

Case Name:

MacDonald v. MacDonald

Between

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

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

**British Columbia Supreme Court
Vancouver, British Columbia
Sigurdson J.**

Heard: February 4 - 8, 11 - 15, 18 - 19, 25 - 28 and
March 1, 2002.

Written submissions received: May 27, 2002.

Judgment: October 15, 2002. (240
paras.)

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

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

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

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

Statutes, Regulations **and** Rules Cited:

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

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

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

Counsel:

F. Ean Maxwell, Q.C., for the plaintiff.

Lawrence A. Kahn, for the defendant.

SIGURDSON J. :-

INTRODUCTION

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

FACTS

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

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

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

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

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

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

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

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

used to pay debts and general expenses of the family.

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

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

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

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

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

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

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

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

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

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

20 The parties separated on May 18, 1999.

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

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

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

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

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

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

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

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

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

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

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

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

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

ASSETS

Agreed Family Assets

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

Disputed Family Assets

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

