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CANADA / JUDGMENT

## Blom v. Blom

2021 BCSC 181

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COURT

Supreme Court of British Columbia

DECIDED

5 February 2021

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2021 BCSC 181 Blom v. Blom

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Blom v. Blom,

2021 BCSC 181

Date: 20210205

Docket: E200884

Registry: Victoria

Between:

Shawn Clifton Blom

Claimant

And:

Erin Nicole Blom

Respondent

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for the Claimant:

S. E. Hickey

Counsel for the Respondent:

M. Gorman

Place and Date of Trial/Hearing:

Victoria, B.C.

October 9, 2020

October 28, 2020

November 13, 2020

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November 18 and 20, 2020

Place and Date of Judgment:

Victoria, B.C.

February 5, 2021

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## A. INTRODUCTION

- [1] In this family dispute the parties were married in July 2007 and they separated in July 2019. There are two children of the marriage aged 12 and nine years old. The claimant is the husband and the respondent is the wife.
- [2] The family property, the subject of this claim, is located at 6596 Lakes Road, Duncan, British Columbia. The respondent is the sole owner on title for this property but the claimant lives there. There are no issues involving the children in this claim.
- [3] There is a separation agreement between the parties dated in July 2019. The specific completion date and date of signing are in dispute. The claimant seeks the enforcement of the part of the agreement that relates to property. It requires the respondent to transfer title in the Duncan property to him but she has not done so. There is also a gift document from September 2019 in which the respondent transferred her interest in the property to the claimant. The claimant also seeks enforcement of that document.
- [4] For her part, the respondent has filed a counterclaim and she opposes the claim of the claimant. Specifically, she says that the property section of the 2019 separation agreement should be set aside because of its defects and that it was signed by her under duress. She also says that the gift letter is unenforceable. According to the respondent the property should be sold and the proceeds divided equally.
- [5] The Family Law Act, S.B.C. 2011, c. 25 (the "FLA") applies, specifically ss. 1, 81, 93 and 95. There is an issue with respect to the signing of the separation agreement and the property section of the agreement. It covers other issues such as parenting time and I do not understand those other parts of the agreement to be in dispute or the object of the claim and counterclaim.

## B. BACKGROUND

- [6] As above, the parties were married in July 2007 and they separated in July 2019. There are two children of the marriage and there is family property located at 6596 Lakes Road, Duncan, British Columbia.

- [7] The parties purchased the Duncan property in August 2015. The purchase price was \$310,000 and they took out a mortgage. The current assessed value is about \$374,000 and there is about \$250,000 remaining to be paid on the mortgage. The claimant has lived in the house since the respondent moved out in August 2019 and he pays the mortgage and other costs. During their relationship the parties pooled their incomes and expenses in the same bank account. It appears that the respondent managed most of the family finances using money she received from the claimant as well as her own money (she earned less).
- [8] The respondent also dealt with loans because, as the claimant testified, banks would not talk to him. His general approach to the family finances is that all of their problems were because of the mistakes made by the respondent. This included his assertion that problems he had with his income tax were because the respondent prepared his tax returns and "lied" for him.
- [9] There were a number of times during the relationship when the parties' incomes were low and foreclosures were threatened on perhaps three occasions. Each party blames the other for these problems. There are also some family debts that the claimant says the respondent was to pay with money he gave her but she did not pay them. As will be seen, according to the claimant, the debts that the respondent accumulated are relevant to the 2019 separation agreement because he was to be sole owner of the family home to compensate him for the debts accumulated by the respondent.
- [10] In the last one or two years of the relationship both parties worked in the cannabis business. The claimant says that he was a part owner in the business and the respondent testified that she believed he was an employee. There is also a landscaping business for which the respondent worked and the claimant may have also worked. The cannabis business ended just before or about the time the relationship ended in June and July 2019 and each of the parties received a payout for their share of the last crop. As will be seen the payout to the respondent became controversial.
- [11] The respondent testified that it was her decision to end the relationship with the claimant. She said he was very controlling, especially about money. She said that she had to account for any expenses she incurred but the claimant refused to be accountable for any of the expenses he incurred. For example he bought a sailboat without her knowledge. The respondent also testified that the claimant discouraged her from working at other places except the landscaping and cannabis businesses, he was verbally abusive and she wanted to have income separate from him.
- [12] The parties discussed separation in June and into July 2019. They talked about their main asset, the Duncan property, and decided they needed a separation agreement. At the time they thought there would be about \$60,000 in equity available to each of them in the event the property was sold. Neither party had legal advice at the time and nor was there financial disclosure.

- [13] The respondent found an application on her cell phone which offered draft separation agreements. She and the claimant reviewed the drafts, made changes and settled on their own version of an agreement.
- [14] There are two draft agreements in evidence, both in email format and both dated July 31, 2019. Each of them cover the issues of parenting, guardianship and property, as well as related issues such as disclosure of financial information. With respect to property both agreements would have resulted in the respondent transferring her interest in the Duncan property to the claimant. The claimant says that the respondent agreed to this because she had incurred a number of debts for the family and those debts totalled more than the equity available to the respondent. As the claimant put it in his evidence, he believed that the respondent had "already spent her equity" in the family home.
- [15] I set out the section on property from the version of the agreement that was ultimately signed by the parties, which I have reproduced as written and with references to provisions deleted from a previous draft (complications with the signing are discussed below):

### Section 3: Property

#### Your basic information

Short name:

Erin

Short name:

Shawn

The property at 6596 Lakes Road Duncan BC V9L 5V9 is the family home.

When this agreement is signed, Erin will transfer their interest in the home to Shawn.

Shawn will make all payments due under the specify: e.g., first mortgage.

Shawn will be responsible for paying out all other charges registered against the family home (except property taxes owing to date)

Shawn will be pay for taxes, water, sewer, insurance, repairs, maintenance, and any other outstanding expenses related to the family home from here on out

["Shawn will pay Erin the sum of \$60,000" from previous draft deleted, see below]

Except as otherwise provided in this agreement, each person will be the sole owner of personal clothing, jewellery, recreational equipment, and the like in that person's possession.

#### Motor vehicles

When this agreement is signed, Shawn will transfer their interest in the 2008 BMW to Erin.

Erin will keep the 2008 BMW as Erin's sole property. Shawn will keep the 2007 GMC Sierra as Shawn's sole property.

1976 Ontario 32' sailboat property of Shawn [sic]

2001 Kawasaki motorcycle property of Shawn [sic]

- [16] The subject claim relates only to this section of the agreement; none of the other sections of the agreement are in dispute.
- [17] There are four differences between the above version and the previous draft.
- [18] A significant difference between the two versions is that the first one included in the property section: "Shawn will pay Erin the sum of \$60,000." The claimant testified that he asked the respondent to take that provision out of the agreement and he says she agreed. It was removed for the second draft.
- [19] The respondent's description of this change is quite different. She says the parties had agreed on the agreement as a whole including the \$60,000 payment to her. They arranged to get together to sign the agreement at the family home where the respondent was with the children. The claimant arrived and came into the bedroom where the respondent was and closed the door behind him. According to the respondent he said words to the effect that he had talked to a number of people and because she had decided to ruin the family he did not have to pay her anything. He also said that if the \$60,000 payment to the respondent stayed in the agreement he would tell their two children that she was having an affair. The respondent testified that she believed the claimant. The claimant testified that the respondent readily agreed to the removal of the \$60,000 payment to her and her version of the conversation never took place.
- [20] The respondent described in her testimony that the claimant told her to take out the \$60,000 payment to her from the agreement. She said she felt pressured to do so and she was worried about the claimant interfering with her custody and access to the children. She described the claimant previously "forcing" her to watch videos about reconciling marriages. She accessed the agreement on her phone and removed the provision about the payment of \$60,000 to her. She sent the document to a printer in the kitchen downstairs and the claimant went to retrieve the document. She testified that he was away for about 10 minutes, he returned to the bedroom and she signed the document. She did not review the document and the claimant kept the document. She moved out the next day.
- [21] A second difference between the two versions of the agreement is that the one that was signed included reference to a sailboat and a motorcycle as being the property of the claimant. He testified that he asked the respondent about these, she said she did not want them and she readily agreed that the claimant could have them. The signed version of the document includes these two items in very different font and it is obvious that the page was copied with a piece of paper describing these items pasted on the page of the agreement. The claimant agrees that he did that.

- [22] The respondent says that she first saw the additions of the boat and motorcycle when she visited a lawyer's office in September 2019 (discussed below). She said that when she signed the agreement she was upset and nervous about what the claimant said to her in the bedroom about her children so she signed without reading the new version of document that the claimant brought back from the printer. She accepted in her evidence that the provisions about the boat and motorcycle "could have been" in the document she signed. She also said they could have been added later. In any event, she says that she did not agree to them.
- [23] A third difference between the two documents is that the one that was signed included the crossing out of a phrase that said the claimant was to pay the property taxes "owing to date." The respondent testified that she did not agree to that and she has no memory how that phrase was crossed out. The claimant did not explain this in his evidence.
- [24] Lastly, there is then the issue of the signing of the agreement. Again, only one was signed and both are dated July 31, 2019. The signed document has a signature for each of the parties and a witness signature. The original idea was that it was going to be signed on the party's anniversary date, July 9. However, that did not work out and it was signed on July 6, 2019 (not July 31, 2019). And the witness witnessed the signature of the claimant but not the signature of the respondent. The claimant had possession of the document after the respondent signed it and he testified that the witness signed the document after it was signed by the parties and in the absence of the respondent.
- [25] There is another event that occurred in September 2019 that is significant. The claimant testified that he needed to finance the property in order to become the sole owner on title. His bank required some document demonstrating that the respondent's equity had been transferred to him and it was decided that this would take the form of a gift from the respondent to the claimant of her interest in the property.
- [26] The gift document is dated September 4, 2019. On the same day the parties had a text exchange. It is of some significance and is reproduced in full below. Among other things, it demonstrates that the claimant was holding back \$5,640 in cash owed to the respondent unless she signed the gift letter. It also records the respondent saying she signed the separation agreement under duress.
- [27] The claimant then arranged with a solicitor in Duncan for the respondent to execute a gift letter to transfer her ownership in the property to the claimant. She agreed and attended at the lawyer's office with the claimant. She saw the lawyer by herself (while the claimant was in the waiting area of the office) and she testified that he simply asked her why she was signing the letter. She replied it was so the claimant could get approval from the bank to take over the property.

- [28] The claimant had apparently arranged for the document to be prepared and to be signed in the solicitor's office. The respondent testified that she believed that the solicitor was representing both her and the claimant. There was a short conversation in which the lawyer asked the respondent why she was agreeing to the gift and she said it was so the claimant could get financing to take ownership of the property. She signed the gift letter (while the claimant waited outside the solicitor's office) but the claimant did not sign it.
- [29] I set out the body of the gift letter here (handwritten additions by the solicitor, the respondent's signature in italics and I have deleted the address and telephone number of the respondent):

Date: September 4 2019

[illegible]

### Dear Sirs/Madams

This is to confirm that a financial gift in the amount of transfer of equity in 6596 Lakes Rd Duncan BC will [sic] made to Shawn Clifton Blom to assist in the purchase of a home at 6596 Lakes Road. These funds are being provided as a gift and will never have to be repaid.

We I further confirm that we I am an immediate relative of Shawn Clifton Blom (see below) and that no part of the financial gift is being provided by any third party having any interest, direct or indirect, in the sale or purchase of the property being mortgaged.

Sincerely,

"EBlom" [signature of respondent]

Donor Signature

Donor Name: Erin Nicole Blom

Donor Address: [address deleted]

City: Duncan Province: BC

Postal Code: [postal code deleted]

Telephone: [telephone number deleted]

Relationship to Borrower: estranged spouse

[no signature]

### Borrower's Signature

- [30] The respondent says that it was about this time that she saw the signed version of the agreement with the addition of the motorcycle and sailboat and the other changes above.

[31] In the course of this evidence I raised a number of questions about the gift letter including the respondent's evidence that she believed the solicitor was representing both parties. Neither party called the solicitor as a witness or addressed these issues.

### C. ANALYSIS

[32] As above, the claimant seeks to enforce the September 2019 separation agreement with the result that he would be the sole owner of the family property. He relies on the agreement itself and the November 2019 gift letter. On the other hand the respondent says she signed the separation agreement under duress from the claimant and he added things to the document after she signed it. She also says she signed the gift letter under duress. She says the agreement should be set aside and the property should be sold and the net proceeds divided equally.

[33] I will consider the following issues:

- a) Should the 2019 separation agreement be enforced or set aside?
- b) Should the 2019 gift letter be enforced or set aside?
- c) If the agreement and gift letter are set aside, what is the remedy?
- a) The July 2019 separation agreement

[34] The claimant seeks the enforcement of the property section of the 2019 agreement but the respondent seeks to set it aside. The other parts of the agreement are not in dispute here. The entire document was taken from a draft agreement that the respondent found on the internet. Both parties made changes to that generic draft, including changes at the time of signing. I do not agree with the claimant that it was drafted entirely by the respondent with no participation by him.

[35] The claimant relies on the plain meaning of the property provisions in the separation agreement. Among other things, it says: "[w]hen this agreement is signed, Erin [the respondent] will transfer their interest in the family home to Shawn [the claimant]." It then says that the claimant will be responsible for paying for the mortgage, taxes and the other expenses and each party will be the owner of personal things in their possession.

[36] The respondent relies on s. 93 of the FLA in her counterclaim to set aside the separation agreement. That provision is 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.
- [37] For the purposes of s. 93(1)), in the circumstances here, there is a written agreement signed by both parties. There is also a signature of a witness, "Kyle Duckworth", but the claimant ultimately conceded in cross-examination that this person signed the document after it was signed by the parties. That is, Mr. Duckworth did not witness the parties' signatures and, therefore, s. 93(1) has not been fully complied with.
- [38] The evidence is not clear but the claimant probably signed the document just after the respondent signed it and in her presence. The claimant got the respondent to agree to remove the payment of \$60,000 to her, the claimant changed the draft on her phone, the respondent sent it downstairs to the printer, and the claimant retrieved it (apparently being away for about 10 minutes, according to the respondent). The claimant agrees he added the provisions about the boat and the motorcycle after the agreement was printed and, in any event, that is obvious by the different font and paste marks. The respondent says he added

these provisions after it was signed and after he took it from her. The claimant then arranged for Mr. Duckworth to sign as a witness but after the parties had signed. It is not clear when this "witnessing" took place. Neither party called Mr. Duckworth as a witness.

- [39] In any event, s. 93(6) states that s. 93 may apply to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in the circumstances. The parties accept that they each signed the agreement and, on this basis, I conclude that it is appropriate to consider it under s. 93 even though it was not validly witnessed.
- [40] The specific parts of s. 93 relied on by the respondent are s. 93(3)(a) and (d). She accepts that there are no clear violations of s. 93(3)(b) and (c). But she also says the agreement is significantly unfair and it should be set aside under s. 93(5).
- [41] The respondent also relies on s. 95 of the FLA. But that section is about an unequal distribution of property and the respondent seeks an equal distribution. In a similar way, the claimant does not rely on s. 95 but seeks the unequal distribution of property as set out in the separation agreement. I will not be considering s. 95.
- [42] I turn to the specific factors to consider under s. 93(3) in the subject application to set aside the 2019 separation agreement here.
- (i) Section 93(3)(a): disclosure of significant property/debts?
- [43] Section 93(3)(a) relates to failure to disclose significant property or debts. As can be seen from the language of s. 93, where this circumstance exists at the time of entering into an agreement, it may be set aside. A related provision is s. 5 of the FLA which requires a party to a family dispute to provide to the other party "full and true information for the purposes of resolving the family dispute."
- [44] The 2019 separation agreement is noteworthy for saying nothing about a number of financial issues. As examples, there is no mention of pensions (including CPP), RRSPs or credit cards. The parties' joint bank account is not mentioned nor is an account opened by the claimant in March 2019 (before the separation in July 2019). And there is no mention of the two businesses the parties were involved in, All Season Landscaping and Back 40. Both parties knew about the joint account and they each had their own CPP accounts.
- [45] In addition, there are no references to debts (family or personal) in the agreement. Significantly, there is no reference to the idea of setting-off debts of the respondent by giving the claimant sole ownership of the property. Since that was, according to the claimant, the reason for him to receive all of the property and the respondent to receive none of it, its absence is noteworthy. Indeed, according to the claimant, it was the basis for the unequal distribution of property in the agreement. One would expect something that the claimant says was key to the transfer of the family home to him would be at least referenced if not set out in detail.

- [46] Having said that, the respondent accepts that the intention of the agreement was to give the claimant most assets including the family home (she ended up with only the BMW). She says that she did not agree to the claimant receiving the boat and motorcycle, and that he added them to the agreement without her knowledge. Her main point is that she agreed to the unbalanced distribution of the family assets because she was forced into that agreement by the claimant. That is her claim of duress under s. 93(3)(d) of the FLA, discussed below.
- [47] Overall, it is clear that the separation agreement itself did not itemize some assets and debts. However, with the possible exception of the claimant's own bank account, these were known to the respondent. And it is not clear that the claimant's bank account was a "significant" asset. In addition, I accept that the bargaining power was unbalanced in favour of the claimant but I also conclude that it was open to the respondent to put in the agreement things like the joint bank account. There is no evidence the claimant told her not to put them in. Apparently both parties did not put their minds to this issue, perhaps because neither party had legal advice.
- [48] The result is that I conclude that there is no basis under s. 93(3)(a) of the FLA to set aside the 2019 separation agreement because of a lack of disclosure of significant information about property and debt.
- (ii) Section 93(3)(d): voidable under common law?
- [49] The respondent also relies on the common law ground of duress to set aside the 2019 separation agreement under s. 93(3)(d) of the FLA.
- [50] Duress in a family law context has been considered in previous judgements. In one case, Justice Brown usefully set out a definition of duress as follows (*G.C.G. v. M.J.T.*, 2016 BCSC 1277):
- [104] Duress is a form of oppressive contractual conduct directed by one party towards another to compel them to act to their disadvantage, or, as Black's Law Dictionary frames it: in a manner they otherwise would not. The underlying question in most cases is whether the oppressor's action vitiated the consent of the oppressed party.
- [51] The onus to prove duress lies with the party alleging it, in this case the respondent (*Young v. Sherk*, 2019 BCSC 312, at para. 84; citing *Roberts v. Roberts*, 2000 BCSC 611, at para. 32). As well, mere emotional difficulty or strain generally is insufficient to establish duress and to set aside a family agreement; (*Young*, at para. 85; citing *A.B. v. T.R.*, 2013 BCSC 1798, at para. 19).
- [52] The context in which duress can arise has been discussed in other cases. For example, *G.C.G.* cited a previous decision from the Supreme Court of Canada as follows (*G.C.G.*, at para. 108; citing *Rick v. Brandsema*, 2009 SCC 10, at para. 1):

- [1] This court has frequently recognized that negotiations following the disintegration of a spousal relationship take place in a uniquely difficult context. The reality of this singularly emotional negotiating environment means that special care must be taken that, to the extent possible, the assets of the former relationship are distributed through negotiations that are free from informational and psychological exploitation.
- [53] Brandsema also pointed out that bargains between spouses in a marriage breakdown "should not be seen to be, subject to the same rules as those applicable to commercial contracts negotiated between two parties of equal strength" (G.C.G., at para. 109; citing Brandsema, at para. 40).
- [54] The two events where the respondent alleges there was duress are the July 2019 separation agreement and the September 2019 gift letter.
- [55] Unlike other cases where there are allegations of duress, as it happens in this case there is written evidence on the issue that was virtually contemporaneous to these two events. This is the text exchange on September 4, 2019, the same date of the gift letter and two months after the separation agreement.
- [56] The exchange begins with the claimant wanting the respondent to sign "papers" for the bank and continues as follows:

[Claimant]: I said sign the papers you get your money

[Respondent]: No

I don't work like that

That's mine fair and square

[C]: [Shows photograph of \$5,640 cash with respondent's name on the top]

[R]: I don't legally have to sign anything

[Cl]: Yes you do

We have a signed separation agreement

[R]: I was under diress [sic]

[C]:

[R]: You forced me to sign it

[C]: Lololololololol

Funny

[R]: Why do you think they need a gift letter

[C]: That's for the mortgage Erin because I'm going to a different bank

Legally you owe me this house

[R]: Take me to court

[C]: It's done

Stop

[R]: Bye

[C]: You wanna get fuckin ugly?

[R]: Give me the money I'm owed or take me to court

[C]: What money

[Emphasis added].

- [57] It is agreed that the photograph of the \$5,640 cash is the money owed to the respondent as final payment for her work on the cannabis business. The claimant agrees that he held the money back in order to get the respondent to sign the "papers" for the bank. The gift letter is discussed below.
- [58] As can be seen from the text exchange, the respondent told the claimant that she believed she signed the separation agreement under "duress" and that she was "forced" to sign it. This statement, again, was made shortly after the agreement (and at the time of the gift letter) and was made before any litigation was commenced between the parties. It was not a statement of argument in the context of litigation well after the fact before an audience such as the court. Rather it was a private, contemporaneous conversation in which the respondent stated her view of what was happening at the time and two months previously. The claimant was engaged in the same private exchange and I conclude that his statements are similarly unguarded for the purposes of assessing reliability. For these reasons I conclude the text exchange of September 4, 2019 must be given considerable weight.
- [59] Significantly, in the text exchange the claimant did not dispute the respondent's account of what happened but, instead, he used a mocking emoji and dismissed her description of being forced to sign as being "lololololololol Funny." At trial the claimant testified that he meant that it was "hilarious" for the respondent to say she was under duress (and he stated that he believed he did not scare her). But there is no question that the respondent was making a serious allegation that contradicted the claimant's explanation why the respondent should transfer the property to him. His reaction was certainly dismissive of the respondent's account but he did not clearly contradict it during the text exchange. Nor did he do so in court.

- [60] The claimant also submits that there was no duress under the agreement (and the property should be transferred to him) because the agreement captured what they agreed. Put another way, he denies that he threatened to alienate the respondent from her children and his explanation for what happened was that he was simply getting the respondent to execute what they agreed (and that is what he seeks in his claim). There are problems with this explanation.
- [61] Looking at the agreement generally, it ended a 12-year marriage. Under the agreement, the claimant received the family property, a 2007 GMC Sierra, a boat, a motorcycle and the funds in the bank account he set up just before separation. The respondent received a 2008 BMW. As a simple accounting exercise this is obviously not an equal distribution. The evidence is not clear that there is any value left in the two businesses, Block 40 and All Season Landscaping, but both parties developed and worked with them. However, as above, there is no reference to them in the agreement and no suggestion that the respondent would receive a share of any value in them.
- [62] The claimant does not resile from the inequality of 2019 agreement. Instead he says that the parties intended it to be unbalanced because of the debts incurred by the respondent. He was to be compensated for those debts by receiving sole title to the family property because the respondent had used up her equity in the property by generating significant family debt. Again, according to the claimant, this is not duress but simply executing the agreement.
- [63] The claimant is correct about his interpretation of the property provisions of the agreement and it is also true that the respondent signed the document indicating her consent. However, as above, consent can be vitiated by duress and the question is whether the respondent voluntarily agreed to the property provisions because its effect was to essentially offset the debts she incurred.
- [64] The evidence as to the non-mortgage debts of the parties is contained in four documents: an email dated April 28, 2020 from a collections agency for a cell phone bill in the claimant's name with Rogers Communications in the amount of \$1,532.85; a 2017 cellphone bill in the claimant's name in the amount of \$1,189.49; a December 28, 2014 bill from BC Hydro to the claimant in the amount of \$3,991.70.
- [65] The claimant began his evidence on this issue by saying there was a fourth tax debt, an undated collection notice from "BC Servic " [sic] for \$2,618.33. However, he ultimately agreed that he did not know its date or even where it was from (despite its title it appears to have a federal government internet address).
- [66] The respondent accepts the amounts of \$1,532.85, \$1,189.49 and \$3,991.70 are debts but she says they were family debts and are to be divided equally. The evidence is not clear, but some or all of these debts may have been paid. It is not explained by the claimant how his 2014 bill with BC Hydro for \$3,991.70 could have remained unpaid for four years. Similarly, he complains that the respondent managed all of the family finances including a credit card in his name. He professes to not being told about this account. But he did nothing to find

information in his own name when he found out about it and he did not tender any documentary evidence about that account at trial.

- [67] Looking at these debts generally, the debts for hydro and cellphones are broadly in the category of what one would expect as being family debt for which both parties are responsible. In my view the debts alleged by the claimant were family debts in the sense of being incurred for the purpose of maintaining family property such as the family home, as defined in s. 86 of the FLA. It follows that I have some difficulty with the claimant trying to extricate himself from debts that were for his benefit as a member of the family.
- [68] I also note that the debts at issue are in the claimant's name. He explains this by saying he gave the respondent money to pay these debts. I accept that he gave her some money to pay debts from time to time but he also had the greater income and the respondent did attempt to cover some of the family debts with her income. But sometimes the parties' combined income was not sufficient to cover their expenses including debt payments. The claimant relies on vague claims of many other debts including credit card debt that the respondent incurred but he is unable to provide any evidence of those debts. As well, there is very little documentary evidence that corroborates the claimant's description of how the family managed their debts and he did not tell her all the expenses he incurred. For the most part, it fell on the respondent to try and make ends meet for the family.
- [69] Finally, the parties are of modest means but it is nonetheless hard to accept that the total of the above debts is a significant amount, especially considering that the amount of \$3,991.70 was from 2014. Similarly, the debts for which there is documentation total an amount significantly less than the approximate \$60,000 equity in the family home that the parties estimated was available to each of them.
- [70] With respect to mortgage debt, the claimant also alleges that the respondent, while managing the family finances, caused two mortgage accounts to go into arrears to the point of the risk of foreclosures. The parties did have two mortgages for a time, one in Duncan and another in Quesnel where they used to live and there was at least one threatened foreclosure, perhaps three. However, the evidence is also that the parties never had consistent income of any significance and the claimant was not forthcoming in making contributions to expenses like mortgage payments. In 2016, for example, the parties were no longer working with a pre-fab builder and they were just starting their cannabis business. They could not keep up their payments on both properties and the family home in Duncan went into arrears. This also occurred in 2017 and 2018.
- [71] The claimant's income has been uneven (as has the respondent's but her income has consistently been less than the claimant's). He denies that he was terminated from his work in 2015. Instead he says he resigned to start the cannabis business thus reducing his income. He says the respondent ran the business "into the ground" but the evidence is clear that he kept the respondent at arm's length with respect to the business. For example, he had not explained to the respondent, his wife, whether he was an employee or an owner. He

similarly was vague if not misleading about his other business interests. For example, in his evidence he denied that he had any connection with or knew anything about a landscaping business until he acknowledged that he was driving a truck with the name of the business on the door of the vehicle.

- [72] As the above authorities point out, negotiations following separation create a uniquely difficult context, one that is singularly emotional and where parties can be particularly vulnerable. Special care is required to ensure that assets from the prior relationship are distributed free from any exploitation. The circumstances of the signing of the separation agreement in this case involve a mother worried the father would alienate her from her children and they certainly give rise to those concerns.
- [73] I conclude that the evidence supports the respondent's account of what took place with the 2019 separation agreement. As she said, two months later in the text exchange she was "forced" to sign the agreement. This is consistent with her evidence at trial that she believed the claimant would carry through on his threat to interfere with her relationship with her children by telling them she was having an affair. That circumstance would create a vulnerable state in any mother and it meant that her first and perhaps only consideration became her relationship with her children. The claimant's explanation for the structure of the separation agreement - that the respondent incurred large debts and thereby used up her equity in the property - is not supported in the evidence.
- [74] It is true that the respondent could have tried to leave the bedroom (where she was with the claimant behind a closed door), not signed the agreement and then tried some alternate approach to resolving the impasse with the claimant. On her own evidence she had about 10 minutes to consider this while the claimant was getting the document from the printer in the kitchen. However, that would have left the claimant in the house with the children and it would have essentially dared him to carry out his threat to alienate her from her children.
- [75] I decline to second-guess the respondent's decision to stay and sign the agreement. I do conclude that she did not sign it willingly, voluntarily and with reliable consent. Her description of signing the agreement under duress must be preferred over the claimant's explanation that the inequality in the agreement is explained by the debts incurred by the respondent. At best the evidence does not support that explanation and one is driven to ask: why would the respondent sign the agreement except because of duress? Contemporaneous exchanges between the parties corroborate the duress.
- [76] I conclude that the respondent has proven on a balance of probabilities that the 2019 separation agreement was made with duress by the claimant against the respondent and it must be set aside under s. 93(3)(d) of the FLA.
- (iii) Section 93(5): is the 2019 agreement significantly unfair?
- [77] The respondent submits that the 2019 agreement should be set aside under s. 93(5) because it is significantly unfair. The claimant disagrees and says it is not unfair.

[78] As can be seen above, there are some significant restrictions in the language in s. 93(5). It requires significant unfairness before an agreement can be set aside or replaced. As well, it applies if "none of the circumstances" in s. 93(3) existed when the parties entered into the agreement. And, it does not apply generally to significant unfairness but to consideration of the three specific factors in s. 93(5). These are the length time that has passed since the agreement was made, the intention of the spouses to achieve certainty and the degree to which the spouses relied on the terms of the agreement.

[79] I have found above that the circumstances in this case meet the requirements of s. 93(3)(d). As well, s. 93(5) states that before the court's discretion under that provision can be exercised, it is necessary that none of the circumstances under s. 93(3) exist. The intent appears to be that both ss. 93(3) and 93(5) cannot apply in the same case. Again, I have found above that one of those circumstances does exist.

[80] As required by s. 93(5), the respondent's application under that provision must be dismissed, not on its merits but as required by that provision.

(b) The September 4, 2019 gift letter

[81] I have set out the entire September 4, 2019 gift letter above. I reproduce the following excerpt:

This is to confirm that a financial gift in the amount of transfer of equity in 6596 Lakes Rd Duncan BC will [sic] made to Shawn Clifton Blom to assist in the purchase of a home at 6596 Lakes Road. These funds are being provided as a gift and will never have to be repaid.

[82] There are three conditions for a gift to be valid and enforceable:

- a) an intention to donate, without consideration or expectation of remuneration;
- b) an acceptance of the gift; and
- c) a sufficient act of delivery or transfer of the property to complete the transaction.

(Bruce Ziff, *Principles of Property Law*, 7th ed. (Toronto, ON: Thomson Reuters, 2018) at 184, citing *Gonsalves v. Scrymgeour*, 2017 ONCA 630, at para. 19.)

[83] As a starting point, I have some difficulty characterizing the letter as a "gift". In my view, the letter is an agreement because the parties were effectively exchanging promises. By signing the letter, the respondent purported to gift her equity in the property to the claimant in exchange for cash. The gift letter also appears to flow from a term of the separation agreement; i.e. that the respondent "will transfer their interest in the home to" the claimant. In any event, as will be seen, there are issues with the first and third (and possibly the second) conditions required for a valid gift.

- [84] Turning to the facts, it is not clear on the face of the gift letter who it was to be sent to but the evidence (including from the respondent) is that the claimant said his bank needed it so he could get financing and then be the sole owner of the family property. It is signed by the respondent. It is not signed by the claimant and it, therefore, suffers from that defect; perhaps it is only technical. As demonstrated by the subject litigation the respondent continues to have title to the property, not the claimant.
- [85] The circumstances leading up to the respondent signing the letter were that the claimant arranged with his solicitor to draft the document. Both parties attended at the solicitor's office and the respondent had a short conversation about the letter with the solicitor (while the claimant waited outside). The claimant testified that the respondent received legal advice about the letter but the respondent testified that the solicitor only asked her why she was willing to sign the letter. I raised with counsel that it was not at all clear who the client was in this situation and what took place between the respondent and the solicitor. I urged them to at least talk to the solicitor. They did not do so and neither party called the solicitor as witness. The respondent did sign a certificate indicating she received independent legal advice but it is not clear she actually received that advice.
- [86] Prior to the office visit with the solicitor, but earlier on the same day, there was the text exchange set out above. The claimant said in the text exchange "I said sign the papers you get your money" and the respondent replied "No I don't work like that That's mine fair and square." The claimant then sent the photograph of the cash with a note on it that said "Erin 5,640." The claimant said "Legally" the respondent owed him the house and she replied "Take me to court." He said "It's done" then "Stop", to which the respondent replied "Bye." Then the claimant said "You wanna get fuckin ugly?", to which the respondent replied, "Give me the money I'm owed or take me to court."
- [87] It is clear that the claimant was holding back the \$5,640 in cash that was owed to the respondent from her work in the cannabis business. Furthermore, the claimant accepts that he did this as leverage to get the respondent to sign the papers for the bank. He testified that this was because the respondent was "trying to make my life as difficult as possible" and he said (in his evidence) to her "you sign it and I will give you the money I owed her". The respondent ultimately went to the solicitor's office and signed the gift letter.
- [88] In these circumstances I conclude that the respondent signed the September 4, 2019 gift letter under duress. This was not a matter of free consent but, as the claimant intended, to obtain the money owed to her by the claimant. Those funds had nothing to do with the family property and the respondent was entitled to them regardless of any dispute with the claimant over the property. It is clear from the text exchange that the respondent did not want to sign the gift letter since it implemented the July 2019 separation agreement that she was forced to sign. I conclude that the withholding of the money from the respondent resulted in the respondent acting in a manner she otherwise would not have done.

- [89] The claimant says that the respondent's signature on the gift letter supports his position that the respondent willingly agreed to transfer the sole ownership of the property by means of the July 2019 separation agreement. I disagree. In my view the two documents and the respondent's motivation in signing them are separate events. In the case of the separation agreement the respondent signed it because of the risk of being alienated from her children. For the gift letter, she wanted the cash owed to her and that was withheld from her by the claimant to put pressure on her to sign. This is not one incident, but two incidents of duress.
- [90] I conclude that the September 4, 2019 gift letter was really an agreement between the parties and, pursuant to s. 93(3)(d) of the FLA, it must be set aside.
- [91] In the alternative, if the gift letter was a gift and not an agreement under the Family Law Act, it is unenforceable as a gift since it does not meet the above conditions for a gift. In terms of the first condition, I have found that the respondent did not voluntarily intend to gift her equity in the property to the claimant because she signed the gift letter under duress. Additionally, the gift was not being given without consideration or the expectation of remuneration as the claimant offered and the respondent received \$5,640 for signing the gift letter.
- [92] Regarding the second condition, there is an issue as to whether the claimant actually accepted the gift as he did not sign the gift letter. As for the third condition, in legal terms, the respondent never took the requisite steps to transfer her equity in the property to the claimant beyond signing the gift letter (see *Mordo v. Nitting*, 2006 BCSC 1761, at paras. 273-279). Even if the first two conditions were somehow satisfied, courts will not perfect an imperfect gift such as by ignoring the delivery requirement (*Ziff* at 186, citing *Milroy v. Lord* (1862), 45 E.R. 1185 (Ch.)).
- (c) What is the remedy?
- [93] As above, the current situation is that the respondent holds sole ownership over the property in dispute and the claimant seeks to become sole owner.
- [94] I have concluded above that the July 2019 separation agreement and the September 2019 gift letter must be set aside. The objective of the separation agreement that the claimant would become the sole owner of the family property cannot be sustained on the terms set out in the agreement. In my view, absent the threat by the claimant to alienate the respondent from her children as a means to get his version of the separation signed and absent the use of the \$5,640 as leverage to get the respondent to sign the gift letter, the respondent would not have given her consent to transferring ownership of the property to the claimant. The parties have family debt but the evidence does not support the claimant's contention that it was all the doing of the respondent.

- [95] In light of those findings the next issue is what remedy follows. The above review of the 2019 separation agreement demonstrates its multiple problems, in both drafting and in execution. The claimant has not demonstrated that the respondent incurred substantial debts that offset the intention of the separation agreement to give him most of the assets and the respondent very little. It, therefore, cannot be sustained and, specifically, it cannot be varied in order to give effect to the parties' intentions.
- [96] I conclude that the property must be sold. Alternatively, the claimant should be given the option of purchasing the respondent's interest in the property. The details of this are below.

#### D. SUMMARY & CONCLUSION

- [97] The parties separated in 2019 after a 12-year marriage. The claimant seeks the enforcement of a separation agreement dated in July 2019 and a gift letter in September 2019. He says those documents mean he is entitled to sole ownership of the family property (currently the respondent is the sole owner on title).
- [98] The respondent agrees she signed the agreement and the gift letter but she says these were signed under duress. She says the documents must be set aside for that reason, the property should be sold and the net proceeds divided equally. She relies on ss. 93(3) and 93(5) of the FLA.
- [99] There a number of problems with the July 2019 separation agreement. The most significant one is that the claimant presented the respondent with the choice of either making changes to the agreement that resulted in his sole ownership of the property or he would do things that would alienate the respondent from her children. She took him seriously and she agreed to sign the document. Her account of duress is corroborated in a text exchange two months later. The claimant's explanation for the unequal distribution in the agreement is not supported by the evidence.
- [100] The September 2019 gift letter was similarly the result of duress by the claimant on the respondent (among other problems). He withheld money owed to her for work she did independent from anything related to the family property until she signed the letter. The respondent's account of duress is corroborated in a text message the same day as the date of the gift letter. And it was not a gift because the claimant paid money to the respondent to get her to execute the letter.
- [101] The July 2019 separation agreement and the September 2019 gift letter are set aside under s. 93(3)(d) of the FLA. It follows that, pursuant to s. 81 of the FLA, each party has an undivided half interest in the family property at 6596 Lakes Road, Duncan, British Columbia. The respondent's counterclaims under ss. 93(3)(a), 93(5) and 95 of the FLA are dismissed.
- [102] The ownership of the family property at 6596 Lakes Road, Duncan, British Columbia, will be resolved by either the claimant buying the respondent's interest in the property or by selling the property and dividing the net proceeds equally.

[103] Any sale of the respondent's interest in the property will be conducted as follows:

- a) Within 21 calendar days of this judgment the claimant may offer to purchase the respondent's one-half interest in the property. This will be by a letter of offer (not email or text) from counsel for the claimant to counsel for the respondent. It will include a solicitor's cheque in an amount equivalent to 25% of the purchase amount. This will be deposited in the trust account of counsel for the respondent. The letter will also state when the claimant will comply with the order for him to pay costs in this litigation to the respondent.
- b) The value of the property will be determined by agreement or by appraisal. If there is no agreement, each party may retain an appraiser and the purchase amount will be the average of the two appraisals. If either party refuses to retain an appraisal within 30 calendar days of this judgment, the other party may retain his/her appraisal to calculate the purchase amount. The appraisal will be shared.
- c) The letter referred to in (a) will include a calculation of the purchase amount for the claimant to purchase the respondent's interest in the property. It will account for the value of the property, any mortgage amount due, interest penalties, taxes, utilities etc. Any outstanding family debts prior to separation (only those referred to in this judgment) will also be included in the accounting. The purchase amount will be one-half of this amount. Any outstanding court costs payable by the claimant will be deducted from his share of the value of the property and added to the share of the respondent.
- d) The respondent will have 10 calendar days to dispute in writing the amount and calculation of the claimant. If there is a continuing dispute between the parties the matter will be decided by Justice Steeves.
- e) If there is agreement on the value of the property, or an order from court on the value, counsel for the claimant will give counsel for the respondent a solicitor's cheque for the balance owing and the original documents necessary for the transfer of the property to the claimant as sole owner.
- f) Upon receipt of the second solicitor's cheque and upon payment by the claimant of the respondent's costs in this litigation, the respondent will execute the documents necessary for the transfer of the ownership of the property to the sole ownership of the claimant. The documents will be delivered to counsel for the claimant who will arrange for filing. Once counsel for the claimant has confirmed to counsel for the respondent that the property has been transferred to the claimant (with copies of the relevant documents), the respondent will be paid the amounts of the two solicitor's cheques.

[104] In the event the claimant is not able to purchase the respondent's interest in the property it will be sold. I conclude the respondent will have conduct of the sale.

[105] If the parties cannot agree on the sale of the respondent's interest in the property to the claimant as discussed above, it will be sold as follows:

- a) After 21 calendar days from this judgment, the respondent will have sole and exclusive conduct of the sale. This includes retaining a real estate agent, executing the required documents, instructing the agent, setting or changing the asking price, deciding the selling price and all other matters necessary for the sale. The claimant will be provided with a copy of the listing agreement for information purposes and he will be advised in writing of any change in the asking price.
  - b) The respondent will give the claimant reasonable notice to vacate the property. Reasonable notice primarily includes time for the respondent to obtain alternative accommodation. The respondent will decide when the notice commences and its length subject to, again, reasonableness. It will be in writing and delivered to the claimant in a way that provides confirmation of its receipt.
  - c) The claimant will leave the house in a clean state, capable of being shown to potential buyers. The respondent may show the house during the notice period after reasonable notice to the respondent. He will provide prompt cooperation for the signing of any documents required for the sale.
  - d) When the respondent has accepted an offer of purchase she will advise the claimant as soon as practicable by sending him a copy of the contract of purchase and sale. Justice Steeves will decide any dispute over the offered amount. The claimant will also be advised when the sale of the property closes.
  - e) Expenses such as taxes, insurance, legal fees and reasonable costs to prepare the property for sale will be deducted from the sale proceeds. Any outstanding family debts prior to separation will be accounted for in the net proceeds.
  - f) The net proceeds of the sale will be deposited in the trust account of counsel for the respondent. A written accounting of the proceeds (not necessarily prepared by an accountant) will be provided to counsel for the claimant as soon as practicable after possession by the new owners. The accounting will include a proposal for disbursement of the net proceeds.
  - g) Unless there is agreement between the parties within a reasonable time, the respondent will apply to court for approval of the disbursement of the net proceeds of the sale of the house, with the usual notice to the claimant. Justice Steeves will hear and decide any application for approval of sale.
- [106] The respondent has been substantially successful and she is entitled to her ordinary costs from the claimant. If the property is sold, these costs are payable from the claimant's share of the net proceeds of the sale of the family property, unless the parties agree on an alternate means of payment.

"J. J. Steeves, J."

The Honourable Mr. Justice Steeves

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