "It is generally unfair to allow the spouse to reap the benefit of a pension both as an asset and then again as a source of income":

c) Avoidance of Double Dipping

The court should, where practicable, focus on that portion of the payor's income and assets that have not been part of the equalization or division of matrimonial assets when the payee spouse's continuing need for support is shown.

d) Avoidance of Double Dipping

Where the parties' assets had, effectively, been equalized, the husband continued to grow his assets following the parties' separation. He continued to contribute to his retirement annuity from the time of the parties' separation until his actual retirement in 2015. That portion of the pension was not equalized nor the subject matter of the parties' property division.

The husband's income, from his annuity and Canada Pension payments, amounted to $186,612 annually. From this should be subtracted the wife's entitlement of $20,900.

The wife, according to the *Boston* case, "must look to her assets in an income producing way." Thus, $30,000 in pension and investment income was attributed to her.

The court left the parties to do a *Spousal Support Advisory Guideline* calculation based on the mid-point.

Purtzki v. Saunders, 2016 BCCA 344

a) Background

This case is the appeal decision of The Supreme Court of British Columbia. It was an appeal taken from a case known as *J.S.P.* v. *J.H.S.*, 2015 BCSC 1239 which was summarized in last year's Valuation Law Review (Family Decisions). As was the case last year, the only issue was whether the husband's interest in a discretionary trust was a "family asset" within the meaning of s. 58(3)(a)(ii) of British Columbia's *Family Relations Act*, R.S.B.C. 1996, c. 128.

The parties began to live together in the summer of 1997. They married each other in July of 2001. They separated in early 2011. In 1998, the husband acquired his interest in certain real estate. He bought it for $408,000, using his own funds and borrowing the rest from his mother. After the purchase, he spent approximately $157,000 to renovate to suit. Shortly before the marriage, he caused the property to be transferred out of his name into a discretionary trust in which his mother was both the settlor and the sole original trustee. Upon the conveyance being completed, the mother resigned as trustee, naming the husband and a close personal friend of the husband as co-trustees.

The beneficiaries of the trust would be the husband, his future wife, his future children, and future grandchildren. At the time, he did not have a spouse, children, or grandchildren. The trust was fully discretionary. The trustees could, in their absolute discretion, make income payments, lend or encroach on the capital of the trust, or permit any of the beneficiaries to occupy the property on a rent-free basis. The trust could be wound up or terminated at any time and, if terminated during the husband's lifetime, the funds could be paid entirely to the father.

It was common ground that since the trust's creation, the home trust was always occupied by the husband (and during cohabitation his family). It never received income or distributed any income or capital. The trustees had always permitted the husband to live in the home. At the same time, the husband never asked the trustees to terminate the trust nor transfer the property to him.

The trial judge declared that the husband had an interest in the home, making it a family asset. She valued it at the time of trial at $3.7 million (it was worth $850,000 at the time that the parties began cohabitation and had grown to $2.75 million by the time they separated).

Taking into account the discretionary factors of section 65(1) of the *Family Law Act*, the court apportioned this particular asset on the basis that the husband received 60% of its value and the wife receive 40% of its value.

The husband appealed. His appeal was focused on whether he "owned" an interest in the property, making the asset a "family asset" and on the valuation issues.

b) The Husband's Arguments

In summary, the husband argued the following:

1. He did not "own" an interest in the home. He merely derived a "benefit" by occupying it;
2. The relationship between a beneficiary of a trust and the trustees is not a relevant consideration; and

3. His occupational “benefit”
    (a) should not be equated with the entire value of the home as there was now a host of beneficiaries or potential beneficiaries;
    (b) in any event, the value did not equate with the entire interest in the fee simple; and
    (c) as the wife was seeking a compensation order, the onus of proving its value rested on her shoulders, not his.

c) The Wife’s Position

The wife’s position was considerably more fluid. She asserted that the court should look at the following factors:

1. the source of the transferred property;
2. the competing interests of any other beneficiaries;
3. the identity of the trustees; and
4. the usage pattern of the trust.

Her argument, distilled to its simplest principles, was that the husband had always enjoyed an unfettered use of the property and would, in all likelihood, continue to do so. Moreover, in conjunction with his friendly trustees, he was capable of conveying the entire trust property to himself.

d) The Court’s Ruling—The Property Is A Family Asset

The court reviewed a number of authorities which dealt with trusts. They noted the clear distinction between the husband’s position—that the trust was purely discretionary—and the wife’s position—that the husband had an interest “akin to a fixed interest” in the trust.

The court sided with the wife. Under a discretionary trust, the beneficiaries cannot be ascertained, usually, at the time of the settlement of the trust. In a discretionary trust, the trustee retains the power to choose amongst the potential beneficiaries concerning whether they receive a benefit and its quantum. Indeed, the trustee will usually have the power to choose whether or not to make any distribution at all.

This was unlike the trust created by the husband. The trial judge found as a fact that the trustees “would do as the father wishes.” This would likely include transferring the trust asset to him or permitting him to mortgage it. He had the power to sell or dispose of it. As the home did not generate income, its only value was its capital value. Upon termination of the trust, the capital would be transferred to the husband (or if he was not alive, to his children).

Although described as a “discretionary trust”, the Home Trust functioned more closely to a fixed trust.

This was the finding of fact of the trial judge. He did not err in that factual finding.

e) The Time for Division

The court rejected any notion that an “if and when” division would be appropriate. They agreed with the trial judge that the father would attempt to avoid a timely division of the family asset if such a division were permitted. The husband had always treated the trust assets as his own. There was a virtual certainty that the legal interest in the asset would be transferred to him at some time in the future.

Because of the husband's control of the Home Trust, an immediate division was appropriate. Its value was more or less equivalent to the assessed value of the matrimonial home as the father was, effectively, its owner. He was the source of the trust property and the history and use of the trust asset demonstrates that the Home Trust had been governed by the husband's convenience and objectives.

f) Re-Apportionment

The court upheld the 70/30 reapportionment of the Home Trust. The trial judge considered the appropriate circumstances under s. 65 of the *Family Law Act*. Although the husband emphasized the fact that he inherited the property, it is settled law that the importance of an inheritance will diminish over time. It is not necessary for the court to compare the respective contributions of the spouse to the acquisition of the asset. Moreover, to fail to include the house in the overall value of the assets would leave the husband with five times the value of the assets of the wife.

Strober v. Strober (2016), 72 R.F.L. (7th) 481 (B.C.S.C.)

a) Background

Under Rule 13 of British Columbia's *Supreme Court Family Rules* (B.C. Reg. 169/2009), a party wishing to present expert evidence upon financial issues must do so by way of a joint retainer. While parties generally agree on the identity of the expert and the terms of the retainer, there is provision in the rules dealing with default.

Secondly, the *Family Law Act of British Columbia* contemplates that a person's interest in a trust might be included in that person's net family property. It also provides that the value of the family property must be based on its fair market value.

Each of the husband and the wife were beneficiaries of a discretionary trust. They had agreed upon a valuator but disagreed on the scope of the evidence that he could give.

b) The Parties' Positions

The husband took the position that the determination of the value of the parties' interest in the trust was necessary if the court found that the interests fell into the definition of "property." He also insisted that the court provide specific instructions to the valuator to assume certain facts to guide the valuator in his task. The claimant opposed the application on the basis that the valuator's opinion involved mixed questions of fact and law that would otherwise fall within the exclusive jurisdiction of the trial judge. In effect, it would be asking the expert to express an opinion on the ultimate issue (a matter solely within the purview of the judge).

c) "The ultimate issue"

In the past, there was an exclusionary rule that prohibited expert evidence that went to the "ultimate issue." The justifiable concern that underlaid that principle was that an expert must not be permitted to supplant the proper role of the trial judge. More recent jurisprudence, however, has moved away from the "ultimate issue" concept and instead focuses on the issue of whether the evidence will be helpful.

In the case at bar, the court noted that the principles and methodologies of valuation are not well-known or established. There is no clear jurisprudence that will necessarily guide a court or the expert in approaching the issue of the value of the interest in issue. Indeed, given the nature of a discretionary trust, it may have no fair market value.

That having been said, however, section 87 of the *Family Law Act* provides that value

must be based on fair market value. Thus, when valuing family property for the purposes of division, the court must start with market value and then go on from there. Accordingly, the court requires evidence of fair market value where evidence is that there is no fair market value for a particular type of property.

In the court's view, that evidence can only be properly obtained through the expert opinion sought by the respondent. The court further indicated that it did not think it was appropriate for the court to dictate the factual assumptions to be put to the expert. Rather, that should be left to the expert. As a result, the court included as a term of the order that each party could provide assumptions to the expert for his consideration within a specified period of time.

d) Private Experts

The court noted that each of the parties had retained his and her own valuation experts who would be at liberty to review and critique the jointly-retained expert's report.

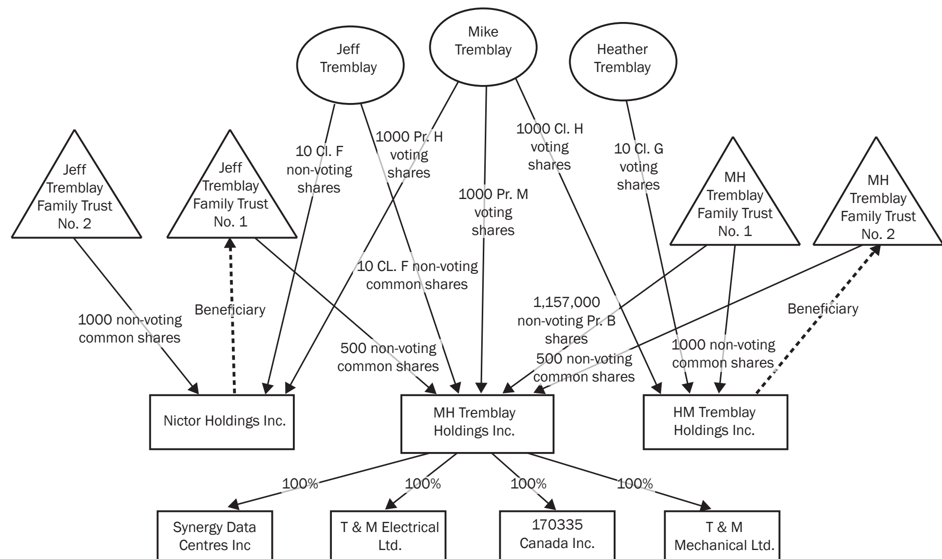
Tremblay v. Tremblay, 2016 ONSC 588

a) Background

The parties separated after a 20-year period. They had two minor children. Although the case involved equalization of net family property, child support and spousal support, only issues relating to the equalization issues are reported here.

The husband was an electrician. He started out in companies that had been incorporated by his father, Michael. Over the years, he began to assume more substantial corporate responsibilities.

In 2009, the father implemented an estate freeze which involved a complete corporate re-organization. The purpose behind the estate freeze was to restructure the father's corporate holdings so that half its growth would inure to the benefit of the husband's family while the other half would inure to the benefit of the father's family. New holding companies and new trusts were created to accomplish this. The ultimate corporate structure is set out in the schematic set out below.



It is important to note that the husband held no voting power in the corporate structure. All of the voting shares were owned exclusively by the father in MH Tremblay Holdings Inc. That corporation, in turn, held all of the voting shares in the various operating companies.

Put another way, when any of the operating companies ended up with excess cash, they could pay a dividend to their 100% shareholder, MH Tremblay Holdings Inc. The holding company would be free to deal with the funds as it saw fit. It could loan them back to the holding companies, it could continue to hold the funds, or it could dividend them out to its shareholders.

Nictor Holdings Inc. was incorporated for these purposes. To get to Nictor, the dividend funds would first flow through Jeff Tremblay Trust No. 1 where they would be allocated to Nictor as a beneficiary. In that way, Nictor would receive the funds tax free as a related corporation as the Jeff Tremblay Family Trust No. 2 was the only shareholder of Nictor entitled to receive dividends. The husband is the sole director of Nictor and, as such, has the sole power to issue dividends. That said, however, Michael Tremblay, while unable to receive dividends through his preferred shares, had voting power over Nictor (including, of course, the composition of its board and officers).

Shortly before the separation, $1.8 million was distributed by dividend declared by MH Holdings Inc. As a consequence, $905,000 ended up in Nictor Holdings Inc. It was agreed that the *en bloc* valuation day net book value of those funds was $891,200.

Also, on the valuation date, there was approximately $2.23 million in MH Tremblay Holdings Inc. which remained undistributed.

b) The Shares of MH Tremblay Holdings Inc.

The wife took the position that the common shares in MH Tremblay Holdings Inc. should form part of the husband's net family property. She pointed to the purpose of the estate freeze. It was to allow future profits of the operating companies to accrue 50% to the benefit of her family and 50% to the benefit of the father's family. In this sense, she argued that the intention of all concerned was that any profits in MH Tremblay Holdings Inc. were meant to be equally shared between father and his son (the husband).

While the court agreed that this was the ultimate intention, that was not what the parties had actually done. MH Tremblay Holdings Inc. is solely controlled and owned by the father. He has sole control over the composition of the board of directors. His shareholder's agreement provided that a quorum would exist only if the father was present. It further provided that no dividend or other distribution of assets of the company could be made without the father's consent. Hence, the bottom line was that the shareholder's agreement made it clear that control of MH Tremblay Holdings Inc. rested solely in the hands of the father in all meaningful respects. The funds of MH Tremblay Holdings Inc. would not have to necessarily fall to the common shares. Those funds could be used to redeem preferred shares held by the father. They could be allocated to bonuses. They could continue to be held by the holding company as a contingency reserve. All of these would be legitimate business reasons to retain funds within the holding company or to be disbursed in ways other than through dividend.

Accordingly, the husband had no interest in the holding company as defined by section 4 of the *Family Law Act*.

c) Did the Husband have an Interest in Nictor Holdings Inc.?

Nictor was intended to be a holding company to hold any profits that the father would actually disburse from MH Holdings Inc. Although the father controlled the shares of Nictor, once the funds were in Nictor, they were irrevocably on the son's "side" of the corporate structure. The husband was, at all material times, the sole director of Nictor and had unfettered, autonomous discretion with respect to the issuance of dividends. While the father could remove the husband as a director or otherwise constrain his autonomy in that position, he had never done so. After all, it was the intention of all concerned that the husband would be able to direct the funds found in Nictor as he saw fit. The shares of Nictor are owned by the Jeff Tremblay Family Trust No. 2. With respect to that trust, the husband was both a trustee and a beneficiary. Under traditional trust law, a beneficiary under a discretionary trust does not hold a beneficial interest. He has only what is termed an "expectancy." He has the right to be considered by the trustees as a recipient under the trust in accordance with its terms. The right to be considered by the trustees is not a right that is capable of assignment by the right-holder since there is no proprietary interest to transfer.

To that extent, there is a collision between trust law and family law. Accordingly, the central question with respect to determining a proprietary character to the husband's interest in the discretionary trust must be his ability to control whether distributions of trust property can be made to him for his benefit. To the extent that he has meaningful control in that regard is an important question. Thus, the court may look to a series of factors which may include the following:

- evidence with respect to the founding intent of the trust. Was the trust designed to effectively allow control by the beneficiaries?
- the composition of the trustees, including whether the beneficiary is a trustee;
- any requirement, including veto powers, that a beneficiary may be part of any trustee decisions;
- any history of past trustee actions which demonstrate indirect control by the beneficiary;
- any powers of the beneficiary to remove trustees or to appoint replacement or additional trustees;
- the relationship of the beneficiary to the trustees.

In other words, are the trustees independent and at arm's length or are they instead family members or other persons who may not act independently?

None of those factors are necessarily determinative. The weight to be assigned to each will vary on a case-by-case basis. In analyzing the factors listed above, the court considered it important to recognize that none of the transactions were at arm's length. The fundamental purpose of the Jeff Tremblay Family Trust No. 2 was to provide for the husband's family. The husband, the wife, and the two children were the beneficiaries of the trust. While the husband and his two parents were the trustees, the husband had the sole ability to appoint further trustees. In a practical sense, he had the ability to control the trust. Indeed, historically he had done so as he was able to access $130,000 from the trust when he determined that supplementation to his ordinary income was needed. The degree of control that the respondent had over the Jeff Tremblay Family Trust No. 2 elevated his "expectancy" into something more akin to a certainty. As such, the holdings of the Jeff Tremblay Family Trust No. 2 were to be

considered property within the context of Section 4 of the *Family Law Act*.

d) Are there Contingent Liabilities Associated with the Funds held by Nictor?
Funds should be valued on a dollar-for-dollar basis or its net book value of $891,200. That is its nominal value on a "value to owner" valuation.

There should be no liquidity discount as the funds were entirely under the control of the husband.

On the other hand, there should be a discount for tax. The consequence of utilizing upon the funds would be the immediate taxation. The court found the tax discount to be $290,521. Accordingly, the fund was then reduced to $60,679.

e) Is the Respondent's Interest a "Gift"?
There was little question that the purpose of the estate freeze came by way of gift. When a shareholder was paid a nominal share to subscribe for the shares in Nictor Holdings Inc., it was done only to avoid the consequences of the attribution rules. Moreover, it was intended that the payment would ultimately be repaid from a distribution.

It was important, however, not to conflate the actions of the husband as a trustee (along with his parents) with his beneficial interest in the trust as beneficiary. The property that is gifted is the interest in the trust. Thus, what was gifted was to be a member of the class of beneficiaries. Consequently, the applicant and his wife (and the children once they attained the age of 18) would all be beneficiaries. Thus, the husband could not show that the gift was solely to him to attract the consequences of section 4(3) of the *Family Law Act*

Thomas v. Thomas, 2016 SKCA 53

a) Background
The parties separated after a 24-year marriage. The husband was a car dealer and the wife was a registered nurse. At various stages in the litigation, different findings were made with respect to their respective incomes. Initially, it was found that the husband's income was $257,000 and the wife's was $105,000. Mid-way through the litigation and at trial, it was determined that the husband's income was $175,000 and the wife's income was approximately $58,000. Initially, the husband was required to pay $6,000 monthly interim spousal support. This amount was ultimately reduced to $3,000 monthly. At trial, the court ordered support of $4,200 monthly for a term of 5 years.

Both parties were active stock market speculators. When the court action was started, the husband had approximately $3.4 million in his trading account, while the wife had $1.3 million. Both parties continued to actively trade stocks while the action was pending. By the date of adjudication, the husband's portfolio was worth $50,000 and the wife's was worth $530,000. These substantial declines in the parties' trading accounts were due to a decline in the stock market and because each of them had made substantial withdrawals from their trading accounts – the husband $1,000,000 and the wife $150,000.

The wife received $60,000 from her parents during the marriage which was used to pay down corporate debt. She alleged this was an "advance of her inheritance" and should be exempted as a "gift." The trial judge accepted her arguments but gave no reasons for so doing.

Under Saskatchewan's *Family Law Act*, valuation is to be made based on fair market value. It can be made either at the time that the application is made or at trial. If the fair market value cannot be determined on either of these dates, the court may pick a "reasonable" date for valuation.

The trial judge valued the majority of assets as of the date of application. He measured the parties' stock market trading accounts as of the date of trial. He exempted the sum of $60,000 from the division, holding that it was a prepayment of the wife's inheritance. Finally, he ordered that the wife would be entitled to support for 5 years at $4,200 per month.

Both parties appealed.

b) The Stock Trading Account

The wife argued that the stock trading accounts should be valued as of the date of application. She argued that this was the "fairest" way of dividing the trading accounts as each party controlled his or her own account, each continued to trade the accounts after the application was commenced, her husband was a stock market speculator, and he had withdrawn $1,000,000 towards his own use pending trial.

This argument was, however, rejected by the Court of Appeal. What the trial judge had attempted to do, taking into account the withdrawals and the substantial decline in the market value of the investments, was to attempt to determine the "real money" value of the investments that accrued to each party. Thus, the trial judge attempted to "fairly" divide the funds, taking into account the benefit that each of them derived from them. Consequently, there was no error on the part of the trial judge in deciding to value them as of the date of trial, notwithstanding that the majority of the other assets were valued as of the date of application.

c) The Holding Company

Both parties owned approximately 50% of a holding company. The holding company, in turn, owned 50% of the car dealership.

The chartered business valuator called on behalf of the wife concluded that the holding company should be valued on its asset value. However, he testified that the car dealership should be valued on a going concern basis using a multiplier of cash flow (as opposed to a liquidation value). He also ruled that there would be no tax discount as it was unlikely that either party would have any capital gains to pay.

He rejected a suggestion by the husband that a prior transaction should be used as a template for value. That transaction was not a sale in the open market. It was a share redemption and the redemptor was merely an investor who was seeking to have his capital returned.

The court concluded that the transaction would likely be free of tax because of the rollover provisions of the *Income Tax Act*, but they gave either party the right to apply for further directions, if the transaction resulted in taxation.

d) The Advance on Inheritance

Under Saskatchewan's legislation, a gift is a shareable asset unless the recipient can show a basis for the exemption. The wife had not demonstrated that there was anything unfair or inequitable about the sharing of the gift. Thus, the trial judge was reversed on this point.

e) Was the Interim Support Order "Double Dipped"?

The husband argued that because the trial judge used the date of trial valuation to value his investment account, the fact that he paid interim support constituted an impermissible double dip.

The Court of Appeal disagreed for several reasons:

- He had sufficient non-capital sources of income to pay support which included, of course, his salary;
- There was no evidence to indicate that the source of interim support came solely from the investment account;
- The wife's claim for interim support was based on her economic need – one of the exceptions to the rule against double dipping;
- He had withdrawn $1,000,000 from the investment account and, therefore, had substantial sums at his disposal.

f) The Valuation Date

It is not necessary that all assets or even similar types of assets be valued at the same valuation date, if the circumstances require otherwise.

g) Was the Wife Entitled to Support following the Trial?

The husband argued that the wife was not entitled to support. He cited several reasons:

- He and his wife pursued separate careers throughout their marriage;
- She had been a nurse for 23 years;
- She had not contributed to the acquisition, management, maintenance or improvement of the family business;
- As a result of the division of assets, she was still a wealthy woman; and
- The trial judge seemed to focus on non-compensatory matters, rather than viewing the evidence relating to entitlement on an overall basis.

While the court acknowledged that there was very little analysis conducted by the trial judge concerning entitlement, he did not err. He took into account the following factors:

- For most of her career, her nursing was only on a part-time basis;
- Nursing is a hard working environment and she had difficulty keeping up with the pace;
- She was not expected to return to nursing full-time;
- There was still a significant disparity in income. Her income was $58,000 per annum, whereas the husband's income easily exceeded $170,000 per annum.

The trial judge did not err in awarding spousal support.

Mason v. Mason, 2016 ONCA 725

a) Background

The parties married in 1992 and separated in 2011. They had two children, both of whom were pursuing post-secondary education.

During the marriage, the parties worked together so that by the time they separated, they had built a successful recreation equipment business in North Eastern Ontario. Both worked in the business and the parties took equal salaries and bonuses from the business.

By the time the case reached trial, the parties had agreed upon everything but spousal support. They agreed that the matrimonial home would be sold and the proceeds divided equally. The husband would acquire the wife's shares in the business and pay an equalization payment. Child support was agreed to, with the husband paying $1,856.00 monthly on the following terms:

> "The provisions of the prior interim order shall be suspended save and except for the child support order…which shall continue until the interim order for child support is confirmed by a final order…which shall continue until this court finally adjudicates upon the wife's claims for spousal support."

The parties did not, however, agree upon the husband's income and the wife's claim for spousal support. These two matters were left to the trial judge.

The trial judge ruled that the wife was capable of earning a salary as a bookkeeper and could generate investment income of approximately $40,000 to $50,000 annually. He assessed her income at $82,500.

The trial judge concluded that the husband was capable of earning $400,000 annual income and imputed this amount to the husband.

The husband appealed, alleging four errors committed by the trial judge as follows:

1. The trial judge applied the *Divorce Act* instead of the *Family Law Act* in the resolution of the husband's income;
2. The trial judge failed to take into account his child support obligations;
3. The trial judge erred in imputing former corporate income and losses to him;
4. The trial judge failed to take into account the significant property award of the wife in determining spousal support; and
5. In awarding spousal support at all.

b) Are there Differences between the *Family Law Act* and the *Divorce Act*?

The court concluded that there is no real distinction or differences between Ontario's *Family Law Act* and the federal *Divorce Act*. Both statutes require the court to consider the assets and means of the parties currently and in the future.

c) Did the Trial Judge err in Failing to Consider the Child Support Award?

The husband's argument was that his income was established by child support agreement. His income could be determined by reference to s. 2(10) of Ontario's *Family Law Act*. That section provides that "a domestic contract dealing with a matter that is also dealt with in this Act prevails…."

The Court of Appeal disagreed. The Minutes of Settlement did not deal with the

husband's income. The Minutes of Settlement merely recited that the "interim" arrangements with respect to child support would continue. Moreover, the parties' agreement relating to the amount of child support was not a reliable indicator of the husband's income. One child lived with the wife and the other child attended school away from home. Moreover, other arrangements for child support, including RESP withdrawals and payments from a family trust, were included in the child support analysis. Thus, it was not a reliable indicator of the husband's income.

Moreover, the agreement relating to child support could not create "issue estoppel." Issue estoppel occurs where there has been a final adjudication in prior proceedings. The issue of child support was not adjudicated nor was it final. The Minutes simply provided that child support would continue until the adjudication of spousal support was finally determined.

d) The Attribution of After-Tax Corporate Profits

1) The trial judge's reasons
Although the judge used the *Spousal Support Advisory Guidelines* to determine the range of support, he arrived at an income figure without either applying the Guidelines or explaining why they were inapplicable. In effect, he adopted an unreasonable approach to determining the income of each party.

2) Procedure where the SSAGs are adopted
Where a trial judge elects to apply the *SSAGs*, it is incumbent upon him to either rely upon the Guideline provisions to determine income or explain why they should not apply. In determining that he would apply the *SSAGs*, the trial judge did not articulate the following:

- what amount, if any, he attributed to the husband from the wife's former salary;
- over what period of years (if any) he averaged past corporate profits;
- why he chose the number of years;
- whether and why he included or did not include in any averaging the loss suffered by the business in 2013;
- what percentage of anticipated corporate profits he included in the husband's income; and
- why he chose that percentage.

The court must address these issues in order to demonstrate that there is a "rational basis" for the income selected, which is "grounded in the evidence."

3) Case specific errors
The trial judge averaged income, apparently, over a wide period of time (approximately 8 years). In using such a lengthy period, the trial judge failed to account for the fact that the corporate revenues and income had peaked in its fiscal year ending in 2008 and continued in a downward trajectory after that date. Indeed, it suffered a loss of revenue and income in 2013. While the trial judge concluded how the business could return, in the near future, to its former levels of profit, he did not point to any evidence that would suggest this. Third, the Guidelines generally rely upon more recent past income as a predictor of near-term future income and do not adopt average income as a default methodology. Moreover, the trial judge failed to take into account non-recurring sources of income. The trial judge's assumption that the parties' salaries

formed part of the corporate profits was incorrect – especially in light of the fact that the company had lost money in 2013.

4) Determining the Husband's Income

The appeal court felt that averaging the husband's income over the three years preceding the trial would be appropriate. This took into account the inter-relationship of ss. 17 and 18.

5) The Wife's Income and the SSAGs

i.) Admitted Errors

It was admitted, in the Court of Appeal, that the trial judge had made certain small errors in respect to the calculation of the wife's interest and investment income. The Court of Appeal determined that her investment income would average $109,535.

ii.) Is the wife entitled to support?

The husband argued, unsuccessfully, that the wife's wealth combined with her business skills made her self-sufficient.

That suggestion was rejected by the Court of Appeal. While the wife did acquire substantial benefits from the marriage, the business and the marriage were intertwined. Because of the breakdown of the marriage, it was virtually inevitable that the wife would have to relinquish her stake in the business. In so doing, she lost the ability to generate the significant income she was able to earn while married and working in the business in the capacity as an owner.

Although the assets the wife received would generate some income, that income plus her employment income would not approach the income that she formerly earned as an owner of the business. Thus, the trial judge did not err in recognizing that the wife suffered a significant disadvantage as a result of the breakdown of the marriage.

iii.) The Application of the *SSAGs*

Based on the husband's income of $214,872 annually and the wife's income of $109,535 annually, for the total cohabitation period of 20 years, and employing the "with child" support formula, the *SSAGs* will produce a range of spousal support from zero to $1,678.00, with a mid-range of $767.00.

The *Spousal Support Advisory Guidelines: Revised User's Guide* provides that courts should avoid a tendency to "default" to mid-range amounts. Rather, in determining the appropriate quantum, the court is required to consider the support factors and objectives found in the *Divorce Act* and the *Family Law Act*.

In this case, the wife had a strong compensatory claim based on the duration of their cohabitation and the fact that she could no longer work as an owner in the business. Consequently, she suffered a significant disadvantage as a result of the breakdown of the marriage which would warrant an award approaching the high end of the range. Balanced against this, however, was the fact that she received an equalization payment of over $1.6 million which the husband would have to finance.

Finally, child support was set at a very low level.

Accordingly, the court awarded spousal support of $1,500 monthly.

e) *Bear* v. *Thompson* decision was not followed

The Ontario Court of Appeal disagreed with the judgment of the Saskatchewan Court of Appeal in the decision of *Bear* v. *Thompson*, 2014 SKCA. That case was authority for the proposition that section 18 of the *Child Support Guidelines* was a stand-alone provision which did not permit the court to consider pre-tax corporate profits beyond the later fiscal period. The Ontario Court of Appeal ruled that section 18 allowed the court to take into account the corporate pre-tax profits of the corporation for up to three years for the following reasons.

a. ss. 16-20 must be interpreted in its entirety. When interpreted in this purposeful and contextual fashion, it avoids any incentive to a shareholder to manipulate corporate income;
b. it is consistent with the fundamental objective of the Guidelines which is to ensure fairness to both spouses and their children in determining the amount of money that is reasonably available for the payment of support; and
c. the court must necessarily take into account the distinct legal personality of the corporation and its legitimate corporate interests in retaining pre-tax corporate income as opposed to the degree of the payor's involvement in the corporation.

f) Application of the Legal Principles to the Case

The corporation had pre-tax profits in two of its three preceding years. In its year immediately preceding the trial it lost money but the shareholder, nevertheless, drew a salary. The court was prepared to average the corporate profits over those three years as follows:

	his line 150 income	his corporate pre-tax profit	his corporate pre-tax profit attributed	his income under s. 18
2011	$130,000	$346,539	$200,000	$260,293
2012	$127,161	$269,165	$130,000	$257,161
2013	$127,161	nil	nil	$127,161

By averaging the results found in column 4, the court concluded that the husband's average income for the three years preceding the trial was $214,872.00.

In making its determination, the court concluded that the corporate loss in 2013 was a

"one-off." The court concluded that the company would return to profitability in the immediate future having regard to the following factors:

1. 2013 was an unusual year in that the wife ceased to be the company bookkeeper;
2. the matrimonial dispute between the parties was disruptive to the corporate working environment;
3. the parties had, over the years, withdrew money from the corporate retained earnings through the shareholder accounts to pay various personal and living expenses. There was no reason to suggest that this practice would not continue in the future; and
4. the husband and wife had agreed to the husband purchasing the wife's interest on valuation based upon its 2011 value. Thus, the court concluded that it would return to profitability in the near future.

***Woodburn v. Woodburn*, 2016 ONSC 6694**

a) Background

The parties were separated. They were the parents of three children. The matrimonial home had been sold and approximately $390,000 was held by lawyers in trust. The wife had obtained two advance payments, on consent, to enable her to continue to prosecute the action.

The husband earned in excess of $100,000 annually. The wife was currently on a maternity leave and had an income of approximately $20,000 annually.

It appeared that the case would be hotly contested. The husband was seeking an unequal division of net family property and asserted that he was entitled to a marriage-date deduction for that portion of the matrimonial home brought into the marriage. He was also seeking joint custody of the children and had produced an extensive witness list relating to the proposed witnesses that he intended to call in the custody proceedings.

The wife sought an advance of $75,000 to enable her to continue to prosecute the action. She deposed that she had already spent approximately $60,000 in legal fees, disbursements, and H.S.T.

Her motion was based on Rule 24(12) of Ontario's *Family Law Rules* which provides as follows:

> 24(12) The court may make an order that a party pay an amount of money to another party to cover part or all of the expenses of carrying the case, including a lawyer's fees.

b) General Observations

Normally, the court will adhere to the general rule that costs should not be awarded before trial except in circumstances prescribed by law. Rule 24(12) sets out an exception to this rule. Initially, Rule 24 was narrowly circumscribed. In a case that went back to the early nineties, the court described that the rule would be applied only in "very exceptional cases" and would be narrowly applied. However, the law evolved to the point where there were very clear rules relating to its application which included:

1. the rule would not be restricted to exceptional cases. Rather, the discretion should be applied to cases where it is necessary to "...level the playing field";
2. the rule should not give a litigant a belief that he or she was immune from carrying costs or has a licence
3. a realistic budget for legal fees must be set out. If the claim is to engage an expert, evidence of the need of an expert and his or her anticipated fees must be set out;
4. the claimant must show that he or she is incapable of funding the requested amounts;
5. the claim must be meritorious. However, it is unnecessary to balance or weigh the respective strengths of each party in a given case;
6. it is not necessary to limit the rule to cases where equalization is sought. It can be applied to cases involving spousal support or child support.

c) Application of the Rules to this Case

It is clear that the words to "carry a case" means prosecuting a case to ensure its fair

and proper adjudication. To that end, the word "expenses" extends to an advance payment for one party to incur disbursements such as an expert's report. It can also include legal fees of the solicitor having carriage of the action.

Rule 24 must be read in conjunction with the primary directive of the *Family Law Rules* which is "to enable the court to deal with cases justly." This requires the court to deal with the Rules in a fashion that is appropriate to the case's importance and complexity. To that end, it must balance the questions of importance and flexibility with the interests of the proposed respondent who may be put to paying the costs of the litigation before the success of either party has been determined.

d) The Outcome

The court concluded that there was merit in the wife's case, particularly having regard to the assertions made by the husband. The court was less convinced about whether the applicant would be precluded from pursuing her case as her concerns appeared to be more conjecture than substantive, from an evidentiary standpoint. Although she owned property jointly with her mother, the only way of accessing its value was by refinancing the property.

As a result, the court did not make a specific order under Rule 24(12). Rather, it ordered the solicitors holding the trust funds to advance to the wife $75,000 from the proceeds of sale held in trust. The advance would be without prejudice to ask the presiding justice at the end of the trial to consider it an advance against any payment found due to her by the husband.

M. M. v. R. M., 2016 ONSC 7003

In the middle of a trial, an issue arose as to whether the long-standing Chartered Accountant for the husband's business would be permitted to give expert testimony on the issue of the determination of the husband's income. The accountant had been the accountant for the husband's business for almost 30 years. He had prepared thousands of income tax returns for clients over the years. His area of expertise was corporate organization and reorganizations. He had been recognized as an expert, on limited occasions, with regard to providing valuation evidence. He had filed reports and filed an Acknowledgment of an Expert's Duty in accordance with the Ontario court rules.

The court ruled that he could not give expert testimony. While he completed numerous income tax returns, he admitted that he did not consider the *Child Support Guidelines* or the *Spousal Support Advisory Guidelines* as the starting point for his analysis. Consequently, it could not be argued that the accountant's evidence was "necessary" under the test established in *R*. v. *Mohan*, 1994 CanLII 80 (S.C.C.). Moreover, the accountant could effectively "critique" the testimony given by the other spouse's expert by remaining available to the spouse during the cross-examination of the admitted expert and also assisting that spouse in argument.

Second, the court noted that it would be difficult to classify the accountant as an independent and impartial witness. The duty cast upon an expert is to provide "fair, objective and non-partisan" opinion evidence. This requires an expert that is independent and neutral. The accountant's relationship with the respondent was long-standing and had gone on for years. In those circumstances, it would be impossible for the accountant and the respondent to be neutral. The accountant was actually the source of the

financial information that would be relied upon and would also be the architect of the arrangements relating to the respondent's income and compensation.

Simply put, it would be impossible to disentangle the long-standing work that the accountant did for the respondent under his retainer for services and yet provide evidence in a fair, objective and non-partisan fashion.

Rea v. Rea, 2016 ONSC 382

a) The Facts

The parties were separated spouses. The wife had virtually no assets and had no income. It was alleged, by her, that the respondent had assets which exceeded $80 million. The respondent, by contrast, argued that he might have a net family property of below "zero" as a result of his contingent liabilities. He deposed that his liquid assets were now below $780,000. He had been previously ordered to maintain the matrimonial home – an obligation described by the court as being "not inconsequential." Finally, he had previously provided his wife with $100,000, which the wife had spent paying lawyers and expert witnesses, repayment of her line of credit, and Christmas presents for the family.

b) Interim Expenses

Rule 24(12) of Ontario's *Family Law Rules* provides that a court may make an order that a party pay an amount of money to another party to cover part or all of the expenses of carrying on the case, including a lawyer's fees.

In her motion material, the wife filed affidavits from a business valuator and her own lawyer deposing that:

- the valuator indicated that her fees would not be less than $250,000;
- the valuator's fees were merely an estimate and placed neither a floor nor a ceiling on the costs;
- the lawyer estimated that the fees and disbursements would likely be somewhere around $660,000.

Both counsel agreed that the matters would be very complex, both legally and factually.

c) The Court's Considerations

1) Stuart v. Stuart

The court reviewed the guiding principles in the leading case of *Stuart* v. *Stuart* (2001), 24 R.F.L. (5th) 188. It noted that since the decision had been handed down 15 years earlier, the courts had made significant interim expenses awards ranging between $100,000 to $500,000.

2) Awards Made In Early Stages

If an award is made at an early stage of the litigation, the court operates from the assumption that the claims made by the parties are, *prima facie*, meritorious.

3) Special Circumstances

The court was of the belief that it was not necessary to establish any special circumstances relating to the case. However, the court nevertheless was of the view that special circumstances existed due to the vast disparity in the available resources as between the parties.

d) The Outcome
As the combination of fees and disbursements sought by counsel was close to $1,000,000, the court concluded that a further award was necessary to level the playing field.

The husband was ordered to contribute $250,000 by way of interim disbursements. The amount would be credited to him in respect of any monies found owing by him to the wife. The court expressly noted that the particular order was without prejudice to the wife's entitlement to seek further interim disbursements later on in the proceedings.

Rosati v. Reggimenti, 2016 ONSC 7013

a) Background
The parties separated in 1996 and, for the next 20 years, were engaged in bitter and acrimonious court proceedings. These proceedings involved a series of trials and appeals, and motions brought by the wife for disclosure. Primarily, she alleged that her husband was guilty of fraud and that he misrepresented his financial position.

In part, to establish his fraud, she engaged the services of a professional who was both a Chartered Business Valuator and a certified forensic investigator, in 2007. Over the next several years, the CBV conducted numerous forensic investigations and filed various reports with the court, some of which commented on the conduct and credibility of the former husband.

The case was scheduled for trial in 2013. In a *voir dire* respecting the entitlement of the CBV to give expert testimony, evidence was led that the former wife had been billed over $200,000 in fees by the CBV and that $173,000 remained outstanding. The evidence indicated, in addition, that the CBV had required the former wife to sign an irrevocable direction authorizing any recovery to be paid first to the CBV's corporation on account of unpaid fees and disbursements.

Following the *voir dire* held in the 2013 trial, the trial judge indicated that she would not permit the CBV to give expert testimony. There were two reasons for this. First, the CBV had a significant financial interest in the outcome of the trial. Second, the trial judge ruled that the CBV had taken on the role of an advocate rather than an independent, unbiased witness.

The former wife had brought a motion to have the trial judge recuse herself from the further conduct of the trial. Amazingly, the CBV, without the advice of counsel, asked for intervener status in the motion to recuse. She reviewed the trial transcript and filed a 33-page affidavit outlining details of where the CBV believed erroneous testimony was given on the *voir dire*. Ultimately, however, the CBV withdrew her claim for intervener status after she had legal advice that her conduct was inappropriate.

The trial judge refused to recuse herself but indicated her schedule would not permit her to continue the trial. As a result, it was ordered that the trial continue before a different justice.

While awaiting the trial before the second justice, the CBV and the wife entered into a new agreement respecting fees and disbursements. The new agreement provided that:

- The CBV would testify at the new trial;

- $120,000 of fees and disbursements would be written off;
- The CBV would receive $25,000 immediately and;
- The CBV would receive a further $5,000 payment as a retainer to prepare for and testify at the second trial.

b) Developments in the Law between the Trials

In between the two trials, the Supreme Court of Canada heard a case called *White Burgess Langille Inman* v. *Abbott and Haliburton Co.*, 2015 SCC 23. That case established a two-step process for a trial judge when qualifying experts to give opinion evidence to the court. The first stage is called "the threshold stage." The second stage is called the "gatekeeper stage." As this was only a voir dire, the court was limited to the first stage, namely, the "threshold stage."

c) Characterization of the Two Stages

The first stage deals with the four well-known *Mohan* factors which are:

i) the proposed evidence is relevant;

ii) the proposed evidence is necessary to assist the trier of fact;

iii) the proposed evidence is not subject to any other exclusionary rule; and

iv) the proposed expert is properly qualified (through study or experience) to present evidence in respect of the matters on which he or she is to testify.

The second stage of the inquiry—the "gatekeeping function"—was not important as this was a voir dire limited to the "threshold stage." The "gatekeeping" stage, however, would also consider the four Mohan factors a second time on a sliding scale to determine whether the proposed evidence is not outweighed by the risk of the dangers that can materialize when experts testify. At the second stage, the court will pay particular attention to the expert's independence and impartiality in weighing the evidence tendered by the proposed expert.

d) Could the CBV Qualify as an Expert?

The husband's lawyer asserted that the CBV could not qualify as an expert for two basic reasons. First, the evidence indicated that she had a financial interest in the outcome in that her fees were associated with the success of her client. Second, her affidavits and reports clearly indicated that she had become an advocate for her client rather than a dispassionate, objective expert presenting evidence to assist the court.

The recent Supreme Court ruling indicated that there was a very low threshold to deal with the proposed expert's independence and impartiality. The court would be required to make an actual determination of a lack of independence or bias. The question of "apparent bias" would not be sufficient. Thus, it would occur in only very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than that should not lead to exclusion. Rather, it would be considered, more properly, at the "gatekeeping stage."

Dealing with the "interest in the outcome" argument, the court noted that less onerous pre-arrangements had been negotiated by the parties between the two trials. Thus, this mitigated against the argument that the CBV had a significant interest in the outcome of the litigation. The court excused the CBV's attempt to join herself as an intervener in the motion to recuse as the court did not feel it was associated with

the monetary outcome. Rather, it was the CBV's concern about her professional reputation in the valuation community. She belatedly sought legal advice and, acting on that advice, withdrew her motion to have intervener status. More troubling to the court were the comments and observations that were made by the CBV in her reports and her affidavits questioning the conduct of the husband.

However, the CBV's opinions about delay, fraud, intentional non-disclosure of documents or other wilful behaviour could be taken into account by the court and excluded. After all, it is the court's prerogative to determine the facts and the credibility of witnesses. Moreover, such comments may be considered by the court as part of the narrative explaining the course of the expert's investigations.

As a result, the court concluded that the CBV had met the low threshold required to give independent, fair and non-partisan evidence. A possible lack of independence and impartiality, however, would potentially go to the weight that the court would ultimately attribute to her evidence.

McKenzie v. McKenzie, 2016 BCSC 2132

The parties were involved in complicated and lengthy litigation. The litigation included, amongst other things:

- the valuation of corporate shares;
- the tax consequences attendant thereto;
- commercial real estate appraisals;
- pension actuarial values;
- whether property was owned by the husband or a trust; and
- income determination.

Various experts were retained to express opinions regarding:

- the valuation and tax consequences of the businesses;
- real estate appraisals; and
- valuation issues relating to the trust.

The wife hired B.M.M. to give expert evidence at the trial regarding the income of the husband. They concluded that the husband's income was approximately $676,000. The husband retained his own expert, H.S.L., who concluded that the husband's income was between $270,000 and $300,000. The trial judge found that the husband's income was $550,000 annually. Based on this, he ordered a lump sum as spousal support.

In the end, the trial judge concluded that the wife had achieved substantial success and awarded her costs. The husband appealed from the trial judge's judgment. Success was divided in the appeal and the Court of Appeal refused to grant either party costs of the appeal. The Court of Appeal did not, however, interfere with the trial judge's costs award. Significantly, however, the Court of Appeal assessed the husband's income at $375,000 annually and invited counsel to re-calculate the lump sum payment based on the diminished assessment of the husband's income.

With his success in the Court of Appeal, the husband attempted to re-litigate the question of the trial costs unsuccessfully both before the trial judge and in the Court of Appeal.

Apparently undismayed, when the matter came on for the assessment of costs before the court registrar (as is the practice in British Columbia), the husband argued that he should not be charged with having to pay the full costs of B.M.M. occasioned by the wife in the income determination. Those costs, incidentally, were $60,253.00.

He put forth four different arguments:

1) the Court of Appeal disagreed with the assumptions of B.M.M. which formed the foundation of their opinion;
2) the parties should have retained a joint expert which would have resulted in costs savings;
3) B.M.M's costs were excessive in comparison to the costs paid by the husband to H.S.L. B.M.M's account was double that of H.S.L.; and
4) the costs of B.M.M. were disproportionate to the success achieved by the wife in her support claim.

The registrar rejected all four propositions put forth. Dealing with the first proposition, the issue of the husband's income was a live issue throughout the trial. The fact that there was a significant divergence in the foundations for each party's evidence was not a material consideration on the assessment.

On the issue of the joint retainer, the Supreme Court rules did not require a joint retainer for an income determination. Thus, each party was justified in engaging his or her own expert.

This left only the question of "reasonableness" of the B.M.M. account. While the onus is on the claimant to justify an expert's charge, the other side must lead evidence to justify a charge of "unreasonability." A mere comparison of the amounts paid will not be sufficient. There was no evidence adduced as to any unnecessary duplication of work internally. Finally, a registrar, in assessing an account, cannot stand in the shoes of a judge to analyze, compare, or weigh the expert opinions to assess the reasonableness of the charges.

Apart from an unspecified "administration fee", the charges of B.M.M. were allowed.

The Canadian Institute of Chartered Business Valuators and Terry Hainsworth