COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Maguire v. Maguire*,
2016 BCCA 431

Date: 20161103
Docket: CA43057

Between:

Wendy Arlene Maguire

Respondent
(Claimant)

And

Hugh Patrick Maguire

Appellant
(Respondent)

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated August 4, 2015 (*Maguire v. Maguire*, Vancouver Registry E131160).

Counsel for the Appellant:	P.M. Daykin, Q.C. and F. Gropper
Counsel for the Respondent:	A.E. Thiele and C.E. Drake
Place and Date of Hearing:	Vancouver, British Columbia September 21, 2016
Place and Date of Judgment:	Vancouver, British Columbia November 3, 2016

Written Reasons by:
The Honourable Mr. Justice Savage

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Willcock

Summary:

Dr. Hugh Maguire appeals from an order valuing the family property and debt and ordering a compensation payment from him to Ms. Maguire to effect an equal division of family property and family debt. He argues the trial judge erred by failing to account for corporate and distributive taxes payable on a sale of his endodontic practice and on a sale of an asset by a second corporation. He says those taxes must be accounted for in assessing fair market value, treated as family debts, or alternatively the compensation payment must be adjusted to account for them. Held: appeal dismissed. Corporate and distributive taxes may be taken into account in the division of family assets. The judge did not err in not adjusting the compensation payment for such taxes here where the incidence of tax and timing of events triggering such taxes was fundamentally uncertain.

Reasons for Judgment of the Honourable Mr. Justice Savage:

[1] The sole issue in this appeal is whether the trial judge erred in valuing the appellant's interest in two corporations and calculating a compensation payment payable by the appellant to the respondent to create an equal division of family property and debt without deducting amounts for corporate and distributive personal income tax. The compensation payment is only payable on the eventual sale of a dental practice.

Background

[2] The appellant is an endodontist with an established practice in South Surrey. He conducts his practice through a professional corporation which I will refer to as "HMI".

[3] The ownership structure of HMI is that: the appellant holds all of the voting, non-participating shares of HMI; the non-voting, participating shares (which represent the equity in the company) are held by the HM 2010 Family Trust (the "2010 Trust"); and the appellant is the trustee of the 2010 Trust.

[4] The beneficiaries of the 2010 Trust are the appellant, the respondent, their children, the appellant's parents and another corporation which I will call "ELC". At the time of trial the parties were equal shareholders in ELC, holding 50% of the

voting and preferred shares, but there is also a class of non-voting, participating shares which are held by the 2010 Trust.

[5] At the time of trial, the parties had various other significant assets including a family residence, vehicles, bank accounts, and RRSPs. At trial all of these assets together with HMI and ELC were conceded to be "family property" within the meaning of the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*].

[6] Following closing submissions at the trial, the learned trial judge outlined to the parties the decisions he would make if required to give formal reasons for judgment on the division of family property, child support and spousal support, and invited the parties to resolve those issues on the terms proposed by him. The parties were able to resolve all the matters except the issue currently before the Court.

[7] The judge found the net value of family property to be $3,449,373. That figure includes a value of $877,000 for HMI and $1,215,719 for ELC, both of which are included in the property division as assets of the appellant. That required an equalization payment of $413,674 by the appellant to the respondent. The equalization payment is only to be paid when the appellant sells HMI, the endodontist practice.

[8] In providing the outline of the decision he would make if required to give formal reasons for judgment, the trial judge set the appellant's income at $400,000. This was substantially less than the income actually earned by the appellant in preceding years. A review date was set four years from the trial.

[9] The appellant's income was set at an amount that the appellant was capable of earning, that would satisfy his obligations to the respondent, and that would allow the appellant to reduce his work hours and perhaps transition away from work as an endodontist. It would also allow him to maximize his income without a review should he continue as before in the practice of dentistry. There has been no appeal from that aspect of the order.

[10] HMI had been listed for sale since the summer of 2014. It was listed at $1,200,000, a price substantially higher than the valuation provided by the jointly-appointed business valuator. At the time of trial there had been limited interest with only one expression of interest and no offers. The evidence was that it was difficult to predict if and when the practice would sell.

[11] With respect to HMI (referred to as "$877,000") and ELC, the trial judge said this:

> I struggle with the question of what to do with the income-earning asset. On the one hand $877,000 may have tax implications. On the other hand, to require it to be valued now and cash brought into the picture to compensate Mrs. Maguire would be unfair and would fetter Dr. Maguire to handle his own assets, as she has the family home. He has the cash and the company and his parents' interest in the other company.
>
> I believe the best -- best done by taking that value of $877,000 as a notional disposition now which, on the numbers as far as I'm aware, leaves about a $400,000, $413,000 equalization payment. I would not order that payment sold -- made until the asset is sold. It becomes a liability. If Dr. Maguire sells the practice for a million dollars he takes the benefit of that; if he sells it for less he takes the risk. I do that very deliberately. I want him to get the best price that he can, for his own benefit as well as for the benefit of the children and Mrs. Maguire.
>
> I accept Mr. McKay's evaluation as reasonable. And I won't adjust that for taxes because of the potential upside of a sale above the [$877,000] level, and also the fact that it will be a while before the money is recovered by Mrs. Maguire from the sale.
>
> That also should alleviate, to a certain extent, the need for the court to oversee that sale, because there is an obvious incentive to get the best price possible for it. But I would be prepared to put supervisory orders in, if necessary, if the parties -- I would be prepared to do that.
>
> I do not believe that there should be any restriction on ELC or what has gone with it. A fair distribution is a fair distribution. It may be taxed later. It doesn't have to be.
>
> Dr. Maguire can make his decisions to eliminate taxes to the extent that he wants to by assisting his parents in other ways. That will be his choice. But I would not burden Mrs. Maguire with those decisions and release that money, any more than I would hold up that money by way of security. The security that is available here is the half interest of if there's any value above $400,000 in Dr. Maguire Inc., which is available until such time as it's sold, and upon sale we will know what, if any, issues have arisen with respect to payment of support and whether security is even necessary for the future. We'll also, at that point in time, know what Dr. Maguire's intentions and prospects are on a real basis, as opposed to an imaginary basis.

[12] With respect to setting the income of the appellant, the trial judge said this:

> That's a little vague in some respects. I will say that I would like it to be clear that I do not want to see child and spousal support reduced at a level behind – below that which is payable at $400,000 for at least four years. The attribution of those amounts, I don't have the numbers in front of me, but the numbers appear to be pretty close to the forms that Mr. Daykin put forward. Five – five and nine appear to be not unreasonable, and they do allow savings and plannings for at least four years.

[13] The formal order says this:

> ...
>
> 8. on the Closing Date, the claimant shall transfer to the respondent her shares in ELC. Such transfer shall be conducted pursuant to the spousal rollover provisions of s. 73(1) of the Income Tax Act, and neither party shall elect out of those provisions;
>
> ...
>
> 10. subject to paragraph 11 hereof, the respondent shall retain, as his sole property, his shares in HMI;
>
> 11. on the earlier of:
>
> a. the sale by HMI of the endodontic practice; or
>
> b. the sale of the shares of HMI;
>
> the respondent shall pay to the claimant compensation in the sum of $413,674, as calculated in accordance with Schedule A hereto;
>
> 12. except as set out in this Order:
>
> a. the claimant shall retain, as her sole and separate property, all assets registered in her name or held in her possession;
>
> b. the claimant shall bear sole responsibility for her debts, and shall save harmless and indemnify the respondent with respect to same;
>
> c. the respondent shall retain, as his sole and separate property, all assets registered in his name or held in his possession;
>
> d. the respondent shall bear sole responsibility for his debts, and shall save harmless and indemnify the claimant with respect to same;
>
> 13. until March 31, 2019 (the "Review Date"):
>
> a. the income of the respondent, for the purpose of calculating child and spousal support, will be $400,000; and
>
> b. the income of the claimant, for the purpose of calculating child and spousal support, will be $36,000;
>
> ...

> 21. either party may initiate a review of the child and spousal support provisions of this Order after the Review Date, without having to show a change of circumstances.
>
> 22. the Honourable Mr. Justice Davies shall remain seized of this matter until the completion of the review; ...

The Parties' Positions

[14] The appellant says that the shares of HMI held by the appellant, and the interest of the parties in the 2010 Trust are "family property" within the meaning of the *FLA*. Consequently, in applying s. 87(a) of the *FLA* one must consider corporate or distributive income taxes in determining the fair market value of that family property. Moreover, any taxes payable by a spouse on the sale of family property, in order to realize funds with which to pay compensation, constitute a family debt within the meaning of the *FLA.* In the further alternative, corporate and distributive taxes payable by a spouse occasioned by being required to pay compensation must be taken into account under s. 97(1).

[15] In the result, the appellant says that the trial judge erred in failing to take into account (1) the fact that the sale of shares in HMI was unlikely, and therefore, (2) the sale of the assets of HMI would likely trigger corporate taxes. The appellant says that the same analysis applies to ELC. In valuing ELC, the trial judge should have taken into account the corporate tax payable by ELC on the sale of the house owned by it, and that, in order to pay compensation for her interest in ELC the appellant would have to draw funds out of ELC, thereby triggering distributive taxes.

[16] The appellant says the trial judge should have accounted for these taxes in calculating the compensation payment, either by including them in valuing the family property and family debt, or by making an "if and when" order that would include them in the calculation of the compensation payment.

[17] The respondent says the trial judge made no error in declining to account for corporate and distributive income taxes in his valuation of HMI and ELC and in calculating the compensation payment required to effect an equal division of family property and family assets. She submits the trial judge's decision on valuation was

supported by evidence that the tax implications of an eventual HMI sale were speculative, while the appellant would receive the benefit of his income being set below its actual value, any increase in the eventual sale price over the fair market value, and the time value of money in both HMI and ELC. The respondent submits the trial judge came to an equitable result that accorded with the law. She says the appellant's interpretations of the *Family Law Act* strain the plain meaning of that Act. The calculation of the compensation payment flowed from the trial judge's valuation.

[18] Both parties have referred to cases decided under the *Family Relations Act*, R.S.B.C. 1996, c. 128 [*FRA*], in support of their positions here. A discussion of the law under that Act and the changes under the current *FLA* is therefore appropriate.

Family Law Act & Family Relations Act

[19] Subject to reapportionment, s. 56(2) of the *FRA* gave an undivided half interest in a family asset to each spouse as a tenant in common. The *FRA* did not contain a definition of "fair market value", recognize the notion of "family debts", or contain any provisions regarding income tax. Thus, under the *FRA* the only recognition a court could give to liabilities, including income taxes, was in the reapportionment of family assets under s. 65(1) of the *FRA*.

[20] Section 65(1) of the *FRA* provided that:

> **65** (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
>
> (a) the duration of the marriage,
>
> (b) the duration of the period during which the spouses have lived separate and apart,
>
> (c) the date when property was acquired or disposed of,
>
> (d) the extent to which property was acquired by one spouse through inheritance or gift,
>
> (e) the needs of each spouse to become or remain economically independent and self sufficient, or
>
> (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

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

[21] Section 66(1) of the *FRA* provided that:

> **66** (1) In proceedings under this Part or Part 6 or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 65, or under Part 6 and may make orders that are necessary, reasonable or ancillary to give effect to the determination.
>
> [Emphasis added.]

[22] The leading case on the recognition of corporate and distributive taxes under the *FRA* is *Halpin v. Halpin* (1996), 27 B.C.L.R. (3d) 305 (C.A.) [*Halpin*], where this Court observed:

> 63 It is well settled in this province that there is no absolute rule as to whether tax consequences should or should not be taken into account in the valuation of assets or in the determination of the amount of the compensation order. As stated in *Murchie v. Murchie* (1984), 53 B.C.L.R. 157 at 162, 39 R.F.L. (2d) 385 at 390 (C.A.), "The circumstances of each case will dictate what seems to be the best course in valuation." The same can be said as to the amount of compensation.
>
> 64 A good illustration of the effect of evidence can be found in *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208, 111 D.L.R. (4th) 19 (C.A.) [cited to O.R.]. There, the Ontario Court of Appeal was considering an equalization payment to the wife under the Ontario *Family Law Act*. In calculating the husband's net family property on the date of valuation determined by that statute, the trial judge had deducted the amount of taxes estimated to be exigible if the assets were realized in the future. One of the wife's grounds of appeal was that this notional tax should not have been deducted in arriving at the value of the husband's net family property. On appeal, the husband moved for the admission of fresh evidence of events that had transpired since the trial; namely, the dramatic decrease in the value of his real property, the dramatic decrease in the work available to his business, and the seizure and realization of his RRSP by the sheriff, on the wife's instructions to satisfy a portion of the equalization payment. The new evidence showed the imminence of the dispositions.
>
> 65 The court admitted the new evidence under s. 134(4)(b) of the *Courts of Justice Act*, the equivalent of Rule 24 of the Court of Appeal Rules. In upholding the trial judge's decision to deduct the estimated taxes, McKinlay J.A. clarified the appropriate rule at 215:
>
> > If the evidence satisfies the trial judge, on a balance of probabilities, that the disposition of any item of family property will take place at a

> particular time in the future, then the tax consequences (and other properly proven costs of disposition) are not speculative, and should be allowed either as a reduction in value or as a deductible liability.

[Emphasis added.]

[23] In *Stein v. Stein*, 2008 SCC 35, Bastarache J. said:

> 6 The *FRA* states that when a marriage ends, each spouse is presumptively entitled to a half [page 270] interest in the family assets (*FRA*, s. 56(1) and (2)). No mention is made about the division of debt, although the Act does allow a court to vary the 50 percent asset division where this presumptive position would be "unfair" having regard to a number of factors (*FRA*, s. 65(1)). One of the enumerated factors which may render an equal division of assets unfair is the "liabilities of a spouse" (*FRA*, s. 65(1)(f)).
>
> …
>
> 9 It seems self-evident that, generally speaking, both assets and debts need to be considered in [page 271] order to ensure fairness upon the breakdown of a marriage. As the British Columbia Court of Appeal noted in *Mallen v. Mallen* (1992), 65 B.C.L.R. (2d) 241:
>
> > ... the equality of treatment of the spouses as required by the scheme of the Act is intended to be a true equality in real terms, and not an artificial equality reached by ignoring some of the facts and emphasizing others. In order to bring about a true equality it is necessary that debts and other liabilities of the spouses at the time of the triggering event and earlier be examined in a way that will illustrate the true relationship between the debts, on the one hand, and the attainment of equality and fairness, on the other. [para 10].
>
> [Emphasis added.]

[24] Unlike the *FRA*, the *FLA* contains specific provisions with respect to the valuation of property, the recognition and sharing of responsibility for family debt, and the impact of income taxes. The reference to the impact of taxes occurs in a section that allows for unequal division where there would otherwise be significant unfairness.

[25] The relevant provisions of the *FLA* are:

> **81** Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [*Pension Division*],
>
> > (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and

(b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

…

86 Family debt includes all financial obligations incurred by a spouse

(a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and

(b) after the date of separation, if incurred for the purpose of maintaining family property.

…

87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

(a) the value of family property must be based on its fair market value, and

(b) the value of family property and family debt must be determined as of the date

(i) an agreement dividing the family property and family debt is made, or

(ii) of the hearing before the court respecting the division of property and family debt.

…

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

(a) equally divide family property or family debt, or both, or

(b) divide family property as required under Part 6 [*Pension Division*].

(2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

…

(h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;

...

...

97 (1) For the purposes of giving effect to a division of property or family debt under this Part or Part 6 [*Pension Division*], the Supreme Court may

(a) determine any matter respecting the ownership, right of possession, or division of the property or family debt, and

(b) despite sections 94 (2) *[orders respecting property division]* and 215 (2) [*changing, suspending or terminating orders generally*], and subject to subsection (3) of this section, make any order that is necessary, reasonable or ancillary to give effect to the division.

> (2) Without limiting subsection (1), the Supreme Court may make an order to do one or more of the following:
>
> (a) declare who has ownership of, or right of possession to, property;
>
> (b) require that title to a specified property granted to a spouse be transferred to, held in trust for, or vested in the spouse, absolutely, for life or for a term of years;
>
> (c) require a spouse to pay compensation to the other spouse if property has been disposed of, transferred, converted, or exchanged into another form, or for the purpose of dividing the property;
>
> (d) require partition or sale of property and payment to be made out of the proceeds of sale to one spouse or both in specified proportions or amounts;
>
> (e) require property forming all or a part of the share of either or both spouses to be transferred to, held in trust for, or vested in a child;
>
> (f) require a spouse to give security, in any form the court directs, for the performance of an obligation imposed by an order under this section, including a charge on property;
>
> (g) require a spouse to waive or release in writing any right, benefit or protection given by section 23 of the *Chattel Mortgage Act*, R.S.B.C. 1979, c. 48, section 19 of the *Sale of Goods on Condition Act*, R.S.B.C. 1979, c. 373, or section 58 or 67 of the *Personal Property Security Act*;
>
> (h) subject to subsection (3), declare that one spouse is responsible for payment of an item of family debt and must indemnify the other spouse for the item of family debt;
>
> (i) require the sale of property for the purposes of paying an item of family debt;
>
> (j) transfer property to a spouse.
>
> [Emphasis added.]

Discussion and Analysis

[26] I will address the appellant's arguments on fair market value, family debt, and property division in turn.

Definition of Fair Market Value

[27] The appellant's first argument is that any taxes payable on a sale must be accounted for in the valuation of the parties' interests in HMI and ELC. He says that in order to correctly apply the definition of "fair market value" in s. 87, one must

necessarily, i.e., as a matter of law, include the calculation of taxes payable upon a sale.

[28] Although the *FLA* mandates valuation based on "fair market value", it does not define that term. The definition of "fair market value" as set out in the business valuation of the jointly appointed business valuator is as follows:

> 5.01 *Fair market value* is defined as:
>
> > *The highest price available in an open and unrestricted market between informed and prudent parties, acting at arm's length and under no compulsion to act, expressed in terms of cash.*

[29] The respondent referred the Court to *Black's Law Dictionary* which defines "fair market value" as "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction; the point at which supply and demand intersect": *Black's Law Dictionary*, 8th ed., *sub verbo* "fair market value".

[30] In my view, there is nothing in the *FLA* that suggests or entails that the meaning of "fair market value" is anything other than its ordinary meaning. The business valuator's definition and the *Black's Law Dictionary* definition are consistent. Fair market value is the price at which a transaction would occur, in an open and unrestricted market between informed and prudent parties acting at arm's length, where neither party is acting under compulsion. Thus, if the sale of an investment property would trigger a capital gain, and capital gains tax payable by a vendor, the fair market value of the property is not reduced by the taxes payable by the vendor. It follows that the use of "fair market value" in s. 87 does not entail that the fair market value of family property is reduced by taxes payable.

Section 86 – Family Debt

[31] The appellant's second argument is that corporate and distributive taxes payable on the disposition of property are a "family debt" within the meaning of s. 86 of the *FLA.* He therefore argues the trial judge wrongly ignored family debt in the

form of corporate and distributive taxes in determining the compensation or equalization payment of $413,674.

[32] A family debt is defined in s. 86 as including matters coming under two branches. The first branch, which describes financial obligations incurred during a period between the beginning of a relationship and separation is clearly not applicable. The second branch refers to "all financial obligations incurred by a spouse … after the date of separation, if incurred for the purpose of maintaining family property". The second branch does not apply because, in my view, corporate or distributive taxes payable on the disposition of property allocated to one spouse do not qualify as being incurred "for the purpose of maintaining family property".

[33] The appellant referred to the decision in *K.M.J. v. J.H.D.N.*, 2014 BCSC 1895, where Betton J. took the post-separation retirement of family debt into account in the allocation of family property. I do not find this decision helpful in determining the issue here, which is whether possible corporate and distributive taxes payable at an unknown future date is a "financial obligation incurred by a spouse". In my opinion, a family debt must be described by one of the two branches of s. 86. Neither applies here.

Section 97 – Giving Effect to Property Division

[34] In the further alternative, the appellant argues that corporate and distributive taxes should be taken into account as provided for in s. 97(1) and (2). Those provisions read as follows:

> **97** (1) For the purposes of giving effect to a division of property or family debt under this Part or Part 6 [*Pension Division*], the Supreme Court may
>
> > (a) determine any matter respecting the ownership, right of possession, or division of the property or family debt, and
> >
> > (b) despite sections 94 (2) *[orders respecting property division]* and 215 (2) *[changing, suspending or terminating orders generally]*, and subject to subsection (3) of this section, make any order that is necessary, reasonable or ancillary to give effect to the division.
>
> (2) Without limiting subsection (1), the Supreme Court may make an order to do one or more of the following:

> (a) declare who has ownership of, or right of possession to, property;
>
> (b) require that title to a specified property granted to a spouse be transferred to, held in trust for, or vested in the spouse, absolutely, for life or for a term of years;
>
> (c) require a spouse to pay compensation to the other spouse if property has been disposed of, transferred, converted, or exchanged into another form, or for the purpose of dividing the property;
>
> (d) require partition or sale of property and payment to be made out of the proceeds of sale to one spouse or both in specified proportions or amounts;
>
> (e) require property forming all or a part of the share of either or both spouses to be transferred to, held in trust for, or vested in a child;
>
> (f) require a spouse to give security, in any form the court directs, for the performance of an obligation imposed by an order under this section, including a charge on property;
>
> (g) require a spouse to waive or release in writing any right, benefit or protection given by section 23 of the *Chattel Mortgage Act*, R.S.B.C. 1979, c. 48, section 19 of the *Sale of Goods on Condition Act*, R.S.B.C. 1979, c. 373, or section 58 or 67 of the *Personal Property Security Act*;
>
> (h) subject to subsection (3), declare that one spouse is responsible for payment of an item of family debt and must indemnify the other spouse for the item of family debt;
>
> (i) require the sale of property for the purposes of paying an item of family debt;
>
> (j) transfer property to a spouse.
>
> [Emphasis added.]

[35] As the value of family property and debt is to be divided equally unless it is significantly unfair to do so, the appellant argues that there is a high threshold to depart from that standard. He says the trial judge's decision to not deduct for corporate and distributive taxes effects an unequal division of property, without addressing the "significant unfairness" threshold for making an unequal division. As noted by this Court in *Jaszczewska v. Kostanski,* 2016 BCCA 286:

> [41] Clearly, the statutory intent is to constrain the exercise of judicial discretion. The test of "significant unfairness" imposes a more stringent threshold than the mere "unfairness" test of the *FRA* to allow unequal division by a court. As Mr. Justice Butler observed in *Remmem v. Remmem*, 2014 BCSC 1552, "significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is "weighty, meaningful or compelling." He concluded that to justify an unequal distribution "[i]t is

> necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": *Remmem* at para. 44. As the judge here noted at para. 162 of her reasons, the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result. I agree.
>
> [42] No doubt the nuanced meaning attaching to the test of "significant unfairness" will develop in the case law. No other province uses the same test, so there is no clear persuasive authority to look to. It would be unwise to attempt to define the test with too much precision in anticipation of circumstances arising in individual cases; however, one can say that reapportionment will require something objectively unjust, unreasonable or unfair in some important or substantial sense.
>
> [43] The determination of whether an equal division would be significantly unfair is also guided by a more precise identification of relevant factors than was found in the *FRA*. Importantly, the Legislature did not include in s. 95(2) the principle of relative contribution found in s. 65(1)(f) of the *FRA*. Under s. 65(1)(f), a court could consider circumstances relating to the acquisition, preservation, maintenance, improvement or use of property. Section 95(2), by comparison, refers rather narrowly to career contributions (95(2)(c)) and to post-separation increases in value beyond market trends caused by one spouse (95(2)(f)). I agree with the judge's view that if relative contribution to the acquisition, preservation, maintenance or improvement of family property during the relationship was intended to be a significant factor or one frequently relied on in justifying the conclusion that the equal division of family property is significantly unfair, the Legislature would have said so. Allowing relative contribution to become a regular consideration in the context of s. 95 would likely create uncertainty and complexity. This would be contrary to the legislative objectives discussed earlier that underlie the *FLA* division of property regime.
>
> [44] Having said that, in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal division, it did not provide a closed list of factors and it did not eliminate the discretion. Accordingly, in my view, one cannot read the *FLA* as abolishing unequal contribution as a factor that may be relevant to reapportionment, although the circumstances in which it may be considered and relied on are intended to be much constrained.

[36] In *Jaszczewska*, a tax issue arose because the judge divided the value of shares in a company equally without any adjustment for taxes. The chambers judge declined to adjust for tax implications because of "a lack of sufficiently concrete proof of what the tax burden would be". This Court applied *Stein v. Stein*, 2008 SCC 35, to grant an "if and when order" with a sunset provision in circumstances where the business purpose of a real estate development company was about to be exhausted by the sale of the last strata units in the development.

[37] The parties also referred us to the recent decision of the British Columbia Supreme Court in *M.S. v. M.M.*, 2015 BCSC 1599. In that case, Pearlman J. also made an "if and when order" where it was apparent that funds necessary to pay a compensation order would be derived in part from the withdrawal of cash from a corporation attracting a 34% personal income tax.

[38] The case law that developed under the *FRA* provided that there is no absolute rule as to whether tax consequences should or should not be taken into account in the division of family assets. Where there is evidence that a division of family assets will attract tax consequences, an allowance should be made for tax. Where it is not clear when or in what amount taxes will be exigible, an allowance may not be made: *Murchie v. Murchie* (1984), 53 B.C.L.R. 157 at para. 390 (C.A.); *Halpin* at para. 63; *McPherson v. McPherson* (1988), 48 D.L.R. (4th) 577 at 583 (Ont. C.A.). Likewise, where taxes are "speculative" the court may not take taxes into account: *O'Bryan v. O'Bryan* (1997), 43 B.C.L.R. (3d) 296 at para. 54 (C.A.); *Ouellette v. Ouellette*, 2012 BCCA 145 at paras. 31-32.

[39] In my opinion, corporate and distributive taxes can and should be taken into account in the division of property in appropriate cases. In this case, the trial judge said that there should be no tax consequences borne by the respondent because of the uncertainties with respect to the sale of the appellant's professional practice.

[40] There was evidence before the Court that the tax implications of the sale of HMI were speculative, that it was not possible to know whether the sale would take place by way of a share sale or an asset sale (which had different tax implications), what the purchase price might be, what length of time it would take to accommodate a sale, and what the tax implications of the sale would be. As I have said, HMI was advertised for sale at a price substantially in excess of the value determined by the valuator. The date of any sale of HMI was uncertain and ELC had substantial cash reserves.

[41] The respondent also referred to the trial judge's determination of the appellant's income. Although the respondent's endodontic practice had historically

generated returns that could justify a much higher income, the trial judge used $400,000 in his calculation of child and spousal support, and provided for a first review four years after trial. HMI's net income in the five years before trial had averaged over $500,000. The respondent says that viewed globally, the decision to leave the compensation payment payable only if HMI sells and to set the appellant's income at the reduced level for four years, were orders crafted to allow the appellant the maximum flexibility in the conduct of his practice, something that would allow him to maximize HMI's value prior to sale should he choose to do so. Because the compensation payment is a fixed amount, he could benefit by maximizing HMI's value prior to sale. During the period of time before sale and before payment of the compensation amount, the appellant would have the benefit of not having to pay any compensation payment. In other words, he would benefit from the time value of money, both by not having to make a compensation payment and by having cash reserves in ELC (which at 31 December 2014 were in excess of $500,000) in advance of any compensation payment.

[42] In my opinion, there is merit to the respondent's position. In this case it is by no means certain that HMI will sell or when, or how it will sell, by assets or shares, or at what amount; or what the tax consequences will be. Nor is it obvious that ELC will incur tax, depending on the appellant's choices. There is no set date at which time the compensation payment is due, rather it is contingent on a certain event. As the trial judge said, setting the appellant's income at the $400,000 level allows him to save and plan. I agree that in general tax consequences should be taken into account, and in some cases a sunset clause is appropriate. However, in these rather unique circumstances, it cannot be said that the trial judge erred in making the order that he did, which was tailored to the unique circumstances before him.

Order

[43] In the result, I would dismiss the appeal.

"The Honourable Mr. Justice Savage"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Mr. Justice Willcock"