

CANADA / JUDGMENT

Bradley v. Callahan

2025 BCCA 69

COURT

British Columbia Court of Appeal

DECIDED

13 March 2025

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2025 BCCA 69 Bradley v. Callahan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Bradley v. Callahan,

2025 BCCA 69

Date: 20250313

Docket: CA49714

Between:

Norval Bradley

Appellant

(Claimant)

And

Edward James Callahan, Midwest Ventures Ltd. and

C.M.S.T. Investments Ltd.

Respondents

(Respondents)

Before:

The Honourable Chief Justice Marchand

The Honourable Justice Fleming

The Honourable Justice Iyer

On appeal from: An order of the Supreme Court of British Columbia, dated January 31, 2024 (Bradley v. Callahan, 2024 BCSC 163, Vancouver Docket E161000).

Counsel for the Appellant:

E.I.B. Hayward

Counsel for the Respondents:

L.A. Kahn, K.C.

J. Wahid

Place and Date of Hearing:

Vancouver, British Columbia

October 16 and 17, 2024

Place and Date of Judgment:

Vancouver, British Columbia

March 13, 2025

Written Reasons by:

The Honourable Chief Justice Marchand

Concurred in by:

The Honourable Justice Fleming

The Honourable Justice Iyer

Summary:

The appellant challenges the trial judge's property division and retroactive child and spousal support orders. Held: Appeal allowed in part. The judge erred in determining the parties' marriage agreement operated fairly. He improperly applied the factors for determining whether a marriage agreement is fair, overlooked the appellant's indirect contributions to the growth of corporate assets held by the respondent, and incorrectly concluded the enormous growth in those assets was reasonably contemplated by the parties at the time of the agreement. The agreement was not fair because it allowed the respondent to keep all the increased value in corporate assets despite the appellant's contributions to their growth over a 17-year marriage. The court orders property reapportionment to satisfy the objectives of the Family Relations Act, R.S.B.C. 1996, c. 128, and Divorce Act, R.S.C. 1985, c. 3. Other grounds of appeal dismissed.

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Introduction

- [1] The appellant, Norval Bradley, and the respondent, Edward James ("Ted") Callahan, began living together in 1992, married on September 13, 1997, and separated on June 1, 2014. When they separated, their two children were 12 and 14 years old.
- [2] Two days prior to their marriage, the parties signed a marriage agreement setting out their rights and responsibilities in the event of a future termination of their marriage. The marriage agreement addressed topics such as property division, spousal support and child support. Both parties were represented by experienced counsel during the negotiation of the marriage agreement.
- [3] In the event the marriage ended, the marriage agreement provided Mr. Callahan's business interests, including those he acquired following the parties' marriage, would not be subject to division. Those business assets grew exponentially in value, from approximately \$3,000,000 when the parties married to approximately \$85,000,000 when they separated and approximately \$127,000,000 by the date of their last valuation on May 2, 2019. They continued to grow in value to the date of trial.

- [4] Between the parties' separation and trial, the parties made various interim arrangements, including to: (1) provide Ms. Bradley with a home; (2) divide certain properties; and (3) establish interim child and spousal support amounts. Some of these arrangements were made by court order.
- [5] Given the date of the marriage agreement, by operation of s. 252 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], Ms. Bradley's property division claims had to be decided under the former Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. Her claims for divorce, retroactive child support, and retroactive and ongoing spousal support were decided under the Divorce Act, R.S.C. 1985, c. 3.
- [6] Following a 40-day trial, the trial judge found the marriage agreement was valid and operated fairly. He made income findings, divided the parties' property according to the marriage agreement and ordered Mr. Callahan to pay Ms. Bradley \$8.6 million in lump sum spousal support. He declined to award Ms. Bradley retroactive child or spousal support. The judge's reasons for judgment are indexed as 2024 BCSC 163 [RFJ].
- [7] The parties dispute the financial result. According to Mr. Callahan, Ms. Bradley received property, proceeds from property dispositions and support payments totalling approximately \$16 million. Mr. Callahan kept corporate assets worth roughly \$160,000,000 to \$240,000,000, as well as other property.
- [8] On appeal, Ms. Bradley does not challenge the judge's finding that the marriage agreement was valid. Although Ms. Bradley alleges the judge committed a material error of fact in finding the parties' marital standard of living and her post-separation standard of living were "comfortable" or "very comfortable", I consider this to be a matter of semantics, not substance. I will confine my analysis to whether the judge erred in principle by:
1. finding the marriage agreement operated fairly and dismissing Ms. Bradley's claim for variation;
 2. failing to order retroactive child support and retroactive spousal support according to the Federal Child Support Guidelines ("Guidelines") and the Spousal Support Advisory Guidelines ("SSAGs") respectively; and
 3. failing to divide the value of the parties' post-marriage RRSPs according to the marriage agreement.
- [9] Mr. Callahan submits the judge made no such errors. He says Ms. Bradley is attempting to relitigate the parties' lengthy trial based on evidence rejected by the trial judge. He further says the judge paid proper heed to the parties' reasonable expectations at the time they entered the marriage agreement and achieved fairness by ensuring Ms. Bradley had sufficient resources to live in the same lifestyle the parties enjoyed during their marriage.

- [10] Although the judge's findings of fact and his finding of fairness are owed significant deference, for the reasons that follow, I am satisfied he made legal errors and palpable and overriding errors of fact in his analysis of the operational fairness of the marriage agreement. I would therefore allow the appeal in part and reappportion the assets so as to satisfy the objectives of the FRA and Divorce Act. I would dismiss the second and third grounds of Ms. Bradley's appeal.

Issue 1: Did the judge err by finding the marriage agreement operated fairly?

The Parties' Circumstances Prior to Their Marriage

- [11] When the parties married, Ms. Bradley was in her late twenties. She was a licenced real estate agent. She owned various personal property, including a car, jewellery, a bedroom set, artwork and sporting equipment. She also owned RRSPs worth approximately \$25,000.
- [12] Mr. Callahan was in his mid-thirties. He had various business interests worth roughly \$3,000,000 and worked with his family as a property developer. He owned personal property, including a car, motorcycle, boat, furniture, artwork and sporting equipment. He also owned a lakefront residential property in Kelowna. His RRSPs were worth approximately \$205,000.

The Marriage Agreement

- [13] The marriage agreement runs 35 pages and can fairly be described as comprehensive. At trial, Ms. Bradley challenged the validity of the marriage agreement on the basis she received inadequate legal advice from her lawyer and inadequate disclosure from Mr. Callahan. The trial judge rejected these claims: RFJ at paras. 192-207. On appeal, Ms. Bradley does not challenge the judge's findings. The marriage agreement is therefore valid. I summarize its key provisions below.
- [14] Under the heading "Obligations During Marriage", the marriage agreement provides the parties are responsible for supporting themselves during and after the marriage. It indicates both parties intend to remain in the workforce throughout the marriage until retirement at age 65, regardless of whether they have children. According to the agreement, if either party voluntarily chooses to leave the workforce while any child is under 18, doing so "will not entitle him or her to any compensation from the other party for loss of career advancement or opportunities."
- [15] This section of the marriage agreement also contains some terms related to property. Of relevance to the appeal, the agreement recognizes Mr. Callahan's house will be used as the "matrimonial home" but will remain his exclusive property. It also indicates that if the parties purchase property or enter business jointly, "they shall do so expressly and in writing." If an acquisition of property or an entry into business is not recorded in writing as a joint acquisition, the marriage agreement provides the property or business will remain the sole property of the acquiring party.

- [16] Under the heading "Maintenance on Separation", the marriage agreement requires Mr. Callahan to pay Ms. Bradley annual "support and maintenance" of \$45,000 per year if she has left the workforce to care for any child of the marriage. The support and maintenance is subject to a cost of living adjustment and terminates "if [Ms. Bradley] remarries, takes up residence with an unrelated adult person for a period of six months or there are no longer children under the age of 19 living with [her]".
- [17] Under the heading "Residences or Allowances on Separation", the marriage agreement requires Mr. Callahan to pay Ms. Bradley a "Residence Allowance" and "Relocation Allowance" in case of separation. The Residence Allowance is defined to be an amount the parties agree or an amount equal to the median price for a detached single-family home in the greater Kelowna area. The Relocation Allowance is \$25,000, subject to a cost of living adjustment.
- [18] Under the heading "Marital Property", the marriage agreement defines "Marital Property" to be:
- (a) the real and personal property described in Schedule "A";
 - (b) all other real and personal property acquired in the joint names of the parties after the date of this Agreement;
 - (c) the net equity of any household effects and furniture purchased by either or both parties after the date of the marriage;
 - (d) the new registered retirement savings plans to which either of the parties contributes after the date of marriage; and
 - (e) all property, real and personal, acquired after the marriage which is not the Sole Property of one party or the other.
- [19] Under the marriage agreement, Marital Property is to be divided equally by the parties. No property was listed by the parties under Schedule "A".
- [20] Under the heading "Sole Property", the marriage agreement provides that Schedule "B" lists all of Mr. Callahan's and Schedule "C" all of Ms. Bradley's property. Among other things, Schedule "B" lists Mr. Callahan's interest in 11 companies and "assume[s]" those interests to be worth "in excess of \$2 million." The marriage agreement further provides the parties each had the opportunity to "investigate, examine and appraise" the assets and liabilities of the other but chose not to do so.
- [21] Sections 25 and 26 of the marriage agreement then make clear neither party would acquire an interest in the other's "Sole Property", including Mr. Callahan's business interests, "under any circumstances", unless specifically added to Schedule "A". These sections are particularly relevant to the appeal. They provide:

25. Except as otherwise specifically provided for in this Agreement, neither party shall under any circumstances acquire any interest in the following property (which is referred to collectively as "Sole Property") which shall be and remain the sole and exclusive property of either Ted or Norval, as the case may be, throughout the marriage and in the event of dissolution or nullification of the marriage, or upon the death of either party:
- (a) The real and personal property of either party described in either Schedule "B" or Schedule "C" to this Agreement;
 - (b) All other real and personal property acquired by either Ted or Norval prior to the date of marriage;
 - (c) All real and personal property acquired by either Ted or Norval in his or her name alone after the marriage, including any share or interest in any corporation or other business entity;
 - (d) All real and personal property inherited by either Ted or Norval;
 - (e) All income earned or paid to Ted or Norval from any source;
 - (f) All real and personal property acquired by Ted or Norval exclusively from his or her Sole Property either in substitution or in replacement therefore;
 - (g) All real and personal property acquired by Ted or Norval from whatever source by gift, bequest, devise or descent, including all real and personal property which the one party receives or which one party becomes entitled to under the provisions of any trust instrument and all right, title and interest in or to any trust under which the one party is a beneficiary;
 - (h) All growth in the equity or interest that either Ted or Norval may have in any corporation or other business entity;
 - (i) All property in which either Ted or Norval have a beneficial interest, whether vested, contingent, discretionary or absolute;
 - (j) All property later referred to in this Agreement as being the Sole Property of either Ted or Norval;
26. Without limiting the generality of the foregoing, neither party shall attain any interest in any Sole Property of the other, or receive any other form of compensation:
- (a) by reason of any direct or indirect contribution including (but not limited to) emotional, spiritual or other support of a party whether or not savings occur through effective management of the household or child rearing responsibilities and including (but not limited to) any excess contribution to Household Expenses, as described in paragraph 6 of this Agreement;

- (b) despite the use of Sole Property or any property owned by corporations or other business entities which are Sole Property for a family purpose;
- (c) despite any sacrifice made by a party, including any sacrifice resulting in loss of career advancement or earning potential; or
- (d) despite any economic hardship that a party may suffer as a result of the marriage or its breakdown.

Provided, however, that if one party intends that the other party should obtain an interest in his or her Sole Property by direct or indirect contribution, then the parties shall add the property to Schedule "A" of this Agreement stating the interest each party shall have in the property and each party shall place his or her signature beside the addition indicating his or her agreement with the addition. Schedule "A" shall be a conclusive list of any property which the parties intend there to be a direct or indirect interest by the other party and agreed that no oral, implied[,] inferred or other means of communicating or providing an interest other than in writing shall be valid nor be made by the other party.

[Emphasis added.]

[22] Section 29 reiterates Mr. Callahan's present and future shareholdings in the companies listed in Schedule "B" would remain his "notwithstanding any direct or indirect contribution that may be made by [Ms. Bradley]" (emphasis added). Throughout their relationship, the parties did not list any property in Schedule "A".

[23] Under the heading "Children", the parties set out terms they believed would be in the best interests of any children of the marriage. In the event the parties' marriage ended, they were to retain joint custody and guardianship of the children. The children were to live principally with Ms. Bradley. Mr. Callahan was to pay Ms. Bradley child support and maintenance of \$1,100 per month per child (subject to a cost of living adjustment) until the child moves away, marries, turns 19, becomes self-supporting, or dies.

[24] In the marriage agreement, the parties state their belief the child support and maintenance provisions are "fair, reasonable and generous" and indicate their wish that "their agreement be given effect notwithstanding any [child support] guidelines."

[25] Under the heading "Legal Advice, Disclosure and Fair Agreement", each party acknowledged, among other things, that:

- they believed the agreement adequately discharged their present and future responsibilities to one another;
- the contract would not result in circumstances that would be unconscionable or unfair to either party;
- they believed the agreement was and would be fair regardless of the duration of the marriage; and

· they had considered various "future occurrences", including changes in the economy, changes in the real estate market or the stock market, and the receipt of windfall sums by one party.

The Parties' Circumstances During and After Their Marriage

- [26] During the marriage, both parties were good, loving, and engaged parents. Ms. Bradley assumed primary responsibility for household management and the care of the children. Mr. Callahan focused on growing the Callahan family business. Starting in the early 2000s, he was also enmeshed in costly disputes with his brothers and father over the business: RFJ at para. 215.
- [27] In addition to her childcare and homemaking responsibilities, Ms. Bradley was paid an annual salary of \$48,000 for advising on the design and decoration of some of the family businesses' properties: RFJ at para. 264. The trial judge concluded Ms. Bradley was not involved in the management of the business: RFJ at para. 266.
- [28] The parties separated on June 1, 2014, after a spousal relationship of 22 years, including 17 years of marriage.
- [29] Prior to trial, the parties obtained a preliminary ruling confirming the FRA applies to property division under the marriage agreement: *Bradley v. Callahan*, 2017 BCSC 2266. Then, on December 13, 2017, a s. 57 FRA declaration was made that the parties had no reasonable prospect of reconciliation. The parties agree this date constitutes the "triggering event" for determining the operational fairness of the marriage agreement.

Mr. Callahan's Business Interests

- [30] Mr. Callahan's father launched a trucking business in the 1950s. Later, he branched out into construction and real estate. Beginning in their teens, Mr. Callahan and his three brothers were involved in the family businesses.
- [31] The Callahan family companies experienced financial difficulties in the 1980s. At his father's request, Mr. Callahan left law school in 1986 to return home and work for the family companies: RFJ at para. 215. According to Mr. Callahan, he was "promised an interest in the business if he were successful in managing the difficult financial situation and returning matters to profitability": RFJ at para. 183.
- [32] Over the years, the Callahan family has been embroiled in many business-related disputes. As a result of litigation and arbitration, Mr. Callahan's business interests have been largely separated from those of the rest of his family. Mr. Callahan's business interests are now commonly referred to as the "Argus Group": RFJ at paras. 9, 215.

- [33] Michael Bowie, CPA, CBV, completed a joint expert valuation report dated May 2, 2019 ["Bowie report"] just prior to an intended trial date. He valued the Argus Group as of the date the parties married (September 11, 1997), the date they separated (June 1, 2014) and the date of his report (May 2, 2019).
- [34] Mr. Bowie's valuations of the Argus Group are not in dispute. They are:
- September 11, 1997 \$2,967,417 to \$3,305,278
 - June 1, 2014 \$82,934,644 to \$87,041,730
 - May 2, 2019 \$123,842,697 to \$130,433,611
- [35] Given the availability of corporate financial statements, property tax assessments and the like, and concerns about delay, the judge dismissed Ms. Bradley's application for an updated valuation report before the trial. Nevertheless, the parties agreed the value of the Argus Group had further increased since May 2, 2019. Each party put forward their own estimate. Ms. Bradley estimated the value of the Argus Group as of the trial date to be approximately \$227 million to \$239 million. Mr. Callahan put the value at approximately \$151 million to \$163 million: RFJ at para. 13.

The Judge's Findings on the Operational Fairness of the Marriage Agreement

- [36] At an early stage of his reasons, the judge noted the property division provisions of the FRA applied: RFJ at paras. 25-27.
- [37] At para. 168, he outlined the approach for determining the fairness of marriage agreements under the FRA. The judge referred to *Hartshorne v. Hartshorne*, 2004 SCC 22, where Justice Bastarache, writing for the majority, stated:
- [47] 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.

- [38] Turning to an application of the Hartshorne framework, the judge first noted the parties' positions regarding what property Ms. Bradley would receive under the marriage agreement. Following the parties' separation, Mr. Callahan purchased a nearby lakefront home for Ms. Bradley. It was comparable in value to his own home. In addition, Ms. Bradley said she would receive \$1.82 million while Mr. Callahan said she would receive \$2.1 million: RFJ at paras. 218-220.
- [39] The judge, at para. 223, next noted the following guidance from the majority decision in Hartshorne:
- [46] [] A fair distribution of assets must of course take into account sacrifices made and their impact, the situation of the parties at the time of distribution, their age, education and true capacity to reintegrate into the work force and achieve economic independence in particular. But this must be done in light of the personal choices made and of the overall situation considering all property rights under the marriage agreement and other entitlements.
- [Emphasis added by trial judge.]
- [40] The judge then turned to consider the factors set out in s. 65(1) of the FRA:
- [224] Applying a marriage agreement engages the factors set forth in s. 65(1) of the FRA. With respect to the facts at bar and the Marriage Agreement, these factors are:
- a) Duration of the marriage: The marriage lasted almost 17 years, with another approximately five years where the parties lived together before marriage (as set forth in Recital A to the Marriage Agreement);
 - b) Duration of the period during which the spouses have lived separate and apart: The parties have lived separate and apart since June 1, 2014 (approximately nine years as of the first day of trial);
 - c) Date when property was acquired or disposed of: [The family home] was acquired before the parties' relationship started. Similarly, Mr. Callahan has continued to hold as part of the Argus Group the corporate assets as they have evolved in which he had an interest, or possible interest, as of the date of the Marriage Agreement;
 - d) Extent to which property was acquired by one spouse through inheritance or gift: To a significant degree, Mr. Callahan's corporate assets result from his father (and mother) being engaged in acquiring and developing real estate;
 - e) Needs of each spouse to become or remain economically independent and self sufficient: The Marriage Agreement has operated to provide Ms. Bradley with a principal residence ([Ms. Bradley's home]) similar to one that Mr. Callahan enjoys and to provide Ms. Bradley with further properties (or funds in lieu of). Ms. Bradley will enjoy economic independence and self-sufficiency, with the Court's determination of the equitable appropriate lifestyle for Ms. Bradley in the context of the parties' relationship, including the Marriage Agreement. As

McEachern C.J.B.C. stated in Metzner, "any shortfall on independence or self sufficiency may be made up by an appropriate order for maintenance" (at para. 40); and

- f) Any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse: There are no other circumstances relating to the acquisition, preservation, maintenance, improvement, or use of property that would take away from the fact that the parties contemplated that Mr. Callahan's business assets would be his "Sole Property" as defined in the Marriage Agreement. Further, I see no reason relating to Ms. Bradley's capacity or liabilities that cannot also be addressed by spousal support.
- [41] Finally, the judge rejected Ms. Bradley's submissions with respect to unfairness and found the agreement operated fairly. His decision rested on three findings.
- [42] First, the judge found it was "certainly within the reasonable contemplation of the parties that Mr. Callahan's business holdings had a high likelihood to increase in value, and significantly so, having regard to Mr. Callahan's particular expertise and experience in real estate in the Kelowna area": RFJ at para. 227.
- [43] Second, the judge noted the marriage agreement preserved Ms. Bradley's right to spousal and child support, and both parties acknowledged the support amounts should be greater than the amounts set out in the agreement. In the judge's view, an "equitable result" would be assured by an award of lump sum spousal support: RFJ at para. 228-229.
- [44] Third, the judge emphasized "the Court should not disregard the parties' original intention, as reflected in the Marriage Agreement, that Mr. Callahan's business assets would not be subject to division upon separation": RFJ at para. 230.
- [45] He concluded an equitable result would be to award Ms. Bradley lump sum spousal support of \$8.6 million that would: (1) allow her to enjoy "much more than 'a reasonable standard of living in the community' for the rest of her life"; and (2) satisfy the four objectives of spousal support under s. 15.2(6) of the Divorce Act: RFJ at para. 231.

The Parties' Positions on Appeal

- [46] The parties agree the governing authority for determining the operational fairness of a marriage agreement is Hartshorne but disagree about each stage of the analysis.
- [47] Ms. Bradley submits the judge committed several errors in determining the circumstances on marriage breakdown were within the parties' contemplation at the time the agreement was made. Most notably, she argues the parties could not have realistically contemplated the extraordinary growth of Mr. Callahan's business interests. She also maintains they failed to contemplate her decision to take on primary childcare and household management responsibilities and how this decision allowed Mr. Callahan to both grow the family assets and engage in the unforeseen, long-lasting and time-intensive legal dispute with his family. Ms. Bradley argues the parties never reviewed the agreement during their marriage or made

adequate arrangements to respond to these unforeseen changes. Ms. Bradley concludes the burden on her to establish operational unfairness should therefore be lessened.

- [48] Mr. Callahan responds by arguing Ms. Bradley relies on assertions not proven at trial or directly contradicted by the trial judge's findings. Specifically, the judge explicitly found the increase in asset value was within the parties' reasonable contemplation, a finding that is owed deference. He argues Ms. Bradley's claims as to the unforeseen nature of her contribution to the growth in assets was also considered and rejected by the judge.
- [49] The parties also disagree as to whether the agreement operated unfairly based on the s. 65(1) factors. Ms. Bradley argues the judge failed to adequately consider how several factors weighed in her favour, including the length of the marriage, her financial circumstances at marriage breakdown, her direct and indirect contributions to the growth in assets, and the fact Mr. Callahan acquired significant business interests during the marriage. She also noted the judge categorized Mr. Callahan's assets as a 'gift or inheritance' without a specific finding there had been a gift and no evidence to support such a finding.
- [50] Mr. Callahan emphasizes the marriage agreement accounted for the length of marriage and any direct or indirect contributions. He argues the trial judge made factual findings as to the growth of the assets over time, the inheritance-like nature of the assets, and the parties' relative positions and needs at marriage breakdown, none of which reveal palpable and overriding errors.
- [51] Finally, Ms. Bradley argues the judge erred in concluding the spousal support award was sufficient to render the marriage agreement fair. She argues reapportionment, in addition to spousal support, is necessary to remedy the operational unfairness of the agreement. Ms. Bradley seeks a variation of the division of property provisions of the marriage agreement under s. 65 and a compensation order directing Mr. Callahan to pay her \$50,000,000.
- [52] Mr. Callahan counters by arguing a court may address economic self-sufficiency via a spousal support award and the judge did not commit a reversible error in doing so. Overall, Mr. Callahan argues Ms. Bradley is over-reliant on self-serving portions of her evidence, ignores the trial judge's findings, and is ultimately attempting to have this Court relitigate the issues.

Legal Framework

- [53] Sections 56 and 61 of the FRA permit spouses with binding marriage agreements to avoid the default regime for property division in Parts 5 and 6. Under the default regime, each spouse is presumptively entitled to an undivided half interest in each family asset when the marriage breaks down, and an equal division of those assets absent a finding of unfairness based on the factors enumerated in s. 65(1). Section 65(1) allows the court to vary the terms of a marriage agreement regarding property division if the agreement would be unfair having regard to those same factors. The question of fairness is examined at the time of the "triggering event": Hartshorne at paras. 11, 28; Dhaliwal v. Dhaliwal, 2021 BCCA 72 at para.

25.

- [54] Under the Hartshorne analysis, the court first calculates the entitlements of each party under the agreement and from other sources. The court then considers the factors in s. 65(1) holistically to determine whether the agreement operates unfairly or contrary to the objectives of the FRA. At the second stage, the court must also consider the parties' personal and financial circumstances and whether the agreement accurately contemplated the circumstances the parties find themselves in on separation. The availability of entitlements such as spousal support and child support are considered when assessing the overall fairness of the agreement in its operation: Hartshorne at para. 47.
- [55] Elsewhere, this Court has framed the analysis as a three-step process, where the court: (1) determines property division under the agreement; (2) considers whether the agreement contemplated the circumstances at separation; and (3) determines whether the agreement operated fairly in light of the s. 65(1) factors: Santelli v. Trinetti, 2019 BCCA 319 at para. 72.
- [56] The framing of the analytical approach is not at issue in this case. What is important to note -- and as Mr. Callahan acknowledges -- is that the expectations of the parties when they made the agreement are not an independent factor for varying an agreement. Instead, they inform the weighing of the s. 65(1) factors. Where the circumstances at marriage breakdown were not contemplated by the parties' agreement, the burden for establishing operational fairness "is somewhat lighter"; where the circumstances were contemplated, the burden is "heavier": H.S.S. v. S.H.D., 2018 BCCA 199 at para. 57; Hartshorne at para. 47.
- [57] The relevant portion of s. 65 provides:
- 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.

[58] I would note that under s. 65(1)(e) the following factors may be taken into account:

- (a) diminished earning capacity and loss of economic opportunity suffered by one spouse due to homemaking and childcare duties: *Lodge v. Lodge* (1993), 79 B.C.L.R. (2d) 360 at paras. 19-22 (C.A.);
- (b) the past earnings and future earning capacity of each spouse and the contributions made by one spouse to the enhancement of the earning capacity of the other spouse due to homemaking and childcare: *Toth v. Toth* (1995), 13 B.C.L.R. (3d) at paras. 44-46 (C.A.);
- (c) the fact that one spouse has better income-earning prospects as well as a significant difference in earnings that would continue into the future: *Davies v. Davies* (1999), 50 R.F.L. (4th) 353 at paras. 30-32 (B.C.S.C.); *M.R.M. v. I.M.M.*, 2006 BCSC 568 at paras. 41-46; *Ashlie v. Ashlie*, 2010 BCSC 1101 at para. 27;
- (d) ongoing responsibility for children and the need by a spouse to retain a home for the benefit of children: *Lanaway v. Lanaway* (1983), 37 R.F.L. (2d) 214 at 216 (B.C.C.A.); *Kennedy v. Kennedy* (1994), 98 B.C.L.R. (2d) 287 at para. 22 (S.C.);
- (e) the impact of ongoing responsibility for a child with special needs, particularly its impact on a return to work for a spouse in their 40s and 50s: *L.A.L. v. R.L.*, 2005 BCSC 1776 at para. 45; *Gagnon v. Petke*, 2008 BCSC 610 at para. 91;
- (f) the need to keep a home to provide stability for children and lessen the impact of divorce and provide a capital investment to the dependent spouse to assist with economic self-sufficiency: *T.M.S. v. E.S.*, 2004 BCSC 477 at para. 26.

See *J.E.H. v. P.L.H.*, 2013 BCSC 752 at para. 100, *aff'd* *Hathaway v. Hathaway*, 2014 BCCA 310, leave to appeal to SCC *ref'd*, 2015 CanLII 11719.

[59] The needs of each spouse referred to in s. 65(1)(e) are determined by reference to their standard of living prior to separation as well as their needs arising out of post-separation circumstances: *Fong v. Fong*, 45 B.C.L.R. 222 at 229, 1983 CanLII 293 (C.A.).

[60] Section 65(1)(f) of the Family Relations Act was described in *Piskor v. Piskor* (1981), 27 B.C.L.R. 230 at 233, 1981 CanLII 411 (C.A.), as the "basket clause":

that is, any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property for the capacity or liabilities of the spouse. Under this heading one must consider the substance of the relationship and the respective contributions of the parties...

- [61] The primary objective of the FRA regarding property division is fairness. In dealing with marriage agreements the objective is to strike an appropriate balance between deference to the parties' intentions and ensuring a fair result: Hartshorne at paras. 34-36; Dhaliwal at para. 27. Courts must respect parties' property division arrangements on the breakdown of their relationship: Hartshorne at para. 9. Marriage agreements are therefore presumed to operate fairly unless shown to be otherwise: Dhaliwal at para. 23. Similarly, an agreement is not unfair simply because it departs from the statutory scheme: Hartshorne at para. 67. But courts must also "encourage parties to enter into marriage agreements that are fair, and to respond to the changing circumstances of their marriage by reviewing and revising their own contracts for fairness when necessary": Hartshorne at para. 36.
- [62] This is why the court must consider whether the circumstances on marriage breakdown were within the parties' actual or realistic contemplation at the time they made the agreement. If the parties accurately anticipated their personal and financial circumstances at the time of marriage breakdown (i.e., the triggering event), made adequate arrangements in response to these anticipated circumstances, and understood the true impact of the agreement on their interests, then a judge should be hesitant to intervene. The court should not substitute its notion of fairness for that of the parties', "providing that nothing else would suggest that the parties did not really consider the impact of their decision in a rational and comprehensive way": Hartshorne at para. 44.
- [63] Where the parties did not anticipate the circumstances at marriage breakdown, less deference is owed to what they understood to be a fair division of property at the time the agreement was made. The change need not be "radically unforeseen". Rather, if in light of the circumstances, "the terms of the agreement no longer reflect the parties' intentions at the time of execution", the judge may be required to vary the marriage agreement to ensure fairness and alignment with the FRA's objectives: Hartshorne at para. 43, citing Miglin v. Miglin, 2003 SCC 24 at para. 88.
- [64] The ultimate question remains whether the agreement operates fairly at the time of the triggering event. Even where the parties accurately anticipated what their circumstances would be when the marriage broke down, their intentions are not determinative. The court must still be attentive to potential unfairness under the marriage agreement: Hartshorne at para. 46.
- [65] In determining if the agreement operates unfairly, the court considers whether the listed factors, taken together, reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances: Hartshorne at para. 47. As this Court stated in Santelli, "the focus is on distribution of assets and the resulting economic consequences": at para. 73.

Discussion

Errors in the reasons for judgment

- [66] The judge correctly set out the analytical framework from Hartshorne: RFJ at paras. 166-172. The judge also made extensive findings of fact. However, in my respectful view, his application of the Hartshorne framework to those facts was tainted by legal and factual errors.
- [67] At para. 224, the judge set out the factors in s. 65(1) of the FRA and linked factual findings to each factor. But he did not explain how the factors weighed in his fairness analysis or how they, considered holistically, took him to his final conclusion. Further, he failed to weigh various factors in favour of Ms. Bradley and, in doing so, erred in applying s. 65(1).
- [68] For example, under s. 65(1)(a), the judge stated, "the marriage lasted almost 17 years, with another approximately five years where the parties lived together before marriage": RFJ at para. 224. However, he made no mention of how this impacted his fairness analysis.
- [69] The length of the marriage is relevant to the fairness analysis. As noted in Hartshorne, "[t]he provisions of a contract could well be fair if the marriage lasted one year and unfair if the marriage lasted 30 years": at para. 37. In part, this is because marriage agreements "are anticipatory and may not fairly take into account the financial means, needs or other circumstances of the parties at the time of marriage breakdown": Hartshorne at para. 39. This is particularly so when the marriage lasts a long time, as was the case here.
- [70] Under s. 65(1)(b), the judge noted the parties had been separated for nine years but, again, did not indicate how this impacted his fairness analysis. Further, he measured the length of separation to the date of trial rather than to the date of the triggering event. He provided no explanation or justification for this choice.
- [71] Under s. 65(1)(c) -- where consideration is given to the date when property was acquired or disposed of -- the judge stated, "Mr. Callahan has continued to hold as part of the Argus Group the corporate assets as they have evolved in which he had an interest, or possible interest, as of the date of the Marriage Agreement": RFJ at para. 224.
- [72] Although this statement is true, it focuses on who held the property, not when the property was acquired, as s. 65(1)(c) directs. As the judge noted, Mr. Callahan only had contingent interests in Argus Industries Ltd. and Callahan Construction Company Ltd. (two of the companies listed in Schedule "B") at the time of the agreement: RFJ at para. 11. In addition, Schedule "B" lists only 11 corporate entities. By contrast, Mr. Bowie's 2019 valuation report lists 61 separate companies (including active, inactive, and holding companies). At no point did the judge consider how the acquisition of these additional properties during (rather than prior to) the marriage impacted his analysis.
- [73] Similarly, when considering whether property was acquired through inheritance or gift under s. 65(1)(d), the judge noted, "[t]o a significant degree, Mr. Callahan's corporate assets result from his father (and mother) being engaged in acquiring and developing real estate".

- [74] As Ms. Bradley points out, the judge never made a factual finding as to whether the property Mr. Callahan received from his parents was a gift. Elsewhere in his reasons, the judge indicated that, at least according to Mr. Callahan, it was not. In fact, Mr. Callahan testified he returned home from England to help manage the family real estate business out of its financial difficulties and, in return, "was promised an interest in the business": RFJ at para. 183.
- [75] Mr. Callahan claims the characterization of the property as a "gift" under s. 65(1)(d) is immaterial. He argues the judge could have considered the familial circumstances through which the property was acquired under s. 65(1)(c) or (f).
- [76] The problem is that, without more explanation from the judge, it is difficult to understand the role this factor played in his s. 65(1) fairness analysis. This is particularly so when considered alongside the fact a significant portion of the assets at issue were acquired during the marriage.
- [77] With respect to s. 65(1)(e), the judge erred by considering the availability of spousal support as a means of mitigating or remedying unfairness before having considered all of the factors holistically: Dhaliwal at para. 87. As will become clear below, this was not an appropriate case for such a remedy.
- [78] The most problematic element of the judge's analysis, however, was his treatment of s. 65(1)(f). The judge concluded "there are no other circumstances relating to the acquisition, preservation, maintenance, improvement, or use of property that would take away from the fact the parties contemplated Mr. Callahan's business assets would be his 'Sole Property' as defined in the Marriage Agreement": RFJ at para. 224 (emphasis added).
- [79] Respectfully, this statement misconstrues the issue to be addressed under s. 65(1)(f). Section 65(1)(f) is not concerned with whether the parties contemplated some future state of affairs in the marriage agreement. Rather, it asks whether the division of property would be unfair having regard to any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.
- [80] More importantly, in concluding there were no relevant circumstances under s. 65(1)(f), the judge failed to account for the indirect contributions of Ms. Bradley. Paragraph 46 of Hartshorne, which the judge cited in part, makes clear s. 65(1)(f) requires consideration of such contributions in the context of a marriage agreement:
46. Where, as in the present case, the parties have anticipated with accuracy their personal and financial circumstances at the time of distribution, and where they have truly considered the impact of their choices, then, without more, a finding that their Agreement operates unfairly should not be made lightly. This does not mean that no attention should be given to the possible deficit in the assets and future income of the spouse who chose to stay at home and facilitate the professional development of the other spouse, compared to what they would realistically have been otherwise. Section 65 mandates as much. A fair distribution of

assets must of course take into account sacrifices made and their impact, the situation of the parties at the time of distribution, their age, education and true capacity to reintegrate into the work force and achieve economic independence in particular. But this must be done in light of the personal choices made and of the overall situation considering all property rights under the marriage agreement and other entitlements.

[Underline added by trial judge; bold added.]

- [81] Along the same lines, this Court has stated, "While the particulars of direct contribution to an asset are significant considerations in s. 65(1)(f), the jurisprudence has recognized that indirect contributions should not be subordinated in family law analyses": H.S.S. at para. 108.
- [82] Here, Ms. Bradley was paid an annual salary for her modest direct contributions to the Argus Group: RFJ at paras. 264-266. She was not, however, compensated for the sacrifices she made -- and her sacrifices were significant. She left her career as a realtor soon after the parties married, was the primary caregiver for the children and was responsible for managing the household for 17 years. This allowed Mr. Callahan not only to pursue corporate endeavours but also to devote considerable time to the mediation, arbitration and litigation of the drawn-out legal battle with his family.
- [83] The judge's failure to consider the factors holistically led him to improperly rely on the availability of spousal support as a means for rendering the agreement fair. By overlooking Ms. Bradley's indirect contributions, he grossly underestimated the value of what she gave up under the agreement. Although spousal support may be an appropriate means for rendering an agreement fair, this is a case-by-case determination and, importantly, must account for the legislative objectives not met in the agreement: Dhaliwal at 87.
- [84] Here, a significant element of unfairness relates to s. 65(1)(f) -- namely, ignoring Ms. Bradley's indirect contributions to the explosive growth in the Argus Group assets, and leaving only Mr. Callahan to benefit from that growth: Dhaliwal at para. 127. A spousal support award (particularly at the amount ordered by the judge) was not the appropriate means for ensuring fairness. As I outline below, the appropriate remedy in the circumstances of this case is reapportionment.
- [85] The judge then turned to consider the intentions of the parties as expressed in the marriage agreement. The judge found the parties contemplated Mr. Callahan's business assets would not be subject to division and reasonably contemplated those holdings had a "high likelihood" of significantly increasing in value: RFJ at para. 227. I take no issue with the first finding. However, insofar as the judge can be taken to have found the parties reasonably contemplated the explosive growth in Mr. Callaghan's business assets, that finding is not supported by the record.

- [86] Using the approximate values adopted by the judge from the Bowie report, the Argus Group was worth approximately \$3 million at the date of the marriage agreement and \$127 million in 2019 (two years after the triggering event). This represents an increase of over 4,100 percent and an annual growth rate of approximately 20 percent.
- [87] Analysis under s. 65(1) is holistic and fact dependant. Comparisons are therefore fraught with challenges. Nevertheless, according to Ms. Bradley, growth at this level is without precedent in the case law. Mr. Callahan did not refer to any authorities to refute this assertion and I have not identified any. In other cases, unexpected growth in assets over a lengthy marriage has prompted findings of unfairness and court intervention: See e.g., *Guivian v. Goldarre*, 2017 BCSC 1786 at para. 38, 43-45; *Dowell v. Dowell*, 2008 BCSC 138 at para. 43.
- [88] Further, the court must consider not just whether the situation at marriage breakdown was anticipated but also whether "the parties made adequate arrangements in response to these anticipated circumstances": *Hartshorne* at para. 43; *Dowell* at paras. 30-31. In the present case, the marriage agreement provided Ms. Bradley would receive \$45,000 per year as spousal support until the youngest child reached 19, subject to a cost of living adjustment based on the consumer price index. Child support was capped at \$1,100 per month per child, subject to the same adjustment.
- [89] Following a 2021 order, Mr. Callahan began paying Ms. Bradley \$60,000 in monthly spousal support and \$24,000 in monthly child support: RFJ at para. 262. This demonstrates just how far the post-separation situation departed from what the parties contemplated at the time of the agreement. Along these lines, it is noteworthy the trial judge awarded Ms. Bradley very substantial spousal support to compensate her for her loss of career advancement despite the clear intent of the marriage agreement that neither party would be entitled to such compensation.
- [90] Over time, Mr. Callahan has demonstrated considerable expertise and achieved truly exceptional results in the real estate industry. Further, the agreement specifically provides neither party was to acquire any interest in the growth of the other's property. In the agreement, both parties acknowledged they had considered various "future occurrences", including changes in the economy and the real estate market. Some growth was clearly within their contemplation.
- [91] But there is simply nothing in the record to support the conclusion the parties reasonably contemplated the extraordinary growth at issue at the time of the marriage agreement. How could they?

[92] In my respectful view, the judge made a palpable and overriding error in concluding it was within the reasonable contemplation of the parties that Mr. Callahan's business holdings had a high likelihood to increase from approximately \$3 million at the time of the marriage agreement to approximately \$85 million at the time of separation and \$127 million 17 months after the triggering event.

The marriage agreement operated unfairly

[93] It is important to recall that the determination as to whether the current circumstances were previously contemplated is only relevant to defining the burden for establishing unfairness. The more the circumstances were within the parties' contemplation, the heavier the burden. But the question remains whether, at the time of the triggering event, the agreement was fair when considering the s. 65(1) factors holistically.

[94] In my respectful view, the trial judge erred in concluding the marriage agreement operated fairly. His analysis appears to have been overwhelmed by the parties' intentions at the time they negotiated the marriage agreement.

[95] At the first stage of the Hartshorne analysis, the court determines the entitlements of each party under the agreement. According to the trial judge, Ms. Bradley said she would receive approximately \$1.82 million, largely as a result of the division of family properties, plus the median price for a detached Kelowna home. Mr. Callahan claimed Ms. Bradley would receive approximately \$2.1 million, in addition to her home, valued at approximately \$1,650,000: RFJ at paras. 218-219. In addition, Ms. Bradley was entitled to \$45,000 in spousal support per year and \$1,100 per child per month in child support until the children turned 19.

[96] Mr. Callahan would receive his equal share of the family properties, as well as the family home. In addition, Mr. Callahan would retain the full value of the Argus Group. As I note below, as of the triggering event, the Argus Group was worth roughly \$115 million.

[97] At the second stage, the court looks at whether the parties reasonably contemplated this state of affairs and, ultimately, whether the marriage agreement operates fairly in light of the factors in s. 65(1).

[98] There is no question the parties' intentions were important (though not determinative): Hartshorne at para. 46.

[99] There is also no question the agreement is unequivocal in setting out the parties' intentions regarding the role length of marriage, direct and indirect contributions, and loss of career advancement were to play in the division of any property at marriage breakdown. As Mr. Callahan points out, at various points it provides:

1. The agreement is fair whether or not the marriage is of long or short duration;

2. Neither party shall under any circumstances acquire any interest in the property of the other after the marriage;
3. Neither party shall attain any interest in the property of the other by reason of any direct or indirect contribution, including child rearing and household management;
4. Neither party shall attain any interest in the property of the other due to the loss of career advancement, economic hardship, or the use of property for family purposes; and
5. If a party chooses to leave the workforce to care for children of the marriage, this does not entitle them to compensation from the other party for loss of career advancement or opportunities.

[100] Finally, there is no question the fact Ms. Bradley had the benefit of independent legal advice during the formation of the marriage agreement is a significant factor in determining whether the marriage agreement operates fairly: Hartshorne at paras. 9, 60.

[101] Yet, the question is not whether a well-negotiated agreement was fair at the time it was entered. The question, rather, is the extent to which the "unimpeachably negotiated agreement" contemplated the situation at the time of the triggering event: Hartshorne at para. 43, citing Miglin at para. 89. Having legal counsel at the time a marriage agreement is formed does not guarantee fairness when the marriage breaks down: see e.g., H.S.S. at paras. 7, 62; Guivian at paras. 44-45.

[102] As discussed above, the extent to which the exponential growth in the Argus Group was unexpected is reflected in the agreement itself. Had the parties anticipated such extraordinary growth, the agreement's provisions regarding spousal and child support presumably would have reflected those considerations.

[103] On the question of the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation at marriage breakdown, as noted, the parties simply could not have reasonably contemplated all that unfolded during their lengthy marriage. Less deference is therefore owed to what the parties understood to be a fair division of property at the time the agreement was made.

[104] I turn then to a holistic consideration of the s. 65(1) factors, in light of the FRA's objective of striking a balance between respecting the parties' intentions and ensuring a fair result.

[105] In my view, one s. 65(1) factor weighs in favour of Mr. Callahan, one is neutral and the rest collectively weigh heavily in favour of Ms. Bradley.

[106] Factor 65(1)(b) (the duration of the period during which the spouses have lived separate and apart) weighs in favour of Mr. Callahan. The parties separated on June 1, 2014. The triggering event was three and a half years later on December 13, 2017. According to the Bowie report, the Argus Group's value increased from approximately \$85 million at the time of separation in 2014 to approximately \$127 million in May 2019. By my estimate, discussed below, the Argus Group would have been worth roughly \$115 million at the triggering event

in 2017. Although three and half years is not a particularly long time and Ms. Bradley continued to make indirect contributions in this period through her child-rearing responsibilities, Mr. Callahan was primarily responsible for this post-separation growth.

- [107] Factor 65(1)(d) (the extent to which property was acquired by one spouse through inheritance or gift) is neutral. There is no evidence Mr. Callahan acquired any of the property at issue through inheritance or gift. In fact, his evidence was that he earned it.
- [108] Factors 65(1)(a) (the duration of the marriage), (c) (the date when property was acquired or disposed of), (e) (the needs of each spouse to become or remain economically independent and self-sufficient) and (f) (any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse) overlap and collectively weigh heavily in favour of Ms. Bradley.
- [109] Under s. 65(1)(a), the parties lived together for five years and were then married for 17 years. During this lengthy period of time, Ms. Bradley gave up her career to take on household management and primary caregiving responsibilities for two children. This impacted not only her ability to become and remain economically independent and self-sufficient. It also allowed Mr. Callahan to grow the Argus Group and engage in protracted litigation with his family. As a result, the holdings of the Argus Group expanded significantly and its value grew exponentially.
- [110] I acknowledge the properties Mr. Callahan acquired during the marriage stemmed from his parents' business endeavours and his pre-marriage financial resources. While these facts weigh in his favour under factors 65(1)(c) and (f), they pale in comparison to the unprecedented extent to which the assets grew in value thanks, in part, to Ms. Bradley's responsibility for household and childcare activities. The agreement operates unfairly by depriving Ms. Bradley of the economic value of her contributions, and leaving Mr. Callahan as the sole beneficiary of the explosive increase in the value of corporate assets that occurred during the parties' lengthy marriage.
- [111] Under s. 65(1)(e), Ms. Bradley gave up her career, compromising her ability to become or remain economically independent and self-sufficient.
- [112] Of course, the availability of entitlements such as spousal support and child support are to be considered when assessing the overall fairness of the agreement: Hartshorne at para. 47. But the court should not settle on the quantum of support prior to determining property division, and the availability of a spousal support award will not necessarily be sufficient to render a marriage agreement fair. Rather, it is a case-by-case determination: H.S.S. at paras. 56, 64.
- [113] Here, in light of subsequent events, the agreement's child and spousal support provisions can only be described as meagre and grossly unfair.

- [114] The trial judge found Ms. Bradley was entitled to spousal support beyond what the marriage agreement provides: RFJ at para. 173. He went on to conclude the availability of spousal support entitlements was sufficient to render the agreement fair: RFJ at para. 224. Considering all the circumstances, and in particular the growth and sheer scale of the assets in question, I conclude it is not. The agreement operates unfairly.
- [115] In my view, the appropriate remedy must recognize Ms. Bradley's indirect contributions to the Argus Group and address the unfairness of Mr. Callahan receiving all the benefit of the explosive growth in the corporate assets. As I see it, that requires a reapportionment of assets.
- [116] I consider the impact of the judge's spousal support award on overall fairness in my analysis of the appropriate remedy below.

Remedy

- [117] Where a marriage agreement is found to operate unfairly under s. 65 of the FRA, the court may vary, but not set aside, the agreement: *Gold v. Gold*, [1994] 106 D.L.R. (4th) 179 at 185-186, 1993 CanLII 286 (B.C.C.A.). This Court has seen fit to do so when, as here, it has identified an error in the trial judge's fairness analysis: *Dhaliwal* at para. 142.
- [118] Courts enjoy "wide discretion" to ensure the fair distribution of property after finding a marriage agreement is unfair: *Gold* at 189. Fairness does not necessarily mean equality, especially where substantial assets are at stake. Rather, the determination is context dependant: *Gold* at 186-187, 191. Typically, courts still consider the intentions of the parties as expressed in the marriage agreement even where it has been found to operate unfairly: see e.g., *Dhaliwal* at paras. 142-44. Variation is also usually limited to those elements of the marriage agreement that are unfair in their operation: see e.g., *Dhaliwal* at paras. 142-44; *Tian v. Cheung*, 2016 BCSC 950 at para 92.
- [119] In *Janis v. Janis*, 2016 BCCA 364, this Court helpfully summarized the case law concerning the date at which property should be valued when considering reapportionment under s. 65:
- [54] In summary, the foregoing authorities support the following propositions. When considering reapportionment under FRA s. 65, the presumptive valuation date is the date of the triggering event. When considering a compensation order under s. 66, the presumptive valuation date is the date of trial. However, the court retains the discretion to determine a different valuation date for the purpose of achieving fairness between the parties. Setting a different valuation date may be appropriate where there has been an increase or decrease in the value of a family asset between the triggering date and the date of trial. The conduct of one party as it relates to an increase or decrease in value may be a relevant consideration.

[55] I emphasize, however, that the ultimate goal is achieving fairness. Lotzkar indicates that a mechanical application of any of these principles is not desirable and may be antithetical to achieving a fair result.

[Emphasis added.]

[120] The present case is unusual in several ways. Most notably, the Court is called on to reapportion assets of enormous value. There was also a delay of over five years between the triggering event and trial. Within that time, the Argus Group's value increased immensely. And the Court must contend with the reality that the judge made an order for spousal support that has some impact on the unfairness arising from the operation of the marriage agreement. Fashioning an appropriate remedy must take account of these unusual circumstances, be guided by the governing legal principles and ultimately deliver a result that is fair to both parties.

[121] The trial judge has already made orders dividing certain of the parties' property in accordance with the marriage agreement. This includes payments by Mr. Callahan to Ms. Bradley for her primary residence, as well as the equal division of additional residences in Hawaii, Big White, Kelowna and Vancouver: RFJ at paras. 19-20, 316-319, 326. These orders comport with the marriage agreement and are not challenged on appeal. I would therefore limit my intervention to the Argus Group. In doing so, I remain cognizant of the fact Ms. Bradley has already received almost \$4 million in assets as a result of the division of the family homes and other property.

[122] Turning to the reapportionment of the Argus Group, several considerations weigh in the balance. Reapportionment of the Argus Group is necessary to:

- ensure Ms. Bradley can remain economically independent;
- account for Ms. Bradley's loss of career advancement and earning potential;
- account for Ms. Bradley's indirect contributions to the growth of the corporate assets; and
- remedy the unfairness of Mr. Callahan being the sole beneficiary of the explosive growth of the corporate assets.

[123] On the other hand, both parties' unambiguous intent, as expressed in the marriage agreement, was to keep their assets separate from one another. They came into the marriage agreement with unequal assets, and they intended an unequal division at marriage breakdown. Despite the marriage agreement's unfairness, these intentions remain relevant and weigh against an equal division.

- [124] Any reapportionment must also account for the continued growth of the Argus Group from the triggering event until trial. This is not a straightforward case where adopting the valuation at the triggering date is sufficient. Here, there was a delay of over five years between the triggering event in December 2017 and the beginning of trial in May 2023. To make matters even more challenging, no precise valuations of the assets were provided for either the date of the triggering event or the eventual start of trial.
- [125] Yet even some rough calculations reveal the value of the Argus Group increased dramatically in this period. Using a straight-line increase in value between the Bowie report valuations in 2014 and 2019, the Argus Group would have been worth roughly \$115 million at the triggering event in 2017. Adopting the midpoint of the parties' estimates, by trial it may have been worth \$195 million.
- [126] Mr. Callahan has continued to lead the Argus Group through this period and should be the primary beneficiary of the fruits of this growth. However, I recognize this exceptional growth post separation was "built on the base created during cohabitation": H.S.S. at para. 110. Ms. Bradley also continued to make indirect contributions through her child-rearing responsibilities after separation. In addition, Mr. Callahan has been growing the Argus Group with Ms. Bradley's money, meaning Ms. Bradley has lost the opportunity to put her money to work for herself rather than for Mr. Callahan.
- [127] Any decision must holistically balance all of these competing interests. For instance, Ms. Bradley could be apportioned 25 percent of the increase in the Argus Group's value between the marriage and the triggering event, plus a reasonable rate of return on that award from 2017 until trial. The estimated value in 1997 was between \$2,967,417 and \$3,305,278. The midpoint is approximately \$3,150,000. Using the rough estimation of the Argus Group's value at the triggering event I provided above, the change in value is approximately \$112 million, 25 percent of which is \$28 million. Using a 5 percent rate of return over six years would result in an award of about \$37.5 million.
- [128] How would such a reapportionment affect or be affected by the spousal support award?
- [129] Property division will affect the relative needs and means of the parties. In some cases, it may fully address the compensatory, non-compensatory, and contractual grounds for spousal support and obviate the need for a spousal support order altogether: Chutter v. Chutter, 2008 BCCA 507 at para. 76. Therefore, the court typically first reapportions property before turning to the issue of spousal support: H.S.S. at para. 56; Dhaliwal at para. 28. Whether a spousal support award is needed in addition to property division turns, in part, on whether reapportionment adequately compensated for all of the objectives of spousal support: Chutter at para. 76.

- [130] Reapportionment under s. 65 is particularly well-suited to addressing the objectives of spousal support. This is because it allows for consideration of both "the relative abilities of the parties to become or remain economically independent and self-sufficient" (s. 65(1)(e)) and "the respective capacities and liabilities of the parties" (s. 65(1)(f)): *Toth v. Toth*, [1996] 13 B.C.L.R. (3d) 1 at para. 59, 1995 CanLII 1917 (C.A.) (Prowse J.A. concurring). Similar considerations are at play in determining spousal support: *Divorce Act*, s. 15.2(6).
- [131] In the present case, however, the trial judge has already awarded \$8.6 million in spousal support. He expressly intended this award to account for any "shortfall on independence or self-sufficiency" and "satisfy both the compensatory and non-compensatory bases of spousal support": RFJ at paras. 222, 224, 237.
- [132] As I have said, the circumstances before the court are unusual. Further, the parties have been litigating these issues for seven years, and fairness warrants finality.
- [133] Although there is no mathematical formula for calculating fairness, considering all of the above, I would reapportion \$29 million to Ms. Bradley from the value of the Argus Group. This award approximates 25 percent of the increase in the value of Argus Group from the date of the marriage to the triggering event, plus a 5 percent return on that increase to the date of trial, less the lump sum award of spousal support made by the trial judge.[1] I consider the deduction of the spousal support award necessary to avoid double recovery: *Dhaliwal* at para. 28.
- [134] Despite the imprecise valuation of the assets as a whole, I am confident this reapportionment, along with the spousal support order made by the trial judge, would satisfy the objectives of both the FRA and *Divorce Act*. It would balance the parties' clear intentions in the marriage agreement against the need for fairness in light of the unanticipated circumstances of the parties when the marriage ended.
- [135] Given the scale of the assets in question, it is appropriate to give the parties an opportunity to arrange their affairs and for Mr. Callahan to effect payment to Ms. Bradley in a tax-efficient fashion. I would give them 90 days to reach such an agreement, with leave to return to the court below if they fail to do so.

Issue 2: Did the judge err by failing to order retroactive child and retroactive spousal support?

The Judge's Findings on Child and Retroactive Spousal Support

- [136] Ms. Bradley sought \$7,533,605 in retroactive spousal support for the period June 2014 to December 2022: RFJ at paras. 247-249.
- [137] The judge noted Mr. Callahan had been paying Ms. Bradley \$60,000 in monthly spousal support and \$24,000 in monthly child support following a June 8, 2021, order. Cumulatively, the judge found Mr. Callahan had already paid Ms. Bradley \$2,417,500 in spousal support between June 2014 and December 2023: RFJ at paras. 262-263.

- [138] The judge noted the SSAGs are discretionary, particularly where the payor has an annual income above \$350,000: RFJ at para. 273. Based on the spousal support payments prior to May 2023, other payments and assets Ms. Bradley received, and an imputed income to Ms. Bradley's of \$60,000 for part of the claim period, he declined to award retroactive spousal support: RFJ at para. 274.
- [139] The judge then considered the issue of child support. The judge first declined to order prospective child support. Ms. Bradley does not challenge this conclusion on appeal.
- [140] Turning to retroactive child support, the judge noted Ms. Bradley sought \$5,281,936 for the years 2014 to 2022 "if there were not an equal property division of the Argus Group". This amounts to an average of \$51,784 per month. During this period, the judge determined Mr. Callahan paid \$771,500 in child support (a \$7,564 monthly average) and substantially all the tuition, education expenses and other s. 7 expenses for the children. He also noted both children provided Ms. Bradley with monthly budgets of approximately \$5,000 in recent years: RFJ at paras. 304-307.
- [141] The judge ultimately concluded Ms. Bradley's claim for retroactive child support was extravagant and unreasonable. He exercised his discretion under the Guidelines to reject her claim: RFJ at paras. 312-314.

The Parties' Positions on Appeal

- [142] Ms. Bradley argues the trial judge failed to consider *D.B.S. v. S.R.G.*, 2006 SCC 37, the leading authority on retroactive support orders. She claims the Guidelines, even where the payor has a high income, are still the primary determinant of child support amounts.
- [143] On the question of spousal support, Ms. Bradley acknowledges the SSAGs are discretionary. However, she claims spousal support at the mid to high range of the SSAGs is warranted given, amongst other things, the length of the relationship, her strong compensatory and non-compensatory claims, her limited capital and significant liabilities, and her needs in the context of Mr. Callahan's post-separation standard of living.
- [144] Mr. Callahan acknowledges the judge did not expressly reference *D.B.S.* but argues the question remains whether the order made was "clearly wrong". Mr. Callahan submits the judge had considerable discretion to depart from the Guidelines and SSAGs due to his income being above the ceilings they prescribe. Where the ceiling is exceeded, he claims the courts have rightfully considered other factors to determine retroactive spousal support awards, including whether the recipient spouse has received other assets, generous child support payments, and the payment of s. 7 expenses.
- [145] In terms of retroactive child support, Mr. Callahan argues a child support award should not exceed the children's reasonable needs to such an extent that they become a functional wealth transfer to the recipient parent.

[146] Mr. Callahan concludes the trial judge's determinations of retroactive support are subject to a high degree of deference.

Legal Framework

[147] D.B.S. remains the leading authority for determining retroactive variation of child support. The analysis is two-fold.

[148] First, the court must determine whether to exercise its discretion to award a retroactive child support award: D.B.S. at paras. 94-116. In doing so, the court considers four factors:

1. the reason for the recipient parent's delay in seeking child support;
2. any misconduct of the payor parent;
3. the past and present circumstances of the child, including the child's needs at the time the support should have been paid; and
4. whether the retroactive award might entail hardship.

[149] Ultimately, the court must adopt a holistic view and decide each case on its particular facts, balancing the payor parent's interest in certainty against the need for fairness to the child: D.B.S. at paras. 6, 99.

[150] Second, if the court concludes an award is necessary, the court then determines the amount of the award. This includes determining the date to which the award should be retroactive and the amount of support due during that time: D.B.S. at para. 117.

[151] The D.B.S. factors also apply to determining whether retroactive spousal support is appropriate: *Kerr v. Baranow*, 2011 SCC 10 at para. 207. However, in spousal support cases, the factors must be considered in light of the legal principles underpinning spousal, rather than child, support. In contrast to child support, there is no presumption that spousal support be paid. Concerns about notice, delay and misconduct therefore carry more weight in the analysis: *Kerr* at para. 208. Much like the analysis for retroactive child support, courts must consider retroactive spousal support holistically and with regard to the particular facts: *Ducharme v. Rempel*, 2016 BCCA 198 at para. 18.

Discussion

[152] The first -- and in this case decisive -- issue is whether the judge's failure to cite D.B.S. is fatal.

- [153] A court considering a claim for retroactive support is not required to refer to D.B.S. explicitly nor discuss each of the factors it highlights, but some discussion of the reasons for or against a retroactive award is expected: *Reis v. Bucholtz*, 2010 BCCA 115 at para. 67; *Ducharme* at para. 19. Even in the absence of any analysis, the trial judge's omission will not be fatal so long as the principles in *D.B.S.* and *Kerr*, applied to the findings of fact, support the judge's conclusion: *Hallgren v. Fry*, 2013 BCCA 15 at para. 27.
- [154] In the present case, the judge failed to explicitly reference D.B.S. It is also not apparent he applied its four-factor analysis. However, the judge did consider the retroactive support claims at some length and made a number of factual and legal findings relevant to the D.B.S. analysis that informed his ultimate conclusion. When considered holistically and in light of the four factors in D.B.S., his discretionary decision to deny the retrospective support claims was not clearly wrong.
- [155] First, there was no unreasonable delay on the part of Ms. Bradley that would militate against a retroactive spousal or child support award. She gave formal notice of her retroactive claims in the Notice of Family Claim filed April 4, 2016. Prior to doing so, Ms. Bradley and Mr. Callahan had attempted to resolve matters without litigation by way of a November 25, 2014, handwritten agreement: RFJ at para. 158.
- [156] Second, the judge did not find any misconduct on the part of Mr. Callahan that would weigh in favour of either a retroactive spousal or child support award. Although there were some early under-payments, there is nothing in the trial judge's findings to indicate Mr. Callahan knowingly avoided or diminished his support obligations: D.B.S. at paras. 107-109. He complied with the June 8, 2021, order requiring him to pay Ms. Bradley \$60,000 in monthly spousal support and \$24,000 in monthly child support: RFJ at para 262. As noted above, the judge found Mr. Callahan had paid \$2,417,500 in spousal support and \$771,500 in child support as of December 2023. In addition, he had paid substantially all of the tuition, education expenses, and all other s. 7 expenses for the children and provided funds for Ms. Bradley to purchase a home.
- [157] Turning briefly to the fourth factor in D.B.S., I note there would not have been any hardship occasioned on Mr. Callahan if a retroactive award were made.
- [158] The argument for both retroactive spousal and child support therefore largely turns on the third factor, the past and present circumstances of Ms. Bradley and the children, including their needs at the time support should have been paid.
- [159] The trial judge's findings do not indicate the children's standard of living is or has been diminished due to a failure of Mr. Callahan to provide sufficient child support. In addition to the considerable child support and other payments made by Mr. Callahan, each child also owns a condominium, as well as a 20 percent interest in a tenanted commercial warehouse property: RFJ at para. 294. As the Court in *D.B.S.* made clear, the argument for retroactive child support will be "less convincing" when the child "is currently enjoying a relatively high standard of living" and "already enjoyed all the advantages [they] would have

received had both parents been supporting [them]": at paras. 111-113.

[160] Based on this factual matrix, the judge was justified in concluding Ms. Bradley's child support claim was extravagant and unreasonable, and to exercise his discretion not to make a retroactive award. The judge indicated the retroactive claim would amount to impermissible spousal support in the guise of child support -- in other words, an impermissible wealth transfer from the payor to the recipient: *Francis v. Baker*, 3 S.C.R. 250 at para. 41, 1999 CanLII 659.

[161] Similarly, a claim for retroactive spousal support is less convincing where the spouse already enjoyed the advantages she would have received from such support: *Kerr* at para. 212. A judge declining to order retroactive spousal support may also put "considerable weight" on the fact the payor has made substantial financial contributions to the recipient since separation: *Hallgren* at para. 38.

[162] The trial judge concluded as much: "Taking into consideration the spousal support payments made before May 2023, the other payments and assets Ms. Bradley has received, and Ms. Bradley's imputed income, the Court will not award the further retroactive spousal support Ms. Bradley seeks for the period before May 2023": RFJ at para. 274. This conclusion is also justified, particularly in light of the division of property award made above.

[163] Having found the judge was not clearly wrong in exercising his discretion to not award retrospective spousal or child support, I would not accede to these aspects of Ms. Bradley's appeal. There is no need to consider the parties' arguments regarding the second stage of the D.B.S. analysis.

Issue 3: Did the judge err by failing to divide the value of the parties' post-marriage RRSPs?

[164] During oral submissions, Ms. Bradley indicated she was pursuing her appeal regarding division of the RRSPs the parties acquired post-marriage only if this Court were to deny her appeal for an order varying the marriage agreement. Having allowed that aspect of her appeal, there is no need to consider this alternative argument.

Disposition

[165] The judge erred in concluding the marriage agreement operated fairly. He failed to consider how several of the s. 65(1) factors weighed in favour of Ms. Bradley, overlooked Ms. Bradley's indirect contributions to the Argus Group, and incorrectly held the enormous growth in the Argus Group's value was reasonably contemplated by the parties at the time of the marriage agreement.

[166] I find the agreement was not fair because it allowed Mr. Callahan to keep the entire increase in value of the Argus Group despite Ms. Bradley's contributions to the Group's growth over a 17-year marriage.

[167] I would therefore allow the appeal in part and order Mr. Callahan to pay Ms. Bradley \$29 million for her interest in the growth of the Argus Group.

[168] In all other respects, I would dismiss the appeal and affirm the order below.

[169] The parties have 90 days to reach an agreement as to the most appropriate means for Mr. Callahan to effect payment to Ms. Bradley. If they are unable to do so, the parties have leave to return to the court below.

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Justice Fleming"

I AGREE:

"The Honourable Justice Iyer"

[1] [(value at triggering event less value at marriage) times 25%] plus 5% return from triggering event to trial date less lump sum spousal support = $[(\$115,000,000 - \$3,000,000) \times 0.25] + \$9,500,000 - \$8,600,000 = \$29,100,000$ (all numbers approximate).

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