For later Reasons for Judgment on this Action, see 1200.95.DATE OF RELEASE: May 25, 1995 No. A9302025

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)	
)	
WILLIAM ANTHONY PEVECZ)	REASONS FOR JUDGMENT
)	
PLAINTIFF)	
AND:)	OF THE HONOURABLE
)	
LINDA LILLIAN PEVECZ)	
)	MR. JUSTICE SMITH
)	
DEFENDANT)	
Counsel for the Plaintiff:	F.G. Potts
	H. MacKenzie
Counsel for the Defendant	L.A. Montaine
Place and Dates of Hearing:	Vancouver, B.C.
	September 6, 7, 8, 9, and October 6, 7, 1994

1 The plaintiff seeks an order fixing the respective shares of the parties in their family assets:

(a) pursuant to s. 51 of the Family Relations Act, R.S.B.C. 1979, c. 121 ("the Act") on the ground that a marriage agreement, made by the parties in writing on September 12, 1991, to provide for division of their property at the end of their marriage, is unfair having regard to the factors set out in s. 51 of the Act; and

(b) alternatively, pursuant to s. 43 of the Act on the ground that there is no enforceable marriage agreement because:

(i) the agreement purports to bind after-acquired assets of the plaintiff to the prejudice of actual or potential future claimants under the Act and is therefore contrary to public policy; and

(ii) the defendant failed to satisfy a condition precedent to the agreement that she make full and accurate disclosure of her assets.

BACKGROUND

2 Mr. Pevecz came to Canada from Hungary in 1957. He obtained employment with B.C. Electric Company in April, 1957, and was continuously employed by that company and its successor, B.C. Hydro & Power Authority, until he retired on April 1, 1988, at fifty-eight years of age. He is a professional engineer. Mrs. Pevecz is twenty years younger than Mr. Pevecz. She has been an employee of B.C. Hydro & Power Authority continuously since 1968 and is presently a personnel officer in the Vancouver office.

3 Mr. and Mrs. Pevecz met through their employment and began living together in 1973. He was then forty-three years old and she was twenty-three. Both were married. Before long they purchased a condominium in North Vancouver where they lived for about two years. During that time each was divorced; they married each other on November 1, 1974.

4 They sold the condominium in 1976 and purchased a home in West Vancouver. In October, 1985, they sold that home and purchased a third home in North Vancouver, which I will refer to as the matrimonial home. They were assisted in the latter two purchases by loans from Mrs. Pevecz's father totalling $70,000.

5 Mr. and Mrs. Pevecz agreed at the outset that they would not have children and that they would each continue in their respective careers. Consequently, there were no children born of their union.

6 During their cohabitation, Mr. Pevecz looked after the family finances. They deposited their respective salaries in a joint bank account from which he paid their expenses.

7 In early 1988, B.C. Hydro offered incentives to certain of its employees, including Mr. Pevecz, to induce them to retire early. The offer included payment of all accrued vacation pay and other benefits, a substantial cash incentive payment, and a choice of eight options for receipt of pension. The pension options available to Mr. Pevecz ranged from a maximum monthly payment until, and ending on, his death to a minimum monthly payment until the death of the survivor of he and Mrs. Pevecz. The difference between the maximum and minimum payments was $600 per month.

8 After discussing this opportunity with Mrs. Pevecz, and with her encouragement, Mr. Pevecz accepted the offer to retire and elected to take the latter pension option. The election is irrevocable. It names Mrs. Pevecz as the "joint annuitant". Their reasoning for his selecting this pension option was that Mrs. Pevecz should have the security of the pension for the balance of her life as Mr. Pevecz would almost surely predecease her. As well, he had gained expertise in the supply of natural gas and planned to use that expertise by working as an engineering consultant after his retirement. They felt they could live comfortably on her salary supplemented by whatever he could earn as a consultant and the smaller pension payments.

9 B.C. Hydro's cash incentive payment to Mr. Pevecz was $43,084. He deposited $18,084 of that sum in a retirement savings plan with Vancouver City Savings Credit Union and the balance of $25,000 in a retirement savings plan with Standard Life Assurance Company. Both plans were registered in his name.

10 Mr. Pevecz received a further $50,261.21 in payment for unused vacation time and other benefits. With that money he purchased units in a mutual fund. The net amount invested, after payment of brokerage and management fees, was $43,677.

11 The parties had been having difficulties in their relationship for several years before they separated. Mrs. Pevecz felt her husband was uncommunicative and failed to display any love and affection for her. He

professed to love her and was unable to appreciate that there was anything amiss in their relationship. He resisted her suggestion that they consult a marriage counsellor. They ceased having sexual relations in 1987, or earlier, and for approximately the last eighteen months of their cohabitation they slept in separate beds. Mrs. Pevecz finally left the matrimonial home in October, 1990, in an effort to make him realize that she considered the problem to be serious.

12 Shortly before she left Mr. Pevecz, Mrs. Pevecz told him her father needed money and required repayment of the loan they had taken to assist in the purchase of the matrimonial home. Mr. Pevecz drew a cheque for $70,000 in full payment to her father on an account he had opened in the name of his consulting business, Pevecz Consulting Services, a proprietorship. This account was comprised of receipts from his clients.

13 Mrs. Pevecz rented an apartment near the matrimonial home and she and Mr. Pevecz continued to communicate and to see each other frequently after their separation. While Mr. Pevecz was working out of town, which was most of the time, Mrs. Pevecz cared for the house and their dog. They discussed reconciliation many times, but Mrs. Pevecz was unwilling to reconcile until she could be satisfied her concerns would be dealt with, and Mr. Pevecz continued to be unable to appreciate her concerns and to resist the suggestion of counselling.

14 A few months after they separated Mrs. Pevecz suggested they should draw up a written agreement to settle their financial affairs and divide their family assets. Mr. Pevecz agreed to her suggestion because he still hoped they could reconcile and felt he could promote a reconciliation by co-operating with her.

15 Mrs. Pevecz retained Louise Johnston, a solicitor in North Vancouver, to prepare the agreement. Ms. Johnston told Mrs. Pevecz at their first meeting that Mr. Pevecz should obtain legal advice. He did not wish to do so, however. From time to time he and Mrs. Pevecz discussed the terms of the proposed agreement and reviewed drafts prepared by Ms. Johnston. Mr. Pevecz never met with Ms. Johnston and she prepared the document entirely on Mrs. Pevecz's instructions and delivered it to her when it was completed. She again suggested that Mr. Pevecz take it to another lawyer for review. Mrs. Pevecz took it to Mr. Pevecz and he signed it without any legal advice.

16 The reconciliation Mr. Pevecz hoped for was not to be and the parties were divorced on June 10, 1993. Mr. Pevecz commenced this action on June 3, 1993. Both parties have since remarried.

WHETHER THE AGREEMENT IS UNENFORCEABLE

17 I will deal first with the plaintiff's alternative submissions relating to the enforceability of the agreement. The pleadings do not support these submissions and Mr. Potts, counsel for the plaintiff, has requested leave to amend. I have a discretion to permit the requested amendments: Rule 24(1). Mr. Potts referred to Wilkinson v. B.C. Electric Railway (1939), 54 B.C.R. 161 (C.A.) for the proposition that amendments should be granted to permit the resolution of the issues between the parties on their merits and may be granted even when the evidence is completed so long as no new claim is set up. He also referred to Arrow Services Ltd. v. Wedge and McCuaig (1964), 49 W.W.R. 65 (Sask. Q.B.).

18 Mr. Potts wishes to argue that paragraph 16 of the agreement is contrary to public policy as it purports to bind after-acquired property to the prejudice of future claimants to a share of Mr. Pevecz's assets. This paragraph was included in the written agreement during the late stages of drafting at Mrs. Pevecz's insistence. It reads as follows:

16. The husband shall maintain the wife as the irrevocable beneficiary of his group life insurance policies through B.C. Hydro, his Standard Life annuity and his registered retirement savings plan and shall provide to the wife, as she may reasonably request from time to time, proof of the continuation in force of the nomination and of the said insurance policies, annuity and R.R.S.P. The husband shall also maintain in force a valid last will and testament bequeathing his estate to the wife and the wife shall maintain in force a valid last will and testament bequeathing the first $250,000 of her estate to the husband. These provisions shall continue in effect notwithstanding the remarriage of either party. Neither party shall alter the aforesaid provisions of his or her last will and testament without the approval of the other party. The husband shall maintain the wife as irrevocable beneficiary of all his B.C. Hydro employee pension plans and the wife shall maintain the husband as irrevocable beneficiary of her voluntary group life insurance policy with B.C. Hydro.

As I understand his position, Mr. Potts seeks to have the agreement declared unenforceable or, alternatively, to have paragraph 16 declared unenforceable and severed from the agreement.

19 Public policy is an amorphous and fluid concept. What is contrary to public policy at one time and place may not be at another time and place. Whether this agreement is unenforceable in whole or in part as contrary to public policy for the reason asserted is better determined if and when a claimant brings such a claim and is met with paragraph 16 as a defence. The resolution of that issue involves not just an interpretation of the written words but also a consideration of the possible roles of mistake, illegality, unconscionability, moral culpability, and competing public interests. Such a consideration should take place in the context of a body of evidence adduced with those issues in mind. Accordingly, I refuse leave to amend to permit an argument that the contract is contrary to public policy, in whole or in part.

20 Mr. Potts also contended that full and accurate disclosure of assets is expressed to be a "condition precedent" to the agreement, and that Mrs. Pevecz's omissions amount to a breach of that condition precluding the formation of a binding agreement. Leave is granted to amend to plead this issue.

21 While the parties have described the disclosure clause as a condition precedent in the agreement I think those words have to be interpreted in the context of the whole agreement and the surrounding circumstances. Viewed in that light, I see the clause as a mere contractual promise, and not one of such importance that its breach relieves Mr. Pevecz of the performance of his obligations in the agreement: see Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd., [1962] 2 Q.B. 26 (C.A.) per Diplock L.J. at pp. 65-6.

22 Mr. Potts says it is impossible to know whether Mr. Pevecz would have entered into the contract at all if he had known of the existence of all the assets. I do not think the evidence supports that submission. Mr. Pevecz made no inquiry of Mrs. Pevecz as to the existence or the value of other assets. He was not concerned about these matters because he was still hoping she would come back to him despite the execution of the agreement. He believed that by co-operating with her and signing the agreement he would improve the chances of a reconciliation. The total value of the undisclosed assets is less than $20,000 and I do not think Mr. Pevecz's agreement would have been affected by the knowledge that Mrs. Pevecz had these additional assets.

23 Accordingly, if Mr. Pevecz is entitled to any relief in this action it must be on the ground that the agreement is unfair having regard to the factors set out in s. 51 of the Act.

WHETHER THE AGREEMENT IS UNFAIR

24 Section 51 reads as follows:

> **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 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

25 There is no dispute that the agreement in issue is a marriage agreement within the meaning of that term in s. 51. The proper approach has been stated in Clarke v. Clarke (1991), 55 B.C.L.R. (2d) 273 (C.A.). The respective positions of the spouses must be examined objectively at the date of the agreement to determine if the agreement was fair. Whether they conducted their affairs sensibly or negotiated well is irrelevant. Section 51 does not authorize the court to set aside a marriage agreement on the ground of unfairness, but only to reapportion family assets to achieve a fair result.

26 Fairness is measured by comparing the contractual disposition of family assets with the equal division mandated by s.43 in the light of the factors set out in s. 51. Equality and fairness are not always synonymous: Gold v. Gold (1993), 82 B.C.L.R. (2d) 165 (C.A.).

A. Identification and valuation of the family assets

27 The parties have agreed that for purposes of identifying and valuing the family assets the material date is the date they signed the marriage agreement, September 12, 1991. The first step in the analysis is to identify and value the family assets at that date.

1. Family assets - no contest over value

28 There are several assets over which there is no contest. They are listed as "Category I" family assets in Schedule "A" to these reasons for judgment.

2. Family assets - contest over value

29 There are other assets which are agreed to be family assets but over which there is a dispute as to value. They are listed as "Category II" assets in Schedule "A" to these reasons.

(a) Pensions

30 The first of these assets are the respective pension plans. The actuaries called, Mr. Brown for the plaintiff and Ms. Wilson for the defendant, agree that the total lump-sum value of Mr. Pevecz's pension entitlement at September 12, 1991, was $845,882.

31 The only issue with respect to the value of Mrs. Pevecz's pension is her probable date of retirement. Mrs. Pevecz will be eligible for retirement at age 55 and her retirement is mandatory at age sixty-five. Her pension plan provides credits for each year of service with B.C. Hydro to a maximum of thirty-five years. Mrs. Pevecz will have completed her thirty-five years when she reaches age fifty-five. After the thirty-five years, she will receive no pension increase based on the number of years of service, but she will receive increased benefits proportional to any subsequent increases in salary. If she elects to retire after she turns fifty-five but before she reaches sixty, she will receive her full pension but her monthly benefits will be reduced to reflect earlier commencement. Once she reaches age sixty there will be no financial incentive for her to continue to work.

32 Mrs. Pevecz testified that she intends to continue at her job until she is sixty-five years of age. She has married a man younger than herself and says they have no plans for a family. She has been physically active in the past, but is beginning to notice the effects of age on her health.

33 Taking all of these circumstances into account, I think it is reasonable to assume that Mrs. Pevecz will work until she is sixty years old and will then retire. On that basis, the lump-sum value of her pension entitlement at the date of the agreement was $138,453.

34 Mr. Pevecz accumulated his pension benefits over a working life of thirty-one years, seventeen of which were before the marriage. In my view this is an appropriate situation to apply what has come to be known as the "Rutherford formula" to Mr. Pevecz's pension. This method of dealing with pensions is derived from Rutherford v. Rutherford, [1981] 6 W.W.R. 485 (B.C.C.A.). That is a fair approach here because the portion of Mrs. Pevecz's pension benefits earned before the marriage is small, and she will continue to accumulate pension credits for approximately eighteen years after the valuation date and will not have to share those pension credits with Mr. Pevecz. Applying the formula, the family-asset portion of Mr. Pevecz's pension is 14/31 of $845,882, or $382,339.

35 With respect to Mrs. Pevecz's pension, the value of the credits earned during the marriage based on a retirement age of sixty was calculated to be $100,568. This is the amount of her pension that is to be considered a family asset.

(b) Mrs. Pevecz's bank accounts

36 Mrs Pevecz failed to disclose the existence of two bank accounts to Mr. Pevecz or to her solicitor. She also understated the amount of cash she had on hand when she declared a sum of $10,000. I am satisfied on the evidence that she had the following cash on hand at the time of the agreement:

Central Guaranty Trust	
Account No. 1007653	$ 4,036
Central Guaranty Trust	
Account No. 30-02632	13,107
Canadian Imperial Bank of Commerce	
Account No. 5205360	$ 330

TOTAL	$17,473

Her counsel, Mr. Montaine, concedes this figure is correct and does not dispute these funds are family assets.

(c) Mrs. Pevecz's savings bond

37 It is not disputed that Mrs. Pevecz owned a $1,000 Canada Savings Bond on September 12, 1991.

(d) Mrs. Pevecz's R.R.S.P.

38 Mr. Pevecz invested $6,000 in a spousal R.R.S.P. in the name of Mrs. Pevecz on January 19, 1990. Mrs. Pevecz listed its value for Ms. Johnston at $10,000 when she gave instructions for the preparation of the agreement. I think she mistakenly referred to the maturity value of the plan. Mr. Pevecz testified that he believed he had invested a further $4,000, but the statement from the plan's trustee indicates otherwise. The investment earns interest at 11% and had a value of $10,110.36 on maturity at January 19, 1995. I assess its value at September 12, 1991, to be $6,400.

(e) Pevecz Consulting Services

39 Pevecz Consulting Services is not a legal entity but is simply the name under which Mr. Pevecz carries on his business. It is not an asset. Whatever assets are held in that name are Mr. Pevecz's assets. The only such asset identified in evidence is a bank account. At September 7, 1991, there was a credit balance of $9,819 in the bank account. Mr. Potts concedes the funds in the account were used for family purposes and that this money is a family asset. However, he submits that, as this money represents gross receipts from the plaintiff's consulting efforts, I should reduce the value by approximately 40% to reflect income tax liability. I think that is reasonable, and I value this asset at $6,000.

40 Mr. Montaine said I should allow for accounts receivable and the value of ongoing contracts, but that submission is based on the misconception that the business is an asset owned by Mr. Pevecz. Accounts receivable are simply Mr. Pevecz's unpaid earnings, and any ongoing contracts merely give him the right to earn income in the future. His personal income is not a family asset. Accordingly, such considerations are irrelevant to this aspect of the analysis.

(f) The matrimonial home

41 The value of the matrimonial home is in issue. Mr. Cunningham, an expert appraiser called for the plaintiff, assessed its value at $435,000 at the date of the marriage agreement. Mr. Lee, an expert appraiser called for the defendant, opined that the fair market value of the matrimonial home at the same date was $375,000.

42 A crucial assumption underlying Mr. Lee's opinion was that the house was in a poor state of repair at the date of the agreement. Mr. Lee did his appraisal in June, 1994, and relied on Mrs. Pevecz's description of the condition of the house at the material time. However, there was independent evidence of the condition of the house at that time that was inconsistent with Mrs. Pevecz's description to Mr. Lee. It came about in the following way.

43 Mr. and Mrs. Pevecz agreed they would assign a value of $380,000 to the matrimonial home for purposes of their agreement. That was its then-current assessed value for property tax purposes. They also agreed that Mrs. Pevecz should have the matrimonial home, and that she would purchase Mr. Pevecz's interest.

44 Mrs. Pevecz shopped diligently for a mortgage loan to finance the purchase. She approached a number of lending institutions and eventually settled on Central Guaranty Trust Company, which offered the most favourable terms. A condition of the loan was an appraisal of the matrimonial home at Mrs. Pevecz's expense. She agreed. Mr. Hossack, a qualified real estate appraiser, was engaged by Central Guaranty Trust to prepare the appraisal. He inspected the home on July 9, 1991, and valued it at $425,000 as of that date. He concluded that the house was in average to good condition. He disagreed with the particulars of its poor condition provided to Mr. Lee by Mrs. Pevecz. I accept Mr. Hossack's evidence as to the condition of the home at that time and conclude that Mr. Lee's opinion was based on incorrect information.

45 I found Mr. Lee's evidence to be unreliable in other respects. He admitted to making an $8,000 mistake in his opinion with respect to replacement cost of a concrete floor. He did not correct that error until it was elicited from him in cross-examination. He said he was aware of his mistake but was waiting to see if it would be brought out in cross-examination. That reflects adversely on his objectivity and his credibility. Moreover, he expressed his opinion of value after deduction of real estate commission and Goods and Services Tax. Such expenses relating to the sale of property are not a consideration in the assessment of fair market value. Mr. Lee said it was his practice to use a "net" value in appraisals for divorce purposes because he felt that was fair to both parties. This approach betrays a misunderstanding of his function as an independent expert and calls into question the reliability and the objectivity of his testimony.

46 Mr. Lee placed considerable reliance on a subsequent sale of the neighbouring property, but I accept the opinions of Mr. Cunningham and Mr. Hossack that it was not a comparable sale. Mr. Lee's testimony as to the allowances he made for the cost of repairs was fluid and arbitrary and he went so far as to deduct his estimate of this item twice, once as cost of repair and once as depreciation. That is patently a wrong approach.

47 I prefer the opinions of Mr. Cunningham and Mr. Hossack to that of Mr. Lee. Mr. Hossack's opinion at July 9, 1991 was $425,000. Mr. Cunningham's opinion, done in retrospect as of September 12, 1991, was $435,000. The evidence supports an inference that the value increased slightly between the date of Mr. Hossack's appraisal and the date of the agreement. Taking everything into account, I assess the value of the matrimonial home at $430,000 at September 12, 1991.

3. Contest over whether family asset

48 The only asset over which there is a dispute as to whether it is a family asset is the cash incentive payment made to Mr. Pevecz to induce him to retire early.

49 Mr. Potts submitted that the moneys paid to Mr. Pevecz as an inducement for early retirement amount to compensation for the loss of future income and are therefore not family assets within the meaning of the Act. He referred in this regard to Hickley v. Hickley (6 January 1982), Vancouver A801605 (B.C.S.C.); Dzuba v. Dzuba (17 February 1983), Vancouver 5936/D244050 (B.C.S.C.); Penner v. Penner (1984), 42 R.F.L. (2d) 402 (B.C.C.A.); Tkach v. Tkach (1984), 65 N.S.R. (2d) 378 (S.C. T.D.); Booth v. Booth (30 May 1990), Victoria 1653/89 (B.C.S.C.); Jenkins v. Jenkins (31 May 1993), Vancouver D081326 (B.C.S.C.); Read v. Read (1993), 46 R.F.L. (3d) 426 (Alta. Q.B.); and Cameron v. Cameron (1994), 100 B.C.L.R. (2d) 104 (S.C.).

50 In all of these cases, with the exception of Booth v. Booth, the money in question was received after the parties had separated. That is not the case here. Moreover, Mr. Pevecz immediately placed the money here into R.R.S.P.'s, thus changing its character and making it a family asset by virtue of s. 45(3)(d) of the Act.

In Booth v. Booth, the husband invested his severance pay on retirement in a R.R.S.P. and the court held that in the circumstances of that case the money represented nothing more than invested severance pay. There, the parties both worked and spent their own money to the exclusion of each other. They kept separate bank accounts and meticulously shared household expenditures. Those facts distinguish that case. The evidence here does not permit a finding that the inducement allowance retained its character as such after Mr. Pevecz invested it in registered retirement savings plans. The parties were still together and, in the belief they would remain together, Mr. Pevecz set the money aside for their retirement years. The plans are clearly family assets within s. 45(3)(d) of the Act.

51 I therefore conclude that the family assets are those set out in Schedule "A" to these reasons for judgment and that they have the values as of September 12, 1992, which have been assigned to them in Schedule "A". The total value of the family assets is, $ 1,078,000.

B. Hypothetical division pursuant to the Act

52 The next step in the analysis is to determine how these assets would have been divided if the division had been made pursuant to the Act rather than the marriage agreement.

53 If the assets had been divided equally pursuant to s. 43 of the Act, each party would have received $539,000. In fact, Mrs. Pevecz received assets worth $768,233. These are listed in Schedule "B" to these reasons for judgment. Thus Mrs. Pevecz has received $229,233 more than an equal share.

54 Mr. Potts has suggested that the assets would not have been divided equally but that a reapportionment would have been made in Mr. Pevecz's favour pursuant to s. 51. I agree, but it is sufficient to note the disparity if there had been an equal division to come to the conclusion that the agreement reached between the parties is unfair.

55 Mr. Potts made submissions on the additional monetary unfairness arising out of Paragraph 16 of the agreement. Given that the above analysis demonstrates the agreement is unfair it is unnecessary to determine what additional unfairness, if any, would be contributed by the operation of Paragraph 16 on the distribution of assets under the agreement.

C. The Appropriate Division

56 Mr. Pevecz is sixty-five years old. He operates a consulting business that has an uncertain cash flow depending on his ability to compete against others in his field. He was unable to obtain any work during 1988, but he acquired a contract with the City of Victoria in 1989 that kept him busy between May and October of that year. It appears that almost all of his earnings from that contract were used to repay the $70,000 loan to Mrs. Pevecz's father. He obtained a second contract in January, 1990, again in Victoria, that paid him approximately $150,000 during that year. No evidence was led of his earnings since then but he testified that he worked on a number of smaller contracts in 1991, had a "disastrous" year in 1992, and was working at the time of trial on a contract in Argentina that would take him to the end of February, 1995. His income consists of his pension of $3,115.23 per month and his earnings from his consulting business.

57 Mr. Pevecz's health is poor. He regularly takes medication to control his heart condition, a condition which has caused him to be hospitalized in the past. Mr. Pevecz's working life is clearly coming to an end and his share of the family assets will be the economic foundation for his retirement years.

58 Mrs. Pevecz is forty-five years old and has been employed by B.C. Hydro for approximately twenty-seven years. Her seniority assures her job

security. She continues to contribute to her pension plan, which will be maximized when she reaches age sixty. Her income was $3,986 per month in 1991 and she can look forward to increases throughout her remaining working years. She is in good health and is active and energetic. She has a fully indexed pension plan and will in all likelihood receive the survivor's portion of Mr. Pevecz's plan, as there is at least a 91% probability that he will predecease her. Her prospects for her retirement years are, from an economic point of view, substantially better than those of Mr. Pevecz. As well, she is better placed in the meantime to maintain and improve her current financial situation.

59 This was not a marriage where the wife was financially dependent on the husband. The parties had no children and concentrated on their respective careers. Mrs. Pevecz made it clear that she considered herself to be capable of looking after herself financially. She was not in any way disadvantaged economically by her marriage to Mr. Pevecz, and no suggestion has been made that she would be entitled to maintenance or to any reapportionment of family assets in her favour.

60 Mr. Potts submits that for the above reasons there should be an unequal division of family assets in Mr. Pevecz's favour. I agree.

Pensions

61 Both counsel submit a fair disposition would have been to direct that the parties retain their respective pensions but suggest it is no longer possible because Mr. Pevecz has elected the "full and joint survivor" pension option and has irrevocably designated Mrs. Pevecz as the recipient of the survivor benefits. Mr. Potts suggests a fair result can be achieved by a sharing of the respective pension values in the manner I am about to outline together with a reapportionment with respect to the matrimonial home and the retirement inducement fund.

62 The pension value in which Mrs. Pevecz was entitled to share at September 12, 1991, was $382,339, one-half of which is $191,169. As a result of the irrevocable pension election, Mrs. Pevecz has the right to receive $356,792 from Mr. Pevecz's pension, so she has received $165,623 more than an equal share. As Mrs. Pevecz will likely retire at age sixty, her pension at the same date was $100,568, one-half of which is $50,284. Thus, the inequality in pension rights can be corrected by a payment from Mrs. Pevecz to Mr. Pevecz of $215,907. I agree that this is an appropriate method for remedying the unfairness in the pension distribution.

The matrimonial home

63 With the exception of the $70,000 loan from Mrs. Pevecz's father, the matrimonial home was acquired and paid for with joint funds. Mr. Pevecz brought no assets to the marriage, having left everything to his former wife on their divorce. Mrs. Pevecz had about $8,000 in cash, some furniture, and an automobile after her divorce from her first husband. The parties purchased the condominium with joint funds, and the first house with the proceeds of sale of the condominium and a loan from Mrs. Pevecz's father. They parlayed that house into the matrimonial home with the assistance of an increase in the loan.

64 Mr. Potts submits there should be an adjustment in Mr. Pevecz's favour of $35,000 on the division of this asset because he repaid the $70,000 loan in full from his personal earnings.

65 I accept Mr. Pevecz's testimony that he repaid the loan because Mrs. Pevecz told him her father needed the money and asked him to make the payment. I also accept Mr. Pevecz's testimony that he did not know his wife planned to leave him. The circumstances, including in particular the temporal proximity between the date of repayment of the loan and the date Mrs. Pevecz left her husband, lead me to conclude that she had decided to leave him when she asked him to repay the loan. I think she did this in the expectation that she would

be able to avoid repaying her share.

66 Mr. Potts says the effect of the payment was to increase the equity in the home and it is therefore within s.51(f), that is, it is "a circumstance relating to the acquisition" of the home. He also contends it is within s. 51(c) as it relates to "the date the property was acquired". I do not see how it can be said the payment increased the equity in the home, as the loan was not secured by a mortgage against the home. Nevertheless, I think the repayment is a "circumstance relating to the acquisition" of the home, as the loan was taken out to purchase the home. Accordingly, it would be unfair to permit Mrs. Pevecz to escape repayment of her share of the loan and Mr. Pevecz should be compensated by a reallocation of $35,000 in his favour on the division of the value of the home.

The retirement inducement fund

67 For the reasons already stated, Mr. Pevecz is entitled to a reapportionment of family assets in his favour. Except for the adjustment made to compensate him for one-half of the loan repayment to Mrs. Pevecz's father, the approach suggested by his counsel, which I have adopted, provides for an equal division of other family assets. The inducement fund is a liquid asset which will assist to smooth his transition to retirement. While he deposited it in an R.R.S.P., making it a family asset, it cannot be forgotten that the money was a payment to him personally in lieu of future income. In my view fairness dictates that this asset be given to Mr. Pevecz in its entirety. This can be accomplished by an order that Mrs. Pevecz pay her share of that asset, $21,532, to Mr. Pevecz.

Paragraph 16 of the separation agreement

68 It is conceded that the court would not have ordered the provisions of paragraph 16 as part of a division of family assets as of September 12, 1991. Mrs. Pevecz would be seen to have been adequately provided for on Mr. Pevecz's death without the need for insurance on his life. The plans purchased with the inducement payment would have been considered family assets and divided as of September 12, 1991, as I have already indicated. Thus, Mrs. Pevecz would have been paid her share of those assets. That is incompatible with any provision that Mr. Pevecz should hold them for her until his death.

69 A provision that would bind Mr. Pevecz to bequeath his estate to Mrs. Pevecz would be potentially contrary to his obligations under the Wills Variation Act, R.S.B.C., 1979, c. 435 and to the rights of his future spouse if he should remarry. Further, in view of the wholly adequate provisions for Mrs. Pevecz after Mr. Pevecz's death, such a provision would be unnecessary.

70 Moreover, the agreement that Mrs. Pevecz would bequeath the first $250,000 of her estate to Mr. Pevecz and would make him the irrevocable beneficiary of her group life insurance policy provides illusory benefits. The statistical probability is at least 91% that he will die before her.

71 Paragraph 16 cannot be set aside or varied in this proceeding. It is the defendant's position, as I understand it, that the effect of the clause is to give Mr. Pevecz only a life interest in his annuity and R.R.S.P.'s and to make her the beneficiary of his estate. If that is so, the value of family assets taken by her must be increased for purposes of the calculation of the proper division. However, if the clause is unenforceable, Mr. Pevecz must be credited with having taken the full value of these assets.

72 The value of Mrs. Pevecz's covenants in this paragraph is negligible because of the very high probability that Mr. Pevecz will not live to enjoy the benefits of them. On the other hand, the benefits conferred by Mr. Pevecz have value, which must be adjusted for the possibility they will not be binding. The possibility exists that paragraph 16 may be enforceable in whole or in part. If it is enforceable it is of more value to Mrs. Pevecz than to

Mr. Pevecz. The nature of the problem dictates that any value assigned be arbitrary, and I assess the value at $5,000 to Mrs. Pevecz. There should be an adjustment in Mr. Pevecz's favour in that amount to compensate him in this regard.

Other Adjustments

73 I have set out the results of my conclusions in Schedules C and D to these reasons for judgment. Schedule C deals with assets other than pensions and Schedule D deals with pensions.

74 Other than the specific instances of reapportionment of assets set out above in the judgment there are two further adjustments to achieve fairness. They are found in Schedule C. The first is an adjustment to apportion the non-pension assets equally. Under the agreement there was no thought given to the equality of the splitting of assets. In order to achieve a starting point of equal distribution Mrs. Pevecz must pay $12,900 to Mr. Pevecz.

75 The second is with respect to the matrimonial home. I have concluded that the fair market value of the matrimonial home at the date of the agreement was $430,000. However, it is clear the value appreciated following that date as Mrs. Pevecz sold it for $486,000 in June, 1993. In the circumstances, it would be unfair to Mr. Pevecz to apportion the matrimonial home on the basis of its value at the date of the agreement. It is open to me to choose a valuation date other than the date of the agreement to achieve fairness. In my opinion the matrimonial home should be valued as of the date of trial, October 7, 1994. I find support for this approach in Stark v. Stark (1990), 47 B.C.L.R. (2d) 100 (C.A.) at p. 110.

76 No evidence was presented of the costs of sale or of any expenditures for improvements before sale. In the ordinary course of events there would likely have been such costs. On the other hand, Mrs. Pevecz has had the use of the full sale proceeds since June, 1993, which is a benefit to her. In my view fairness can be achieved here by valuing the matrimonial home on October 7, 1994 at $470,000 for purposes of the proper division of family assets. The increase in value between the date of the agreement and the date of trial is $40,000.00. Fairness will be achieved by an order that Mrs. Pevecz pay $20,000.00 to Mr. Pevecz on the division of the matrimonial home.

77 The actuaries used a discount factor of 10.5% per annum in calculating the pension values as of September 12, 1991. Those values are significantly higher now. Fairness requires that the pensions be divided at their trial date values: Stark v. Stark, *supra*. That can be achieved by reversing the discounting process. I will leave that calculation to be done by counsel with the assistance of their respective actuaries. If no agreement can be reached, the matter may be spoken to.

78 In reapportioning the pensions I have made lump-sum awards to Mr. Pevecz. The values on which I base such awards were not reduced for income tax liability. The experts did not thoroughly canvass this issue and I leave this calculation to counsel and their actuaries as well. Again, if no agreement can be reached, this matter may be spoken to.

79 The balance due to Mr. Pevecz as a result of the division of non-pension assets (except for the $20,000 in respect of appreciation in value of the matrimonial home) will bear interest pursuant to the Court Order Interest Act, R.S.B.C. 1979, c. 76 at the Registrar's rates prevailing from time to time on default judgments.

80 Accordingly, the plaintiff will have judgment for the sum of $74,432 together with Court Order Interest thereon from September 12, 1991, $20,000 for the appreciation of the matrimonial home to the date of trial, and the balance found in his favour after the recalculation of the division of pensions. The plaintiff is entitled to costs on Scale 3.

"K.J. Smith, J."

Vancouver, B.C.

May 25 , 1995

SCHEDULE "A"

FAMILY ASSETS AS AT SEPTEMBER 12, 1991

Category I(No Dispute)

1.	Joint Bank Account	Bank of B.C. 04004-7-29	$ 6,482
2.	Husband's Bank Account	Van City Savings	396
3.	Wife's Stocks		$ 6,000
4.	Husband's RRSP's		
	Global Fund (Nov. 30/91)	$44,704	
	Van City (Sept. 30/91)		
	Term 2	$16,650	
	Term 3	12,210	
	Term 4	$ 4,714	$ 78,278
5.	Lump Sum Value of Husband's Pension Plan (Sept. 12/92)		$382,339

Category II(Disputed Values)

6.	Lump Sum value of Wife's Pension Plan (Sept. 12/91)	$100,568
7.	Wife's Bank Accounts	
	Central Guaranty (1007653) (Sept. 4/91)	$ 4,036

Central Guaranty (30-02632) $13,107		
(Sept. 12/91)		
CIBC (5205360)	$ 330	17,473
(Oct. 30/91)		
8. Wife's Canada Savings Bond		$ 1,000
9. Wife's RRSP		$ 6,400

10. Pevecz Consulting Services		$ 6,000
Cash on Hand		
Van City 213329 (Sept. 7/91)		
11. Matrimonial Home		$430,000
TOTAL		**$1,034,936**

Category III (Assets disputed to be Family Assets)

12. Husband's Inducement Fund		
VanCity RRSP (Term #1)	$18,064	
Standard Life RRSP	$25,000	
Total		$ 43,064
TOTAL FAMILY ASSETS AS AT SEPT. 12, 1991		**$1,078,000**

SCHEDULE "B"

ASSETS TAKEN BY WIFE PURSUANT TO AGREEMENT

Total Family Assets [Schedule "A"]	$1,078,000
One-half Interest ($1,115,885 ¸ 2)	539,000
1. Wife's Stocks	6,000
2. Wife's Bank Accounts	17,473

3.	Wife's Pension Plan	100,568
4.	Wife's Canada Savings Bonds	1,000
5.	Wife's R.R.S.P.	6,400
6.	Matrimonial Home	430,000
7.	Death Benefit to Wife from Husband's Pension Plan	356,792
	Total assets taken by Wife	$918,233
	Less Payment to Husband	150,000.
	Net Assets Taken by Wife	768,233
	Value of Half-Interest	539,000
	AMOUNT TAKEN BY WIFE IN EXCESS OF EQUAL SHARE	**229,233**

SCHEDULE "C"

ALLOCATION OF NON-PENSION ASSETS PURSUANT TO JUDGMENT

A. Total Family Assets

(excluding pensions)

1.	Wife's Stocks	$ 6,000
2.	Husband's R.R.S.P's	78,278
3.	Wife's Bank Accounts	17,473
4.	Wife's Canada Savings Bond	1,000
5.	Wife's R.R.S.P.	6,400
6.	Matrimonial Home	430,000
7.	Joint Bank Account	6,482
8.	Husband's Bank Account	396
9.	Pevecz Consulting Service	6,000
10.	Husband's Inducement Fund	$ 43,064
	Total Family Assets	$595,093

B. Assets Taken by Wife

	(excluding pensions)	
1.	Wife's Stocks	$ 6,000
2.	Wife's Bank Account	17,473
3.	Wife's Canada Savings Bond	1,000
4.	Wife's R.R.S.P.	6,400
5.	Matrimonial Home	430,000
	Total Assets Taken by Wife	$460,873
	(excluding pension)	
	Less Payment to Husband	$150,000
		$310,473

C. Assets Taken By Husband

	(excluding pensions)	
1.	Payment for house	$150,000
2.	Joint Bank Account	6,482
3.	Husband's Bank Account	396
4.	Pevecz Consulting Service cash	6,000
5.	Husband's RRSPs	$ 78,278
6.	Husband's Inducement Fund	$ 43,064
	Total Assets Taken by Husband	$284,220
	(excluding pensions)	

	Assets Due to Wife	$297,546.50
	(595,093 ¸ 2)	
	Assets Taken by wife	310,473.00
	Difference	12,908.50, rounded to 12,900

REALLOCATION PURSUANT TO THIS JUDGEMENT

	Adjustment to Equalize Assets	12,900

Adjustment regarding loan payment to wife's father	35,000
Adjustment for appreciation in value of home	20,000
Adjustment for contingency with respect to Paragraph 16	5,000
Adjustment to apportion inducement fund entirely to Mr. Pevecz	$21,532
BALANCE DUE TO HUSBAND BY WIFE PURSUANT TO THIS JUDGMENT (exclusive of pension)	**$94,432**

SCHEDULE "D"

ALLOCATION OF PENSION ASSETS PURSUANT TO THIS JUDGMENT

Pensions

1.	Value of Husband's Pension	$382,339.00
	Husband's Share	191,169.50
	Due to Wife	$191,169.50
	Less Value of Death Benefits	356,792.00
	Balance due to Husband to Equalize (at Sept. 12, 1991)	$165,622.50
2.	Value of Wife's Pension	$100,568.00
	Wife's Share	50,284.00
	Balance due to Husband to Equalize (at Sept. 12, 1991)	$ 50,284.00
3.	Total due to Husband to Equalize Pensions	**$215,906.50**

(at Sept. 12, 1991)

4. Less: Taxes at Sept. 12, 1991

Plus: Reversal of discounting from Sept. 12, 1991 to valuation date, October 7, 1994.

(Both to be calculated by counsel or their experts)