
CANADA / JUDGMENT

B.A.B. v. S.S.B.

2005 BCSC 593

COURT

Supreme Court of British Columbia

DECIDED

21 April 2005

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2005 BCSC 593internet B.A.B. v. S.S.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.A.B. v. S.S.B.,

2005 BCSC 593

Date: 20050421

Docket: 041100

Registry: Victoria

Between:

B.A.B.

Plaintiff

And:

S.S.B.

Defendant

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Counsel for the Plaintiff:

T.L. Brown, Q.C.

Counsel for the Defendant:

A. Milne

Date and Place of Trial/Hearing:

February 22-25, 2005

Victoria, B.C.

I. Introduction

- [1] The issues in this family law proceeding are whether the separation agreement signed by the parties in 2003 should be found "unfair" within the meaning of s. 65(1) of the Family Relations Act, R.S.B.C. 1996, c. 128, and varied as to the determination and division of family assets, and whether the plaintiff B.A.B. should have an order for lump sum spousal support under s. 15.2 of the Divorce Act, R.S.B.C. 1985, c. 3 (2nd Supp.).
- [2] The plaintiff also seeks a divorce. The parties have been living separate and apart since May 24, 2003, there is no reasonable prospect of reconciliation, and I am satisfied that there has been no collusion. There will be an order for divorce.

II. The Parties

- [3] The plaintiff B.A.B. held various jobs with the provincial government, then ran her own business as a contractor for a time through a sole proprietorship. She is currently working for the provincial government as a graphic designer and she also does some contract work at night and on weekends. Her current income from both sources is around \$51,000.
- [4] She had been married three times before her marriage to the defendant. She has two sons from one of her previous marriages, who are 23 and 21 years of age. She is 53 years of age and ended her formal education at the high school level.
- [5] The defendant S.S.B. obtained a diploma in civil and structural technology in 1978 and a Fish Master Level 4 certification in 2002. He worked as a private insurance broker in business with his former wife. When they divorced and sold their home and business in the early 1990s, he realized about \$240,000. He and his former wife carried on lengthy and very expensive litigation, particularly with respect to access. He estimates that the litigation cost him something like \$160,000. He is currently in the business of fishing for crabs, earning about \$55,000 per year.
- [6] He had one previous marriage and has a son from that marriage, who is 15 years of age. S.S.B. is 48 years of age.

III. The Cohabitation and Marriage

- [7] The parties met in 1994 and began to live together in June of that year. Using funds he received from the division of assets in his first marriage, the defendant purchased a boat and started crab fishing on January 1, 1995. The purchase price for the boat including crab licence and engines was about \$204,000.

- [8] On June 7, 1995, the parties entered into a written pre-nuptial agreement. Both parties testified that the reason for entering into the agreement arose from concerns about the disparity between their financial positions and a desire to keep separate S.S.B.'s pre-acquired assets.
- [9] The agreement sets out two schedules.
- [10] Schedule A states that the assets and liabilities of the defendant included the commercial fishing boat, engines and crabbing licence, life insurance with B.A.B. as the beneficiary, and joint bank accounts in the names of S.S.B. and B.A.B. S.S.B. stated liabilities of \$40,000 in the form of a business improvement loan and \$10,000 on a line of credit.
- [11] Schedule B states that B.A.B.'s assets consisted of a car, some furniture, and her interest in the same joint bank accounts. Her liabilities totalled \$6,000.
- [12] The 1995 agreement provides that in the event of separation, each party will be responsible for his or her own maintenance, and that all assets jointly acquired after the date of agreement will be jointly owned by the parties and divided equally between the parties upon separation. The parties release any interest in the other's Canada Pension Plan credits and agree that any registered retirement savings plans will be the separate property of the party in whose name they are registered. They agree that all property of each party is to be the separate property of the party in whose name it is registered or of the party who acquired it if it is not registered, and release each other from any claim against the other's separate property other than claims arising under or to enforce the provisions of the agreement. In the event of separation, separate property is to remain with the person in whose name it is held and each party is to be responsible for their own debts. Joint assets and liabilities are to be equally divided. The parties acknowledge in the agreement that they are aware that the law provides for judicial intervention if the agreement is considered unfair in future circumstances and that each of them relies on the agreement to be enforced according to its terms. The agreement states that neither party would have entered into the agreement if they believed that the other would apply at any time to vary it, that it is the entire agreement and that "each acknowledges that he or she has no rights as to property, support, or maintenance against the other except as included in this agreement". Finally, it provides, "each party expressly waives the protection of Part 3 of the Family Relations Act of British Columbia or similar legislation in any other jurisdiction where they may happen to reside".
- [13] The circumstances under which the agreement was negotiated were these. The parties decided to make the agreement, and together went to see a lawyer, Alice Finall. Ms. Finall said that she would have to act for one or the other of them. It was determined (by a coin toss, it seems) that she would act for the defendant, and the plaintiff was told that she should get independent legal advice. However, she did not do so. She testified that she did not seek legal advice because she loved and trusted S.S.B. and believed that "if the end ever happened, he would be fair with her".

- [14] The plaintiff testified that she had proposed an agreement that S.S.B. would keep everything he brought in but they would share any increase in assets during the marriage. Her evidence was that S.S.B. rejected that proposal and in the end the agreement was worded the way he wanted. The plaintiff also testified that the defendant referred to the boat as "our boat" and as their future, but said that it had to stay in his name because it was his job.
- [15] The defendant testified that the pre-nuptial agreement was basically the plaintiff's idea and that he would not likely have married her without the agreement. He testified that they went together to Alice Finall, and told her what they wanted in the agreement. The defendant swore that he was very clear about the fact that the boat was his, and denied referring to it as "our boat" or as their joint provision for retirement.
- [16] By and large, I accept the defendant's evidence with respect to the negotiation of the pre-nuptial agreement and the subsequent discussions about the boat. I find that S.S.B. was clear in his own mind, before and after the pre-nuptial agreement was signed, that he considered the fishing boat to be his separate property and it is implausible that he would have referred to it as "our boat" or as the parties' joint retirement asset. The fact that he was still involved in litigation with his former wife and that he was unwilling to marry without the pre-nuptial agreement reinforces the conclusion that he would have been careful in what he said.
- [17] B.A.B. agreed on cross-examination that she had had the services of lawyers in her previous three separations and divorces.
- [18] The parties married on September 23, 1995. They did not have children together but for a time the plaintiff's two sons lived with them and for a time, the defendant's son lived with them.
- [19] In early 1995, B.A.B. was laid off from her provincial government job and she began her sole proprietorship as a consultant. S.S.B. began his crab fishing business and did well in it.
- [20] The plaintiff gave evidence that during the marriage she paid a great deal more toward the parties' joint living expenses than did the defendant. She testified that she believes that she enabled him to build up his fishing business by doing so. She testified that she even made some of his child support payments to his ex-wife. She produced spreadsheets she created after the separation setting out totals of payments from and contributions to the parties' joint account, and relied on those documents to show the imbalance.
- [21] On the other hand, the defendant gave evidence that they had agreed for a time that since the plaintiff had her two sons with them, she would pay three-quarters of the living expenses; then it became two-thirds when one son moved out, and eventually one-half. S.S.B. testified that he believes that he in fact paid more than half of the joint expenses during the marriage. His evidence was that he would regularly provide money to the plaintiff for the household expenses, and she would use the funds in the joint account to pay those expenses. He said he did not use the joint account himself.

- [22] The pre-nuptial agreement is silent on the subject of the sharing of expenses during the marriage.
- [23] I have reviewed the evidence, including the testimony of the parties and the documents provided by both parties, and have concluded that it is not possible to know with any accuracy how the joint expenses were divided. Cash expenditures are unaccounted for in B.A.B.'s spreadsheets. There was no expert evidence as to the accounting, and the plaintiff is not a trained accountant.
- [24] There is no evidence that either party squirreled money away and failed to disclose assets. They had a family (varying between three and four persons) to support from their joint earnings. It is most likely that each party spent the money they had during the marriage. S.S.B. earned a total of about \$534,000 after tax in the nine years between 1995 and 2003; B.A.B. earned a total of about \$346,000. (She did not regularly pay her taxes, and went into bankruptcy in 1998 as a result; accordingly I have used her gross earnings for this purpose because the question at the moment is how much money each party had available to spend on the family.) The defendant in addition paid out some \$160,000 on litigation with his previous wife, and child support at \$300 per month as well as expenses entailed by access visits. As a rough estimate, he paid \$32,400 in child support over the nine years, and an additional \$10,000 in access expenses.
- [25] While I do not accept B.A.B.'s evidence that for several years during the marriage, S.S.B. asked her not to remit money to pay her taxes so that he would have enough money to get his business through the winter, I do find that she did not pay her taxes and that it is most likely that she paid at least half of the family living expenses throughout the marriage. I reject her evidence about his request that she not pay taxes because: in the first year that she described this happening, her tax bill was some \$200, and it seems unlikely that amount would have made any difference; S.S.B. had available a line of credit for his business; and S.S.B. struck me as a fairly astute business person who is careful with his money, making it implausible that he would have recommended this practice. I accept that the plaintiff paid at least half of the family expenses because that is consistent with the evidence regarding their total incomes and the fact that S.S.B. was paying out a significant amount for litigation and access costs.
- [26] Because of the plaintiff's non-payment of taxes, on September 21, 1998, she went into bankruptcy, owing \$35,000 to Revenue Canada. She was discharged from bankruptcy on January 8, 2000.
- [27] The parties rented various places to live until December 2000, when they purchased a house in Sidney. They each contributed \$10,000 towards the down payment. Subsequently they undertook renovations costing some \$60,000 and, although the agreement was that they would evenly divide the cost of those renovations, S.S.B. testified that B.A.B. still owed him some \$9600 at the end of the marriage. A portion of the renovations (she estimated a large portion, he estimated \$25,000 worth) related to a workshop which was substantially for the

purposes of his business.

- [28] During the marriage, B.A.B. assisted with the fishing business to some extent, not only through keeping its books but also through chores such as picking up bait, preparing crab traps and delivering crabs. She served as a volunteer for the Crab Fishers Association. She assisted S.S.B. in obtaining contract work. I find that she did not render so much assistance as she testified to, but more than S.S.B. was willing to admit.
- [29] The defendant put a considerable amount of money into the boat during the marriage, outfitting it with equipment, replacing engines, and the like. The evidence does not permit much precision, but the total was over \$140,000 and likely around \$200,000.

IV. The Separation

- [30] The marriage was a troubled one. There was a trial separation in the fall of 2002 with reconciliation around Christmas of that year. However, by April 2003, the plaintiff was seriously considering a separation. At that time she consulted a lawyer, Lois Phillips, with respect to the significance of the pre-nuptial agreement and her position if there was a separation.
- [31] Ms. Phillips testified that she first met B.A.B. on April 14, 2003. B.A.B. described the marriage, her work in the crab business, and her understanding of her contribution to the household expenses.
- [32] B.A.B. told Ms. Phillips that she wanted half of the equity in the home and about \$12,000 as reimbursement for the child support payments she had made plus compensation for her book keeping.
- [33] Ms. Phillips did not recall whether she gave the plaintiff any specific advice about the pre-nuptial agreement. Ms. Phillips was asked how the plaintiff seemed, and testified that she seemed to be "trying to make the best of a really awful situation", and struck her as "professional and competent", though faced with some "really horrendous difficulties".
- [34] After that meeting between the plaintiff and Lois Phillips, and as a result of the plaintiff learning that the defendant had a relationship with another woman, the parties decided to separate. Some six days later, they entered into a separation agreement dated May 23, 2003. It was drawn up by B.A.B. using a kit with a computer disc that she obtained at a local stationery store.
- [35] The separation agreement provides that it is a final settlement between the parties as to property and support. Its terms include that the defendant would retain assets as follows: household items, a 1990 pickup truck, RRSPs and savings totalling some \$8800, certain chattels including a camper and sport boat, fishing gear and tools, and most significantly, a crab fishing boat which was stated to be worth \$600,000. At the time the separation agreement was executed, the fishing boat (with licence) was on the market with an asking price of \$629,000.

- [36] The separation agreement states that the plaintiff would retain as her assets some listed household items, and a 1991 van.
- [37] Under the agreement S.S.B. was to assume debts of around \$55,000 and B.A.B. to assume debts of around \$36,000. He was to purchase her share of the matrimonial home for \$40,000, and to pay her \$3,531 for her contribution to contract work he did for a third party.
- [38] At the same time as the separation agreement, the defendant signed a promissory note to the plaintiff. In it he agreed to pay her, upon sale of his boat, ten percent of the net sale proceeds to a maximum of \$50,000.
- [39] The separation agreement states that the parties agree that the agreement "adequately and completely provides for the present and future needs of the Husband and the Wife", and that they agree that "the arrangement herein described constitutes a full, complete and final settlement of all rights, causes, claims and demands with respect to support, and property".
- [40] There is no reference in the separation agreement to the pre-nuptial agreement.
- [41] B.A.B. did not review the terms of the separation agreement with Lois Phillips, or with any other lawyer at that time. On the day the agreement was to be signed, however, she did try to see Ms. Phillips, who was not in the office. B.A.B. saw one of Ms. Phillips' partners instead, but upon his stating that he would not witness her signature without giving her advice and would not give her advice without a retainer, B.A.B. left without receiving such advice. She executed the separation agreement before another witness, and moved out of the home the next day.
- [42] The plaintiff testified that after she had learned of the defendant's relationship with another woman, she was devastated and very distressed. She testified that as she and the defendant went through the terms of the proposed separation agreement she would dispute various matters but the defendant would say that she had to sign the way he wanted or else "he would drag it out until she was destitute". B.A.B. testified that she believed that the defendant would carry out that threat because she had seen him act in that manner with his first wife. She swore that the promissory note regarding the boat was S.S.B.'s idea.
- [43] S.S.B.'s evidence regarding the circumstances of negotiating the separation agreement was different. He said that they worked on it together, that B.A.B. was not unduly stressed or depressed and that in the end she agreed to do the "right thing", which he defined as living up to her agreement that he would keep his boat. He testified that B.A.B. had encouraged him to enter into a new relationship. He swore that the promissory note came about because B.A.B. said she had been to a lawyer and wanted a share of the boat to compensate her for the work she had done in keeping the books for his business. He testified that she said she preferred to receive the money later to assist with her retirement.
- [44] I find that the promissory note was initially proposed by the plaintiff, but that the precise terms (including the provision for delayed payment) were at the defendant's suggestion.

- [45] On June 3, 2003, the plaintiff went to see Lois Phillips again. She told Ms. Phillips that to avoid a fight, she had signed the separation agreement but that she felt coerced into signing. The terms of the separation agreement were discussed although Ms. Phillips was not sure if she had a copy of it at that stage. Ms. Phillips's notes, she testified, show that B.A.B. said that S.S.B. had told her exactly what he wanted in the separation agreement and she had refused to sign that, and that she had proposed that she receive more than half the equity but he had made her change that. B.A.B. told Ms. Phillips that initially she had included the promissory note as part of the separation agreement but S.S.B. insisted on it being separate. Ms. Phillips testified that she discussed with B.A.B. bringing an action to set aside both the pre-nuptial and the separation agreement because of unfairness, and an application for interim spousal support and perhaps a restraining order. Ms. Phillips said that B.A.B. was obviously upset, but seemed to be coping quite well in that she was not tearful.
- [46] On June 9, 2003, the date when the transfer of B.A.B.'s interest in the home pursuant to the separation agreement was to take place, B.A.B. called Lois Phillips. She left a message that she had done a whole lot of thinking and Ms. Phillips should hold off on the restraining order and send a demand letter instead. She told Ms. Phillips that the appraisal had come in, showing \$96,000 equity in the house (higher than the parties had thought), and that she wanted \$48,000 for her half of the equity and \$12,000 reimbursement for the child support payments she had made on S.S.B.'s behalf. However, later that day, B.A.B. told Ms. Phillips that she was just going to sign the papers. As a result of this conversation, Ms. Phillips wrote a letter to B.A.B. as follows:

Re: Matrimonial Matters

We confirm that:

- you consulted us before you separated in April, 2003 and again after signing the attached Separation Agreement without independent legal advice;
- you first instructed us to prepare a Writ, Statement of Claim for divorce and corollary relief including ex-parte Restraining Order and variation of the Separation Agreement;
- after reaching a verbal settlement with your husband, you further instructed us to take no further action. You wish to re-consider the grounds for your divorce application. (adultery v. 1-year separation) before proceeding;
- you do not wish us to contact your husband's lawyer, Alice Finall;
- you are willing to accept \$55,000 settlement monies at Alice Finall's office this afternoon and to sign any papers they may have prepared to document the transaction.

We also confirm that you wish to proceed as above despite our advice that you may be entitled to spousal support if the Separation Agreement can be varied, and to a portion of your husband's fishing business. You agree that you may be "selling yourself short" by accepting this settlement offer, but you prefer not to fight for anything beyond the \$55,000 lump sum. You are confident that if your step-son chooses to live with you, his father will pay child support.

Yours truly,

McKIMM & LOTT

I, [omitted] have read this letter and agree with its contents.

"[omitted]" Dated: 9 June 03

Lois D.W. Phillips

[47] B.A.B. read this letter and signed a copy.

[48] In fact, the payment received by B.A.B. upon completion was \$49,000.

[49] Ms. Phillips also testified that at some point during her professional relationship with B.A.B., she noticed an improvement in B.A.B.'s physical demeanour in that she appeared "brighter" and less distraught.

[50] The clinical notes of the plaintiff's general practitioner show (and B.A.B. testified) that B.A.B. was seeing her doctor with respect to stress and depression over the period of time between February 2, 1998 and March 4, 2003. The notes show B.A.B. telling her doctor as early as April, 2000, that she was going to leave her husband. The note on March 4, 2003 (her last visit prior to the separation) is "...not drinking but nothing else well" followed by a note regarding her son and his son, and "wants out".

[51] There was no evidence that B.A.B. was clinically depressed or otherwise lacked capacity at the time of signing the separation agreement. However, I am satisfied on the evidence that she was very upset and scattered in her thinking (evidenced by the several dramatic vacillations in the instructions she conveyed to Ms. Phillips) and that she was in a somewhat vulnerable state.

[52] In summary, I find that B.A.B. had independent legal advice about her legal position (specifically, under the pre-nuptial agreement) before she negotiated the separation agreement with the defendant, and had further legal advice before the post-execution negotiations were completed and before she signed the transfer of the home. She received, in the form of the promissory note, some compensation for what she felt was her interest in the fishing boat. I find that as a result of her April 14 discussion with Ms. Phillips, she had sought that compensation. In her early June discussions with Ms. Phillips she learned that she could challenge the pre-nuptial agreement and the May 23rd separation agreement. She then sought a greater share in her discussions with the defendant. Some weeks after signing the separation agreement and after receiving further advice and further concessions from

the defendant she chose to go ahead and perform it. During the period in question, and most acutely during the six days in which she and S.S.B. negotiated the May 23 separation agreement, she was in a highly emotional state.

V. Post Separation

- [53] The plaintiff testified that she left the marriage with very little, since her total debts at the time of separation were about \$40,000. She was depressed and stressed, as is confirmed in her doctor's notes.
- [54] B.A.B. also suffered a serious decline in her income in 2003 because she had lost contracts with a couple of key clients, and after the separation she was in bad shape emotionally, unable to go out and get new business. She applied for social assistance in November, 2003, and relied on that form of income for three months. She then obtained a few short term contracts prior to succeeding in obtaining her current position with the provincial government, which she said was seven months prior to trial (thus, August, 2004). She testified that she had given up her pension entitlement when she left the government before, but would like to reinstate it, and could do so for a payment of some \$7,000.
- [55] The plaintiff testified that she sought legal advice again and commenced this action in March, 2004, because she looked at the web site of the broker who had listed the fishing boat and license for S.S.B. She said that she saw that the defendant was seeking either a sale for \$629,000 or a trade for a "Queen Charlottes package", and concluded that the terms of the promissory note meant that she would get nothing if there was a trade.
- [56] At the date of trial she had assets of about \$9,000 and debts of about \$23,000.
- [57] The defendant carried on with the crab fishing business after the separation. He testified about the tremendous enjoyment he has in that work.
- [58] There was no expert evidence as to the value of the crab fishing boat and business. S.S.B. paid \$204,000 for it in late 1994. It was valued at \$600,000 in the schedule to the separation agreement. S.S.B. testified that after the separation, his business suffered a decline as a result of the decline of the crab fishery as a whole. Although the boat was listed for sale in 2003 for \$629,000, there were no offers on it. He testified that the only sale of a comparable crab fishing boat in the area in the past few years was in 2004, for the sum of \$470,000. He testified that was quite a unique sale, and there were many crab fishermen offering to sell their boats at that price. Mr. Milne argued that the listing price of \$629,000 in 2003 did not accurately reflect the value of the fishing boat at the time, evidenced by the absence of any offers to purchase it at any price. Based on all of the evidence before me, I find that this asset was worth about \$450,000 at the time the separation agreement was signed.

[59] S.S.B. still has the former matrimonial home and testified that its most recent tax assessment was at \$329,000 with a mortgage balance of \$250,000; thus, he has an equity of about \$80,000 in the house. With the value of the fishing boat at \$450,000 he has assets of about \$790,000 and debts totalling about \$350,000.

VI. Law

[60] The relevant statutory provisions are:

Divorce Act

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

Family Relations Act

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient,
or
- (f) any other circumstances relating to the acquisition, preservation, maintenance,
improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

- (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.
- (3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

[61] *Miglin v. Miglin*, [2003] 1 S.C.R. 303, 2003 SCC 24 is the leading case with respect to the circumstances under which a court should make an initial order for spousal support under s. 15.2 of the Divorce Act despite the existence of an agreement waiving spousal support. In brief, the court held in *Miglin* that it is not necessary for the applicant to show a radical and unforeseen change in circumstances and that the change was causally connected to the marriage. However, the court emphasized that courts' discretion to review and reject the terms of an agreement should not be exercised lightly. Instead, Bastarache and Arbour JJ. wrote at ¶ 78:

Therefore, in searching for a proper balance between consensus and finality on the one hand, and sensitivity to the unique concerns that arise in the post-divorce context on the other, a court should be guided by the objectives of spousal support listed in the Act. In doing so, however, the court should treat the parties' reasonable best efforts to meet those objectives as presumptively dispositive of the spousal support issue. The court should set aside the wishes of the parties as expressed in a pre-existing agreement only where the applicant shows that the agreement fails to be in substantial compliance with the overall objectives of the Act. These include not only those apparent in s. 15.2 but also, as noted above, certainty, finality and autonomy.

- [62] They held that a two-stage process should be followed, in which the court asks first whether the circumstances in which the agreement was made show a reason to discount it, and whether the substance of the agreement was in substantial compliance with the overall objectives of the Divorce Act when it was made. Second, the court assesses whether the agreement still reflects the original intentions of the parties and whether it is still in substantial compliance with the objectives of the Act. The basic underlying premise is that (as stated in the court's headnote) "[u]nimpeachably negotiated agreements that represent the intentions and expectations of the parties and that substantially comply with the objectives of the Divorce Act as a whole should receive considerable weight."
- [63] In *Miglin* the separation agreement had been negotiated over a fifteen month period with several professionals advising the wife. The wife released her claim to spousal support and received a significant property settlement and child support. The court found that the agreement should be determinative of her rights.
- [64] With respect to the circumstances in which an agreement should be found to be "unfair" within the meaning of s. 65(1) of the Family Relations Act and set aside or varied, the leading case is *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550, 2004 SCC 22. In *Hartshorne*, which arose in the context of a pre-nuptial agreement, Bastarache J. for the majority stated that even though the statutory scheme in British Columbia sets a lower threshold for judicial intervention than do the schemes in other provinces (at ¶ 14), nevertheless there is a significant burden on an applicant for such relief. He wrote in summary at ¶ 67,

Once an agreement has been reached, albeit a marriage agreement, the parties thereto are expected to fulfill the obligations that they have undertaken. A party cannot simply later state that he or she did not intend to live up to his or her end of the bargain. It is true that, in some cases, agreements that appear to be fair at the time of execution may become unfair at the time of the triggering event, depending on how the lives of the parties have unfolded. It is also clear that the FRA permits a court, upon application, to find that an agreement or the statutory regime is unfair and to reapportion the assets. However, in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initial arrangement, particularly where independent legal advice has been obtained. They should not conclude that unfairness is proven simply by demonstrating that the marriage agreement deviates from the statutory matrimonial property regime. Fairness must first take into account what was within the realistic contemplation of the parties, what attention they gave to changes in circumstances or unrealized implications, then what are their true circumstances, and whether the discrepancy is such, given the s. 65 factors, that a different apportionment should be made.

- [65] At ¶ 42, Bastarache J. discussed the difference between the analysis to be followed under s. 65(1) of the Family Relations Act and that prescribed in *Miglin* regarding an application for spousal support. He stated that adopting the two-stage process in *Miglin* in the context of s. 65(1) of the Family Relations Act without qualification would distort the analytical structure already provided in the British Columbia legislation, which requires the court to determine

whether the marriage agreement is substantively fair when the application for reapportionment is made. Thus, a different two-stage approach has to be followed: first, apply the agreement and determine its results; second, decide whether the contract operates unfairly in all of the circumstances.

[66] The central questions are as set out in ¶ 47 of Hartshorne:

The ultimate point then is this: in determining whether a marriage agreement operates unfairly, a court must first apply the agreement. In particular, the court must assess and award those financial entitlements provided to each spouse under the agreement, and other entitlements from all other sources, including spousal and child support. The court must then, in consideration of those factors listed in s. 65(1) of the FRA, make a determination as to whether the contract operates unfairly. At this second stage, consideration must be given to the parties' personal and financial circumstances, and in particular to the manner in which these circumstances evolved over time. Where the current circumstances were within the contemplation of the parties at the time the Agreement was formed, and where their Agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff's burden to establish unfairness is heavier. Thus, consideration of the factors listed in s. 65(1) of the FRA, taken together, would have to reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances. This approach, in my view, accords with the underlying principle of the FRA, striking an appropriate balance between deference to the parties' intentions, on the one hand, and assurance of an equitable result, on the other.

[67] In assessing those questions, the court should consider whether the agreement operated fairly at the time of distribution, whether one party took advantage of the other, and whether the circumstances of the parties at the time of separation were within their reasonable contemplation when they made the agreement.

[68] The court in Hartshorne held that the agreement the parties had executed on their wedding day was not unfair. It provided for spousal support and resulted in the wife receiving \$280,000 and the husband \$1.2 million, after a nine-year marriage (13-year cohabitation). The husband had brought substantial assets into the marriage while the wife had been in debt. The court emphasized that the wife had had independent legal advice and was therefore aware of the agreement's shortcomings. The court also found it highly significant that the agreement explicitly preserved a right to spousal support, and emphasized that the trial judge should have first determined whether the factors of self-sufficiency and need could be met through an order for spousal support before concluding that the agreement operated unfairly.

VII. Positions of the Parties

- [69] Ms. Brown for the plaintiff agreed that there is a significant onus on the plaintiff in attempting to persuade the court that the two agreements should be set aside. She argued, however, that the plaintiff has met that onus.
- [70] As I understand the plaintiff's position, it is that the pre-nuptial agreement did not, in the end, govern the parties' financial relationship during the marriage and should be disregarded. Specifically, Ms. Brown argued, when the parties made that agreement, they did not contemplate that B.A.B. would be subsidizing S.S.B.'s business through her contributions to the family expenses, and through her work in his business, nor that the only significant asset that the parties would acquire jointly during the eight year marriage would be the matrimonial home. Ms. Brown emphasized that the plaintiff did not use the money from her business to build up an asset but instead spent it on the family's expenses, to the point of bankruptcy. At the same time, the defendant managed to build up his business asset from a value of about \$200,000 to its value of about \$450,000.
- [71] Ms. Brown, for the plaintiff, submitted that the real question is whether the separation agreement is fair according to the principles set out in s. 65 of the Family Relations Act, arguing that it clearly is unfair since it resulted in completely disparate positions between the parties, with the defendant netting about \$600,000 and the plaintiff about \$14,000. She said that B.A.B. was in emotional turmoil and did not have independent legal advice as to the terms of the separation agreement and that she signed it mere days after having suffered a horrendous shock (learning of the defendant's involvement with another woman). She submitted that B.A.B. is entitled to re-apportionment of family assets and to lump sum spousal support given what she experienced in the year following the separation.
- [72] The factors under s. 65 of the Family Relations Act which Ms. Brown emphasizes are s. 65(e) and s. 65(f): the plaintiff's need to achieve economic independence and self sufficiency, and her contribution to the fishing business both through work that she did in the business and through her enabling S.S.B. to build up the business while she supported the family from her earnings. Ms. Brown submitted that there is no doubt that the business would be a family asset pursuant to s. 58 of the Family Relations Act and argued that a fair division would be 1/3 of the net assets to B.A.B. She submitted that there should be lump sum spousal support in the range of \$30,000-\$40,000.
- [73] Mr. Milne for the defendant emphasized that the defendant brought \$240,000 into the marriage while the plaintiff brought nothing. He argued that B.A.B. had independent legal advice before the overall separation agreement was concluded on June 9, 2003. He submitted that nothing that occurred in the marriage, or after the separation, was unforeseeable.
- [74] Mr. Milne conceded on behalf of the defendant that the crab fishing business would be a family asset under the Family Relations Act were it not for the two agreements.

- [75] He argued that there was no compulsion or practical necessity for B.A.B. to sign the separation agreement. He pointed out that B.A.B. continued to negotiate after the separation agreement was signed, and obtained an increased payment. He submitted that nothing prevented the plaintiff from obtaining independent legal advice prior to signing the separation agreement; she could have paid a retainer, as she had just received a cheque from the defendant with respect to payment on the contract. Mr. Milne pointed to authorities (*Rosen v. Rosen* (1994), 3 R.F.L. (4th) 267 (Ont. C.A.); *Ablaka v. Ablaka* (1994), 4 R.F.L. (4th) 167 (Ont. C.A.)) in which courts declined to declare domestic contracts invalid simply because a party chose not to take advantage of the opportunity to seek legal advice.
- [76] Mr. Milne argued that the agreements here were very straightforward, that the parties were not in unequal bargaining positions, and that B.A.B. initiated the pre-nuptial agreement and held the pen when it came to the separation agreement.
- [77] Counsel for the defendant urged that the separation agreement was a relative improvement on what B.A.B. would have obtained under the pre-nuptial agreement in that she received the promissory note and an additional \$9,000 beyond a strictly equal division of the equity in the property (taking into account matters such as real estate commission payable on sale and unpaid property taxes).
- [78] Mr. Milne submitted that the claim for spousal support in this case is tantamount to a retroactive claim for interim support and such a claim cannot be made.

VIII. Analysis

- [79] In this section, I will consider whether the agreements call for an exercise of my discretion, under the legislation and the principles described in *Hartshorne* and *Miglin*, to find them unfair, and to substitute different orders with respect to property division and spousal support.
- [80] Although this point was not specifically addressed in the arguments of counsel, I find that the parties intended the separation agreement to supersede the pre-nuptial agreement; thus, where there is any conflict the separation agreement prevails.
- [81] In general when I refer to the "separation agreement" I include the document signed on May 23, 2003, the promissory note of the same date, and the amendments to the separation agreement made by the parties up to June 9, 2003.
- [82] *Hartshorne* and *Miglin* both call for an inquiry into the circumstances in which the agreements were made, and that will be the beginning point in the analysis.

A. Circumstances of Signing the Agreements

i. Pre-Nuptial Agreement

[83] The parties signed the pre-nuptial agreement on June 7, 1995. The plaintiff did not receive independent legal advice, while the defendant did. There was no suggestion that the plaintiff lacked the opportunity to seek and obtain legal advice, and no evidence of any other untoward circumstances in the making of the agreement.

ii. Separation Agreement

[84] The separation agreement (signed on May 23, 2003) was made after the plaintiff had received legal advice about the effect of the pre-nuptial agreement but before she received specific advice about the separation agreement. The defendant had independent legal advice before signing the separation agreement.

[85] After the separation agreement was signed there were further negotiations between the parties, leading up to the June 9 transfer of the plaintiff's interest in the matrimonial home, and during that period the plaintiff did have some legal advice. She negotiated an increase in the payment to herself from the defendant, from \$40,000 to \$49,000. Prior to executing the transfer of the matrimonial home, she read and signed the letter from Ms. Phillips acknowledging the legal advice she had received.

[86] Nevertheless, by the time B.A.B. had consulted Ms. Phillips and received advice, she had already signed the separation agreement. The legal advice concerned whether she might be able to persuade a court to set the two agreements aside. The crucial time for legal advice was when the agreement was signed, not when it was later amended. I also note that she had already signed the pre-nuptial agreement, without independent legal advice, and its effect was carried forward into the context in which she signed the separation agreement.

[87] The separation agreement was prepared and signed in a rush, over six days, and I accept that the plaintiff was in an emotional and vulnerable state. I also accept that she was convinced that if she fought too hard, the defendant would conduct prolonged litigation that she could not afford.

[88] B.A.B. is not a lawyer (as was Ms. Hartshorne) nor does she have other professional credentials. However, she was able to work on the draft separation agreement, she impressed her lawyer as competent, and she was able to continue to negotiate even after the agreement had been signed. As well, she had the opportunity to receive legal advice before signing the agreement but declined to do so.

iii. Conclusions on Circumstances of Signing the Agreements

[89] I will focus on the circumstances in which the separation agreement was signed and amended, but the pre-nuptial agreement is relevant as part of those circumstances.

[90] It could not be said that the separation agreement was "unimpeachably negotiated" in the light of the factors I have described: the existence of the pre-nuptial agreement in connection with which only the defendant had had independent legal advice; the plaintiff's emotional state at the time of separation; the absence of independent legal advice for the

plaintiff before she signed it; and the haste in which it was negotiated. While the circumstances come nowhere near showing coercion, duress or undue influence (and counsel for the plaintiff did not argue the case on that basis), I have concluded that they do fall short of those that would require the highest level of deference to the agreement.

- [91] Therefore, the separation agreement should be somewhat discounted and viewed in the light of those circumstances. However, it must still receive considerable weight as indicating the parties' informed agreement on the manner in which they wished to terminate their financial relationship.

B. Fairness under s. 65(1) of the Family Relations Act

- [92] The Hartshorne test for considering whether the separation agreement is "fair", as described above, consists of two stages: (1) applying the agreement, and (2) deciding whether the agreement operates unfairly in all of the circumstances. I refer to the separation agreement alone in this context because I have found that the parties intended it to supersede the pre-nuptial agreement.

i. Applying the Separation Agreement

- [93] The separation agreement as a whole (taking the promissory note as part of it) left the plaintiff with \$49,000, representing a little more than half the equity in the matrimonial home after taxes and real estate commission, a vehicle and some household items, her business which had little value, and debts of around \$36,000. It left the defendant with the matrimonial home, a vehicle and some household items, RRSPs and savings worth about \$8,800, life insurance policies, a camper and sport boat, fishing gear and tools, and debts of around \$55,000. It also left the defendant with 100 percent of the boat and crab fishing business (worth around \$450,000) subject to his promise to pay the plaintiff ten percent of the net proceeds of sale up to \$50,000. (I do not take the \$3,531 payment to the plaintiff for contract work into account as part of the separation agreement; it was payment of a debt for work she had done.)
- [94] No spousal support was payable under the agreement. In 2003, the year of the separation, the defendant had an income of \$63,745. The plaintiff's business was in serious decline, due in large measure to her rocky emotional state, and she had to rely on social assistance.

ii. Does the Agreement Operate Unfairly?

- [95] At this second stage, the question is whether the separation agreement is substantially fair. The jurisprudence makes clear that unfairness is not established simply by showing that the statutory regime would have produced a different result. Instead, in assessing whether there was unfairness, the court must consider what was within the realistic contemplation of the parties when they made the agreement, what actually occurred, and whether the discrepancy between the former and the latter makes the outcome following from the agreement unfair within the meaning of s. 65 of the Family Relations Act.

- [96] Here, I must consider the parties' personal and financial circumstances, and in particular the manner in which these circumstances evolved over time. Were their current circumstances within the contemplation of the parties at the time the agreement was formed? Does consideration of the factors listed in s. 65(1), taken together, reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances?
- [97] With respect to the first question, Ms. Brown for the plaintiff argued that the extent of the plaintiff's responsibility for family expenses during the marriage was not within the contemplation of the parties when they made the pre-nuptial agreement. While that may be so, in the end it does not have much significance because of the separation agreement subsequently made by the parties. In that agreement they modified the strict separation of property they had embodied in the pre-nuptial agreement. The separation agreement was meant to supersede the earlier agreement and must be assumed to have taken into account what had occurred during the marriage. I also note that although the plaintiff testified that she did not become fully aware of the extent of the imbalance in payments for family expenses, she was aware of the issue when she spoke to Ms. Phillips.
- [98] As well, Ms. Brown for the plaintiff argued that the parties could not have contemplated that after the separation B.A.B. would have no income or assets and would have to rely on social assistance for three months and on a very low income from her contract work for the balance of the period between May 2003 and August 2004. (Her total income for 2003 was \$5,015, and she testified that most of that was earned prior to the separation.) I have not overlooked the evidence that the loss of some of B.A.B.'s contracts pre-dated the separation, but I find that the parties believed that she would continue to earn sufficient income to support herself. That proved, for a time, not to be the case.
- [99] As to the second question, were the consequences of the marriage breakdown shared equitably in all of the circumstances, with reference to the factors listed in s. 65 and taking into account their two agreements?
- [100] In *Hartshorne*, the Supreme Court of Canada makes clear that courts in British Columbia should be very reticent to disturb agreements that the parties make for themselves, despite the latitude provided in the terms of s. 65(1), and despite discrepancy between the agreement and what the statutory regime would afford, at least where the parties have legal advice and where the agreement's provisions are not rendered wholly unfair by subsequent events.
- [101] Because it is relevant to know the extent of the discrepancy, if any, I will consider what results the statutory regime would have produced for these parties in the absence of agreements.
- [102] I find that if there had been no pre-nuptial agreement and no separation agreement, the statutory regime would have produced a different division of property and a different treatment of spousal support. Given the work that the plaintiff did on the business during

the marriage (the book keeping as well as various odd jobs that assisted the business) and her indirect contribution through work in the home and through the provision of financial support for family expenses, and taking into account the factors in s. 65, in particular s. 65(e) and (f), I find that the boat and fishing business would have been a family asset. I find that the defendant would have been entitled to reapportionment of 75% of that asset, taking into account the fact that he brought its purchase price into the marriage, the plaintiff made no direct financial contribution to its acquisition, and all of the other circumstances including the eight-year span of the marriage. The matrimonial home and its contents, the vehicles, the RRSPs and savings, would all have been family assets and divided equally. The total amount of the debts would have been divided equally.

[103] The plaintiff, who had suffered an abrupt decline in income, but who had an established ability to earn income, would have been entitled to a limited term order for spousal support.

iii. Conclusions on Hartshorne Test

[104] With reference to the factors listed in s. 65(1), I note the following: it was an eight year marriage; the parties have lived separate and apart for two years; the fishing boat was purchased before the marriage with funds the defendant had before the marriage; the plaintiff required some assistance to remain economically self sufficient; and the plaintiff made contributions both direct and indirect to the maintenance, improvement and use of the fishing boat and business. I have already reviewed the circumstances in which the separation agreement was reached.

[105] At the end of the day, the plaintiff may receive up to \$50,000 (most likely it will be less, in the range of \$40,000) from the net proceeds of sale of the boat in addition to the \$49,000 she received as her share of the matrimonial home. Taking all of these circumstances into account and recognizing what the Supreme Court of Canada said about the importance of respecting the intentions of the parties who sign agreements, I do not find that the separation agreement should be set aside with respect to apportionment of property so long as an order is made for lump sum spousal support in accordance with the principles under s. 15.2 of the Divorce Act and consistent with the overall objectives of that legislation.

[106] I will turn now to my reasons for making a spousal support order.

C. Spousal Support under the Divorce Act

[107] The Miglin test, as was set out above, has two stages: (1) whether the circumstances in which the agreement was made show a reason to discount it and whether in substance the agreement complies with the overall objectives of the Divorce Act; (2) whether the agreement still reflects the parties' intentions and whether it remains in substantial compliance with the objectives of the Act. The parties confirmed in the separation agreement what they had earlier set out in the pre-nuptial agreement; there would be no order for spousal support.

i. Stage One: Circumstances and Compliance with the Objectives of the Divorce Act

- [108] The Miglin case emphasizes the importance of the circumstances of negotiation, which were, in that case, conducted over a 15-month period with the benefit of advice from various professionals. For the reasons I have set out above, I find that the circumstances of negotiation here give reason to discount the two agreements to some extent.
- [109] I next consider whether the separation agreement was in substantial compliance with the overall objectives of the Divorce Act when it was made. Those objectives include recognition of the factors referenced in s. 15.2: the length of cohabitation; the functions each spouse performed during cohabitation; any agreements made by the parties; recognition of economic advantages or disadvantages arising from the marriage or its breakdown; relief of any economic hardship of the spouses arising from the breakdown of the marriage; and promotion of economic self-sufficiency of the spouses within a reasonable time. Further, as set forth in Hartshorne, the objectives include the promotion of negotiated settlements, and respect for the autonomy of individuals to regulate their own affairs by entering into mutually acceptable and binding agreements.
- [110] I find that the separation agreement in this case was not in substantial compliance with the objectives of the Divorce Act in that it wholly disentitled the plaintiff to spousal support, at a time when she was in severe need of such support, and did not provide her with some other means of meeting her needs such as through a property settlement. She had suffered some economic disadvantage as a result of the marriage or its breakdown and was under economic hardship after the separation.
- [111] Mr. Milne for the defendant argued that this claim is tantamount to a claim for retroactive interim support. The current support provisions of the Divorce Act, unlike their predecessor legislation, permit a court to award retroactive support: *Darlington v. Darlington*, [1997] B.C.J. No. 2534 (C.A.) at ¶ 21-26 (I note that the retroactive order in that case was for child support; however, the reasoning in *Darlington* applies to spousal support orders as well). A retroactive order is the exception to the norm, but where the need is plain, the order can be made: *Kloos v. Kloos* (1996), 20 R.F.L. (4th) 1 (Man. C.A.). In that case, the wife had seriously depleted her capital, while the husband continued to have the benefit of the money that ought to have been paid to her, and earnings therefrom. The Court of Appeal for British Columbia has relied on the *Kloos* decision in holding that "an application for interim support is not a pre-condition for spousal support retroactive to the date of the petition": *Coupar v. Coupar*, [1998] B.C.J. No. 2673 at ¶ 12. I note, though, that where the circumstances make it likely that an interim support application would have been refused had it been pursued, a retroactive order will not usually be granted: *Fischer v. Fischer*, 2004 BCSC 1111 at ¶ 184.
- [112] Although claims for child support are in some ways different from those for spousal support, the principles discussed in *L.S. v. E.P.*, 1999 BCCA 393 are instructive in this context: see *Kripotos v. Kripotos*, 2004 BCSC 37 at ¶ 151. Those factors include: the need for

the order and corresponding ability to pay; whether there has been blameworthy conduct such as non-disclosure on the part of the paying spouse; encroachment on capital by the recipient spouse; an excuse for the delay in bringing the application where the delay has been significant; the timing of notice that support will be sought; the imposition of an unfair burden on the paying spouse; and whether the purpose of the award would be to redistribute capital.

[113] I refer now to those factors in the context of this case. B.A.B. was clearly in need during the eleven month period following separation, although she is now working and supporting herself. While Mr. Milne argued that S.S.B. had no ability to pay in the relevant period, I find that he did have that ability; his gross income for 2003 was \$63,745 according to his own "income summary". Compared with B.A.B., he was doing well. There is no suggestion that S.S.B. was guilty of some blameworthy conduct such as non-disclosure. B.A.B. did deplete all of her capital before going on social assistance in November 2003. The first notice to the defendant that the plaintiff was seeking spousal support was the service of the writ issued in March, 2004. There was no application for interim support. The reason for the delay in seeking spousal support was explained by the two agreements, which precluded B.A.B. from seeking spousal support unless she moved to set them aside. There was no evidence that a retroactive lump sum award would impose an unfair burden on S.S.B. at this time. The award would have the effect of redistributing capital, but that would not be its purpose. Its purpose would be to compensate B.A.B. for the extent to which she depleted her resources during a time in which she should have been receiving spousal support.

[114] I find that in this unusual set of circumstances an order for lump sum spousal support relating to the period between March 2004 and August 2004 is appropriate.

[115] There is no need to proceed further in the Miglin test, as I have found that the agreements failed to promote the objectives of the Divorce Act.

[116] B.A.B. will receive an order for lump sum spousal support of \$17,500.

D. Conclusion

[117] The claim for reapportionment of family assets under s. 65(1) of the Family Relations Act is dismissed. The claim for spousal support under s. 15.2 of the Divorce Act is allowed. The plaintiff will receive a lump sum of \$17,500 for spousal support.

[118] The parties will be divorced.

IX. Provision regarding sale or trade of the boat

[119] In the light of the evidence regarding the plaintiff's concerns as to assurance of payment on the defendant's promise of a share of the sale proceeds of his boat, I would consider making an order declaring that the trade of the boat is to be treated as a sale and requiring the defendant to keep the plaintiff informed as to progress in his efforts to sell or trade the boat. The parties may make submissions in writing in that regard, or counsel may be able to agree to such a term.

X. Costs

[120] With divided success, the usual order would be that each party bears his or her own costs. If the parties wish to make submissions as to costs, however, they may do so in writing through the Registry.

"Lynn Smith, J."

The Honourable Madam Justice Lynn Smith

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Prepared on 29 October 2026 · Esheria