
CANADA / JUDGMENT

A.K.K. v. A.S.K.

2021 BCSC 1602

COURT

Supreme Court of British Columbia

DECIDED

16 August 2021

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2021 BCSC 1602 A.K.K. v. A.S.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.K.K. v. A.S.K.,

2021 BCSC 1602

Date: 20210816

Docket: E162516

Registry: Vancouver

Between:

A.K.K.

Claimant

And

A.S.K.

Respondent

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

Counsel for the Claimant:

L.J. Mackoff

(via telephone)

Counsel for the Respondent:

P.M. Daykin, Q.C.

B. St. Pierre

(via telephone)

Place and Dates of Hearing:

Vancouver, B.C.

August 4-6, November 6, 2020,

January 15 and March 29, 2021

Place and Date of Judgment:

Vancouver, B.C.

August 16, 2021

Introduction

- [1] The respondent, A.S.K., applies to set aside a separation agreement dated June 29, 2016 (the "Agreement"), which settled all matters arising from his marriage with the claimant, A.K.K.
- [2] The respondent submits that the court should set aside the Agreement pursuant to procedural grounds under s. 93(3) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], or by reason of the Agreement being significantly unfair under s. 93(5) of the FLA.
- [3] At the hearing of the application both parties took the position that this matter was suitable to be decided in a summary fashion under R. 10-5 of the Supreme Court Family Rules. Despite there being issues with credibility due to conflicting affidavits, as set out below, I find that I am able to decide the matter in a summary fashion: see *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 215-16 (C.A.).
- [4] For the reasons discussed below, the respondent's application is dismissed.

Background

- [5] The claimant is a 52-year-old immigration lawyer. The respondent is a 54-year-old dentist.
- [6] The parties were married in 1991 and have two children. Since the children have the same initials, I will refer to them as Child 1, who is now 23 years old, and Child 2, who is now 19 years old.
- [7] During the marriage both parties worked and built their respective careers. The respondent supported the claimant during law school. The claimant took a 12 month parental leave after the birth of Child 1 and a few months before and after the birth of Child 2. They engaged the services of a full-time nanny for approximately five years.

- [8] Child 1 was born with a genetic disorder which required him to have two surgeries under the age of three. The children, while assessed as being gifted at an early age, also have learning disabilities and a number of tutors assisted with their educational needs. The claimant did not work full-time after the birth of Child 2. She focused much of her time on the needs of her children, tutoring them herself for periods and overseeing their outside tutoring needs. She provided home schooling for a period.
- [9] At the time of the Agreement, Child 1 was 18 and about to graduate from a private high school, and enrolled in an American university for the fall of 2016. Child 2 was 14 years old and completing grade eight at the private school.
- [10] The parties operated their respective practices through solely owned professional corporations and each also had holding companies. The respondent had a holding company, which I will call ASK Holdings, which invested in real estate with the respondent's dental colleague through subsidiary companies. The claimant had a holding company which I will call AKK Holdings, through which she held investments.
- [11] In the year before separation, the respondent sold the assets of his professional corporation to a company which buys and operates dental offices.
- [12] Also in 2015, the parties sold a jointly-held investment property. The proceeds were deposited into AKK Holdings' bank account. In January 2016 the net proceeds from the sale of three rental properties held through the respondent's ASK Holdings in conjunction with his dental colleague, were deposited into ASK Holdings' bank account.

Family property and debts at the time of separation

- [13] At the time of separation, the assets and liabilities disclosed by the parties included:
- a) A family home, with equity of approximately \$2,900,000;
 - b) Three vehicles with values of \$25,000, \$8,000 and \$100,000, with a loan of \$120,000 on the third;
 - c) Two RRSP accounts (claimant's \$358,000; respondent's \$382,000);
 - d) The claimant's law practice, with recent financial statements from 2011-2015;
 - e) ASK Holdings (cash, investment holdings, debt and intercompany loans, as set out in financial statements); and
 - f) AKK Holdings (financial status as set out in emails from the accountant and respondent, including investments in real estate).

The separation and the creation of the Agreement

- [14] While on vacation to celebrate their 25th wedding anniversary in May 2016, the claimant discovered texts on the respondent's telephone which made her suspicious of the respondent's fidelity. They arrived back in Vancouver on May 29, 2016. On that day the claimant confronted the respondent regarding an affair, and the respondent confessed to engaging the services of sex trade workers throughout their marriage. The respondent moved out of the family home later that day.
- [15] On May 29, 2016, the respondent stayed at the home of the claimant's sister and brother-in-law, who were good friends of the parties. The claimant's sister is a psychiatrist. The next day, the parties met together with the claimant's sister and brother-in-law.
- [16] On May 30, 2016, at the claimant's request, the respondent transferred \$797,200 from ASK Holdings to AKK Holdings.
- [17] The claimant made arrangements for a lawyer to assist the respondent, however the claimant and respondent both attended at the lawyer's office, and that lawyer declined to act in the matter.
- [18] On June 4, 2016, the claimant's sister (who I will refer to as "the psychiatrist") sent the claimant a "treatment plan" for the respondent. The claimant forwarded it to the respondent. The plan included the respondent entering a men's only residential rehabilitation facility with expertise in behavioural addiction. The respondent deposed that the psychiatrist did not meet with him in person:
- when I contacted her, she immediately prescribed medication for me and, at the request of both of them [the claimant and the psychiatrist], I began taking it. We did not meet in person, and only briefly discussed how I was feeling over the phone. I did not receive a formal diagnosis. She asked me to complete a one page mental health questionnaire to "prove she had done the work". I was not warned about the side effects of the drugs prescribed to me, and was told that one medication would help with sleep while the other would help with my mood and depression.
- [19] That same day the psychiatrist prescribed the respondent Citalopram (an anti-depressant) and Quetiapine (an anti-psychotic used to treat mood disorders). The respondent deposed that he took the medication as directed, and experienced drowsiness, sluggishness, dry mouth, shakiness, weight gain, a loss of motivation and a loss of libido.
- [20] The psychiatrist was cross-examined prior to the hearing of this application. She testified that she observed her family in distress and was triaging to their needs until the respondent could be seen by another psychiatrist and the rest of the family could obtain their own assistance. She saw the respondent at his office on May 29, 2016, and later that night at her home where he stayed, where she had conversations with him about his symptoms. They continued their discussions in person, over the telephone, by text and by email over the next few days. The respondent apparently brought up the possibility of a sex addiction, which they discussed. She prescribed the medication (discussed above) to help the

respondent with sleep and to address his sex addiction which was her working diagnosis. She deposed that she specifically informed the respondent about the side effects of the medications over the telephone on June 4, 2016, when the medication was being filled, which accorded with her usual practice of over 20 years.

- [21] The psychiatrist testified that she sent the respondent a detailed questionnaire to assess the state of his symptoms and for monitoring purposes. She stated many psychiatrists do not use the questionnaires at all. She denied saying she sent them to prove she had "done the work".
- [22] The psychiatrist confirmed that her sister, the claimant, had no input into the treatment or medication prescription for the respondent. The psychiatrist testified that the respondent asked her about other medication after attending a peer support group and seeing a therapist. The psychiatrist did prescribe a limited amount of Prozac because she had arranged a referral to another psychiatrist who would then be responsible for diagnosing and prescribing medication for the respondent.
- [23] The psychiatrist testified that the respondent was asked about side effects from the medication and he said he did not have any distressing side effects, despite her asking many times. She confirmed that loss of libido was one of the objectives of the medication. She also stated that it is her standard practice to ask working professionals how they are managing from a mental health perspective as well as a medication and side effect perspective.
- [24] Finally, the psychiatrist testified that she did not, at any time, attempt to influence or affect the respondent's mental state to effect an advantage to her sister with regard to the family law matter between them.
- [25] On June 10, 2016, at the claimant's request, the respondent transferred \$444,335 from ASK Holdings' investment account to AKK Holdings' account.
- [26] The parties had discussions about a financial settlement and spousal and child support. The respondent deposed that he hoped for a reconciliation and expressed this to the claimant. He also deposed that she promised to consider reconciliation but told him she wanted to sign an agreement first. The claimant's sister confirmed that at some point both the claimant and respondent discussed with her a wish to reconcile.
- [27] The respondent says he thought the Agreement would be temporary in nature and either abandoned if they reconciled or subject to negotiation if they decided to divorce. He further says the claimant told him the Agreement was security for her and that it would not be registered unless they could not repair their relationship. The respondent deposed that at that point in time, in June 2016, he was prepared to do anything that the claimant wanted.
- [28] The claimant retained legal counsel to draft up an agreement. Financial information was gathered from the respondent and the parties' accountants, banks and investment advisors.

- [29] On June 23, 2016, the claimant sent the draft agreement to the respondent. He forwarded it to his new legal counsel for her review. On Friday June 24, 2016, the claimant asked her counsel to do what she could do to conclude settlement as she was anxious about it, and she was leaving on a trip in a week. The claimant indicated the respondent was prepared to sign the agreement.
- [30] The draft included recitals stating that the respondent had diverted funds in furtherance of his extra-marital activities and that the parties acknowledged the division of family property under the draft agreement is in partial contemplation of this diversion. There was also a provision stating that the claimant had been diagnosed with post-traumatic stress disorder ("PTSD") in relation to her discovery of the extra-marital activities and it was anticipated that she would not be able to resume full-time employment. Another recital set out that the claimant was primarily responsible for the children.
- [31] The respondent's lawyer made extensive notes on the draft, including comments about lack of financial disclosure, no evidence of PTSD, her inability to advise without full information, that the recitals were put in to justify the good deal for the claimant, and a note that it was a "terrible deal". The respondent met with his lawyer on June 27, 2016. He told her he was prepared to sign it. The lawyer advised him not to sign it as she wanted to request changes.
- [32] The lawyers had discussions on June 28, 2016. The respondent's lawyer wrote to the claimant's counsel on June 29, 2016, and requested a number of changes, including:
- a) Revising the respondent's income from \$470,000 down to \$400,000;
 - b) Making child support only payable when the children are living at home;
 - c) Reviewing child support annually;
 - d) Deducting expenses for the oldest son, including tuition, from the respondent's income;
 - e) Specifying the amount and duration of spousal support;
 - f) Making the claimant responsible for taxes associated with funds transferred to her holding company;
 - g) Making the parties share all tax liabilities in respect of the respondent;
 - h) Providing that if the education funds held with the claimant's holding company are not exhausted the remainder will be paid to one or both of the children as agreed;
 - i) Addressing tax and other liabilities with regard to sale of the properties;
 - j) Making the claimant responsible for the costs of refinancing the family residence; and
 - k) Adding a reconciliation clause setting out a minimum of 90 days of cohabitation in order for the agreement to be voided, otherwise reconciliation and cohabitation will not affect the agreement.

- [33] The claimant's lawyer sent a revised agreement that same day substantively incorporating the requested changes, including the reconciliation provision. The recital regarding the PTSD diagnosis and return to full-time employment was removed. The respondent's lawyer again advised the respondent not to execute the agreement as she was concerned about confirming tax liability on support payments and transfers to the respondent's holding company, and that the respondent should have discretion about the sale of certain named properties. Those changes were made as initialled interlineations. The respondent's lawyer's concerns were focussed on her belief that the claimant had not made financial disclosure which she mentioned to her client. She explained ss. 93 and 95 of the FLA to the respondent and suggested that if he decided to sign the Agreement perhaps he should sign it without obtaining disclosure. This was founded upon the lawyer's understanding of the level of disclosure. This may appear to be counselling willful blindness.
- [34] The respondent's lawyer did not notice anything remarkable about his physical state. He did not appear to be drowsy or sluggish. He did not report to her being unable to work. She did not form the opinion that the respondent did not understand the nature and consequences of the Agreement, or that he was under duress. She had no concerns about the respondent's capacity to enter into the Agreement.
- [35] The respondent did not tell his lawyer the Agreement would be temporary, be abandoned or renegotiated later. He did tell his lawyer that he would like to sign the Agreement. The claimant agreed to all of their requested changes and the respondent felt very comfortable with the Agreement.
- [36] Despite the 25-year-marriage, the spousal support terms under the Agreement were time-limited to 15 years (to age 62) without reconsideration at that time, and the amount was below the low-end of the Spousal Support Advisory Guidelines' amount based on the respective incomes disclosed by the parties.
- [37] The respondent signed the agreement on June 29, 2016, and the claimant signed it on June 30, 2016. Both parties and their counsel executed solicitors' certificates of independent legal advice which included confirmation they were fully advised and informed by their legal counsel, fully understood the Agreement, and that the parties stated to their counsel they were not under any duress or stress by the other party.
- [38] On July 1, 2016, the claimant and the children, along with the claimant's sister and her family travelled to Europe and the respondent went to Arizona to attend a rehabilitation facility.
- [39] The Agreement was filed with the court on August 31, 2016.
- [40] The respondent claims there were attempts at reconciliation. The correspondence in support of his contention does not support any such intention to reconcile on the part of the claimant, and the respondent's own texts speak of no point in avoiding the "inevitable".

[41] The respondent commenced his family law proceeding on February 14, 2018, by way of notice of family claim seeking a divorce and the setting aside of the Agreement. On June 27, 2018, this Court struck the respondent's claim with regard to the Agreement, on the grounds that the application to set aside the Agreement should be brought within the existing family law matter commenced with the filing of the Agreement by the claimant.

[42] The respondent filed this application to set aside the Agreement on October 1, 2019.

The validity of the Agreement under the Family Law Act

[43] Section 93 of the FLA sets out the statutory authority for setting aside written agreements respecting the division of property and debt. The respondent seeks an order setting aside the Agreement pursuant to ss. 93(3) and 93(5). The respondent submits the process of entering into the Agreement was procedurally unfair, and further that the Agreement terms are significantly unfair.

[44] In the alternative, the respondent seeks an order that the terms of the Agreement be replaced with an order that the remaining balance of the educational fund be repaid by AKK Holdings to ASK Holdings, and jointly administered by the parties to pay for post-secondary educational expenses of the younger son, with the residue divided equally between the parties upon the completion of his post-secondary education program so as to remedy the alleged unfairness.

[45] The alternative order is sought based on facts which occurred after the date of the Agreement. At the time of the application hearing, Child 1 had left university to work at a start-up company in Toronto.

Procedural and substantive unfairness under s. 93

[46] Section 93 of the FLA provides, in relevant part, as follows:

93 (1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

(3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

- (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
- (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
- (c) a spouse did not understand the nature or consequences of the agreement;

- (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.
- (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
 - (a) the length of time that has passed since the agreement was made;
 - (b) the intention of the spouses, in making the agreement, to achieve certainty;
 - (c) the degree to which the spouses relied on the terms of the agreement.
- [47] Domestic agreements are different from commercial ones, and different considerations apply in testing the procedural and substantive fairness of these agreements: *Stark v. Stark* (1990), 26 R.F.L. (3d) 425 at 434 (B.C.C.A.).
- [48] Section 93 of the FLA is essentially a codification of the common law set out in *Miglin v. Miglin*, 2003 SCC 24; and *Rick v. Brandsema*, 2009 SCC 10, as it applies to marriage agreements.
- [49] Section 93 contemplates a two-pronged approach to determining whether to set aside an agreement: see *Asselin v. Roy*, 2013 BCSC 1681 at paras. 124-131.
- [50] The first inquiry is directed at the formation of the agreement. Under this stage the court should determine if any of the circumstances described in s. 93(3) existed when the parties entered into the Agreement. If so, the Agreement was unfairly reached.
- [51] A court may decline to set aside an agreement that was unfairly reached if the terms that the court would substitute are not substantially different than those contained in the agreement: *Y.L. v. G.L.*, 2020 BCSC 808 at para. 283.
- [52] A very helpful summary of the principles the court will consider under s. 93(3) is set out in *Y.L.*:
- [285] With regard to the s. 93(3) considerations, on review of *Miglin*; *Rick v. Brandsema*, 2009 SCC 10; *Asselin*; *Bartch*; *De Medeiros*; *B.L.S. v. D.J.S.*, 2019 BCSC 846; and *Bradshaw v. Bradshaw*, 2011 BCSC 1103, the following principles emerge:
 - a) the court should consider the s. 93(3) considerations holistically, and not in isolation to each other as the combination of certain factors may lead to setting aside the agreement where each of the factors alone would not, or where the presence of a factor in favour of setting aside the agreement may be ameliorated by the absence of another factor;

- b) the fact-specific nature of the inquiry, particularly the relative vulnerabilities of the parties and/or the relative amount of information they have about each other's financial affairs is such that the cases are not necessarily readily comparable;
- c) with regard to failing to disclose significant property, debts or other relevant information:
 - i. failure to disclose financial information or incomplete disclosure impacts the integrity of the bargain made. The extent and nature of the failure determines whether the court will intervene;
 - ii. a party's assertion that he or she did not believe the other party had a claim to the assets and so did not disclose is not an answer if the party has a claim or an arguable claim. Disclosure is mandatory separate from any argument or negotiation around whether there is a legal interest in the property;
 - iii. failing to disclose any value for property cannot be defended on the basis that there is no misrepresentation because no value is given;
 - iv. where an asset's value is uncertain, the party with the duty to make disclosure should disclose the facts that will allow the other party to make a decision as to the value or as to whether further investigation is required;
 - v. if a party waives the right to financial disclosure in making a separation agreement but does so in the context of having been misled about the existence of assets and/or their value, the waiver may not be informed and therefore not determinative, especially if it is paired with a representation that the facts disclosed are true, accurate and complete;
 - vi. failure of a party to act in good faith and to act in accordance with an agreement made is not an answer to the other party's failure to disclose financial information;
 - vii. failing to disclose includes incomplete financial disclosure such as not providing the values of assets that both parties know to be in existence, not advising of the true income stream of a business, and providing estimates of the values of an RRSP;
 - viii. failing to ask for greater financial disclosure does not prevent the party who did not receive it from relying on s. 93(3)(a);
 - ix. where the party complaining of non-disclosure has general knowledge of the other party's assets and their value, non-disclosure of the exact value may not result in an agreement being set aside where the non-disclosure is not a deliberate attempt to avoid addressing the division of those assets or to deprive the other party of information he or she should have in making the agreement;
 - x. the non-disclosure must be significant and material;
- d) with regard to one spouse taking advantage of the other's vulnerability, including the other's ignorance, need or distress:

- i. the parties' relative abilities to understand financial matters is relevant to the assessment of whether one party took advantage of the other's vulnerabilities;
- ii. vulnerability of a less powerful party should not be presumed, there must be evidence to support a finding of vulnerability;
- iii. whether the party who asserts vulnerability had input into the content of the agreement is relevant to assessing this factor;
- iv. legal advice may negate vulnerability but does not necessarily do so and the absence of legal advice does not lead to a presumption that a vulnerability has not been exploited;
- v. the parties' respective bargaining power is relevant to vulnerability and includes whether one of the parties was at an immediate economic disadvantage because the other party controlled the cash or had better access to cash;
- vi. physical and/or emotional abuse is relevant;
- vii. the timing of emotional or physical abuse in relation to the time at which the agreement was made is relevant in the sense that if a party is living in active fear and makes the agreement to get away from an abuser, that is different than a situation where there was an incident of abuse a significant length of time prior to when the agreement was made, especially if the parties were living in different locations when the agreement was made;
- e) with regard to whether one of the spouses did not understand the nature or consequences of the agreement:
 - i. whether the party received independent legal advice is relevant, but not determinative;
 - ii. persons who do not take advantage of the ability to receive legal advice may not be held to unfair agreements despite their own failures especially where the party seeking to enforce it withheld information or the person is vulnerable;
 - iii. if a party received legal advice but it was affected by incomplete financial disclosure, it may be not fair to hold the party to the agreement;
 - iv. similarly, failure to read an agreement when there was an opportunity to do so will be taken into account in assessing whether failure to understand the agreement is a basis on which to set it aside;
- f) with regard to other circumstances that would, under the common law, cause all or part of a contract to be voidable:
 - i. unconscionability can be based on information asymmetry; and
 - ii. unconscionability does not have to result in the same type of power imbalance that would void a commercial contract but can arise out of any circumstances of oppression, pressure or other vulnerabilities.

[53] The second stage assesses the substantive fairness of the effect of the Agreement. This involves consideration of the three factors set out in s. 93(5), for ease of reference, those being:

- (a) the length of time that has passed since the agreement was made;
- (b) the intention of the spouses, in making the agreement, to achieve certainty;
- (c) the degree to which the spouses relied on the terms of the agreement.

[54] While certainty is a desirable objective, it should not trump either procedural or operational fairness as defined in s. 93: Asselin at paras. 130-131. As explained in Y.L.:

[284] A touchstone in the analysis is whether the legislative objectives of the Family Law Act, namely, to encourage resolution of family law disputes through agreements (s. 4(b)) and the certainty, predictability and clarity created by the simplified equal division regime (Jaszczewska at para. 36), are met. The analysis must also respect contractual autonomy while recognizing the unique nature of negotiating agreements for the dissolution of spousal relationship and the inherent vulnerabilities in play as they relate the concept of unconscionability: Miglin at paras. 66, 82.

Was the Agreement unfairly reached?

[55] The respondent submits that the process which led up to the execution of the Agreement was fundamentally flawed for the following reasons:

- a) It was prepared in haste;
- b) There was incomplete disclosure of the corporate assets of each of the parties;
- c) No business valuations were conducted;
- d) No tax advice was obtained; and
- e) The respondent was vulnerable and prepared at that stage to sign anything and the claimant took advantage of that vulnerability.

[56] The respondent deposed that he felt ashamed and humiliated after the separation and during the negotiations for the Agreement, and that he was suffering from insomnia and depression. He says that he let the claimant lead the process and he was hopeful for a reconciliation. He says, which is denied by the claimant, that the claimant told him she would consider reconciliation but only if he signed the Agreement. He says he was prepared to do anything the claimant wanted.

- [57] The respondent provides no medical opinion evidence in support of his claims of insomnia and depression, however the psychiatrist confirmed her working diagnosis of a sex addiction, not depression, and that she prescribed a sleeping aide. His lawyer's evidence and in particular his instruction to add a minimum 90 day reconciliation clause contradicts his statement that the Agreement was temporary.
- [58] As set out in Miglin:
- [82] Recognition of the emotional stress of separation or divorce should not be taken as giving rise to a presumption that parties in such circumstances are incapable of assenting to a binding agreement.
- [83] Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.
- [59] The circumstances which led to the separation were stressful for both parties. However, on the evidence before me there is no indication of a power imbalance between the parties. They are both sophisticated professionals. Neither party alleges any physical or mental abuse by the other during or after the relationship. The respondent's lawyer did not observe any vulnerability apart from the respondent appearing to be upset (which is to be expected).
- [60] Expressing a desire to finalise the Agreement quickly is not undue pressure. As I noted above, I prefer the psychiatrists' evidence over that of the respondent with regard to her level of treatment and observations of him, despite her relationship with the claimant. She interacted regularly with the respondent during the weeks leading up to the execution of the Agreement and was not concerned about his mental or physical state.
- [61] Both parties were represented by highly competent lawyers. The respondent instructed his lawyer with regard to changes to the drafts proposed by the claimant. The respondent sought and obtained changes to the claimant's draft which shows he was not necessarily willing to sign anything or that he was subject to undue influence of the claimant.
- [62] As for financial disclosure, there is disagreement between the parties as to who led the process for gathering information. The parties were well aware of the corporate holdings structure between them and of the recent investment transactions in a general sense. There is no evidence that the claimant was attempting to mislead the respondent as to the value of her professional corporation. The parties shared the same accountants for their respective corporate holdings. While the respondent claims the claimant did not make full disclosure of her corporate financial circumstances, in fact, the respondent had, without legal authority, been the person who signed off on the claimant's holding company financial

statements. He would have had prior knowledge of that company's financial position. The respondent also regularly accessed and made withdrawals from the claimant's professional corporation general account for household expense purposes. Withdrawals by the respondent occurred as late as March 2016. The accountants provided information before the Agreement was executed. The respondent was the first to provide his own valuations of the property and liabilities of the parties. The parties were content to rely on their own assessments based on the financial statements and their personal knowledge and not obtain professional valuations.

- [63] It turns out that some of the financial information (provided by the respondent) was inaccurate and to this day has not been fully reconciled. It also came to light that the respondent had not disclosed an investment account and another corporation which, he says now, was a failed investment vehicle and not worth anything at the time of separation. The evidence of the respondent's accountant attempting to explain the discrepancies and corrections and the missing corporation changes from affidavit to affidavit, along with the changes in the respondent's recollection and explanation of financial transactions. The accountant relies heavily upon the respondent's characterisation of transactions which tend to change over time.
- [64] On the whole of the evidence, I do not find that the claimant failed to disclose financial information, and in fact it is the respondent who did not provide full financial disclosure to the claimant.
- [65] The Agreement specifically contemplates that the parties will share the tax burden of the division of property, and addresses the tax treatment of support and tuition payments. It does not appear that the parties obtained tax advice prior to execution of the Agreement. The Agreement contains a mechanism for tax advice and any tax liabilities associated with the education fund. The parties were prepared to address the tax consequences of the transfers to the claimant's holding company to establish the education fund, and other tax consequences arising from the terms of the Agreement, after its execution.
- [66] As it stands today, the tax consequences, the respondent submits, are such that the respondent is subject to an overwhelming tax liability. His evidence on this point is troubling as it is provided by his accountant whose evidence, as I noted above, is not very reliable. The respondent's tax liability also appears to be due, in part at least, to the respondent's post-separation handling of his financial affairs.
- [67] The parties did jointly retain the services of another accountant to assess the financial positions of the parties and their tax liabilities. By the time of the final continuation of the hearing of this application that accountant was not able to fully assess the positions. This is because the information which eventually came from the parties' original accountants has been shown to contain errors and gaps.

[68] I do not find that the process leading up to the Agreement was fundamentally flawed. Both parties sought to finalise the Agreement quickly. The respondent chose not to follow his lawyer's advice. He was not under undue pressure or under any incapacity. The respondent was prepared to take the risk that the specific tax consequences of the property division were unknown at the time of the Agreement, and instructed his lawyer to propose terms to address the matter of taxation. With regard to financial disclosure, on the whole, if anything, it would appear that the respondent was not forthright in his financial disclosure. He was also familiar with the financial position of the claimant's corporations. None of the circumstances in s. 93(3) have been made out. The Agreement was not unfairly reached.

Is the Agreement significantly unfair?

[69] Having found that the Agreement was not unfairly reached, I turn to the question of whether the substance of the Agreement is significantly unfair.

[70] In determining whether the Agreement is significantly unfair, as set out in s. 93(5) of the FLA, the court must consider: the length of time that has passed since the Agreement was made; the intention of the parties, in making the Agreement, to achieve certainty; and the degree to which the parties relied upon the terms of the Agreement.

[71] Further, I note, the FLA specifically permits parties to structure their division of property in ways that are unequal. Section 92 provides:

92 Despite any provision of this Part but subject to section 93 [setting aside agreements respecting property division], spouses may make agreements respecting the division of property and debt, including agreements to do one or more of the following:

- (a) divide family property or family debt, or both, and do so equally or unequally;
- (b) include as family property or family debt items of property or debt that would not otherwise be included;
- (c) exclude as family property or family debt items of property or debt that would otherwise be included;
- (d) value family property or family debt differently than it would be valued under section 87 [valuing family property and family debt].

[72] The respondent's submissions regarding unfairness focus on the fact that the parties were unable to obtain tax advice and make a plan for the tax consequences of their separation prior to entering into the Agreement. The respondent says this renders the Agreement significantly unfair and therefore the court should set aside the Agreement or vary certain parts.

[73] The respondent advanced other arguments related to unfairness, including: (i) the Agreement financially punishes the respondent for his infidelity; (ii) the Agreement provides for a significant reapportionment of family property in the claimant's favour; (iii)

the Agreement creates a significant education fund without any consideration of whether the amount set aside was reasonable, any provision for what will happen with the fund if not needed, and it requires the respondent to pay child support for the parties' eldest child; and (iv) despite the reapportionment of family property in the claimant's favour, there is no corresponding reduction in either the amount or duration of spousal support.

- [74] The respondent's initial attempt to bring his application was in 2018, over two years after the Agreement was made. When his initial claim was struck in July 2018, he did not file his application within this proceeding until October 1, 2019. It is clear that the claimant sought to achieve a final resolution and certainty over division of property and support. Both parties retained counsel and certified that they intended to achieve certainty. I have already noted how the respondent's submission that the parties were making an interim agreement is not reliable. The education fund has been funded and used in accordance with the Agreement. The claimant has refinanced the former family home as she is entitled to under the division of property provisions of the Agreement. The respondent paid child and spousal support in accordance with the Agreement until 2020. The parties' properties have been sold in accordance with the Agreement and its proceeds held pending the resolution of the respondent's claim. Support arrears have been paid from those proceeds, after involvement of the Family Maintenance Enforcement Program.
- [75] The initial draft of the Agreement included a provision confirming that the claimant would likely not be able to work full-time and so the respondent was put on notice of that possibility when the final child and spousal support terms were agreed to. As of the last day of the hearing, the claimant maintained that she was unable to work at all due to PTSD. The amount of support under the Agreement is lower than the Guidelines would provide for in the circumstances of the relationship.
- [76] The Agreement does address the education fund by way of setting out that AKK Holdings' bank account (which contained the funds transferred by the respondent just prior to execution of the Agreement as well as funds from the disposition of AKK Holdings' property, totalling approximately \$1,500,000), must be used for the children's post-secondary expenses.
- [77] The Agreement further set out Child 1's undergraduate and graduate school expenses are anticipated to total approximately \$700,000. Child 2's undergraduate and graduate expenses are estimated to total \$800,000. The claimant deposed that these figures were based on actual amounts paid or owing for Child 1's undergraduate degree and associated costs with obtaining the degree at the American university, and similar costs used for the graduate fees. At the time, the claimant deposed that it was commonly understood that Child 2 would follow in Child 1's footsteps, and both children if they gained admission would be funded to attend a top American university. The figures bear out based on the invoicing records. The respondent does not challenge the claimant's evidence with regard to attending a top American university or the amounts set out in the Agreement.

- [78] The Agreement also sets out that if the funds in AKK Holdings' account are not exhausted prior to the children completing their education, the funds will be provided to one or both of the children as agreed to by the parties.
- [79] It appears that the parties initially agreed that the division of property under the Agreement was unequal in the claimant's favour since the Agreement included a statement that the parties agree the division of property under the Agreement is in partial contemplation of the diversion of funds by the respondent. The respondent now claims he spent no more than \$10,000 for sexual services during the 25-year-marriage. He made no request to remove that clause when he instructed his counsel to seek other recitals to be removed. The respondent's evidence on this point is not credible in the circumstances of admitting to regular extramarital paid sexual services throughout the marriage.
- [80] The respondent maintained throughout his submissions that the Agreement's terms were unfair because property was unequally divided in the claimant's favour. The claimant's position changed from agreeing there was unequal division to positing the possibility that division was not so unequal based upon discovery of additional assets and examining the nature of transactions and past accounting treatment. The claimant now submits that the division is approximately equal. The respondent claims the division of property under the Agreement, including tax consequences but excluding the amounts allocated to the education fund, is approximately 71% to the claimant.
- [81] A problem arises from the lack of clarity on what the true financial position of the corporate holdings were, specifically the respondent's corporate holdings and the nature of the intercompany loans between both of their holding companies. Post-Agreement transactions have also muddled the waters. However, the bulk of the lack of clarity arises because of unsubstantiated claims by the respondent of the source, characterization and/or use of funds to which he had access. As such, I find the claimant's submissions on the allocation of debt and property under the Agreement more reliable than the respondent's.
- [82] As well, a significant amount of family property, and the majority of the disclosed cash assets, were allocated to the children's education.
- [83] However, I do not have before me reliable information about the state of the parties' financial position from the respondent, specifically the properties held within the respondent's corporations. Based on what has been produced subsequent to the execution of the Agreement, it appears to me that if any party was not disclosing their financial position to the other, it was the respondent.
- [84] The parties have taken a number of steps in furtherance of the terms of the Agreement. The respondent brought his claim initially over two years after the date of the Agreement, and then when informed of the proper process, waited another 16 months to bring this application. The parties clearly contemplated there would be an unequal division of property in the claimant's favour. This may in fact not have been the case, but the claimant is content to adhere to the Agreement. They also contemplated there would be tax issues to

work out in the future.

[85] Given the frailties in the accounting evidence, and the ongoing attempts to assess the true financial positions of the parties and the tax consequences of the Agreement, the respondent has not put forth reliable evidence to support his claim that the Agreement is significantly unfair to warrant it being set aside or varied. Based on my findings set out above, and in consideration of the factors set out in s. 93(5), I decline to set aside or vary the Agreement.

Conclusion

[86] For the reasons discussed, the respondent's application is dismissed. The Agreement was neither unfairly made nor is it significantly unfair.

Costs

[87] If the parties wish to make submissions on costs, they may do so provided they contact Trial Scheduling within 30 days of receiving this decision to schedule a costs hearing. If they do not do that, then I award the claimant costs of the application at Scale B.

"Wilkinson J."

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