Date: 19970312
Docket: D034460
Registry: New Westminster

1997 CanLII 1478 (BC SC)

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SANSAR SINGH GORAYA

PETITIONER

AND:

AMARJIT KAUR GORAYA

RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE D.M. SMITH

Counsel for the Petitioner: Mr. Kent-Snowsell

Counsel for the Respondent: Ms. P. Nunrha

Dates and Place of Hearing: February 5, 6, and 7, 1997
New Westminster, B.C.

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INTRODUCTION

[1] This case is about the division of assets, spousal support, and child support following the breakdown of a marriage. By consent, the issues of custody and access have been resolved. The court has heard conflicting, incomplete, and uncorroborated testimony from only the parties to this action. Credibility of the parties is a factor in deciding some of the outstanding issues.

[2] The Petitioner ("Husband") and Respondent ("Wife") were married in India on December 27, 1985. They separated on February 14, 1994, while on a family holiday in India. They were divorced on March 27, 1996. The Husband remarried on May 29, 1996.

[3] There are four children of the marriage:

Chattar Singh, born March 23, 1981 ("Chattar")
Sharandeep Kaur, born July 16, 1988 ("Sharandeep")
Jaskarn Singh, born February 27, 1990 ("Jaskarn")
Simranjit Kaur, born January 15, 1993 ("Simranjit")

[4] Chattar is the Husband's nephew whom the parties adopted in 1989. Chattar has six siblings and it was felt by his biological parents, and agreed to by the parties, that he would have a better life in Canada if adopted by the Husband and Wife.

[5] All of the children are presently healthy, although Jaskarn was born with kidney problems and as an infant required surgery.

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[6] The Wife has been described as a caring parent who is interested in her children's welfare. The Husband is described as a parent who takes an interest in the children's well being and education.

[7] Since their separation Chattar has resided with the Husband and the three younger children have resided with the Wife. Chattar has stated he wishes to remain in the care of the Husband and this is agreeable to the Wife.

[8] The parties have agreed on a consent order regarding custody and access of their children as follows:

(i) The Wife and Husband shall have joint custody of the children, Sharandeep, Jaskarn and Simranjit, with primary residence of the children to the Wife and reasonable access to the Husband; such access to include the following:

(a) every week that the Husband works day shift, from 5.00 p.m. Friday to 7.30 p.m. Sunday;

(b) every week that the Husband works afternoon shift, from 10.00 a.m. Saturday until 7.30 p.m. Sunday;

(c) July or August each year as chosen by the Husband and upon advising the Wife of his election no later than May 30 of that year.

(d) one week at Christmas to be agreed upon between the parties.

(ii) The Husband shall have sole custody of Chattar with reasonable access to the Wife.

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BACKGROUND

[9] The Husband was born and raised in India where he completed the equivalent of his Bachelor of Arts Degree. He came to Canada in 1975 at age 25. In 1990 he became a Canadian citizen.

[10] He first worked at odd jobs and since 1978 has been employed with Cantree Plywood Corp. ("Cantree"). He states his average annual income is approximately $39,000. However, his January 1997 statement of earnings and deductions, and his 1993 and 1995 income tax returns, suggest a higher annual income. 1994 was not a normal working year for the Husband as he was, in part, on stress leave due to the marriage breakdown and had

taken certain time off to travel to India. Although his employment income includes some overtime and is subject to market conditions in the forest industry, I find that the Husband can anticipate earning approximately $45,000 per year.

[11] The Wife also was born and raised in India and met her future Husband just a few weeks before the wedding. She has the equivalent of Grade 10 schooling. After leaving school, for approximately one and-a-half years she undertook volunteer social work distributing food to children. She kept the accounts for suppliers. She also acquired some sewing skills.

[12] Following the wedding the Husband returned to Canada. He sponsored his wife's entry into Canada approximately one year later in December, 1986. She was 25 years old when she arrived in Canada.

[13] Upon the Wife's arrival in Canada she obtained some part-time employment as a dishwasher for 4 hours a day, 4 days a week at the O'Henry Restaurant. She ceased this employment when she became pregnant with the parties' first child.

[14] In 1990, following the birth of Jaskarn, the Wife returned to work as a dishwasher at the Knight & Day Restaurant. She worked part-time, approximately 5 hours a day, 4 days a week. She states that after she put the children to bed, she would leave home at approximately 10.00 p.m. to catch a bus to work

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and would return home by bus at approximately 8.00 a.m. Mr. Goraya would then leave for work and she would assume the care of the three children, Chattar, Sharandeep, and Jaskarn.

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[15] The Wife's employment at the Knight & Day Restaurant ended after approximately 4 months when she was involved in a motor vehicle accident.

[16] The Wife has not worked outside the home since 1990.

[17] Since the parties' separation, the Wife's source of income has been social assistance in the sum of $1,004 per month and $295 per month child tax credit. The Husband has made no financial contribution to the support and maintenance of the Wife and three children in her care.

ISSUES

[18] The issues to be resolved are the determination and division of the family assets pursuant to Part 3 of the ***Family Relations Act*** R.S.B.C. 1979, c. 121; the amount and duration of spousal support, and the amount of child support.

[19] The parties make the following claims regarding the division of property issue:

(a) The Wife seeks a 70/30 reapportionment of the net proceeds of sale of the family home of approximately $150,626.96; the Husband proposes an equal division of the proceeds.

(b) While the parties have agreed that certain family jewellery worth approximately $10,000 is a family asset, each party denies this jewellery is in his or her possession and asks the Court to make a notional allocation of the value of this asset to the other.

(c) The Husband seeks to exclude as a family asset the sale proceeds of a 1991 Mazda motor vehicle of approximately $4,000.

(d) The parties disagree on the location of the furnishings from the family home and the value of those furnishings; both agree they are family assets. The Husband seeks a notional allocation of a value of $25,000 to the Wife for the furnishings in her possession.

(e) The Husband seeks to exclude as a business asset a small business he operates using either three or four vending machines, which he values at $2,000 and the Wife values at $12,000.

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(f) The Husband states he has paid certain debts since the parties separation which he alleges arose in the course of the marriage and are family debts and accordingly must be shared equally by the parties. The Wife denies any knowledge of these debts.

[20] Finally, the Husband seeks an order for costs of enforcement applications he states he had to make to obtain his access rights awarded to him pursuant to an interim order of Master Joyce, dated May 12, 1994.

ASSETS

(a) THE FAMILY HOME

[21] In April 1985, the Husband purchased a home in Burnaby for $110,000. He built and lived in a basement suite while renting out the upstairs of the home to assist paying the mortgage of $75,000. In December, 1985, he moved into the upstairs of the home. In December, 1986, the Wife moved into this home with her Husband when she came from India. She says she gave him $3,000 at that time. The Husband denies receiving any monies from her.

[22] The home was sold in 1988. From the sale proceeds of approximately $70,000, a second home was purchased on

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Cumberland Street where the parties lived for the next year with their new daughter, Sharandeep.

[23] A third home was purchased with the sale proceeds from the second home. The parties lived in this third home for just a few months before selling it. They then moved into a rented basement suite for a short time and thence into a rented duplex for approximately 8 to 9 months.

[24] With the proceeds of sale from the third home, they purchased the home on Wilberforce, (the "family home") which was sold in December, 1994, after their separation. The sale realized $150,626.96.

[25] During these various moves, two more children, Jaskarn and Simranjit, were born to the parties.

[26] The family home had a basement suite which rented for $550 per month. The rent monies contributed to the monthly mortgage payment.

[27] Following the parties' separation in February, 1994, the Wife and three younger children continued to live in the family home, along with the Wife's mother, father and brother. The Husband states that the mortgage was not paid during this time nor did anyone pay him any rent. The Wife retained the rent

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from the tenants in the basement suite. The mortgage arrears were eventually paid from the proceeds of sale of the home.

(b) FAMILY JEWELLERY

[28] During the marriage the parties acquired jewellery as an investment and security for difficult economic times when the Husband might be out of work. The jewellery was looked upon as a "rainy day" fund. Customarily, this jewellery would be worn by the family on special occasions including weddings and religious events.

[29] Before leaving on a family holiday to India in January, 1994, the Wife had all of the jewellery appraised by Bharti Art Jewellers in Vancouver. This appraisal is outlined in Exhibit 1, Tab 3. En route to India, the parties stopped over for a few days at Singapore where they purchased some additional jewellery for the children. The Husband and Wife agree that all of the jewellery has a value of approximately $10,000.

[30] The Wife states she obtained the appraisal in order to avoid any problems they might encounter from Canadian Customs on their return trip from India. She states she had the jewellery in her possession on that portion of the trip from Vancouver to Singapore. Thereafter she says the Husband took the jewellery in his bag along with their passports and airline

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tickets for the balance of the trip. The Husband denies he ever had possession of the jewellery.

[31] Upon their arrival in India, the family stayed at the home of the Husband's parents.

[32] While in India, they attended the wedding of the Wife's brother and the wedding of her nephew. On both occasions everyone in the family wore their respective jewellery. The third special occasion was a religious ceremony scheduled for the morning of February 12, 1994.

[33] The Husband states that at approximately 3.00 a.m. on February 12, 1994 when all were sleeping, the Wife's brother came to his parents' door. His Wife got up, she had a discussion with her brother. The Husband woke up briefly, saw the brother there, did not speak to him, and promptly went back to sleep.

[34] The Wife was not wearing her jewellery at the religious ceremony they attended that morning. When the Husband asked her about its absence, he says she was evasive in her answers, and said that she would wear it some other time. The Husband now believes the Wife gave the jewellery to her brother for safekeeping when he attended at his parents' home in the early morning hours of February 12, 1994.

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[35] On February 13, 1994, the Husband states he was invited to the home of his Wife's parents where he was taken into a back room. His Wife and her parents were present. The Wife's mother was sitting on a bed and the Wife and her father were standing. The Husband states his father-in-law bolted the door to the room and then all three of them started hitting on him. He managed to escape and took off in the car which was waiting for him outside the home.

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[36] After this argument, the Wife remained at her parents' home.

[37] The mayors of the two communities which housed each of their respective families agreed to act as mediators in the marital dispute. A meeting was arranged for February 17, 1994, at the home of the Wife's parents. All members of each family attended. The Wife states that the Husband then gave her her passport but kept the children's passports and return airline tickets.

[38] The Husband states that at this meeting the Wife displayed all of the jewellery on her lap. She told him that it was her jewellery as the appraisal which she had obtained in Vancouver indicated that the jewellery was in her name. He states that her father and she then quickly removed the jewellery from the room and that he has not seen it since. The Wife denies any discussion or display of the jewellery at this meeting.

[39] It was recommended by the mayors that both the Husband and the Wife each take one-half of the family jewellery.

[40] The Husband returned home to Canada on February 19, 1994, with Chattar only, leaving the Wife and the three younger children in India. He confirms that he had possession of the children's passports and return airline tickets. He states the Wife refused to speak or see him following the meeting of February 17, 1994 and for that reason he could not give her the return tickets and passports for her and the children. He stated it was imperative that he return to Canada for the purpose of returning to work.

[41] The Wife gave her evidence in Punjabi, speaking through an interpreter. Even making allowances for this, she did not address in her examination in chief the several allegations made by the Husband involving the disappearance of the family jewellery, and specifically the alleged meeting with her brother in the early morning of February 12, 1994 and the alleged beating of the Husband at her parents' home on February 13, 1994.

[42] She states that the last time she saw the jewellery was after the second wedding when she removed it, and along with the travel documents and passports, put it all into a large box at her in-laws home. She states she does not know what happened to the jewellery after that occasion, but suspects

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that the Husband took it with their passports on his return to Canada.

[43] The Wife confirms that the meeting with the mayors occurred on February 17, 1994, but denies displaying the jewellery at that time. She states that at the meeting the Husband gave her her passport but kept the remaining airline tickets and children's passports. The Wife gave no evidence of the mayors' recommendation concerning the jewellery.

[44] The Wife states she later went back to her in-laws home to obtain the jewellery but they refused to open the door to their home. She says she wanted her and the children to return to Canada with the Husband and followed him to New Delhi to that end. She states that her Husband, however, refused to tell her what time or what flight he was taking to Canada and she could not find him. She states that with the help of a Member of Parliament she acquired airline tickets and documents for herself and the children to return to Canada on April 6, 1994.
[45] She further states that she obtained $10,000 from jewellers in India, who were close friends of her family, to purchase her tickets home and to cover the expenses for her and the children while she stayed in India. Upon her return to Canada she immediately borrowed $10,000 from a friend to repay this loan. The Husband suspects she pawned the jewellery in India for $10,000 and upon her return to Canada immediately borrowed the money to repay the loan and secure the return of

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the jewellery. He believes the jewellery is presently in her possession or control. The Wife denies these allegations.

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[46] No written documentation was signed by the parties relating to this loan from the jewellers.

[47] Neither the Husband nor the Wife called any witness to corroborate their respective version of what occurred during the trip to India.

[48] The Husband asks this Court to take an adverse inference from the Wife's testimony based on her refusal to call as a witness her father, who now lives just a few blocks from her present home. He cites the decision of ***Faryna v. Chorny*** (1951), 4 W.W.R. 171 (B.C.C.A.) as authority for a finding of credibility against the Wife. Specifically he refers to where O'Hallaron J.A. states:

> Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, ...
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those

> conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

[49] Authority can also be found for the proposition that failure to call an available witness to provide an explanation or reply concerning an allegation, may allow the Court to draw an adverse inference against the party refusing to call that witness. In ***Wall Bros. Construction Co. Ltd. v. Canson Enterprises Ltd. et al*** (1986), 70 B.C.L.R. 243 at 250 to 25l, Hinkson J.A. states:

> In addition to the two foremen on the site, Franchuk and Cleave, there was a superintendent, Smith. None of these individuals was called as a witness at trial. In view of the conclusion reached by the trial judge that the sole responsibility for the loss suffered by the owners rested with Killoran and Bailey Laboratories, it was not necessary for him to consider whether or not to draw an adverse inference from the failure of Greenlees to call any of these

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> three employees, that is, the ones who were knowledgeable from being on site and who, from their experience, were in a position to judge whether or not the piles were meeting the desired capacity. The evidence at trial disclosed that an experienced foreman could tell what kind of ground he was working on. On the appeal, the owners again sought to have an adverse inference drawn from the failure to call these three witnesses. No explanation was offered by Greenlees for its failure to call these witnesses. In these circumstances, I would infer that if these witnesses had been called they would have supported the claim of the owners that it was known at the time the piles were being driven that they did not meet the specifications; *Barker v. McQuahe* (1964), 49 W.W.R. 685 (B.C.C.A.).

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[50] Unfortunately, the Court is left with two different versions of what transpired in India and two irreconcilable theories about what became of the $10,000 worth of family jewellery.

(c) THE MAZDA VAN

[51] The Husband and Chattar returned to the family home in February, 1994. The Husband then sold the 1991 Mazda Van for $4,000 which he states he needed to finance his return trip to India to see about the children.

[52] The Husband argues that the Van proceeds are not a family asset or in the alternative the proceeds should be reapportioned in his favour as a family debt as he had to return to India to retrieve the children.

[53] The Wife, in the meantime, made arrangements to return to Canada with the children about the same time as the Husband was making his second trip to India. She and the Husband's paths did not cross and upon her return, she and the three younger children returned to the family home.

(d) THE FURNISHINGS

[54] The Wife states that upon her return home from India in April, 1994, all of the small items in the family home, such as dishes, linen, and her clothing were gone. Some of the children's clothing still remained in the home as did the furniture. The Husband denies removing any items from the home except a single pillow, blanket, and quilt for Chattar.

[55] The parties significantly disagree on the value of the furniture in the home. The Wife states that except for a dining room suite and bedroom suite purchased new in 1992 for a total of approximately $4,000, and a stereo system purchased a few years earlier for $1,000, all of the furniture was old or second-hand, in poor condition and of little value. Many of the old items the Wife sold or gave away after the home was sold in December of 1994. The Husband suggests the furnishings retained by the Wife are worth at least $25,000 and are in good condition.

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[56] Upon the Husband's return from his second trip to India, the Wife states that he received one-half of the household items including the sofa purchased in 1991 for $1,300. The Husband denies this and states that he received only a few items from the home.

[57] There is, of course, no appraisal of the furnishings and personal property in each of the parties' possession. Both the Husband and the Wife have had to purchase new furnishings since their separation. Both the Husband and Wife currently live in basement suites.

(e) GORAYA VENDING INDUSTRIES

[58] In approximately January, 1987 the Husband paid $4,000 to a fellow employee at Cantree for three vending machines which dispense soft drinks, chips, and coffee. The Wife suggests the Husband has a fourth machine for soup however the Husband states that the soup is sold from the coffee machine. These machines are located in the employees' lunch room at Cantree. An employee of Cantree has always operated this business.

[59] Within a year one of the machines was donated to recycling; in 1992 a new pop machine was purchased for $3,000; in 1995 a used coffee machine was bought for $1,500. The Husband states the chip machine will have to be replaced soon.

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In total he has spent approximately $8,500 since 1987 on this business.

[60] This proprietorship is a cash business. The Husband's income tax returns indicate that he operates it at a loss. Certain charges for his motor vehicle, including the interest on his loan for the purchase of the vehicle, a "salary" for himself, and meals and entertainment are written off against the revenue. In 1993, with employment income of $43,000, a full personal deduction for his unemployed Wife, and a business loss of $3,483.25, the Husband was able to receive an income tax refund of $2,922.28. Similarly, in 1994 the Husband had an income tax refund of $2,386.36 and in 1995 a refund of $2,146.29. In both those years, Chattar, who was living with the Husband, was used for the equivalent to spouse deduction.

[61] The Husband states he makes $100 per month net after expenses. The Wife states the Husband brought home an additional $1,000 per month from the business.

[62] The truth of the revenue from this business probably lies somewhere between these two extremes. It is clear that the alleged business expenses provide a write-off for the Husband thereby permitting him to claim an income tax refund so long as he is able to claim Chattar as a dependent.

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[63] No appraisal was tendered by either party for the market value of this business. The Husband's opinion is that the machines are worth $2,000 and the Wife believes their value to be $12,000. The Husband's 1995 income tax return indicates the undepreciated capital cost for the machines, at the end of 1995, was $19,374.

[64] The Husband claims these assets are his business assets and not family assets. He states his Wife made no financial contribution to the business and contributed only minimal physical labour. The Wife states that she contributed financially to the acquisition of the machines from an I.C.B.C. motor vehicle settlement award, and that she assisted the Husband in cleaning and filling the machines. She states she also contributed indirectly to the business by managing the household and caring for the children while the Husband was working.

(f) <u>THE DEBTS</u>

[65] Following the sale of the family home, the parties agreed to a draw of $10,000 from the sale proceeds which were being held in trust by their respective solicitors. A further $32,500 draw was agreed upon in April, 1996. The Husband took his agreed upon draws. The Wife, whose source of income since the separation has been social assistance, did not. She states

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she was not aware of the agreement to draw the additional $32,500.

[66] By December of 1994, the Husband received demands for payment from creditors, and in particular, B.C. Tel for $670.01, American Express for $1,383.47, and Visa for $4,674.36. He has paid these bills but seeks a 50% contribution from the Wife. He alleges these bills were family debts. He states the American Express bill was for the purchase of clothes for the family holiday in India in January, 1994. The Visa bill, he states, included a $2,000 draw for spending money on this trip with the balance being for shopping in India. The B.C. Tel bill was for telephone calls by both the Husband and the Wife to India.

[67] The Husband provides no details of the transactions making up these debts and the Wife states she has no knowledge of them as all accounts and credit cards were in the Husband's name.

ANALYSIS

(a) SALE PROCEEDS OF THE FAMILY HOME

[68] The division of assets pursuant to s. 43 of the ***Family Relations Act*** contemplates a *prima facie* entitlement to an "undivided half interest" in the family assets:

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

(a) a separation agreement;

(b) a declaratory judgment under section 44;

(c) an order for dissolution of marriage or judicial separation; or

(d) an order declaring the marriage null and void

respecting the marriage is first made.

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

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

(a) an order under this Part; or

(b) a marriage agreement or a separation agreement.

(4) This section applies to a marriage entered into before or after this sections come into force.

[69] In ***Murchie v. Murchie*** (1984), 39 R.F.L. (2d) (B.C.C.A.) at p. 392, Lambert J.A. states:

> I refer to the judgment of this court in *Baird v. Baird*, [1982] 2 W.W.R. 8, 25 R.F.L. (2d) 17, 33 B.C.L.R. 77 at 82, 130 D.L.R. (3d) 128. Seaton J.A., in giving the judgment of the court, said:
>
> > "The court should not set aside s. 43 by substituting the division that in its view would be just. The court is not authorized to interfere unless equal division 'would be unfair' and then only if it is 'unfair having regard to' the criteria set out in s. 51. There is, in my view, no basis for

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> finding unfairness in this case when one has regard to those provisions."

> As I understand that passage, the trial court and this court ought not to be trying to settle on the distribution of assets that seems to the judges to be a just one. The Family Relations Act requires equality. It is only if there is real unfairness in equality that the court is justified in interfering. Interference can only come through a finding that equality would be unfair.

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[70] Section 51 of the ***Family Relations Act*** outlines those factors which may be considered when determining whether an equal division of the assets would be unfair:

> 51. Where the provisions for division of property between spouses under section 43 or their marriage agreement, as the case may be, would be unfair having regard to
>
> (a) the duration of the marriage;
>
> (b) the duration of the period during which the spouses have lived separate and apart;
>
> (c) the date when property was acquired or disposed of;
>
> (d) the extent to which property was acquired by one spouse through inheritance or gift;
>
> (e) the needs of each spouse to become or remain economically independent and self sufficient; or
>
> (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,
>
> the Supreme Court, on application, may order that the property covered by section 43 or the marriage agreement, as the case may be, be divided into shares fixed by the court. Additionally or alternatively the court may order that other property not covered

> by section 43 of the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

[71] In support of her claim for a reapportionment of 70% of the proceeds of sale of the family home, the Wife cites ***Lodge v. Lodge*** (1993), 79 B.C.L.R. (2d) 360 (C.A.) and ***Toth v. Toth*** (1995), 19 R.F.L. (4th) 55 (B.C.C.A.). Both those decisions were post ***Moge v. Moge***, [1992] 3 S.C.R. 813 in which compensation for economic hardship arising from the marriage breakdown was addressed in a maintenance order. There were no assets remaining for distribution. Madam Justice L'Heureux-Dubé at page 374 stated:

> Equitable distribution can be achieved in many ways: by spousal and child support, by the division of property and assets, or by a combination of property and support entitlements.

[72] In ***Lodge v. Lodge*** (*supra*) Mrs. Lodge gave up her secretarial career for approximately 15 years to raise the parties' two children and run the household while Mr. Lodge developed a contracting business. In ***Toth v. Toth*** (*supra*) the wife also left a secretarial job for 12 to 13 years to raise four children while the husband obtained a B.A. and M.A. for his teaching career and eventual administrative position.

[73] In both those cases, reapportionment was awarded to the wives pursuant to s. 51(e) and/or s. 51(f) of the ***Family Relations Act*** as compensation for the capital loss they

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suffered by reason of the sacrifices they made and the child care responsibilities they assumed during their respective marriages. The reapportionment was necessary because of their earning capacity and need to become or remain economically independent and self-sufficient.

[74] By comparison, Mrs. Goraya, upon her marriage, did not give up a career or job. In fact, her evidence suggests that she expected the marriage to be a traditional one wherein her Husband would work outside the home, and support her and any children of the marriage, while she would manage the household and be primarily responsible for the raising of any children.

[75] Except for two brief part-time jobs, the Wife has not worked outside the home. Her English skills after 10 years in Canada are limited. The Husband states that he tried to encourage her to attend school or obtain employment outside the home in order to upgrade her English skills.

[76] Mrs. Goraya's present reality is that she has three young children to raise, no job, and limited educational and employment skills. She has the benefit, however, of Mr. Goraya having an active and sincere interest in the children and assuming responsibility for their care every weekend and during certain holiday times.

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[77] The Husband is critical of the Wife for not having done enough to become economically self-sufficient. He cites as an example in 1993 of the Wife quitting an ESL course after three days. The Wife replies that she was breastfeeding Simranjit at the time and that it was simply too difficult for her to attend. The Husband also states that since the parties' separation, the Wife failed to follow up on taking an ESL course, and has not sought employment in a field such as janitorial work, where her working knowledge of English might not be a requirement of employment.

[78] On the whole of the evidence, I am satisfied that the Wife's inability to become economically self-sufficient is primarily due to the responsibilities she assumed in the marriage, of managing the household and caring for the children, which responsibilities she continues to have today. Her ability to obtain employment for probably minimum wage, while at the same time having to arrange for the care of her children while she is working during evening or graveyard hours, will not be easy and may impose financial constraints on her ability to obtain employment.

[79] There is no evidence that Mrs. Goraya gave up opportunities for employment advancement due to her marriage. She did not suffer a capital loss in the manner experienced by Mrs. Lodge or Msr. Toth. She has however, by reason of her role in the marriage and the child care responsibilities she assumed

both during the marriage and since its breakdown, sustained a "disadvantage" which will be ongoing until the children are older. These responsibilities along with her limited educational and employment skills, will continue to result in her having a diminished earning capacity as contemplated by s. 51(f) of the ***Family Relations Act*** and s. 15(7)(a)-(c) of the ***Divorce Act***, 1985.

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[80] In the absence of a capital loss, the interplay of s. 51 of the ***Family Relations Act*** and s. 15(7) of the ***Divorce Act***, 1985, was canvassed in a detailed analysis by Newbury J. (as she then was) in ***Kennedy v. Kennedy***, [1995] 1 W.W.R. 576 (B.C.S.C.) at p. 590 where she concluded that Mrs. Kennedy's child rearing responsibilities would affect her "capacity" under s. 51(e) of the ***Family Relations Act***:

> Thus neither the marriage nor its breakdown can be said to have resulted in something akin to "damage" compensable by a lump sum award. The main "economic consequence" of this marriage is instead the factor referred to in s. 15(7)(b) of the *Divorce Act* - the fact that Ms. Kennedy will in future have the majority of the day-to-day child-rearing responsibilities and will be subject to the various expenses and pressures that entails. This consequence can be recognized primarily by an order for child support, but it also affects Ms. Kennedy's "capacity", as referred to in s. 51(e) of the *Family Relations Act*. Given this factor, as well as her contribution to the acquisition of the family assets through inheritance, and her need to become economically independent and to achieve for herself and her children a standard of living as close as possible to the standard that prevailed during the marriage, I am persuaded that an equal division of the family assets would be unfair to Ms. Kennedy. I conclude that a 65/35 split would be appropriate.

[81] In that case, Mrs. Kennedy after separation, had secured a job earning $24,000 per year. In the present case, Mrs. Goraya has no employment and no foreseeable employment prospects.

[82] I conclude that the Wife requires some reapportionment of the proceeds of sale of the family home pursuant to s. 51(e) and s. 51(f) of the ***Family Relations Act*** to assist her in becoming economically independent and self-sufficient. Accordingly, I make an award of a 60/40 split in her favour.

(b) THE FAMILY JEWELLERY

[83] While the exact whereabouts of the family jewellery at this time is undisclosed, I am more inclined to accept the Husband's evidence as to what became of the jewellery. In my opinion the Wife's evidence on this issue was unconvincing, particularly in her failure to address the specific allegations as to the incidents that occurred between the parties while they were in India, and her failure to call her father as an independent witness to corroborate her version of the events. Accordingly, I order that the value of the jewellery shall be divided equally between the parties.

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(c) THE 1991 MAZDA VAN

[84] This vehicle was clearly a family asset and the proceeds of its sale, namely $4,000, shall be divided equally. The expenses of the Husband in returning to India for a second time in 1994, were also borne by the Wife in having to finance her return to Canada with the children. What eventually became of the children's already paid for airline tickets was never addressed by either of the parties.

(d) FURNISHINGS

[85] No formal valuation of the furnishings was obtained by either party. It is unclear what furnishings remain with each party or the value of those furnishings. Given the Wife's limited financial capacity and the age of the children in her care, I am not prepared to disturb the present distribution of household furnishings.

(e) THE VENDING BUSINESS

[86] I find the assets of this business to be family assets by reason of the Wife's direct contribution in money from her I.C.B.C. settlement, and labour, and in her indirect contribution pursuant to s. 46(2) of the ***Family Relations Act***, namely "... savings through effective management of household or child rearing responsibilities ...".

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[87] While value of the business was not established by either party, I am more inclined to accept the wife's evidence that the cash flow from this business is substantially more than $100 per month net. It seems to me unlikely that someone would invest $8,500 in the acquisition of the machines, and do the attendant work required of this business for a return of $100 per month. Given these factors, and the amount of the remaining undepreciated capital cost allowance as reflected in the Husband's 1995 income tax return, I find the business to have a value of approximately $10,000 which value will be divided equally between the parties.

(f) THE DEBTS

[88] The Husband's evidence of the transactions which resulted in debts of $6,727.84 was very limited. However, on the totality of the evidence I find the debts of $6,727.84 to be family debts. While recognizing the principles outlined in ***Mallen v. Mallen*** (1992), 65 B.C.L.R. (2d) 241 (C.A.), in seeking an equal sharing of those debts the Husband has the onus of proving on a preponderance of evidence that a reapportionment pursuant to s. 51 provides that sharing is required as a matter of fairness. As stated by Wood J.A. in his dissent at p. 250:

> Recognizing that liabilities incurred for a family purpose can only be taken into account by way of a reapportionment of family assets under s. 51, and

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> that they cannot be automatically or presumptively apportioned equally between the parties, is important for two reasons. Firstly, the onus is on the party seeking a reapportionment under s. 51 to satisfy the court that it is required as a matter of fairness. Thus, the party who is responsible for a liability which is claimed as a family debt must satisfy the court on a preponderance of evidence that fairness requires that the other spouse assume an equal or some other share of its burden.

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[89] I am satisfied that the Husband's failure to contribute to the support of his Wife and three younger children after their separation provided him with necessary income from his employment and business to pay these debts. Accordingly, I decline to make an order pursuant to s. 51 of the ***Family Relations Act*** to reapportion a share of those debts to the Wife.

(g) CHILD SUPPORT

[90] Pursuant to s. 15 of the ***Divorce Act***, 1985, both the Husband and Wife have a joint obligation to contribute to the maintenance and support of their children:

> 15. (8) An order made under this section that provides for the support of a child of the marriage should
>
> (a) recognize that the spouses have a joint financial obligation to maintain the child; and
>
> (b) apportion that obligation between the spouses according to their relative abilities to contribute to the performance of the obligation.

[91] I am invited by both the Husband and the Wife to follow the proposed Federal Child Support Guidelines as published in 1996. Based on a finding that the Husband has an annual income of $45,000, the Husband's contribution for the three children in the Wife's care should be $839 per month net of tax. However, the Wife is also obliged to contribute to the support of Chattar who lives with the Husband. At her estimated income level of $15,600 per year, she should contribute $142 per month net of tax. I therefore award to the Wife maintenance for the three children in her care, after taking into account her obligation to contribute to the support of Chattar, $350 per month per child, commencing April 1, 1997 and payable on the first day of each and every month thereafter. This periodic payment will be taxable to the Wife and deductible to the Husband. The parties are at liberty to return to court for an order under the guidelines when they have been proclaimed.

(h) SPOUSAL SUPPORT

[92] Mrs. Goraya has acknowledged her obligation to take steps to become economically independent and self-sufficient. She consents to a two year fixed term award for spousal support in the amount of $300 per month.

[93] The Husband argues that in the event an equal division of the proceeds of sale of the family home is awarded, at most

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there should be an order for spousal support for a one year fixed term. He further argues that in the event a reapportionment of the family assets is ordered, there should be no award for spousal support.

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[94] Unlike the decision of ***McDonnell v. McDonnell*** (unreported, New Westminster Registry No. D029323, February 10, 1995 (S.C.)), where an order for reapportionment of the family assets was declined on the basis that the wife's capital loss could be redressed through a support order, the limited employment income available to the husband especially after the payment of child support, does not allow for an appropriate spousal support award.

[95] Given the order reapportioning the net proceeds of sale of the family home on the 60/40 basis in favour of the Wife, I award her spousal support of $300 per month for a fixed term of two years from April 1, 1997.

ENFORCEMENT OF INTERIM ACCESS ORDER

[96] The Husband was awarded specified interim access to the three children residing with the Wife pursuant to an order of Master Joyce made May 12, 1994. The Wife refused the Husband his court ordered access on several occasions. Her explanation was that he would often be late in picking up or returning the children, and that there were times when the children did not

want to visit with him. The s. 15 Custody and Access Report does not corroborate the Wife's description of the children's relationship with their father. They appear to have a close bond with Chattar and enjoy their visits with him and their father.

[97] On three occasions the Husband had to take enforcement proceedings to see his children: May 9, 1995, August 25, 1995, and September 8, 1995. He incurred legal expenses and lost wages for time off work in order to attend these applications. The Wife was admonished by the Court and ordered to produce the children for the specified access. She was advised that any further denial of access would be at her peril. Since then, the Husband has received the specified access to the children.

[98] It is expected that orders of this Court shall be followed. In my opinion the Husband's need to enforce the order of May 12, 1994 warrants some consequences to the Wife and accordingly I accede to his request and grant him an award of costs of those three Court appearances.

CONCLUSION

[99] In order to give effect to the orders for the division of family assets, pursuant to s. 52 of the ***Family Relations Act*** I make the following ancillary orders:

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(a) the Wife shall retain ownership and possession of the family jewellery;

(b) the Husband shall retain ownership and possession of the sale proceeds of the 1991 Mazda Van and the assets of the vending business;

(c) each of the parties shall retain the furnishings in their respective possession;

(d) the net proceeds of sale from the family home, along with any interest earned on those proceeds, shall be paid out 60% to the Wife and 40% to the Husband subject to the following adjustments:

(i) $5,000 for the Husband's interest in the family jewellery shall be paid to the Husband from the Wife's share of the proceeds;

(ii) $2,000 for the Wife's interest in the Van shall be paid to the Wife from the Husband's share of the proceeds;

(iii) $5,000 for the Wife's interest in the vending business shall be paid to the Wife from the Husband's share of the proceeds;

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(iv) taxable costs for the Husband's three court appearances on the enforcement application of the interim access order shall be paid to the Husband from the Wife's share.

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COSTS

[100] Subject to further submissions by counsel and my order for costs to enforce the interim access order, in view of the divided success of the parties, I make an order that each party shall bear their own costs.

D. M. SMITH J.

"D. M. Smith J."