

CANADA / JUDGMENT

C.C. v. S.P.R.

2022 BCSC 1817

COURT

Supreme Court of British Columbia

DECIDED

18 October 2022

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2022 BCSC 1817 C.C. v. S.P.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.C. v. S.P.R.,

2022 BCSC 1817

Date: 20221018

Docket: E61432

Registry: New Westminster

Between:

C.C.

Claimant

And

S.P.R.

Respondent

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

Counsel for C.C.:

M. Verdun-Jones

Counsel for S.P.R.:

M. Lokshin

Place and Date of Trial:

New Westminster, B.C.

May 2-6, 9-13, 16-18, and

June 17, 2022

Written Submissions from the Claimant Received:

June 6, 2022 and

June 21, 2022

Written Submissions from the Respondent Received:

June 13, 2022

Place and Date of Judgment:

New Westminster, B.C.

October 18, 2022

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I. INTRODUCTION

- [1] In this family law trial, the claimant, C.C., and the respondent, S.P.R., brought a number of issues before the court, the primary being the claimant's request for an order relocating the parties' six-year-old child to Kamloops from Vancouver. Given that the relocation decision impacted where the child would attend school, I thought it important to release the relocation decision in advance of the commencement of the school year. Accordingly, on August 30, 2022, I ordered that the child, S.R., should not relocate to Kamloops in reasons indexed as C.C. v. S.P.R., 2022 BCSC 1503. I also granted a divorce order. I deferred giving judgment on the remaining issues of which there are three.
- [2] First, the respondent seeks an order setting aside a prenuptial agreement the parties signed just prior to their wedding. The respondent says he did not obtain legal advice before signing the agreement, did not understand the legal implications of the agreement, and, relative to the claimant, was in a vulnerable position when he signed it.
- [3] Second, the respondent seeks spousal support. The respondent says, as a result of the marriage, he was unable to pursue certain academic and work opportunities, putting him at an economic disadvantage. He also argues that after the marriage his standard of living is significantly lower than the claimant's standard of living.
- [4] Third, the parties seek an order regarding child support for their child, S.R.
- [5] For the reasons that follow, I conclude: (a) the prenuptial agreement is valid; (b) the respondent is not entitled to spousal support; and (c) the child support and s. 7 expenses are to be determined based on the parties' incomes and parenting time pursuant to the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines].
- [6] Due to the age of the child involved in these proceedings, in the interests of privacy, I refer to all parties only by their initials.

II. BACKGROUND FACTS

- [7] In my reasons for judgment for relocation I set out the background facts related to the parties and the facts relevant to the issues of relocation and divorce. In these reasons, for convenience, I will repeat the background facts, but focus on the facts that are relevant to the issues of the prenuptial agreement and support.

A. The Parties and S.R.

- [8] The claimant is 39 years old and was raised in Kamloops, where she has a large extended family. Prior to November 2020, the claimant lived in the Lower Mainland for the previous 15 years. She obtained a Bachelor of Education from the University of British Columbia ("UBC") in 2006. She obtained her Master of Education from UBC in 2016 with a focus on early childhood education. The claimant has worked as a kindergarten to grade three teacher with the North Vancouver School District from 2006 to 2020, except while on maternity or unpaid medical leave. The claimant is currently on maternity leave. She has guaranteed employment as a teacher with either the North Vancouver School District or the Kamloops School District, as both are holding positions for her when her maternity leave ends in September 2023.
- [9] The respondent is 36 years old and originally from Sri Lanka. He moved to Italy with his family when he was a teenager. In 2010, he obtained a Bachelor of Science from the University of Plymouth in the United Kingdom. In June 2017, he obtained a Master of Science in economics and finance from the Università Ca' Foscari Venezia in Venice, Italy. He obtained a Bachelor of Education from UBC in 2019 and is currently employed as an elementary school teacher for the Burnaby School District.
- [10] The parties met on February 24, 2015, while taking a continuing education course at UBC. Before marrying the respondent, the claimant was married to F.D. The claimant and F.D. married in 2008 and lived together at a townhome on Cassiar Street in Burnaby, British Columbia ("Cassiar Townhome").
- [11] The claimant and F.D. separated briefly in 2012, reunited and then separated again permanently in 2015. They entered into a separation agreement in May 2015. As part of the separation agreement, the claimant paid F.D. a lump sum of \$30,000 to remove him from title to the Cassiar Townhome. F.D. stopped living at the Cassiar Townhome in September 2015.
- [12] The claimant and F.D. divorced on November 14, 2015. The claimant and the respondent married ten days later on November 24, 2015, in a small wedding at the Cassiar Townhome. The claimant did not tell her parents she was getting married and appears to have kept it a secret from them for some time. The claimant became pregnant soon after they married. S.R., the parties' only child, was born in September 2016.
- [13] S.R. is currently 6 years old and attended kindergarten at an elementary school in the Lower Mainland during the 2021-2022 school year. The respondent is a teacher at that school. As a result of my relocation decision, I presume that S.R. continues to attend the same elementary school for the 2022-2023 school year and is residing primarily with the respondent in the Lower Mainland.

- [14] The parties disagree on the date their marriage ended. The claimant says that the parties, while still living together, effectively separated in June 2019. The respondent says that the parties separated in September 2020.
- [15] On November 16, 2020, the claimant gave birth to a M., a child she had with E.F., an individual residing in California. The claimant had a second child with E.F. in May 2022 and is currently on maternity leave with that child. While E.F. provides some limited financial support to pay for diapers and baby food, he does not pay child support. He resides in California and is not involved in parenting or spending any significant time with the claimant or her children. The claimant and E.F. are no longer romantically involved.

III. ANALYSIS

A. The Prenuptial Agreement

- [16] On November 1, 2015, the parties signed a prenuptial agreement that provides that assets the parties bring into the marriage will remain each party's property on the breakdown of the marriage (the "Prenuptial Agreement"). The respondent applies under s. 93 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] to set aside the Prenuptial Agreement on three grounds.
- [17] First, the respondent says he had no independent legal advice and was unable to obtain legal advice prior to entering into the Prenuptial Agreement. Without that advice, the respondent asserts he did not understand the "nature and consequence" of the agreement when he signed it.
- [18] Second, the respondent asserts he was in a vulnerable position as compared to the claimant because he wanted to marry her and knew that in order to do so he needed to sign the Prenuptial Agreement.
- [19] Third, the respondent says that, when viewed holistically and given the particular circumstances of this case, the result of the Prenuptial Agreement is unfair.
- [20] After setting out the relevant facts in respect of the Prenuptial Agreement, I will address the respondent's arguments.
- i. Factual Findings Regarding the Prenuptial Agreement
- [21] On the evening of November 1, 2015, the parties invited V.W. and H.W., twin sisters, who were friends of the claimant, to dinner at the Cassiar Townhome. V.W.'s and H.W.'s testimony of what occurred during that evening was consistent. I found both H.W. and V.W. forthright and objective witnesses despite the fact they were better acquainted with the claimant than they were with the respondent. I accept that they both viewed their role as to provide an honest account of what they witnessed during the signing of the Prenuptial Agreement. I also note that their testimony was corroborated by the claimant's testimony regarding the circumstances of the signing of the Prenuptial Agreement.

- [22] V.W. and H.W. both testified that on November 1, 2015, they had a pleasant dinner with the claimant and respondent after which the parties announced that they were going to get married. H.W. testified that the respondent went upstairs and returned with a printed version of the Prenuptial Agreement for the parties to sign and for V.W. and H.W. to witness.
- [23] H.W. testified that the respondent told her that he had taken law courses and that he seemed proud that he had found the Prenuptial Agreement online. H.W. said that, as a teacher, she always asked people about their educational background, thus the reason she had asked the respondent about his education. H.W. testified that the claimant discussed that she had "bought out" F.D.'s share of the Cassiar Townhome and so wanted to ensure it stayed in the claimant's name if her marriage to the respondent failed. H.W. testified that this conversation occurred in the presence of the respondent. Generally, testimony such as the testimony provided by H.W. with respect to statements the respondent or claimant made to her may constitute hearsay. However, in these circumstances the statements are not hearsay because I am admitting them for the sole purpose of proving that the claimant or respondent made the statements to H.W., and not for the truth of their contents.
- [24] In note that on cross examination, H.W. admitted that she did not believe the claimant used the phrase that the claimant wanted the Cassiar Townhome "protected". However, in my view, the message in the conversation H.W. heard was that the claimant did not want to lose any share of the Cassiar Townhome should her marriage to the respondent fail.
- [25] H.W. testified that the respondent seemed relaxed when he signed the Prenuptial Agreement. H.W. further testified that she would not have signed the document as a witness if she sensed that there was any coercion because she has a high level of integrity. The manner in which she presented her evidence regarding her role as a witness to the Prenuptial Agreement, in my view, demonstrated to me the importance to H.W. of providing a truthful account to assist the court with this issue. Further, I accept her evidence because it is corroborated by the evidence of her sister, V.W. and the claimant, as well as the fact that the respondent's academic transcripts are consistent with his statement to H.W. that he had taken some legal courses.
- [26] V.W. testified that the claimant and respondent appeared very happy when they announced they were going to get married. She testified that the respondent appeared very pleased with himself that he found the Prenuptial Agreement online, and went upstairs to obtain the printed copy before returning to have it signed by the parties and witnessed by V.W. and H.W.
- [27] V.W. testified that the claimant explained that she had recently "bought out" her former spouse's share of the Cassiar Townhome. V.W. testified that the claimant stated that she wanted to have a prenuptial agreement with the respondent to secure the Cassiar Townhome in the claimant's name before she married the respondent and in case her anticipated marriage to the respondent failed. V.W. testified that the reasons for the agreement stated by the claimant were made in close proximity to the respondent, such that

he would have heard those reasons. V.W. testified she saw no pressure or coercion applied by the claimant to the respondent in signing of the document and if she had, she would not have signed as a witness.

- [28] Again, if adduced for the truth of their contents, statements made by the claimant to V.W. would constitute hearsay. However, I accept V.W.'s evidence as serving to prove that the claimant communicated to her, in the presence of the respondent, that the purpose of the Prenuptial Agreement was related to the claimant's desire to protect her investment in the Cassiar Townhome. In my view, the relevance of this fact is that the claimant made the respondent aware that as a result of signing the Prenuptial Agreement the respondent would forego his future interest in the Cassiar Townhome.
- [29] The claimant's evidence in respect of the Prenuptial Agreement was that after going through her separation and divorce with F.D. and paying him \$30,000 for his share of the Cassiar Townhome, she wanted to ensure that she did not lose control of the Cassiar Townhome should her marriage to the respondent fail. The claimant wanted to make sure she had a prenuptial agreement to "protect her asset". In cross examination, the claimant testified she would not have married the respondent without a prenuptial agreement.
- [30] The respondent testified that he did not draft the Prenuptial Agreement and that it came from the internet. The respondent testified that he showed the claimant how to convert the document from a PDF format to a Word format and how to remove the watermark from the document. The respondent says that the parties never discussed the Prenuptial Agreement and he understood that the reason he needed to sign it was to make the claimant's father happy. The respondent testified that he did not receive any legal advice and the claimant never informed him that he should obtain legal advice. The respondent testified that the first time he saw the document was on November 1, 2015 - the night it was signed - and that he did not take any time to review the Prenuptial Agreement. He testified that he signed it because he trusted the claimant. Finally, the respondent testified that he had no understanding of the future consequences of the Prenuptial Agreement.
- [31] On the issue of the circumstances surrounding the respondent's signing of the Prenuptial Agreement, I do not find it credible that he had no understanding of the purpose or impact of the agreement. The claimant and respondent were involved with each other during the aftermath of the breakdown of the marriage between the claimant and F.D. It is inconceivable that the parties would not have discussed the claimant's issues surrounding the ownership of the Cassiar Townhome between the claimant and F.D., as well as the claimant's concerns about keeping the Cassiar Townhome in her name after the breakdown of her marriage to F.D. As stated above, this conclusion also accords with the evidence of V.W. and H.W. that during the signing of the agreement, the claimant expressed her concerns about keeping ownership of the Cassiar Townhome as the reason for the agreement.

- [32] I found the respondent's testimony about his disinterest in reviewing the document or his inability to understand the general implications of the Prenuptial Agreement incredible. I find that the respondent was involved in obtaining the draft of the Prenuptial Agreement from the internet and was proud that he had been able to do so for the parties. As I will discuss below, the respondent is well educated and had taken some basic law courses. While no substitute for independent legal advice, in my view, his background provides him with at least some basis to know he could or should obtain legal advice before signing an agreement if he had any uncertainty or concern about its nature or consequences. That he would or should know that signing a document could impact his future legal rights is also highlighted by the additional formal steps taken by the parties to have H.W. and V.W. act as witnesses.
- [33] The Prenuptial Agreement contains a number of relevant clauses for my analysis:
- 1) The agreement is to provide for the "status, ownership, and division of property between" the parties;
 - 2) Each party agrees that they executed the agreement voluntarily; it was not unconscionable when it was executed; prior to executing the agreement they were provided with fair and reasonable disclosure of the property or financial obligations of the other party; and they entered into the agreement "freely and under no duress or undue influence on their decision by the other Party";
 - 3) The parties acknowledge that "they have had an opportunity before signing this Agreement to consult with independent legal counsel in their jurisdiction and of their choice. Notwithstanding, they have chosen to expressly and voluntarily waive their rights to legal counsel";
 - 4) "any Separate Property owned by a Party will be and remain property of that Party and the other party will have no rights and interests in that property";
 - 5) "In the event of a separation, the Parties agree that spousal support may be payable to one of the parties on the basis of the Party's financial circumstances at the time of separation or otherwise. It is understood and accepted by each party that a determination of spousal support will be done so under the appropriate Federal or Provincial laws"; and
 - 6) While the parties acknowledge that the circumstances at the time of executing the Prenuptial Agreement could change, including the passage of time, they agreed that "it is nonetheless their intention to be bound strictly by the terms of this Agreement at all times."
- [34] As will be discussed below, the predominant impact of the Prenuptial Agreement is on the distribution of the proceeds of the sale of the Cassiar Townhome owned by the claimant. While there are other assets covered by the Prenuptial Agreement including vehicles, the parties' pensions, and investments, the only asset of significant value is the Cassiar Townhome.

- [35] The evidence on the values of the Cassiar Townhome at various points in time and the amounts of contributions made by the claimant and the respondent to the mortgage and upkeep of the property were not clear from the evidence. What emerged was that in 2015, the Cassiar Townhome was valued at \$576,000 with a mortgage of approximately \$372,000. On April 19, 2022, the claimant sold the Cassiar Townhome for \$1,200,000. At December 31, 2021, the property had a mortgage with CIBC in the amount of \$412,255.55. The parties agree that if the Prenuptial Agreement is set aside, in order to obtain an accurate accounting of the value of the Cassiar Townhome, the matter needs to be referred to a Registrar's hearing to allow for a reapportionment of the assets. What emerges from these two snapshots of the value of the Cassiar Townhome and its mortgages is that during the 7 years between 2015 and 2022, the debt obligation increased, thus indicating to me that there was more money borrowed against the property than repaid. Although, I note that the specifics of the borrowing against the Property are unclear and it appears there was mortgage refinancing towards the end of the marriage in June 2019.
- [36] The parties comingled their funds. The respondent states that he paid 60% of the salary that he earned working retail at Winners and Marshalls towards payments related to the Cassiar Townhome. However, he was unable to demonstrate with any clarity that he made those payments or how payments were made towards maintaining the Cassiar Townhome. In his testimony, the respondent acknowledged that the claimant "handled the finances".

ii. Discussion

a) Is the Prenuptial Agreement Procedurally Unfair?

- [37] Assessing whether to set aside a prenuptial agreement is a fact-specific exercise and requires a two-step analysis. First, the court must determine if there was procedural unfairness, such as duress applied by one party on the other, a vulnerability used to one party's advantage, or non-disclosure of significant property. If the court finds that there is no procedural unfairness, the second step requires the court to assess whether the agreement is significantly unfair. Sections 93(3) and 93(5) of the FLA set out factors for the court's consideration.
- [38] In *Bartch v. Bartch*, 2019 BCSC 1643 [Bartch], Madam Justice Young explained the process for considering whether an agreement should be upheld under the provisions of s. 93 of the FLA as follows:
- [146] First, the court considers whether the agreement was formed in a procedurally unfair manner under s. 93(3). Second, the court must consider the substantive fairness of the agreement, that is, the agreement's effect. If the agreement was reached by an unfair process, it may nonetheless be upheld if the court would not have replaced it with an order that is substantially different from the agreement's terms: s. 93(4). On the other hand, where an agreement was reached by a fair process, the court may still set it aside if the substance of the agreement is significantly unfair: s. 93(5); see *Asselin v. Roy*, 2013 BCSC 1681 at paras. 125-127.

[39] Section 93(3) of the FLA sets out the four factors a court must consider in determining whether to set aside an agreement:

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.

[40] I do not find that the claimant failed to disclose properties or debt. The evidence is consistent from the claimant, H.W., and V.W. that the purpose of the Prenuptial Agreement was to allow the claimant to keep the Cassiar Townhome in her name if her marriage to the respondent failed. Further, the respondent was aware that a major issue in the claimant's divorce from her first husband, F.D., was the division of the Cassiar Townhome. The respondent was aware that the claimant kept ownership of the Cassiar Townhome by paying \$30,000 to F.D. when she and F.D. separated. The evidence supports a conclusion that the respondent was aware that the purpose of the Prenuptial Agreement was to preserve the Cassiar Townhome for the claimant.

[41] The respondent says that the claimant took advantage of his lack of knowledge of the legal consequences of the Prenuptial Agreement and exploited his vulnerability in wanting to marry the claimant. The evidence is that the claimant would not have married the respondent if he refused to sign the Prenuptial Agreement. In support of his argument, the respondent cites *Asselin v. Roy*, 2013 BCSC 1681 [Asselin] to show the differences between what will be considered fair in the context of family law as compared to commercial matters:

[137] Procedural fairness in family related matters is paramount. Different considerations apply in the negotiations of contracts between spouses, on the one hand, and commercial transactions, on the other. As was said in *Rick v. Brandsema*, 2009 SCC 10 at para. 46:

[46] This contractual autonomy, however, depends on the integrity of the bargaining process. Decisions about what constitutes an acceptable bargain can only authoritatively be made if both parties come to the negotiating table with the information needed to consider what concessions to accept or offer. Informational asymmetry compromises a spouse's ability to do so.

- [42] I note that in *Asselin*, the court's analysis of procedural unfairness was influenced by the fact that Ms. Asselin had already been living with Mr. Roy for at least two years at the time the agreement was signed. Ms. Asselin had thus accrued rights that entering the impugned agreement waived. In the case at bar, the respondent and claimant were preparing to get married and had not yet entered a marriage-like relationship.
- [43] The respondent asserts that the claimant took advantage of his comparative vulnerability and ignorance of his rights because she had recently dealt with and gained knowledge relevant to the issue of property division with her former spouse. Further, the respondent says that he would not have received the claimant's parents' blessing if he did not sign the Prenuptial Agreement and, as such, signed the document under duress.
- [44] I do not find the respondent's argument provides grounds to support the procedural unfairness he alleges. The respondent was free not to sign the Prenuptial Agreement or to seek independent legal advice. The respondent is well educated; at the time the Prenuptial Agreement was signed he held an undergraduate degree and was working on completing his master's degree. I accept the evidence of H.W. and V.W. that the respondent showed no signs of distress when signing the Prenuptial Agreement and that he was pleased and proud with his involvement in obtaining and preparing the agreement.
- [45] In *G.C.G. v. M.J.T.*, 2016 BCSC 1277, the court defined duress as follows:
- [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, including this one, is whether the oppressor's action vitiated the consent of the oppressed party.
- [46] Duress can include threats of violence or economic duress. The focus is on whether the parties entered into the agreement willingly, or whether one of them was deprived of any choice in the matter.
- [47] There is no evidence that the respondent was deprived of the choice to enter into the Prenuptial Agreement, other than his testimony that he felt pressure to sign it to please the claimant's parents. I note that the agreement provides several clauses that state that the parties entered into the agreement "voluntarily" and that "they entered into this Agreement freely and under no duress or undue influence on their decision by the other Party".
- [48] In *C.M.M. v. D.R.M.*, 2014 BCSC 2123 at para. 73, the court held that "emotional distress will be insufficient to constitute duress [citation omitted] and economic duress requires urgent economic pressures that are sufficient to vitiate consent. [citation omitted]". In that case, the court found that C.'s anxiety that her imminent wedding would not go ahead if she did not sign a prenuptial agreement, leading to disappointed relatives, motivated her to enter the agreement. However, the pressure she felt was not sufficient to make out duress or undue influence. The court held that C. was ultimately making a choice for herself "in order to avoid what she perceived to be undesirable consequences not a situation in which she was

deprived of the ability to choose by D's actions": at para. 75.

- [49] The possibility that the claimant would not marry the respondent if he did not sign the Prenuptial Agreement, or the fear that he would not get the claimant's parents' blessing if he did not sign, does not amount to duress. While the evidence is that the respondent did not want to disappoint the claimant or her parents by not signing the agreement, the respondent ultimately made the choice to sign to avoid undesirable consequences. In doing so, the respondent was not denied the ability to choose by the claimant's actions. The respondent's claims of duress and vulnerability are not made out on the facts presented to the court.
- [50] Situations of unequal bargaining power can also be the basis for setting aside a prenuptial agreement. In *Klassen v. Klassen*, 2001 BCCA 445 at para. 59, the court summarized the elements required for a finding of unconscionability as follows: "(i) proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger; and (ii) proof that the purchase was made from the ignorant party at a considerable undervalue".
- [51] On the evidence before me, there was no substantial imbalance in power or knowledge between the parties that led to a fundamental flaw in the negotiation process. While the evidence supports a finding that the claimant had more financial means than the respondent at the time the Prenuptial Agreement was signed, it is not such a financial imbalance as to render the signing of the agreement procedurally unfair.
- [52] The respondent argues that the Prenuptial Agreement should be set aside because he was denied the opportunity to obtain independent legal advice before signing the agreement. While the court considers whether the parties obtained independent legal advice as part of its assessment of whether the agreement was procedurally fair, this factor is not determinative. Although courts are more likely to enforce an agreement if the parties had independent legal advice, the lack thereof is not itself a reason to set aside the agreement. As the court explained in *Bradshaw v. Bradshaw*, 2011 BCSC 1103:
- [49] Independent legal advice, in the family law context, is important because it ensures that the spouses are fully aware of their statutory and common law rights and obligations. It safeguards against one spouse taking unfair advantage of another and redresses or at least minimizes disparity of bargaining power between them: see, for example, *Gurney v. Gurney*, 2000 BCSC 6 (B.C. S.C.) at para. 29, [2000] B.C.J. No. 13 [Gurney]. In *Gurney*, supra, Pitfield J. found that "the lack of independent legal advice in this case is not fatal and the agreement should not be set aside because of its absence" (at para. 30). Indeed, the absence of independent legal advice will not, by itself, invalidate an agreement: *Chepil*, supra, at para. 45, citing *Rosen v. Rosen* (1994), 3 R.F.L. (4th) 267, 72 O.A.C. 342 (Ont. C.A.), leave to appeal ref'd (1995), [1994] S.C.C.A. No. 392 (S.C.C.). Nor will the receipt of independent legal advice automatically cure or neutralize one or both spouses' vulnerabilities; in other words, it will not protect an otherwise invalid or unfair contract: see, for example, *Stark*, supra; *Davidson*

v. Davidson (1986), 2 R.F.L. (3d) 442, [1986] B.C.J. No. 505 (B.C. C.A.), Gold v. Gold (1993), 49 R.F.L. (3d) 41, 82 B.C.L.R. (2d) 165 (B.C. C.A.), leave to appeal ref'd (1994), [1993] S.C.C.A. No. 441 (S.C.C.).

- [53] Thus, where a party simply decides not to retain counsel and there are no other indicia of procedural unfairness, lack of legal advice has not been seen as a significant factor. However, where there are other indicia of procedural unfairness present, a lack of legal advice may take on more importance, as the court explained in *Liu v. Xu*, 2020 BCSC 92:
- [95] Third, the parties did not receive legal advice regarding the SA. Mr. Xu drafted the agreement and neither party obtained professional advice.
- [96] While failure to obtain legal advice does not necessarily result in a separation agreement being set aside, this factor is particularly relevant given the relative financial positions of the parties and the lack of financial disclosure. It is also relevant given the liability that the SA imposes on Ms. Liu, as noted above.
- [54] The respondent cites *A.K.K. v. A.S.K.*, 2021 BCSC 1602 [A.K.K.] for the principle that "persons who do not take advantage of the ability to receive legal advice may not be held to unfair agreements despite their own failures especially where the party seeking to enforce it withheld information or the person is vulnerable": *A.K.K.* at para. 52, citing *Y.L. v. G.L.*, 2020 BCSC 808 at para. 285.
- [55] Having found that the respondent was not in a vulnerable position as compared to the claimant at the time of the signing of the Prenuptial Agreement, I find the circumstances of *A.K.K.* distinguishable. There is no evidence that the respondent was prevented from obtaining legal advice. I also note that the fact-specific nature of the inquiry into the fairness of a marriage agreement leads me to assess the particular circumstances of the respondent. In this regard, the following factors lead me to conclude that the respondent would have known, or should have known, that he had an opportunity to receive legal advice:
- 1) the respondent was well-educated and at the time of signing was working on a master's degree; and
 - 2) the respondent took a number of law courses while attending the University of Plymouth in the United Kingdom:
 - i. Introduction to the English Legal System and Legal Practice;
 - ii. Law of Contractual Obligations;
 - iii. Law of Torts;
 - iv. Criminal Law;
 - v. Business Environment; and
 - vi. Business Finance.

[56] In referencing the respondent's completion of non-law school, university-level legal courses, I am not concluding that he had specific knowledge of Canadian family law matters or was trained to a level approaching that of a lawyer. However, I accept that the respondent, as said in his own words during testimony had, "more than a basic understanding of the law in the United Kingdom". I conclude that this understanding would provide him with, at the very least, an understanding of the importance of obtaining legal advice and a rudimentary understanding that there can be consequences to an individual from signing an agreement. The conclusion that the respondent was aware that he had the right to obtain legal advice is informed by my finding that he was involved in preparing the Prenuptial Agreement and that the agreement contained the following clause:

F. The Parties also acknowledge that they have had an opportunity before signing this Agreement to consult with independent legal counsel in their jurisdiction and of their choice.

Notwithstanding, they have chosen to expressly and voluntarily waive their right to legal counsel.

[57] Again, I do not find the respondent's evidence credible that he did not read the Prenuptial Agreement before signing it. He initialed each page of the document. Further, I accept that he was involved in the preparation of the document and from the evidence of V.W. and H.W. would have known that the primary purpose of the agreement was to keep the Cassiar Townhome beyond his reach.

[58] In light of the factors enumerated in s. 93(3) of the FLA, I find there was no procedural unfairness in the creation of the Prenuptial Agreement. I will now turn to whether, despite being procedurally fair, the Prenuptial Agreement is substantively unfair, as is required by s. 93(5) of the FLA.

b) Is the Prenuptial Agreement Substantively Unfair?

[59] Even if an agreement is procedurally fair, the court must determine whether it is substantively fair under s. 93(5) of the FLA. The standard for setting aside a prenuptial agreement on substantive grounds is that it is "significantly unfair" with respect to: the length of time that has passed since the agreement was made; the intention of the spouses, in making the agreement, to achieve certainty; and the degree to which the spouses relied on the terms of the agreement. Each of these factors must be assessed on the facts of the case in order to assess the fairness of the agreement.

[60] The standard of significant unfairness is a change from pre-FLA legislation, which only required unfairness. Accordingly, the FLA requires a higher standard of unfairness to be met in order for the court to interfere with a freely-negotiated agreement.

[61] As the court noted in *Blom v. Blom*, 2021 BCSC 181 [Blom], the notion of significant unfairness under s. 93(5) of the FLA is constrained and only comes into play if none of the factors of procedural unfairness in s. 93(5) are made out:

- [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 of 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] 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.
- [62] Both parties rely on *Hartshorne v. Hartshorne*, 2004 SCC 22 [Hartshorne] as the leading authority on whether a marriage agreement is unfair. While Hartshorne was decided on the pre-FLA provisions, the parties agree that the case remains good law with regard to its finding that the primary policy objective guiding the courts' role in division of assets on marital breakdown in British Columbia is fairness. The Supreme Court held that courts "must 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. 8; see also para. 34.
- [63] Importantly, the Court held that to be enforceable, a marriage agreement governing the division of property must operate fairly at the time of distribution; otherwise judicial reapportionment of property will be available to achieve fairness: Hartshorne at para. 35. Similar to the provisions of the FLA, enacted after Hartshorne, the Court held that a marriage agreement may be found to have been fair at the time it was executed but unfair at the time it is triggered by the separation. As observed by the Court, one must "consider the fairness of the division of property as contracted under the marriage agreement at a specific point in time. The provisions of a contract could well be fair if the marriage lasted one year and unfair if the marriage lasted 30 years": Hartshorne at para. 37.
- [64] As such, I must consider whether, in the circumstances of this case, upholding the Prenuptial Agreement and thus keeping the parties' property insulated from distribution would be unfair when examined at the time of the breakdown of marriage.
- [65] The respondent argues that the Prenuptial Agreement is significantly unfair because it does not account for the following circumstances that occurred since it was signed in November 2015:
- 1) Since the signing of the Prenuptial Agreement, the parties have had a child, and the respondent cared for the claimant during her maternity leave. In doing so, the respondent delayed completing his master's degree in Italy and his opportunity to earn income;

- 2) The respondent had to incur significant legal fees because the claimant took S.R., without authority, to Kamloops, thus requiring the respondent to initiate court proceedings;
 - 3) During the marriage, the respondent contributed money he earned from his employment, as well as money generated from the homestay students that he says he was more involved in managing, towards the family assets, including the Cassiar Townhome; and
 - 4) During the marriage, the respondent assisted the claimant to finish her master's degree, thus leading to an increased salary for her.
- [66] The respondent relies on *Tian v. Cheung*, 2016 BCSC 950 [Tian] and *Brovkin v. Brovkin*, 2008 BCSC 1602 [Brovkin] as support for his argument that a court will find an agreement unfair if a party makes significant contributions to the family assets during the marriage that were not contemplated at the time the agreement was created. I find those cases distinguishable on their facts.
- [67] In *Tian*, the parties were married for 14 years. During that time Ms. Tian made significant contributions to the matrimonial home in terms of time and effort. Further, and importantly, without a variation of the prenuptial agreement, Ms. Tian would not be able to become and remain economically self-sufficient. In the case at bar, the parties were married for a relatively short time - four years, not 14 as in *Tian*. Further, unlike in *Tian*, the respondent does not need the assets to be financially self-sufficient. In fact, I find that he is economically in a better position now than he was during the marriage. He now has full-time permanent, pensioned, employment as a teacher, largely as a result of the claimant supporting him while he completed his teaching qualifications.
- [68] Similarly, *Brovkin* was decided based on very different facts than the case at bar. In *Brovkin*, the court held that a prenuptial agreement was inherently unfair for a number of reasons including that it did not anticipate that Ms. Brovkin would ultimately have the primary care of the parties' child; that she made significant monetary contributions that would increase the value of the assets owned by Mr. Brovkin; and that she was led by Mr. Brovkin to believe that the document was never to have legal effect, had been destroyed, and that she was to consider that the signing of the document "never happened": at paras. 10 and 36. The facts of *Brovkin* leading to a finding of unfairness are not present in the case at bar.
- [69] In my view, the following factors support a conclusion that the Prenuptial Agreement is not significantly unfair to the respondent. The parties were married for a relatively short time and during that time there was no significant change in their circumstances, other than the birth of S.R. The respondent has not provided compelling evidence to support his claim that he contributed in any significant way to the Cassiar Townhome to increase its value. The claimant brought the Cassiar Townhome with her into the marriage. In respect of non-monetary contributions, on the evidence before me, I accept that both parties contributed towards S.R.'s caregiving during the marriage, but given the claimant was on maternity leave with S.R. during his first year and the respondent was working, I accept that the claimant provided significantly more caregiving to S.R. than did the respondent.

- [70] Financially, the banking documents support the view that the claimant made greater contributions to the Cassiar Townhome than did the respondent. While the parties' funds were comingled, I accept that for the majority of the marriage the claimant's income was higher than the respondent's income and that the respondent did not contribute in any significant manner to the funds required to maintain the Cassiar Townhome. The respondent conceded in his written submissions that the claimant assisted him financially in completing his graduate education and his teaching degree by transferring funds to him in excess of \$11,000.
- [71] I similarly reject the respondent's argument that he should be credited for money earned from the homestay program because he was more involved in providing meals to the homestay students. Although both parties were involved to some extent in making meals for the homestay students, the evidence was unclear as to each party's relative contribution to meal-making. I was left with the view that the homestay students often made their own meals in their rooms or did not eat with the parties, in part due to the tension and conflict that was occurring between the parties as their relationship deteriorated.
- [72] In any event, I find that what ultimately generated the homestay income is the capital asset of the Cassiar Townhome itself. In other words, it is the capacity of the Cassiar Townhome to house the students that is the main source of the income, not the meals or other services provided by either the claimant or the respondent. As the owner of the Cassiar Townhome, I conclude that the claimant's ownership of the Cassiar Townhome was the driving force behind generating the homestay income.
- [73] I also find that the parties had a shared intention in making the Prenuptial Agreement to achieve certainty regarding their assets. I accept the evidence of the claimant that because she had already gone through a separation from her former husband--where division of the Cassiar Townhome was an issue resolved only when the claimant bought out her ex-spouse--she did not want to repeat that experience. This evidence was corroborated by H.W. and V.W., who both testified that during the evening on which the Prenuptial Agreement was signed there was conversation that the purpose of the agreement was to prevent the claimant from losing the Cassiar Townhome should the marriage fail.
- [74] In this regard, I do not accept the respondent's evidence that he was unclear regarding the purpose or effect of the Prenuptial Agreement. The respondent was in a relationship with the claimant when she was untangling her financial matters from her first marriage. These issues included the division of the Cassiar Townhome between the claimant and her former husband F.D. From that fact flows the reasonable inference that the respondent was aware of the claimant's concern about potentially losing the Cassiar Townhome if her second marriage failed.
- [75] In respect of the criteria under s. 93(5)(c) of the FLA, I find that the parties relied on the Prenuptial Agreement. The evidence is that the mortgage for the Cassiar Townhome was paid from the bank account the claimant shared with her mother. While the respondent

made occasional contributions to that bank account, and certain funds were comingled, there was no evidence that he was responsible for paying the mortgage. Further, the only evidence of a discussion to add the respondent on title to the Cassiar Townhome was when the respondent discovered that the claimant was pregnant with E.F.'s child. The evidence from the claimant regarding this event was that the respondent stated that in exchange for the claimant putting the respondent's name on title to the Cassiar Townhome, the respondent was willing to give the child that the claimant was having with E.F. the respondent's last name and raise it as his own. In my view, this demonstrates, at least to some extent, that the respondent was aware that he had no entitlement to the ownership of the Cassiar Townhome unless his name was added to the title which undermines his argument that he was unaware of the consequences of the Prenuptial Agreement. It appears to me that in that moment the respondent was attempting to leverage the claimant's potential vulnerability of having another child to, in effect, negotiate setting aside the terms of the Prenuptial Agreement. To my thinking, this demonstrates that the respondent was aware of both the nature and consequence of the Prenuptial Agreement on his entitlement to a share of the Cassiar Townhome.

[76] In summary, the following factors persuade me that upholding the Prenuptial Agreement is not substantially unfair:

- 1) The marriage was relatively short in duration, lasting less than four years. In this regard, as set out below, I have concluded that the date of separation is June 19, 2019;
- 2) The parties married less than one year after meeting each other;
- 3) The respondent entered the marriage with few assets, while the claimant had the significant asset of the Cassiar Townhome;
- 4) Based on the incomes of the parties during the marriage and the financial evidence, including the bank statements and bills, the respondent contributed little to the maintenance of the Cassiar Townhome including the mortgage or utilities. The evidence was that the respondent did not make any payments for the strata fees or special levies related to the Cassiar Townhome; and
- 5) The Prenuptial Agreement did not exclude the option for child or spousal support.

[77] In note that, Justice Bernard considered these considerations as relevant to his determination as to whether to uphold a prenuptial agreement in *Reischer v. Reischer*, 2006 BCSC 772.

[78] Courts are clear that whether to set aside a prenuptial agreement is a fact-specific exercise. I am satisfied that the manner in which the Prenuptial Agreement was entered into was not procedurally unfair. Further, I am satisfied that the result of the Prenuptial Agreement is not significantly unfair. In so doing, as will be discussed below, I have considered the relevant financial circumstances of the parties, including their relatively close incomes and future earning capacities and that child support will most likely be payable from the claimant to

the respondent given S.R. is residing primarily with the respondent.

- [79] In concluding to uphold the validity of the Prenuptial Agreement, I have also considered the effect of my denial of the respondent's claim for spousal support. In my view, even with no entitlement to spousal support from the claimant, upholding the Prenuptial Agreement does not result in an unfair distribution of assets when the totality of the parties' post-marriage financial circumstances are considered. To this end, I note that despite my conclusion that the respondent is not entitled to spousal support, the Prenuptial Agreement did not preclude me from making such a finding as the agreement did not limit the parties' ability to seek spousal support.
- [80] Given the foregoing, I conclude that the Prenuptial Agreement is valid and so the parties will retain all assets and debts in their names and those assets do not need to be distributed between the parties.

B. Child Support and Section 7 Expenses

- [81] The child support amounts largely follow my decision on relocation because that determination and related parenting time arrangements set the time that S.R. spends with each parent. While I did not calculate the parenting time specifically flowing from my relocation decision, I presume that my determination on the parenting time arrangement results in the claimant having less than 40% of S.R.'s parenting time.
- i. Discussion - Child Support
- [82] As mentioned above, both parties are elementary school teachers in the British Columbia public school system. The respondent's income for 2021 was \$70,672.21, but he expects raises of approximately \$3,000 each year. Due to her greater seniority, the claimant, when not on maternity leave, earns more than the respondent with a potential annual income of between \$94,000 and \$97,000. As she is currently on maternity leave, she earns approximately \$40,000 per year consisting of employment insurance benefits and a school board "top-up".
- [83] I conclude that there is no reason to deviate from the methodology or amounts set out in the Guidelines and that the parties should calculate child support based on their current incomes and on the basis of the amount of parenting time. Based on my determination that S.R. will primarily reside with the respondent and the assumption that the claimant has less than 40% of S.R.'s parenting time, I order that s. 3 of the Guidelines be used to determine the amounts of table support that the claimant will pay to the respondent with no set-off required.

- [84] The claimant suggests that for the purpose of calculating S.R.'s current child support, the claimant's income should be set at \$40,000, as it approximates her maternity income. The claimant also submits that the respondent's income for Guidelines purposes should be set at \$70,672.21, the amount set out in his most recent Form 8 Financial Statement. I accept that these are appropriate amounts to commence the calculation of child support from September 1, 2022, until amounts are recalculated should the parties' income change.
- [85] I order that the support amounts should commence on September 1, 2022, to reflect the change in parenting time, if any, that resulted from my August 30, 2022, decision and will continue going forward based on the parties' incomes.
- [86] Further, in order to account for the parties' potential changing incomes, I order that, unless agreed to in writing by the parties, the parties are to exchange financial information--including their line 150 income and Notices of Assessment--each year no later than June 1, for the purposes of adjusting the child support amounts set out under the Guidelines.
- [87] Finally, the respondent argues that he has overpaid child support by the amount of \$3,686 as a result of the Madam Justice Norell's order of June 18, 2021. His argument is based on his assertion that Norell J. accepted the claimant's position that her income was \$16,512 during her maternity leave, but this was inaccurate because it failed to account for the "top-up" paid by her employer bringing her income during that time to \$40,000. I agree with the respondent that if the s. 9 Guidelines child support was based on the claimant's erroneous representation of her income during her maternity leave, the respondent is entitled to reimbursement for the amounts he overpaid. It is trite to say that it is crucial that if using the table amounts under the Guidelines to calculate child support, the parties' income should be accurate. Having made this observation and order, I leave it to the parties to calculate the amounts of any retroactive child support owing from the claimant to the respondent based on her underpayment. If the parties are unable to reach agreement on the retroactive amounts owed by the claimant to the respondent, or the time periods for which retroactive child support is owed, they have leave to appear before me for the purpose of making that determination.

ii. Discussion - Section 7 Expenses

- [88] In submissions, the parties indicated that, at this point, s. 7 special and extraordinary expenses are not an issue. As such, I leave it to the parties to agree to s. 7 special and extraordinary expenses should they arise in the future. I express that before incurring an expense a party believes is special or extraordinary, the parties should obtain, in writing, the other party's consent to that expense. Further, unless agreed to in writing to the parties, I would expect that the s. 7 expenses should be shared between the parties in proportion to their incomes for that year, as adjusted each year from July 1 to June 30 in the subsequent year. Finally, I would expect that the party seeking reimbursement of a s. 7 expense maintain receipts for the expense and provide the other party a copy of the receipt on demand.

[89] For greater clarity and to assist the parties in calculating the amount of child support and, potentially, s. 7 expenses in the future, I order that the parties shall, unless they agree in writing to other arrangements:

- 1) make best efforts to file their income tax returns promptly each year within the mandated filing deadlines; and
- 2) by June 1 each year the parties will exchange copies of filed income tax returns, together with copies of all schedules, information slips and receipts, and a copy of the Notice of Assessment once issued by the Canada Revenue Agency.

C. Spousal Support

[90] The respondent seeks spousal support from the claimant. While the claimant initially sought spousal support from the respondent, she no longer pursues that claim.

i. The Law

[91] Section 15.2(4) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [Divorce Act] sets out the factors a court must consider when determining whether to make a spousal support order:

In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[92] Section 15.2(6) of the Divorce Act lays out the objectives of spousal support:

An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[93] There are three grounds upon which to base a claim for spousal support: (1) contractual; (2) compensatory; and, (3) non-compensatory. The respondent's primary position in respect of a claim for spousal support is based on a compensatory claim. In other words, the respondent asserts he suffered an economic loss or economic disadvantage as a result of the marriage. The respondent also argues that he is in economic need and so the claimant should be responsible for raising his standard of living by making a lump sum spousal support payment to him. While the contractual basis was not raised by the respondent as a ground for spousal support, the claimant argues that there is no contractual obligation to support the respondent and if there were, she has satisfied that obligation because she sponsored the respondent for a period of three years during his Canadian immigration process.

[94] I will now address the respondent's claim for compensatory and non-compensatory spousal support.

[95] The purpose of compensatory claims for spousal support are well-summarized in *The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version*, Rogerson and Thompson, March 2010, as referenced in *Morigeau v. Morrey*, 2015 BCCA 160 at para. 34, as follows:

Compensatory claims are based either on the recipient's economic loss or disadvantage because of the marriage (typically a loss of earning capacity) because of the roles assumed during the marriage or on the recipient's conferral of an economic benefit on the payor without adequate compensation. While compensatory claims in theory require an individualized assessment, in practice, in long marriages with children, the marital standard of living is used as a proxy measure of compensatory gains and losses.

[96] A summary of non-compensatory spousal support was aptly summarized by Shergill J. in *S.A.H. v. I.B.L.*, 2018 BCSC 544:

[163] Non-compensatory spousal support is "grounded in the 'social obligation model' of marriage, in which marriage is seen as an interdependent union" (Chutter para. 54) or a "joint endeavour" where the "default presumption of this socio-economic partnership is mutuality and interdependence" (Bracklow (para. 20).

[164] Upon marriage dissolution, it falls on the former partner to meet the needs of a disadvantaged spouse, not the state: Chutter at para. 54. "Need" alone may be sufficient to ground a claim for spousal support: *Bracklow v. Bracklow*, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420, at para. 43.

[165] "Needs" are something more than basic necessities and may vary according the circumstances of the parties and the family unit: Chutter at para. 55. Importantly, "need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. Rather, it is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

[166] Similarly, economic self-sufficiency is a relative concept, which is "informed by the standard of living previously enjoyed by the parties": Chutter at para. 56, quoting the Ontario Court of Appeal in *Allaire v. Allaire* (2003), 2003 CanLII 26263 (ON CA), 170 O.A.C. 72, 35 R.F.L. (5th) 256. As the court noted in *Fisher*, "[S]ection 15.2(6)(d) of the Divorce Act promotes the objective of economic self-sufficiency only if it is "practicable" to do so and where the objective can be realized "within a reasonable period of time"" (*Fisher* at para. 52).

[167] In *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813 at 870, the court held that the parties' standards of living are relevant considerations in determining spousal support:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. ... As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

[Citations omitted.]

ii. Discussion

[97] The respondent argues that he delayed and reduced his educational employment pursuits because the parties married and had a child. He argues that his entitlement to spousal support is contingent on the court's decision regarding whether to uphold the Prenuptial Agreement because that decision impacts the funds each party will receive from the proceeds of the sale of the Cassiar Townhome. Citing *Robinson v. Robinson*, 2012 BCCA 497 and *K.K.C. v. A.P.C.*, 2003 BCCA 295 the respondent argues that in the circumstances of this case, it is appropriate for the court to make spousal support in a lump sum amount, due to the fact the claimant does not have the income to make monthly payments but has capital to pay spousal support.

[98] Having found that the Prenuptial Agreement is valid such that the respondent is not entitled to any amount from the proceeds of the sale of the Cassiar Townhome, I must include that factor in my determination as to the respondent's entitlement to spousal support. For the reasons that follow, I am satisfied that the respondent is not entitled to spousal support.

[99] As public school teachers with similar levels of educations, both parties have relatively equal incomes, earning capacities, benefits and pensions. Further, over time as the respondent gains more seniority as a teacher the gap between the claimant's and respondent's income

will lessen. The evidence is that the claimant's income would be approximately \$97,000 if employed as a teacher in the North Vancouver School District and \$94,000 if employed as a teacher in the Kamloops Regional School District. Based on his most current financial statement filed on April 1, 2022, the respondent earned \$70,672.21 in 2021. He testified that he expects his teaching salary to increase by approximately \$3,000 each year. While not in evidence, I expect that the respondent's income will eventually reach a ceiling based on seniority at a level approximately equal to the claimant's income, in light of the parties' similar education levels and the fact they are both elementary public school teachers. Further, the claimant is currently on maternity leave and has been on maternity leave for three of the past seven years where she earns approximately \$40,000 after the school board "top-up" to her employment insurance benefits. As such, since the respondent started his teaching career, on average, he is earning more income than the respondent.

[100] Given the relative parity in their current and future incomes, I find that spousal support is not required to achieve similar standards of living between the parties and to keep the respondent in similar circumstances as he was when he was married to the claimant. Accordingly, on a "needs based" non-compensatory analysis, I conclude that the respondent is not entitled to spousal support.

[101] In respect of the respondent's claim for compensatory spousal support, the evidence does not support his claim that he is in a worsened economic situation than he otherwise would have been as a result of his marriage. To the contrary, the evidence provides that the claimant largely supported the respondent financially as he engaged in various academic pursuits during the marriage. The claimant supported the respondent's educational and professional development in the following ways:

- 1) The claimant assisted the respondent with completing the Law School Admission Test;
- 2) The claimant helped the respondent get into a Certified Public Account ("CPA") course;
- 3) The claimant helped the respondent finish his master's degree both by assisting him with completing his thesis and financially;
- 4) The claimant paid for the respondent to take courses at Thompson Rivers University that he required to qualify for his teaching degree at UBC; and
- 5) The claimant financially supported the respondent when he attended UBC for his education degree.

[102] There is no evidence to support that the claimant personally, or the marriage generally, are responsible for the respondent not pursuing law school or a CPA designation. My view of the evidence is that during most of the marriage the respondent held low-paying retail positions at Winners and Marshalls while the claimant assisted him in taking courses to ultimately earn more income as a teacher. The claimant thus provided significant support to the respondent during their four years of marriage that enhanced the respondent's ability to earn a higher level of income. Put another way, when viewed holistically, I find

that the respondent benefitted economically from his marriage to the claimant, rather than the marriage being a financial detriment to him.

- [103] In respect of domestic tasks, as set out above in my consideration of the parties' contribution to the family household for the purposes of addressing the validity of the Prenuptial Agreement, the evidence supports that while the claimant and the respondent generally shared domestic tasks, the claimant provided more caregiving duties to S.R. during her maternity leave. I found no evidence to support the view that the respondent contributed in a sufficiently significant way to justify an award of spousal support on the basis that his contribution to the marriage endeavour was to his economic detriment.
- [104] Given the factors in 15.2(4) of the Divorce Act, including that the parties did not cohabit for a lengthy period of time and that they performed relatively equal functions while they cohabited - except to the extent that the claimant performed more caregiving for S.R. due to her maternity leave and the respondent's work schedule during that time, I dismiss the respondent's claim for spousal support.
- [105] In respect of the respondent's argument that the parties are now in different economic circumstances such that the claimant is in a superior financial situation, I find that the claimant's current economic well-being is largely, if not entirely, a function of the generosity of her parents and the benefits of her living situation in Kamloops. In my view, the fact that her parents are able to provide her with subsidised accommodation and low-cost child care has no bearing on whether the respondent is entitled to spousal support. These are not factors that relate to the parties' current incomes or earning capacity, nor to the contributions or sacrifices made by either party during their marriage.
- [106] As a final comment on the issue of spousal support, I note that in coming to my conclusion, I have considered the impact of upholding the Prenuptial Agreement on the parties' future economic circumstances. Finding the Prenuptial Agreement valid results in additional funds from the sale of the Cassiar Townhome flowing to the claimant but not the respondent. Even with the funds from the sale of the Cassiar Townhome not being shared between the parties, I find that, in the circumstances of this case, the claimant is not obligated to pay the respondent spousal support on either a compensatory or non-compensatory basis. In my view, there are no compelling grounds that the respondent either sacrificed economic opportunities because he married the claimant or that he has such a level of ongoing economic need that an award of spousal support is warranted.

D. Date of Separation

- [107] The parties disagree on their date of separation, with the claimant arguing that the parties separated in June 2019, and the respondent arguing that they separated in September 2020.
- [108] I have not awarded the respondent spousal support nor have I made any findings with respect to the valuation of family property at a certain point in time in these reasons given my decision to uphold the Prenuptial Agreement. It is therefore not necessary for me to

determine the parties' date of separation. However, I elect to provide the parties a determination of their date of separation, given that: (a) the parties disagree on this issue; (b) the parties argued this issue during these proceedings; and (c) a determination of the issue may have implications for the parties' possible future claims, obligations or entitlements.

[109] The claimant articulates her claim that the parties separated in June 2019 in her written submissions:

The parties disagree on their date of separation -- the Claimant states that the parties separated on or about June 2019 while the Respondent states that the parties separated on September 5, 2020. The Claimant testified that she communicated her intention to end the parties' relationship to the Respondent since on or about June 19, 2019 and insists living separate and apart since that time. The Claimant further testified that the parties did not have sexual intercourse after June of 2019 and were not romantic in any way. The Claimant's parents also confirmed their observations that the parties' behaviours were consistent with two people being separated after June of 2019. For example, the Claimant's parents confirmed that the parties slept in separate rooms after June of 2019 when they observed them.

[110] The respondent counters that the parties and their child, viewed holistically, continued to function as a family unit after June 2019 and until September 2020. The respondent sets out the basis of his claim for a later date of separation in his written submissions:

[207] Even on [the claimant's] version of events, they lived as a family for [S.R.] from June 2019 onwards and this, even without an active romantic component, can constitute a marriage-like relationship (that is, the common-law standard for a spousal relationship). The authorities are clear that such relationships come in many forms, and while there are factors that are often characteristic of a marriage-like relationship, they are not a checklist: *Mother 1 v Solus Trust Company*, 2019 BCSC 200. Many of the factors applied to the parties in this case, even if were accepted that their relationship was not romantic during this period. Like in *S.A.H. v. I.B.L.*, 2018 BCSC 544, discussed at paragraph 62, their day to day life was quite similar after the alleged date of separation - among other things, they continued financial inter-dependence, continued to reside under the same roof, parent their child together, and take family vacations together.

[111] Given the positions of the parties, the court must decide whether the parties separated in June 2019, September 2020, or some other date.

i. The Law

[112] The first relevant principle in this case is that spouses can separate even if they continue to inhabit the same dwelling. The seminal case of *Rushton v. Rushton* (1968), 2 D.L.R. (3d) 25, 1968 CanLII 606 (B.C.S.C.) articulated this principle as follows (at 27):

The words "separate and apart" are disjunctive. They mean, in my view, that there must be a withdrawal from the matrimonial obligation with the intent of destroying the matrimonial consortium, as well as physical separation. The two conditions must be met. I hold that they are met here. The mere fact that the parties are under one roof does not mean that they are not living separate and apart within the meaning of the Act. There can be, and I hold that here there has been, a physical separation within the one suite of rooms.

[113] In *Nearing v. Sauer*, 2015 BCSC 58 [Nearing], the court further clarified that a disagreement between the parties as to their separation does not preclude a judicial finding of separation. Instead, where there is no meeting of the minds on the intention to separate, courts will generally examine whether one party intended to live separate and apart and took "action consistent with that intention": at para. 54. The court explained that, in practice:

[56] when the parties dispute the date of separation, the court's analysis focuses on the generally accepted characteristics of marriage including the intention to remain married, having sexual involvement, carrying on activities in public, sharing financial resources and sharing significant family events. The court will also consider a range of other factors, including a clear statement by one of the parties of his or her desire to terminate the relationship. Sexual involvement, or lack thereof, is not conclusive.

[114] Building on *Nearing*, the court in *H.S.S. v. S.H.D.*, 2016 BCSC 1300, rev'd on other grounds 2018 BCCA 199 [H.S.S.], reframed the approach to dates of separation as follows:

[40] The legal framework for determining that spouses have lived separate and apart requires that the Court find, first, an intention of one spouse to repudiate or end the marital relationship and, second, action consistent with that intention. The parties disagree on whether that action must include an unambiguous verbal expression of his or her settled intention.

[42] The Court's task is to assess objectively, on the totality of the evidence, whether one spouse held a settled intention to separate and communicated that intention through his or her conduct to the other spouse. An express statement is only one of the factors for consideration in what is necessarily a contextual analysis.

[115] The framework articulated in *H.S.S.* largely mirrors the conclusions of the court in *Charen v. Charen*, [2018] B.C.J. No. 3152:

[45] In *S.A.H. v. I.B.L.*, 2018 BCSC 544 at paras. 49-54, I reviewed the various authorities respecting the determination of the date of separation. Based on my reading of the authorities, I concluded at para. 55 that this was a fact driven exercise which could be aided by answering the following questions:

1. Did at least one spouse have the intention to separate?
2. Was the intention to separate communicated to the other spouse?

3. Was the intention to separate acted upon? In other words, using generally accepted characteristics of marriage, did one or both spouses take action that is consistent with the separation, such as:

- a. changing how they behaved with each other in public; and
- b. changing how they behaved with each other in private.

[116] The authorities caution that while the parties' subjective intentions are relevant, they are not necessarily determinative: *O.C. v. K.C.*, 2016 BCSC 72 at para. 18. In *Bartch* at para. 94, the court helpfully summarized a non-exhaustive list of factors to be considered in determining spousal separation, referencing *Coupar v. Roh*, 2014 BCSC 1392:

- the lack of changes to distinguish the relationship before moving into separate residences and after moving into separate residences: para. 73;
- regular interaction between the parties including occasional dining out or attending events together: para. 74;
- continuing to perform domestic services, cooking, cleaning and laundry: para. 83;
- continuing to attend social functions together: para. 84;
- making gifts to one another: para. 85;
- taking vacations together: para. 86;
- neither party becoming involved in another relationship: para. 87;
- continuing to share the common use of assets: para. 88; and
- whether one party told the other party of the intention to permanently end the relationship: para. 90.

ii. Discussion

[117] Based on the evidence before me I accept that the parties separated in June 2019. My conclusion is based in large part by the extensive evidence of the parties and witnesses regarding the acrimony and tension that existed between the parties after June 2019.

[118] I accept the claimant's evidence that the parties, while living under the same roof, were living separate and apart in terms of their daily lives. The claimant's father testified that in June or July 2019, the respondent called him and said "We're done", referring to the respondent's marriage with the claimant. While this is hearsay as to the truth of that statement, I accept it as evidence of whether the respondent held out to others that he and the claimant continued to be living as a married couple. The claimant's father also testified that on any visits to Kamloops after June 2019, the parties did not act as a couple and stayed in separate rooms. This evinces that the parties were not presenting themselves to the public, or at least their family, as married, especially given the accompanying disharmony

between them that was observed by the claimant's parents during those visits.

- [119] The claimant testified that the last time the parties had sexual contact was June 18, 2019, and before that was in January 2019. I accept the claimant's testimony that while the parties were trying to show they were a couple for S.R. in public, they were privately living separate lives. I accept that the claimant would stay out late when the respondent returned from work because she was uncomfortable being at the Cassiar Townhome with the respondent.
- [120] I also accept that claimant's testimony regarding the purpose of seeing a counsellor, Dr. W., was to try to better co-parent S.R. and not to reconcile or repair the marriage. Another factor I conclude supports the claimant's version of events with respect to the date of separation is her relationship with E.F. during the time she says she was living under the same roof with, but separately from, the respondent.
- [121] The claimant testified that she met E.F., online, in 2017 at a food forum, and met him in person for the first time in Hawaii in December 2019. Between December 2019 and March 2020, the claimant met with E.F. about six or seven times. In approximately February 2020, the claimant became pregnant with E.F.'s child. Although not determinative, I find that the claimant's relationship with E.F., which developed as a long distance relationship over the months leading to their first in-person meeting in December 2019, supports her claim that she and the respondent were not living in marital circumstances from June 2019 onward. At the very least, these facts casts serious doubt on the accuracy of the respondent's claim that the parties were in a marriage-like relationship until September 2020. The claimant's involvement in another romantic relationship militates in favour of finding separation: Bartch at para. 94.
- [122] I accept that the parties' continued to live together and have comingled finances until well into 2020, but I do not find those factors sufficient to find that they continued in a marriage-like relationship. I also accept that the onset of the COVID-19 pandemic and its associated uncertainty in early 2020 may have complicated and delayed the parties' ability to untangle their communal lives especially given the fact they were caring for S.R.
- [123] I note that the respondent has not provided compelling evidence that the parties remained together in a marriage-like relationship until September 2020. For instance, the respondent provides scant evidence that the parties continued to attend social events together or continued to interact with each other privately, for example, by dining out together or socializing as a couple.
- [124] Given the foregoing, I am satisfied that the parties separated in June 2019. I accept that the claimant expressed and acted on an intention to separate, and in particular there was a significant change in the romantic and sexual behaviour of the parties. Balancing these facts against the largely undetailed evidence of the respondent leads me to accept that the parties separated in June 2019.

IV. COSTS

- [125] In rendering my decision on relocation, I deferred making my decision regarding costs until all issues at trial were resolved. In my view, the primary issue at trial in terms of evidence tendered, complexity and time required was relocation. Further, the relocation issue was largely determinative of the child support issues.
- [126] The general rule in respect of costs is that the party who is substantially successful is entitled to their costs: *Gold v. Gold*, 106 D.L.R. (4th) 452, 1993 CanLII 1248 (B.C.C.A.) [*Gold*] at para. 19. This general rule accords with the principle, entrenched in Rules 16-1(7) and 16-1(9) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules], that costs follow the event.
- [127] *Gold* has been interpreted as setting the standard of "substantial success" for the recovery of costs: see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref'd, 2002 BCCA 454 at para. 45 [*Fotheringham*]; *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16; and *Meghji v. British Columbia (Ministry of Transportation and Highways)*, 2014 BCCA 345 at para. 13 [*Meghji*]. In *Fotheringham*, Justice Bouck determined that substantial success is equated with a party achieving approximately a 75% success rate. Bouck J. wrote:
- [45] [S]ubstantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.
- [128] I am mindful that there is discretion in ordering costs and courts should always attempt to achieve fairness. As held by the Court of Appeal in *Meghji*:
- [15] The exercise of our discretion should not be exercised by counting up the number of issues raised and making costs directly proportional to the ratio of success to failure but, rather requires us to look at the appeal as a whole and to seek to craft a result that achieves a measure of fairness.
- [129] Given the foregoing, I order that respondent is entitled to 70% of his costs under the Rules. In my view, proportioning the costs in this manner is fair in that it acknowledges the respondent's success on relocation, the major issue in trial, but recognizes the claimant's success on the issues of the validity of the Prenuptial Agreement and spousal support.
- [130] If the parties wish to make further submissions on costs, they may do so by providing written submissions and arranging to appear before me through the Registry.

V. CONCLUSION

- [131] I wish to express my thanks to counsel for both parties for their capable and effective work in presenting the case to the court.

"Gibb-Carsley J."

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