No. 6101-02038

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

UMATHEVAN VISWALINGAM, alias UMAR VISWALINGAM BIN ABDULLAH,

Petitioner

- and -

INDRA RANI VISWALINGAM, alias ZARINA BTE. ABDULLAH,

Respondent

Trial of petition and counter petition for divorce, child custody and support, spousal support, and division of matrimonial property.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES

Heard at Yellowknife,
on March 26, 27 & 28, 1996.

Reasons filed: April 23, 1996

Counsel for the Petitioner: Earl D. Johnson, Q.C.

Counsel for the Respondent Katherine R. Peterson, Q.C.

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REASONS FOR JUDGMENT

1 The parties are husband and wife. In these proceedings they make claims against each other for a divorce, spousal support, child custody and support, and a division of matrimonial property. The proceedings have been lengthy and litigated with an apparent amount of acrimony.

FACTS:

2 The petitioner husband is now 67 years old. The respondent is 50 years old. They were married in Kuala Lampur, Malaysia, on September 11, 1977. They separated in Fort Smith, Northwest Territories, in January of 1991. They have one son, Vinod, born on October 10, 1977.

3 The husband is a medical doctor. He had a successful clinical practice in Malaysia. He was already married when he began a relationship with the respondent wife. He supported her. From the time the relationship commenced she ceased to be an independent and self-supporting woman. The parties married after the husband's first marriage was dissolved by Muslim law. She was already seven or eight months pregnant at the time.

4 The family lived a life of considerable affluence in Malaysia. They also lived in what was termed a traditional Asian relationship. The husband focused his energies to his medical practice and numerous investments. The wife devoted herself to the upbringing of their son and the maintenance of a household suitable to their economic status. The husband made all decisions of substance for the family and the wife complied.

5 In 1982 the family immigrated to Canada. The economic situation in Malaysia had deteriorated and the parties were concerned about securing a good education for their son. The family moved to Manitoba where the husband entered into partnership with a local physician. Considerable amounts of money were transferred by the husband from bank accounts in Singapore to Canada to aid their establishment of a life in this country. These funds came from the liquidation of the husband's assets in Malaysia as well as other investments.

6 In Manitoba the parties bought a home which was placed in their joint names. The husband also purchased two properties in British Columbia. One was a commercial property. The other was a residence in Richmond. Title to both properties was placed in the husband's name. The Richmond house was paid for in cash. The commercial property was bought by use of funds from a mortgage placed on the Richmond property. The Richmond property was rented out while the family lived in Manitoba.

7 In 1983, the husband took a position as a staff physician with the Fort Smith Hospital. The Manitoba home was sold and the family moved into a rented house in Fort Smith. In the next few years the husband sold both British Columbia properties. In 1988 the husband purchased a residential property in Edmonton. Title to this property was also put in the husband's sole name. It was purchased for $145,000 by a combination of cash and a mortgage. Renovations were done and the property generated rental income. In 1990 a new mortgage of $43,500 was placed against this property. These funds went to pay off the earlier mortgage and to finance further renovations.

8 In January of 1991, the wife moved out of the matrimonial home. Marital relations between the wife and the husband had been deteriorating for some time. By January the wife felt intimidated and emotionally abused. The son stayed with the husband.

9 The wife had not been employed outside of the home throughout her marriage until the family moved to Fort Smith. In 1986 she took a hairdressing course and was employed for a time in a local salon. She earned a modest income on a commission basis. She also did freelance hairdressing out of her home. All of the money she earned was deposited in a joint account controlled by her husband. In 1990 the wife obtained employment in a clerical position with Parks Canada. She continued in that employment after the separation although, as of now, the position is subject to reclassification and she may lose her job. At present, she earns approximately $3,800 gross per month.

10 In late 1991, the husband started encountering difficulties with his employment. He was suspended in August of 1992. There were allegations of incompetence which since have been the subject of a medical board of inquiry. The allegations were dismissed but the husband was directed to get retraining in certain areas. The result is that he has not practised medicine since his suspension.

11 After his suspension the husband commenced legal proceedings against his employer and others. He continued to receive his salary (approximately $125,000 per year at the time) while on suspension. Then in March of 1993 the legal proceedings were settled with his employer making a lump sum payment of $195,000. Much of this was consumed by legal fees for the litigation.

12 In July of 1993 the husband was injured in a car accident. As a result he received disability payments until September of 1995. Since then his sole source of income has been a modest superannuation payment plus Canada Pension Plan and Old Age Security payments. His total monthly income now is only $1,750. He makes ends meet by periodically liquidating assets and drawing on credit lines. His sole assets now are an R.R.S.P. of $16,600, a motor vehicle, and the Edmonton house in which he now lives with his son.

13 After the separation the husband purchased the former matrimonial home in Fort Smith. He had it renovated and sold it in October of 1995. Approximately $50,000 was realized as a gain on the sale. This amount was divided equally between the parties on a "without prejudice" basis.

14 The wife's relationship with her son has completely deteriorated since the separation. It seems to me clear that, over the years that the son has been living with the husband, his feelings toward his mother were allowed to turn to antagonism and resentment.

15 These are the facts necessary to give a background to the issues in this case. I will touch on some further facts in my discussion of the issues.

16 It is agreed that there are sufficient grounds to grant a divorce. The substantive

issues are (a) the husband's claim for child support; (b) the wife's claim for spousal support; and (c) the competing claims with respect to the division of matrimonial property.

CHILD CUSTODY & SUPPORT:

17 Vinod is now 18 years old. There was evidence that he plans to continue full-time education pursuits. There is an investment fund available to fund much of his education costs. Unfortunately there was no evidence as to Vinod's ability to support himself or his efforts to do so. He lives in the Edmonton home with the husband and my impression from the evidence is that the husband has lavished quite a bit of money on him over the years. I do not think it is unreasonable, however, to expect this young man to now contribute significantly to his living expenses.

18 The husband's counsel submitted that it would be appropriate to order child support on the basis of the formula set forth in Levesque v. Levesque, [1994] 8 W.W.R. 589 (Alta. C.A.). With the current disparity in incomes, that would result in an apportionment of 60% of child care costs to the wife and 40% to the husband. The difficulty I have with this submission is that it assumes an obligation to pay support without reference to other circumstances.

19 In this case the husband, while no doubt incurring some expenses on behalf of

Vinod, also incurs expense for himself by their joint use of the house in Edmonton. Part of the reason the wife has a higher income now is because she works at three jobs, night and day, seven days each week. It seems to me that a blind application of the formula would simply be an incentive to work less. I am also not satisfied by the evidence as to actual child care costs nor as to Vinod's ability, or lack thereof, to support himself. Finally, considering Vinod's age, there is no presumption as to support in the absence of evidence.

20 In the circumstances, I decline to make any order as to child custody or support. Vinod is old enough that he will choose with whom he wants to live and where and how he will communicate with either one of his parents. He will decide when and how he will pursue his education. I do not think an order accomplishes anything in this case.

SPOUSAL SUPPORT:

21 I have no hesitation in describing this marriage as, what we would term, a "traditional" one. Indeed it was more "traditional" than any similar Canadian marriage. Both parties readily referred to the expectation in Asian marriages that the husband would decide what was best for the family, without consultation or debate, and the wife would be expected to be compliant. The husband made all financial decisions for this family and, even though he professed at trial his desire for his wife to be independent, he expected her to follow his directions at all times. This is not meant to be criticism

of a different cultural attitude; it is simply a statement of fact based on the evidence.

22 In the well-known case of Moge v. Moge, [1992] 3 S.C.R. 813, the majority judgment by L'Heureux-Dubé J. signals a move away from an emphasis on the "traditional - modern" dichotomy used to characterize marriages for spousal support purposes. In this case, however, the characterization is apt and helpful. In Moge, the Supreme Court of Canada stated explicitly that the support provisions of the *Divorce Act* are intended to deal with the economic consequences, for both spouses, of the marriage or its breakdown. For the husband here, the marriage provided the opportunity for him to pursue his professional and financial interests while the wife provided a home and family. The marriage breakdown, by itself, had no financial consequence to the husband. His current financial problems are related to his professional difficulties, not anything connected to the marriage. For the wife, on the other hand, she relied throughout the marriage on her husband for her economic well-being. He had the power to extend or withhold the economic benefits that went with being his wife. She now has to create an independent life for herself, something neither she nor her husband expected she would have to do while the marriage was a viable relationship.

23 The comments of McEachern C.J.B.C. in the recent case of Rolls v. Rolls, [1996] B.C.J. No. 292 (C.A.), are applicable to this case:

> In my view authorities binding on this Court, such as *Moge v. Moge*, [1992] 3 S.C.R. 813 and others, make it clear that when there is a breakdown of a traditional marriage such as this one, the law must ensure as best it can that the disadvantages imposed upon a wife upon a marriage breakdown will be taken into account in the division of property and the other financial arrangements that are made. This is to off-set the almost certain impoverishment of the wife over a period of time following a divorce, such impoverishment resulting in almost all cases, from the fact that the husband had spent the married years acquiring the skills which permit him to earn more than the wife will be able to earn and the absence of the skills that she might have acquired but for the years spent as a home maker during the marriage.

24 In my opinion, spousal support for the wife would be justifiable so as to alleviate the economic disadvantage she has suffered as a consequence of marriage breakdown. The wife's counsel, however, in recognition of the husband's financial situation, submits that the wife's entitlement to support can be adequately addressed by a division of property and a monetary judgment in that regard. I agree. I will therefore treat this entitlement within the context of the matrimonial property claim. There will be no specific order for periodic support.

DIVISION OF MATRIMONIAL PROPERTY:

25 The matrimonial property claims require consideration of a number of subsidiary issues: the applicable law; the status of the Edmonton property (which is the only substantial asset under consideration); and the question of what would constitute a fair and equitable division in the particular circumstances of this case. The

parties acknowledge that this court has jurisdiction to deal with this claim as between the parties. But, because the property is not located within the jurisdiction of this court, special rules are brought into play.

26 The common law rule when dealing with real property outside of the jurisdiction is that the local court has no jurisdiction to affect the right, title or interest of the parties in the property: British South Africa Co. v. Companhia de Mocambique, [1893] A.C. 602 (H.L.). The local court can, however, take into account the value of the property in determining what may be an appropriate money judgment as between the parties. In such cases, though, the law to be applied in respect of the notional division of the property is the *lex situs*, in this case, the law of Alberta: Tezcan v. Tezcan, [1988] 2 W.W.R. 264 (B.C.C.A.).

27 The husband's counsel submits that I should apply the traditional rules. That would mean the application of the Alberta *Matrimonial Property Act*, R.S.A. 1980, c. M-9. The wife's counsel submits on the other hand that I should apply the Northwest Territories legislation, being the *Matrimonial Property Act*, R.S.N.W.T. 1988, c. M-6. She argues that the *lex situs* choice of law rule should be abandoned in the context of matrimonial disputes in favour of a "real and substantial connection test" which, in this case, would favour the Northwest Territories since it is the jurisdiction where the parties lived for the last eight years of cohabitation. The "real and substantial connection test" has been advocated by some commentators but was specifically rejected by the court

in the Tezcan case noted above. I find no reason to differ from that judgment since, in my view, the same principles apply here.

28 The Northwest Territories legislation, just as the British Columbia legislation under consideration in Tezcan, and just like the Alberta legislation, deals with property ownership rights as between spouses. If spouses choose to own property in another jurisdiction then there is no reason why their rights with respect to that property should not be governed by the laws of that jurisdiction. Having said that, however, it seems to me that there is no practical effect in this case because of the similarities in the Alberta and Northwest Territories statutes.

29 The *Matrimonial Property Act* of the Northwest Territories provides that a judge may make an order that he or she considers fair and equitable, notwithstanding that the legal or equitable interest of the husband and wife in the property in question is otherwise defined. The Act requires that the judge take into account the respective contributions of the husband and wife whether in the form of money, services, prudent management, caring for the home and family, or in any other form. There is no statutory presumption of an equal distribution of matrimonial property but jurisprudence has deferred to the principle that "equity favours equality": Kucey v. Kucey, [1990] N.W.T.R. 234 (S.C.). The over-riding consideration, however, is, as the statute directs, that the distribution be what the judge considers "fair and equitable": Chapman v. Chapman, [1993] N.W.T.R. 355 (C.A.).

30 The *Matrimonial Property Act* of Alberta also grants a wide discretion to a judge to order a fair and equitable distribution. There are many more factors specified in the Alberta statute than in the Northwest Territories one, and there is a presumption of equal distribution expressly provided for in the *Act*, but the over-riding principles and the variety of mechanisms available to achieve an equitable distribution are the same in effect. The philosophy behind the Alberta Act was stated by Laycroft C.J.A. in Dwelle v. Dwelle (1982), 46 A.R. 1 (C.A.), at page 10:

> In Alberta, the Legislature has provided a remarkably flexible statute dealing with the division of matrimonial property. When in some statutes on this subject in other jurisdictions, the Legislature chose to specify firm rules to be followed, the Alberta Statute specifies only "the matters to be taken into consideration" (s.8) leaving the interplay of those matters to judicial discretion. Only in s. 7(4) where there is a presumption of equality to be applied in the division of property other than that described in ss. 7(2) and 7(3) did the Legislature specify anything approaching a firm rule. The Court must not replace this approach of judicial discretion with the rigid rules which the Legislature saw fit to reject.

31 This underlying philosophy was also the subject of comment by Stevenson J.A. in Mazurenko v. Mazurenko (1981), 124 D.L.R. (3d) 406 (Alta. C.A.), at page 413:

> The legislation introduces a discretionary system with the presumption of equal sharing, which is similar to a deferred sharing scheme with a power of adjustment. The important point is that both of these schemes recognize "the principle that a husband and wife carry on their married life, including their economic functions, for their mutual benefit and account and according to arrangements accepted by both for that purpose. That principle, if accepted, requires that the law provide in some way for the sharing of their economic gains between the husband

> and wife" (p. 26). That is done by the legislation and done with the presumption of equality ...

32 In my opinion, the philosophy and purpose of the two statutes are the same.

33 The husband's counsel points out, however, that the Alberta statute specifically exempts from distribution property acquired by a spouse before the marriage. He submits that the Edmonton property comes within this category on the basis that the source of funds used to purchase this property was the sale of assets owned by the husband prior to the marriage. Counsel argues that the Edmonton property was acquired by the husband as an investment, it was never used as the matrimonial home, and the husband's funds can be traced into the property. These submissions require comment on some other aspects of the evidence adduced at trial.

34 The Edmonton property was purchased with funds from the sale of the Richmond property as well as a mortgage. The Richmond property was purchased with funds transferred from the husband's bank account in Singapore. Those funds came from the liquidation of the husband's assets in Malaysia including the residence that was owned by the husband before the marriage but used for some years as the parties' matrimonial home.

35 The onus is on the husband to prove the connection between the pre-marriage assets and the present property he claims as exempt. I find he has failed to do that.

The evidence reveals that the husband, who had complete control of the family's assets throughout the marriage, mingled his funds indiscriminately. Some of his assets in Malaysia were acquired before marriage. But some, such as the matrimonial home there, became, at least in Canadian law, matrimonial property. I do not know what its status was under Malaysian law but, in either country, it would be considered the matrimonial home. He testified that during the marriage all of his investments were for the "benefit of the family" so that his wife and son would be provided for should he die. Some funds were used directly for the family's needs, such as the first home in Manitoba, while others were used for speculative investment purposes. I do not see any direct connection between the Edmonton property and pre-marital assets.

36 Furthermore, I do not accept the husband's evidence that this property, as well as the Richmond property, were purchased solely as his investment properties. I accept the wife's evidence that both properties were purchased as potential homes for themselves in later years. The wife played a significant role in choosing the properties even though she was kept ignorant of all financial aspects of the purchases. Her evidence is corroborated by the fact that when they sold the Manitoba home, some of their personal possessions were put first in the British Columbia house and then moved to the Edmonton house. The intended use of this house also coincides with the fact that their son attended university in Edmonton. I therefore conclude that the Edmonton house is matrimonial property subject to distribution.

37 The husband's counsel further submits that, if there is to be a distribution taking into account the Edmonton property, as well as the Fort Smith property, there should be an unequal distribution since the wife made no financial contribution whatsoever to those assets. That may be true but it may also be one of the reasons why matrimonial property legislation recognizes non-monetary contributions. To do otherwise would simply reward those who have the economic power in the marriage. And in this case, as the wife's counsel points out, the wife could not have made a financial contribution even if she had wanted to do so. From before the marriage she was economically dependant upon her husband. All through the marriage she was expected to fulfil the traditional roles of homemaker and mother. I fail to see therefore why her non-monetary contributions to the marriage should not be recognized.

38 Even if I take into consideration the husband's position that he should at least be credited with some value for the assets he accumulated before the marriage, as well as the disproportionate financial contributions, these are more than offset by a number of other factors: (1) the need to redress the wife's economic disadvantages by some form of support; (2) the fact that the husband gave no financial support to his wife after the separation except by court order for a short period between October, 1991, and December, 1992; (3) the fact that the husband has failed to satisfactorily account for the disposition of significant liquid assets prior to the separation (such as the disposition of $99,000 in treasury bills reflected on his 1990 tax return); (4) his continued use and occupation of the Edmonton home, including the rental income

therefrom; and (5) his retention and use of the family's personal assets after the separation (including furniture and a vehicle). I recognize that the husband has carried the sole financial burden of raising Vinod since the separation, but he was the one best able to do so.

39 The husband says that I should also consider his current financial circumstances. He has no income and his financial assets have been depleted due to his on-going litigation over his professional credentials. While of course one should sympathize with him, one cannot ignore the fact that the depletion of his resources occurred after the separation. All of the steps taken since the separation | the litigation, the expenditures on legal costs and other activities, the accumulation of debt | are all steps taken by the husband. I fail to see why the husband's depletion of assets should affect the wife's entitlement to an equitable share of the assets at the time of separation.

40 In this case there was no inventory or valuation of the distinct assets existing as of the date of separation. This makes it more difficult to do a rational, mathematical calculation; it does not, however, prevent me from exercising my discretion to order what I consider to be fair and equitable in the circumstances of this case.

41 The Edmonton property was valued at $205,000 in 1995. I do not have evidence as to its value in 1991 at the time of separation. A mortgage of $43,500 was

placed on the property in 1990. I do not know what is the outstanding amount on that mortgage as of now since it has been subsumed in a line of credit which is secured against the house. That line of credit stands at approximately $120,000 but much of that was incurred by the husband to finance his litigation and personal expenses. There were extensive renovations to the house but most of those were paid for from the original mortgage and then the 1990 mortgage. Whatever increase in the property value is due to these renovations, the bulk of it would have already been realized by the date of separation. It seems to me that the rational thing to do is simply to take the 1995 valuation, subtract the face amount of the 1990 mortgage, and divide the remainder in half. This results in a sum of $80,750 as the wife's share. This does not take into account any notion of occupation rent or any accounting for rental income received by the husband since the separation.

42 With respect to the Fort Smith property, this was purchased, renovated and sold by the husband after the separation. The proceeds were divided in half subject to the outcome of this litigation. It can be argued that this property was purchased with funds available at the separation so it should go back into the pool of assets subject to distribution. In my opinion, even if one concluded the wife should not ordinarily be entitled to share in these post-separation proceeds, she should be entitled to retain her share of these proceeds as an alternative to compensatory spousal support.

43 With respect to other assets, the wife's counsel suggests that use be made of

the liquid assets itemized on the husband's statement of financial affairs dating from October, 1994. These show investments worth approximately $51,000. In my opinion this is a conservative reference point. By 1994 the husband had already depleted his assets. I have no doubt that, as of the date of separation, the husband had significantly more investments than he had in 1994; more than the wife knew and more than was disclosed in the evidence before me. In this regard I need only refer, as an example, to the fact that the husband had a bank account in England which, eight months after the separation, had a balance in excess of £6,200. The wife's counsel, however, suggests use of the 1994 figure since it is the most cogent evidence available. I agree. I will therefore allocate half of the 1994 asset figure, being $25,500, to the wife's share. The English bank account will not be brought into this calculation since there was evidence that the husband maintained accounts in England prior to the marriage.

44 I therefore conclude that, to achieve a fair and equitable distribution of assets in the circumstances of this case, the husband should pay to the wife, the sum of $106,250. This is arrived at as follows:

(i)	one-half share of Edmonton property	$80,750
(ii)	proceeds from Fort Smith disposition	25,000

(iii)	one-half share of liquid assets	25,500
Sub-Total:		$131,250
(iv)	less funds received	25,000
Total:		$106,250

45 In my opinion, awarding a monetary judgment, albeit using imprecise figures, achieves the objectives of the matrimonial property regime in existence in both Alberta and the Northwest Territories. I make no order affecting the Edmonton property. This order is simply the exercise of this court's personal jurisdiction over the parties. The wife will have her judgment which she can then enforce in any manner available to her.

PRE-JUDGMENT INTEREST:

46 The wife advanced a claim for pre-judgment interest on any monetary award. There were no submissions made on this point at trial on behalf of either party. I will therefore address the wife's entitlement to interest but I will afford an opportunity for further submissions on the particulars of this award.

47 I am not aware of any authority from this jurisdiction discussing the applicability of pre-judgment interest to matrimonial property judgments. I know of no particular impediment to an award of interest since such an award is commonly made with respect to money judgments. There is, of course, a residual discretion in the trial judge

to deal with interest in such manner as may be appropriate to the case. There is authority from Ontario, where the relevant statute mandates property equalization payments from one spouse to another, that prejudgment interest is, as a general rule, payable on such a payment: Burgess v. Burgess (1995), 24 O.R. (3d) 547 (C.A.). That judgment also canvassed the factors that may result in not awarding interest (at page 553):

> The principles for awarding prejudgment interest on equalization payments are not necessarily identical to those used in commercial cases: *McQuay v. McQuay* (1992), 8 O.R. (3d) 111, 39 R.F.L. (3d) 184 (Div. Ct.). The weight of jurisprudence in family law cases at the trial level indicates that exceptions do exist to the usual award of interest on an equalization payment. Specifically, the court's discretion will be exercised ... and prejudgment interest will not be awarded on an equalization payment where, for various reasons, the payor spouse cannot realize on the asset giving rise to the equalization payment until after the trial, does not have the use of it prior to trial, the asset generates no income, and the payor spouse has not delayed the case being brought to trial ... (Citations omitted).

48 In British Columbia, where the matrimonial property regime is more similar to

that in the Northwest Territories and Alberta, the applicable factors with respect to prejudgment interest are nevertheless similar to those in Ontario. As a general rule, prejudgment interest on a matrimonial property entitlement is awarded where the titled spouse has had the use of liquid funds or property which have themselves earned income: Rednall v. Rednall (1986), 4 R.F.L. (3d) 337 (B.C.S.C.); Billingsley v. Billingsley, [1991] B.C.J. No. 2614 (C.A.).

49 Taking the above-noted factors into account, I see no reason not to award pre-judgment interest. All of the family's assets were always under the control of the husband before and after separation, and he used them as he pleased or as necessary for his purposes. He could have accessed these assets after the separation so as to settle the wife's claims. If he complains about his lack of funds now, then that is the result of circumstances related solely to his activities after the separation. It has no impact on the entitlement to interest.

CONCLUSIONS:

50 For the foregoing reasons, I order as follows:

1. A divorce judgment will issue in the usual terms.
2. The respondent will have judgment against the petitioner in the sum of $106,250.00.
3. The respondent will have pre-judgment interest at such rate and from

such time as will be determined after receiving further submissions from the parties. To that end, counsel will have 30 days from the date of these reasons to file further submissions with me. If counsel are able to agree on this point, they may incorporate the terms agreed upon in the formal judgment.

4. The respondent will have her costs of these proceedings. Again, if the parties are unable to agree, they may file written submissions within 30 days.

51 If further directions are required, counsel may address me in chambers.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 23rd day of April, 1996.

Counsel for the Petitioner: Earl D. Johnson, Q.C.

Counsel for the Respondent: Katherine R. Peterson, Q.C.