2009 CarswellAlta 1238, 2009 ABCA 272, [2009] A.W.L.D. 3450, [2009] A.W.L.D. 3451, [2009] A.W.L.D. 3452, [2009] W.D.F.L. 4093, [2009] W.D.F.L. 4098, [2009] W.D.F.L. 4124, 70 R.F.L. (6th) 63, 13 Alta. L.R. (5th) 1, 464 A.R. 16, 467 W.A.C. 16

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2009 CarswellAlta 1238, 2009 ABCA 272, [2009] A.W.L.D. 3450, [2009] A.W.L.D. 3451, [2009] A.W.L.D. 3452, [2009] W.D.F.L. 4093, [2009] W.D.F.L. 4098, [2009] W.D.F.L. 4124, 70 R.F.L. (6th) 63, 13 Alta. L.R. (5th) 1, 464 A.R. 16, 467 W.A.C. 16

J. (D.) v. J. (M.)

Dallas Robert Jensen (Respondent / Plaintiff) and Margerite Jensen (Appellant / Defendant) and Crowfoot Cattle Co. Ltd. (Not Party to the Appeal / Defendant)

Alberta Court of Appeal

Marina Paperny, Keith Ritter, Patricia Rowbotham JJ.A.

Heard: May 7, 2009
Judgment: August 17, 2009
Docket: Calgary Appeal 0801-0185-AC

Proceedings: varied *J. (D.) v. J. (M.)* ((2008)), 2008 CarswellAlta 845, 2008 ABQB 380, 92 Alta. L.R. (4th) 355, 54 R.F.L. (6th) 235 ((Alta. Q.B.))

Counsel: D. Castle, N. **Koul**, for Appellant

J. Boyes, Q.C., for Defendant

Subject: Family; Property

Family law --- Family property on marriage breakdown — Factors affecting equal or unequal division — Effect of conduct of spouses during marriage — Relative contribution of spouses

Parties were married in 1991 and separated in 2005 — Parties were ranchers, and their property included land and equipment used in ranching operations — Trial judge determined that relative contributions to marriage were not equal and divided most of assets in favour of husband on 70-30 basis — Wife appealed — Appeal allowed in part — Trial judge erred in his interpretation and application of Matrimonial Property Act — Trial judge failed to differentiate between exempt and non-exempt assets — Trial judge overlooked presumption of equal division in s. 7(4) of Act — Trial judge required parties' contributions to be equal on s. 8 factors before awarding equal distribution — Record did not support conclusion of exceptional circumstances sufficient to rebut presumption of equality.

Family law --- Family property on marriage breakdown — Assets which may be excluded from property to be divided — Gifts and inheritances — Alberta.

Family law --- Support — Child support under federal and provincial guidelines — Determination of spouse's annual in-

come — Shareholding spouses.

Cases considered:

Bodor v. Bodor (1988), 12 R.F.L. (3d) 425, 84 A.R. 301, 1988 CarswellAlta 326 (Alta. Q.B.) — distinguished

Buhler v. Buhler (1990), 30 R.F.L. (3d) 341, 112 A.R. 161, 1990 CarswellAlta 291 (Alta. C.A.) — distinguished

Cox v. Cox (1998), 233 A.R. 258, 1998 CarswellAlta 1080, 1998 ABQB 987 (Alta. Q.B.) — referred to

Crosby v. Crosby (2007), 2007 ABQB 31, 2007 CarswellAlta 52 (Alta. Q.B.) — referred to

Dwelle v. Dwelle (1982), 1982 CarswellAlta 349, 31 R.F.L. (2d) 113, 46 A.R. 1 (Alta. C.A.) — referred to

Elsom v. Elsom (1989), 37 B.C.L.R. (2d) 145, [1989] 1 S.C.R. 1367, [1989] 5 W.W.R. 193, 59 D.L.R. (4th) 591, 96 N.R. 165, 20 R.F.L. (3d) 225, 1989 CarswellBC 95, 1989 CarswellBC 707 (S.C.C.) — followed

Fehr v. Fehr (2003), 2003 MBCA 68, 2003 CarswellMan 182, [2003] 8 W.W.R. 440, 40 R.F.L. (5th) 71, 177 Man. R. (2d) 1, 304 W.A.C. 1 (Man. C.A.) — referred to

Harrower v. Harrower (1989), 1989 CarswellAlta 105, 68 Alta. L.R. (2d) 97, 97 A.R. 141, 21 R.F.L. (3d) 369 (Alta. C.A.) — followed

Hickey v. Hickey (1999), [1999] 2 S.C.R. 518, 172 D.L.R. (4th) 577, 1999 CarswellMan 254, 1999 CarswellMan 255, 46 R.F.L. (4th) 1, 240 N.R. 312, [1999] 8 W.W.R. 485, 138 Man. R. (2d) 40, 202 W.A.C. 40 (S.C.C.) — referred to

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

Hulleman v. Hulleman (1999), 1999 CarswellAlta 1193, 2 R.F.L. (5th) 406, 1999 ABCA 366 (Alta. C.A.) — referred to

Jackson v. Jackson (1989), 1989 CarswellAlta 106, 68 Alta. L.R. (2d) 118, 97 A.R. 153, 21 R.F.L. (3d) 442 (Alta. C.A.) — followed

L. (H.) v. Canada (Attorney General) (2005), 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 333 N.R. 1, 8 C.P.C. (6th) 199, 24 Admin. L.R. (4th) 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 8 W.W.R. 1, 29 C.C.L.T. (3d) 1, 251 D.L.R. (4th) 604, [2005] 1 S.C.R. 401 (S.C.C.) — referred to

LeBlanc v. LeBlanc (1988), 81 N.R. 299, [1988] 1 S.C.R. 217, 47 D.L.R. (4th) 1, 84 N.B.R. (2d) 33, 12 R.F.L. (3d) 225, 1988 CarswellNB 32, 1988 CarswellNB 221, 214 A.P.R. 33 (S.C.C.) — followed

M. (J.J.) v. M. (C.D.) Estate (2009), 2009 ABCA 96, 2009 CarswellAlta 366, 62 R.F.L. (6th) 164 (Alta. C.A.) — considered

Mazurenko v. Mazurenko (1981), 23 R.F.L. (2d) 113, 30 A.R. 34, 15 Alta. L.R. (2d) 357, 124 D.L.R. (3d) 406, 1981

CarswellAlta 36 (Alta. C.A.) — followed

Mazurenko v. Mazurenko (1981), 32 A.R. 612 (note), 30 R.F.L. (2d) xxxiv, 39 N.R. 539, [1981] 2 S.C.R. ix (S.C.C.) — referred to

Millhaem v. Millhaem (1981), 24 R.F.L. (2d) 44, 16 Alta. L.R. (2d) 355, 32 A.R. 157, 1981 CarswellAlta 80 (Alta. Q.B.) — distinguished

Morton v. Morton (2008), 52 R.F.L. (6th) 248, 2008 CarswellAlta 488, 2008 ABCA 144 (Alta. C.A.) — referred to

Murdoch v. Murdoch (1973), [1974] 1 W.W.R. 361, 1973 CarswellAlta 119, 13 R.F.L. 185, 41 D.L.R. (3d) 367, [1975] 1 S.C.R. 423, 1973 CarswellAlta 156 (S.C.C.) — referred to

Paddock v. Paddock (2009), 2009 CarswellOnt 1593, 2009 ONCA 264 (Ont. C.A.) — referred to

Panara v. Di Ascenzo (2005), 2005 CarswellAlta 135, 2005 ABCA 47, 42 Alta. L.R. (4th) 1, 361 A.R. 382, 339 W.A.C. 382, 16 R.F.L. (6th) 177, 13 E.T.R. (3d) 159, 250 D.L.R. (4th) 620, [2005] 9 W.W.R. 282 (Alta. C.A.) — distinguished

Pecore v. Pecore (2007), 2007 SCC 17, 2007 CarswellOnt 2752, 2007 CarswellOnt 2753, 32 E.T.R. (3d) 1, 37 R.F.L. (6th) 237, 361 N.R. 1, 224 O.A.C. 330, 279 D.L.R. (4th) 513, [2007] 1 S.C.R. 795 (S.C.C.) — followed

Rathwell v. Rathwell (1978), 1978 CarswellSask 36, 1978 CarswellSask 129, [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 83 D.L.R. (3d) 289, 19 N.R. 91, 1 E.T.R. 307, 1 R.F.L. (2d) 1 (S.C.C.) — referred to

Saylor v. Madsen Estate (2007), *(*sub nom. *Saylor v. Brooks)* 360 N.R. 327, 42 C.P.C. (6th) 1, 2007 CarswellOnt 2754, 2007 CarswellOnt 2755, 2007 SCC 18, 32 E.T.R. (3d) 61, *(*sub nom. *Saylor v. Brooks)* 224 O.A.C. 382, 279 D.L.R. (4th) 547, *(*sub nom. *Madsen Estate v. Saylor)* [2007] 1 S.C.R. 838 (S.C.C.) — followed

Shephard v. Cartwright (1954), [1954] 3 All E.R. 649, [1955] A.C. 431 (U.K. H.L.) — considered

Sparrow v. Sparrow (2006), 2006 ABCA 155, 2006 CarswellAlta 573, 26 R.F.L. (6th) 247 (Alta. C.A.) — distinguished

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

Land Titles Act, R.S.A. 2000, c. L-4

s. 106 — referred to

s. 106(1)(a) — referred to

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

Generally — referred to

s. 7 — considered

s. 7(2) — considered

s. 7(2)(a) — referred to

s. 7(3) — considered

s. 7(4) — considered

s. 8 — considered

s. 8(b) — referred to

s. 8(c) — referred to

s. 8(m) — referred to

s. 37 — referred to

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Federal Child Support Guidelines, SOR/97-175

Generally — referred to

s. 17 — referred to

Land Titles Act, R.S.A. 2000, c. L-4

Forms Regulation (Land Titles Act), Alta. Reg. 480/81

Form 7 — referred to

APPEAL by wife from judgment reported at *J. (D.) v. J. (M.)* (2008), 2008 ABQB 380, 92 Alta. L.R. (4th) 355, 2008 CarswellAlta 845, 54 R.F.L. (6th) 235 (Alta. Q.B.), distributing matrimonial property.

***Per curiam*:**

Introduction

1 In 1978, Alberta enacted matrimonial property legislation to legally recognise marriage as an economic partnership, founded on the presumption that the parties intend to share the fruits of their labour during and as a result of it, on an equal basis. The legislation filled a juridical vacuum that required courts to use equitable remedies in dividing matrimonial property, with questionable results. (See, for example, *Murdoch v. Murdoch* (1973), [1975] 1 S.C.R. 423, [1973]

S.C.J. No. 150 (S.C.C.); and *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, [1978] S.C.J. No. 14 (S.C.C.)) This appeal, 31 years after the proclamation of the *Matrimonial Property Act*, R.S.A. 2000, c. M-8 (the "*MPA*"), engages the same issue. What is meant by a fair and equitable distribution of assets acquired during marriage and what is necessary to rebut the presumption of equality?

2 The husband and wife were married for 14 years and were ranchers. Their property includes land and assets used in that operation. Most of the property was acquired during the course of their marriage. The trial judge determined that the relative contributions to the marriage were not equal and divided most of the assets unequally, a 70-30 split in favour of the husband. A portion of the assets was removed from distribution entirely on the finding of a resulting trust in favour of the husband's parents. The trial judge concluded that although the husband's parents had legally transferred property to the parties in their joint names during their marriage, the husband's parents intended to retain ownership of the property. He therefore ordered that property transferred back to the husband's parents.

3 The wife appeals.

Conclusion

4 For the reasons that follow, the appeal must largely be allowed. The trial judge erred in his interpretation and application of the *MPA*: in failing to differentiate between exempt and non- exempt assets; in overlooking the presumption of equal division in s. 7(4); in requiring the parties' contributions to be equal on the s. 8 factors before awarding an equal distribution; in finding a resulting trust; in valuing certain property; and in failing to determine guideline income in accordance with the *Federal Child Support Guidelines*, S.O.R./97-175 (*"Guidelines"*).

Background

5 The husband and wife married in July 1991 and separated in August 2005. They have joint custody of their child. The husband has been ranching with his father and brother since 1975. The wife was a dietician at the time of marriage but at the husband's request left her job to join him in the ranching operation. During the marriage she worked as a horse breeder and trainer, did some work on the ranch including bookkeeping, and assumed primary responsibility for their child.

6 A few months prior to the marriage, the husband and wife incorporated a company known as Crowfoot Cattle Company Ltd. ("CCC"), in which they were equal shareholders and into which they rolled most of their personal assets. Personal and ranching expenses went through CCC during the course of the marriage.

7 The husband commenced a divorce action in 2005. The wife commenced a separate action for relief under the *Business Corporations Act*, R.S.A. 2000, c. B-9, against the husband and CCC. The actions were consolidated. (The husband's parents were not parties to either action, nor did they commence a separate action.)

8 The assets subject to division at trial included various parcels of land, some of which had been owned by the husband prior to marriage and some of which had been acquired by the parties during the course of the marriage. Prior to the marriage, the husband owned, either solely or jointly with his brother, parcels of land known as "Myrthu", "Across the Road", and "Farm Credit". Property acquired during the course of the marriage was either put into CCC or placed in the joint names of the husband and wife. These assets include parcels of land known as the "Duthie land", "Saskatchewan land", and what will be referred to as the "Disputed Lands", comprising the "Home Half", "Pete's land", "Kaarsberg lands" and "Grandma's lands".

9 The Disputed Lands were acquired by a transfer of title from the husband's parents to the husband and wife jointly, secured by a mortgage in the amount of $455,000 and evidenced by a promissory note in favour of the parents. Shortly thereafter, the husband and wife granted a life estate to those lands in favour of the parents, which was also registered on title. The mortgage was subsequently discharged and the parties used part of those lands as security for the purchase of the Saskatchewan land by CCC.

10 The parties entered into an Interim Distribution Agreement dealing with certain of the lands prior to trial, the interpretation of which is also the subject of this appeal.

The Trial Decision

11 The trial judge found that the husband's father (the "father") did not intend to legally transfer the Disputed Lands to the husband and wife. He concluded that the Disputed Lands were the subject of a resulting trust in favour of the husband's parents and as such did not form any part of the matrimonial property.

12 The trial judge also concluded that the parties' relative contributions to the marriage and the assets acquired during it were not equal and, accordingly, it would be unfair to distribute them equally. The trial judge awarded a 70-30 split in favour of the husband. Of a possible distribution of matrimonial property totalling $2,273,738 (excluding the Disputed Lands valued at $740,000) the husband was awarded $1,819,232 and the wife $454,506. The trial judge declined to order spousal support. He set child support at $350 per month based on the husband's deemed income of $42,100 per year.

Grounds of Appeal

13 Did the trial judge err in:

1. ordering an unequal division of matrimonial property;

2. valuing CCC;

3. finding a resulting trust in favour of the husband's parents with respect to the Disputed Lands;

4. determining the interim distributions to the wife;

5. failing to award spousal support; and

6. failing to fix income in accordance with the *Guidelines* in setting child support?

Standard of Review

14 This Court has recognized that the division of matrimonial property is an exercise of discretion warranting appellate intervention only if the trial judge misdirected himself on the facts or if the decision is so clearly wrong as to amount to an injustice: *Morton v. Morton*, 2008 ABCA 144, 52 R.F.L. (6th) 248 (Alta. C.A.).

15 With respect to support orders (both spousal and child support), an appellate court is not entitled to interfere unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or the award is clearly wrong: *Hickey v. Hickey*, [1999] 2 S.C.R. 518, [1999] 8 W.W.R. 485 (S.C.C.).

Analysis

The Scheme of the Act and the Presumption of Equal Division

16 The division of matrimonial property in Alberta is governed by the *MPA*, which has not been materially amended since its enactment in 1978. Thus the early case law setting out first principles continues to govern.

17 Section 7 of the *MPA* sets out a scheme for the distribution of property between spouses. Certain property, including property acquired by a spouse before marriage, is classified as exempt from distribution under that section: s. 7(2). Any increase in the value of exempt property during the course of the marriage may be distributed in a manner that the court considers just and equitable: s. 7(3). Section 8 sets out the factors to be taken into consideration in making such a distribution.

18 Section 7(4) deals with the distribution of non-exempt matrimonial property. It sets forth a legal presumption of equal distribution. Only where, after considering the factors in s. 8, the court concludes it would be unjust or inequitable to divide the property equally may an unequal distribution of non-exempt property be made. There is no formula for applying the s. 8 factors. The presumption of equality for non-exempt property acquired during marriage is the closest the Legislature came to imposing a rule for matrimonial property distribution. (See *Dwelle v. Dwelle* (1982), 46 A.R. 1, 31 R.F.L. (2d) 113 (Alta. C.A.)).

19 In *Mazurenko v. Mazurenko* (1981), 30 A.R. 34, 124 D.L.R. (3d) 406 (Alta. C.A.), application for leave to appeal dismissed, (S.C.C.) ("*Mazurenko*"), Stevenson J.A. (as he then was) emphasized that rebutting the presumption of equal distribution is an exception to the rule of equal distribution (at para. 20):

> The court must, in my view, look at the relevant facts under s. 8 and then ask itself if it would be unjust or inequitable to divide the property equally. That conclusion would not be lightly reached. There must be some real imbalance in the contribution having regard to what was expected of each or attributable to the other factors in s. 8. In establishing the presumption I take the Legislature to have decided that in ordinary cases equality is the rule. ... The legislation introduces a discretionary system with the presumption of equal sharing, which is similar to a deferred sharing scheme with a power of adjustment. The important point is that both of these schemes recognize "... the principle that a husband and wife carry on their married life, including their economic functions, for their mutual benefit and account and according to arrangements accepted by both for that purpose. That principle, if accepted, requires that the law provide in some way for the sharing of their economic gains between the husband and wife". (p. 26) That is done by the legislation and done with the presumption of equality[.]

20 *Mazurenko* remains the law in Alberta. The presumption of equal distribution is the rule and unequal distribution the exception. The legislation is designed to protect against inequities arising from dissolution of marriage and to recognize a social and economic partnership. The respective contributions of the parties will rarely be identical or measure equally. Partners allocate expectations and responsibilities in a manner satisfactory to them. Those responsibilities may change and evolve over time. Put simply, it is *not* a requirement (nor is it a realistic view of marriage) that the contributions of each party be equal for there to be an equal division. See *Cox v. Cox*, 1998 ABQB 987, 233 A.R. 258 (Alta. Q.B.); *Hulleman v. Hulleman*, 1999 ABCA 366, 2 R.F.L. (5th) 406 (Alta. C.A.) and *Crosby v. Crosby*, 2007 ABQB 31, [2007] A.J. No. 49 (Alta. Q.B.).

21 The Supreme Court of Canada made clear in *LeBlanc v. LeBlanc*, [1988] 1 S.C.R. 217, 47 D.L.R. (4th) 1 (S.C.C.), that the presumption of equal division in matrimonial property legislation should not be disturbed lightly. The SCC specifically rejected an approach that analyzes whether the contribution of each spouse is equal in order to apply the presumption of equal distribution. La Forest J. wrote at 222-23:

> In applying [the equality] principle, courts are not permitted to engage in measurements of the relative contributions of spouses to a marriage.
>
> . . .
>
> While a court should, in the words of Galligan J. in *Silverstein v. Silverstein* (1978), 20 O.R. (2d) 185 (H.C.), at p. 200, "be loath to depart from [the] basic rule [of equal division]", it should nonetheless, as he indicates, exercise its power to do so "in clear cases where inequity would result, having regard to one or more of the statutory criteria set out in cls. (*a*) to (*f*)." This does not, as previously indicated, mean that a court should put itself in the position of making fine distinctions regarding the respective contributions of the spouses during a marriage. Nonetheless, where the property has been acquired exclusively or almost wholly through the efforts of one spouse and there has been no, or a negligible contribution to child care, household management or financial provision by the other, then, in my view, there are circumstances relating to the acquisition, maintenance and improvement of property that entitle a court to exercise its discretion under s. 7(f).

22 The Supreme Court reiterated the point in *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, 59 D.L.R. (4th) 591 (S.C.C.), at 1376-77.

23 The *MPA* is premised on a presumption of equal distribution of non-exempt property acquired during the marriage. The presumption should only be rebutted in the clearest of cases when, having regard to the s. 8 factors, it would be unjust and inequitable to make an equal division. When considering the s. 8 factors, courts should not embark upon the weighing of each party's respective contribution and make divisions of property that are proportionate to the relative contributions of each spouse. Rarely if ever will the contribution of each spouse be the same. The purpose of the legislation is to avoid microscopic analysis of the respective roles each party played to determine who did more. It is only in cases where, having regard to the factors in s. 8, it would be unjust and inequitable to have an equal division that the court should depart from the principle of equality.

Application to the Facts

24 In this case, both the husband and the wife owned property prior to marriage that the trial judge considered exempt property under s. 7(2). The husband's exemption included personal property that had been rolled into CCC upon marriage, as well as the value of land acquired before the marriage. The trial judge divided the increased value of the exempt land 70-30 in favour of the husband pursuant to s. 7(3). Notwithstanding the presumption of equal division in s. 7(4), some of the non-exempt property, including the value of CCC and the value of the Duthie land (acquired during the marriage), was also divided unequally in favour of the husband. The table below summarizes the division of assets at trial. Further details regarding the valuation and division of the various assets follow the table.

Property	*Value*	*Trial Award*	
		Wife	*Husband*
Section 7(2) Property			
Husband's exempt property	$605,800[FN1]		$605,800
Husband's exempt land (Myrthu, Across the Road and Farm Credit)	$266,550[FN2]		$266,550
Wife's exempt property	$67,500[FN3]	$67,500	
Section 7(3) Property			

Increased value of land owned by husband prior to marriage (Myrthu, Across the Road, and Farm Credit)	$847,538	$254,261 (30%)	$593,277 (70%)
Section 7(4) Property			
Crowfoot Cattle Company Ltd. (CCC)	$945,000	$48,350 (17.8%)	$223,350 (82.2%)
Lands acquired during marriage (Duthie land)	$114,650	$34,395 (30%)	$80,255 (70%)
Other property	$100,000	$50,000 (50%)	$50,000 (50%)
Disputed Lands			
Home Half, Pete's land, the Kaarsberg lands and Grandma's lands	$740,000	0	0
Total (excluding Disputed Lands and exemptions in the amounts of $605,800 and $67,500)	*$2,273,738*	*$454,506 (20%)*	*$1,819,232 (80%)*
Total (including Disputed Lands but excluding exemptions in the amounts of $605,800 and $67,500)	*$3,013,738*		

25 The trial judge valued interim distributions of property to the wife at $602,000, an amount that exceeded the value of her portion of the matrimonial property. He therefore made no order for further distributions to either party.

26 As noted above, CCC, the "Duthie land" and "other property" are all non-exempt assets and therefore subject to the presumption of equal division under s. 7(4). The trial judge concluded that the Duthie land should be divided on a 70-30 basis in favour of the husband. CCC was valued at $770,000. An additional sum of $175,000, representing the proceeds of sale of cattle, legally formed part of CCC, but the trial judge carved out that value and awarded the husband all of it. He also deducted from the value of CCC exemptions claimed by both parties, although the claimed exempt assets had been rolled into CCC at the time of its incorporation and were treated as assets of that company throughout the marriage. The trial judge found that there was sufficient evidence to link the original exempt assets to the existing assets. He granted the husband an exemption of $605,800, representing the value of the husband's cattle and equipment at the time of marriage. He declined to deduct the $200,000 debt owed by the husband on those assets. The wife's exemption was $67,500. The remaining value of CCC, after deducting exemptions and the cattle sale proceeds, were divided equally. However, the trial judge's separate treatment of the $175,000 cattle sale proceeds had the effect of distributing 82.2% of the value of CCC to the husband and only 17.8% of its value to the wife. The "other property", valued at $100,000, was divided equally.

27 In making his unequal distribution of assets, the trial judge found that it would be inequitable to distribute property equally. He stated at para. 64:

> The cases above reflect the reality that the contribution of each spouse is not always equal, and matrimonial property should not be divided based on the fiction that it is.

28 He also stated at para. 25, "The underlying consideration in property distribution under section 7 is that distribution be in a manner that is just and equitable."

29 The first statement in para. 64 is incorrect. The law does not require an equal contribution for property to be divided equally. Moreover, the statement in para. 25 makes clear that the trial judge failed to distinguish between exempt

and non-exempt assets; he overlooked the presumption of equal distribution of s. 7(4) property and instead focussed solely on what he considered just and equitable.

30 In doing so, the trial judge engaged in a detailed examination of the relative contributions to the marriage. For example, when assessing the wife's contribution, he considered it relevant that she occasionally had domestic help in the house. He did not consider it relevant that the husband had help with the ranch. The trial judge noted that the wife's contribution in raising the couple's son was a contribution of considerable weight, but remarked that the husband was also very devoted, suggesting that this diminished or neutralized the wife's contribution.

31 Section 8 delineates a number of factors that inform the exercise of discretion. The trial judge identified several and concluded that the husband had done most of the ranching and that the property acquired during the marriage was largely a result of the husband being a rancher or a result of the husband's ranching background. He placed considerable emphasis on this factor and appears to have weighed it several times. In his consideration of subsections 8(c) and 8(m) of the *MPA*, the trial judge reached the same conclusion as under subsection 8(b). The reasons suggest that these factors, albeit significant, were determinative of relative contribution under at least three or four s. 8 factors. These factors also weighed heavily in the decision to allow the husband an exemption of $605,800 for the property that he brought to the marriage.

32 The husband drew support for an unequal division from *M. (J.J.) v. M. (C.D.) Estate*, 2009 ABCA 96, 62 R.F.L. (6th) 164 (Alta. C.A.), (*M. (J.J.)*), affirming a trial decision that awarded the wife 22% of the matrimonial property. The wife in that case was "plagued by drug and alcohol addiction throughout the marriage", and as a result "made little contribution to the marriage" (at para. 2). Counsel acknowledge those are not the facts here. Slatter J.A. for the Court in *M. (J.J.)* described the case as not only tragic, but "out of the ordinary and exceptional" (at para. 6).

33 In addition, the trial judge relied on *Sparrow v. Sparrow*, 2006 ABCA 155, [2006] A.J. No. 513 (Alta. C.A.); *Millhaem v. Millhaem*, [1981] A.J. No. 565, 32 A.R. 157 (Alta. Q.B.); *Bodor v. Bodor*, [1988] A.J. No. 147, 84 A.R. 301 (Alta. Q.B.); *Buhler v. Buhler*, [1990] A.J. No. 1058, 112 A.R. 161 (Alta. C.A.); and *Panara v. Di Ascenzo*, 2005 ABCA 47, [2005] 9 W.W.R. 282 (Alta. C.A.).

34 The facts of these decisions make them readily distinguishable. For example, in *Sparrow* the property was s. 7(3) property, acquired prior to the marriage. In *Millhaem*, the wife had much less involvement in the ranching operation than the case at bar. Nevertheless, the court divided the matrimonial property 60-40 in favour of the husband.

35 In *Panara*, the trial judge distributed investment properties acquired during the marriage through the parties' corporation 75-25 in favour of the husband. Profits from the family restaurant business, in which both spouses worked, were used to buy the investment properties. This Court held that the trial judge had significantly undervalued the wife's contribution to the family's welfare. Accordingly, this Court directed equal sharing in the value of the assets acquired from the restaurant profits.

36 With respect to s. 7(4) property, the law remains as set out in *LeBlanc* and *Elsom*. The division of property begins with the presumption of equal division. The question to be asked is whether there is some real imbalance in the contributions having regard to what was expected of each. In unusual and exceptional circumstances (such as those found in *M. (J.J.)*), it will be unjust and inequitable to divide matrimonial property equally.

37 These errors in principle informed the division of property. Had the trial judge properly approached the task with a view to the purpose and structure of the *MPA*, and the presumption of equality for non-exempt assets, he would not have reached the same conclusion. The record does not support a conclusion of exceptional circumstances sufficient to

rebut the presumption of equality here. Accordingly, the Duthie Land and the value of CCC ought to be divided equally.

38 The trial judge valued CCC at $770,000, excluding disposition costs and the proceeds of a 2006 cattle sale, and then awarded the wife 50% of the value of CCC remaining after the parties' exemptions had been deducted (i.e., $48,350). The wife argues that disposition costs in the amount of $648,189 (comprised of commission fees and the sale of depreciable assets, and corporate income tax for the future disposition of the company's assets) should be added back to the value of CCC. The trial judge did not explain his valuation of CCC at $770,000. He appears to have accepted the evidence of the husband's expert that disposition costs should be deducted when valuing the business. Given this evidence and the standard of review, we are prevented from intervening.

39 The evidentiary basis upon which the trial judge granted the entire $175,000 cattle sale proceeds to the husband is problematic. The trial judge recognized that the sale proceeds formed part of CCC's income but chose to distribute them separately, giving the proceeds entirely to the husband on the basis that the sale was a result of his efforts. The evidence indicated that the ultimate proceeds were higher than expected because of the market price of cattle. The trial judge did not consider that the sale and its proceeds was legally part of CCC, nor did he consider that CCC is non-exempt property under s. 7(4). The wife was precluded from being involved in the operation of CCC at the time of the sale, another factor that the trial judge appears to have overlooked. There is no legal basis for removing the sale proceeds from the valuation of CCC. We direct that the sum of $175,000 be added to the $770,000 value of CCC identified by the trial judge, for a total of $945,000.

40 The value of CCC is to be divided equally between the parties. Deducting the parties' respective exemptions of $605,800 and $67,500 leaves a balance of $271,700. Half of that amount is $135,850.

41 The presumption of equal division does not apply to s. 7(3) property, in this case the parcels of land known as Myrthu, Across the Road and Farm Credit. The trial judge divided the increased value of these properties 70-30 in favour of the husband. While we may not have placed such a heavy emphasis on the factors relied upon to come to this award, we discern no error in principle warranting our intervention on apportionment.

Resulting Trust

42 The trial judge excluded all of the Disputed Lands from the division by finding that those lands were the subject of a resulting trust in favour of the husband's parents. Whether the presumption of resulting trust applies and whether it has been rebutted are questions of mixed fact and law turning on whether there was a gratuitous transfer and whether a gift was intended. As such, the trial judge's interpretation of the evidence as a whole should not be overturned absent palpable and overriding error, or a fundamental mischaracterization, or misapprehension of the evidence: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 10-18 and 36; *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.), at paras. 52-76.

43 The husband's pleadings do not make any claim in relation to a resulting trust. His Amended Statement of Claim pleads exemptions under s. 7(2) for property owned by him or his family before the marriage, or acquired by gift or by inheritance during the marriage.

44 The husband's parents are not parties to this action and have not brought a separate action for a declaration of resulting trust. No relief is sought by them. Technically, the pleadings would not permit the relief ultimately granted, an order transferring the lands in the names of the parties to the husband's parents. Despite this, the trial judge accepted the argument that the transfer of the Disputed Lands to the parties jointly was not intended to effect a legal transfer of the parents' interest to their son and his wife. Accordingly we turn to a consideration of the law of resulting trust, the circum-

stances, documentation and evidence surrounding the transfer, and the debt arising therefrom.

45 The Supreme Court of Canada elaborated on the law of resulting trusts in the context of joint bank and investment accounts in *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795 (S.C.C.) ("*Pecore*") and *Saylor v. Madsen Estate*, 2007 SCC 18, [2007] 1 S.C.R. 838 (S.C.C.) ("*Madsen*"). A resulting trust arises when property is in one party's name, but that party is under an obligation to return it to the original title owner because of a fiduciary duty or because the party holding the property gave no value for it. The presumption of resulting trust is a rebuttable presumption of law that applies if there is insufficient evidence to displace the presumption. The presumption may be relevant where there has been a gratuitous transfer and where evidence as to the transferor's intention is unavailable or unpersuasive: *Pecore* at para. 23. Because equity presumes bargains, not gifts, the presumption of resulting trust has the effect of placing the burden on the transferee to demonstrate that a gift was intended where a transfer has been made without consideration: *Pecore* at para. 24. As Rothstein J. observed for the majority in *Madsen*, the clearer the evidence in the documents, the more weight that evidence should carry: para. 21.

46 To determine if there was a resulting trust here, the trial judge was obliged to consider whether the transfer in question was gratuitous and, if so, whether the presumption of resulting trust was rebutted. If the transfer was not gratuitous no resulting trust could arise.

Application to the Facts

47 In 1994, the husband's parents, with the benefit of legal advice, decided to transfer the Disputed Lands to the husband and wife jointly for estate planning purposes and in order to take advantage of the capital gains exemption. On September 15, 1994, the parents, the husband and the wife executed an agreement to transfer the lands from the joint names of the parents to the husband and wife jointly for $455,000. The husband and wife signed a promissory note acknowledging their indebtedness to the parents and the obligation to pay interest at the rate of 8% per annum. They granted a mortgage to the parents to secure the debt. Thereafter, the husband and wife entered into an Interest Reduction Agreement, reducing the interest payable under the mortgage and the promissory note to 0% per annum. Contemporaneously, the parents had wills prepared that provided for the forgiveness of the debt owing by the husband and wife.

48 An Amending Agreement was entered into by the same parties on January 12, 1995, granting the husband's parents a life estate in the Disputed Lands as well as the right to receive all payments made pursuant to surface lease agreements. The life estate was registered against title along with the mortgage in January 1995.

49 The transfer, the mortgage and the promissory note establish a transfer of property for the value of $455,000, as required by the provisions of the *Income Tax Act*, S.C. 1985, c. 1 (5th Supp.).

50 The trial judge, however, accepted the evidence of the husband, largely corroborated by his father, that the transfer documents did not reflect the husband's parents true intentions. The husband testified and the trial judge accepted that the property always belonged to his parents and he always considered it theirs. The father testified that while he executed all of the documents, he did not intend to transfer the property to the parties, although in cross-examination he acknowledged that transferring the property to the parties in joint names was a mistake in retrospect because of the parties' subsequent divorce. The wife testified that she always believed that the property was the parties' and treated it as a legal transfer. The husband's mother did not testify.

51 The trial judge found that no payments were ever sought from the parties in connection with the mortgage and that none were made. He also found that the promissory note was never paid and that the husband's parents continued to pay the property taxes. He found that rental payments by the parties and crop sharing on the land were consistent with

continued ownership of the land by the husband's parents, and did not constitute consideration for the transfer of the Disputed Lands.

52 In 2003, the mortgage on the properties was discharged. The trial judge rejected the wife's argument that the discharge was evidence of repayment. He found that no mortgage payments were ever made and that the sole purpose of the discharge was to enable the husband and wife to obtain a bank loan to finance the purchase of the Saskatchewan land which was acquired by their company, CCC. He found that because no payments were ever made, the transfer of the Disputed Lands was gratuitous and therefore the presumption of resulting trust arose.

53 The trial judge did not discuss, nor does he appear to have considered, the following matters in reaching this conclusion: that the transfer of the Disputed Lands was part of an estate freeze, the terms of the documents themselves, the timing of the transfer and the subsequent granting of a life estate, and the discharge of the life estate and the mortgage. The trial judge accepted the husband's evidence that he and his parents thought the parents retained ownership of the land but he did not address the conflict between that evidence and the documentation or other contradictory evidence suggesting that the husband and wife owned the land, not the parents. In particular, the trial judge overlooked the following: that the matrimonial home was on the Disputed Land, that the husband's parents played no role in the interim order regarding possession of the matrimonial home (part of the Disputed Lands), and the evidence of the husband that it was because of the wife's desire to keep the home quarter free and clear of encumbrances that the parcel did not form part of the security for the land obtained by CCC (as did the rest of the Disputed Lands and other property of the parties).

54 The parties and the husband's parents were familiar with registration and discharge of mortgages. The prescribed form used to discharge a mortgage under s. 106 of the *Land Titles Act*, R.S.A. 2000, c. L-4, requires that the mortgagee acknowledge that the debt has been paid.[FN4]

55 The claim of resulting trust in these circumstances must be viewed with a degree of caution. This is not a case where the intention of the transferors cannot be discerned from the document, nor are the transferors deceased. We recognize that evidence of intention subsequent to transfer is not automatically excluded if it fails to comply with the rule in *Shephard v. Cartwright* (1954), [1955] A.C. 431 (U.K. H.L.), that subsequent declarations are admissible as evidence only against the party who made them: *Pecore* at para. 59. However, the following observation in the same paragraph of *Pecore* must also be borne in mind:

> Such evidence, however, must be relevant to the intention of the transferor at the time of the transfer: *Taylor v. Wallbridge* (1879), 2 S.C.R. 616. The trial judge must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention.

A court should be wary of evidence that is self-serving when a resulting trust is asserted by one spouse, in order to defeat a matrimonial property claim.

56 The trial judge did not address the terms of the documents, nor did he attempt to discern any intention from them, although the father and the husband testified that it was to effect an estate freeze. He disregarded them in favour of oral evidence contradicting the documents. The effect of documents used in estate freezes ultimately challenged in matrimonial disputes has not always received consistent treatment. (See for example, *Fehr v. Fehr*, 2003 MBCA 68, 40 R.F.L. (5th) 71 (Man. C.A.) and *Paddock v. Paddock*, 2009 ONCA 264, [2009] O.J. No. 1258 (Ont. C.A.).) The documents here are unequivocal as to their intent and legal effect. Moreover, this was the position taken by the parties with the Canada Revenue Agency. To effect an estate freeze, the transaction required consideration and consideration was given. The parties granted a mortgage and promissory note to guarantee the debt in an amount that reflected the then market value.

57 The Interest Reduction Agreement entered into coincident with the transfer of the Disputed Lands expressly recognized the husband and wife as "the only beneficial owners" of the land. After their separation, the parties provided the family accountant with information about their assets so that she could prepare personal net worth statements. Those statements include the Disputed Lands as matrimonial property.

58 The finding that the transfer was gratuitous is not supportable and is reversible error.

59 However, the trial judge found that the indebtedness of $455,000 remained outstanding. There was some evidence to support this finding. Accordingly, the forgiveness of that debt could reasonably be characterized as a gift (arguably to both parties). In an effort to avoid further litigation, the wife submitted before us that the Court could treat the forgiveness of the debt evidenced by discharge of the mortgage in 2003 as a gift to the husband which the husband chose to share jointly with the wife.

60 In the circumstances of this case, we agree that the forgiveness of the debt of $455,000 was a gift to the husband from his parents which he shared with his wife. As a gift from a third party, the amount of the debt is exempt property under s. 7(2)(a) of the *MPA*. However, where one spouse has shared exempt property with the other spouse, the half that has been shared is treated as matrimonial property subject to the presumption of equal division under s. 7(4) of the *MPA*: *Harrower v. Harrower* (1989), 68 Alta. L.R. (2d) 97, [1989] A.J. No. 629 (Alta. C.A.), ("*Harrower*"), and *Jackson v. Jackson* (1989), 68 Alta. L.R. (2d) 118, [1989] A.J. No. 630 (Alta. C.A.), ("*Jackson*"). Here the parties used the proceeds jointly to purchase land in the name of CCC for their joint advantage.

61 Applying *Harrower* and *Jackson*, the husband is entitled to 75% of that amount ($341,250) and the wife is entitled to 25% of that amount ($113,750). The parties agreed that the value of the Disputed Lands at trial was $740,000. The difference between the value at trial and the amount already allocated in respect of debt forgiveness is the sum of $285,000 ($740,000 - $455,000). That sum is to be distributed equally between the parties (i.e., $142,500 each).

Interim Distributions

62 The wife challenges the trial judge's failure to apply the Interim Distribution Agreement between the parties regarding the value of the Myrthu property. She also takes issue with the characterization of amounts that she received from CCC as income.

63 The parties agreed that one of the parcels of land that the husband had owned prior to the marriage (the Myrthu property) would be transferred to the wife and that she would be provided with funds from CCC in order to build a home on that property. This was reflected in an Interim Agreement which provided:

> 1. The parties shall take steps to immediately transfer [the Myrthu property] to [the wife] as an interim matrimonial property distribution, as provided by paragraph 5 of the Interim Order of the Court of Queen's Bench dated June 8, 2006;
>
> 2. [The wife] acknowledges a credit of $250,000.00 towards her share of the final division of matrimonial property between the parties as a result of this transfer of property, or such sum to be adjusted to the amounts expended to the date of transfer by [CCC] for the construction of improvements on the property. The expended sum shall be added to the bare land value of $138,536.60 [as per the Harriman Report - July 31, 2005] to arrive at an adjusted sum.

64 The amount of $97,000 was advanced to the wife as an interim distribution for the purpose of building her home

on the Myrthu property. The sum of $97,000 was reflected in the T5 prepared for the wife by the family's accountant as a dividend. Consequently it was included in income.

65 The husband argues that the Interim Agreement sets out a floor only and does not set the amount at which the interim distribution was to be valued. He argued that the Interim Agreement was without prejudice to the value of the Myrthu property. The trial judge accepted that.

66 However the Interim Agreement was not without prejudice. It met the requirements of s. 37 of the *MPA* and was therefore binding.

67 In accordance with the parties' agreement, the interim distribution to the wife in respect of the Myrthu property should have been valued at $235,536.60 (the sum of the $97,000 spent for improvements on the land and the bare land value as agreed of $138,536.60).

68 The wife further argues that the Agreement contemplated that the $97,000 was to be paid by CCC and not by the wife. We agree. However, that does not change the value of the interim distribution, but rather, means that CCC should revise its reporting of the wife's draws to reflect the amount of $97,000 as an expense of CCC rather than as a dividend to the wife.

69 The husband concedes that the sum of $35,900 that was treated as property should be considered as payments for the wife's support and accordingly should not be included as part of her interim property distribution. As we have not been directed to anything on the record that indicates an error on the part of the trial judge in treating the balance of the $74,727 as a property distribution, we decline to interfere with the remaining sum of $38,827.

70 The interim distributions to the wife should therefore be adjusted to $235,536.60 plus $38,827, for a total of $274,363.60.

Spousal Support

71 In argument, the wife conceded that if she received the matrimonial property she was seeking, she did not require spousal support. In light of the division of matrimonial property that we have directed above, there is no basis to interfere with the trial judge's decision not to order spousal support.

Child Support

72 The husband has been paying interim child support in the amount of $350 per month as determined by the case management order of Hawco J. dated May 31, 2007. That order provided that the amount of child support and retroactive child support were subject to review at trial. The monthly support amount was based on deemed annual income of $42,100. The trial judge maintained that order and found no retroactive support owing.

73 The wife argues that the trial judge failed to assess the husband's income in accordance with the *Guidelines* as he was required to do, and that the husband's annual income should be $85,396.66 for the purpose of child support. The husband's income was $17,332 in 2005 and $64,613.99 in 2006. In 2007, his taxable income was $174,244. The amount of $85,396.66 suggested by the wife reflects an averaging of the husband's income for 2005, 2006 and 2007, as contemplated by s. 17 of the *Guidelines*. Failure to determine income in accordance with the *Guidelines* is an error in principle.

74 The trial judge did not consider the husband's tax returns in fixing income and chose to rely on the deemed income in the previous order. This was in error. The husband's income should be set at $85,396.66 for the purpose of de-

termining child support in accordance with the *Guidelines*. The amount of monthly child support based on an annual income of $85,396.66 should go back to May 1, 2007, the date at which support began under the order of Hawco J.

Summary

75 The trial judge erred in failing to divide the s. 7(4) property equally, namely CCC and the Duthie land, in excluding the cattle sale proceeds from the value of CCC, and in removing the Disputed Lands from distribution by the finding of a resulting trust. In light of our conclusions on the various grounds of appeal, the division of property will be varied to reflect the following award to the wife:

Property	**Value**	**Trial Award**		**Appeal Award**	
		Wife	**Husband**	**Wife**	**Husband**
Section 7(2) Property					
Husband's exempt property (deducted from value of CCC)	$605,800		$605,800		$605,800
Husband's exempt land (Myrthu, Across the Road and Farm Credit)	$266,550		$266,550		$266,550
Wife's exempt property (deducted from value of CCC)	$67,500	$67,500		$67,500	
Section 7(3) Property					
Increased value of land owned by husband prior to marriage (Myrthu, Across the Road, and Farm Credit)	$847,538	$254,261 (30%)	$593,277 (70%)	$254,261 (30%)	$593,277 (70%)
Section 7(4) Property					
CCC	$945,000	$48,350 (17.8%)	$223,350 (82.2%)	$135,850 (50%)	$135,850 (50%)
Duthie land	$114,650	$34,395 (30%)	$80,255 (70%)	$57,325 (50%)	$57,325 (50%)
Other property	$100,000	$50,000 (50%)	$50,000 (50%)	$50,000 (50%)	$50,000 (50%)
Disputed Lands					
Home Half, Pete's land, the Kaarsberg lands and Grandma's lands	$740,000	0	0	$113,750 (25% of forgiven debt)	$341,250 (75% of forgiven debt)
				$142,500 (50% of balance)	$142,500 (50% of balance)
Sub-total before deducting interim distributions	**$2,273,738 [excluding Disputed Lands]**	**$454,506 (20%)**	**$1,819,232 [excluding Disputed Lands] (80%)**	**$821,186 (27.24%)**	**$2,192,552 (72.76%)**

	$3,013,738 [including Disputed Lands]				
Interim distributions		($602,000)	not specified	($274,363)	not specified
Total after deducting interim distributions		**($147,494)**	**$1,819,232**	**$546,823**	**$2,192,552**

Note: figures are rounded to the nearest dollar.

76 For the purpose of child support, the husband's annual income is set at $85,396.33.

77 The appeal is allowed in part.

Costs

78 The wife was ordered to pay double costs at trial. Given the result on appeal, the parties have leave to make submissions as to costs within 30 days of the release of these reasons by way of written submissions not to exceed three pages.

> I, [...], (the mortgagee, encumbrancee or transferee, as the case may be) do hereby acknowledge to have received all the money (or the sum of [...] dollars, being part of the money,) to become due under the mortgage (or encumbrance) made by [...] to [...] which mortgage (or encumbrance) was registered in the Land Titles Office as instrument number [...], that the mortgage (or encumbrance) has not been transferred, and that the same (or, in the case of a partial discharge, the land legally described as (include legal description)) is wholly discharged (or discharged as to the sum of [...] dollars).

Appeal allowed in part.

FN1 Value deducted from CCC in calculation of net value of CCC to distribute between parties.

FN2 This amount is obtained by deducting the increase in value ($847,538) from the total value of these properties at trial ($1,114,088).

FN3 Value deducted from CCC in calculation of net value of CCC to distribute between parties.

FN4 Section 106(1)(a) of the *Land Titles Act*, R.S.A. 2000, c. L-4, provides that the Registrar shall discharge a mortgage on the production to the Registrar of a discharge in the prescribed form signed by the mortgagee. Pursuant to the *Forms Regulation (Land Titles Act)*, Alta. Reg. 380/1981, Form 7, Receipt or Discharge by Mortgagee or Encumbrancee, is the form prescribed for purposes of s. 106 of the Act. Form 7 provides:

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