
CANADA / JUDGMENT

A.M. v. M.S.

2017 BCSC 2061

COURT

Supreme Court of British Columbia

DECIDED

14 November 2017

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2017 BCSC 2061 A.M. v. M.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.M. v. M.S.,

2017 BCSC 2061

Date: 20171114

Docket: E153225

Registry: Vancouver

Between:

A.M.

Claimant

And

M.S.

Respondent

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

In Chambers

Counsel for the Claimant:

Ronak Yousefi

Counsel for the Respondent:

Edward G. Wong

Place and Date of Hearing:

Vancouver, B.C.

June 15, 2017

August 28, 29, 2017

Place and Date of Judgment:

Vancouver, B.C.

November 14, 2017

Table of Contents

Paragraph Range

A. INTRODUCTION

[1] - [5]

B. BACKGROUND

[6] - [21]

C. PREVIOUS APPLICATIONS

[22] - [23]

D. ANALYSIS

[24] - [174]

(a) Section 93(5) of the FLA

[39] - [70]

(b) "Approval" of a mortgage

[71] - [93]

(c) Damages

[94] - [119]

(d) The mehr and the oral agreement

[120] - [140]

(e) Iranian divorce

[141] - [158]

(f) Parenting Time

[159] - [171]

(g) Household items

[172] - [174]

E. SUMMARY

[175] - [192]

A. INTRODUCTION

- [1] In this family matter there are two applications to be decided on a summary basis.
- [2] In the first, filed May 26, 2017 by the respondent, he seeks a number of orders related to property, parenting time, damages, household property, an Iranian divorce and a dowry. At the hearing of his application the respondent applied to adjourn the issue of an Iranian divorce, this is discussed below.
- [3] In the second application, filed June 2, 2017 by the claimant, she seeks payment of a fine by the respondent. She also seeks production of documents from him but those documents have been produced. At the hearing of these applications, the claimant advised that she has the documents sought by her application. The claimant's application filed June 2, 2017 is adjourned generally.
- [4] There is a separation agreement dated April 2015 which became a divorce order dated March 15, 2016. The latter references the Divorce Act, R.S.C., 1985, c.3 but the parties are proceeding in the subject applications under the Family Law Act, S.B.C. 2011, c. 25 ("FLA"). There was also an oral agreement in April 2015 for issues related to an Iranian divorce. There has been a civil divorce but not an Iranian one.
- [5] I have anonymized the names of the parties in order to protect the privacy of their child.

B. BACKGROUND

- [6] The parties are of Iranian heritage. The claimant has training in graphic design and esthetics. The respondent is a mortgage broker and realtor.
- [7] They were married on March 14, 2004 in a dual service in Canada, a civil one and one under Sharia law. There is one child, N., aged 6 years old.
- [8] A Canonical Marriage Deed for the Sharia marriage set out the particulars for that marriage including the following:

Marriage Portion: A volume of Holy Koran, a bunch of rose flower, a cluster of sugar crystal, a Ritual Pilgrimage Trip to Mecca (Hajj), five gold bullions of 24 karats equal to 5 kilogram [sic] of 24 karats gold, a pane of mirror, a pair of candelabrum, which are all being the husband's liability and payable to the wife on demand.

[9] The Marriage Portion is also described as a mehr or dowry. There is a dispute between the parties about the valuation of the gold referenced here, as discussed below. According to the claimant the value of the mehr is \$270,000 and the respondent says the value is \$45,100.

[10] There was a family home in Coquitlam, British Columbia. It was sold in 2017 pursuant to a court order, discussed below. The claimant and N. now live with the claimant's parents. The respondent lives in a separate residence with his parents and he has a new relationship with another woman, N.S.

[11] The parties separated on September 16, 2013 and there is the separation agreement dated April 28, 2015 (reproduced as written):

...

BACKGROUND

1. The husband and the wife were lawfully married on March 24th, 2004 in North Vancouver, British Columbia. Due to certain differences that have developed to the parties, they agree to live separate and apart from each other.
2. The parties have made complete, fair and accurate disclosure to each other on all financial matters reflected in this agreement.
3. The terms of this agreement are intended to settle the matters addressed, but it will not be incorporated into a final decree of divorce.
4. The parties have each consulted an attorney with regards to her or his legal rights arising out of the material relationship and the terms of this agreement.
5. The parties have each voluntarily entered into this agreement and have not been forced by anyone to sign this agreement, and both parties confirm that they are in sound mental health.

LIVING SEPARATE AND APART:

6. The parties have lived separate and apart since September 16th, 2013. Neither party will attend the other's living space without invitation or approval.

CHILDREN

7. [N.] is the child of the marriage and was born in January 9th, 2011. From every Sunday in the morning (before noon) he stays with the wife till Thursday. On every Thursday in the afternoon the husband picks him up from the school and he stays with the husband from

then till Sunday morning. The child support is based on the husband and wife's incomes (the calculation was done and obtained from www.mysupportcalculator.ca determined to be \$154 per month paid by the husband to the wife. Each party received a copy of the Child and Spousal Support Calculation.

SPOUSAL SUPPORT:

8. The amount of Spousal Support (the calculation was done and obtained from www.mysupportcalendar.ca) determined to be between \$76 and \$260 per month; however, both parties agree that the amount of \$263 per month to be paid to the wife for a period of five years.

ASSETS:

9. The parties have property located at [Coquitlam Property] as a joint Tenant. Both parties agree that [the] amount of \$2,150 per month for a period of two years commencing on the day the order of divorce [is] issued by the Supreme Court of British Columbia, being paid by the husband to the wife. Both parties agree the title of the mentioned property [is] to be transferred to the wife's name (the husband's name to be removed from the title) on the day the order of divorce [is] issued by the Supreme Court of British Columbia subject to lender(s)/Bank(s) approval. The husband has no obligation whatsoever for any mortgage default(s) caused by the wife after two years mortgage payments [are] paid by the husband. The parties have a 2010 Volkswagen Golf, which the title will be transferred to the wife's name on the day the order of divorce [is] issued by the Supreme Court of British Columbia.

DEBTS:

10. The parties agree that any indebtedness against or attributable to either party is receiving under the agreement will be the sole responsibility of the party.
11. Neither party will incur any further debt or liability on other party's credit. Any debt accumulated as of the date of this agreement is the debt of the individual party.

[Emphasis added].

- [12] The parties agree that there was also an oral agreement in April 2015. They agree on some elements of this agreement but differ on others. The idea of the oral agreement was to deal with the Iranian divorce while the separation agreement and the divorce order dealt with the civil divorce. There does seem to be agreement that the parties agreed to have an Iranian divorce.

- [13] The parties were divorced civilly by a final consent order of this court dated March 15, 2016. I reproduce the divorce order as follows (reproduced as written):

FINAL ORDER

THIS COURT ORDERS that;

Subject to section 12 of the Divorce Act (Canada), the claimant [A.M.] and the respondent, [M.S.], who were married at North Vancouver B.C. on 14/Mar/2004, are divorced from each other, the divorce to take effect on the 31st day after the date of this order.

THIS COURT ORDERS that:

1. [N.] will be with the father from Thursday afternoon until Sunday 11 am in the morning. And the rest of time [N.] will be with the mother.
2. Claimant #2 [the respondent] will pay \$154 per month based on Child Support Table each and every month from November 12, 2015 until the time the child remains the child of marriage as defined by the Family Act
3. Claimant #2 will pay to the Claimant #1 the amount of \$263 per month as spousal support for a period of 5 years effective November 1, 2015 each and every month.
4. Claimant #1 [the claimant] and Claimant #2 own a property located at [Coquitlam property]. The parties agree that for the next 2 year starting November 1, 2015 Claimant #2 will pay the the amount \$2150 the expense of matrimonial home until April 30, 2017. The title will be transferred upon the approval of mortgage of the Claimant #1.
5. The transfer of an 2010 Volkswagen Golf title from Claimant #2 to Claimant #1 on November 16,2015

[Emphasis added].

- [14] As the respondent points out, the April 2015 separation agreement was "rolled into" this divorce order.
- [15] The respondent seeks the setting aside of this order under s. 93(5) of the FLA on the basis of unfairness, as discussed below. Part of this submission is also a challenge to the 2015 separation agreement.
- [16] The respondent had not transferred his interest in the Coquitlam property at the time of the 2017 sale of the property and, instead, he agreed that the property would be sold. However, as will be seen, this became embroiled in a disagreement about the Iranian divorce and the "approval" of a mortgage. In the end, the respondent refused to cooperate in the sale of the Coquitlam property until the claimant first completed the Iranian divorce. The claimant lost a \$20,000 deposit she put on the new property which she now seeks as damages.
- [17] The respondent seeks one-half of the net proceeds of the sale of the Coquitlam property, about \$50,000. There are complicated calculations about the mehr. In addition, the respondent seeks to minimize the value of the mehr while the claimant relies on much higher value. As above, the valuations are \$45,100 and \$270,000 respectively.

- [18] The parenting time with N. is currently as set out in the separation agreement and divorce order so that the claimant has N. about 60% of the time and the respondent 40% of the time. In his application the respondent now seeks to change the parenting time, essentially to reverse the current arrangement.
- [19] There has not been a Sharia divorce even though this was agreed in the 2015 oral agreement. Both parties say they still want one. In his application the respondent seeks orders requiring the claimant to apply for a Sharia divorce, among other orders sought, but on the second day of submissions he sought to withdraw it. The claimant opposes the withdrawal. This is discussed below.
- [20] The Coquitlam property was not transferred to the sole ownership of the claimant and ultimately the claimant obtained a court order for its sale in February 2017, discussed below. The sale completed in 2017 with a purchase price of \$723,800. The parties agree that the equity remaining after the sale is about \$110,000; counsel also use a figure of \$100,000.
- [21] The subject applications were scheduled to be heard on one day on June 15, 2017. However, that was not sufficient time and two further days were scheduled in August 2017. As a condition of the adjournment, on June 15, 2017 I ordered that one half of the net proceeds of the sale of the Coquitlam property be released to the claimant. The other one half was to remain in the trust account of counsel for the claimant, to be distributed as determined in this judgment.

C. PREVIOUS APPLICATIONS

- [22] There appears to have been some cooperation between the parties after they separated. However, that ended some time ago and there have been a number of disputes including the following applications in court:
- (a) In an application filed August 31, 2016 the claimant applied for orders for enforcement of paragraph 4 of the March 2016 divorce order to transfer the Coquitlam property to her. She also sought an order that the respondent pay her the \$20,000 she lost as a deposit on the apartment she made an offer on. She was also concerned with the respondent's obligations to pay the mortgage payments on the Coquitlam property until April 2017. This application was ultimately adjourned generally by consent. The issue of the lost \$20,000 was an issue in a later application and it is now an issue in the subject application.
- (b) The respondent filed an application on September 30, 2016 seeking a number of orders with respect to the child N. He also sought an order for sale of the Coquitlam property, the parties to have joint conduct of the sale and the proceeds to be divided equally. This application was never heard in court. The issue of parenting time with N. is an issue in the subject application as is the issue of the proceeds of the sale of the Coquitlam property.

- (c) In another application, filed February 15, 2017, the claimant sought the sale of the Coquitlam property, dispensing of the need for the respondent's participation in the sale, production of documents and payment of \$20,000 in damages for the loss of a deposit paid by the claimant on a new residence. Also, that the current partner of the respondent not be present at any exchanges for parenting time for N., among other orders. No one appeared for the respondent.

The result was an order by Justice Sharma, dated February 24, 2017 as follows:

1. The property located at [Coquitlam property] (the "Parkway Apartment") shall be forthwith listed for sale with the Claimant having sole conduct of the sale.
2. The Claimant shall be at liberty to execute whatever documents needed for the sale of the Parkway Apartment without the need for the Respondent's signature.
3. If any institutions or governmental agencies require the signature of the Respondent on any documents, the respondent shall execute same within 24 hours.
4. Within 7 days of this Order, the respondent shall produce to the Claimant complete copies of the following documents:
 - (a) Notices of Assessment for the 2013 to 2015 years;
 - (b) Brokerage ledger showing your clients total commissions for the 2016 year;
 - (c) T2 corporate statements from 2013 to present if your client owns a corporation;
 - (d) T1 General Tax Returns for the 2013 to 2015 years; and
 - (e) Disclosure of any other source of income your client has had from 2013 to present.
5. The respondent shall provide the claimant with \$20,000 representing damages the claimant has incurred as a result of the Respondent's breach of this Court's order, dated March 15, 2016.
6. The Respondent shall not allow or cause [S.N.] to be present at any exchanges of the child, [N.].
7. Neither party shall say anything disparaging about the other to the child the other party.
8. Costs are payable by the Respondent to the Claimant in the amount of \$1200 payable forthwith.

[Emphasis added].

[23] Later in the day of the hearing on February 24, 2017, counsel for the respondent was able to appear in front of Justice Sharma. It was agreed that paragraph 5, the payment of \$20,000 in damages, would be stayed and the issue of any damages payable by the respondent would be argued and decided at a future date. That issue is now part of the subject applications. The respondent also sought joint conduct of sale of the Coquitlam property but this was refused.

D. ANALYSIS

[24] For the purpose of the subject application the significant documents are the separation agreement dated April 28, 2015 and the consent divorce order dated March 15, 2016. The latter effected the civil divorce of the parties and that matter is complete.

[25] The parties agree that the separation agreement formed the basis of the divorce order; as the respondent puts it, the former was "rolled into" the latter. For this reason, I will primarily refer to the March 2016 consent divorce order. There are no issues about child or spousal support; the former continues until N. is no longer a child of the marriage and the latter continues to 2020. Similarly, as agreed, the respondent paid mortgage payments until April 2017. There is reference in some documents to a car but that also is no longer an issue.

[26] Then there is the April 2015 oral agreement dealing with an Iranian divorce. That divorce has not yet taken place as a result of a dispute over the approval of documents related to the Coquitlam property and the respondent's insistence that the Iranian divorce take place before the documents were completed. The documents were not completed and the claimant says she lost a \$20,000 deposit on a new apartment because of this. There is also a dispute about the valuation of the 5 kilograms of 24 carat gold described in the mehr.

[27] As above, the Coquitlam property was the family home. The claimant and N. lived there after separation and, pursuant to the April 2015 separation agreement, the respondent made mortgage payments for two years. When those payments ended in April 2017 the claimant had to sell the home because she could not afford to make the mortgage payments herself.

[28] The Coquitlam property was sold pursuant to the February 2017 court order set out above. At the point of sale, the respondent remained on title. He had agreed to the sale rather than being removed from title but, as will be seen, this nonetheless caused a number of problems.

[29] As also described above, one-half of the net proceeds of the sale are being held in the trust account of counsel for the claimant, pending this judgment. The other half has been paid to the claimant.

[30] The parties are agreed that the claimant was to be the sole owner of the Coquitlam property and, indeed, the 2015 separation agreement and 2016 consent divorce order are unequivocal on this point. Section 9 of the former expressly states that the title of the property will be transferred to the claimant's name after "approval" of a mortgage. Similarly, s. 4 of the divorce order is as follows (reproduced as written):

4. Claimant #1 [the claimant] and Claimant #2 [the respondent] own a property located at [Coquitlam property]. The parties agree that for the next 2 year starting November 1, 2015 Claimant #2 will pay the amount \$2150 the expense of matrimonial home until April 30, 2017. The title will be transferred upon the approval of mortgage of the Claimant #1.
- [31] Despite these agreements the title of Coquitlam property was not transferred to the claimant and she was not the sole owner on title when the property was sold in 2017. How that came to be is very much in dispute. It has also become more complicated by the respondent's assertion that he is entitled to the one-half of the net proceeds of the sale being held in trust.
- [32] The respondent points out that the sale of the Coquitlam property was not contemplated by the separation agreement or divorce order. However, he says he intended that any proceeds from the sale of the property after the agreement and order would be divided equally. This means that the March 2016 divorce order is ambiguous and incomplete and, therefore, the separation agreement should be set aside under s. 93(5) of the FLA because of significant unfairness.
- [33] The claimant says that the divorce order is clear: she demonstrated to the respondent that she had approval of a mortgage and title should have been transferred to her. Instead, the respondent refused to follow the order and that cost her a \$20,000 deposit she put down on a new apartment. She now seeks that as damages.
- [34] Overlaying these issues is the oral agreement of April 2015 which was intended to result in an Iranian divorce.
- [35] I will proceed by considering the respondent's application to set aside the separation agreement and/or divorce order under s. 93(5) of the FLA, the issue of the "approval" of a mortgage and then the oral agreement and mehr.
- [36] In addition, there are issues about parenting time but those are essentially new issues rather than being based in the previous orders and agreement. That is, the respondent applies to change the parenting time as recorded in the order and that is currently in place.
- [37] The parties have not been able to agree on the division of household items.
- [38] Therefore, the following issues require consideration:
- (a) Whether the divorce order and/or the separation agreement should be set aside under s. 95(3) of the FLA;
 - (b) The dispute over "approval" of a mortgage;
 - (c) The mehr and the oral agreement;
 - (d) Sharia divorce;
 - (e) Household items, and

(f) Parenting time;

(a) Section 93(5) of the FLA

[39] The respondent seeks to set aside the April 2015 separation agreement and/or the March 2016 divorce order under s. 93(5) of the FLA because they are significantly unfair. The claimant says there was no unfairness because she was to receive the respondent's interest in the Coquitlam property in exchange for giving up her mehr that she values at \$270,000.

[40] I reproduce all of s. 93 as follows:

Setting aside agreements respecting property division

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.

- (2) For the purposes of subsection (1), the same person may witness each signature.
- (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.

- (6) Despite subsection (1), the Supreme Court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

[Emphasis added].

- [41] As a first consideration, the respondent's submission raises a question as to the relationship between the separation agreement and the divorce order because the submission is not clear whether one or both are challenged.
- [42] Comparing the two documents, they were drafted by the parties. The divorce order includes the granting of a divorce and has a provision about a car. The separation agreement has some sections not in the divorce order: a provision on debts (as well as "Background" and "Living Separate and Apart") and there is different language for the issues of parenting time and property. The separation agreement sets out that the respondent was to pay mortgage payments on the Coquitlam property for two years. He completed this in April 2017 and that same provision is not in the divorce order.
- [43] The separation agreement also says that the respondent will be removed from title of the Coquitlam property on the day of a divorce in this court (and "subject lender(s) Bank(s) approval"). The divorce order does not include this statement, presumably because it was made on the date of the divorce (to take effect in 31 days).
- [44] Other than those differences, as the respondent puts it, the separation agreement was "rolled into" the divorce order.
- [45] In this context the respondent says that "[t]he court may look at the Separation Agreement to determine the completeness of the divorce order and in doing so may set aside the Separation Agreement as 'substantially unfair' under s. 93(5) of the Family Law Act."
- [46] It is not clear, but it appears that the respondent's objective is to set aside the divorce order (he consented to) by challenging the separation agreement. Assuming that is the case, it is fully answered by pointing out that, in legal terms, a divorce order can exist independent of a previous separation agreement. Further, I take it as self-evident that a court order can be in addition to or replace a private agreement. Here, as the respondent points out, the divorce order for the most part replaced the separation agreement. Section 214(3) of the FLA is also applicable:

Orders respecting agreements

214 (1) If an order is made to set aside part of an agreement, the part is deemed to be severed from the remainder of the agreement.

- (2) A court may incorporate into an order all or part of a written agreement respecting a family law dispute made by the parties to the proceeding and, unless the court orders otherwise,
- (a) the order replaces that part of the agreement that is incorporated, and

- (b) the remainder of the agreement remains effective.
- (3) Unless the court orders otherwise, if an agreement and an order made after the agreement provide differently for the same subject matter,
- (a) the order replaces the part of the agreement that provides differently for the same subject matter, and
- (b) the remainder of the agreement remains effective.

[Emphasis added].

- [47] If there is a part of the separation agreement that "remains effective" and is not in the divorce order, neither party identifies it or relies on it.
- [48] The result is that the divorce order is the primary document with respect to the legal relationship between the parties from March 2016 onward. That is, the respondent must set aside the divorce order and not just the separation agreement if he is to succeed.
- [49] The significance of this conclusion is that, as can be seen above, s. 93 is titled "Setting aside agreements respecting property division." Under s. 93(5), an agreement can be set aside if it is significantly unfair on consideration of specific factors. This provision applies to agreements and not court orders such as the divorce order in this case. I acknowledge that a court order can be set aside on the basis of fraud, duress or other serious grounds: *Pond v. Pond*, 2017 BCCA 243. However, the respondent does not rely on those grounds and nor is there evidence of them. He relies on s. 93(5) of the FLA but, again, it applies to an agreement and not an order.
- [50] This alone is sufficient to dismiss the application of the respondent under s. 93(5) of the FLA to set aside the March 2016 consent divorce order. I will briefly address other issues raised in the respondent's submission.
- [51] The respondent says the divorce order is incomplete because it is "totally silent" about the 2017 proceeds from the sale of the Coquitlam property. That makes the separation agreement and/or the divorce order significantly unfair, according to the respondent. Put another way, if the divorce order (or separation agreement) does not give the respondent a half share in the proceeds of the 2017 sale then it is incomplete and must be set aside as significantly unfair under s. 93(5) of the FLA.
- [52] It is true that the divorce order is silent about the sale proceeds from the sale of the Coquitlam property. The separation agreement is also silent on this point. This is not at all surprising since neither party intended or considered the sale of the Coquitlam property at the time of the 2015 agreement or 2016 order. Therefore, it is not at all surprising that neither document did or could anticipate the sale. When an agreement does not contemplate future events it can be reopened for those events if the parties agree to do so. There is no such agreement here. In the absence of such an amendment the parties to an agreement must rearrange their affairs to deal with the unanticipated event or events. Here

the respondent seeks to rearrange the separation agreement and/or the divorce order after they were executed.

- [53] The respondent says he intended that the separation agreement and divorce order would apply to the increase in value of the Coquitlam property when it was sold so that he would receive a one-half share of the increase. He says that he never would have entered into the separation agreement and consented to the divorce order if he knew how much the property value would have increased. Further, the divorce order is incomplete because it did not include this protection for him. Put in terms of s. 93(5), it would be significantly unfair not to change the divorce order to reflect the manifest intention of the parties that it would change with future changes in the value of the Coquitlam property and that increase would be shared equally. Since the order is incomplete it should be set aside.
- [54] However, just as the separation agreement and divorce order are silent about any future sale they are also silent about any entitlement the respondent might have to the proceeds of the sale. There is no evidence these matters were discussed or even contemplated in April 2015 or March 2016.
- [55] Overall, the respondent's submission is no more than his unilateral wish in 2017 about how the separation agreement and divorce order would operate if he knew in 2015 or 2016 what he knows now. How he could predict the future in that way is not explained. The claimant obviously disagrees with the respondent on his view and, therefore, there is no basis for an agreement between the parties on this issue. I add that, if the respondent's submission was correct, it would also mean that, logically, any reduction of value would result in the re-opening of the divorce order. The respondent obviously does not take that position. I also add that, assuming it is relevant, there is no evidence comparing the value of the Coquitlam property at the time of separation and the time of the 2017 sale so it is not known if the claimant was the beneficiary of a significant windfall.
- [56] It follows that I do not agree with the respondent on this point. The fact that the separation agreement and/or divorce order did not contemplate the sale of the Coquitlam property at a future time when its value had increased (from the values at the dates of the agreement and order) does not make the agreement or order significantly unfair under s. 93(5).
- [57] A further difficulty for the respondent is that the issue in dispute under the divorce order relates to the provision about property. Section 215(1) of the FLA provides for a change in an order if there has been a change in circumstances since the order has been made. However, s. 215(2) states that "a court may not change, suspend or terminate an order" made under Part 5 ("Property Division") except as provided in that Part. Section 93(5) is in Part 5 and it is discussed above.

- [58] Section 93(3) is also in Part 5. It says an order or part of an agreement can be set aside or replaced where there are problems with disclosure of documents, improper advantage by one spouse over the other, a spouse did not understand the nature or consequences of "the agreement" and other common law grounds that would cause all or part of a contract to be voidable. The respondent's application does not rely on s. 93(3) and nor is there evidence of any of the circumstances described there.
- [59] The jurisprudence is consistent with the statutory restriction on review of orders involving property. Where a final order respecting property has been entered, the court has jurisdiction to vary it only in two narrow circumstances: where there has been a "slip" in drawing the order or where the order fails to express the manifest intention of the parties such that it requires the prevention of an injustice: *Ting v. Wong*, 2015 BCSC 1808 at paras. 12-21, citing *Shackleton v. Shackleton*, 1999 BCCA 704, at para. 12, *Buschau v. Rogers Communications Inc.*, 2004 BCCA 142, at paras. 26-27; *Sandhu v. Sandhu*, 2012 BCSC 1183 at para. 54; and *McLachlan v. McLachlan*, 2013 BCSC 1733 at para. 114.
- [60] Here there is no suggestion of a "slip"; the respondent's challenge to the divorce order goes much further than that. He seeks a half-interest in the 2017 proceeds of sale from the Coquitlam property.
- [61] While it is not specifically addressed, I take from the submissions of the respondent that the March 2016 order must be set aside because it fails to express the manifest intention of the parties and it, therefore, creates an injustice. As above, the focus of the respondent's challenge to the divorce order is that the Coquitlam property has significantly increased in value since the order was made and he should benefit from that increase.
- [62] I have considered this above and there is no evidence of a manifest intention or any intention that the parties intended that any future increases in the value of the property would be shared equally. The title to the property was supposed to be transferred to the claimant in July 2016 when she confirmed with the respondent that she had mortgage approval. I take from this that the claimant was to have the benefit of any increase in the value of the property, as well as take the loss for any reduction in the value.
- [63] Other case law does not support the respondent's submission. These were reviewed by Justice Fleming in *McLachlan* and they involved similar situations where the value of property changed after the issuing of an order: *Gilpin v. Gilpin* (1990), 1990 CanLII 1576 (BC CA); *Akkor v. Roulston*, 2009 BCSC 1584; and *Hodgkinson v. Hodgkinson*, 2004 BCSC 1630, aff'd 2006 BCCA 158.
- [64] In *Gilpin*, Justice Lambert pointed out that "[c]ontinuing fairness is impossible to achieve. Fairness at a particular point in time is the legislative goal" (at pg. 259). This was under the former Family Relations Act, R.S.B.C. 1979, c 121. The Court noted at that time (i.e. before the FLA) that there were numerous judgments that made it clear that, as a matter of fairness, the valuation date should be the date of trial, unless there is reason for a contrary date (pg. 255). I note that some of these judgments involved situations where the value of

family property had decreased since the previous agreement. I can find no principled reason for finding that an increase in value should have a different result.

- [65] Overall, a final order respecting division of property is not subject to variation (except after a successful appeal). Even if it was reviewable, under s. 87(b), the valuation date is the date of an agreement (in this case, April 28, 2015) or the date of the divorce order (March 15, 2016). And, in any event, the authorities do not support the respondent's submission that an agreement can be set aside as unfair because the subject property has increased in value (or decreased in value). Finally, there is no evidence that the manifest intention of the parties was that the agreement and order would be opened if the value of the Coquitlam property increased or decreased.
- [66] As a final issue, and assuming there is a legal basis for reviewing the separation agreement and/or the divorce order, I turn to whether the parties' agreement was in fact significantly unfair. This requires consideration of the separation agreement, the divorce order and the oral agreement between the parties. It is clear that they considered all three of a piece. For example, in a heated text message exchange on July 28, 2016 (set out in detail below) the respondent stated, "my decision to giving you the house and the car and paying two years of the mortgage was based upon the Iranian divorce and you signing off your mehr " The claimant accepts this was agreed. In these proceedings the respondent values the mehr at \$45,100.
- [67] It is questionable whether the respondent, a mortgage broker and realtor, would agree to the transfer of his one-half share of the Coquitlam property for \$45,100 when it was to be sold in April 2017 for \$727,000. Again, there is no evidence the parties discussed the value of the mehr on its own as part of the separation agreement or the divorce order. Nor is there evidence that they compared that value with the value of the Coquitlam property. Obviously, if the mehr is valued at \$270,000 the agreement between the parties is more fair than if the mehr is valued at \$45,100. The problems with the evidence about the valuation of the mehr are discussed below and it is not possible to make a decision on that issue at this time. And, in any event, there a number of other problems with the respondent's submission that he is entitled to one-half of the proceeds, as discussed above.
- [68] The respondent's application to set aside the March 2016 divorce order under s. 93(5) of the FLA is dismissed. The result is that the order must be considered as valid, subject to its interpretation which I will address next.
- [69] Assuming the respondent's submission is also a challenge to the 2015 separation agreement (on its own or as the basis of the 2016 divorce order), I also conclude that it must be dismissed. As with the divorce order it is not an issue of unfairness under s. 93(5) of the FLA for an agreement to not anticipate and address unforeseen future events such as the sale of the Coquitlam property in 2017 in this case.

[70] It follows that the submission of the respondent that the separation agreement and divorce order entitles him to a half-interest in the proceeds of the 2017 sale of the Coquitlam property must be dismissed. Those proceeds are to be paid out to the claimant forthwith and such payment is not subject to any condition.

(b) "Approval" of a mortgage

[71] There is a dispute between the parties about the "approval of mortgage" language in the divorce order. The respondent's interest in the Coquitlam property was to be transferred to the claimant upon that approval. It never was transferred and, when the claimant had to sell the property, the respondent agreed to the sale and to sign the necessary documents. The claimant needed to sell the property because she could not afford the mortgage payments. She found an apartment, made a deposit of \$20,000 and ultimately lost the deposit because the respondent would not sign the property documents.

[72] The background to this issue begins with the April 2015 separation agreement between the parties. It included the following with respect to the division of the Coquitlam property:

9- The parties have a property located at [Coquitlam property] as a Joint Tenant. Both parties agree that amount of \$2,150 per month for a period of two years commencing on the day the order of divorce issued by the Supreme Court of British Columbia being paid by the husband to the wife. Both parties agree the title of the mentioned property to be transferred to the wife's name (the husband's name to be removed from the title) on the day the order of divorce issued by the Supreme Court of British Columbia subject to lender(s)/bank(s) approval. The husband has no obligation whatsoever for any mortgage default(s) caused by the wife after two years mortgage payments paid by the husband.

[Emphasis added].

[73] As the respondent points out, the April 2015 separation agreement became part of the divorce order of March 15, 2016. The result was the following provision in that order (reproduced as written):

4. Claimant #1 [the claimant] and Claimant #2 own a property located at [Coquitlam property]. The parties agree that for the next 2 year starting November 1, 2015 Claimant #2 will pay the the amount \$2150 the expense of matrimonial home until April 30, 2017. The title will be transferred upon the approval of mortgage of the Claimant #1.

[Emphasis added].

[74] It is this latter document that the respondent relies on for his submission that any mortgage had to have his approval. The claimant says all that was required was the approval of her financial institution, which she obtained.

- [75] The formation of agreements on financial matters on the breakup of a marriage and their interpretation has been discussed in previous judgments. I adopt the following from *Reid v. Reid*, 2011 BCSC 231 at paras. 25 -28, cited in *Stanbridge v. Stanbridge*, 2015 BCSC 1468 at para. 31:
- [25] It is well-established that settlement agreements must meet the requirements of contractual formation: offer, acceptance, consideration and an intention to create legal obligations: *S. (O.H.) v. S. (M.J.)*, 2004 BCSC 600, at para. 22; *Jorgensen v. Jorgensen*, [1996] B.C.J. No. 1153 (QL) (S.C.) aff'd (1998), 56 B.C.L.R. (3d) 124 (C.A.).
- [26] Settlement agreements made upon marriage breakdown, and for the purpose of resolving issues such as property division and spousal support, are generally referred to as "separation agreements". While these agreements are subject to the requirements of contract formation, such are not applied with the same rigour in a matrimonial context. In this regard, our courts have recognized the need to achieve fairness as between the parties: *Mitchell v. Mitchell*, 2000 BCSC 1367, at para. 35.
- [27] In addition to the foregoing, for a settlement agreement to be enforceable there must be a "meeting of the minds" of the parties on the essential elements of the agreement: *Fridman G.H.L.*, *The Law of Contract in Canada*, 5th ed. (Toronto: Carswell, 2006) at p. 14. The burden of proving consensus between the parties falls to the party seeking to prove the existence of the agreement, and the standard to be met is proof on a balance of probabilities: *Bell v. Bell* (1998), 80 A.C.W.S. (3d) 705 (B.C.S.C.).
- [28] In determining whether the parties were *ad idem* at the time of contract formation, the manifested intentions of the parties are considered. Generally, the courts apply an objective, rather than a subjective, test and consider whether a reasonable person in the situation of the party would have believed and understood that the other party was consenting to identical terms: *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607, adopted by the S.C.C. in *St. John's Tugboat Co. Ltd. v. Irving Refining Ltd.*, [1964] S.C.R. 614. The starting point for determining whether the parties were *ad idem* is the contract, itself; however, where it is unclear whether or not the parties have agreed, the court may resort to the evidence beyond the contractual language, including the circumstances in existence at the relevant time, the genesis and aim of the transaction, and the conduct of the parties during, and subsequent to, the purported making of the contract: *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365, at 18, and *Aerovac Systems Ltd. v. Darwin Construction (Western) Ltd.*, 2010 BCSC 654, at 26.

[Emphasis added].

[76] Returning to the language of the separation agreement and divorce order, I accept that the sentence in the latter that "[t]he title will be transferred upon the approval of mortgage of the Claimant #1" is not clear because it does not specifically say who will approve the mortgage. However, the genesis of the order was the separation agreement which answers this question as follows:

Both parties agree the title of the mentioned property to be transferred to the wife's name (the husband's name to be removed from the title) on the day the order of divorce issued by the Supreme Court of British Columbia subject to lender(s)/bank(s) approval.

[Emphasis added.]

[77] From this I conclude it is quite clear that the parties' intention was that what was needed was the approval of a lender or bank, not the approval of the respondent.

[78] This is further demonstrated by the conduct of the parties subsequent to the agreement and order. The following text exchanges between the claimant and the respondent on July 28, 2016 are noteworthy. They start with a discussion about an Iranian/Sharia divorce (reproduced as written):

[Respondent to Claimant: 15:43:16 hrs.]

Iranian divorce is totally different with the Canadian one, and like you i have seen lawyers and in the original seperation agreement you signed that the title will be transferred upon the Canadian divorce being filed and that has taken two years , there is no writing anywhere about the iranain divorce, but i didnt wanna "drag" it, i simply said to do both things at the same time. And i dont know what is wrong with that! You talked about assurance, but i m guessing thats not your excuse. You just wanna do it your way or highway

[Claimant to respondent: 15:36:12]

The whole point is to get them both done, what is wrong with trying and helping eachother?

[Respondent to Claimant: 15:43:16]

My decision to giving you the house and the car and paying two years of the mortgage was based upon the iranain divorce and you signing off your mehr... fine you are not going to do it, I am going to cancel everything... If you check the separation agreement you see it says the title will be transferred upon mortgage approval.

[Claimant to respondent: 15:44:21]

And i have mortgage approval

[Respondent to Claimant: 15:44:32]

And i am going to do the iranain one

[Claimant to respondent: 15:44:47]

But it might take a long time to get back

[Respondent to Claimant: 15:45:02]

And you dont even have your birth certificate here

[Claimant to respondent: 15:45:27]

You want this over as much as i do

[Respondent to Claimant: 15:45:53]

So please lets just do it legally and get it over with

[79] The evidence is that, at this time, the claimant had found an apartment and had made a deposit of \$20,000 and obtained financing for a mortgage to purchase her apartment. It is clear from this exchange that both parties were operating on the understanding that what was required was approval from a bank or lender.

[80] Significantly, in the above exchanges, the respondent did not state that it was his approval that was accepted. Nor did he say he required documentation to support the claimant's statement. Instead he simply accepted the claimant's statement that she had the approval of a bank without comment and then continued the discussion about the Iranian divorce. His claim that his approval was needed came much later and is contrary to the separation agreement he signed and his previous conduct.

[81] There is also evidence from third parties.

[82] Ms. S. was the realtor for the claimant for the sale of the Coquitlam property. In her affidavit (filed June 14, 2017) she deposes that the claimant told her that the respondent was on title for the property and he needed to sign the contract for the multiple listing. After some delay in replying to Ms. S.'s calls, the respondent was friendly enough and he said he was willing to sign the contract because, as described by Ms. S., he said the claimant was the owner and "his name was just there." In a discussion about price with Ms. S., the respondent said, "I don't care since is [the claimant's] home, what ever price she would like to sell it for is her business Its all her business its going to her." The respondent also asked Ms. S. to pass on to the claimant that he wanted her to sign the Iranian divorce papers.

[83] Similarly, B.Z. swore an affidavit, filed on June 14, 2017. He is an "advocate (for social justice) and a translator." He had known the parties for about two years and he helped them translate the separation agreement from English to Farsi "to ensure they understand what it means." B.Z. deposes that the respondent did not at any point say he had an interest in the Coquitlam property.

- [84] The respondent challenges the credibility of Ms. S. and B.Z. by, for example, saying that Ms. S. is an "overzealous advocate" for the claimant. In the case of B.Z., the respondent says he does not set out the facts or basis for his conclusions. Having reviewed the affidavits of Ms. S. and B.Z., I conclude the evidence recorded in those documents is presented in an objective and fair manner.
- [85] Their evidence is also consistent with text messages in which the respondent did not make the transfer of the property conditional on him receiving a share of the sale proceeds. For example, he stated on July 5, 2016, "[y]ou can list the house and do whatever you want to do with it as soon as you sign the Iranian divorce." And on July 28, 2016 he said, "[a]fter the Iranian divorce is finalized, I'll sign the listing contract."
- [86] The respondent relies on a letter dated October 18, 2016 from Antrim Investments to the claimant. It advises her that a mortgage on the Coquitlam property in the amount of \$355,000 had been approved, subject to an appraisal and other conditions. The respondent describes this letter as tantamount to the figurative smoking gun because it is the only evidence of the claimant receiving mortgage approval but it is dated well after the material events in summer 2016. He also says he did not know about it until May 2017 when it was disclosed by counsel for the claimant. His submission is that he could not have known until May 2017 that the claimant had mortgage approval.
- [87] The October 18, 2016 letter was obtained after the events of summer 2016 as part of the documents for an application to court by the claimant, dated August 31, 2016. That application is summarized above, but it sought the transfer of the Coquitlam property to her, among other things, and it was ultimately adjourned generally. The approval of a mortgage was judged necessary as part of that application in case the court asked whether there was a mortgage. I accept that explanation. I also note that the respondent's submission on the October 18, 2016 letter does not explain why he accepted without question and without requesting documentation that the claimant had mortgage approval, as she stated in her text on July 28, 2016.
- [88] I conclude that the parties intended that the approval of the mortgage on the Coquitlam property was to be the approval of a lender or bank. That is demonstrated clearly in the separation agreement, the subsequent conduct of the parties and, frankly, it would be a novel provision in a marriage breakup to give one party essentially a veto over the purchase of a new family home for the other party and child.
- [89] A somewhat related matter is that the respondent also claims he still has a beneficial interest in the Coquitlam property. As the claimant points out this claim was made just before the hearing of these applications, more than two years after the separation agreement and more than one year after the divorce order.

- [90] There is no mention of a beneficial interest in the separation agreement or divorce order or any other basis to interpret the documents to include that concept. Ms. S., the realtor for the sale of the Coquitlam property, spoke to the respondent about the sale and she deposes that the respondent did not say anything about a beneficial interest in the property. B.Z., the person who assisted the parties in translating the separation agreement from English to Farsi, said the same thing in his affidavit.
- [91] It is not clear what the respondent means by his reliance on a beneficial interest. He says that it is what was left in the Coquitlam property after he paid mortgage payments that ended in April 2017. However, that submission runs counter to the wording of the separation agreement and the divorce order. Both of those documents state that the respondent will be off title as of the date of the divorce. At that point he would have had no interest, legal or beneficial.
- [92] Another aspect of this submission is that the respondent suggests his beneficial interest is based on his entitlement to one-half of the value of the Coquitlam property. As discussed above that too is not supported by the agreement or the divorce order. And to be clear, to the extent the claim of a beneficial interest relates to the respondent's assertion of a one-half interest in the net proceeds of the sale of the Coquitlam property I have also rejected that submission above.
- [93] The respondent's claim that his approval of a mortgage as set out in the March 2016 divorce order is dismissed. The remainder of the funds from the net proceeds of the sale of the Coquitlam property held in trust by her counsel will be paid to her forthwith.
- (c) Damages
- [94] The claimant seeks damages in the amount of \$20,000. The court order of February 24, 2017 initially ordered these damages against the respondent, noting that he did not appear in court or have a representative. However, this part of the order was stayed and it is an issue to be decided in the subject application.
- [95] To be a bit repetitive, the history relevant to the issue of any damages begins in June 2016 when the claimant advised the respondent that she wanted to sell the Coquitlam property. Then, on July 5, 2016, she asked him to sign the sale agreement with her agent. He replied by asking her if she had signed the documents for the Sharia divorce. The claimant accepts that under the 2015 oral agreement (discussed below) the timing of the transfer of the property to her would be at the same time as the Iranian divorce.
- [96] The claimant then asked whether the respondent was to continue the mortgage payments until April 2017. If so, " I will sign the [Iranian divorce] papers then since I can not trust ur any more. The only good quality ur had was ur honesty and that seems to be gone too." She also pointed out that the house was supposed to have been transferred to her "long ago." (All texts reproduced as written).

- [97] The respondent replied that he signed the "divorce Agreement knowing you will sign the Iranian divorce as well, you can not blackmail me like always into getting what you want.! I will not sign anything until Iranian divorce is finalized, " (emphasis added).
- [98] At one point in this exchange (July 5, 2016) the respondent appeared to agree to attending an appointment for the Iranian divorce and asked the claimant to arrange it. A few days later the claimant said that in order to prevent going "back and forth anymore she would call "ahmad"." Four days later she asked, "[c]an we go on monday to sign for the papers." Two days later the respondent replied that he was " Actually waiting for you to sign the iranain divorce like you were supposed to a long time ago. You have been dragging this process and not doing your part (signing the iranain divorce) Not me. " On July 25, 2016 the claimant told the respondent that she emailed "the info for the iranain lawyer to do the Iranian divorce, on friday, july 22 nd, the iranain divorce cannot be signed by just one person, he needs you to call him and take him your ids."
- [99] The respondent replied that he saw the person (perhaps a lawyer) the previous day and the claimant was to pick up the documents and give it to another person (perhaps a notary). The claimant replied that she had been there the day before and the person she saw "shredded the paper we signed since we didn't need it anymore " She asked if the respondent could sign for the transfer of the property the next day. The respondent replied, "[a]fter the Iranian divorce is finalized, I'll sign the listing contract." The claimant replied that they needed to sign the divorce documents and the property documents at the same time.
- [100] On July 28, 2016 the claimant sent a text to the respondent saying that "[i]f I don't get this done by next week I will lose a 20000 \$ deposit that I've put down The reason I said to do them infront of a lawyer was so we are both assured We either do them at the same time infront of a lawyer or just leave it." To this the respondent replied:
- The deposit that you put for the new house is not my problem. You should finalize everything before going ahead and buying a new house. Fine if we leave the Iranian divorce, you can never go back to Iran and has no impact on my life.
- [101] The claimant stated that the " Whole point is to get them both done, what is wrong with trying and helping each other?" The respondent replied:
- my decision to giving you the house and the car and paying two years of the mortgage was based upon the Iranian divorce and you signing off your mehr Find you are not going to do it, I'm going to cancel everything If you check the separation agreement you see it says the title will be transferred upon mortgage approval.
- [102] To this the claimant stated, "[a]nd I have mortgage approval." As set out above, the respondent did not say anything further about the issue of the approval. A few minutes later the respondent said, "My word is final and I am not going anywhere or sign anything until the Iranian divorce is finalized ".

- [103] Then, on August 3, 2016, the claimant said in a text she wanted to "finish this" and the respondent could have his half-interest in the property. She offered to sell the house and give the respondent one-half of the net proceeds. The respondent relies on this as an admission of his entitlement to the one-half interest. However, I accept that the claimant was under considerable pressure at the time. This included the aggression and intransigence of the respondent.
- [104] For example, the previous text from the respondent was, "[y]our not gona like whose gona drop off [N.] next week, Figure it out." This was a reference to N.S., the respondent's new partner, picking up N. and the animosity between her and the claimant was well known. The respondent announcing this unilateral change to parenting time arrangements can only be seen as a hurtful provocation by him. And the claimant was quite reasonably worried about losing her deposit. I also conclude that the claimant's statement was an offer to settle rather than a declaration of her rights.
- [105] In any event, her offer was not accepted (although it is now a significant part of the respondent's submission). Instead, 16 days later, the respondent complained about parenting time issues and finished by saying, "How fucked are you in the head to keep confusing my son don't make me take his custody. With ur depression and history it's a piece of cake."
- [106] There are a considerable number of other texts between the parties before and after these exchanges none of which resolve any of the issues before them. It is sufficient to say that the parties now bring these issues to court.
- [107] As can be seen there was a progressive deterioration of the communications between the parties. It started out somewhat civil but ended up with obscenities and abuse from the respondent towards the claimant and he threatened her with the prospect of her not being able to return to Iran. There were two issues. First, there was the issue of the "approval" of the mortgage. As discussed above and reflected in the text messages, the respondent accepted that the claimant had the approval of a mortgage and he did not ask for any supporting documents until much later, most particularly in the subject application. But what appears to have happened is that the respondent believed that he not only had the right of approval over the mortgage but also the right to approve the sale itself. He had neither.
- [108] The second and more serious issue between the parties was the Iranian divorce. The oral agreement between the parties contemplated the divorce happening at the same time as the transfer of the property. The parties began to discuss the two issues together but the respondent quickly focused on the Iranian divorce to the exclusion of the property issue. This meant that the sale of the property was at a serious impasse. Within about 20 minutes of the claimant's request for cooperation on the property documents the respondent said "I will not sign anything until the Iranian divorce is finalized."

- [109] At one point the respondent had the opportunity to sign both the property documents and the documents for the Iranian divorce after the claimant made the arrangements to do so. He seemed inclined to do so. But when the claimant proposed doing this on a Monday the respondent again imposed the condition that she had to complete the Iranian divorce documents and accused her of "dragging this process." At this point the discussion was no longer about completing the property documents and the Iranian divorce documents at the same time but the respondent's insistence that the latter must be done first.
- [110] The claimant attended at what may have been a notary's office where a document was shredded. She pointed out to the respondent that the documents had to be signed by both parties. However, he replied that he would not sign anything until the Iranian divorce was finalized. He took this position knowing that the claimant could not afford to continue to live in the Coquitlam property, that she had an offer on an apartment and that a \$20,000 deposit on the apartment was at risk if he did not cooperate.
- [111] The 2015 separation agreement and the 2016 consent divorce order required the respondent to agree to the transfer of the Coquitlam property to the claimant as sole owner. The separation agreement says this was to occur on the day of the parties' divorce order in court and subject to the approval of a bank or lender. The later divorce order does not refer to the date of divorce as the date of the transfer. But that order was, by definition, on the date of the divorce order and the only remaining condition on March 15, 2016 was the approval of the mortgage.
- [112] There can be little doubt that the respondent was required by an agreement and an order that he consented to, to transfer his interest in the property (or agree to the sale of it) on or about July 28, 2016, the date the claimant confirmed she had approval of a mortgage. He did not and the claimant lost her deposit. His response was that the deposit was the claimant's problem when all she was trying to do was to get the respondent to comply with the divorce order so she could sell the Coquitlam property that she could no longer afford.
- [113] The respondent now says the loss of the deposit was a result of the negligence of the claimant. As part of this submission he says the claimant "unilaterally" decided to sell the Coquitlam property but this is not an accurate description of what happened. The claimant attempted to get the agreement of the respondent for the sale because she could no longer afford the mortgage payments. This was, frankly, generous on her part because his approval was not necessary.
- [114] In any event, the agreement was not given by the respondent and the claimant applied to court for an order for sale. The respondent had notice of the claimant's application but did not appear. An order for sale was granted in February 2017 as set out above. This was not a unilateral move on the part of the claimant but a necessary one, required by her financial circumstances and the refusal of the respondent to agree to the sale. It is certainly not a case of negligence.

- [115] The respondent also says that the claimant was negligent because she did not include terms and conditions with her deposit that would have protected her from its loss. Similarly, the respondent says the loss of the claimant's deposit was "self-inflicted" because she made a "bad business decision" in not putting in terms and conditions to protect her. Examples of terms and conditions that might have protected the claimant are not provided by the respondent. In fact, it would be a novel deposit that was conditional on the kinds of protections contemplated by the respondent. For example, it is safe to say that a deposit conditional on the approval of the sale by the respondent would likely be rejected by a potential seller.
- [116] According to the respondent it would be oppressive to order damages against him and he seeks relief under s. 24 of the Law and Equity Act, R.S.B.C. 1996, c. 253 and he cites MTK Auto West Ltd. (c.o.b. MINI Richmond) v. Allen, 2003 BCSC 1613. MJK Auto West Ltd. was a case where a contract for the sale of a vehicle created a penalty in an amount significantly more than the actual loss and Justice Kirkpatrick found that it would be unconscionable to enforce the penalty. That is a very different situation than the subject application where the claimant seeks only the amount she lost.
- [117] Overall, I conclude that the loss of the claimant's deposit in the amount of \$20,000 was the result of the respondent's refusal to execute the documents necessary for her to obtain a mortgage. The claimant posted the deposit because she could not afford to stay in the Coquitlam property and she needed to have another residence for her and N. She was acting reasonably and prudently in trying circumstances not least because of the aggressiveness and intransigence of the respondent. He knew the deposit was at risk but he said it was not his problem.
- [118] The oral agreement was that the property documents would be executed at the same time as the Iranian divorce documents but the respondent insisted on the completion of the latter before the former in breach of the oral agreement. His position was that he had to approve any mortgage and then any sale of the property but neither were supported by the separation agreement or divorce order.
- [119] I conclude that damages in the amount of \$20,000 against the respondent are justified in these circumstances as a means to put the claimant somewhere close to the position she would have been in if the respondent had complied with the oral agreement, the separation agreement and the divorce order.
- (d) The mehr and the oral agreement
- [120] In broad terms the parties present the separation agreement and divorce order as reflecting their civil marriage, separation and divorce. There is no reference in the separation agreement or the divorce order to the Iranian marriage of the parties. That is appropriate since this court does not have jurisdiction over substantial issues relating to Sharia law.

- [121] The parties made an oral agreement in April 2015 with respect to their Iranian divorce. According to the respondent the elements of this oral agreement were that the parties would obtain a Sharia divorce. The respondent also says that the claimant agreed to forgo her mehr, valued by him at \$45,100, in exchange for the respondent paying mortgage payments on the Coquitlam property for two years (\$2,150 a month; totalling \$38,700); transfer of a car to the claimant (valued at \$8,127); and payment by the respondent of spousal support at \$263 per month. As he stated in his text message of July 28, 2016, in his mind he transferred his one-half interest in the Coquitlam property to the claimant in return for an Iranian divorce and the claimant forgoing her mehr.
- [122] As a first comment on the respondent's account of the oral agreement, the numbers do not add up. He says the claimant gave up her mehr, valued by the respondent at \$45,100, for three payments: \$38,700 for mortgage payments over two years, \$8,127 for the car and spousal support of \$263 paid over five years (commencing November 1, 2015). The total amount of these items is \$62,607. The respondent does not say that he was being generous and, indeed, except for a short period after separation, he has demonstrated a lack of generosity. The result is that I am unable to give much credence to the respondent's evidence about the financial aspects of the oral agreement.
- [123] For her part, the claimant agrees there was an oral contract and that it was in April 2015. She also agrees that the agreement included a Sharia divorce and the respondent was to pay mortgage payments and spousal support in the amounts and over the time periods as described by the respondent (which he has done). And the claimant agrees that she said she would forgo her mehr. She does not mention the car. She does agree that the oral agreement was to be implemented at the same time as the Coquitlam property was transferred to her.
- [124] Overall, setting aside the respondent's quite unreliable description of the financial aspects of the 2015 oral agreement, it can be said with some confidence that there was an agreement that the parties would divorce, the respondent would pay spousal support and mortgage payments and the claimant would forgo her mehr. The transfer by the respondent of his one-half interest in the Coquitlam property was part of the separation agreement and divorce order but also related to the Iranian divorce in two respects. First, the Iranian divorce and the transfer of the property were to take place at the same time and, second, the claimant forgoing her mehr was part of the consideration for the respondent entering into the separation agreement and divorce order. The evidence does not support a conclusion that the car was part of the oral agreement (there is a transfer of a car on November 1, 2015 included in the March 2016 divorce order).
- [125] The transfer of the property never took place because of the respondent's insistence that he had to approve a mortgage on the property in favour of the claimant (then his insistence that he had to approve any sale) and the Iranian divorce had to take place before the property was transferred. I have found above that he was wrong on both counts.

[126] I next turn to consideration of the mehr in the Iranian marriage deed. The legal issues of a mehr were usefully discussed by Justice Fisher (as she then was) in *Mohammadi v. Mohammadi*, 2016 BCSC 1873:

Marriage portion (dowry)

[45] The parties' Iranian marriage certificate includes a "Marriage Portion" which provides as follows:

A volume of Holy Koran, a pane of mirror, a pair of candleholders, which are all submitted to the Wife and she admitted receipt, plus 700 Full Bahar Azadi Gold Coins, being the husband's liability and payable to the Wife upon her demand. Signed by the two spouses.

[46] The respondent testified that the value of the 700 gold coins referenced in the marriage portion is approximately \$276,000. It appears that the dowry is a contract between the husband and the wife. The respondent described it as both a contract between the families and a contract just between the parties. She said that she has never claimed this amount and did not plan to claim it in Iran, but at the same time, she has never given up her right to claim it.

[47] The claimant testified that the marriage portion of the marriage certificate was purely symbolic. He never had the equivalent of 700 gold coins and that number was based on a numeric calculation of the respondent's name. His understanding is that the dowry is security for housewives in Iran who do not work. In any event, he said that the respondent had agreed not to seek her dowry in Iran and submitted that she should not be able to do so here.

[48] Similar claims to enforce provisions of these kinds of marriage documents have been accepted in British Columbia where the evidence established that they met the definition of "marriage agreement" in the former Family Relations Act, RSBC 1996, c. 128 (repealed): *Delvarani v. Delvarani*, 2012 BCSC 162; *N.M.M. v. N.S.M.*, 2004 BCSC 346; *Amlani v. Hirani*, 2000 BCSC 1653. Given that the Iranian marriage certificate in this case was signed in 1999, the provisions of the Family Relations Act apply to issues involving the enforcement of marriage agreements, per s. 252(2)(a) of the Family Law Act.

[49] The Family Relations Act, in s. 61(2) defined a "marriage agreement" as

an agreement entered into by 2 people before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for

(b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.

- [50] In Delvarani, the court reviewed these cases and concluded that the marriage portion of an analogous religious marriage certificate "has been interpreted to be in the nature of a reverse dowry or sum of money agreed upon by the parties, which is to be paid by the husband to the wife in the event of a separation" (at para. 202). However, it was emphasized that the evidence must support that conclusion in each case.
- [51] In Amlani, the court was satisfied that it was a term of the marriage contract that the "marriage portion" amount ("maher" or "mehr" in that case) was payable upon dissolution of the marriage. A similar finding was made in N.M.M. In both of these cases, the marriage portion was enforced as a marriage agreement. In Delvarani it was not, as the judge was not satisfied that an agreement had in fact been reached.
- [52] Even if the dowry is a valid marriage agreement under the Family Relations Act, it is subject to being set aside if the court determines it to be unfair, a less stringent standard than that under the Family Law Act. In Amlani and N.M.M., the amounts claimed were relatively modest, in the range of \$50,000. In this case, the amount claimed is quite substantial, assuming the respondent's estimated value of \$276,000 is accurate.
- [127] I pause to note that the respondent makes a short submission that the mehr is a legal contract and it is "bound" by the "previous" Limitation Act, R.S.B.C., c 266. The point is that a six-year limitation period commenced on the day the mehr was "advanced" and has now expired. However, if the respondent is correct then any claim to a mehr in an Iranian marriage of more than six years could not be made. No authority is given for this submission and it must be dismissed.
- [128] The parties differ significantly on the meaning of Iranian law and the value of the mehr. There is no evidence that the parties agreed or even discussed the value of the mehr at the time of the oral agreement in April 2015. In fact, it became an issue only after the Coquitlam property was sold and the net proceeds were available. The respondent's submission assumes throughout that the mehr was always valued at \$45,100 but the evidence is that its value was not discussed as part of the 2015 separation agreement or 2016 divorce order.
- [129] The respondent relies on an affidavit from Negar Nami Parsa. Mr. Parsa is a lawyer with a Vancouver address who has practiced law in Iran since 2008. He has a Bachelor's degree in law and a Master's degree in international law. He deposes that his practice is predominately specialized in corporate and family law, presumably in Iran.
- [130] Mr. Parsa explains in his affidavit that a divorce in Iran is based on "the sole acceptance and permission of the husband" and a wife cannot get a divorce without the husband's permission (except for some specific exceptions such as the husband's drug addiction). Nonetheless Mr. Parsa also says that there can be a divorce if the husband does not agree, but it can take years. Where the parties agree on a divorce it can take three months.

- [131] Mr. Parsa's affidavit continues that in Iran, where a husband does not have the requisite funds to pay a mehr in a marriage contract, and where the mehr is greater than 110 gold coins or its equivalent, the husband's assets are taken into account and assessed. If an Iranian court finds that the husband does not have the requisite funds to pay the mehr, the court will order that the husband pay "the least amount as set out in Iranian law, which is 110 gold coins or its equivalent amount." I note this description is contrary to the submission of the respondent that a mehr is only of symbolic value.
- [132] The respondent also relies on his own affidavit. This includes a copy of a Google translation of an Iranian press release about Iranian law. It includes a reference to "coins", not gold coins. In his affidavit he deposes that he is destitute; his average income over the three-year period 2014 to 2016 is \$10,365 and in 2016 his income was \$3,990. He has significant debt. His evidence is also that he works 60 hours a week as a realtor and mortgage broker and it is not explained how this large number of hours results in a minimal income. Nor is there an explanation about how the respondent paid mortgage payments of \$2,150 for two years, spousal support for five years and he continues to pay child support. As with the respondent's submission on the value of the items in the November 2015 oral agreement, these numbers also do not add up.
- [133] In any event the respondent says in his affidavit that he is entitled to be released from the mehr in the marriage deed by the payment of 110 gold coins. He says each coin has a value of \$410 for a total of \$45,100 and that is the value of the mehr in this case. Counsel for the respondent also offered his own interpretation of Iranian law based on someone else's translation but I declined to accept that submission.
- [134] The claimant says she has never heard of the description of Iranian law relied on by the respondent. She also questions the date the law relied by the respondent took effect and she says the 110 gold coins are a mandatory payment and the balance owing by the husband is assessed based on the financial circumstances of the husband. With regards to the value of the mehr, the claimant uses an on-line site for a value of a kilogram of 24 carat gold of \$54,236 (as of June 12, 2017). Using this figure, according to the claimant, the value of the 5 kilograms referenced in the mehr is \$270,000.
- [135] There are obvious problems with this evidence. The respondent tenders Mr. Parsa's affidavit as being from "someone with expertise, but it does not purport to be an expert 'opinion' report." This frankly confusing statement is intended to avoid the requirement to comply with the Supreme Court Family Rules on expert evidence because the affidavit does not comply with the usual requirements of an expert report as described in Rule 13-6, among others. In any case, the affidavit is clearly opinion evidence. With regards to the Google translation of Iranian law, it must be rejected out of hand as quite unreliable hearsay and opinion evidence. An additional problem is that in his affidavit the respondent does not explain the basis of his valuation of Iranian gold coins as being \$410 each.

- [136] The claimant's evidence is better but also problematic. The reference to the date of the Iranian law cited by the respondent is a submission of counsel based on her or some other unknown person's translation of an unknown source. Her calculation of the value of 5 kilograms of 24 carat gold is based on an on-line source and it is not known how reliable that source is.
- [137] In summary, I am asked to choose between two valuations of the mehr in this case and the difference between them is \$264,900. As well, I have not been given the information necessary to fully or properly assess each valuation. It is not a stretch to say that the decision making process with the evidence here is akin to flipping a coin. In my view it is self-evident that the evidence in this case is unsuitable for the kind of determinations sought by both parties. I decline to make those determinations.
- [138] If the parties wish a decision from this court on how a mehr is treated in Iranian law in the case of a divorce and the value of the mehr they will have to make an application to that effect. I acknowledge that the Rules on expert evidence only apply to a "trial." However, given the wide differences between the parties about the valuation of the mehr and in light of the need for legitimate expert evidence on Iranian law, pursuant to s. 218 of the FLA and my inherent jurisdiction, I direct that any evidence on these issues must comply with the rules on expert evidence: Family Rules, Part 13. Again, the two issues requiring expert evidence are the valuation of a kilogram of gold and Iranian divorce law, in particular the valuation of a mehr as part of a divorce.
- [139] A decision on the value of the mehr will be made after the filing of the appropriate application and response, accompanied in each case with the appropriate evidence. I add that an expert and his/her report may be cross-examined under Rule 13-7(3). I also note that Rule 13-3 provides for the appointment of a joint expert.
- [140] As to the relationship between the value of the mehr and the one-half interest of the net proceeds of the sale of the Coquitlam property the respondent says he is entitled to, I have concluded above that he is not entitled to that amount. That may also be an issue under Sharia law but that is for the appropriate authority to say. It has no bearing on the release of the remaining proceeds from the sale of the Coquitlam property to the claimant.
- (e) Iranian divorce
- [141] Both parties seek an Iranian divorce. As can be seen above, the reason they have not obtained one is because of their complicated history on other issues such as the Coquitlam property. I have found above that it was primarily the actions of the respondent that have held up the Iranian divorce since he did not comply with the oral agreement to transfer the Coquitlam property to him at the same time as the divorce took place.

- [142] As a preliminary matter here, in argument counsel for the respondent sought an adjournment of this issue. I deny an adjournment. Despite the passage of much time, countless text messages about this issue and the 2015 oral agreement it remains a significant source of conflict between the parties. I conclude some closure is required.
- [143] There are obvious religious sensitivities with this issue as well as some genuine jurisdictional questions and a leading judgment from the Supreme Court of Canada is instructive.
- [144] In *Bruker v. Marcovitz*, 2007 SCC 54, the marriage was a Jewish one, the parties appeared before a rabbi for a divorce and this was recorded in a written agreement. However, a get is required before a divorce can be finalized and the wife can only obtain a get from the husband; she remains a wife and unable to marry again without a get. In *Bruker* the husband refused to grant the get for 15 years even though the agreement was to appear before the rabbinical authorities to obtain a Jewish divorce immediately upon the granting of a civil decree nisi.
- [145] At trial the agreement to obtain a divorce was found to be a valid and binding civil contract albeit also with religious obligations ([2003] R.J.Q. 1189). Damages were the significant issue and these were awarded to the wife. However, the Court also said this:
- [19] Defendant claims that he had a religious obligation, not a civil one, and thus this dispute cannot be adjudicated before a civil court. However, once the Defendant signed a civil contract, agreeing to appear immediately before Rabbinical authorities, this obligation moved into the realm of the civil courts, and the religious obligation became embodied in a secular agreement. Consequently, the Defendant had a clear and unequivocal civil law obligation to appear "immediately" before the Rabbinical authorities. He did not appear, however, for 15 years. Once there is a civil contract, even if its object relates to religious obligations, it is justiciable and within the jurisdiction of the civil court.
- [146] The trial judgment was overturned on appeal on the basis that the obligation in the contract was substantially a religious one ([2005] QCCA 835). A majority in the Supreme Court of Canada allowed an appeal by the wife and restored the trial judgment (Justice Deschamps dissenting).
- [147] Justice Abella wrote for the majority in *Bruker* and her reasoning included the following findings and conclusions, summarized by me:
- (a) The fact that a dispute has a religious aspect does not make it non-justiciable. "The courts will not consider matters that are strictly spiritual or narrowly doctrinal in nature, but will intervene where civil rights or property rights have been invaded" (at para. 41, 42; citing *M. G. Ogilvie Religious Institutions and the Law in Canada*, (2nd ed. 2003), at pg. 218).

- (b) That a marriage contract is deeply affected by religious considerations is not determinative; it is "the beginning and not the end of the matter" (at para. 46; citing *Re Morris and Morris* (1973), 42 D.L.R. (3d) 550 (Man. C.A.), at pgs. 559, 560).
 - (c) The court was not dealing with judicial review of doctrinal religious principles such as whether a particular get is valid (at para. 47).
 - (d) The court disagreed with the husband's submission that requiring attendance before a rabbinical authority to obtain a divorce in accordance with Jewish law to permit remarriage under that law, was against public order because it was a violation of freedom of religion (at paras. 54-93). The court applied the Civil Code of Quebec, S.Q. 1991.
 - (e) The court considered the husband's claim that a civil court taking jurisdiction over his religious divorce would condemn him ex post facto for abiding his religion on the first place (para. 65). It relied on the court's "robust interpretation of freedom of religion" in previous cases and concluded it had to weigh the husband's religious claim with the democratic values, public order and general well-being set out in the Quebec civil code (para. 78). As part of this analysis the Court accepted the right of Canadians to decide for themselves whether their marriage was irretrievably broken down (para. 82).
 - (f) The approach in other jurisdictions was reviewed. The use of damages to compensate someone whose spouse refused to provide a get has been upheld in the European Commission of Human Rights. Similar approaches are taken in France, the United States and Israel. In *Bruker* the Court concluded that the "international perspective reinforces the view that judicial enforcement of an agreement to provide a Jewish divorce is consistent with public policy values shared by other democracies" (para. 90).
- [148] As above, the majority in *Bruker* agreed with the trial judge that the wife was entitled to damages for the husband's violation of a civil contract requiring him to immediately attend the religious authorities to complete a Jewish divorce. In dissent, Justice Deschamps acknowledged the situation of the wife but concluded it was a matter for Hebrew law which is an autonomous source of law in Canada (at para. 183).
- [149] The issue of the autonomy of Hebrew law was a key difference between the majority and the dissent of Justice Deschamps as can be seen from the following excerpt from the dissent:
- [183] Although, like the Court of Appeal, I am sensitive to how difficult it is for the Jewish community to modify the rules of religious divorce, the fact remains that the courts are limited to deciding cases that originate in positive law. The instant case is one in which the religious and civil worlds collide. In my opinion, the problem is a matter for Hebrew law. I see no reason to change, for this case, the clear rule that religion is not an autonomous source of law in Canada.
- [150] The conclusion of the majority also included the following:

[184] I will conclude by noting that the reserved approach taken by the Canadian courts to religious precepts is in my view a sound one. Civil rights arise out of positive law, not religious law. If the violation of a religious undertaking corresponds to the violation of a civil obligation, the courts can play their civil role. But they must not be put in a situation in which they have to sanction the violation of religious rights. The courts may not use their secular power to penalize a refusal to consent to a get, failure to pay the Islamic mahr, refusal to raise children in a particular faith, refusal to wear the veil, failure to observe religious holidays, etc. Limiting the courts' role to applying civil rules is the clearest position and the one most consistent with the neutrality of the state in Canadian and Quebec law. Gandhi is credited with saying that each person is responsible for his or her own religion. That responsibility goes hand in hand with the neutrality of the state toward religious precepts and, in the case at bar, favours dismissing the appellant's action.

[Emphasis added].

[151] Obviously the Court had in mind the analogous situation of an Iranian divorce and the failure to pay a mehr.

[152] Considering the circumstances of the subject application in light of Bruker there are some differences in the facts. For example, in Bruker there was a written agreement while in this case there was an oral agreement. As well, the oral agreement in this case was about two years ago while the agreement in Bruker was in place for 15 years without compliance by the husband.

[153] There can be problems of proof with oral contracts. The essential problem is that the parties are usually attempting to set out what was agreed orally in some formal way after the contract was made and after events have been distorted by the passage of time and intervening issues such as personal animosity. However, subject to those problems, there is no reason in law why an oral contract cannot be as enforceable as a written one: *Hik v. Redlick*, 2012 BCSC 1684 at para. 38. In the subject case these difficulties do not arise because the parties accept that they agreed they would apply for an Iranian divorce, the consideration relating to the mehr and the value of the Coquitlam property. Applying Bruker, this is a civil contract that can be enforced by this Court.

[154] Also significant is that, unlike in Bruker, neither party here challenges the jurisdiction of the court to make certain orders with respect to their Iranian divorce. Indeed, each of them bring their own history about why there has not been an Iranian divorce (despite the 2015 oral agreement) but they nonetheless agree there should be one and that this Court should make the appropriate order.

[155] I find that the elements for an order as described in Bruker are made out here. There was an oral agreement between the parties in 2015 that there would be an Iranian divorce. The many text messages between the parties attest to this. I have found above that the reason this did not happen is because the respondent insisted on the claimant completing the Iranian divorce before he executed the documents necessary for the sale of the Coquitlam

property. The claimant, at least, is entitled to an appropriate remedy from this Court on the issue of the Iranian divorce as a result of the civil oral agreement between the parties and because of the significant negative consequences to her of not being divorced (i.e. not being able to travel to Iran).

- [156] Unlike in *Bruker*, there is no need to weigh one party's religious freedom with democratic values such as the parties' right to decide for themselves whether their marriage is irretrievably broken down. There is no doctrinal issue here involving religious principles, only an agreement that the parties would attend for a divorce. I can find no violation of the parties' freedom of religion in ordering them to attend to complete their agreement and the Iranian divorce. The parties are under no illusion that their marriage has broken down and what is required is a civil order to make them complete the divorce as reflected in their civil agreement to do just that.
- [157] For the above reasons I adopt essentially the approach in *Bruker* as described in paragraph 19 of the trial judgment in *Bruker*. A strict application of the evidence would result in an order requiring only the respondent to apply for an Iranian divorce. This is because he was the primary obstacle to a religious divorce in July 2016. However, also in the spirit of bringing closure to this issue, I conclude that the order should apply to both parties.
- [158] For the above reasons, immediately after the publication of this judgment, each party will attend at the appropriate Sharia authority in order to apply for a divorce. If a divorce before that authority requires both parties to attend together they will do that after making arrangements through their counsel. N.S. will not be there. I emphasize that I am not making an order of divorce; it would be the Sharia authority that would determine if a divorce should be granted. In the event of an Iranian divorce, within 15 calendar days, the parties will share the documents demonstrating the divorce. Neither party will do any act or cause any act to be done that would interfere with the other party's travel to Iran. The application for an Iranian divorce is not conditional on any other event.

(f) Parenting Time

- [159] The respondent applies to change the current parenting time arrangement under s. 47 of the FLA:

Changing, suspending or terminating orders respecting arrangements

47. On application, a court may change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person.

- [160] The current parenting time arrangement is that the respondent picks up N. from school on Thursday and returns him to the claimant on Sunday afternoon. The claimant has the child the rest of the week. This was set out in the April 2015 separation agreement. It was then repeated in the March 2016 divorce order as follows:
6. [N.] is the child of the marriage and was born on January 9th, 2011. From every Sunday in the morning (before noon) he stays with the wife till Thursday. On every Thursday in the afternoon the husband picks him up from school and he stays with the husband from then until Sunday morning.
- [161] In his current application the respondent seeks to reverse this allocation of parenting time so that the claimant would have N. only from Thursday to Sunday.
- [162] The respondent says there has been a change in the needs or circumstances of the child because the claimant has acted irresponsibly and exercised poor judgment in her parenting time with N.
- [163] According to the respondent, there are serious issues about N.'s participation in French immersion kindergarten. The respondent complains N. has had significant absences from his French immersion kindergarten and there is concern that these will continue. In his affidavit filed March 26, 2017 the respondent states that 23.75 days are recorded as absent for N. from September 2016 to February 2017. The report card is in evidence and the claimant accepts N. was away these days. In her affidavit filed June 14, 2017 she states N. had a contagious illness. The respondent relies on hearsay evidence from a teacher who said N. was not sick. The claimant points out that since February 2017 N. has not missed any school days. She also points out that most of the school days fall on her days with N. because of the parenting time schedule.
- [164] A report card for "March 2016-2017" is in evidence. It is in a narrative form using the headings Social Responsibility and Student Behaviour, Emotional and Social Development, Intellectual Development, Speaking and Listening, Reading, Writing, Mathematics, Science, Aesthetic and Artistic Development, Physical Development and Well-Being and Ways to Support Learning.
- [165] Much to the credit of N., all of the comments are positive. For example, under Social Responsibility and Student Behaviour, the following is written:
- [N.] is an outgoing student and he continues to achieve positive results in the classroom because of his hard work ethic, his great study habits, and his interest in learning new material. His French language abilities are continually progressing at a healthy rate and his positive attitude should continue to help him achieve success. [N.] continues to be a friendly, conscientious, and responsible kindergarten student. He is developing his ability to work cooperatively, share equipment, and consider and respect the ideas and feelings of others. When conflicts arise, he is usually able to solve problems in a peaceful manner. He understands classroom expectations, adjusts nicely to new routines, and continues to be a pleasure to have in the classroom.

- [166] The remainder of the report is in the same vein and can only be described as glowing.
- [167] I note that both parents describe N. as shy but he is apparently not shy, at least not at school. I also note that the respondent was concerned about N. being in French immersion but thus far he is thriving in it. There were absences in Fall 2016 for illness but none since February 2017. There are no references in the report card to undue absences or any references to problems with the claimant (or the respondent).
- [168] Overall, both parents should take pride in their son's development and achievements at school. And, despite their bitterness and anger towards each other, they are due some credit for N.'s achievements.
- [169] The respondent raises issues about a room being rented to a "stranger" in the house where the claimant and N. live. I accept the claimant's explanation that the person is not a stranger and renting the room out is necessary in order to obtain some income.
- [170] I cannot find any basis to change the current parenting time arrangement. If there has been a change in N.'s circumstances it has obviously been to his benefit and his current circumstances should be kept in place.
- [171] Having said that, there are some specific parental issues raised by the parties that need to be addressed. These are:
- (a) I confirm that, under s. 39 of the FLA, the parties are joint guardians of N. and they are to jointly exercise the parental responsibilities described in s. 41 of the FLA. These are important responsibilities and they are not an opportunity for the parties to generate more disputes. Any disputes will be submitted to a parenting coordinator, the cost of which will be shared equally.
 - (b) Each parent will attend the parenting through separation course within 30 days of the date of this judgment, unless he or she had taken the course already.
 - (c) The respondent will have one continuous month with N. each summer. He will advise the claimant of this time on or before May 15 of each year. Holidays such as Spring break, religious holidays and Christmas will be shared on an alternating basis, unless otherwise agreed. Notice of changes by a party to scheduled parenting time will be given as soon as possible and will be given reasonable consideration by the other party. If possible, last minute changes are to be avoided.
 - (d) The passport for N. is currently in the possession the claimant. After 14 days' notice by the respondent (or other time agreed by the parties) of planned trip the claimant will provide him with the passport. The notice will include the itinerary of any trip that N. takes with the respondent (including dates, locations etc). and contact information during the trip. Each parent will provide reasonable cooperation for any renewal of the passport of N. and other necessary travel documents. Either parent may request additional parenting time for trips, especially for family reasons, and agreement will not be unreasonably withheld.

- (e) The claimant will, as soon as practicable after the date of this judgment, provide the respondent with a copy of the birth certificate and care card of N. The respondent will be recorded as the father of N. at his school and with his doctors.
- (f) Each party may enroll N. in extracurricular activities she or he chooses which can take place during the parenting time of a party. The cost of these activities will be borne by the party enrolling N.
- (g) Each parent is required to advise the other by text message if N. is sick for more than two days. Further if N. requires emergency medical care the parent taking N. to that care will advise the other parent as soon as practicable with a brief explanation of the reason for the care. The parent with N. at time of the emergency care will have the responsibility to make the necessary decisions about that care during the applicable parenting time. Neither parent can demand from the other medical information that is not readily available. The parents will cooperate in all respects and at all times in ensuring that N. has adequate medical care and they will avoid blaming each other for any illness or accident.
- (h) There have been problems with the exchanges of N. and the parents have not been able to protect N. from displays of their anger to each other. These displays in front of N. are very unfortunate and unnecessary. The parents have recently taken to parking their cars a short distance away from each other and letting N. walk from one car to the other. The parents will continue to exchange N. in a public space. Either parent may choose to have the exchange take place in a public place or business where there is video surveillance.
- (i) Any text messages between the parents about N. will discuss only the practical issues that arise with parenting time such as exchange times or changes of times. These messages will not include anger or abuse or obscenities from one parent to the other, as in the past.
- (j) There have also been angry and loud shouting matches between the claimant and N.S., the respondent's new partner. On one occasion the police were involved but no charges were laid. In the Order of February 24, 2017 the respondent was ordered not to allow or cause N.S. to be present at any exchanges. In his current application the respondent seeks to have that order removed. The claimant does not take a strong position on the role of N.S. in the life of N. and, in fact, is supportive of N.S. having a role as a step-mother as long as she is respectful. I agree with the claimant that N. should not be exposed to verbal attacks by N.S. or anybody else.
- (k) In order to assist the parties and N.S. to obtain the skills necessary to prevent N. from being exposed to more anger and abuse the parties will attend counselling with Alison Jones, the cost to be shared equally. N.S. will attend those sessions as directed by Ms. Jones. N.S. will not be at any exchanges of N. until this has been approved by Ms. Jones.
- (g) Household items

[172] The parties have had a long and continuing dispute over the household affects from the family home. The respondent values these items at \$54,200 but there is no evidence supporting that valuation. The claimant does not have an alternate valuation.

[173] The household items will be distributed as soon as practicable after the date of this judgment as follows:

- (a) The 20 gold coins will be divided equally, 10 to the claimant and 10 to the respondent.
- (b) The claimant will retain the gifted jewellery (white gold necklace and earrings; wedding ring, yellow square diamond ring and yellow gold pendant with God messengers on both sides) except the yellow men's gold necklace which will go to the respondent.
- (c) The respondent will retain the brown sofa, love seat, 40" Sony TV, Apple TV, the Ghom Persian carpet and the camping equipment (12 person tent, BBQ, cooler, two sleeping bags, 2 camping chairs).
- (d) The claimant will retain the L shaped black sofa, brown queen-sized bed and six brown cabinets and drawers.
- (e) The dining room table no longer exists.

[174] The process for the exchange of these items is as follows:

- (a) The 20 gold coins will be divided equally as soon as practicable and in a secure manner.
- (b) Within 10 calendar days of the date of this judgment each party will deliver to the other party a sworn affidavit describing his or her believe as to where each of the above items are located. If a party believes an item no longer exists, or she/he does not know where it is, that will be stated. I emphasize that the distribution of the items is as above and the affidavits will relate only to their location.
- (c) If, upon receipt and review of each other's affidavit, there are differences about the location of items these will be identified in a second affidavit from each party, delivered to the other party within a further 10 calendar days.
- (d) Items with the party who has been identified above as the new owner will remain in the possession of that party.
- (e) After the locations of the items are identified and the location is not with the person listed above, the party who has been given ownership will arrange and pay for the pick-up of the items. This will be done by a third-party without any family connections to either party, preferably a professional mover or courier, and after reasonable notice. The party holding items for another party will take reasonable care of the items until they are picked up and provide reasonable access to them for pick-up.

- (f) In the event items have not been picked within 15 days of the second affidavits in (b) above, they will become the property of the party holding them. That party may use the items as their own, sell them or dispose of them (donate to charity or garbage).
- (g) If there are disputes about the above, they will be resolved by an arbitrator chosen and jointly paid for by the parties. If the parties are unable to agree on an arbitrator either party may apply to court to make that appointment.

E. SUMMARY

- [175] The parties were married in dual ceremonies, civilly and under Sharia law, on March 14, 2004. The Sharia marriage included a mehr of, among other things, 5 kilograms of 24 carat gold. There is one child, N., aged 6. The parties separated on September 16, 2013.
- [176] There is a separation agreement dated April 28, 2015 and a divorce order dated March 15, 2016. A civil divorce was granted in the divorce order. There was also a separation agreement in April 2015 dealing primarily with the Iranian divorce of the parties. The Iranian divorce has not been completed.
- [177] There are now issues relating to property, whether the separation agreement and/or the divorce order should be set aside under s. 93(5) of the FLA, the Iranian divorce, parenting time and the distribution of household items.
- [178] The respondent's application is that he is entitled to one-half of the net proceeds of the Coquitlam property. His application is dismissed. The one-half of the net proceeds held in the trust account of counsel for the claimant will be released to the claimant as soon as practicable. This is not conditional on any other event.
- [179] The respondent's application to set aside the March 2016 divorce order and/or the April 2015 separation agreement under s. 93(5) of the FLA is dismissed.
- [180] The respondent was in breach of the March 2016 divorce order when he withheld approval of a mortgage that was permitted under that order. He continued this breach when he obstructed and prevented the sale of the Coquitlam property.
- [181] The claimant is entitled to damages in the amount of \$20,000 from the respondent. This is to compensate her for a deposit on an apartment that she lost because of the respondent's obstruction of the sale of the Coquitlam property.
- [182] The respondent's application to set aside the interim order of Justice Sharma, dated February 24, 2017, is dismissed. To consolidate matters, that order is replaced by the orders in this judgment.
- [183] There is a significant dispute between the parties about the valuation of the 5 kilograms of gold in the mehr. The parties rely on unreliable information for their valuations including the respondent's reliance on an on-line translation of Iranian law. The difference between the parties' valuations is \$264,900. It cannot be resolved with the current information. If the

parties wish to proceed with the issue of the valuation of the mehr they will provide the necessary evidence, as described above, and make the appropriate application. This valuation is not related to the respondent's claim for an interest in the Coquitlam property, which is denied, as above.

- [184] The respondent's application to order the claimant to attend to finalize an Iranian divorce is allowed, in part. Pursuant to their oral, civil agreement both parties will immediately attend at the appropriate authorities to seek an Iranian divorce. The parties' attendance at a religious authority or to otherwise make an application for an Iranian divorce is not conditional on any other event. Whether a divorce is granted is a decision of the religious authorities.
- [185] With respect to parenting time, the respondent's application to reverse the 60/40 arrangement (60 percent with the claimant) is dismissed. N. had some absences from school in late 2016. Since then he has been thriving in school and there are no changes in his needs or circumstances that support a change in parenting time. Paragraph 1 of the March 2016 divorce order is confirmed.
- [186] Orders with respect to guardianship and details of parenting time including exchanges of N. between the parties and the participation of N.S. are set out above.
- [187] The distribution of household items will be as above.
- [188] I confirm that the respondent will continue to pay spousal support in the amount of \$263 per month until October 2020 and child support based on the Child Support Guidelines in the amount of \$154 per month until N. is no longer a child of the marriage under the FLA.
- [189] The parties will, commencing June 1, 2018 and on June 1 of each year following, exchange their Canada Revenue Agency Notices of Assessment, T1 General Tax returns and T2 Corporate returns for the previous year. This term will expire when N. is no longer a child of the marriage.
- [190] The orders resulting from this judgment replace all previous orders and agreements.
- [191] I retain jurisdiction over the implementation of this judgment unless I am not available.
- [192] The claimant has been substantially successful and she is entitled to her ordinary costs against the respondent.

"The Honourable Mr. Justice Steeves"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/17/20/2017BCSC2061.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/a-m-v-m-s-2017>

Prepared on 29 October 2026 · Esheria