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Marmer Penner Inc. Newsletter

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Value of Books of Business: Contrary Decisions or Consistent? (. . . Continued from October)

In our October 2013 Newsletter, we raised our collective eyebrows at the curious decision reached by the Supreme Court of British Columbia in the case *Lightle v. Kotar*, 2012 BCSC 1363 (CanLII). In its findings, the Lower Court found that an investment advisor's "book of business" was not an asset that was available for division under B.C.'s family law rules, despite there being prior transactions involving the very book that was being considered. One of these transactions involved the purchase of the book by Mr. Kotar himself, when he first became an investment advisor nine years before the date that the parties became separated.

Consider this: With the Lower Court's findings unchanged, any investment advisor in B.C. could easily lower his or her divisible assets, either by using available cash or by borrowing and buying up books of business which would not be subject to division under the law. This conundrum troubled us, and we were hopeful that a Higher Court would provide some clarity as to whether a book of business should be considered property, and what, if any, discounting of the value should be considered.

Enter the Court of Appeal for British Columbia. Its decision last month has answered our request, thankfully, and provides clarity on this issue: see *Lightle v. Kotar*, 2014 BCCA 69. In the 2-out-of-3 decision, the

Court of Appeal reversed the decision of the Lower Court, and held that Mr. Kotar's book of business should in fact be property that is divisible. In its findings, the Higher Court held that:

1) Mr. Kotar's book of business represents goodwill that constitutes a "family asset", and that it was capable of sale; and

2) Although the goodwill implicit in Mr. Kotar's book of business would have little or no value unless he agreed to co-operate in the sale, i.e. to effectively convey the goodwill and to refrain from entering into competition with the purchaser, these facts do not mean that the goodwill must be excluded from the pool of family assets.

In its analysis of whether Mr. Kotar's goodwill should be divisible or not, the Higher Court reasoned that if the goodwill was not divisible, "ex-spouses could retire from [their businesses], sell the goodwill and realize its full value . . . without accounting to their ex-spouses for the asset accumulated in part through the joint efforts of the spouses during marriage. If such goodwill is said to be of no value, the most substantial asset of many marriages [would] be excluded from the division of property and will be left in the hands of one party to realize on retirement, or earlier".

Also noteworthy in the Court of Appeal's reasons is a very detailed analysis of the case on which the Lower Court relied in coming to its conclusion, *C. (R.A.) v C. (V.L)*, and found that that case's conclusion i.e. that a book of business did not have value "cannot be regarded as establishing a principle of general application". Also noteworthy in the Higher Court decision is mention of the now-consistent Ontario cases where books of business have been found to be property i.e. *McLean* and *Mavis,* "for reasons that [the Court regarded] as compelling".

In the decision, the Higher Court stated:

> *While the matrimonial regime in Ontario does not presumptively exclude business assets from the pool of assets subject to division, the threshold question – whether*

> *a book of business constitutes property – must be addressed on the same principled basis in Ontario as in British Columbia. The discussion of the proprietary interest in an investment advisor's book of business in McLean helpfully addresses the argument that problems with transferability and valuation do not render an interest, right, or title something less than, or other than, property at common law.*

The most interesting aspect of the decision is that the Court of Appeal, not having any evidence on value, returned the case to the Lower Court, and directed the Lower Court to assess its value "by giving it the notional value it would have in an open market between willing sellers and buyers but on the assumption that the seller would continue to work as a financial planner without soliciting his former clients." So, we now have clarity and consistency in relation to whether a book of business should be considered property, and we have consistency in both Ontario and B.C. We will have to wait just a little longer to see what discounts apply, if any, and if the Ontario and B.C. Courts will be consistent or not in that regard. To be continued…stay tuned.