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## Till Debt Do Us Part

*Category: Division of Assets*

It's a sensitive, potentially awkward, and emotionally charged, topic of conversation, which eventually lands many unfortunate couples in family court. Of course, I'm referring to the hot button issue of family finances, specifically, family debt.

But rarely does the matter of family debt become more problematic and contentious than when couples separate or divorce. The reason is simple.

Everybody wants to claim their share of the assets. Nobody wants to assume their share of the family debt.

It reminds me of the expression, "Success has many fathers, while failure is an orphan." Family debt has definitely been considered an orphan, but as the Supreme Court of Canada, recently decided, at least in some situations, its days as an orphan have come to an end.

The case in question involved Wayne and Malka Stein, whose twelve year marriage ended with two children, an equal division of 1.2 million dollars in assets, and an order of spousal support. At issue was responsibility for the future tax liabilities associated with Mr. Stein's tax shelters, the extent and timing of which were not ascertainable at the time of trial. Nevertheless, the trial judge ordered, that such future "contingent liabilities" would be shared equally by both Mr. and Mrs. Stein, "on an "if and when" basis, since they both benefited from them."

However, the British Columbia Court of Appeal disagreed with the trial decision. It did so, because in its view, the Family Relations Act "precludes the kind of "freestanding" division of debt", made by the trial judge. Further, because the "speculative nature" of the liability precluded a "rational adjustment of the property to account for the potential liability", at the time of trial, the Court ordered Mr. Stein to be solely responsible for any liability.

Mr. Stein appealed to the Supreme Court of Canada. In a relatively short, nearly unanimous decision, Canada's highest court dismissed the legal arguments raised by the Court of Appeal. In essence, the Court decided, simply because the parties were unable to calculate the amount of the future liability at the time of trial, did not mean that such liability could not be divided between the spouses.

It was a matter of basic fairness, as well as recognition that any marriage is a joint venture in every sense. As the Court opined, "fairness requires that both assets and debts, even those that cannot be precisely valued at the time of separation be considered upon the breakdown of a marriage, in recognition that spouses jointly contribute to not only the accumulation of assets, but also to debts incurred for family related costs."

As a consequence the Court ordered that both Mr. and Mrs. Stein share responsibility for such liabilities, provided, if the impact of such future liabilities resulted in any unfairness, the legal door remained open to make appropriate adjustments.

So if "debt" rather than "death" does you part at least it's somewhat re-assuring (or not) to know, that your promise "for better or worse" may have far more significance than you ever imagined.

