Case Name:

MacDonald v. MacDonald

Between
Susan Rebecca MacDonald, plaintiff, and Ian
Alexander MacDonald, defendant

[2002] B.C.J. No. 2320 2002 BCSC
1453 Vancouver Registry No. F991576

British Columbia Supreme Court
Vancouver, British Columbia
Sigurdson J.

Heard: February 4 - 8, 11 - 15, 18 - 19,25 - 28 and
March 1, 2002.
Written submissions received: May 27,2002.
Judgment: October 15,2002. (240
paras.)

Family law - Husband and wife - Marital property, distribution orders - Property subject to distribution - Divorce - Corollary relief, maintenance and awards - Awards, lump sum - Awards to wife, considerations Awards, effect of income or potential income of claimant - Awards, effect of net worth (incl. trust funds) Corollary relief, maintenance, support guidelines (incl. nondivorce cases) - Where income over $150,000 Evidence and proof

Trial to determine spousal and child support and division of family assets. Susan MacDonald, plaintiff, and Ian MacDonald were married for almost 11 years. They had three children, aged 11, 10 and 8. Ian worked as a stockbroker and Susan worked in goldsmithery but ceased work during her first pregnancy. Susan had an interest in two family companies and a family trust. There was an issue as to whether these holdings were family assets. The other assets in question were Ian's post separation bonuses and his interest in MacDonald Consultants Inc. Susan said that she had been largely unaware of the extent of Ian's income which had averaged $4.5 million over the preceding three years. Interim spousal support was being paid in the amount of $10,000 per month. Susan also received $800 per month rental income from a guesthouse which she retained notwithstanding a court order that required it to be paid to Ian. Interim child support had initially been ordered at the Guideline level of $59,500 per month retroactive to December 2000 but was reduced on appeal to $20,000 per month also retroactive. Ian claimed that he had overpaid child support and sought set-off.

HELD: Child support ordered in the amount of $18,000 per month and lump sum spousal support was ordered in the amount of $750,000. All spousal support was taxable in Susan's hands. The family assets were ordered divided equally. Neither Susan's interest in the family companies and family trust, nor Ian's interest in MacDonald Consultants were family assets. There was no nexus between either parties' effort or contribution, direct or indirect, to the acquisition or preservation of these assets. They were never relied upon for family purposes. The first bonus received by Ian pertained to the time before separation and that portion was a family asset. The portion earned after separation was not. Susan's interest in the family companies and the Trust were of significant value to her and would continue to benefit her and as such, was relevant to the issue of spousal support. Her income earning potential was, however, very modest, compared to Ian's. Susan was entitled to spousal support. Based upon Ian's income the Guideline amount for child support would be $61,970 per month. Ian rebutted the presumption that the table amount was appropriate. Before separation the family had a comfortable

but not lavish or extravagant lifestyle achieved at a cost significantly less than the table amount. Susan's ability to contribute to the children's maintenance was taken into account. The award was retroactive to September 1,2000 and Ian was entitled to a credit for any overpayment during that time.

Statutes, Regulations **and** Rules Cited:

Divorce Act, s. 15.2(1), 15.2(4), 15.2(6).

Family Relations Act, s. 58(2), 58(3), 60, 65, 65(1)(d), 65(1)(e), 65(1)(f).

Federal Child Support Guidelines, ss. 1,3,4.

Counsel:

F. Ean Maxwell, Q.C., for the plaintiff.
Lawrence A. Kahn, for the defendant.

SIGURDSON **J.:-**

INTRODUCTION

1 This matrimonial dispute essentially concerns issues of spousal and child support.

FACTS

2 Susan Rebecca MacDonald, now 42, and Ian Alexander MacDonald, now 43, married on August 14, 1988 and separated after almost 11 years marriage in May 1999. They have known each other since childhood. The matrimonial home is on the waterfront in the semi-rural Woodlands area of North Vancouver, where their parents had summer homes.

3 Ms. MacDonald, by agreement, now lives in this matrimonial home with the couple's three children, Eric 11 years old, Rebecca 10 years old and Sarah who is 8 years old.

4 The parties have resolved issues of guardianship, custody and access by consent, essentially in accordance with the recommendations of Dr. Mary Korpach, but have liberty to apply if there remain any outstanding issues.

5 I will briefly outline the history of this family to the extent that it is necessary to introduce the issues that I must decide.

6 Before marriage Mr. MacDonald embarked on a career as a stockbroker. Mr. MacDonald is an avid sailor, water skier and carpenter. Ms. MacDonald, formerly a nationally competing figure skater, taught and judged that sport and before she had children was, as well, an apprentice goldsmith.

7 Prior to their marriage, Mr. MacDonald's assets basically were an interest in a condominium in Whistler, an interest in a 40-foot sailboat called Per Mare, and a securities portfolio. Ms. MacDonald had a car, some furnishings and personal effects. Mr. MacDonald had purchased a lot called Grey Rocks in the Woodlands area, and following their marriage the parties bought the neighbouring lot at Grey Rocks with the expectation of ultimately building a residence there.

8 Following their marriage, Mr. MacDonald worked in the investment business and Ms. MacDonald worked in goldsmithery. Ms. MacDonald ceased that kind of work during her first pregnancy.

9 Ms. MacDonald's grandfather, Doug Welch, gave her certain monies early during the marriage, which she

used to pay debts and general expenses of the family.

10 In December 1989, Mr. Welch reorganized the shareholdings of his holding company Welcon Services Ltd. Indian River Holdings Ltd owns one-third of Welcon Services. Joan MacDonald, Ms. MacDonald's mother, owns Indian River's voting shares and holds preferred shares worth $4,600,000. The non-voting common equity shares in Indian River are owned 25% by the plaintiff Ms. MacDonald, 25% by her brother Jay MacDonald, and 50% by the MacDonald Family Trust which was also formed in December, 1989.

11 Ms. MacDonald has an interest in the MacDonald Family Trust.

12 There is an issue whether Ms. MacDonald's interest in Welcon Services Ltd., Indian River and the MacDonald Family Trust are family assets.

13 During the marriage, Ms. MacDonald from time to time received monies from Welcon, Indian River Holdings and the MacDonald Family Trust. Throughout the marriage Ms. MacDonald received substantial amounts from these sources and she and Mr. MacDonald used it for their family. From 1990 to 1996 she received, from these sources and by gifts from her grandfather, over $460,000. Since 1997 to trial, Ms. MacDonald has received from Welcon, Indian River and the MacDonald Family Trust $585,000. Mr. MacDonald received some money during marriage from his parents' company, MacDonald Consultants (the parties had the same surname before marriage) and used it to buy a piano for the family. There is also an issue whether Mr. MacDonald's interest in MacDonald Consultants is a family asset.

14 Rather than building at Grey Rocks, in 1991, the couple purchased Ms. MacDonald's parents' home in Woodlands, located at 5511 Indian River Drive, as well as a 50% interest in Lot K. Lot K is an undeveloped property which provides access to 5511 Indian River Drive and is presently co-owned by the parties with a neighbour.

15 The couple bought the matrimonial home at Woodlands by selling Grey Rocks and obtaining a mortgage loan of $200,000 from Ms. MacDonald's parents. They began to build an in-law suite in the residence for Ms. MacDonald's parents, but ultimately the arrangement did not work out. Ms. MacDonald's parents left about six months after the interior of the in-law suite was built.

16 The matrimonial home and Lot K are admitted family assets although there is some issue about their value.

17 Early in the marriage, Mr. MacDonald worked at Pemberton Securities which was subsequently bought out by Dominion Securities. The firm later became R.B.C. Dominion Securities. Presently Mr. MacDonald is a Vice-President in the Capital Market Division of R.B.C. Dominion Securities. Mr. MacDonald is extremely skilled in the options and futures markets. Although he earned less than $200,000 until 1994, his income in recent years has been very large. Mr. MacDonald's income, largely due to bonuses, grew substantially in the years following 1994. Ms. MacDonald testified that she was largely unaware of the extent of his income. The amount of Mr. MacDonald's income has lead to contentious issues regarding child support and spousal support.

18 During the marriage Ms. MacDonald was, and she remains, the child's principal caregiver. Mr. MacDonald spent much of his spare time at Woodlands working on renovations to the matrimonial home and waterskiing.

19 All three children have developed a keen interest in diving, particularly the eldest, Eric, who has shown significant talent for the sport. The other children also train and share his interest.

20 The parties separated on May 18, 1999.

21 In terms of spousal support, on July 12, 1999, the parties consented to an interim support order of $10,000 per month. Since then Mr. MacDonald has paid B.C. Medical, extended health and dental for Ms. MacDonald and their children, as well as the Royal Bank loan payments of $3,000 monthly. Ms. MacDonald has also received $800 per month rental income from the guesthouse on the Woodlands property, and has retained it notwithstanding the provisions of a court order of July 12, 1999 that required it to be paid to Mr. MacDonald.

22 There was an issue at trial over Ms. MacDonald's entitlement to spousal support and whether the payments under the interim order should be taxable in her hands or net of tax.

23 In terms of interim child support, on May 14, 2001 Master Donaldson ordered Mr. MacDonald to pay child support pursuant to the Guidelines of $59,500 retroactive to December 1, 2000. This was based on three years' of Mr. MacDonald's income averaged at $4.5 million. On appeal, Madam Justice Loo, on July 18, 2001, reduced the maintenance to $20,000, also retroactive to December 1, 2000, which order the Court of Appeal upheld on January 24,2002.

24 Given Mr. MacDonald's payments of maintenance for eight months at $59,500 and the retroactive reduction to $20,000, Mr. MacDonald says that he has overpaid child maintenance by $316,000. He has been setting off future interim child support against that amount. Mr. MacDonald now claims that as at trial that he has the right to a further set-off of $176,000.

25 The appropriate amount of child maintenance and whether the Guideline amount should be paid, or some other amount, were issues at trial that I will discuss in these reasons. There are other issues: the quantum of child maintenance (if! hold that the Guideline amount is not appropriate); whether my order should be retroactive and, if so, from when; and the nature of the order that I should make in connection with the alleged overpayment arising by reason of Madam Justice Loo's order.

26 It is in dispute whether the parties' interests in the various corporate entities and trusts are family assets.

27 In March 1997, Mr. MacDonald arranged borrowings to establish investment accounts for himself and Ms. MacDonald. Those investment accounts, under his direction, have done very well. Those accounts, net of loans which will have to be discharged, total at trial about $3,800,000. It is not disputed that Mr. MacDonald is entitled to be reimbursed for Ms. MacDonald's share of interest payments of $97,500 made in connection with those loans and that the division of those accounts and the two loans be shared equally.

28 It is agreed that Ms. MacDonald will reside in the matrimonial home, an acknowledged family asset. Mr. MacDonald, it is agreed, will retain Silverton, a property in Woodlands that he agreed to purchase shortly before separation, another acknowledged family asset, and the Whistler condominium. There are some relatively minor issues about the value of the properties at Woodlands.

29 The parties are attempting to sort out the issue of the division of chattels and have liberty to apply if those issues are not resolved.

30 The parties each owned a vehicle at the triggering date, July 12, 1999. The plaintiff had a Toyota Forerunner, which she has since traded in, and the defendant a GMC Yukon.

31 Mr. MacDonald has an interest in four boats, the 19-foot Ski Nautique agreed to be worth $20,000, a Boston Whaler worth $6,750 (agreed to be worth between $6,500 and $7,000) and a third interest in the vessels, Per Mare and the Kavalk, owned by J.I.B. Enterprises, which Mr. MacDonald says have a value to him of$32,000.

32 Mr. MacDonald also has a pension, which the parties agree to divide. Mr. MacDonald holds an RRSP valued as at December 31, 2001 at $111,584.62, which the parties agree will be divided equally by a tax-free rollover.

33 I will deal with the issues in the following order: first, the question of assets including what are family assets, their valuation and whether an equal division would be unfair under the provisions of the Family Relations Act; second, the question of child maintenance; and third, the question of spousal support. I will also fix an adjustment date for the purposes of dividing the investment accounts.

ASSETS

Agreed Family Assets

34 Although there is some question about valuation in some instances, the following are acknowledged to be family assets: the matrimonial home, Lot K, Silverton, the Whistler condo, the four boats, the two vehicles, the RBC Dominion Securities investment accounts, the defendant's RRSP and the defendant's pension. The loan accounts related to the RBC Dominion Securities investment accounts are acknowledged to be family debts.

Disputed Family Assets

35 The assets of the parties about which there is dispute as to whether they are family assets are: any interest of Ms. MacDonald in Welcon Services Ltd., Indian River Holdings Ltd. and the MacDonald Family Trust; and the interest of Mr. MacDonald in MacDonald Consultants Ltd.

36 The other assets in question are Mr. MacDonald's post separation bonuses of June 29, 1999, $250,000 net of tax and of September 30, 1999, $400,000 net of tax.

Description of Welcon Services Ltd., Indian River Holdings Ltd., the MacDonald Family Trust and MacDonald Consultants Ltd.

37 Ms. MacDonald comes from a wealthy family. She has shares in Indian River Holdings Ltd., a company set up in 1989 to hold her mother's interest in Welcon Services Ltd. Welcon Services is a company established by Ms. MacDonald's grandfather, Douglas Welch. Welcon Services is a holding company for three family interests: the Pfyffer family, the Welch family and Ms. MacDonald's mother's family. The MacDonald family interest in Welcon is owned through a company called Indian River Holdings Ltd.

38 Ms. MacDonald is a discretionary income beneficiary under a trust called the MacDonald Family Trust that was set up by her mother and father in 1989. The MacDonald Family Trust also has an interest in Welcon Services in that it owns 50% of the common non-voting shares in Indian River Holdings Ltd.

39 Ms. MacDonald does not have voting shares in Indian River Holdings Ltd., but does own 2,500 class C non-voting participating common shares. The MacDonald Family Trust, of which she is a beneficiary, owns 5,000 class D non-voting participating common shares of Indian River Holdings Ltd.

40 Ms. MacDonald also presently owns 70,000 Class E preferred shares and 210,000 Class F preferred shares directly in Welcon that are redeemable at the company's option at $1.00 per share. Some of her preferred shares have been redeemed during the marriage.

41 When Indian River Holdings Ltd. was established in 1989 as part of an estate planning arrangement, Ms. MacDonald's mother received, in a tax freeze, preferred shares with a redemption value of $4,676,577. The future growth of Indian River Holdings Ltd., beyond the value of those preferred shares was 25% to each of Susan MacDonald and her brother and 50% to the MacDonald Family Trust as the Class C and D non-voting common shares.

42 However, Susan MacDonald's entitlement to receive dividends from Indian River is purely discretionary and is presently not within her control. Welcon is controlled by Peter Welch, Susan MacDonald's mother's brother. He holds all of the voting shares, and likely will continue to hold all voting shares for the foreseeable future. Ms.

Macdonald's mother holds the voting shares in Indian River, and Ms. MacDonald's shares do not have voting rights during her parents' lives. As Mr. McMann, an expert witness called by the defendant, indicated in his report, "the corporate structure is designed to perpetuate control in the hands of three families in Welcon and by Joan MacDonald and John MacDonald in their lifetimes in Indian River. The MacDonald Family Trust is a discretionary Trust and while Susan MacDonald is an income beneficiary, the capital beneficiaries are the grandchildren of Joan and John MacDonald."

43 Welcon's underlying assets are in such diverse areas as real estate, a marina, a golf course, a dairy farm and other businesses. Ms. MacDonald's interest in Welcon through her holdings in Indian River on a straight division basis is 8.3%.

44 There is a dispute as to whether Ms. MacDonald's interests in the MacDonald Family Trust, in Welcon directly and in Indian River Holdings Ltd. are family assets. If they are, Mr. Maxwell challenges, on her behalf, the suggestion that they have any significant value.

45 Since 1990 and throughout the marriage Susan MacDonald received monies from Indian River, Welcon, the MacDonald Family Trust and by gift from her grandfather. Many of the payments were by redemption of her Class E and F preferred shares in Welcon. Money from Welcon and the MacDonald Family Trust has been used for family expenditures throughout the marriage.

46 According to Exhibit 29, between 1997 and 2001, the plaintiff received about $460,000 from Welcon by way of share redemption and dividends and $125,000 from the MacDonald Family Trust. As I indicated earlier she also received funds earlier in the marriage from these sources.

47 Mr. MacDonald's position is that since 1989 the plaintiff has received distributions from her interest in Welcon either directly through redemption of preferred shares, or indirectly through her shares in Indian River, and that these monies have been deposited into the parties' joint bank account and used for family purposes. The defendant's position is that Ms. MacDonald's interest in what Mr. Kahn refers to collectively as "Welcon et al" is a family asset. Mr. MacDonald's counsel says that Ms. MacDonald has not discharged the onus on her to prove that her interest in Welcon, Indian River, and the MacDonald Family Trust is not ordinarily used for a family purpose.

48 Regardless of whether it is so determined, or whether Welcon is reapportioned 100% in Ms. MacDonald's favour, Mr. MacDonald's counsel says that it is clear that the plaintiff will enjoy a substantial long-term financial benefit from Welcon and the MacDonald Family Trust, that she is self-sufficient and that she has not and will not incur any economic disadvantage arising from the marriage or its breakdown.

49 On the other hand, Ms. MacDonald's position is that these assets are not family assets. Her counsel says that the law recognizes assets that are family assets, business assets or other assets. Her position is that her interest in the MacDonald Family Trust, Welcon and in Indian River are not family assets, but are "other" assets as observed by the Court of Appeal in Underhill v. Underhill, [1983] 5 W.W.R. 481 (B.c.c.A.).

50 Mr. Maxwell, counsel for Ms. MacDonald, correctly says that there is no nexus between either parties' effort or contribution, direct or indirect, to the acquisition or preservation of these "Welcon assets" which would convert them into family assets; these assets were never pledged or in any way relied upon for borrowing or to secure debt for family purposes, and neither party had any part in developing, maintaining or acquiring those assets: they were simply gifted to the plaintiff. The financial benefit occurs to her by redemption of shares, distribution from the trust, or declaration of dividend. She has no control over the declarations of dividend at least until her parents' death. Only then, if she survives them, will she acquire control over her one-quarter share of Indian River. Further, she has no control over the distribution of income from the trust as she is a discretionary beneficiary. She will never have an interest in the capital of the trust.

51 The possibility of financial success or failure of Indian River, Mr. Maxwell says, is purely speculative.

Moreover, Mr. Maxwell says that Ms. MacDonald's interests in Welcon and the Family Trust have not been shown to have value, a consideration that he says is relevant to the question of spousal support.

52 Mr. Maxwell says that the defendant's interest in MacDonald Consultants IS similar in nature and likewise not a family asset.

Discussion

53 Under section 58(3) of the Family Relations Act, the definition of family asset includes the spouse's interest in a corporation or a trust when the corporation or trust holds property that would be a family asset if owned by a spouse.

54 Section 58(2) provides:

> Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

~ 55 Have the plaintiffs interests in Welcon, Indian River or the MacDonald Family Trust been used such that they have become family assets? The burden is on the plaintiff to prove that her interest in Welcon and Indian River, and the MacDonald family trust, is not ordinarily used for a family purpose (s. 60 Family Relations Act).

56 The cases referred to by counsel illustrate that the determination of whether inherited assets, interests in trusts and private companies are family assets can be a very difficult issue, the determination of which depends on the particular facts.

57 In Evetts v. Evetts (1996), 85 B.C.A.C. 19 (C.A.), the Court of Appeal considered when a capital asset became a family asset. There it specifically considered whether a husband's interest in a company incorporated prior to the marriage was a family asset. The court found that the income and the capital appreciation from the company were drawn each year and used by the husband for his contribution to household expenses. Further, the capital of the asset was available if required for such things as the joint acquisition of family assets. Mr. Justice Lambert said at para. 23:

> I think it would be unwise to try to establish any rules for the determination of whether a capital asset will be considered to be a family asset. However one or two guidelines are readily revealed from the cases. The fact that income from a capital asset is used occasionally for a family purpose does not of itself make the capital asset a family asset, Stuart v. Stuart (1996),21 B.C.L.R (3d) 65 (C.A.). The fact that capital from the asset is used from time to time, when required, for a family purpose may be an indication that the asset is a family asset, Brainerd v. Brainerd (1989), 22 RF.L. (3d) 113 (B.C.C.A.), but the distinction between income being used for a family purpose and capital being used for a family purpose is not, in itself, determinative, Starko v. Starko, [1986] B.C.J. No. 2341 (S.C.). So the fact that only income is used for family purposes does not necessarily mean that the capital asset itself is not used for a family purpose. The use of the asset to provide financial security and protection against erosion of income or other family misadventure in the future may constitute a present ordinary use for a family purpose, Tezcan v. Tezcan (1990), 44 B.C.L.R (2d) 343 (S.C.); Folk v. Folk (1994),99 B.C.L.R. (2d) 188 (C.A.). The fact that the words "ordinarily used ... for a family purpose" are the governing words in the statute means that the use pattern must be examined in each case to determine whether, in the ordinary course, the present use commitment to meet a present or future need includes a use for a family purpose. Ordinary use for a family purpose is not inconsistent with ordinary use for other purposes.

58 In that case, the court held that the husband's interest in the company was ordinarily used for a family purpose. The income from the company and the amount of capital appreciation were drawn in each year in their entirety, and used by the husband to support himself within his family. Mr. Justice Lambert said that "the company" was used in a very similar way to (the wife's) retail business to provide income for one spouse and to permit that spouse to provide an equal contribution to the expenses of the common household.

59 The issue of whether inherited or gifted property is a family asset, of course, arises often in connection with trusts.

60 In Aylott v. Aylott, [1999] B.C.J. No. 1524 (S.C.) there was a trust under which the trustees had sole discretion to distribute the principal or income of the trust. Cowan, J. found that the capital of the trust was not a family asset. He said that given that "the trustees have the sole discretion to distribute the principal or income of the trust, it cannot be the case that the capital of the trust can be said to be a family asset" (para. 21). As indicated by Allan, J. in McCarlie v. Bogoch, [2002] B.C.J. No. 805 (S.c.), 2002 BCSC 560, the question of whether a discretionary contingent interest in a trust is a family asset is an unsettled area of the law and depends very much on the particular facts.

61 However, in Grove v. Grove, [1996] B.C.J. No. 658 (S.C.), Coultas J. considered a trust set up by the husband's father, and held it to be a family asset. The husband had used the trust on four occasions over six years to borrow money, and all of the proceeds of loans were used for family purposes. The court held the amount borrowed to be considerable, $125,000, and the funds were applied to reduce the mortgage on the family home. He applied Gifford v. Gifford (1991),35 R.F.L. (3d) 145, and held that,

> [The husband's] contingent interest in the Trust was considered and intended by the parties to perform the basis, in part, for their future joint financial security.

62 In MacLean v. MacLean (1990), 28 R.F.L. (3d) 103 (B.C.S.C.), the grandmother had created a trust in favour of the husband on his birth. Half vested at 25 and the balance at 30. The trustee had the right, in its absolute discretion, to make advance capital payments. Boyd, J. held that the income and the capital had funded the parties' lifestyle and the husband had failed to prove on a balance of probabilities that the trust was not used for a family purpose.

63 The question of the burden of proof is particularly important in cases involving inheritances, gifts and trusts.

64 In Hefti v Hefti (1998), 57 B.C.L.R. (3d) 171 (C.A.) the question was whether certain accounts that were inherited by the husband during marriage from his mother were family assets. The wife's main argument was that the accounts were held as financial security for the couple's retirement. Finch lA., as he then was, said in a minority judgment at paras. 29-32:

> The trial judge's reasons are silent as to whether the parties together, or individually, formed an intention to use the inheritance to secure their financial future. Section 47 of the Family Relations Act provides that the onus to prove that the disputed property is not a family asset lies with the spouse opposing a claim under s. 43. Hence, it is up to the husband in this case to prove that his inheritance was not intended to be used to secure the financial future of himself and his wife. Counsel for the husband points to evidence that the husband regarded the inheritance as his own. However, he also testified that when the inheritance was received the parties had no intention to separate, and both thought that the husband would continue to provide for the mutual financial needs of the parties to the end of their days.

> In my respectful view, in the absence of clear evidence to the contrary, it would seem to be a natural inference that monies inherited by one spouse would, in the usual course, be used to the mutual benefit of both parties to the marriage, whether for present or future purposes, accepting always that upon a marriage breakup such assets may be reapportioned in the inheritor's favour.
>
> Counsel for the husband contends in the alternative that if the inheritance monies should be held to be family assets, they should be reapportioned 100% in his favour.
>
> In my view, in the absence of any finding by the learned trial judge as to the use of these assets for future financial security, and in the absence of persuasive evidence that there was no such mutual intention, I would hold that the inherited accounts are family assets because they must be taken to have been held, as a matter of natural and probable inference, for the purposes of providing both parties with financial security in their later years.

65 However, Chief Justice McEachern, with whom Cumming J.A. concurred, agreed with the result on the alternate basis found by Finch J.A. that the inherited accounts, even if they were not family assets, were available for reapportionment to redress any unfairness. He did not agree in the reasoning that I have set out above, stating at para. 40:

> I am not able to agree, however, that the inherited property in this case was ordinarily used for a family purpose under either section 45(2) or 42(3)(c) [now 48(2)and 48(3)(c)] of the Family Relations Act so as to become family assets. These assets were not used, ordinarily or at all, beyond talking and thinking about them as a possible source of future retirement income.

66 I return to the situation at hand.

67 Are the plaintiffs interests in We1con, Indian River and the MacDonald Family Trust, and the defendant's interest in MacDonald Consultants family assets? Mr. Kahn puts his arguments this way. He says that because the income from these sources was deposited to the family's joint account and was used for family purposes, actively and for future security, they can properly be classified as family assets.

68 My conclusion with respect to Ms. MacDonald's interest in We1conlIndian River and the MacDonald Family Trust is that they are not family assets. I reach the same conclusion with respect to Mr. MacDonald's interest in MacDonald Consultants.

69 When the reorganization of Welcon took place in 1989 resulting in the establishment of the MacDonald Family Trust, I accept Mr. MacDonald's evidence that he and other members of the extended family attended a celebration of the establishment of the trust. I find that there were some general discussions between Mr. and Ms. MacDonald regarding the intended use of the Trust, and that there was probably a general expectation of both parties throughout the marriage that the monies received from "We1con" would likely continue and likely playa role in their lives. The monies from Ms. MacDonald's grandfather, We1con and the MacDonald Family Trust did not come at specific times but arrived regularly and in significant amounts during the marriage. Ms. MacDonald contributed them without hesitation and they were deposited to the parties' joint bank account to satisfy family obligations and for family purposes. Mr. MacDonald said that he tried to use them in the manner most beneficial from a tax perspective but that it was difficult because the timing of their receipt was uncertain.

70 It was only income that Ms. MacDonald received that went to the family. The capital assets of the trust and the assets ofWe1con were not available to Mrs. MacDonald to be used for family purposes. She did not use or

have access to the capital; although the payments to her were regular, they were discretionary.

71 Saving and reducing debt were part of Mr. MacDonald's plan. However, I do not find that it was particularly a topic of conversation between the couple whether the possible future payments or assets of Welcon et al would be available or would provide for their joint financial security in the future. The payments from WelconiIndian River and the MacDonald Family Trust were simply deposited in the parties' joint bank account and used for family purposes. I do not find that there was a common intention that these interests would provide for the family's future financial security. Financial matters were not extensively discussed by the parties, largely because the question of family finances was left to Mr. MacDonald.

72 Even though during the marriage the income to Ms. MacDonald from Welcon et al may have been used for a family purpose, that of itself, as noted by Southin J.A. in Stuart, does not turn the property into a family asset. The Welcon et al assets were never pledged for family purposes. That is hardly surprising given the absence of control that Ms. MacDonald had over these assets. Indian River and the MacDonald Family Trust were set up so that the control was with someone else. Ms. MacDonald's interest was not ordinarily used for a family purpose and I conclude it did not become a family asset.

73 I reach the same conclusion for Mr. MacDonald's interest in MacDonald Consultants. There the income from that company was used on one occasion for a family purpose, buying a piano; any interest he had in MacDonald Consultants was not used for a family purpose.

74 As I will note later if I am wrong in this conclusion, I would reapportion Ms. MacDonald's interest in Welcon, Indian River, and the MacDonald Family Trust entirely to her and Mr. MacDonald's interest in MacDonald Consultants to him.

The June 1999 and September 1999 Bonuses

75 The next issue is whether bonuses that Mr. MacDonald received from his employment are family assets. Mr. MacDonald received bonuses of $250,000 (net of tax) on June 30, 1999 and a bonus (net of tax) of $400,000 in September, 1999. The parties separated on May 18, 1999 and the triggering event was on July 12, 1999. The bonuses were received after separation and were deposited by Mr. MacDonald into an account that he had opened, after separation, in late June, 1999, which account was never used for a family purpose.

76 Mr. Kahn argues that income is not an asset (a proposition with which Mr. Maxwell agrees), that the bonuses are not family assets but if they are, the date of separation, and not the triggering event, is relevant to ascertain the plaintiffs interest.

77 Mr. Kahn relies on two cases which I think are distinguishable.

78 In Chalmers v. Chalmers (1994), 2 R.F.L. (4th) 446 (B.C.S.C.), Boyd J. held that the wife was not entitled to any bonus paid out to the husband in February 1994 because (at 454):

> The bonus relates to work performed by Mr. Chalmers well after separation rather than to any work performed during the time they lived together. The bonus cannot be considered a family asset.

79 In Walker v. Walker (1989), 23 R.F.L. (3d) 113 (B.C.C.A), the Court of Appeal considered whether unpaid salary in a company in which the husband had an interest was a family asset. The court rejected the argument that salary was normally spent for family purposes and therefore the salary, though unpaid, was a family asset. Seaton J.A. said at 119:

> ... The salary would have become a family asset if he had received it and deposited it in the joint

bank account or otherwise used it for a family purpose, but it was not received. It remained an account receivable.

80 Here, however, the first bonus received by Mr. MacDonald pertains to the time before the parties separated. The evidence indicates that the pattern followed by the parties while they were together was that the bonuses earned prior to separation would have been saved and used for a family purpose: the long term security of the family. The bonus has been received. The receipt was delayed only while the amount was determined.

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.

82 Mr. Maxwell argued that, to the extent that some part of the bonus is not a family asset, it is nevertheless relevant to the question of spousal support, given the family's history of saving substantial amounts of Mr. MacDonald's income. I will discuss the claim for spousal support later in this judgment.

VALUATION OF FAMILY AND OTHER ASSETS

83 The parties dispute the valuation of: the matrimonial home, Silverton, Lot K, two of the boats, the bonuses, and the parties' respective interests in Welcon, Indian River, the MacDonald Family Trust and MacDonald Consultants. My findings with respect to these assets are as follows.

Susan MacDonald's Interest in Welcon and Indian River

84 Although I have held that Ms. MacDonald's interest in Welcon and Indian River is not a family asset, the question of valuation is relevant to questions of support.

85 The interest that Ms. MacDonald has in Indian River Holdings and Welcon Services was described in a report prepared by William McMann. Leaving aside her interest in the MacDonald Family Trust and any preferred shares held by her, Ms. MacDonald's interest in Welcon is 25% of Indian River x 33 1/3 % of Welcon = 8 1/3 %.

86 The defendants called Mr. McMann, a well-known expert in valuations, to value Ms. MacDonald's interest in Indian River Holdings.

87 His report indicated that, including redemptions on Class F shares, Ms. MacDonald has received from Welcon and the MacDonald Family Trust approximately $900,000 between 1990 and 2001.

88 Mr. McMann did not do a market value appraisal but prepared a valuation on a pro rata basis, the first time he has done a valuation on this basis. Mr. McMann frankly acknowledged that he was unable to provide an opinion on the fair market value of Ms. MacDonald's interest in Indian River Holdings because of incomplete data and documentation, but perhaps more importantly because of the impracticality of the interest being able to be sold in the open market. He said the corporate structure in which Ms. MacDonald held her interest was such that it would be impossible to envisage a third party willing to purchase Ms. MacDonald's interest at a price which has any relevance to its real underlying value. He said the discounts demanded by a purchaser would be so great as to render fair market value meaningless.

89 On the other hand, he could not imagine Ms. MacDonald, or any vendor of such an interest, being willing to sell it at a minimal level and that, in his opinion, her shareholdings had a significant value to Ms. MacDonald.

90 Mr. McMann's opinion, based on a pro rata valuation (while expressing reservations that interests like this are never sold in the market place and subject to the qualification that there was limited financial disclosure) was that Ms. MacDonald's interest in Indian River (8.3% of We Icon) would be valued at $3,091,498. In addition,

her Class E and F preferred shares would be given their face value of $70,000 (Class E) and $210,000 (Class F) for redemption purposes. He said that this was done on a conservative basis. His overall valuation of We1con Services as of July 31, 2001 at $54 million, he said, was supported by a transaction in 1998 when property of the Dorothy Welch Trust was converted to Class F redeemable and retractable shares.

91 Mr. McMann, on cross-examination, agreed that Ms. MacDonald's only direct interest in We1con is in the preferred shares worth $70,000 and $210,000 respectively. The indirect interest in Welcon through Indian River Holdings is controlled by the sole holder of the Welcon voting shares. The holder of the voting shares has the power to determine the income that flows to Indian River Holdings.

92 As to a winding up of Indian River, if that took place, Mr. McMann agreed that the first $4,600,000 would go to Ms. MacDonald's mother in repayment of her preferred shares established at the time of the estate freeze. He also agreed that it is speculative when Ms. MacDonald could control Indian River with her brother. As a discretionary beneficiary of the trust she has no power to demand money. Mr. McMann agreed that Ms. MacDonald does not control Welcon, Indian River or the MacDonald Family Trust and that she cannot control dividends from any source or the sale of assets. He agreed that there was no organized market for the sale of her interest in Indian River. Mr. McMann described Indian River as a vehicle to pass on growth and annual income to future generations. He agreed that a bank would not lend much on Ms. MacDonald's shares in Indian River, but might advance $200,000 on her $280,000 worth of preferred shares.

93 Although Mr. McMann could not opine on the market value of Ms. MacDonald's shares (there being no market for the shares), they were nevertheless, he said, of significant value to her.

94 Although Ms. MacDonald's interest in We1con may not have a significant fair market value, I find that her interest in Welcon has a significant value to her and will continue to have significant value to her in the long term. I base that conclusion on the record of benefits that she has received by way of dividends throughout the marriage. I recognize that she does not presently have voting rights in either Welcon or Indian River, that she cannot call for a dividend on the common shares of Indian River, nor can she compel Indian River to call for a dividend on its shares of We1con. Further, a lending institution would unlikely lend much money on the strength of her interest in Welcon. However, I agree with Mr. McMann's conclusion that the shares in Welcon and Indian River have significant value to Ms. MacDonald. I treat his opinion as a reasonable guide of the likely value of her interest for the purposes of spousal support. I note that his pro rata "valuation" does not include any value for her interest in the MacDonald Family Trust.

Silverton

95 The parties disagree on the value of Silverton, the property in Woodlands where Mr. MacDonald now resides. Ms. MacDonald's counsel says that the value for asset division purposes should be $625,000, the amount paid by Mr. MacDonald when he purchased the property in April, 1999. The sale completed after the parties separated. If the defendant's suggested figure of $475,000 is used then Ms. MacDonald says a compensation order for half of the difference should be made in favour of Ms. MacDonald.

~ 96 The only evidence at trial of the value of Silverton was the opinion of Mr. Horst Eschner of Cunningham and Rivard dated February 15, 2002. He concluded that it had a market value of $475,000. I think that, in the circumstances, Mr. Eschner's opinion on the market value of Silverton is reasonable and I accept it. Even though the value may have dropped since the parties separated, or Mr. MacDonald may have paid more than market value, there is no basis to find that he acted improvidently, given the importance to both parties of owning property in Woodlands. I conclude that there is a no proper basis for a compensation order in favour of Ms. MacDonald.

The Matrimonial Home

97 I received appraisals by Mr. David Cavazzi, an expert called by the plaintiff, and Mr. Eschner, an expert

called by the defendant, as to the value of the matrimonial home at roughly the same date. Mr. Cavazzi's valuation was as of December 12,2001, and Mr. Eschner's was as of February 15,2002. Mr. Eschner appraised the property at $1,000,000 (he saw it being in a range of $900,000 to $1,500,000). On the other hand, Mr. Cavazzi appraised it at $950,000. In the circumstances it is reasonable to average the appraisals, and I find the value of the matrimonial home to be $975,000. I note that the defendant's counsel does not apparently take issue with that amount.

LotK

98 The valuation of Lot K, the lot that provides access to the matrimonial home, and is co-owned with a neighbour, is more problematic. Mr. Cavazzi valued Lot K at $120,000 and valued the MacDonald's half interest at $48,000.

99 Mr. Eschner, an appraiser called by Mr. MacDonald, on the other hand did not prepare an appraisal. Mr. Eschner did not so much disagree with Mr. Cavazzi's appraisal of Lot K, as criticize its basis. He stated that an appraisal must include the completion of basic steps, including a survey, geophysical report, input from the Department of Fisheries and a definitive analysis to determine the probable market.

100 Although Mr. Kahn says that Mr. Eschner's approach should be preferred, it is of limited assistance in determining the value of Lot K.

101 The determination of the value of the parties' interest in Lot K is problematic. Lot K is a difficult site. It is steep, contains creeks, and a road winds through it to provide access to 5511 Indian Road and to the neighbour's property. Both experts agreed that proper and accurate determination of the market value of Lot K would involve topographical, engineering, and fisheries studies in order to persuade the municipality of the development potential of the property. Mr. Cavazzi says, in the circumstances, that the highest and best use of the property is as a holding property or a buffer zone for the MacDonald property and the neighbour's property.

102 Mr. Cavazzi, in determining his appraisal, took a discount of 50%, based on the lot not being serviced, not approved for development, the presence of significant topographical concerns, and the presence of creeks and an unprotected water line. He took a further 20% discount because the half interest in Lot K results in a reduction in control over the property.

103 Mr. Kahn pointed out on cross-examination, correctly I think, that the most important question is whether the site is buildable. He suggested that before selling or developing, a prudent owner would probably take steps to have the required studies done. However, those studies may be quite costly (and time consuming). Mr. Kahn pointed out that if Lot K was subdivided, a lot would be accessible from the main road, supporting a higher valuation. He also pointed out that the flexibility in rerouting of the road through Lot K potentially increases its value.

104 There are elements of speculation in determining the market value of the parties' interest in Lot K, given that the necessary studies have not been undertaken. However I think that Mr. Cavazzi's approach is reasonable and that, for the purposes of this case, it is the best evidence. It was suggested that perhaps there could be a reference to the Registrar for a more precise determination of market value. However, it is important to try to avoid further litigation between the parties. On balance, I hold that the parties' interest in Lot K is worth approximately $60,000. I fix that value.

The Boats

105 There was not much difference between the parties on the value of the pleasure craft. The four boats were the 19-foot Ski Nautique, a Boston Whaler, and two boats owned by J.I.B. Enterprises - the Per Mare and Kavalk in which enterprise the defendant has a one-third interest.