Case Name:

# Macdonald v. Macdonald

Between
Susan Rebecca Macdonald, respondent/appellant by cross appeal (plaintiff), and
Ian Alexander Macdonald, appellant/respondent by cross appeal (defendant)

[2005]B.C.J. No. 38
2005 BCCA 23
Vancouver Registry No. CA030307

**British Columbia Court of Appeal**
**Vancouver, British Columbia**
**Lambert, Ryan and Hall JJ.A.**

Heard: November 8 and 9, 2004.
Judgment: January 14, 2005. (42 paras.)

*Family law - Maintenance and support - Appeals - Child support - Support guidelines - Exceptions and exemptions - Spousal support - Contribution to marriage or spouse's career - Awards - Retroactive awards - Marital property - Equalization - Financial resources of parties - Valuation of assets - Business, commercial or non-family assets.*

Appeal by the husband and cross appeal by the wife from the trial judge's decision regarding spousal support and the retroactivity of child support. The parties were married for fourteen years. They had three children who were born in 1990, 1992, and 1994. The husband was very successful and was vice-president at RBC Dominion Securities from 1994 to 2001. The wife stayed at home and cared for the house and children. In 2001, the husband earned over $4.6 million. Between the date of separation and the appeal, the husband was able to save $4.2 million after taxes. The wife had interests in her own family's corporations and trusts, which was valued at over three million dollars. Each party retained their own interests in their own family's corporations and trusts. On appeal, the husband argued that these were family assets. The family assets were divided equally. The trial judge awarded $18,000 in child support for the three children, payable each month. This was below the Guideline amount. This was made to be retroactive to September 2000, but not to June 1999 when the application for child support was first served. A lump sum of $750,000 was ordered in spousal support to the wife. The wife claimed that the lump sum should have been at least $1.5 million. On cross appeal, the wife claimed that two bonuses earned by the husband were family assets. She also claimed that the interim support should not have been taxable in her hands.

**HELD:** Appeal and cross appeal dismissed. The trial judge correctly found that the respective family companies and trusts were not family assets. Even so, a finding that they were family assets would not have affected the spousal support. The husband failed on this ground of the appeal. The wife's economic loss arose due to her role during the marriage. The trial judge considered all the appropriate objectives, factors and models in determining spousal support. Therefore, the appeal and cross appeal regarding spousal support were dismissed. The trial judge properly assessed whether bonuses were family assets by determining when they were earned and not when they were received. The retroactive child support was appropriate. During that period, the wife was able to save some of the support money. It was in the trial judge's discretion to order the retroactive support in the manner he did.

**Statutes, Regulations and Rules Cited:**

Divorce Act, ss. 15.2(4), 15.2(6)

Federal Child Support Guidelines

**Counsel:**

L.A. Kahn: Counsel for the Appellant

R.L. Basham, Q.C. and L.M. Slater: Counsel for the Respondent

The judgment of the Court was delivered by

1 **LAMBERT J.A.:-** A number of issues were argued on this appeal and cross appeal in matrimonial proceedings. Some important issues, including custody and access, and the valuation and disposition of some family assets, were agreed before trial or at the beginning of the trial. Other issues decided by the trial judge were not appealed. The two principal issues on the appeal were spousal support and the retroactivity of child support. There were some other issues.

1.

2 Mr. and Mrs. Macdonald were married in 1988 when he was 30 and she was 29. He was then employed by Pemberton Securities and she was an apprentice goldsmith and part-time figure-skating judge. They were childhood friends and both came from families in comfortable circumstances. They had three children, born in 1990, 1992, and 1994. Mr. Macdonald, over the years, became an experienced, skilful, and trusted dealer in options and futures with RBC Dominion Securities, the successor of his original employer. Mrs. Macdonald maintained the family home and looked after the three young children. She did not work outside the home but she freed Mr. Macdonald from many home and childcare responsibilities so that he was able to concentrate his attention on his very successful career. Mr. Macdonald looked after the family finances, including the household finances, and since they were living at an annual level of expenditure of about $200,000, Mrs. Macdonald did not have to worry about money and did not do so. She does not seem to have been made aware of how much money Mr. Macdonald was earning.

3 Mr. Macdonald's annual earnings in salary and more particularly in bonuses from his work as a vice-president at RBC Dominion Securities from 1994 to 2001, just before trial, as recorded in his T4 slips, were:

| | |
|---|---|
| 1994 | $ 357,000 |
| 1995 | $ 319,000 |
| 1996 | $ 785,700 |
| 1997 | $2,107,000 |
| 1998 | $3,807,000 |
| 1999 | $3,200,000 |
| 2000 | $6,759,000 |
| 2001 | $4,605,000 |

4 It is relevant to the issues in this appeal to understand that Mr. Macdonald is said to have saved $4,200,000, after taxes and after legal fees, between the date of separation in June 1999 and of trial in February 2002, two and one half years. That amount was, of course, his and his alone.

5 The assets that were agreed to be family assets included the family home, an access lot, another building lot, a Whistler condominium, four boats, two vehicles, two RBC Dominion Securities accounts less the corresponding loan accounts, Mr. Macdonald's RRSP and his pension. Mrs. Macdonald had interests in her own family's corporations and trusts: Welco Services Ltd., Indian River Holdings Ltd., and the Macdonald family trust. Mr. Macdonald had an interest in his own family's corporation: Macdonald Consultants Ltd. The expert evidence valued Mrs. Macdonald's interest in her own family's financial entities at over $3,000,000 at the time of trial, with a likelihood of very considerable growth over the years as wealth passed down the generations.

n.

6 Mr. Justice Sigurdson, the trial judge, found that the interests of both Mr. Macdonald and Mrs. Macdonald in their own families' wealth allocation companies and trusts were not family assets, but that if they had been, he would have divided them so that each party would have retained 100% of their own family financial interests.

7 The family assets were divided equally between the parties by value but allocated individually to the appropriate party. For example, Mrs. Macdonald, who was granted custody, was allocated the family home, and Mr. Macdonald was allocated the building lot, the Whistler condo, and the boats. The most valuable assets were the two RBC Investment accounts with approximate values of $2,100,000 each and with corresponding borrowings from Royal Bank of $235,000 each. Those assets had been created by Mr. Macdonald, one in each of the parties' names, and the two assets had built up steadily through the several years before the trial by the astute financial management of Mr. Macdonald. Both accounts were treated as family assets, since they had been designed to promote long term family security, and each of the parties was allocated one of the accounts, and the corresponding borrowings, on the equal division of family assets.

8 In addition to his decisions about family assets, Mr. Justice Sigurdson decided that the Child Support Guidelines, which would have shown an amount in excess of $60,000 each month in child support, were not appropriate in this case and he awarded child support for the three children of $18,000 in total, payable each month. For some periods before trial there had been payments of more than that amount and for some periods less. As part of the accounting between the parties Mr. Justice Sigurdson made the child support order retroactive from the date of his judgment, 15 October 2002, to September 2000 but not back to June 1999 when the application for child support was first served. The amount of child support was not disputed in this appeal but the claim for retroactivity to June 1999 and not just to September 2000 was a principal issue in the cross appeal.

9 Mr. Justice Sigurdson awarded lump sum spousal support of $750,000. Mrs. Macdonald asked for a lump sum of $2,500,000. Mr. Macdonald proposed a much smaller lump sum, to be used by Mrs. Macdonald for retraining as a goldsmith or to prepare for a calling to teach art subjects to children. The amount he proposed was in the order of $200,000. The award of lump sum spousal support is a principal issue in the appeal and also on the cross appeal.

10 I propose to address the issues in the appeal first, in the order in which they were raised. I will then address the issues in the cross-appeal in the order in which they were raised. But, since the amount of spousal support was an issue in both the appeal and cross-appeal, I will deal with both arguments when I deal with that issue on the appeal. All marriage breakdown issues impinge on each other. So all the issues must be kept in mind when dealing with the others.

m.

11 There were three issues raised on the appeal.

12 The first issue on the appeal was whether the respective family companies and trusts were family assets. Mr. Justice Sigurdson decided that they were not, but that if they had been, he would have apportioned 100% of each spouse's interest in his or her own family's corporations and trusts to that spouse. Mr. Macdonald did not object

to the reapportionment but argued that the companies and trusts were all family assets and that an understanding of that fact would change the arguments on spousal support. In the course of the hearing we said that we thought it would make no difference to the arguments on spousal support if the companies and trusts were family assets apportioned 100% to the relevant spouses, on the one hand, or if they were not family assets and they remained with the relevant spouse, on the other hand. The argument was not pressed further. I would not accede to this ground of appeal.

13 The second issue on the appeal was spousal support.

14 We now have the benefit of the decisions of the Supreme Court of Canada in Moge v. Moge, [1992] 3 S.C.R. 813, and Bracklow v. Bracklow, [1999] 1 S.C.R. 420.

15 In considering spousal maintenance, the intention of Parliament, as embodied in the Divorce Act, is paramount. Parliament has set out the objectives of spousal support in what is now s. 15.2(6):

> Objectives of spousal support order
>
> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

These objectives must be considered in the light of the factors set out in what is now s. 15.2(4):

> Factors
>
> (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.

16 The emphasis given to each objective and to each factor in any particular case will depend on the facts of the case. All must be considered, but the significance of each to the particular case will vary and should be infused with an understanding of where the marriage itself, in its context and in the dimensions that were created by the parties themselves, should be thought of as fitting in the continuum between the mutual obligation model and the clean break model of marriage and divorce, and in the continuum between non-compensatory needs-based entitlement, on the one hand, and compensatory loss-based entitlement, on the other hand. And, of course, such an analysis may possibly be modified by contract.

17 On the facts of this case, the compensatory loss-based entitlement required the greatest emphasis, though there was some requirement for consideration of the need for retraining. Mrs. Macdonald's economic loss arose not so much from entry into the marriage but from the role she played throughout the marriage and from the marriage breakdown itself. Throughout the marriage Mrs. Macdonald looked after the children and the home and created an environment in which Mr. Macdonald was free to pursue his career, as he did with diligence and very good effect. At the end of the marriage the breakdown cut Mrs. Macdonald off from Mr. Macdonald's very accomplished income earning skills demonstrated by his ability to save over $4,000,000, after tax and legal fees, in the two and one half years between separation and trial. That lost financial stream could have provided for Mrs. Macdonald, as it may be expected to provide for Mr. Macdonald in the future, a wide variety of economic advantages including sufficient leisure to pursue intellectual and artistic interests in any part of the world.

18 Mr. Justice Sigurdson considered all the objectives, factors, and models that I have mentioned. He suffered from no misapprehension about the facts. He set out the law clearly. He did the balancing that the law expects to be done by the judge who hears and assesses the witnesses. Absent an identified error of law or an identified misapprehension of the evidence, it is not for this Court to substitute its own judgment for that of the trial judge. See Hickey v. Hickey, [1999] 2 S.c.R. 518, and many other cases to like effect. I would not accede to this ground of appeal or to this ground of cross appeal.

19 The third issue on the appeal related to Mr. Justice Sigurdson's award of costs of the trial to Mrs. Macdonald. The argument was said to depend on success on appeal of the spousal support issue. So we said that we should deal with the costs issue after we decided the spousal support issue. Since I would not change the spousal support award, I would not accede to the appellant's argument on the costs of trial.

IV.

20 Four issues were raised on the cross-appeal.

21 The first issue on the cross-appeal related to whether two bonus payments received by Mr. Macdonald were family assets. One was for $238,650, net of tax, received on 30 June 1999 and one was for $381,840, net of tax, received in September 1999. The date of separation was 18 May 1999 and the triggering event was 12 July 1999. Mr. Justice Sigurdson said this:

> [81] My conclusion is that the portion of the bonuses earned, but not received, prior to separation is a family asset, but that portion of the bonus earned after separation is not a family asset because that part was never used or intended to be used for a family purpose.

This was said to leave $238,650 approximately from the June bonus payment and $74,700 from the September bonus payment as family assets allocated in the equal division to Mr. Macdonald. The remainder of the bonus payments remained in his hands as not being family assets. Counsel for Mrs. Macdonald argued that all of the two bonus payments were family assets. I am not satisfied that the trial judge erred to the disadvantage of Mrs. Macdonald in his decision with respect to the categorization of the bonus payments as being, in part, and as not

being, in part, family assets, with the division being based on when they were earned, not on when they were received, in relation to the date of the triggering event. I would not accede to this ground of cross-appeal.

22 The second issue on the cross-appeal relates to the award of spousal support. Mrs. Macdonald said that it should have been at least $1,500,000 in a lump sum. I have dealt with this issue in part ill of these reasons as the second ground of appeal. I would not allow the cross-appeal on this point.

23 The third issue on the cross-appeal was stated as: "Did the trial judge err in making interim support taxable in the respondent's hands." But the issue really relates to whether the requirement that Mrs. Macdonald pay tax on the interim spousal support payments of $10,000 each month had the effect of reducing the agreed interim spousal support amount to an amount that was too little to reflect the needs of the family group comprised of Mrs. Macdonald and the three children. I will deal with retroactive child support as the final issue on the cross-appeal. I would not accede to the cross-appeal on this tax issue since I regard it as intimately bound up with the discretion exercised by Mr. Justice Sigurdson with respect to the retroactivity of child support and with respect to the quantum of lump sum spousal support which he awarded.

24 The fourth and final issue on the cross-appeal related to retroactive child support.

25 The parties separated in May 1999. Not long after that, in late May, Mrs. Macdonald served an application for child support. The parties, through their counsel, felt unable to grapple immediately with what they then perceived to be the uncertain nature of the law in relation to child support in circumstances similar to theirs. In particular, they wanted to wait for the decision of the Supreme Court of Canada in Francis v. Baker, [1999] 3 S.C.R. 250.

26 So counsel agreed that Mr. Macdonald would pay Mrs. Macdonald $10,000 each month beginning 1 July 1999. That amount was called spousal support but it was understood that Mrs. Macdonald would use it to support herself and the children of the marriage on an interim basis.

27 On 14 May 2001, Master Donaldson made an interim child support order, following the Child Support Guidelines, at $59,500 each month, beginning on 1 April 2001 but retroactive to 1 December 2000. That order was appealed and the appeal was heard by Madam Justice Loo. On 18 July 2001, Madam Justice Loo ordered that the child support should not be calculated by the strict application of the Guidelines and she set the child support at $20,000 a month. She again ordered that it be retroactive to 1 December 2000. That order was upheld on appeal by this Court.

28 Mr. Justice Sigurdson addressed the question of child support in order to make the first permanent order. He set the amount of child support for the three children at $18,000 a month in total. That order for prospective child support is not in issue in this appeal. Mr. Justice Sigurdson made the child support order retroactive to 1 September 2000 and said that Mr. Macdonald was entitled to a credit for any overpayment that may exist, to be applied against future child support payments. Mr. Justice Sigurdson's order was made after hearing counsel for Mrs. Macdonald argue that the child support order, whatever it was to be, should be retroactive to the date of the application, namely June 1999, and after hearing Mr. Macdonald's counsel argue that child support, whatever it was to be, should not be retroactive to a date before 1 December 2000, the effective date of Madam Justice Loo's order.

29 I also think it is important to understand the way Mr. Justice Sigurdson reached his conclusion that the correct amount of prospective child support was $18,000 each month in total. He considered that $15,000 a month reasonably covered all the recurring expenses of the children and included a reasonable amount of discretionary spending. To that amount he added an additional $3,000 in total for extra discretionary spending to ensure that there would be enough for savings, a summer home, travelling, and for future education.

30 The power to make child support payments retroactive is derived from the 1985 rewording of the Divorce Act. See Darlington v. Darlington (1997),32 R.F.L. (4th) 406 (B.c.c.A.), Donald v. Donald (1991),33 R.F.L. (3d)

196 (N.S.C.A.) and L.S. v. E.P. (1999), 67 B.C.L.R (3d) 254 (B.C.C.A.). For convenience of reference I will set out the passage from Madam Justice Rowles's reasons in L.S. v. E.P. (1999), 67 B.C.L.R. (3d) 254, at paras. 66 and 67 where she lists the factors which militate for and against retroactivity, in a non-exhaustive list, in this way:

> A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not to order retroactive child maintenance. Factors militating in favour of ordering retroactive maintenance include: (1) the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent; (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.
>
> Factors which have militated against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and (3) a significant, unexplained delay in bringing the application.

31 There is an entitlement to prospective child support and it is the entitlement of the child. But, in relation to retroactive child support, the assessment is complicated by the fact that the period in question has passed without the money being available, or at least not being regarded as available, to meet the child's then current needs.

32 Mr. Justice Davies made these helpful observations on retroactive awards as potentially constituting redistribution of capital or disguised spousal support in S.E.C. v. D.C.G. (2003), 43 RF.L. (5th) 41:

> 135 In almost any situation in which a custodial parent seeks an order for retroactive support, such an award may have the effect of awarding the custodial parent funds that will not have to be immediately expended to' support the child. That is so because the child will have already lived through the period in question without the benefit of the funds that could or should have been available for his or her support. While the creation of an immediately available pool of capital for the non-custodial parent may be the practical result of a retroactive order, it does not necessarily follow that a retroactive award will constitute capital re-distribution.
>
> 136 If, as in this case, the custodial parent has borne a disproportionate share of the cost of raising a child, a retroactive order is better viewed as a re-capitalization of the custodial parent rather than as a re-distribution of capital. In such circumstances there is no reason why a retroactive child support order should not be made even though the custodial parent may be the main beneficiary of the award. The award arises not from a re-distribution of capital but rather from the recognition and enforcement of joint parental responsibility for child support. (See:
> Cherry v. Cherry (1996), 24 B.C.L.R (3d) 158 (C.A.); Hess v. Hess (1994), 2 R.F.L. (4th) 22 (Ont. Gen. Div.) and Collins v. Collins (1998), 221 A.R 111 (Q.B.)).

33 I would adopt Mr. Justice Davies's line of reasoning. In considering whether to make an order for retroactive child support, the starting point is the order being made for permanent prospective child support. Then the actual payments made for child support must be considered. Also to be considered must be the amounts which

each parent should have contributed to the support of the children in the interim period, having regard to their joint obligations for child support and having regard to their financial resources and other circumstances. If, with those considerations in mind, it appears that too little was paid by the non-custodial parent to the principal custodial parent to support the children and the result is that the custodial parent has had to call on resources such as capital or debt that should not have had to be used, then it is appropriate for an award of retroactive child support to be made to restore the capital fund or payoff the debt which should not have had to be called on. Similarly, if the children go short of necessaries such as clothing in the interim period, a retroactive award can make that up by an amount sufficient to meet the shortfall. And if, as in this case, the award of permanent child support is designed not only to provide appropriate current support but also to create a fund for major intermittent future expenditures, then the trial judge has a discretion to enhance that fund from a retroactive award. But there is no absolute entitlement to a retroactive award embodying such an enhancement. And, as Madam Justice Rowles said, to the extent that an award of retroactive child support is properly seen as a redistribution of capital or an award of spousal support in the guise of child support, such a retroactive award should not be made.

34 In this case we were told by Counsel for Mr. Macdonald that during the interim period while Mrs. Macdonald was receiving interim child support she was able to save money after meeting the needs of herself and the children. And we were told by Counsel for Mrs. Macdonald that Mrs. Macdonald received funds distributed from her family companies and trusts which augmented her income from child support. Mr. Justice Sigurdson was aware of those facts and the other relevant factors when he made his decision on retroactive child support.

35 The power to award retroactive child support is governed by a principled discretion. Some of the factors representing the principles governing the discretion are set out in L.S. v. E.P., in the passage I have quoted. But unless a judge applies the wrong principles or fails to consider the correct principles, it is not open to this Court to substitute its decision on retroactivity for the trial judge's discretion. The entitlement to a retroactive award of child support is not absolute. If all or a part of it is properly seen as "a wealth transfer or spousal maintenance disguised as child support", as Mr. Justice Sigurdson decided part of a fully retroactive award would be, then it would be contrary to the principles that govern the exercise of the discretion to make that award.

36 I think it is important in this case to understand that Mr. Justice Sigurdson set out and discussed all of the relevant factors against the background of the facts which he had found. He then ordered retroactivity of his child support decision back from October 2002 to I September 2000 but not back to June 1999, the time of service of the child support application. So the retroactivity was partial only and was nicely calculated to balance the application of the relevant principles set out in L.S. v. E.P ..

37 Having calculated that Mrs. Macdonald had received enough from the beginning to meet the recurring expenses of the children, plus some savings, and having calculated that a fund should be built up for discretionary expenses in the future, it was, in my opinion, pre-eminently for the trial judge to decide to what extent the fund being built up in the future for discretionary expenses for the children should be augmented by an award of retroactive child support, which at the time of trial in this case could only be regarded as an amount paid in respect of the past, measured by the creation of an appropriately sized fund to be available for discretionary expenses in the future.

38 I would not interfere with the retroactivity aspect of the award for child support. Mr. Justice Sigurdson applied the correct principles in deciding how much retroactivity he should allow for future discretionary expenditures and how much would simply be a wealth transfer over and above any recapitalization.

## V.

39 It is, in my opinion, important to understand that Mr. Justice Sigurdson formed his assessments of the witnesses, including the parties, after a 21 day trial. And it is also important to understand that there is an exercise of judgment and a balancing of interests involved, not only within each component of his award, but also on the

relationship which each component of the award bears to every other component.

40 Mr. Justice Sigurdson made no identifiable error in law nor did he suffer under any identifiable misapprehension of the facts. It is not for this Court to try to exercise any independent judgment or discretion or to try to interfere with the balance reached by Mr. Justice Sigurdson within each component of his award and between each component and every other component of his award.

41 I would dismiss the appeal and the cross-appeal.

42 I would order that the parties, if they still wish to do so, may file responsive written submissions about the costs of the trial, as the Court agreed during argument. With respect to the appeal and cross-appeal, I would order that the usual rule should apply and Mrs. Macdonald should have her costs of the appeal and Mr. Macdonald should have his costs of the cross-appeal.

LAMBERT J.A.
RYAN J.A.:- I agree.
**HALL** J.A.:- I agree.

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