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Fisher v. Fisher

Georgette Hilda Fisher (Plaintiff) and Morris Stanley Fisher and Suzanne Fisher (Defendant)

Alberta Court of Queen's Bench

J.D.B. McDonald J.

Heard: September 17-18, 20-21, October 1, 2007; February 4-8, March 7, 2008

Judgment: March 17, 2008

Docket: Calgary 4801-118213

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Counsel: Christian Ouellette for Georgette Hilda Fisher

Ruellen Forsyth-Nicholson for Morris Stanley Fisher

Diann **Castle** for Suzanne Fisher

Subject: Family; Property

Family law --- Family property on marriage breakdown — Valuation of specific assets — Real property — General principles

Parties married in June 1969 and ceased cohabiting in August 2003 — Parties had six children together — Prior to separation, parties owned as joint tenants condominium — Title to condo was transferred into name of wife solely pursuant to terms of Consent Order granted on November 20, 2003 — Wife brought action for several forms of relief, including distribution of properties — Action allowed in part — In light of fact that husband acquired his own condo with proceeds from wife's refinancing of Tuscany condo, net equity in those two properties should be shared equally between parties — Accordingly, husband was to pay wife equalization payment in amount of \$9,750.

Family law --- Family property on marriage breakdown — Assets which may be excluded from property to be divided — Business and employment assets — Pension plans — Alberta

Parties married in June 1969 and ceased cohabiting in August 2003 — Parties had six children together — Wife brought action for several forms of relief, including order for distribution of financial assets — Action allowed in part — Wife was to keep defined benefit pension and RRSP without any claim or deduction made in favour of husband — Likewise, husband was to keep funds in LIF and RIF without any claims or distribution to wife — Equal sharing of assets would not be just or equitable in this case.

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Family law --- Family property on marriage breakdown — Factors affecting equal or unequal division — Multiple factors considered

Parties married in June 1969 and ceased cohabiting in August 2003 — Parties had six children together — Husband had one-half interest in Haysboro property with first wife — Wife brought action for several forms of relief, including determination of share in Haysboro property — Action allowed in part — Husband purchased Haysboro property while still married to first wife and prior to marriage to second wife — There was no presumption of equal sharing as between husband and second wife — Best evidence as to market value of Haysboro property at time of marriage to second wife on June 21, 1969 was purchase price paid for property on January 20, 1966, which was \$13,566.20 — Therefore, amount of husband's interest in property available for distribution would have been \$198,216.90 — A just and equitable distribution of husband's interest in Haysboro property would be 10 per cent to wife and 90 per cent to husband — That the father of six children had some obligation to support them should have come as no surprise to second wife — She married husband when he was subject to preexisting obligation to support children and first wife.

Cases considered by J.D.B. McDonald J.:

Bank of Montreal v. Coopers Lybrand Inc. (1996), 1996 CarswellSask 386, [1996] 8 W.W.R. 153, 40 C.B.R. (3d) 161, 137 D.L.R. (4th) 441, 144 Sask. R. 207, 124 W.A.C. 207, 23 R.F.L. (4th) 415 (Sask. C.A.) — considered

Browne v. Dunn (1893), 6 R. 67 (U.K. H.L.) — considered

Carmichael v. Carmichael (2007), 2007 CarswellAlta 1, 2007 ABCA 3, 404 A.R. 144, 40 R.F.L. (6th) 21, 394 W.A.C. 144, 78 Alta. L.R. (4th) 69 (Alta. C.A.) — referred to

Garland v. Consumers' Gas Co. (2004), 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 72 O.R. (3d) 80 (note), 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 42 Alta. L. Rev. 399, 186 O.A.C. 128, [2004] 1 S.C.R. 629 (S.C.C.) — considered

Hodgson v. Hodgson (2005), 13 R.F.L. (6th) 339, 361 A.R. 190, 339 W.A.C. 190, 2005 ABCA 13, 2005 CarswellAlta 29, 248 D.L.R. (4th) 95, 40 Alta. L.R. (4th) 212 (Alta. C.A.) — referred to

Prévost v. Bedard (1915), 51 S.C.R. 629, 24 D.L.R. 862, 1915 CarswellQue 11 (S.C.C.) — considered

R. v. Wilson (1983), 1983 CarswellMan 154, 1983 CarswellMan 189, [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97 (S.C.C.) — considered

Wensel v. Wensel (1975), [1976] 2 W.W.R. 267, 1975 CarswellAlta 118, 65 D.L.R. (3d) 327 (Alta. T.D.) — considered

Wensel v. Wensel (1976), [1977] 1 W.W.R. 32, 1976 CarswellAlta 136, 5 A.R. 379, 72 D.L.R. (3d) 1 (Alta. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Law of Property Act, R.S.A. 2000, c. L-7

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Pt. 3 — referred to

Matrimonial Property Act, R.S.A. 2000, c. M-8

Generally — referred to

s. 7 — referred to

s. 7(2) — referred to

s. 7(4) — considered

s. 8 — considered

s. 8(f) — considered

s. 8(g) — considered

s. 8(j) — considered

s. 8(m) — considered

s. 10 — referred to

s. 10(1) — referred to

s. 10(1)(a)-10(1)(d) — referred to

s. 10(1)(a)(ii) — referred to

s. 37 — referred to

s. 38 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 38 — referred to

R. 229 — referred to

APPLICATION by wife for division of real property and financial assets.

J.D.B. McDonald J.:

Introduction

1 The Plaintiff, Georgette Hilda Fisher (hereinafter referred to either as the Plaintiff, the wife or Georgette Fisher) was born on May 2, 1933. The Defendant, Morris Stanley Fisher (hereinafter referred to as either the husband or Morris Fisher) was born on October 10, 1936.

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2 Georgette Fisher and Morris Fisher were married on June 21, 1969 and ceased co-habiting on August 15, 2003.

3 The Defendant, Suzanne Arlene Fisher (hereinafter referred to as Suzanne Fisher) was married to Morris Fisher on April 18, 1956 and obtained a *Decree Nisi* of divorce on June 3, 1968.

4 Suzanne Fisher is a Defendant only in the matrimonial property claim, having been named as such in the Amended Statement of Claim filed on August 15, 2007.

5 At the commencement of trial, counsel for the Plaintiff advised the Court that there were essentially 8 issues to be addressed at trial and these were:

1. The personal property owned by husband and wife.
2. The securities owned by Morris Fisher.
3. The pension belonging to Georgette Fisher.
4. Morris Fisher's 2004 Buick motor vehicle.
5. The Tuscany condo now in the name of Georgette Fisher solely.
6. The condo subsequently purchased by Morris Fisher and in his name solely.
7. The property located at 36 Harrow Place S.W. (the Haysboro property), the title to which is held jointly by Suzanne Fisher and Morris Fisher.

Issues

1. Was there an agreement between Georgette Fisher and Morris Fisher to divide their personal property? If not, what is a just and equitable distribution of that property?
2. Was there an agreement between Georgette Fisher and Morris Fisher that Georgette Fisher would own the Tuscany condo solely and that Morris Fisher would own his current condo solely? If not, what is a just and equitable distribution of those two properties?
3. Was there an agreement between Georgette Fisher and Morris Fisher with respect to the financial assets? If not, what is a fair and equitable distribution of the financial assets?
4. Does Georgette Fisher have a claim to Morris Fisher's 2004 Buick Century, and if so, in what amount?
5. Is Georgette Fisher entitled to any claim with respect to Morris Fisher's interest in the Haysboro property in excess of the amount of \$45,000.00 as stipulated in the Consent Order granted by the Honourable Mr. Justice G.C. Hawco on November 29, 2005?

Facts

6 Morris Fisher and Suzanne Fisher had six children together. At the time of the *Decree Nisi*, they were as follows:

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David Maurice, age 11 years;
Bonnie Sue, age 10 years;
Patricia Mary, age 9 years;
Joseph Stanley, age 6 years;
James Steven Patrick, age 4 years; and
Gerald Allen (also known as John), age 8 months.

7 It was expressly provided in the *Decree Nisi, inter alia*, as follows:

Para. 4 - It is further Adjudged and Decreed that the Plaintiff [Suzanne Fisher] shall have exclusive use of the matrimonial home, being 36 Harrow Place, Calgary, Alberta together with the exclusive right to any rental income derived from the said home.

Para. 6 - It is further Adjudged and Decreed that the Defendant [Morris Fisher] shall pay the payments due under the first mortgage registered against the said matrimonial home in the amount of \$113.00 per month.[FN1]

8 Para. 7 provided:

It is further Adjudged and Decreed that the Defendant [Morris Fisher] do pay the monthly payments due on the second mortgage of [sic] the matrimonial home in the amount of \$85.00 per month.

9 There was no claim made pursuant to the provisions of the *Matrimonial Property Act*, RSA Chapter M-8 (the *Matrimonial Property Act*) since it was not enacted into law until 1978.

10 The within Statement of Claim was filed on October 7, 2003. On March 6, 2004, a Certificate of Lis Pendens was filed on behalf of Georgette Fisher against the title to 36 Harrow Place (the Haysboro property) which was still held in the name of Morris Fisher and Suzanne Fisher as joint tenants.[FN2]

11 Suzanne Fisher subsequently retained counsel, namely David Vallance, and commenced proceedings against Morris Fisher by way of Statement of Claim issued on September 8, 2005.

12 In that Statement of Claim, Suzanne Fisher was seeking, in effect, a declaration that she be determined to be the sole owner of the Haysboro property and that a new Certificate of Title should be issued in her name alone.

13 A Judicial Dispute Resolution was held in that Action before the Honourable Mr. Justice G.C. Hawco on November 29, 2005. Suzanne Fisher was represented by David Vallance. Morris Fisher represented himself.

14 Apparently, Mr. Ouellette on behalf of Georgette Fisher wished to intervene in some fashion or another in the Judicial Dispute Resolution meeting but was not permitted to do so since Georgette Fisher was not a party to that lawsuit.

15 Mr. Justice Hawco was successful in effecting a settlement between Suzanne Fisher and Morris Fisher and the settlement was confirmed by way of a Consent Order dated November 29, 2005 (the Hawco Order). The Hawco Order provided as follows:

1. The Defendant's equity in the above described property, more particularly described as 36 Harrow Place is fixed in the sum of \$45,000.00.

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2. The Plaintiff shall cause to pay to the Defendant or at his direction the sum of \$45,000.00.

3. Upon payment of the said sum or satisfactory arrangements and security for the payment of the said sum the Defendant (Morris Fisher) shall forthwith transfer to the Plaintiff (Suzanne Fisher) all his right title and interest in the subject property.

4. There shall be no costs.[FN3]

16 Morris Fisher explained that the reason he did not sign the Consent Order until February 6, 2006 was that he was not prepared to do so until such time as Suzanne Fisher had arranged for the sum of \$45,000.00 to be paid.

17 Notwithstanding the Hawco Order the title to the Haysboro property has not changed and the Certificate of Lis Pendens filed on behalf of Georgette Fisher remains on title.

18 Prior to their separation, the Georgette Fisher and Morris Fisher owned as joint tenants a condominium at 367, 233 Tuscany Springs Boulevard N.W. (the Tuscany condo).

19 Title to the Tuscany condo was transferred into the name of Georgette Fisher solely pursuant to the terms of a Consent Order granted on November 20, 2003 by Mr. Justice Peter Clark (hereinafter referred to as the Clark Order).

20 Paragraph 1 of the Clark Order provided:

Upon payment to counsel for the Defendant of the sum of \$137,000.00 to be held in trust by counsel for the Defendant, the Defendant shall transfer to the Plaintiff the Defendant's interest in the matrimonial home, located at 367 233 Tuscany Springs Boulevard N.W., Calgary, Alberta, T2L 2M2, provided that a Certificate of Lis Pendens in favour of the Defendant shall be registered against the Plaintiff's title concurrently with the registration of the transfer of land. The Certificate of Lis Pendens may be postponed to any new mortgage funding obtained by the Plaintiff in order to obtain the funds to be paid to the Defendant.[FN4]

21 In this testimony, Morris Fisher asserted that this order was entered into from his perspective as part of an overall settlement between the parties. However, it is clear from the evidence that no overall settlement was indeed achieved.

22 At the present time, the Plaintiff is 74 years of age and Morris Fisher, is 71. Both are retired and living in effect on pension income.

23 At the time of trial, the Haysboro property had a fair market value of \$410,000.00.[FN5] At the time of the Judicial Dispute Resolution, it had a fair market value of \$213,000.00.[FN6]

24 At the time of trial, the Tuscany condo had fair market value of \$400,000.00.[FN7] The condo that Morris Fisher purchased had a fair market value of \$300,000.00.[FN8]

25 Morris Fisher's assets at the date of trial were as follows:

Assets	Value
Condominium purchased after date of separation	\$300,000.00
2004 Buick Century	10,500.00
Life Income Fund	24,500.00

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Registered Income Fund 164,597.00

In addition, he had certain chattels of relatively nominal value.

26 Morris Fisher testified that as of the date of trial, he had the following liabilities:

Liabilities	Value
VISA	\$ 12,000.00
ScotiaBank Line of Credit	21,000.00

27 The property owned by Georgette Fisher as at date of trial is as follows:

Assets	Value
Tuscany condo	\$ 400,000.00
Public Service Pension Plan	??
RRSP	20,500.00

In addition, Georgette Fisher also had certain chattels of relatively nominal value.

28 There is a mortgage registered against the Tuscany condo in the face amount of \$152,500.00.[\[FN9\]](#)

29 The Tuscany condo has a Certificate of Lis Pendens registered against title on behalf of Morris Fisher and Morris Fisher's new condo has a Certificate of Lis Pendens registered against that title on behalf of Georgette Fisher.

Law and Analysis

30 All the matrimonial property at issue in this lawsuit — save and except for Morris Fisher's interest in the Haysboro property — was acquired during the marriage and is therefore Section 7(4) property. It therefore follows that subject to the factors enumerated in Section 8 of the *Matrimonial Property Act*, that this court is to make an equal division of this property unless it would not be "just and equitable to do so".

31 Section 8 of the *Matrimonial Property Act* provides in part as follows:

8. The matters to be taken into consideration in making a distribution under Section 7 are the following:

- (f) whether the property was acquired when the spouses were living separate and apart;
- (g) the terms of an oral or written agreement between the spouses;
- (j) a prior order made by a Court;
- (m) any fact or circumstance that is relevant.

32 The date of trial is the date for the valuation and division of matrimonial property, subject to the factors listed in Section 8: *Hodgson v. Hodgson* (2005), 361 A.R. 190, 2005 ABCA 13 (Alta. C.A.) at para. 10.

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1. Was there an agreement between Georgette Fisher and Morris Fisher to divide their personal property? If not, what is a just and equitable distribution of that property?

33 The personalty owned by Georgette Fisher and Morris Fisher were set forth in Exhibits 1 and 2. Counsel for both Georgette Fisher and Morris Fisher argued that there was an agreement regarding the division of that property. Although such agreement did not comply with Sections 37 and 38 of the *Matrimonial Property Act*, I will give effect to it. Accordingly, I direct that the parties now own, free and clear of any claim from the other party, the personal property that is in their current possession.

2. Was there an agreement between Georgette Fisher and Morris Fisher that Georgette Fisher would own the Tuscany condo solely and that Morris Fisher would own his current condo solely? If not, what is a just and equitable distribution of those two properties?

34 Morris Fisher contends that there was an agreement reached between he and Georgette Fisher and her counsel to the effect that she would buy his interest out of the Tuscany condo and that he would be entitled to use those proceeds to acquire his own condominium free and clear of any claim from her.

35 Mr. Ouellette, counsel for Georgette Fisher, took issue with this and originally asserted that there was only an agreement relating to the Tuscany condo. In particular, he had argued that it was agreed that Georgette Fisher would own that property free and clear of any claim from Morris Fisher, but that Georgette Fisher would have a right to make a claim against the condo subsequently acquired by Morris Fisher. When argument resumed on March 7, however, Mr. Ouellette resiled from this position and argued that the two condos should be considered together.

36 It certainly seemed from the testimony of Morris Fisher that he was hopeful that an overall settlement could be achieved prior to the granting of the Clark Order. Such, of course, did not come to pass.

37 In any event, it is important to bear in mind para.1 of the Clark Order which provides in part as follows:

... provided that a Certificate of Lis Pendens in favour of the Defendant shall be registered against the Plaintiff's title concurrently with the registration of the transfer of land.

A similar provision is contained in para.2(c) of the Clark Order allowing Georgette Fisher to file a Certificate of Lis Pendens in her favour against title to Morris Fisher's subsequently acquired condo.

38 Both these paragraphs contemplate that each of Georgette Fisher and Morris Fisher have the right to advance a claim with respect to the equity in the condo registered in the name of the other party.

39 That being so, the clear wording of the Clark Order belies any assertion that there was an agreement reached either as alleged by Morris Fisher or as alleged by Mr. Ouellette on behalf of Georgette Fisher.

40 Both properties are of course Section 7(4) property having been acquired during the course of the marriage. The Tuscany condo has a net equity of \$ 247,500.00 as follows:

Fair Market Value	\$ 400,000.00
less: Related Mortgage	152,500.00
	\$ 247,500.00

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41 Morris Fisher's condo had a fair market value at the time of trial of \$300,000.00. While there is no associated mortgage registered against the title to that property, the amount of his current debt-load, being \$33,000.00 as per paragraph 26 above, should be deducted from this amount leaving a net value attributable to Mr. Fisher's condo of \$267,000.00.

42 In my view, in light of the fact that Morris Fisher acquired his condo with proceeds from Georgette Fisher's refinancing of the Tuscany condo, the net equity in those two properties should be shared equally between the parties. Accordingly, Morris Fisher is to pay to Georgette Fisher an equalizing payment in the amount of \$9,750.00 to be paid within 30 days from the date of this judgment. As soon as the equalizing payment is made, the Certificate of Lis Pendens registered by Georgette Fisher against Morris Fisher's condo is to be discharged forthwith. Likewise, the Certificate of Lis Pendens registered by Morris Fisher against the Tuscany condo is to be discharged forthwith.

3. Was there an agreement between Georgette Fisher and Morris Fisher with respect to the financial assets? If not, what is a fair and equitable distribution of the financial assets?

43 The financial assets of the parties include Georgette Fisher's defined benefit pension through the Public Service Pension Plan as well as Morris Fisher's retirement investments held in a Life Income Fund (LIF) and Registered Income Fund (RIF) which were worth \$26,162.00 and \$176,262.00, respectively, as of March 30, 2007 which was the date of the latest statement introduced into evidence.[FN10] Morris Fisher's evidence was that his LIF and RIF were worth \$164,597.00 and \$24,500.00 respectively at the time of trial. In addition, Mr. Ouellette asserted that Georgette Fisher has an RRSP that was valued at \$20,500.00 at the time of trial.

44 I find that there was no binding agreement between the parties with respect to these assets.

45 According to a letter dated February 2, 2006, Georgette Fisher as of that date was receiving a pension in the amount of \$919.46 per month.[FN11] This pension will continue for her life-time. On the other hand, Morris Fisher has no defined benefit pension, but rather has to provide for his retirement through investments which are now contained in his LIF and RIF.

46 Mr. Ouellette suggests that the financial assets should be divided equally. In my view, that would be an unjust result.

47 Georgette Fisher's pension ceases upon her death and no residual amount is payable at all subsequent to March 30, 2008.[FN12] Therefore, if her pension was to be divided between her and Morris Fisher, then in the event that Georgette Fisher pre-deceases him, Morris Fisher's entitlement to receive any of the benefit is thereafter lost and there is no residual amount payable after March 31, 2008. That said, however, Georgette Fisher does have the comfort knowing that she will receive a definite amount per month (which would appear does escalate somewhat over time) for as long as she is alive, and this will continue even in the event that Morris Fisher predeceases her. On the other hand, Morris Fisher runs the very real risk of out-living his retirement funds contained in the LIF and RIF.

48 Therefore, having regard to the factors set forth in Section 8 of the *Matrimonial Property Act*, it seems to me that the fairest way of dividing the financial assets is to do so *in specie*. I do this by awarding to Georgette Fisher her defined pension benefit without any deductions or payments to be made to Morris Fisher. In addition, she will be entitled to retain her RRSP in total. By the same token, Morris Fisher's LIF and RIF will remain intact and owned by him without any claim from Georgette Fisher.

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49 I appreciate that this is not an equal sharing of these assets, but it seems to me to be the most just and equitable result. Otherwise, we could easily have a situation that if Georgette Fisher were to die in three months time, her pension would cease immediately and Morris Fisher would be deprived of his share of that income stream. At the same time, however, he would have been deprived of one-half of the value of his LIF and RIF and the value of these investments would represent a windfall to Georgette Fisher's estate.

4. Does Georgette Fisher have a claim to Morris Fisher's 2004 Buick Century, and if so, in what amount?

50 Morris Fisher's Buick automobile is Section 7(4) property and at the time of trial was worth \$10,500.00. Accordingly, Morris Fisher is to make an equalizing payment to Georgette Fisher in the amount of \$5,250.00 within 30 days from the date of this decision and thereafter will own this vehicle free and clear of any claims from her.

5. Is Georgette Fisher entitled to any claim with respect to Morris Fisher's interest in the Haysboro property in excess of the amount of \$45,000.00 as stipulated in the Hawco Order?

51 To conduct a proper analysis with respect to this issue, the following dates must be borne in mind:

- October 7, 2003 — the within action is commenced by Statement of Claim filed on behalf of Georgette Fisher;
- March 6, 2004 — a Certificate of Lis Pendens is filed in the within action on behalf of Georgette Fisher with respect to the Haysboro property;
- September 8, 2005 — an action is commenced on behalf of Suzanne Fisher as Plaintiff against Morris Fisher relating to the Haysboro property (the Haysboro action)[\[FN13\]](#) ;
- November 29, 2005 — a Judicial Dispute Resolution is held in the Haysboro action and results in the Hawco Order being granted on that date (although not formally consented to by Morris Fisher until February 6, 2006);
- August 15, 2007 — Suzanne Fisher is added as a Defendant in the within action.

52 No explanation was proffered by Georgette Fisher's counsel as to why he did not seek proper standing for his client in the Haysboro action. He acknowledged that he was aware of the Haysboro action prior to November 29, 2005 being the date of the Judicial Dispute Resolution and yet took no steps to have his client added as a formal party.

53 In my view, the proper procedure for him to have followed was to have made an application pursuant to Rule 38 to have Georgette Fisher added as a party to the Haysboro action. Thereafter, an application ought to have made pursuant to Rule 229 to have the within action and the Haysboro action either formally consolidated or at least tried together in some fashion.

54 This was not done and now Georgette Fisher is in effect launching a collateral attack upon the terms of the Hawco Order in as much as she is seeking to advance a claim to the Haysboro property in excess of the \$45,000.00 that has been declared to be the value of Morris Fisher's interest as set forth in the Hawco Order.

55 Counsel for Georgette Fisher acknowledged in argument that he is not in a position to appeal or set aside the Hawco Order which was given by consent between the parties. In this respect, he is undoubtedly correct: *Wensel v. Wensel* (1975), 65 D.L.R. (3d) 327 (Alta. T.D.) affirm (1976), 72 D.L.R. (3d) 1 (Alta. C.A.).

56 In *Wensel*, the parties had entered into a consent order directing that the original title to certain lands was to be

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cancelled and separate titles were to be issued in the names of each of the parties. By Notice of Motion, the Municipal District of Foothills sought to obtain an order adding it as a Respondent in the proceedings and either discharging or varying the consent order.

57 The Court held that if the consent order was in fact a Judgment it would be *functus officio* and would therefore have no jurisdiction to entertain that motion. The Court held that the order was in effect a consent judgment which had the same effect as a judgment after trial. In so finding it held at pages 330 to 331:

A judgment having been obtained and entered, the Municipal District of Foothills now applies to be added as a party to the proceedings. While there is no doubt that the Court has the power, in proper circumstances, to add a party to an action, once there has been a final adjudication and entry of the order or judgment no one may be added as a party until that order or judgment is first set aside.

Counsel for the municipal district urges that the Court has power to open up and set aside the judgment and in support of that proposition has cited several authorities. My reading of these authorities indicates to me that they refer to case where one of the parties to the original action asserts that the judgment as drawn up does not correctly state what the Court actually intended. In those cases the original judgment was not set aside but merely corrected or amended. The other line of cases deal with the right of a person not a party to the original action to have the judgment after entry set aside in order to be added as a third party pursuant to a right conferred by statute.

The Court went on to quote Duff J in *Prévost v. Bedard* (1915), 24 D.L.R. 862, 51 S.C.R. 629 (S.C.C.) at page 331:

... Once the judgment has been passed and entered once it has become a record the appeal transit in rein judicatam; and the court has no power to re-open it for the purpose of passing upon points which were not actually or constructively involved in the judgement pronounced or intended to be pronounced.

There is not the least reason for relaxing this rule, which is no mere rule of practice, but a rule of high policy for the protection of litigants; there must some time be an end of litigation.

58 Had Georgette Fisher been made a party to the Haysboro action prior to the granting of the Hawco Order, arguably a different result might have been possible. However, that was not done in this case and as her own counsel acknowledges, she is not in a position to appeal or set aside the Hawco Order.

59 However, what is being argued in effect on Georgette Fisher's behalf is that the application brought pursuant to Section 10 of the *Matrimonial Property Act* does not represent a collateral attack on the Hawco Order and in any event she has no other existing remedy.

60 The doctrine of collateral attack was described by the Supreme Court of Canada in *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.) by McIntyre J for the majority at page 599:

...It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding

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exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

61 It was more recently described in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25 (S.C.C.) where Iacobucci J for the Court held, at para. 71:

...The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 2 S.C.R. 77, 2003 SCC 63; D.J. Lange, *The Doctrine of Res Jucicata in Canada* (2000), at pp. 367-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review).

62 Donald J. Lange in *The Doctrine of Res Judicata in Canada*, 2nd ed. (Toronto: Butterworths, 2004) writes at pages 404 and 405:

In regard to an attack on a court order, the doctrine [of collateral attack] is a flexible doctrine, not an absolute doctrine ...

To prevent a collateral attack is to ensure fairness to all parties, but not all collateral attacks are offensive. In *R. v. Domm*, Doherty J.A., for the Ontario Court of Appeal, extensively reviewed the case law and scope of the doctrine of collateral attack and provided two exceptions to its application. The first exception is that obedience to a court order will be relaxed where no harm will come to the justice system...

The second exception is if the litigant does not have an effective remedy through existing court procedures to attack the court order, for example, by way of variation, or appeal, or review...

63 In this case, had Georgette Fisher and her counsel only learned of the Haysboro action after the Hawco Order was granted, then the second exception might be relevant. However, the fact remains that they were aware of the Haysboro action well prior to November 29, 2005 and yet took no steps to have Georgette Fisher added as a party to the Haysboro action nor to make an application pursuant to Rule 229 to have the two actions either consolidated or otherwise tried together.

64 A case involving a somewhat analogous situation is the Saskatchewan decision in *Bank of Montreal v. Coopers Lybrand Inc.* (1996), 144 Sask. R. 207 (Sask. C.A.). In that case, the Court considered whether a judgment in a matrimonial property action consented to by the husband Ostapowich (who subsequently became bankrupt) could be attacked through summary proceedings of the *Bankruptcy and Insolvency Act (Canada)* as a settlement or fraudulent conveyance. Ostapowich's wife commenced an action claiming division of matrimonial property in 1991. In April of 1993 Ostapowich executed a consent form later issued as a judgment settling the property issues as between husband and wife. The terms were amended by consent in May of 1993 and on June 4 1993 the trial judge granted an amended consent judgment.

65 On June 23, 1993 Ostapowich made an assignment into bankruptcy. Shortly thereafter the Bank brought an application by way of Notice of Motion seeking to set aside the vesting order and other portions of the consent judgment claiming it represented a settlement or fraudulent conveyance. Ostapowich opposed the application, claiming that it was in substance a collateral attack on a valid judgment of the Court. The Court agreed, holding at paras. 11-13:

The argument of the respondent appears to be predicated on the premise a consent judgment is merely a decision of the parties which is then approved or rubber-stamped by the Court. This is simply not the case. A judgment is a final

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determination by the Court of the rights and obligations of the parties. A consent judgment, even if it is in the terms consented to by the parties, is not a decision of the parties but is a decision of the Court. The fact the judgment was consented to makes it no less a valid and subsisting judgment. See: *The Hardy Lumber Co. v. The Pickereel River Improvement Co.* (1899) 29 S.C.R. 211; *City of Toronto v. Toronto R.W. Co.* (1917) 39 O.L.R. 310 at p. 313. Any agreement between the parties must receive the independent sanction of the Court before it can become a judgment. This Court has held if an issue is consented to by the parties a judge is not obligated to follow it. See *Peterson v. Bishop et al.*, [1923] 3 W.W.R. 25; *Hope Hardware et al. V. Fields Stores Ltd. et al.* (1978), 7 B.C.L.R. 321. In a matrimonial property application, if the parties come to an agreement the judge must still decide whether the agreement is just and equitable before making the order and thus has a power of review over any agreement and is not bound by the parties' agreement. The Court must decide, based on the facts and the law, and that decision may ultimately reflect the agreement made by the parties but it is still the Court's decision, not that of the parties.

No matter from what perspective one views the application by the bank it is in substance an attack on a valid subsisting judgment of the Court and thus the appellant is correct such judgment can only be attacked in one of the three aforementioned ways:

1. By an application to the Court to vary its judgment;
2. By appeal;
3. By separate action to set aside the judgment on the basis it was obtained by fraud. See *R. v. Wilson*, [1984] 1 W.W.R. 481.

Simply put, if the respondents were to be successful in this appeal, its effect would be to render the consent judgment nugatory. The respondent therefore, has not chosen the correct procedure to attack the judgment.

66 While Georgette Fisher is proceeding pursuant to the provisions of Section 10 of the *Matrimonial Property Act* in advancing her claim to a larger interest in the Haysboro property than stipulated in the Hawco Order, the reasoning in *Ostapowich* is applicable. The Hawco Order is more than just a mere agreement between Suzanne Fisher and Morris Fisher; it represents a final determination of their respective interests in the Haysboro property as sanctioned by this Court.

67 I decline to exercise any residual discretion I might have in this matter so as to allow Georgette Fisher to collaterally attack the Hawco Order. Accordingly, Morris Fisher's interest in the Haysboro property remains set at \$45,000.00.

68 Morris Fisher in his evidence indicated he was quite prepared to share one-half that amount with Georgette Fisher and accordingly I award her the sum of \$22,500.00 representing her claim to Morris Fisher's interest in the Haysboro property. This may be paid by way of the funds currently held in Ms. Castle's trust account.

69 If I am incorrect in my finding above, then Georgette Fisher is entitled to bring an application pursuant to Section 10 of the *Matrimonial Property Act*. That section provides as follows:

10(1) When an application has been made for a matrimonial property order and the Court is satisfied that

(a) a spouse has

(i) transferred property to a person who is not a bona fide purchaser for value, or

- (ii) made a substantial gift of property,
 - (b) the spouse making the transfer or gift did so with the intention of defeating a claim that the other spouse may have under this Part,
 - (c) the transferee or donee accepted the transfer or gift when the transferee or donee knew or ought to have known that the transfer or gift was made with the intention of defeating a claim a spouse may have under this Part, and
 - (d) the transfer or gift was made not more than one year before the date on which either spouse commenced the application for the matrimonial property order,
- the Court may do any one or more of the things referred to in subsection (2).
- (2) If subsection (1) applies, the Court may do any one or more of the following:
- (a) order the transferee or donee to pay or transfer all or part of the property to a spouse;
 - (b) give judgment in favour of a spouse against the transferee or donee for a sum not exceeding the amount by which the share of that spouse under the matrimonial property order is reduced as a result of the transfer or gift;
 - (c) consider the property transferred or the gift made to be part of the share of the spouse who transferred the property or made the gift, when the Court makes a matrimonial property order.
- (3) For the purposes of this section, the value of the property transferred or the gift shall be the market value at the time of the trial.
- (4) If a spouse applies for an order under subsection (1), the applicant shall serve the transferee or donee with notice of the application and shall include the allegations made and the nature of the claim of the applicant as it affects the transferee or donee.
- (5) A transferee or donee who is served with notice under this section is deemed to be a party to the application for the matrimonial property order as a defendant with respect to any allegation or claim that affects the transferee or donee.

70 In his oral argument on March 7, Mr. Ouellette argued that his client should be entitled to a judgment against Suzanne Fisher in an amount of approximately \$100,000.00.

71 The onus is upon Georgette Fisher to satisfy this Court on a balance of probabilities, that all the criteria set forth in Section 10(1)(a) through (d) have been met in this case.

72 In my view, she has failed to do so. In particular, she has failed to establish that Suzanne Fisher is a person "... who is not a bona fide purchaser for value...".[FN14]

73 Although David Vallance was called as a witness regarding the negotiations at the Judicial Dispute Resolution meeting, he declined to give any evidence on the actual negotiations citing confidentiality concerns. His position was not challenged by counsel.

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74 What we do know is that Suzanne Fisher was advancing a claim in the Haysboro action to obtain Morris Fisher's entire interest in the Haysboro property. The Statement of Claim filed in the Haysboro action does not specifically seek any relief pursuant to the provisions of Part 3 of the *Law of Property Act* R.S.A. 2000, c L-7.

75 However, paragraphs 3 and 4 of the preamble to the Hawco Order state:

And Upon Noting that there is a Certificate of Lis Pendens filed by or on behalf of Georgette Hilda Fisher in consequence of proceedings having Court of Queen's Bench Action No. 4801-118213 relating to the marriage of the Defendant Morris Stanley Fisher to the said Georgette Hilda Fisher and certain property claims which arise therein;

And Upon Canvassing all of the issues before the Court as between the parties Morris Stanley Fisher and Suzanne [sic] Arlene Fisher including any and all claims for set off or adjustment whether pursuant to the Divorce Act, or pursuant to the Law of Property Act or otherwise;

76 This Court has no real way of knowing whether given the perceived strengths and weaknesses of the respective claims of Suzanne Fisher and Morris Fisher, whether the \$45,000.00 paid by Suzanne Fisher to acquire Morris Fisher's interest in the Haysboro property was such that she would not be considered "a bona fide purchaser for value". That said, we do have Suzanne Fisher's evidence that she felt that she should not have had to pay anything under the circumstances, but did pay the sum of \$45,000.00 to be rid of the matter.[FN15]

77 In his argument, Mr. Ouellette placed great emphasis upon the following statement made by Morris Fisher in his Settlement Conference Memorandum #2, dated November 20, 2005, and which Mr. Ouelette had cross-examined Morris Fisher on at trial:

Susanne [sic] Fisher on July 31, 2005 or August 1, 2005 called me and requested that I transfer the property over to her to prevent Mr. Ouellette and Mrs. Georgette Fisher from taking my share and that once the title was transferred and my legal action was over with Mr. Ouellette and Georgette Fisher, Susanne [sic] Fisher would pay me my share. [FN16]

78 In her direct testimony at trial, Suzanne Fisher denied making that statement attributed to her by Morris Fisher. Plaintiff's counsel objected to Suzanne Fisher's evidence on this point stating that Morris Fisher had not been cross-examined at trial regarding this statement and cited the rule in *Browne v. Dunn*.

79 Briefly put, the rule in *Browne v. Dunn* [(1893), 6 R. 67 (U.K. H.L.)] stipulates that if a cross-examiner intends to impeach the credibility of a witness by means of extrinsic evidence, he or she must give that witness notice of this intention. Generally, this is accomplished by confronting the witness in cross-examination with the evidence in question. In point of fact, Ms. Castle did cross-examine Morris Fisher on this alleged agreement between himself and Suzanne Fisher and he denied such an agreement existed. Suzanne Fisher's evidence is properly before this Court and I accept her testimony that she did not make this statement as alleged by Morris Fisher in his Settlement Conference Memorandum quoted in paragraph 77 above.

80 Therefore, to re-iterate, I find that Georgette Fisher has failed to discharge the onus upon her to establish her claim pursuant to Section 10(1) of the *Matrimonial Property Act*.

81 In the event that I am incorrect in my above analysis, Georgette Fisher would be entitled to make a claim as against Morris Fisher's entire interest in the Haysboro property.

82 Morris Fisher's interest in the Haysboro property, vis a vis Georgette Fisher, is Section 7(2) property since he had

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purchased the Haysboro property while still married to Suzanne Fisher and prior to his marriage to Georgette Fisher. As a result, there is no presumption of equal sharing as between Georgette Fisher and Morris Fisher. Rather, this Court is to distribute the property in a manner "... that it considers just and equitable."

83 At the time of trial, the Haysboro property had a fair market value of \$410,000.00 and Mr. Fisher's one-half interest therein would then have been worth \$205,000.00.

84 However, since Morris Fisher's interest in the Haysboro property is Section 7(2) property vis a vis Georgette Fisher, the market value of Morris Fisher's interest in the property as at the date of his marriage to Georgette Fisher is exempted from distribution under Section 7.

85 The best evidence before this Court as to the market value of the Haysboro property at the time of Morris Fisher's marriage to Georgette Fisher on June 21, 1969 was the purchase price paid for the Haysboro property on January 20, 1966 which was in the amount of \$13, 566.20.[\[FN17\]](#)

86 Therefore, the amount of Morris Fisher's interest in the Haysboro property available for distribution in this action would have been \$198,216.90 calculated as follows:

Fair Market Value at date of trial	\$410,000.00	
Less: Exempted Value	\$ 13,566.20	
	\$396,433.80 ÷ 2 =	\$198,216.90

87 Morris Fisher's interest in the Haysboro property played no role during his marriage to Georgette Fisher. It is true, that he was obligated to make the mortgage payments on that property pursuant to the provisions of the *Decree Nisi*. However, these payments were really in the nature of support payments for his six children who remained living with their mother, Suzanne Fisher.

88 Georgette Fisher claimed that she was unaware of Morris Fisher's obligations pursuant to the *Decree Nisi* at the time she married him. This is somewhat difficult to accept but in any event she acknowledged she found out about that obligation shortly thereafter.

89 That the father of six children had some obligation to support them should have come as absolutely no surprise to Georgette Fisher. She in effect married Mr. Fisher when he was subject to the pre-existing obligation to support his children and their mother.

90 Under the circumstances and having regard to the factors listed in Section 8 of the *Matrimonial Property Act*, it seems to me that a "just and equitable" distribution of Morris Fisher's interest in the Haysboro property would be 10% to Georgette Fisher and 90% to Morris Fisher. In particular, the fact that the Haysboro property played no role in Morris Fisher's marriage to Georgette Fisher is a "... circumstance that is relevant" within the meaning of Section 8(m) of the *Matrimonial Property Act*. Furthermore, the payments he was directed to make pursuant to the *Decree Nisi* were really in the nature of child support payments as noted above and that is also another relevant circumstance.

91 Accordingly, Georgette Fisher's interest would equate to \$19,821.69.

Conclusion

92 In conclusion, I adjudge as follows:

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a) The personal property currently in the possession of Georgette Fisher and Morris Fisher is declared to be their property solely, free and clear of any claim of the other.

b) With respect to the Tuscany condo and Morris Fisher's current condo, Morris Fisher is directed to make an equalizing payment to Georgette Fisher in the amount of \$9,750.00, the said payment to be made within 30 days of the date of this judgment. Once that payment is made, the Certificate of Lis Pendens registered by Georgette Fisher against Morris Fisher's condo is to be discharged and likewise the Certificate of Lis Pendens registered by Morris Fisher against the Tuscany condo is to be discharged forthwith.

c) With respect to Georgette Fisher's defined benefit pension and her RRSP, she is to keep these assets without any claim or deduction made in favour of Morris Fisher. Likewise, he is to keep the funds in his LIF and RIF without any claims or distribution to Georgette Fisher.

d) Morris Fisher will make an equalizing payment to Georgette Fisher in the amount of \$5,250.00 representing the value of one-half the interest in the 2004 Buick Century, to be paid within 30 days of this judgment, and thereafter he will own that motor vehicle free and clear of any claims from Georgette Fisher.

e) Georgette Fisher will receive from Morris Fisher payment in the amount of \$22,500.00 representing one-half of the value of his interest in the Haysboro property as defined by the Hawco Order, to be paid within 30 days of this judgment. Once that payment is made, the Certificate of Lis Pendens registered by Georgette Fisher against the Haysboro property is to be discharged forthwith.

93 These amounts may be paid to Georgette Fisher from the sum of \$45,000.00 currently held in trust by Ms. Castle.

94 Counsel are at liberty to speak to costs in this matter in the next 60 days.

Order accordingly.

[FN1](#) Exhibit 24

[FN2](#) Exhibit 38

[FN3](#) Exhibit 30

[FN4](#) Exhibit 8

[FN5](#) Exhibit 18

[FN6](#) Exhibit 19

[FN7](#) Exhibit 17

[FN8](#) Exhibit 20

[FN9](#) Exhibit 11

[FN10](#) Exhibit 34

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[FN11](#) Exhibit 5

[FN12](#) Exhibit 3

[FN13](#) Exhibit 39

[FN14](#) Section 10(1)(a)(ii) has no applicability to the facts of this case.

[FN15](#) Exhibit 23, page 42.

[FN16](#) Exhibit 41

[FN17](#) Exhibit 42. It is the market value of the property and not the net equity that is the exempted amount: *Carmichael v. Carmichael* (2007), 404 A.R. 144 (Alta. C.A.) at para.20

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