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Article

Family Law

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Why you should plan for a breakup before your marriage breaks down

By Adam N. Black

Planning for the breakdown of a marriage while the relationship is intact can be difficult and emotionally charged. However, the failure to plan for the end of a relationship can have unintended and potentially disastrous consequences.

That is precisely what happened to a couple in Grand Forks, British Columbia. Unfortunately, their failure to properly plan landed them in a three-day trial before the Supreme Court of British Columbia and, eventually, a one-day appeal hearing before the Court of Appeal for British Columbia.

The couple was married on August 1, 2009. Approximately one year prior to their marriage, they began residing together in the husband's home, which he owned solely. In May 2013, the husband transferred ownership of the home into the parties' joint names. The husband and wife separated three years later.

In October 2012, prior to the parties' separation, the husband's mother died leaving him a substantial inheritance. By the time the husband's mother's estate was fully administered, the husband had received an inheritance in excess of $160,000. From this inheritance, the husband deposited over $40,000 to term deposits held jointly by the husband and wife.

Under British Columbia's Family Law Act, in the event of marriage breakdown, family property is to be divided equally between the separated spouses. Excluded from this sharing regime are property acquired by a spouse prior to the relationship, inheritances, gifts from a third party, and any property derived from such property. Any increase in the value of excluded property over the course of the relationship is, however, to be shared.

The controversial issue in this case was the extent to which the wife ought to share in the husband's inheritance (held in the joint term deposit) and the value of the home, which he owned solely on the date of marriage and subsequently transferred to the parties' joint names. If the inheritance and the home had remained in the husband's sole name, the wife would have been entitled to share in the growth only of

these assets. Instead, the husband was met with the wife's claim that, as a consequence of her joint ownership, she is entitled to one-half of those assets.

At trial, the judge found that the husband intended to gift one-half of these assets to the wife when he placed them in the parties' joint names. However, the judge's analysis did not stop there. The judge found the husband entered the marriage with approximately $300,000 in investments and received an inheritance of $160,000 during the marriage. In the event of an equal division of family property, the husband's asset base would have increased by only $33,000 over the course of the marriage. Conversely, the wife's asset base would have increased by more than $200,000.

After a careful review of the circumstances in the case, the judge concluded that "an equal division of family property would be manifestly unjust." In order to "find a path to fairness" the judge turned to section 95(2) of the BC's Family Law Act. That section permits a court to make an order for unequal division of family assets in circumstances where it would be significantly unfair to divide family property equally. According to the trial judge, the division of family property should be adjusted "as far as necessary so as not to create a significant unfairness, but no further." For the judge, this was the best way "to respect the intention of the legislation to divide family property equally without creating significant unfairness."

In the result, the judge made an order that the wife receive $134,989 of the family property and the husband receive the remaining $337,702.

The wife appealed on the basis that the judge was wrong to exercise his discretion to divide family property unequally. Writing for the BC Court of Appeal, Justice Saunders squarely addressed the issue that arises "when ownership of excluded property is transferred from one spouse's name to the other spouse's name, solely or jointly, and remains in that form of ownership at the time of separation." Against the backdrop of the trial judge's finding that the husband intended to gift one-half of the home and the term deposit to the wife,

Justice Saunders agreed with the trial judge that these assets must be included in family property. The real question is whether "the origins of the property that previously made it excluded property be considered as a factor that might make it significantly unfair to divide the family property equally." Following a thorough and thoughtful review of the legislative framework, Justice Saunders concludes that "by providing for reapportionment if equal division of family property would be significantly unfair, the Family Law Act left it open to the court to consider, as a factor justifying reapportionment, the origins of family property as formerly excluded property contributed by one spouse. The degree of attention paid to this factor will, as in all property division matters, depend on all the circumstances."

In the result, the BC Court of Appeal upheld the trial judge's decision which, more or less, made the husband whole in respect of what could have been excluded property. This decision may serve as a warning to couples considering significant changes in ownership of their assets. With proper planning, a three-day trial and an appeal may be avoided.

This article originally appeared in the National Post.

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