2009 CarswellOnt 3895
Ontario Superior Court of Justice

Gilliland v. Gilliland

2009 CarswellOnt 3895, [2009] W.D.F.L. 4855, [2009] W.D.F.L. 4856, [2009] W.D.F.L. 4880, [2009] W.D.F.L. 4894, [2009] W.D.F.L. 4913, [2009] W.D.F.L. 4935, [2009] W.D.F.L. 4939, [2009] O.J. No. 2782, 178 A.C.W.S. (3d) 621, 72 R.F.L. (6th) 88

Christina Leslie Gilliland (Applicant) and Brent Robert Gilliland (Respondent)

McWatt J.

Heard: January 27-28, 30; February 3-6, 18, 20, 23-27; March 2-3, 9-10, 13, 2009
Judgment: July 3, 2009
Docket: 06-FS-320885FIS

Counsel: Nicole Tellier, Alex Finlayson, for Applicant
Andrea Di Battista, for Respondent

Subject: Family; Contracts; Property

Related Abridgment Classifications

Family law
III Division of family property
III.5 Assets which may be excluded from property to be divided
III.5.d Business and employment assets
III.5.d.i General principles
III.5.d.i.G Ontario

Family law
III Division of family property
III.6 Valuation of specific assets
III.6.g Real property
III.6.g.i General principles

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IV.1 Spousal support under Divorce Act and provincial statutes
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Family law
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Family law
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V.2 Validity
V.2.a Essential validity and capacity
V.2.a.iv Non est factum and lack of understanding

Headnote

Family law --- Domestic contracts and settlements — Validity — Essential validity and capacity — Non est factum and lack of understanding
Parties met in 1989, married in 1995, had one child and separated in 2006 — Just weeks before they married, parties entered into marriage agreement providing that property acquired during marriage be split on equal basis upon breakdown of marriage — Friend of wife's prepared document, which she claimed was prepared for discussion purposes only — Neither party had money or assets when they met, and acquired three properties with substantial worth over course of relationship — Both parties worked as pilots for major American airlines — Wife brought application for order setting aside marriage agreement — Application granted — Parties did not understand nature or consequences of agreement — Agreement was overly broad and did not accord with parties original intentions.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Lump sum award — Factors to be considered — Respondent unlikely to make periodic payments

Family law --- Support — Child support under federal and provincial guidelines — Income over $150,000

Family law --- Support — Child support under federal and provincial guidelines — Determination of award amount — Child care expenses

Family law --- Family property on marriage breakdown — Assets which may be excluded from property to be divided — Business and employment assets — General principles — Ontario

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

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Entitlement — Means of spouses

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APPLICATION by wife for various relief associated with breakdown of marriage.

***McWatt J.*:**

Introduction

1 Christina and Brent Gilliland met while learning to fly. She is Canadian. He is American. Both were in flight school in Florida in 1989. Neither had money nor assets. Today, the wife, 42 years old, and the husband, 46 years old, are employed full time in the U.S. for two major passenger airlines. They own a home in Toronto valued around $1 million. They also own

an income property in Toronto worth over $1 million and a condominium apartment in Florida worth nearly $270,000.00.

2 On May 25, 2005, the couple had a son - Parker Joseph Gilliland. Mrs. Gilliland filed for divorce from her husband on September 13, 2006. I heard no evidence about why the wife wanted to divorce her husband. Mr. Gilliland could offer no explanation in the trial as to why his wife wanted to divorce him. He does not seem to know.

3 Christina Gilliland asks that a marriage contract which she had generated in 1995, just weeks before she married her husband, be set aside and that their net family property be equally divided.

4 It is Mrs. Gilliland's position that because she and her husband borrowed money from her parents over the course of the marriage to acquire their properties and, in her words, "he did nothing to acquire all these properties", that the net effect of her claim should have all the properties vested in her. To that end, the wife also claims the equal division of money and property that Mr. Gilliland acquired from his grandmother's estate. As wealthy as this couple is, Mrs. Gilliland's claim would leave her with their acquired wealth and leave the husband with almost none of it at the conclusion of this matter.

5 In fact, although the couple borrowed money from Christina's parents, Sigrid and Stephen De Auer, all the funds were paid back to the De Auers by both parties during the course of the marriage. Both testified that they were more than happy to lend the couple money to advance themselves and expected nothing from the wife and the husband but the paying back of the loans.

6 Other than this advantageous imbalance in the couple's life together, they worked together to build their fortune.

7 The wife also asks for a lump sum award of spousal support and payment, by the husband, of nanny and day care bills for their son.

8 The issues in this trial, then, are:

1. Should the "Antenuptual Agreement" be set aside?;

2. What amount, if any, should be paid as expenses for the child pursuant to s. 7 of the *Child Support Guidelines*;

3. What is the Net Family Property?; and

4. What, if any, Spousal Support should be paid by the husband to the wife?

The Facts

1989 - 1993

9 After the couple met at school, they moved in together shortly afterwards in 1989. Although Mr. Gilliland asserted that he only began living with Christina in 1993 once a hurricane had destroyed his own apartment, I find that all the evidence in this trial leads to no other conclusion than that the parties cohabitated from 1989 onward. Although he did retain his own apartment with a roommate, the husband's mail, other personal and corporate documents, clothing and toiletries were kept at Mrs. Gilliland's parents' condominium at 400 South Pointe Drive, Suite 1102, Miami Beach, Florida.

10 The parties lived rent free at the condominium between 1989 and 1993. They drove a vehicle provided to Christina by her parents.

11 Mr. Gilliland worked part-time to maintain his flight training. He was also loaned $3,000.00 interest free from Christina's parents. He has long ago repaid this debt.

12 During this period, both parties worked diligently to accomplish their mutual goal to fly for major passenger airlines.

Both gained bachelor's degrees and Aeronautical Science diplomas from Miami Dade College, Florida.

13 Mr. Gilliland had obtained a private pilot's license before he moved to Florida. He obtained his commercial pilot's license in Florida and became a flight instructor at Tamiami Jet Center. Mrs. Gilliland also became a flight instructor at the same school, but was limited in the type of work she could do because she was in the U.S. on a student visa.

14 Mr. Gilliland also worked part-time flying surveillance for the Florida Department of the Interior as a way of gaining more flight hours and experience.

15 The couple incorporated a company called Precision Glide Aerogroup Inc. in May, 1991 in order to acquire additional multi-engine time and in order to become more marketable to the large passenger airlines.

16 In 1992, Mr. Gilliland went to work for Air Sal Airlines in Central America returning to Florida and Christina only once during his employment with the company until 1993. While in Central America, Christina managed Brent's affairs, including banking, sending him his mail and forwarding his applications for employment to airline companies such as American Eagle, United Airlines, Northwest Airlines, UPS and Fed Ex.

17 In 1993, the wife and husband were hired at American Eagle Airlines. The husband was based in Miami, Raleigh, Nashville and Dallas. The wife was based in San Juan, Puerto Rico. Except for Mr. Gilliland's base initially with American Eagle in Miami and in 1998 in Guam with Continental Airlines, neither of the parties have ever resided in or very near their bases.

1993 - 1995

401 Ocean Drive - Unit 617 - SDA

18 In 1993, the De Auers purchased a second condominium in Florida at 401 Ocean Drive, Unit 617, Miami Beach. They offered it to Brent and Christina. Once the couple moved into the new condominium, Mr. and Mrs. De Auer rented unit #1102 at 400 South Pointe, which the parties vacated, for $2,500 per month. While the parties lived at the new condominium, they lived rent free for two years. During the second year, they began to pay $250.00 per month to the De Auers. Christina testified that her parents were happy to let them live rent free. This evidence was confirmed by the De Auers.

19 The condominium was purchased by the De Auers for $130,472.77 USD. They paid $25,137.21 USD to renovate the unit.

20 Sigrid De Auer set up a U.S. corporation called SDA to hold title to this property believing that there might be a tax advantage to doing so upon her death. The company represented Sigrid and Stephan De Auer's names. Mrs. De Auer set up the corporation from a kit she purchased which was similar to the one used by the parties to set up their aeronautics company in the years past. Mrs. De Auer named herself, her husband and her three children, including Christina, as incorporators. Christina was also named as the registered agent of the condominium due to requirements of Florida law. However, no shares were ever issued by this corporation and the wife did not contribute to the purchase price of the unit.

21 Because Christina and Brent lived in the condominium, title was taken in Christina Gilliland's name in order to satisfy the occupancy requirements of the condominium board. Following the acquisition of the condominium, however, Christina signed a quit claim deed and was removed as the owner of the unit in favour of the corporation, SDA Holdings Inc.

22 In a letter dated March 19, 1993, Sigrid De Auer instructed her attorney to register title insurance for the condominium in the name of SDA Holdings, which company she intended to be the owner of the unit.

23 SDA Holdings had no other holdings nor an operating account. Sigrid de Auer prepared tax documents, the company's annual summary and she and Mr. De Auer paid for the condominium unit with their funds.

401 Ocean Drive Unit 705

24 On November 1, 1993, Christina and Brent purchased a condominium apartment for themselves at 401 Ocean Drive, Unit 705, in the building where they had been residing. They borrowed $100,452.80 USD from the De Auers who loaned them the money at the interest rate they were given by their bank. The loan money was generated by the De Auers through a mortgage of their matrimonial home in Toronto for $135,000 CDN. The parties paid nothing to the De Auers themselves, but paid the loan and interest rate acquired from the De Auer's bank in full years later in 2000. The parties have agreed the property is valued at $216,500 USD or $269,542.50 CDN.

1995-1999

25 The parties married on June 23, 1995. Mr. and Mrs. De Auer gifted the couple $50,000 by forgiving that portion of their $135,000.00 loan to the parties at the date of their marriage. The De Auers then paid the principal and interest on the $50,000.00 to their bank as part of this gift.

The "Antenuptual Agreement"

26 A few weeks before the wedding, the wife approached the husband about the signing of an agreement dealing with property and other issues. The purpose of the marriage contract was Christina's. That purpose was to protect her parents' assets from any claims from Brent Gilliland and for any money received by the wife, herself, from her parents to be considered as hers alone. The contract was signed by both the parties on June 17, 1995. It dealt with the issues of property and waivers of spousal support.

27 The contract was created by a friend of Christina Gilliland who was a commercial and insurance lawyer. Ms. R. Taylor-Symons was not retained to write up the contract and neither she nor her law firm was paid for her work. It was Ms. Taylor-Symons' evidence, which I accept, that she prepared the Antenuptual contract for discussion purposes. She expected that each of the parties would seek their own lawyer in Canada (where Mrs. Gilliland's parents owned property) and would execute it once the terms of the contract were finalized pursuant to an agreement. She was surprised to learn in the year before this trial that Brent and Christina had executed the document back in 1995. Ms. Taylor-Symons maintained throughout her testimony that the document she prepared and which was eventually executed by the parties was merely a draft contract meant to generate discussion between them.

28 Christina Gilliland testified that the Antenuptual Agreement was to protect her parents' personal assets. She maintained that the document was a boiler plate document. She agreed that she had read the document, made changes to its preamble, added "law of Canada" to cover her parents' property there, and made other changes which were all incorporated into the final document. She did not discuss the changes she had made with anyone. She did not discuss the document with her husband.

29 Mr. Gilliland's position about the Antenuptual Agreement was that the terms contained in it seemed reasonable at the time so he signed it. He had no part in drafting or making changes to the final document and saw none of the drafts that Christina changed before he signed it. Mr. Gilliland did not understand that the document was an agreement to agree later on terms nor did he believe the document was a starting point for further negotiations. Because the contract was notarized by both him and his bride-to-be, Mr. Gilliland took the contract to be final and binding. He denied knowing anything about Ms. Taylor-Symons' advice that the parties not sign the document. He maintained that Christina and the lawyer worked on the document together, he was never consulted nor spoken to about it until he was asked to sign it, which he gladly did. Mrs. Gilliland did not speak to him again about the terms of the agreement nor did she ever suggest that the contract be revisited for any changes. At the time, each had the same salary of $14,000 USD working for American Eagle Airlines.

30 The Agreement excludes from joint ownership of the couple any property that either brought into the marriage. It recognizes joint property acquired by the couple after marriage as such. Both parties waive alimony, but recognize that child support would be paid to one spouse by the other if there were children of the marriage. The Agreement acknowledges that disclosure by each party of any property owned by them at the time has been made. It sets out a provision allowing for the contract to be amended, modified or rescinded at any time after the marriage.

31 In paragraph 10 of the Agreement, each of the parties acknowledges that they understand the terms of the contract and

"waive any objection he or she may have at a later time based upon not being advised, by an attorney of his or her own selection, of the legal effect of this Agreement".

32 The Antenuptual Agreement also specifies:

> In the event of the parties' separation or a termination of their marriage, the parties intend that this Agreement be given full force and effect by any court, except to the extent that adjustments are necessary to provide appropriately for the care, education and support of any children of their marriage.

33 The Antenuptual Agreement was never an issue until the separation of the parties. Mrs. Gilliland's position now is that it should be set aside and have no force or effect in this trial.

34 After the marriage, the wife and husband continued to live in the De Auer's condominium #617 at 401 Ocean Drive while they rented their own condominium in order to pay off its mortgage. That unit, #705, is mortgage free and, as already indicated, the De Auer's loan to the parties was paid back in full.

35 By 1996, the couple purchased a house in Fort Lauderdale and moved into it. Mr. Gilliland had taken on a job with Challenge Air Cargo flying 707 aircraft and was getting closer to his goal of flying for a major passenger airline in the U.S.

36 In 1996, Mr. Gilliland got another job flying DC-8 aircraft for Fine Air Cargo and then went on to fly for Vanguard Airlines - a passenger carrier. By January 1998, the husband was hired by Continental Airlines as a Second Officer on Boeing 727 aircraft. By 1998, Mr. Gilliland accepted a position as First Officer on Boeing 737 aircraft.

37 Mrs. Gilliland worked for American Eagle as a First Officer from 1993 to 1996. In September, 1996, she was hired by Northwest Airlines and is employed by them to the present time. She could have become a captain at the airline in around 2007, but has chosen to remain a First Officer in order to be with the couple's 3 year old son, Parker.

1999 - Separation in September, 2006

38 In 1999, the couple sold their Fort Lauderdale Home and moved to Toronto. From March to December, 1999, they lived rent free at the De Auer's home on Russell Hill Road in order to save money for a home. The wife's parents have acknowledged that they were happy to help the couple, once again, to get ahead financially.

39 In December, 1999, the parties purchased their matrimonial home at 29 Rathnally Avenue in Toronto after having considered other cities in the U.S. in which to live. The home they bought was located close to Christina's parents and contained a rental unit in the basement. The couple used that rental income over the years to repay the De Auers for a $55,176.00 CDN loan the parents advanced to the couple to buy their Toronto home.

40 The De Auers loaned the parties a further $24,552.00 USD in order for them to purchase the Rathnally residence. By the end of 1999, Mr. and Mrs. Gilliland owed the De Auers $109,298.86 CDN in relation to the Miami condominium they owned and the matrimonial home they purchased in Toronto. Not long after this, however, the loan to purchase their Florida condominium from the de Auers was paid back in 2000.

The Paris Apartment - SCI De Auer

41 The husband claims an equal division of the wife's share in a family company set up in 1999 to own an apartment in Paris. In August, 1999, Stephen and Sigrid De Auer purchased the apartment, paying for 50% of it with an inheritance Mrs. De Auer had received from her family and the other 50% through bank financing. Mrs. De Auer's bridge loan to the company has never been paid back to her, but there is, now, no mortgage on the apartment. It is rented out through an agency to tourists, used by friends and the family itself. The wife and husband have used the apartment.

42 SCI was incorporated naming the De Auer's three children, including the wife, as "Associates" and lists the children as having made capital contributions in the amount of 16.000 francs each. The incorporation document for SCI also indicates that, along with their parent's contribution, the three De Auer children also own a capital base of 160 parts each of the total 1,000 parts of the company.

43 Stephen and Sigrid De Auer, however, testified that the reason a corporation had been set up naming the children was for inheritance purposes for the children and that it was they who owned the apartment, not the children. Both testified that it was they who funded the purchase of the apartment. None of the children contributed any funds to the purchase of the property nor paid to set up the company which owns it. No shares or stocks have been issued by the company. There have been no meetings of the associates and no minutes generated.

44 Their evidence was that Christina never had signing authority nor knew the company existed. She was never gifted part of the property.

45 Mr. De Auer explained that the incorporation documents included the children as well as himself and his wife in case something happened to the couple. Then, the children would be associates in the French company which had legal status in France. Otherwise, the children were non-resident and foreign citizens. They would be without legal rights to the apartment.

46 In 2006, the apartment was valued as being worth 360,000.00 euros. The wife, through counsel, submits that if the property is found to be included in the couple's net family property, her 16% share in the company is worth $46,779.04 CDN.

4 Boulton Drive, Toronto

47 On May 15, 2002, the parties purchased 4 Boulton Drive, Toronto for $930,000.00. The home contained 5 apartments. $105,000 CDN was obtained for this purchase by refinancing the 29 Rathnally Ave. residence and a further sum of $90,000.00 USD was secured by the parties from a line of credit against the equity in their mortgage free Florida condominium. All of the funds were used by the Gillilands to acquire the Boulton Drive income property.

48 The couple worked together to manage their property. Mrs. Gilliland did the work associated with leasing the apartments. Mr. Gilliland did much of the physical work. I find that each worked equally at maintaining the property.

49 From June 18, 2007 to the present, however, Mrs. Gilliland has been the sole manager of the property. The parties were unable to work together to manage it. Mr. Gilliland wished to continue to be involved, but Mrs. Gilliland was unable to manage the property efficiently with her husband's involvement due to the breakdown in their relationship. She moved before this court for exclusive possession of the Boulton property and was granted it.

The Dill Estate / Rodeo, California Property

50 Nola Dill, born Nola Peters, was divorced from her first husband. Her first marriage had produced Brent Gilliland's father, Robert V. Gilliland. Nola remarried Mr. Belvin Dill. Belvin Dill became Robert Gilliland's stepfather. There was no formal adoption. Belvin Dill had no children of his own.

51 Mr. Larry Peters is Nola Dill's younger brother. He has a child, Susan, from whom he is estranged. While alive, Nola and Belvin Dill created a trust naming Larry Peters as their trustee.

52 Belvin Dill was of sound mind when the trust was created. Nola Dill appeared to have been suffering from Alzheimer's disease at the time the trust was set up. Nola did not want any money from her estate to pass to her son, Robert Gilliland, the husband's father. The Dill's property was left, by each of them to whoever survived the other.

53 Nola Dill died in 2000 and Belvin Dill died in 2002.

54 Before the couple's deaths, Christina and Brent Gilliland had been involved with the couple. Mr. Gilliland and his

sister, Laura, had a relationship with their grandparents throughout their lives. The husband testified that his grandmother had told him that everything she and Belvin had would be his and his sister, Laura's, after her and her husband's death.

55 At some point before his grandmother passed away in 2000, the husband and his sister Laura became concerned that Larry Peters had coerced the Dills into transferring their estate into a formal trust naming him the trustee. Mr. Gilliland had concerns that at the time his grandmother signed the trust documents, she was suffering from the onset of dementia caused by Alzheimer's disease.

56 Mr. Gilliland spoke to his immediate family and friends about what to do in the circumstances. His family did not want to get involved. A friend referred him to a lawyer who gave him a written opinion about Mr. Peters' actions in selling off various of about 8 properties owned by the Dills and the trust. The lawyer advised the husband that nothing could be done to stop Mr. Peters until both of the Dills had died.

57 After Belvin Dill died in 2002, Mr. Gilliland sued Larry Peters in California where his grandparents resided and the property was located. Mrs. Gilliland supported her husband in this choice to sue. She loaned him money to pay for the lawyer which the husband repaid when he received funds at the conclusion of the lawsuit.

58 Mrs. Gilliland did research to help the lawyer find properties and the proceeds of properties which Mr. Peters had sold.

59 The lawsuit was settled. Mr. Peters agreed to give an equal share of any remaining assets in the trust to Mr. Gilliland minus a fee to himself for managing the properties.

60 Mr. Gilliland received $358,199.00 USD in cash and the Rodeo, California property valued, on valuation date, in the amount of $490,000.00 USD or $548,359.00 CDN. The Rodeo property was registered in Mr. Gilliland's name alone as a gift from Mr. Peters. His wife did not object to this.

61 The parties discussed what should be done with the funds received. Mrs. Gilliland suggested that they be split amongst the husband, his mother, his father and his sister.

62 The funds were split into lots of $100,000.00 and deposited into different bank accounts in order that the amounts would be insured. The accounts had both parties' names on them as most, if not all, of their accounts did. Thereafter, money was gifted at the legal limit - $20,000 each year - by the wife and husband to Mr. Gilliland's sister, Laura. Each partly gifted $10,000 per year. Mr. Gilliland's mother was also gifted $10,000 each year for a total of $30,000 each year until Mr. Gilliland removed his wife's name from the accounts sometime between October 2005 to 2006.

63 Mr. Gilliland used $88,000 of his funds by putting the money into his and the wife's home in order to enhance their lives. He started a college fund for his son, Parker, with $25,000 from his proceeds. He has used part of the remaining funds to pay for this litigation.

64 The Rodeo Drive property is undeveloped. Mr. Gilliland spent $5,000 to $10,000 to pursue a plan to have the property developed. It remains vacant land at present.

The Parties' Work Histories

65 In 2000, Mrs. Gilliland became a First Officer on Airbus 319/320 aircraft at Northwest Airlines. In spite of having been offered a higher position as a simulator instructor for co-pilots on these planes in 2006, a reserve captain's position on DC-9 aircraft in 2007 and a position as a reserve First Officer on an Airbus 330 and Boeing 747-400 in 2007, the wife has chosen to remain as a First Officer on airbus 319/320 in order to maintain her seniority and assure herself work hour flexibility. If she were to upgrade her present position, Mrs. Gilliland would either lose her seniority or would be forced to commute further than Detroit which is presently her home base.

66 Mr. Gilliland correctly maintains that Mrs. Gilliland could become a captain at Northwest Airline if she wishes to. He is willing to take voluntary reductions in his flying time and, although he has not the flexibility the wife has with her schedule, he would arrange his schedule to allow her to train away from Toronto.

67 Mr. Gilliland became a First Officer shortly after having been hired at Continental Airlines in 1997. By May, 2006, Mr. Gilliland became an airline captain at Continental flying Boeing 737 aircraft. His son, Parker was one year old at the time.

68 In 2004 and 2005, Northwest Airlines declared bankruptcy. Before these years, Mrs. Gilliland made more money than her husband. Due to a decrease in the wife's income of around 39% by 2005 because of the bankruptcy, the couple decided that Mr. Gilliland should take the captaincy he did in 2006 at Continental Airlines. His salary increased by about $50,000.00 per year. At Schedule 6 of the wife's expert report dealing with her claim for compensatory spousal support, her income in U.S. dollars is listed as high as $129,742.24 in 2004. It slipped to $107,787.87 in 2005 and to as low as $88,180.89 in 2006. It began to climb in 2007 and reached $90,175.11 USD.

69 Because of their financial obligations for the matrimonial home and because of their child's birth, the couple sought to increase their income and decrease their expenses. In fact, the parties speculated that they may have afforded to have Mrs. Gilliland stay home with their son, but she chose to return to work six to eight months after his birth.

70 Mr. Gilliland could have taken the promotion to captain in around 2002, but did not do so in order to maintain his 18 days off per month, which changed to 14 days off per month as a result of the promotion.

71 Mrs. Gilliland supported Mr. Gilliland in his bid to be a captain. He was trained by July, 2006. He became a captain in August 2006, and by September, 2006, Mrs. Gilliland filed for a divorce.

September 13, 2006 Separation to the Present

72 After the separation, the parties continued to live separately in the matrimonial home until Mrs. Gilliland gained exclusive possession of it on June 18, 2007. Each of the parties paid expenses for the home based on their salaries as they had done throughout the marriage. After the husband moved out of the home, he paid $3,000 USD per month plus day care expenses for the parties' son. Mrs. Gilliland had sole use of the $1,200.00 / month rental income from the basement apartment, which she put towards expenses at the matrimonial home.

73 By early 2008, Mr. Gilliland commenced training for another promotion to become a captain on Boeing 757 / 767 wide body aircraft, which includes travel to Europe and the U.K. His income is presently $218,312 CDN. His schedule is less flexible than that of Mrs. Gilliland.

74 Mrs. Gilliland's employment income is $93,021.00 CDN.

75 After leaving the matrimonial home, the husband resided in a "crash pad" in New Jersey and then set up an apartment in Houston, Texas for about one year. Subsequently, in early 2008, he vacated the Houston apartment and rented an apartment in the Beach area of Toronto. He pays $1,800.00 rent per month. He uses his mother's residence in Rochester, Minnesota for tax purposes.

Agreements Between the Parties

76 The parties have agreed to the following:

1. A parenting plan regarding their son;

2. Child support to be paid by Mr. Gilliland to Mrs. Gilliland of $1,747.00 per month commencing January 1, 2007 to December 31, 2007 for the one child of the marriage; $1,760.00 per month for the year 2008 based on the father's income of $218,312.00 CDN; and the same amount for 2009 with determinations about future years to be based on a formula agreed to by the parties to determine the father's income;

3. The appointment of a mediator / arbitrator;

4. For the purposes of determining his pro rata share of s. 7 expenses, the father's income shall be determined by an agreed upon formula;

5. In the event that Mr. Gilliland's parenting time with his son is up to 50% of the time, he shall nonetheless pay the full table amount of support pursuant to paragraph 28 of Justice Wilson's Order dated July 31, 2008;

6. The parties have agreed to exclude their pensions from any division;

7. The Florida property at 401 Ocean Drive, Unit 705, Miami Beach is valued at $216,500.00 USD;

8. The wife will keep the matrimonial home whatever the outcome of the case;

9. The wife has the right of first refusal in the purchase of the 4 Boulton Drive property if it is to be sold; and

10. The parties have agreed on the tax calculations on the real property offered by the wife and the amount of the Costs of Disposition.

Analysis

I. The Validity of the Antenuptual Agreement

a) Agreement to Agree?

77 The wife instigated the parties' signing of the Antenuptual Agreement. Neither Christina nor Brent Gilliland had any property of their own at the time. Christina's parents did. I accept that Mrs. Gilliland pushed for the signing of the agreement in order to protect her parents' personal assets without realizing that her marriage to Brent Gilliland would not impact upon her parents' assets in any event. Mrs. Gilliland now wants the contract declared invalid.

78 The husband's position with respect to the agreement is that it would not exist but for the efforts, intentions, instructions and interests of his wife; and that being so, it offends the basic principles of fairness and justice that she now seeks to challenge the validity of the agreement she is solely responsible for.

79 The wife first contends that the contract is a mere agreement to agree and therefore does not prevail over other matters in the *Family Law Act* R.S.O. 1990 c. F-3 pursuant to s. 2(10) [*Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, 1991 CarswellOnt 836 (Ont. C.A.) 19-27]. Mrs. Gilliland submits that analysis of the three questions about the construction of the document will lead me to a finding that the document is not valid and not binding. Those questions are set out in the Saskatchewan Court of Appeal case of *Tether v. Tether*, 2008 CarswellSask 651 (Sask. C.A.) 55 and are as follows:

(a) Would a reasonable observer conclude the parties were *consensus ad idem*? A party's subjective belief that he or she entered into a final and binding agreement is not determinative;

(b) Is there consensus on all essential terms or is the agreement vague and imprecise with additional terms to be later discussed or agreed upon?; and

(c) Did the parties make their agreement conditional upon and subject to the execution of a formal document?

80 Mrs. Gilliland's credibility was weakened, in general, by this area of the evidence in this trial. I was struck by how she tailored her evidence to fit the law, as she obviously now understood it to be, in order to defeat her own contract. The wife is an intelligent, organized and very successful person. She doesn't appear to miss much, so to speak, but is focused and driven. All of her admitted activity in the creation of the marriage contract is consistent with her understanding the nature and

consequences of the document she reviewed and amended and had her future husband sign.

81 The wife's revision of the document, her acceptance of the clause specifically excluding the need for independent legal advice and the fact that once the document was signed and notarized, she never referred to it again until she wished to have it ruled invalid, is evidence which, on all of other evidence in the trial about this issue, makes me conclude that it is a valid domestic contract.

82 It is in the wife's interests to have the contract held invalid. Mrs. Gilliland has gone so far as to question whether the document filed as an exhibit in the trial is the actual Antenuptual Agreement. There is no evidence that it is not. It was her friend, Ms. Robyn Taylor-Symons, who presented the draft agreement to her and who had any discussions about the contract with her. Ms. Taylor-Symons had no discussions with Mr. Gilliland at all about the document and, therefore, could not have told him to seek legal advice or that the document was something to consider for future discussion.

83 The evidence of Ms. Taylor-Symons and the wife was almost identical for the most part. It still did not persuade me that the Agreement was only an agreement to agree, because of the actions taken by Mrs. Gilliland which contradicted that evidence.

84 A reasonable observer would conclude that the parties were *consensus ad idem*. The fact that they did not discuss the document persuades me that they agreed to it and did not need to change it. Mrs. Gilliland reviewed and amended the contract to her satisfaction before having Mr. Gilliland sign it. Mr. Gilliland testified that he understood and accepted the terms of the contract as "reasonable". The parties signed and notorized the contract.

85 The terms of the contract were not vague nor imprecise with additional terms to be discussed and agreed upon.

86 The parties did not make their agreement conditional upon and subject to the execution of a formal document.

b) Section 56(4) of the Family Law Act

87 Alternatively, the wife asserts that the Antenuptual Agreement should be set aside pursuant to s. 56(4) of the *Family Law Act*.

That section provides that:

> A court may, on application, set aside a domestic contract or a provision in it,
>
> > (a) if a party failed to disclose to the other significant assets or significant debts or other liabilities, existing when the domestic contract was made;
> >
> > (b) if a party did not understand the nature or consequences of the domestic contract; or
> >
> > (c) otherwise in accordance with the law of contract.

88 In this case, it is clear that this contract may have exceeded the scope of the parties' original intentions. To that extent, I find that the parties did not understand the nature and consequences of the agreement. Both parties testified that the original intent of the agreement was to protect Mrs. Gilliland's parents' assets. Ms. Taylor-Symons supported this fact in her evidence. All of the other terms were part of a template presented to Mrs. Gilliland by Ms. Taylor-Symons. And, although I cannot find, on the evidence, that the parties intended to discuss the terms later or didn't agree to them, I am satisfied that the agreement goes beyond what both parties contemplated.

89 In this case, the wife did not have legal advice about what she expected herself and the husband to sign. She was preoccupied with plans for her wedding and clearly did not put her mind to the spousal support and property releases contained in the agreement, even though she appeared to agree to them at the time. She had limited discussions with Ms. Taylor-Symons about the terms of the agreement. And, in any event, Ms. Taylor-Symons was not a family lawyer so could not give Mrs. Gilliland the appropriate advice. The parties, also, did not discuss the releases related to spousal support and property.

Dhanna v. Dhanna, 2004 CarswellOnt 6131 (Ont. S.C.J.) p. 4-7, 117 and 119;

LeVan v. LeVan, 2008 CarswellOnt 2738 (Ont. C.A.) p. 11, 27, 28, 33, 35 and 36;

Patrick v. Patrick, 2002 CarswellOnt 593 (Ont. S.C.J.) p. 55;

Stewart v. Foreman, 2005 CarswellOnt 2389 (Ont. C.J.) p. 20-21;

Mittler v. Mittler, 1988 CarswellOnt 303 (Ont. H.C.J.) p. 34, 37, 40.

90 As a result, I find that the Antenuptual Agreement should be set aside pursuant to s. 56(4) of the *Family Law Act*.

91 In any event, I conclude that even if the marriage contract had survived s. 56(4) of the *Family Law Act*, I could still have ordered spousal support payable to the wife notwithstanding a valid agreement.

II Child Support - s. 7 Expenses

92 Mr. Gilliland has agreed to pay child support in accordance with the *Federal Child Support Guidelines* S.C. 1997, C. 1, s. 11, but argues that he should not be forced to pay his proportionate share of the nanny expense due to his own increased costs of exercising access, including, but no limited to, renting an apartment in Toronto at a cost of $1800.00 per month.

93 In addition, the husband's position with respect to the amount of the expense is that it is excessive. The expense includes a salary for a live-in nanny and an expense for the Church of the Messiah day care. Although Mr. Gilliland does not agree that the live-in nanny is necessary, he does agree that the day care benefits his son and he wishes him to continue in it. The amount each month for that expense is $335.34 and is a permissible expense pursuant to s. 7(1) (d) of the Child Support Guidelines.

94 Based on the parties' incomes of $218,312.00 CDN and $93,021 CDN, the husband should pay 70% and the mother 30% of any section 7 expenses ordered pursuant to the Child Support Guidelines.

95 I agree with the husband that having a full-time nanny living in, but in fact on call, is excessive, but it is unavoidable in these circumstances.

96 Mrs. Gilliland has fashioned her flight schedule each month in order to have a minimum of 16 days at home with her son. She, otherwise, would be out of Toronto flying for 24 hour periods or days to destinations outside this city. Pursuant to the Parenting Agreement, Mr. Gilliland will have from 10 to 12 days per month with his son so long as the wife is able to have her 16 days. A full-time nanny seems unnecessary.

97 However, the parties have been unable to arrange their schedules - both before and after separation - in order to care for their child without the services of a nanny. In fact, one was hired by the couple prior to separation because of the parties' flying schedules which left the child without either parent at times during each month.

98 S. 7(1)(a) of the *Child Support Guidelines* allows for this expense in relation to the child's best interest and the reasonableness of the expense in relation to the means of the spouses and the family's spending pattern prior to the separation. The expense is clearly necessary in this case as a result of the parents' employment. This was true before their separation and is more the case now.

99 In fact, the Parenting Plan incorporated into the Final Order of Wilson J. dated July 31, 2008 acknowledges the need for a live-in nanny in the mother's home.

100 There is no need to estimate the amount of the expense. The wife has provided evidence of the nanny expense in question as $2,038.66 per month.

101 The parties did not provide me with any Supportmate calculations. However, after taking into account the mother's tax deductions for day care, the table amount of child support (agreed to by the parties as $1760.00 per month), I find that the husband shall pay $3,146.00 per month commencing March 1, 2009. This figure includes the agreed upon table amount child support and the appropriate s. 7 expenses. I have come to this figure based on the amount of periodic spousal support that I have concluded is fair in this case and which I have discussed later in this judgment. The child and spousal support awards should leave the wife with 50% of the family's net disposable income.

102 The husband should name Mrs. Gilliland and his cousin, David Culligan, the irrevocable beneficiaries of his $500,000 life insurance policy with Continental Airlines in order to secure any child support payable to Mrs. Gilliland for their son, Parker. Any excess funds over what is owed for child support will be returned to his estate once his child support obligations have been fulfilled.

103 I am not prepared to order the father to increase his life insurance coverage to $1,000.000 as suggested by the wife. My jurisdiction to do so, at the very least, is questionable.

III Net Family Property

104 Neither of the parties' net family property statements encompasses what I have concluded is fair in this matter. Their positions were extremely polarized. The exclusion of three properties from their net family property calculations and the values of joint properties will change the outcome from that which they have projected in their statements.

105 I have concluded the following on the issues in the net family property statements where the parties have disagreed.

a) Excluded Property

(I) SDA

106 SDA corporation was formed by Mrs. Sigrid De Auer to own the luxury condominium at 401 Ocean Drive, Unit 617. The documents surrounding the purchase of the condominium, though, could suggest that the Wife has or at least had a one fifth share in the apartment up to 1993. All De Auer family members are named as having incorporated the company.

107 The wife was designated as the agent of the corporation for the purposes of the condominium where the apartment was situated. Mrs. Gilliland was named on title insurance documents for the property - in error, however.

108 If the wife had any ownership of the condominium, it is clear that her Quit Claim Deed for the property executed on June 3, 1993 ended such ownership then. The parties married in 1995.

109 In fact, I conclude that Sigrid De Auer owned the condominium. The wife made no financial contribution to the purchase of the property, improvements of $25,137.21 USD to it, nor the cost of incorporation. She gave no consideration (*Armstrong v. Armstrong*, [1997] O.J. No. 4137 (Ont. Gen. Div.), p. 7). No shares of the corporation were ever issued (*McIntyre v. Royal Trust Co.*, [1946] 1 W.W.R. 210 (Man. C.A.) at para. 16). There was no bank account for the corporation. Instead, Mrs. De Auer paid for and managed the condominium from her personal bank account.

110 In 2003 and 2004, Mrs. De Auer, through the corporation, issued *inter vivos* gifts to the wife and her two siblings in order to reduce tax liability. They received no real funds. The De Auers understood the *inter vivos* gifts were for future tax reductions upon their deaths, but valueless as such if they sold the condominium while they were alive. I accept their

evidence on this issue.

111 The condominium should not be included as part of the couple's net family property. The wife does not own the property and if part of the property has been gifted to her, it is excluded pursuant to s. 4(2) of the *Family Law Act*.

(II) SCI

112 SCI De Auer corporation and the apartment in Paris should also be excluded from the parties' net family property. There is no evidence that the wife had any knowledge or dealings with the corporation which owned the apartment. There is no documentary evidence showing that the wife has a 16% share in the property. As with SDA, no shares were ever issued from the corporation to the wife and any intended gift was unperfected (*McIntyre v. Royal Trust Co.*, *supra*). The wife contributed nothing to the purchase of the property or the setup of the corporation (*Armstrong v. Armstrong*, *supra*). And, as with SDA, if there were a gift given to the wife from her parents of part of this Paris property, the apartment cannot be considered as part of the couple's net family property pursuant to s. 4(2) of the *Family Law Act*.

(iii) The Dill Estate

113 I will add to my conclusion that the properties owned by SDA and SCI should be excluded from the parties' net family property the following observation: Mr. Gilliland candidly admitted in his testimony that he did not want any part of his wife's share in these properties. He acknowledged that he made his claim for the two properties because of Mrs. Gilliland's pursuit of the Dill Estate property and cash. I found his admission compelling and understand this legal positioning in all of the circumstances of the case. As a result of his frankness and all of the evidence related to the Dill Estate, I prefer his testimony over that of the wife in relation to whether the Dill Estate should be included in their NFP statements.

114 As well, the wife appears to be taking an entirely different position at this trial from her position, demonstrated by her words and actions, in the past about her husband's exclusive right to the Dill Estate property and cash. I conclude that she has changed her position about the estate in order to acquire most, if not all, of the couple's real property as a result of an NFP calculation favourable to herself.

115 The husband sued his uncle, Larry Peters, over the subject of his grandparents' estate. This suit commenced only once his grandparents were deceased. He pursued what not only he, but also the wife, believed was his rightful inheritance but for the wrongful conduct by Mr. Peters. Mr. Gilliland's position in the California litigation was that the trust was invalid. Without an actual declaration of such by the court, the fact of a settlement is persuasive evidence to me that the husband was successful in his claim. That being so, the property in question would clearly have flowed to the husband's family as a result of an inheritance.

116 Mrs. Gilliland testified that her husband told her that the Rodeo Drive property from the settlement was for them. While I accept that he may have said this, I do not accept that he meant he was going to give his wife half of the value of this property. He registered the property in his own name. She did not object. At the time this was done, the couple were seemingly on the best of terms. I cannot but conclude that Mrs. Gilliland agreed to this at the time. It is evidence of her acknowledgement that the Dill Estate was her husband's property as a form of inheritance. She was well aware of the sanctity of such marital principles having secured any inheritances she might get from her parents when Mr. Gilliland happily signed her "Antenuptual Agreement" in 1995 - some eight years before.

117 Mrs. Gilliland agreed in her pleadings in this trial that in exchange for the release from his father related to the cash portion of the Dill Estate, Mr. Gilliland was to provide support to his father if a settlement was ever reached in the Dill Estate litigation. Mrs. Gilliland agreed to her husband's providing that support once a settlement was reached. Again, this is more acknowledgement, by her actions, that the proceeds her husband received were an inheritance which included the husband's father and not merely a windfall to Mr. Gilliland.

118 Similarly, Mrs. Gilliland agreed to the husband's sister, Laura, having a portion of the funds of the settlement. Money was passed to the husband's sister with Mrs. Gilliland's assistance over the years. The wife's name was on the bank accounts

holding the funds for this very purpose and because it is the way the couple set up almost all their financial affairs before the breakdown of the marriage. It was not because the money in the accounts belonged, in part, to her.

119 $93,000 USD tax free had been transferred by the couple to Mr. Gilliland's sister by the time of the separation. With respect to the husband's father, cash transfers to him ceased before the separation due to the father's inability to manage the funds because of his medical circumstances, and because he lives in a Veterans' Association facility in the U.S. Additional funds may be needed in the future for any private hospital care the father may need. Any funds already earmarked to go to Mr. Gilliland's father as part of the settlement were to be used to pay for that care.

120 The fact that the husband has used some of the cash earmarked for his sister and father to pay for the litigation does not change my conclusion. He had control over the funds and was obviously forced to use them as his wife was forced to borrow from her parents to fund her part of the trial. I accept him at his word that he intends to pay the money back.

121 Neither the wife nor husband disagree that Mr. Gilliland used a cash portion he got from the estate by spending it on the couple's property in Toronto and for other of their expenses before separation.

122 There is little doubt in my mind that the property was treated by the wife and the husband as inheritance funds. If not an inheritance, the Rodeo property was registered in California as a gift to the husband alone. This is particularly telling in light of the fact that the parties shared everything else they had and treated it as their joint property. There is a logical inference that if the land was registered as a gift, then the cash portion of the settlement was also a gift.

123 I was given no case law containing similar facts as are present in this case by either party. I have searched for such law myself and have failed to find any to compare with the facts of this case. Nonetheless, it strikes me as unconscionable, in the circumstances, that the husband should be denied his inheritance rights by matters outside his control - his grandparents' mental health and frailty and his uncle's admitted mishandling of the Dill Estate.

124 The Dill Estate property and proceeds are excluded property pursuant to s. 4(2) of the *Family Law Act*.

(iv) The Wife's Contingent Assets of Northwest Airlines

125 Mr. Gilliland takes the position that emergence compensation received by the wife and other pilots at Northwest Airlines after its recovery from bankruptcy were contingent assets on the date of separation. In the alternative, he takes the position that the money and shares Mrs. Gilliland received from Northwest Airlines should be included as income for determining her child support obligations. Mrs. Gilliland denies that the compensation is either property or income.

126 The evidence on this issue is contained in the affidavit of Mr. Russell Woody, which was tendered at trial pursuant to Rule 23(20) of the *Family Law Rules* (C.J.A. Ont. Reg. 114/99). Russell Woody is a lawyer who was involved in the negotiation of the bankruptcy restructuring agreement between Northwest Airlines and another airline merging with it from December 2005 to March 2006. Mr. Woody also assisted in the implementation of a claim sale and drafting the underlying documentation for it. Although an objection was made by the husband to opinion evidence contained in paragraph 44 of that affidavit, submissions were never made on this issue by either party and, therefore, no ruling was made by me to determine whether or not I should consider Mr. Woody's opinion on this point as evidence. I have concluded that since no real objection was made to the expert opinion evidence, I will consider it to decide this issue.

127 Based on the evidence I have before me, the emergence compensation does not form part of Mrs. Gilliland's net family property nor is it income for the following reasons.

128 Northwest Airline pilots had to elect on three different dates, namely February 14, 2007, April 23, 2007 and June 13, 2007, whether to opt out of the claim sale. This meant their money had to be placed into their retirement fund or they could receive shares. All of these dates are after the date of separation of September 13, 2006.

129 On the first two dates, Mrs. Gilliland opted out. Therefore, on February 14, 2007, she received 20% of the claim sale in the amount of $27,929.46 which went directly into her 401K (the US equivalent to an RRSP). On April 7, 2007, she received a further 20% of the claim sale in the amount of $28,186.28 which, again, went into her 401 K.

130 Commencing in June 2007 through to October 2008, she received six stock awards, making up the remaining 60% of the claim sale. She received these shares net of tax, for a total of 1379 shares. At the time, they were valued at $9.85 per share. Therefore, the total award received over the course of these 16 months was approximately 13,583.15 USD. The wife testified that these shares no longer have any value.

131 The husband takes the position that these awards were contingent assets on the date of separation. Section 4(1) of the *Family Law Act* defines "property" as including any interest in property that is contingent. In order for the husband to succeed in his claim, the entitlement to the asset would have to had crystallized on or before the valuation date. The husband offered no evidence of the value of the assets when received by the wife nor evidence of any discount in their value for various contingencies, such as the likelihood of actual receipt on V-date, or future taxes payable. As a result, there is no proper valuation.

132 The wife testified that her entitlement to receive this claim sale did not arise until after separation and, therefore, these assets cannot be characterized as contingent on valuation date. Her evidence is supported by Russell Woody.

133 In paragraph 20 of his affidavit, Mr. Woody states that

> ... eligibility criteria and allocation formula were announced after December 8, 2006, no NWA line pilot had any basis for confidently expecting to share the proceeds of the ALPA Claim, whatever they turned out to be. Although pilots knew at that point how their shares would be computed, they still could not estimate their individual allocations since the computation was a "zero-sum game" that depended on data relating to every eligible NWA pilot, data not available to the individual pilots themselves. It was only when the NWA MEC's website went live in late December 2006 that pilots first received an estimate of their allocation of claim dollars. Even then, from the first claim sale, there was no basis for a pilot to estimate the amount of his or her likely recovery on the amount of that allocation.

134 Based on this evidence, I conclude that the asset was received post-separation and, therefore, does not form part of the wife's net family property.

Blais v. Shoemaker, 1999 CarswellOnt 766 (Ont. Gen. Div.)

Gasparetto v. Gasparetto, 1988 CarswellOnt 274 (Ont. H.C.)

Lepage v. Lepage, 1999 CarswellSask 176 (Sask. Q.B.)

Ross v. Ross, 2006 CarswellOnt 7786 (Ont. C.A.)

Simons v. Simons, 1999 CarswellOnt 1120 (Ont. S.C.J.)

Vitagliano v. Di Stavolo, 2001 CarswellOnt 1065 (Ont. S.C.J.)

Woodman v. Deremo, 1994 CarswellOnt 2027 (Ont. Gen. Div.)

Woodman v. Deremo, 1996 CarswellOnt 2823 (Ont. C.A.)

135 This money also cannot be considered income to the wife. It was neither given to nor received by her as income. She had no ability to access the funds as income.

(v) Post Separation Accounting by the Wife

136 The husband claims an accounting of rental income from the basement apartment at 29 Rathnally. Mrs. Gilliland has

had exclusive possession of the matrimonial home since June 2007. Mr. Gilliland also wants his share of the rental income from the Boulton Drive rents which were over $90,000, before expenses, in 2008.

137 Based on the wife's evidence in the trial, the Rathnally rental income has been used to sustain that property. In relation to the Boulton property, the net gain to the wife is under $1,000. Since I have no other evidence on these issues but the wife's accounting of these incomes, I conclude that after all the expenses related to the properties, her gain is negligible and should not be included in any analysis of her income.

(vi) Costs of Disposition on the Husband's 401K

138 The wife has provided evidence through her expert, Stephen Kurtzman, of the costs of disposition for her U.S. 401K. The figure is $15,083.00 and will be included in her net family property. Although ordered by Czutrin J. to provide any similar evidence in relation to costs of disposition for his own 401K, the husband has not done so for the trial.

139 Mr. Gilliland asks the court to use the same percentage to calculate any discount to his retirement fund as his wife has used in her calculation. The wife objects because there is no evidence before me about what an appropriate discount might be in Mr. Gilliland's case. The wife does not wish me to guess at the appropriate discount, but asks that no discount be applied.

140 I am not prepared to guess at any value of a notional cost of disposition when I have no evidence before me about the value of the husband's 401K at the date of separation. As a result, no deduction shall be allowed on the husband's net family property for the costs of disposition on his 401K.

(vii) Cost of Disposition of the matrimonial home and 4 Boulton Drive

141 The parties agreed on the quantum of the costs of disposition for the matrimonial home and the Boulton income property. There was some disagreement at trial about whether the husband had, in fact, agreed they should be included in the N.F.P. statements. His position was that if Ms. Gilliland intended to keep the properties, then no discount should be applied to their value through notional costs of disposing of them. I agree. I do not find that the husband agreed to the inclusion of the costs of disposition in the wife's net family property, but only to the method of calculating them (Ex. 17). I also find that it would be inappropriate for her to discount the properties if she intends to keep them. Her evidence was that the Boulton property would be used to support her during her retirement. She is forty-two years old. She has offered no date for a potential sale of the property. There is also no sale likely for the matrimonial home for many years to come.

142 The notional costs of disposition for these two properties should not be part of the wife's NFP statements.

(b) Value of the Included Properties on Valuation Day

143 The value of two out of 3 properties owned jointly by the parties is in issue. The Florida property at 705-401 Ocean Drive is valued at $269,542.50 CDN. I heard testimony from two real estate appraisers for each of the parties in relation to the values of the matrimonial home at 29 Rathnally Avenue, and the income property at 4 Boulton Drive on Valuation day. For the matrimonial home, Mrs. Gilliland's expert valued the property at $980,000.00. Mr. Gilliland's appraiser set the value of the home at $1,239,000. The wife's expert's value for 4 Boulton Drive was $1,100.000 and the Husband's expert value of that property was $1,275,000.

144 I am prepared to accept the wife's values for the two properties for the following reasons:

1. The wife's expert's qualifications were superior to those of the husband's expert;

2. In relation to the Boulton Drive property, the husband's expert is qualified to value properties containing four self-contained units or less unless his report is co-signed by a supervising appraiser with superior qualifications. The Boulton property, in fact, contains five units and the husband's appraiser did not have his report signed by a supervising

appraiser. To that extent, I gave it less weight than the report filed by the wife's appraiser;

3. The wife's appraiser selected more comparable properties to assess the value of 29 Rathnally Ave. and, in my opinion and based on his evidence, was closer to the real value of the home than the husband's expert's opinion;

4. As well as making adjustments for variable characteristics amongst the comparables for 29 Rathnally, the wife's expert applied a time adjustment, reconciling the decline in the real estate market throughout 2008. The husband's expert did not.

5. The wife's expert was not impugned on cross-examinations.

145 Therefore, the value of 29 Rathnally Avenue for the purposes of the NFP is $980,000. The value of the 4 Boulton Drive property for the purposes of the NFP is $1,100,000. The husband cannot be forced to sell these properties to his wife when the parties cannot agree on their value. Although I have been asked to determine their value for the NFPs, if the parties cannot agree on a price for the properties to be transferred to the wife, they should be sold.

(c) Other Issues

(i) Management Fee for 4 Boulton Drive

146 Mrs. Gilliland claims an amount of $10,000.00 as management fees for 4 Boulton Drive from the period of July 2007 to the present. This amount is based on the evidence of Mrs. Gilliland's expert real estate appraiser whose opinion was that 5% of the income of the property could be paid for managing a building like the Boulton property. Since there is no company handling rentals for the property, the job has been taken on by the wife after she applied to this court to run the property without her husband's assistance.

147 Mrs. Gilliland claims a 5% management fee amounting to $1,000 for managing the Florida property as well.

148 While I acknowledge that Mrs. Gilliland has taken on a mammoth job of managing the two properties in question - and has done a good job of it - I am not satisfied that the management fee is appropriate. These fees were not charged by Mrs. Gilliland before separation. She testified that she will not charge such a fee on a go forward basis in the event that she retains ownership of the Boulton property.

149 There is nothing unusual about parties not getting along after their marriage has broken down. Mrs. Gilliland sought and received court ordered permission to run these properties by herself. Her husband did not agree. She should not now receive payment for managing what is her own property from which control the husband has been excluded.

(ii) Right of First Refusal to Purchase the Florida Condominium

150 Mr. Gilliland has already agreed that Mrs. Gilliland should purchase the matrimonial home from him and have the right of first refusal for the purchase of 4 Boulton Drive. He insists, however, that the Florida condominium be sold. I have no jurisdiction to order that Mrs. Gilliland have the right of first refusal for this Florida property as well. [*Martin v. Martin*, 1992 CarswellOnt 226 (Ont. C.A.)].

151 The parties shall submit new NFP calculations or an agreed upon figure based on the findings that I have made. This should be done by July 17, 2009.

IV Spousal Support

152 The wife has made a claim for lump sum compensatory spousal support and maintains that it is the only appropriate remedy in this case. She is the custodial parent and cannot accept promotions at her airline which would put her at the same

level as her husband at his airline. She is remaining a First Officer in order to have time at home to raise her child. To support her claim, the wife depends on the calculations of an expert witness from Price Waterhouse Coopers who concluded that, based on the age of the parties' son, the relative salaries of the couple and taking into account that Mrs. Gilliland is the primary parent, the husband should pay the wife $595,000.00 in spousal support.

153 The husband's position is that the wife is not entitled to spousal support. She is working full-time in her field. She made more money than he before her employer went bankrupt and reorganized itself by merging with another airline in 2003 / 2004. And, she is qualified to captain any aircraft at her company - as he does. Instead, she chooses not to be promoted, but to remain a First Officer.

154 As I said sometime during the trial, the parties' occupation is a difficult one in which to raise a child. They are obliged to spend 24 hour periods away from Parker several times a month. The wife has organized her work schedule to acquire the most time off that she can. The Parenting Agreement guarantees her no less than 16 days per month. She is able to have this amount of time due to her ability, because she is a very senior First Officer, to control her flying schedule. The wife can receive better remuneration for shorter hours worked because she is able to choose more lucrative routes due to her seniority.

155 If the wife were to take a promotion in her airline, she might have as few as 7 days off per month. Her seniority would be affected with each promotion. She would lose the ability to choose her flight schedule. She would have to fly longer flights, have layovers out of Toronto longer than she now has and spend "dead time" commuting to and from work and waiting to get an aircraft off the runway and into the air.

(i) Eligibility

156 The first issue to be determined is whether the wife is entitled to spousal support as set out in s. 15.2 of the *Divorce Act* R.S.C. 1985, C. 3 (2nd Supp.). Section 15.2 (4) sets out the factors to be considered in making an order as:

> (a) the length of time the spouses cohabitated;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.

157 Section 15.2(6) lays out the objectives of a spousal support order as follows:

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

158 The Supreme Court of Canada, in *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.) and *Bracklow v. Bracklow* (1999), 169 D.L.R. (4th) 577 (S.C.C.), have made it clear that all of the factors and objectives set out in Section 15.2(4) and (6) of the *Family law Act* are important. All must be considered to determine if spousal support is appropriate, in what amount it should be ordered and for how long a period it should be ordered.

159 In considering the factors as set out in s. 15.2(4) of the Act, I conclude that subsection (c) is not relevant in my determination of the wife's eligibility for spousal support. There are no orders, agreements or arrangements relating to support of either spouse.

160 Mrs. Gilliland is a healthy 42 year old female, earning over $93,000 per annum at a full-time job where she is secure in her employment due to her seniority. Her financial needs can be met by her salary and the fact that she is asset rich in the half ownership of the matrimonial home, an income property worth over one million dollars and a mortgage-free condominium worth $270,000. The matrimonial home that she will keep after the litigation is worth close to $1 million and she will receive rental income from a basement apartment in the home. The wife has enough to support herself, but not at the level she maintained while married to Mr. Gilliland.

161 Mr. Gilliland makes twice Mrs. Gilliland's income. He, too is healthy at 46 years old and secure in his employment. He too is asset rich with a 50% share in the ownership of the three jointly owned properties.

162 The parties have lived together for about 17 years and have been married for 11 of those years.

163 The marriage, however, was not what has been termed a "traditional" one. Mrs. Gilliland did not stay home and raise children while Mr. Gilliland pursued his career as a pilot. Instead, they pursued their educations and careers together and both became professionals at neither one's expense. When Parker was born in May, 2005, Mrs. Gilliland took maternity leave for a few months and returned to work even though Mr. Gilliland suggested she stay at home with their son. About 1 1/4 years after their son was born, the couple separated.

164 Both parties worked on the care and maintenance of their properties. Both shared in parenting their son with the assistance of a live-in nanny.

165 Neither party held back on their careers until a year or more prior to the separation in 2006 when the couple agreed that Mr. Gilliland should seek a promotion to captain due to the bankruptcy proceedings of the wife's airline and the dramatic drop in her salary which resulted from that bankruptcy.

166 In considering s. 15.2(4) and the factors affecting the determination of the wife's eligibility for spousal support, two factors are persuasive that Mrs. Gilliland should have some spousal support. The fact that the husband makes double the wife's salary and the length of their cohabitation are of importance in making such an award to her.

167 With respect to Section 15.2(6) of the *Family Law Act*, I find the following. Subsection (d) is irrelevant in this case. Mrs. Gilliland is at the top of her game, so to speak. She could be as senior in her airline as Mr. Gilliland is in his if she chose to take promotions which are now available to her.

168 Subsection 15.2(6)(b) is also not a consideration which would affect my determination of this eligibility issue. There are no financial consequences arising from the care of the couple's child over and above the child support obligation already ordered.

169 Regarding Section 15.2(6)(a), neither party has suffered any economic hardship arising from the marriage itself. Instead, as a couple, the parties built a strong financial base centred in real estate acquisitions which will ensure a promising financial future for them both. During their marriage, they shared equally in its economic advantages and disadvantages.

170 Subsections 15.2(6)(a), in relation to the breakdown of the marriage, and s. 15.2(6)(c), dealing with the relieving of economic hardship arising from the breakdown of the marriage are relevant issues for my consideration.

171 The couple's salaries before the breakdown of the marriage were comparable, with the wife making more money than

the husband until her company's bankruptcy reorganization. By May 2006, Mr. Gilliland's salary began to rise when he became a captain. The parties separated in September 2006. His higher level of salary has primarily been achieved post separation. Nonetheless, I recognize that due to the wife's reasonable needs and the lifestyle achieved by the couple over their 17 year period of cohabitation, Mrs. Gilliland is entitled to an order of spousal support.

(ii) Lump sum or periodic spousal support?

172 A lump sum order for spousal support is out of the ordinary in most circumstances (*Moge*, *supra*) and wholly inappropriate in this case, in part, for the reasons already outlined in determining the wife's eligibility for spousal support.

173 The wife's claim for the lump sum award is based on assumptions about her life over the next 15 or more years until her son is 18 years old. It is also based on the salary differential between herself and Mr. Gilliland, whether she will maintain her position as a First Officer with Northwest Airlines and if the husband continues to advance at Continental Airlines.

174 The expert evidence is that an award of $595,000.00 would satisfy any disparity between the parties until Parker is 18 years old and his mother will be able to leave him for longer periods of time in order to train and advance as a pilot in the industry.

175 I accept, as unchallenged, the accuracy of the wife's expert report on the quantum of spousal support that could be paid to Mrs. Gilliland by Mr. Gilliland. There is also evidence that Mr. Gilliland has the ability to pay such an award by forfeiting his share of the matrimonial home, 4 Boulton Dr. and the Florida condominium rather than by paying any lump sum award through his income from employment [*Elliot v. Elliot*, 1993 CarswellOnt 348 (Ont. C.A.)].

176 In *Sharpe v. Sharpe*, 1997 CarswellOnt 227 (Ont. Gen. Div.), at 14, Campbell J. set out a number of factors which should be present before a court should grant a lump sum spousal support order. I have considered those factors in the following way:

> (a) where difficulties enforcing periodic payments are anticipated:

177 I see no evidence in this trial that Mr. Gilliland will not pay spousal support. He voluntarily paid $3,000 USD to his wife from their separation. Those funds have now been credited toward his child support obligation.

> (b) the possibility that the payor's livelihood is or will become precarious or he is likely to experience a lay-off in the future or where the payor has already experienced a dramatic change in employment:

178 The husband's job is secure based on all the evidence in this trial.

> (c) the availability of sufficient assets from which a lump sum could be paid:

179 There are sufficient assets for a lump sum payment in this case, but this factor is minor in relation to other factors which make this type of order inappropriate here.

(d) where the payor is about to leave or has left the jurisdiction:

180 Mr. Gilliland has taken up his primary residence in Toronto in order to parent his son. I have every confidence that he will remain in Toronto for that reason.

(e) desirability of terminating contact between the parties:

181 In spite of the present hostilities between the parties, they are bound together by their child. Any advantage of a clean break due to a lump sum award is diminished by their continued relationship through Parker (*Elliot v. Elliot*, *supra*.).

(f) disparity in financial positions of the parties:

182 But for the difference in incomes, which can be redressed through a periodic spousal support payment, there is no disparity in the financial positions of the parties.

183 The following factors set out in the *Sharpe* case were not applicable to this case:

(g) dependant spouse taking job retraining or upgrading course;

(h) to provide "nest-egg" for contingencies of life of the dependant spouse;

(i) to compensate for the dependant spouse's lost pension benefits;

(j) to provide for the dependant spouse's immediate needs;

(k) lump sum as compensatory support for lost career opportunities or enhancing the other spouse's career potential and earning capacity;

(l) marriage of short duration;

(m) where dependant spouse has established a new relationship;

(n) to effect a retroactive award of spousal support.

184 The Ontario Court of Appeal set out other reasons for not upholding a lump sum award in *Elliot v. Elliot*, *supra*, which I find compelling and applicable to this case. Mrs. Gilliland's projections about not being able to advance herself beyond the position of First Officer may or may not occur. Although she cannot see herself taking time away now from her son, I cannot accept that she will not be able to do so in the future. I find her speculation about the next fifteen years troubling due to the fact that she can be promoted to a captain's position at this time, but chooses not to be.

185 In other words, the factual basis upon which her expert calculation of the quantum of the order is based has not convinced me that an award of this type should be granted. At page 17 in *Elliot v. Elliot*, *supra*, the Ontario Court of Appeal set out the following which I adopt as part of these reasons:

Clearly, the lump sum order in the present case was made in accordance with events which may or may not occur, see, also, *McMillan v. McMillan* (1983, 44 O.R. (2d) 1 (C.A.) at p. 10.

The reducing of future loss of earnings to a present value is the method of assessing damages in a tort case because, with minor exceptions, the law requires that damages, including future losses, be assessed on a once-and-for-all basis. See *Watkins v. Olafson*, [1989] 2 S.C.R. 750. The deficiencies of a lump sum once-and-for-all award have been criticized in this context. See *Watkins v. Olafson*, *supra*, at p. 756. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, Dickson J. said, for the court, at p. 236:

> When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.
>
> The lump sum award presents problems of great importance ... After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment.

The law of divorce does, of course, know of periodic payment (*Divorce Act*, s. 15(2)).

186 The parties have not provided me with a Spousal Support Guideline calculation nor a Supportmate calculation. However, taking into account their incomes and assets, the child support payment ordered (including the s. 7s) and the length of the marriage, the husband shall pay spousal support to the wife of $1,152.00 per month for a period of 12 years commencing March 1, 2009.

Conclusion

187 The final order will be completed once the exclusions, inclusions and values of the properties and assets as I have determined in this judgment have been used to calculate the net family property. I have not vested any property in the wife as her claims for half the Dill Estate and a lump sum award of spousal support have failed. Depending on the NFP statements or the parties' agreement on an amount to be paid by one party to the other, which are or is to be given to me by July 17, 2009, the properties in question may have to be sold. I will deal with that issue in my final order.

188 There shall be a partial order in the following terms:

1. The parties shall be divorced and that the divorce take effect 31 days after the date of any final judgment in this case;

2. The parties commenced cohabitation in 1989, were married on June 23, 1995 and separated on September 13, 2006. The parties have already consented to the final order of Wilson J. dated July 31, 2008 which, except as set out herein, is a comprehensive order regarding parenting;

3. Commencing March 1, 2009, the father shall pay child support to the mother for Parker in the amount of $1,760.00 per month which is the *Guideline* amount for one child based upon the father's annual income of $218,312.00, subject to adjustment as provided for in paragraphs 6 through 12 of the draft order presented to me by the wife during submissions at this trial and the terms of which the parties are agreed upon;

4. Commencing March 1, 2009, the father shall pay 70% of Parker's current s. 7 expenses which is $1386.00 each month (and takes into account table child support and spousal support) to the mother, subject to adjustment as set out in the draft order referred to in paragraph 3 above. Future special and extraordinary expenses may arise and shall be dealt with in accordance with paragraph 11 of the draft order referred to in paragraph 3. Future special and extraordinary expenses may arise and shall be dealt with in accordance with paragraph 11 of the draft order referred to in paragraph 3 above. For the purposes of determining *pro rata* sharing, the mother's 2008 income converted to CAD using the Bank of Canada average annual exchange rate for 2008, is $93,021.00;

5. Therefore, commencing March 1, 2009, the total monthly payment from the father to the mother is $3,146.00 per month for table child support and s. 7 expenses as set out in paragraphs 3 and 4 above.

Post Separation Adjusments

6. Based on the amounts paid by the father to the mother pursuant to the temporary without prejudice order of Moore J. dated June 18, 2007, his child support obligation pursuant to the table and his obligation to contribute towards the cost of Parker's live-in nanny and Church of the Messiah day care until the end of February 2009 has been fully satisfied and the father has overpaid $4,139.25, which shall be used as a credit of the action.

Life Insurance

7. The father states he has life insurance in the amount of $500,000.00 available through his employer, Continental Airlines. He shall irrevocably designate the mother and his cousin, David Culligan, as co-trustees of all of his life insurance polic(ies) available through his employment in trust for Parker, to secure child support. He shall immediately sign an irrevocable direction permitting the mother to contact the insurance company from time to time ensure that the insurance policy remains in force and unencumbered.

8. The mother shall irrevocably designate the father and her brother, Alex de Auer, as co-trustees of her life insurance polic(ies) available through her employment at Northwest Airlines/Delta in the amount of $500,000.00 in trust for Parker. She shall immediately sign an irrevocable direction permitting the father and Alex de Auer to contact the insurance company from time to time ensure that the insurance policy remains in force and unencumbered.

9. In the event that the life insurance is not used when Parker ceases to be a child of the marriage, the parties shall then be at liberty to reassign the beneficiary as he or she wishes.

Extended Health Coverage

10. Both parties shall maintain extended health coverage for the child Parker through their respective employers. The father shall complete all necessary documents to ensure coordinated coverage for Parker. In order to ensure coordinated insurance coverage for health related services, the mother shall submit all claims for Parker first and the father shall thereafter submit claims to his insurer. Upon receipt of any reimbursement, the father shall pay the funds to the mother forthwith and no later than 7 days. Any shortfall thereafter shall be shared *pro rata* based upon their incomes at the material times determined as set out above. That *pro rata* sharing is currently 50% (father) - 50% (mother).

Validity of the Antenuptial Agreement

11. The Antenuptial Agreement entered into by the parties a few days prior to the parties' marriage is set aside pursuant to s. 56(4)(b) of the *Family Law Act* on the following grounds:

(a) the parties did not understand the nature or consequences of the Agreement; and

(b) the agreement was overly broad and did not accord with the parties' original intentions.

Accordingly, the mother is entitled to pursue a claim for spousal support under the *Divorce Act* and an equalization payment under the *Family Law Act*.

Support and Property

12. The mother's claim for lump sum compensatory support is dismissed. The father shall pay periodic lump sum in the amount of $1,152.00 for a period of 12 years commencing March 1, 2009.

13. Unless this order is withdrawn from the office of the Director of the Family Responsibility Office, it shall be enforced by the Director and amounts owing under the order shall be paid to the Director, who shall pay them to the person to whom they are owed.

14. Where there is default in payment, the payment shall bear interest only from the date of default. Where sufficient deductions are not being made by the Support Deduction Order, payments may be remitted to the Director, Family Responsibility Office, PO Box 2204, Station P, Toronto, Ontario, M5S 3E9.

Order accordingly.

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