
CANADA / JUDGMENT

De Medeiros v. Hodgson

2018 BCSC 408

COURT

Supreme Court of British Columbia

DECIDED

15 March 2018

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2018 BCSC 408 De Medeiros v. Hodgson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

De Medeiros v. Hodgson,

2018 BCSC 408

Date: 20180315

Docket: E51820

Registry: Kamloops

Between:

Tiberio Manuel De Medeiros

Claimant

And

Judy Diane Hodgson

Respondent

Before: The Honourable Mr. Justice Tammen

Reasons for Judgment

Counsel for the Claimant:

Joaquin A. Mariona

Counsel for the Respondent:

Mary N. Fus

Place and Date of Trial:

Kamloops, B.C.

August 15-18 and

September 19 and 20, 2017

Place and Date of Judgment:

Kamloops, B.C.

March 15, 2018

INTRODUCTION AND OVERVIEW

- [1] At the core of this litigation is the validity and legal effectiveness of a separation agreement drafted by the respondent, Judy Hodgson, following the breakdown of the parties' relationship after almost a decade of generally happy co-habitation. The relationship ended abruptly at the end of January 2015. By that time, the claimant, Tiberio De Medeiros, had commenced a new relationship with his current spouse and, upon learning of that fact, Ms. Hodgson terminated their relationship. She drafted a separation agreement which both parties signed in the presence of witnesses at a pre-arranged meeting at a local Burger King restaurant on February 2, 2015.
- [2] Mr. De Medeiros asks the Court to set the separation agreement aside, and to then divide all family assets equally between the parties. The agreement contains a provision for indefinite spousal support of \$1,000.00 per month to be paid to Ms. Hodgson by Mr. De Medeiros. Mr. De Medeiros seeks to have that clause set aside retroactively. At the conclusion of trial, I ordered that Mr. De Medeiros should pay the amount by which he was then in arrears into the trust account of counsel for Ms. Hodgson, and that once he became current on those obligations, they would cease, pending this decision.

THE PARTIES' RELATIONSHIP

- [3] The parties met in April 2005 when Mr. De Medeiros rented a room from Ms. Hodgson in a townhouse she owned on McKinley Terrace in Kamloops, B.C. ("McKinley Townhouse"). At that time, Ms. Hodgson was living in the townhouse with her son, who was in grade 12. She was single, having been divorced from her first husband, and long separated, although not formally divorced, from her second husband. She also has an adult daughter, who did not live with her. Ms. Hodgson was 48 years old. Mr. De Medeiros was also single, having never been married, but the father of two children with two different partners, from whom he was estranged. He was 35 years old.
- [4] At first, Mr. De Medeiros paid \$400.00 per month rent to Ms. Hodgson, generally in cash, since he had no bank account at the time, and cashed his paycheques at Money Mart. The parties disagree about when Mr. De Medeiros ceased paying rent, and thus there is

disagreement about when the parties commenced a "marriage-like relationship". They agree that the relationship became an intimate or romantic one within a very short time, and that they considered May 5, 2005 to be a date which commemorated the commencement of their romance.

- [5] In due course, the parties became engaged, and although they discussed various marriage scenarios, formalizing their union in that fashion was at all times impossible, since Ms. Hodgson remains married to her second husband. Ms. Hodgson testified that being engaged was important to her, but that she was content to remain so indefinitely.
- [6] Throughout the relationship, Ms. Hodgson was employed as an enforcement officer for the Family Maintenance Enforcement Program ("FMEP") within the Ministry of Attorney General, a position that she had held for 20 years by the time of trial. Mr. De Medeiros was a journeyman ironworker, and had varied work postings for different employers, often out of province. Most years, Mr. De Medeiros earned over \$100,000.00. During the relationship, his annual earnings were generally twice that of Ms. Hodgson.

1. Handling of Finances

- [7] The evidence is clear that the couple never had a relationship that involved substantial commingling of funds and assets. They had a system of sorts in place to manage their joint fiscal affairs which, to use a trite phrase, worked until it did not. Ms. Hodgson was an extremely organized and thrifty person. Mr. De Medeiros was extremely disorganized in his financial affairs, and much more free spending than Ms. Hodgson. To use one small example from Ms. Hodgson's evidence, she might buy items on sale at the grocery store and make a meat and pasta dish on her night to cook dinner. Mr. De Medeiros might purchase steak and lobster and prepare a gourmet spread on his night to cook. He loved to cook, and Ms. Hodgson clearly appreciated his largesse, but she was clear that she could not afford such things on her budget. Over the years, many of which found her raising two children as a single parent, Ms. Hodgson understandably became accustomed to living within the confines of a well-managed budget. Mr. De Medeiros, on the other hand, was accustomed to only providing for himself, and seemed to be totally unconcerned with budgetary constraints.
- [8] Mr. De Medeiros' fiscal affairs were in a significant state of disarray in 2005. Ms. Hodgson assisted him in putting them in order. Through her employment, she learned that he was in arrears of child support obligations, and she advised him how to get current, which he did. He was then able to open bank accounts and cease using Money Mart to cash his cheques. With her assistance, he also filed income tax returns for several years, which he had neglected.
- [9] In due course, Mr. De Medeiros maintained a chequing account into which his paycheques were deposited, and to which Ms. Hodgson had access. He also gave her power of attorney, apparently on two occasions, in September 2010 and according to him, one other time. The purpose was so Ms. Hodgson could pay his bills and manage some of his daily banking tasks

when he was out of town working. Ms. Hodgson said that she occasionally deposited funds into that account, but that primarily it was Mr. De Medeiros who did so. Ms. Hodgson had her own bank accounts from which she paid her bills, including the mortgage payment for the McKinley Townhouse.

- [10] Both Ms. Hodgson and Mr. De Medeiros enjoyed travel, and they took several vacations together. Mr. De Medeiros paid for several of them, one to celebrate his 40th birthday in the Azores, where he was born, one to the Dominican Republic, and one or more to Mexico. There was also a final trip to Mexico, to an all-inclusive resort, in January 2015. For this trip, Mr. De Medeiros paid initially, and Ms. Hodgson contributed her half by making payments directly to his Visa account. There was a dispute in the evidence between the parties about whether or not a similar arrangement applied to the earlier Mexico trips. Ms. Hodgson did agree that Mr. De Medeiros paid for some extra "treats" on these trips, for which she was very grateful.
- [11] Ms. Hodgson also testified about a trip that she planned and paid for, to celebrate Mr. De Medeiros' 42nd or 43rd birthday in Las Vegas. Apparently, Mr. De Medeiros was stopped by U.S. Customs at the Vancouver Airport and denied entry to the United States because of an impaired driving conviction. Ms. Hodgson could not get any refund for the funds expended on this aborted trip.
- [12] I find it is irrelevant whether or not Mr. De Medeiros paid for the disputed Mexico vacations, or if Ms. Hodgson paid him back for her share at some juncture. What is important is that at the time, the parties obviously kept track of who paid for what. In other words, these vacations were not funded by using money from a joint account into which both deposited their paycheques. This is but one example of the absence of complete commingling of funds that is a feature of many marriage-like relationships.
- [13] Another important example is the mortgage payments for the McKinley Townhouse. The evidence of Mr. De Medeiros, which I have difficulty accepting, is that he ceased paying rent to Ms. Hodgson within a month or two of moving into the townhouse. Ms. Hodgson's evidence is that he paid the \$400.00 monthly rent for much longer, and stopped paying it much closer in time to his purchase of a small home in Savona, a small lakeside community outside of Kamloops ("Savona House"). The two agree on one fact, namely that Mr. De Medeiros never paid any portion of the mortgage for the McKinley Townhouse. Ms. Hodgson's evidence was that he offered to help out with the mortgage, but she steadfastly refused such help, and suggested instead that he purchase a home of his own, which she said would be a good investment. It was that suggestion which led to the purchase of the Savona House.

- [14] The transaction for the Savona House completed on March 1, 2007. At all times, Mr. De Medeiros has paid the mortgage and related expenses for the house. The purchase price was \$155,000.00, with a down payment of approximately \$15,000.00. For some time, the couple used it as a summer cottage; for some time, it was a generator of rental income; since February 2015, it has been the residence of Mr. De Medeiros, and as of trial, his spouse.
- [15] From March 2007 to December 2010, the parties lived together at the McKinley Townhouse and spent some leisure time at the Savona House. Ms. Hodgson paid expenses associated with the former, Mr. De Medeiros the latter. Mr. De Medeiros did some interior painting at the McKinley Townhouse, and also finished a previously unfinished room in the basement, turning it into a television viewing room. However, on his evidence, he did not even pay rent for more than a month or two, and certainly did not contribute to the mortgage or other household expenses. His claim to a portion of the ultimate sale proceeds of that home, even the amount by which it increased in value during his time of occupancy, is quite tenuous. On one view of the evidence, the parties agreed, as they were entitled to do, that the McKinley Townhouse would always be Ms. Hodgson's and the Savona House would belong to Mr. De Medeiros.
- [16] In late 2010, the couple decided to purchase a home together, and in order to raise sufficient funds for the down payment, to sell both the McKinley and Savona homes. In due course, they found a property on Strom Road, which each described as the other's "dream home", and entered into a contract of purchase and sale, to complete in December 2010 ("Strom House"). The purchase price was slightly more than \$415,000.00, and the mortgage was exactly \$200,000.00. Ms. Hodgson funded the balance of the purchase from the proceeds of the sale of the McKinley Townhouse. Inclusive of fees associated with the new home purchase, \$221,913.21 from the McKinley sale went toward the Strom purchase.
- [17] The prior agreement between the couple was that each would contribute half of the funds for the Strom House. Unfortunately, the Savona House did not sell. Thus, Mr. De Medeiros was unable to provide funds for the down payment. The manner in which the two of them dealt with what was, on paper at least, a significant debt owed from Mr. De Medeiros to Ms. Hodgson is a matter of significant contention in this trial.
- [18] The parties agree that the initial amount owed by Mr. De Medeiros to Ms. Hodgson was \$110,000.00. They also agree that there was always a prospect of repayment from sale proceeds of the Savona House. As well, that at least to a point, Mr. Medeiros could receive credit toward the debt by funding some improvements to the Strom House. Mr. De Medeiros' position at trial was that he had effectively repaid approximately \$90,000.00 of the \$110,000.00 he owed. Ms. Hodgson's position was somewhat fluid but, as I understand it, she ultimately conceded that Mr. De Medeiros had repaid approximately \$16,500.00. They part company significantly on the extent to which Ms. Hodgson agreed to some of the renovations done by Mr. De Medeiros, and to what extent those should be credited toward the debt.

[19] Accordingly, I turn next to the renovations conducted on the properties owned by the parties and the disagreements arising therefrom.

2. Home Renovations

[20] Both parties agree that there were some obvious and necessary improvements that needed to be done to the Strom House, starting with replacing some unsightly orange shag carpeting and green interior paint. Beyond that, there is little agreement. Ms. Hodgson said that she agreed to some relatively minor expenses, and told Mr. De Medeiros that if they spent \$10,000.00 to \$15,000.00 on renovations, then he could repay her \$105,000.00 when the Savona House sold, as opposed to \$110,000.00. Over time, as larger renovation expenses were contemplated, she said that she told Mr. De Medeiros that she could not afford them and would not agree to them. From her perspective, she could not afford to deplete what she described as her "nest egg", the equity that she had acquired in real property over the years. She said that Mr. De Medeiros told her that it was his dream home, and he was happy to pay for the renovations himself. At his examination for discovery in February 2017, Mr. De Medeiros himself described the Strom House as his "dream home".

[21] Mr. De Medeiros testified that Ms. Hodgson agreed in principle to far more renovation expenses than the initial essential improvements, and that she kept track of all expenses in a red book, which each of them initialled each time they spent money on the house. He said the Strom House was Ms. Hodgson's dream home, and that she agreed to all renovations, and accepted that half of the total funds that he expended would be deducted from the debt that he owed her.

[22] Ms. Hodgson attempted to memorialize things somewhat in an email to Mr. De Medeiros on January 14, 2011, which is at Tab 59 of Exhibit 2, the joint book of documents filed by the parties. The email is far from clear, and some of the important amounts do not match other presumably more reliable documents. In addition, the email refers to a promissory note which was to be entered into by Mr. De Medeiros, but likely never was. At least, Ms. Hodgson has never produced such a note, nor is it contained in Exhibit 2. To add to the potential confusion, Tab 38, the separation agreement of February 2, 2015, refers to the then present existence of the promissory note, in a different amount than is referenced in the email.

[23] Further compounding potential confusion is the fact that the email is sandwiched between two pages of a very rough ledger kept by Ms. Hodgson that shows expenditures made by Mr. De Medeiros in satisfaction of a separate amount of \$4,500.00 which he owed Ms. Hodgson in connection with the house purchase, not included in the promissory note amount. The position of Mr. De Medeiros has always been that those two pages represent only a fraction of what was contained in a book which Ms. Hodgson maintained of expenditures incurred by both of them, but mainly him, which, he says, should show that he has contributed a vast sum toward repayment of his debt, by funding various renovations and home improvements. Ms. Hodgson's position initially was that those two pages are all the documentary support which ever existed, and there never was a compendious book of the

sort described by Mr. De Medeiros. However, after her examination-in-chief was concluded, and we adjourned for some weeks, Ms. Hodgson had another look through her documentary files and unearthed several more pages of the ledger, which became Exhibit 10 at trial.

- [24] Of note, Tab 59 ends with a credit to Mr. De Medeiros of \$303.81. Exhibit 10 commences with that exact entry, and concludes with an entry showing a credit balance in favour of Mr. De Medeiros of \$16,502.40, as of September 19, 2012. Underneath that date is written, by Ms. Hodgson, "No more reno's or expenses to be done." Ms. Hodgson said she wrote that entry to signify that she did not agree to fund 50% of any further renovations to the house, which by that time, she said had gotten quite out of control. She did acknowledge that she should have included a credit for the \$16,502.40 in the separation agreement; that her failure to do so was mere oversight; and through counsel, she agreed that such oversight could be rectified by the Court.
- [25] Mr. De Medeiros denied that Ms. Hodgson ever told him that she no longer agreed to pay for half of the mounting renovation costs; that all decisions were made jointly; and that the major projects, such as replacing the pool liner and building a new sundeck, were either necessary or done mainly for the benefit of Ms. Hodgson. He described her as a "big cheerleader" of the various renovation projects.
- [26] With reference to Exhibit 10, Mr. De Medeiros said that he recognized some of the document, but not the last entry, which he believed was added later. He said that there should be additional pages, showing such things as costs for the pool repairs, building a fence, and some concrete work.
- [27] Whatever the understanding between the couple at the time of these renovations, it is clear they had verbal disagreements from time to time regarding these, and other, money issues.
- [28] By 2014, there was considerable strife in the relationship, in part exacerbated by the serious illness of Ms. Hodgson's mother. For part of 2014, when her mother was terminally ill, Ms. Hodgson was off work on short-term leave. At the time Ms. Hodgson returned to work, she said there were discussions between her and Mr. De Medeiros about whether or not she should return to work and if so, whether she should retire before age 65. She said that Mr. De Medeiros encouraged her to retire. She expressed concern about the financial viability of early retirement, and that the solution they came up with together was for her to commence withdrawing \$250.00 per week from Mr. De Medeiros' bank account. I confess I found this part of Ms. Hodgson's evidence extremely confusing, but as I understand it, the purpose of these withdrawals was not, at that time, to supplement her income, but rather to test Mr. De Medeiros' ability to do so at some future time, if she chose to take early retirement, and thus receive a diminished pension amount. Ms. Hodgson said she commenced making these weekly withdrawals in January 2015.
- [29] For his part, Mr. De Medeiros denied ever encouraging Ms. Hodgson to retire early, and said he did not agree to pay her a weekly stipend if she did so.

[30] As noted earlier, the couple took a vacation to Mexico in early January 2015, by which time, according to Mr. De Medeiros, the relationship was all but over. According to Ms. Hodgson, they were still very much a couple, and had an enjoyable vacation together. She said the catalyst to the relationship ending was her discovery, later that month, that Mr. De Medeiros was involved with another woman. She considered the relationship over at that time, and immediately took steps to secure her financial wellbeing by withdrawing \$10,000.00 from Mr. De Medeiros' bank account. Her accounting for those funds is at Tab 35 of Exhibit 2.

3. The Separation Agreement

[31] Ms. Hodgson drafted the separation agreement which the parties both signed on February 2, 2015, after finding some formatting assistance through the Internet. As with many decisions she made after the relationship ended, she did so in order to save money. She said there had been text exchanges between the two of them in which they discussed the possessions that they each wished to keep. She asked Mr. De Medeiros to meet her at a Burger King restaurant, and brought with her two copies of the agreement and a copy of a guide which she printed from the Internet. She said that when she arrived in her car, Mr. De Medeiros met her in the parking lot, she gave him the bed for their dog, Miguel, over whom he then had sole custody, and they went into the restaurant together.

[32] According to Ms. Hodgson, she left the agreement with Mr. De Medeiros while she ordered some lunch, and asked him to read it and not to sign it without a witness present. She also asked him if he wished to take a copy away with him to read, to read it at another table, or to read it with her. She said he declined all those suggestions, instead hurriedly reading it and signing it, and initialling each page. She did not think he read the entire document. He slammed his hand on the table after reading a page or two. He attempted to apologize to her for his misbehaviour. Ms. Hodgson did agree that she made some crude and regrettable comments about him and his new partner, but that she did so as Mr. De Medeiros was leaving the restaurant, after he had signed the agreement.

[33] Mr. De Medeiros said that he agreed to meet Ms. Hodgson at the Burger King, to sign what he thought would be documents solely related to the sale of the Strom House. He said he arrived first, and that 15 minutes later, Ms. Hodgson arrived and immediately told him that he smelled of liquor and made a crude comment directed toward his new partner. He said Ms. Hodgson was "very aggravated" and that she pressured him to sign the agreement immediately. He said he did not read the agreement before signing it, but agreed that he both signed the last page and initialled every page. He said it was a very stressful time, and that he felt pressured to just "get it done".

[34] He denied that Ms. Hodgson gave him a proper opportunity to read the agreement, and that she offered that he could take a copy with him to get legal advice before signing. He did acknowledge that he told Ms. Hodgson that he did not want to go through the agreement with her, so she went to order food, and left him to read the agreement. He said he skimmed it, reading only the bottom part of each page.

[35] When Mr. De Medeiros was asked in cross-examination why he did not read the agreement, he offered the following:

- there was not enough time;
- Ms. Hodgson wanted it signed "there and then";
- he felt like he got tricked into signing it;
- he thought Ms. Hodgson might turn violent;
- Ms. Hodgson was holding it while he signed; and
- he was trying to keep an eye on her so she would not turn violent.

[36] Mr. De Medeiros also said that he did not see the heading "Spousal Maintenance" on page 6 of the agreement; that he did not know about the \$10,000.00 Ms. Hodgson had removed from his bank account (referenced at page 4); and, that he thought he would get back the money he had expended on home renovations, which he said was approximately \$90,000.00.

[37] When it was put to Mr. De Medeiros that he purchased an engagement ring for his new partner that same day, he said he had purchased a ring for her, but that it was later in February and it was not an engagement ring. He later agreed that an entry for a purchase slightly more than \$3,000.00 at Peoples Jewellers showing on his line of credit statement on February 2, 2015 was the ring in question. He still denied that it was an engagement ring. Ms. Hodgson's evidence was that his new partner had made a social media posting that day referring to her engagement.

[38] On February 3, 2015, Ms. Hodgson registered the agreement with the FMEP and filed a copy in the court registry.

[39] Some key terms of the agreement are as follows:

- it purports to divide all family property, including household items;
- it deals with custody/care of the family pet, a French bulldog, Miguel;
- in effect, Ms. Hodgson gives up any claim to the Savona House and furnishings;
- it sets a likely fair market value of the Strom House at \$450,000.00 to \$460,000.00, and stipulates that it will be sold at fair market value, either privately or through a realtor;
- it sets out the manner in which funds are to be divided from that sale, specifically that Ms. Hodgson will receive the first \$220,000.00, and the balance will be divided equally;
- a clause which precedes the above, sets out the original down payment contribution of Ms. Hodgson, and refers to a "Promissory Note" signed by Mr. De Medeiros, still in existence, acknowledging his debt of \$110,000.00;

- each of the parties agrees to forgo any potential claims against the pensions and RRSPs of the other;
- it stipulates that, apart from the Strom House mortgage, there is no other family debt; and
- it provides for spousal support from Mr. De Medeiros to Ms. Hodgson of \$1,000.00 per month for an indefinite period, subject to variation by agreement of the parties, or by the court.

[40] Mr. De Medeiros has continued to live in the Savona House since that date. He complained at trial that it is too small and almost impossible to sell, and indeed has not increased appreciably in value since the time of purchase. Ms. Hodgson referred to the substantial work that they jointly did on the house and property post-purchase, and referred to the house as "cute" and "adorable".

4. Events Post-Separation Agreement

[41] There was considerable evidence, both in testimony at trial and in the form of contemporaneous emails between the parties, of rancour during the time of asset division pursuant to the agreement. Of some minor note, despite the stipulation in the agreement that Mr. De Medeiros would retain an expensive big-screen television from the Strom House, Ms. Hodgson reneged and kept the item after Mr. De Medeiros failed to attend to pick it up at the appointed time.

[42] Ms. Hodgson sold the Strom House privately, to her daughter and son-in-law, for \$455,000.00. In order to complete the sale, she signed documents on behalf of Mr. De Medeiros, purportedly pursuant to the power of attorney he had granted her in 2010. She said she did so because there was urgency to the transaction, and Mr. De Medeiros was refusing to respond to entreaties from the conveyancing lawyer. Mr. De Medeiros now complains that he was never provided with appropriate documentation, and there was no reason for Ms. Hodgson to use the power of attorney to sign on his behalf. Indeed, he believed that the power of attorney was no longer valid, because they were separated.

[43] The crux of Mr. De Medeiros' complaint, during testimony, was that he was effectively out of the loop for the sale, and he was ex post facto summoned to the lawyer's office and given a cheque for approximately \$22,800.00, a wholly inadequate sum from his perspective. I also note that he volunteered at his examination for discovery that "there was never an issue who the house was sold to or for how much it was. There's an issue for how much money I got back."

[44] Thus, the use of the power of attorney by Ms. Hodgson, and the sale to a family member are not real issues from his perspective. His complaint circles back to the separation agreement itself, where the issue of division of funds, including the important proviso regarding the first \$220,000.00, was clearly set out. I need not decide on the propriety of Ms. Hodgson using the power of attorney to effect the house sale. Nor need I decide whether or not a better sale price could have been obtained by an arm's length transaction. I simply note that, through her efforts, Ms. Hodgson saved the parties a minimum of \$10,000.00 in realtor's

commission, and that the sale price was the mean of what was contemplated in the separation agreement.

- [45] Ms. Hodgson used most of her share of the sale proceeds as a down payment for a townhouse. She was frank in her evidence that she felt considerable pressure to sell the Strom House and downsize. She reiterated that her investment in real estate, namely her own primary residence, was always from her perspective a retirement "nest egg". She said that she could never have afforded the Strom House, and would never have contemplated such a purchase, without the participation of Mr. De Medeiros. Once that relationship was at an end, I take from all of her evidence, she wanted to immediately set herself up for her retirement in comparatively short order. She has apparently done so, acquiring a suitable townhouse with a modest and affordable mortgage.
- [46] Mr. De Medeiros has, as noted, remarried since 2015, and continues to live in the Savona House with his new spouse. She works part time, and he is the primary provider for their household. He testified that because of the economic downturn in the oil and gas industry, particularly as regards job opportunities in northern Alberta, his income earning potential has dramatically decreased.
- [47] There was evidence that Mr. De Medeiros has reverted to his pre-2005 ways of disorganized management of his financial affairs, and has not voluntarily made spousal support payments pursuant to the separation agreement, necessitating enforcement steps through the FMEP. He has also, as noted, cashed in various RRSP investments, and apparently, taken a second mortgage on the Savona House.

IMPORTANT CREDIBILITY FINDINGS

- [48] There are three questions of credibility that I find I must make prior to considering the legal issues engaged by this case. They are:
1. Mr. De Medeiros' contribution to the down payment of the Strom House;
 2. the prior agreement of the parties concerning spousal maintenance; and
 3. the circumstances surrounding the execution of the separation agreement.
1. Mr. De Medeiros' contribution to the down payment of the Strom House
- [49] There is no dispute that there was at one time an agreement between the parties that each would contribute \$110,000.00 toward the down payment of the Strom House and that instead, Ms. Hodgson paid the entire amount of \$220,000.00. Whether the ensuing debt owed by Mr. De Medeiros to Ms. Hodgson was ever formalized in a promissory note is a matter of contention. More importantly, the extent to which there was subsequent agreement that Mr. De Medeiros could in effect pay down his indebtedness by funding home renovations was a hotly contested issue between the parties.

- [50] I will address the issue of the promissory note first, since I view its present existence as a relatively unimportant matter. Obviously, the agreement refers to such a note, and it would simplify matters greatly if it were before the Court. However, at the end of the day, very little turns on its absence. It is possible that Mr. De Medeiros did sign such a note, subsequent to the January 14, 2011 email, and that Ms. Hodgson has misplaced it. It is also possible that Ms. Hodgson is mistaken, and that no such document ever existed. I discount the possibility that she has concocted the document entirely, and placed a knowingly false reference to it in the separation agreement.
- [51] The point, simply put, is that Mr. De Medeiros, largely through conduct, has at all times acknowledged his indebtedness to Ms. Hodgson. The January 14 email would serve as sufficient written memorialization of his indebtedness, if such were required. There is no doubt that at the time the couple moved into the Strom House, Mr. De Medeiros owed Ms. Hodgson \$110,000.00. What is much more problematic is the extent to which his indebtedness was subsequently diminished.
- [52] On balance, I accept Ms. Hodgson's evidence on these points, and find that she agreed only to a certain amount of the home renovations being entered into the debt reduction ledger. I accept her evidence that she called a halt to such expenditures being credited against the debt on or about September 19, 2012, as noted in Exhibit 10. I find that her failure to credit Mr. De Medeiros with the amount of \$16,502.40 in the separation agreement was likely an inadvertent oversight on her part. I accept her evidence that she only uncovered Exhibit 10 mid-trial, having previously misplaced it.
- [53] It belies common sense that, if Ms. Hodgson was attempting to hide the continuation of the ledger, beyond what is at Tab 59, Exhibit 2, she would bring it to court in September and acknowledge her mistake, and consequently her present indebtedness to Mr. De Medeiros in that amount. Her evidence was that of an honest witness owning up to an unfortunate error.
- [54] Mr. De Medeiros' evidence regarding the agreement, and in particular, the entries in the red book, suffers from some overarching difficulties. He claimed that each of them initialled every entry. The documents filed before me contain no such initials. I cannot accept his evidence on this point.
- [55] Moreover, while describing Ms. Hodgson as a "cheerleader" for all the renovation projects, Mr. De Medeiros does agree that over time while living at the Strom House, the couple fought about money matters. I have no doubt that Ms. Hodgson did become increasingly strident and vocal in her protests of the mounting expenditures, and that Mr. De Medeiros placated her by assuring her that he was willing to pay for the improvements himself and could afford to do so.

- [56] Finally, I cannot accept Mr. De Medeiros' vague estimate of the amount of money he claims should be credited to him as debt reduction. He gave various figures, ranging from \$90,000.00 to \$100,000.00, but could provide little in the way of specifics. Assuming the usual 50/50 attribution, that would mean a total of almost \$200,000.00 being expended on home improvements from January 2011 to December 2014.
- [57] The trial opened with Mr. De Medeiros calling a witness from his financial institution to address a line from his 2015 tax return, showing that he had cashed in over \$58,000.00 in RRSPs that year. He said the amount was grossly inflated and inaccurate, and the bank representative would correct the record. In fact, the witness located documents which verified the amount as entirely accurate. Obviously, Mr. De Medeiros had simply forgotten about this rather large and important financial transaction.
- [58] Similarly, when questioned about his own Form F8 Financial Statement filed in this case, showing that he had taken a second mortgage on the Savona House in 2016 in the amount of \$16,739.64, he studied the document and after a long pause, said "I don't know about that." From all of this I find that, unfortunately, Mr. De Medeiros cannot be relied upon to provide accurate information about large and important financial transactions. They obviously do not stick in his memory as firmly as for the average person. Also, I find support in his obvious inability to live within his means post-separation for the proposition tacitly and expressly advanced by Ms. Hodgson, namely that he was content to personally and solely fund what, from her perspective, seemed to be extravagant home improvement expenses. I doubt that the amount was as great as that put forward by Mr. De Medeiros. However, I have no doubt that it was sufficient to trigger Ms. Hodgson's refusal to further participate, which she no doubt communicated to him.
- [59] I am prepared to credit Mr. De Medeiros with the amount referred to in Exhibit 10, \$16,502.40, against his initial indebtedness of \$110,000.00, but no more.

2. The prior agreement of the parties concerning spousal maintenance

- [60] In the section of the separation agreement entitled "Spousal Maintenance", Ms. Hodgson refers to her and Mr. De Medeiros' conversations about her taking early retirement and relies on the \$250.00 weekly payments (or more accurately withdrawals from Mr. De Medeiros' bank account) as justification for Mr. De Medeiros paying ongoing spousal support in the same amount. Notably, her evidence at trial was that those payments initially started in January 2015 whereas the separation agreement, which she drafted, says the voluntary payments began in November 2014.
- [61] Mr. De Medeiros denies that he suggested that she retire early, and adamantly denies that he agreed to pay her \$1,000.00 per month if she did take early retirement.
- [62] On this important point, I prefer the evidence of Mr. De Medeiros. I find that Ms. Hodgson, understandably, is tired of working and would very much like to retire prior to age 65. That was her wish in 2015, when she was 59, and remains her wish today. She testified about that

before me. Her plans for early retirement are partly set out in the separation agreement. Although the agreement refers to discussions between the parties about that, and Mr. De Medeiros' agreement with the plans, I cannot find, against his firm denial, that he did agree. Nor can I accept that it was in fact his idea.

[63] As for the monthly payments, unfortunately I cannot make sense of Ms. Hodgson's evidence on this score. Assuming Mr. De Medeiros agreed to supplement her retirement income in the stated amount, I cannot conceive why such payments would commence on some sort of trial basis while Ms. Hodgson was still working full time. At all times while the couple was together, Mr. De Medeiros was seemingly willing and able to pay for extraordinary expenses. Ms. Hodgson had access to his bank accounts and could use funds in those accounts for a variety of purposes if she chose. It makes no sense that she would need to ritualistically withdraw \$250.00 weekly from his account.

[64] In my view, the most likely state of things is that Ms. Hodgson became anxious about her ability to maintain the lifestyle which she had enjoyed while living with Mr. De Medeiros at the time of separation, and attempted to justify the "Spousal Maintenance" portion of the agreement by creating some voluntary payments already made, and committing to writing her own views of the matter, under the guise of mutual agreement/discussion.

3. The circumstances surrounding the execution of the separation agreement

[65] The circumstances surrounding the execution of this agreement are extremely important in this case. The findings I make in that regard will of course inform my consideration of the fundamental argument of the claimant, that I should set aside the entire agreement, pursuant to s. 93 of the Family Law Act, S.B.C. 2011, c. 25 ("FLA").

[66] Because of the importance of this issue, I have set out the evidence of both parties in some detail in these reasons. Where there is a direct conflict in the evidence about what transpired at the Burger King on February 2, 2015, I accept the evidence of Ms. Hodgson over that of Mr. De Medeiros. I will outline the reasons for that conclusion.

[67] No doubt, that time, and that day in particular, was an emotionally charged one for both parties. Ms. Hodgson accepts that she was emotional, at times angry, and said that "the rug had been pulled out from under my feet." However, her evidence is clear that she spent time texting with Mr. De Medeiros and doing internet research in an attempt to create an agreement which would permit them to make an effective and clean break. She says that she thought she took his wishes into account in dividing the assets. She was adamant that she did not insist that he sign the document that day. Rather she told him that he could take the agreement away with him but he declined.

[68] Mr. De Medeiros said very little about his own emotional state on February 2, 2015. He described Ms. Hodgson as "very aggravated", and said that he feared she might become violent with him in the restaurant. He did say that he felt pressure to get the document signed, and attributed that pressure to Ms. Hodgson. He was evasive on the issue of any self-

imposed pressure created by his purchase that very day of an expensive ring for his new partner. I do not believe his evidence that he feared that Ms. Hodgson might become violent. I find that any pressure he was feeling that day was largely based on his feelings of guilt about infidelity, coupled with his own desire to make a clean break from Ms. Hodgson and commence his life with his new romantic partner.

- [69] I do accept that Mr. De Medeiros did not read the entire document. However, I find that was by choice, rather than from any pressure created by Ms. Hodgson. I accept that she did offer that he could take the document away to read, but that he declined. I do not accept his evidence that he thought the entire document was concerned with the sale of the Strom House, nor his assertion that he missed entirely the heading "Spousal Maintenance". That heading is impossible to miss, even if one is skimming the document. The topic of spousal support occupies most of the final two pages. Similarly, the first three pages are devoted to topics other than the sale of the house, and even a cursory reading would reveal references to other personal property, including motor vehicles and the big-screen television. Mr. De Medeiros could not realistically have believed the entire document was about the sale of the Strom House.
- [70] Ms. Hodgson's evidence on two minor points also stands up to scrutiny better than Mr. De Medeiros' evidence. I accept her evidence that they initially met at her car in the parking lot, and that she gave him Miguel's dog bed. I also accept that she made the vulgar comment about his new partner at the conclusion of the meeting, rather than as her opening salvo. Ms. Hodgson was clearly embarrassed to admit making that comment, but readily did so. Her evidence as to timing makes more sense than does that of Mr. De Medeiros. One might well hurl an insult at someone in anger after obtaining his signature on an important document. It makes little sense to insult somebody in vulgar terms at the commencement of what might be a negotiation.
- [71] In short, Mr. De Medeiros' evidence of the Burger King meeting strikes me as an ex post facto reconstruction built around false justifications for his regret at not having fully or carefully read such an important document prior to signing it. His stated fear of physical violence from Ms. Hodgson, in particular, seems like a feeble attempt to support an argument that he signed the agreement under duress.

ISSUES

[72] The issues are as follows:

1. Should the separation agreement be set aside?
2. If so, should there be an equal or unequal division of family assets and debt?
3. Should spousal support be varied or discontinued?
1. Should the separation agreement be set aside?

[73] The claimant, Mr. De Medeiros, relying on s. 93(3) of the FLA, argues that the agreement should be set aside because:

- Ms. Hodgson did not make full disclosure of her assets, invoking s. 93(3)(a);
- Mr. De Medeiros was vulnerable and in distress, and Ms. Hodgson took unfair advantage of him in that compromised state, invoking s. 93(3)(b);
- Mr. De Medeiros did not fully understand the document, invoking s. 93(3)(c); and
- the agreement is "unconscionable," and thus voidable, invoking s. 93(3)(d). (The claimant also refers to the absence of legal advice under this heading.)

[74] For the reasons that follow, I have determined that the separation agreement entered into by the parties on February 2, 2015 should not be set aside.

[75] Before addressing the specific arguments made by the claimant and the cases he relies upon in seeking to set aside the agreement, I should set out some key principles derived from two decisions of the Supreme Court of Canada: *Miglin v. Miglin*, 2003 SCC 24; and *Rick v. Brandsema*, 2009 SCC 10.

[76] *Miglin* was primarily concerned with the provision of a separation agreement which purported to fully and finally release a spouse from any and all spousal support obligations pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). However, much of what the Court said has application to any consideration of setting aside an agreement reached by parties on dissolution of a marriage-like relationship.

[77] The Court recognized the "significant policy goal of negotiated settlement" and the importance of respecting "the parties' autonomy and freedom to structure their post-divorce lives in a manner that reflects their own objectives and concerns": *Miglin* at para. 66. Balanced against such autonomy must be a judicial recognition of the unique nature of the spousal relationship, particularly at time of dissolution, as compared to the concepts of contract law, especially freedom of contract and the test for "unconscionability".

[78] About the latter concept, the Court said at para. 82:

[82] We pause here to note three important points. First, we are not suggesting that courts must necessarily look for "unconscionability" as it is understood in the common law of contract. There is a danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is a unique legal context. There may be persuasive evidence brought before the court that one party took advantage of the vulnerability of the other party in separation or divorce negotiations that would fall short of evidence of the power imbalance necessary to demonstrate unconscionability in a commercial context between, say, a consumer and a large financial institution. Next, the court should not presume an imbalance of power in the relationship or a vulnerability on the part of one party, nor should it presume that the apparently stronger party took advantage of any vulnerability on the part of the other. Rather, there must be evidence to warrant the court's

finding that the agreement should not stand on the basis of a fundamental flaw in the negotiation process. Recognition of the emotional stress of separation or divorce should not be taken as giving rise to a presumption that parties in such circumstances are incapable of assenting to a binding agreement. If separating or divorcing parties were generally incapable of making agreements it would be fair to enforce, it would be difficult to see why Parliament included "agreement or arrangement" in s. 15.2(4)(c). Finally, we stress that the mere presence of vulnerabilities will not, in and of itself, justify the court's intervention. The degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties.

- [79] After setting out the two-stage judicial exercise of looking first at the circumstances of negotiation and execution of the agreement, and then at the substance of the agreement, the Court considered the circumstances in which a judge might intervene because of unforeseen changes in circumstances which were not reasonably anticipated by the parties.
- [80] The Court then concluded, in part, at para. 91 of Miglin as follows:
- [91] Although we recognize the unique nature of separation agreements and their differences from commercial contracts, they are contracts nonetheless. Parties must take responsibility for the contract they execute as well as for their own lives. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight.
- [81] Rick affirmed that the Miglin analysis applied to all separation agreements, not just those dealing with spousal support, and in particular, the Miglin analysis of "unconscionability" applied to all separation agreements: Rick at para. 43.
- [82] The Court then found that it logically flowed from Miglin that "a duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances": Rick at para. 47.
- [83] In Rick, the Court endorsed the trial judge's finding that a separation agreement was unconscionable in circumstances which included the following:
- the husband knowingly misled his spouse about financial transactions he had executed for his personal benefit totalling almost a quarter of a million dollars a week before the wife left the matrimonial home;
 - the husband was aware of his wife's mental instability and hence, vulnerability; and
 - the agreement represented a significant departure from the relevant legislative objectives.

- [84] Both the trial judge and the Supreme Court of Canada found that it was important to the analysis of "unconscionability" that the husband failed to provide his wife with important financial information which she needed during negotiations, and that he "deliberately exploited his wife's known mental fragility": Rick at para. 58.
- [85] To some extent, s. 93(3) of the FLA must be seen as a partial codification of the principles set out in Miglin and Rick: see H.J.S. v. K.C.S., 2013 BCSC 998 at para. 39.
- [86] I also observe that at para. 61 of Rick, the Court recognized that the question of whether or not the agreement represents the parties' mutual desire to finalize the terms of separation and reflects their joint substantive intentions is one of fact, for the trial judge to decide. The logical corollary to the statement that potential exploitation is not "rendered anodyne" by access to professional advice is that an absence of such advice, although offered and available, must not lead to any presumption that there has been exploitation.
- [87] With those principles in mind, I turn to the specific arguments advanced by the claimant, Mr. De Medeiros.
- i. Absence of Full Disclosure
- [88] Under this heading, Mr. De Medeiros asserts that Ms. Hodgson failed to disclose, adequately or at all:
- a) her RRSPs;
 - b) her pension entitlement;
 - c) her entitlement to a portion of her former husband's pension, pursuant to an earlier agreement;
 - d) her income; and
 - e) the amount by which Mr. De Medeiros' original debt of \$110,000.00 had been reduced.
- [89] As an overall observation, I find that Mr. De Medeiros was generally aware of Ms. Hodgson's financial circumstances, assets and income. If he was unaware, for instance, of her exact annual income, it was not through any failure of disclosure on her part. Likewise, although he may not have been aware of her total RRSP investments at the time of separation, and the exact calculations for her pension entitlement, there was no deliberate failure to disclose on Ms. Hodgson's part.
- [90] It is true that the separation agreement does not contain income figures for Ms. Hodgson. It does contain gross income figures for the previous three years for Mr. De Medeiros, and refers to his income being approximately "triple" that of Ms. Hodgson. I find that there was not precise, nor completely accurate, income information for Ms. Hodgson set out in the agreement. However, Mr. De Medeiros at all times had income which was more than double that of Ms. Hodgson, and he would have been well aware of that fact. He must have known her approximate income during the relationship. He certainly knew that he made far more

money than did Ms. Hodgson.

- [91] For the most part, Mr. De Medeiros was uninterested in his own financial circumstances, and certainly chose to pay little attention to those of Ms. Hodgson. For instance, as already noted, he was completely unsure of his own RRSP investments, and the extent to which he had cashed them in prior to trial. At one point, he testified that even the bank did not know about those amounts, so how could he be expected to possess such knowledge.
- [92] He also claimed to have no knowledge about his own pension, and was unsure from where he had taken the number which went into his Form F8.
- [93] The separation agreement acknowledged that each of the parties had some RRSP investments and some form of possible pension income, and that each relinquished claims to the other's RRSPs and pensions. In the context of their overall relationship, such agreement was both sensible and fair. It bears noting that, in the not distant future, Ms. Hodgson's pension and RRSPs would become her sole source of income, while Mr. De Medeiros had many years of contribution ahead of him in which to add to those investments.
- [94] As for her entitlement to a portion of her former spouse's pension, the parties disagreed about the characterization of that asset. Ms. Hodgson argued that it was excluded property; Mr. De Medeiros argued that it was a "debt owing" to Ms. Hodgson and as such was captured in the definition of family property in the FLA. As I understand things, Ms. Hodgson acquired a partial interest in the pension of her husband at the time of the marriage breakup, totalling approximately \$168,000.00. Her entitlement to those funds crystallizes when she turns 65.
- [95] I am inclined to the view that Ms. Hodgson's entitlement to those funds should be treated as excluded property under the FLA. If I am wrong about that characterization, then in my view it would be significantly unfair to divide that pension entitlement between the parties. However, the question remains whether Ms. Hodgson had a duty to disclose precisely what interest she had in that pension, and whether she failed to disclose it to Mr. De Medeiros.
- [96] The evidence on this point was not fully developed. It is unclear when Mr. De Medeiros learned of Ms. Hodgson's interest in this pension. In my view, even if Ms. Hodgson's position was that her entitlement to a portion of it was an excluded asset, it would have been preferable for her to have disclosed it prior to the execution of the separation agreement. A case could be made that she had a positive duty to disclose in the circumstances, particularly in light of page 7 of the agreement, which states that once she retires, her sole sources of income will be benefits from the Canada Pension Plan ("CPP") and Old Age Security ("OAS").
- [97] I agree with the following quotation from *Donnelly v. Weekley*, 2017 BCSC 529:

- [108] In a perfect world, disclosure would be immediate and complete. In the real world, for a court to set aside all or part of an agreement for failure to disclose under s. 93(3)(a) of the FLA, a party to an agreement must demonstrate that a significant asset, debt, or other information relevant to the negotiation of the agreement was not disclosed. I am not persuaded that occurred here. [Emphasis in original.]
- [98] The only possible impact Mr. De Medeiros' precise knowledge on this point could have had on the content of the separation agreement is in respect of his obligation to provide Ms. Hodgson with spousal support. I intend to deal with spousal support later in these reasons.
- [99] I do find that there is some support for the submission of Mr. De Medeiros that the agreement did not accurately set out the amount by which his initial debt of \$110,000.00 had been reduced through his payment for home renovations. Ms. Hodgson acknowledged as much in her evidence. However, this was not a deliberately misleading act on her part, but rather an unfortunate oversight, which went unnoticed by her until very late in the trial. Ms. Hodgson concedes that I can, and should, rectify what she says, and I accept, was a mistake in drafting that portion of the agreement.

ii. Improper Advantage/Spouse's Vulnerability

- [100] I cannot give much credence to this claim advanced by Mr. De Medeiros. In my view, he was not in a compromised state, nor a position of particular vulnerability, when he signed the separation agreement. It is clear to me that he wished to make a clean break with Ms. Hodgson, and to commence his new relationship. Ms. Hodgson was likely in a more vulnerable emotional state than he was at the time. However, his claim that he feared she might become physically violent toward him in the restaurant, I cannot accept. There is no basis in the evidence for such fear on his part. Regrettably, I find that assertion by Mr. De Medeiros is an ex post facto fabrication.
- [101] Much more likely is the scenario advocated by Ms. Hodgson, that Mr. De Medeiros was feeling somewhat guilty about his conduct, and was also anxious to make a clean break and continue his new relationship. Those feelings, coupled with his overall nonchalance in dealing with financial matters, are what most likely caused him to only partially read the separation agreement prior to signing it. He can only blame himself for his failure to fully read the document.
- [102] I also accept Ms. Hodgson's evidence that she told him that he could take the document with him to read in private, prior to signing. The document itself refers to the ability of either signatory to obtain independent legal advice prior to signing. If Mr. De Medeiros failed to read that portion, or having read it, failed to act upon it, Ms. Hodgson cannot be held responsible. Mr. De Medeiros should have paid attention to the document that he was being asked to sign. He could have availed himself of advice from a lawyer if he did not understand any part of the agreement. He chose to neither read it completely, nor seek legal advice as to its content.

- [103] Mr. De Medeiros cites *Asselin v. Roy*, 2013 BCSC 1681, and *G.C.G. v. M.J.T.*, 2016 BCSC 1277, in support of his submission that the agreement should be set aside because Ms. Hodgson took advantage of his vulnerability.
- [104] *Asselin* concerned an agreement which the parties entered into approximately three years into a 14-year common law relationship. The male partner summoned his spouse to a lawyer's office, where he presented her with the document for signature. Although the agreement stipulated that she had an opportunity to obtain legal advice, none was actually provided. At the time, the couple was actively attempting to conceive a child together. Ms. *Asselin* had no input into the content of the agreement. Mr. Justice Harvey found that the agreement was both procedurally and substantively unfair.
- [105] In the present case, I find that although Ms. Hodgson alone drafted the agreement, both parties had input, through the texting which preceded the Burger King meeting. I accept Ms. Hodgson's evidence that she sought Mr. De Medeiros' input on the division of chattels, and attempted to incorporate same into the agreement. Likewise, although Mr. De Medeiros was presented with a completed document at the meeting, I have already found that Ms. Hodgson offered him the opportunity to take it away to fully read it, and presumably obtain legal advice if he chose. She did not, as did Mr. Roy, "spring it upon" Mr. De Medeiros.
- [106] In *G.C.G.*, the Court made very specific findings related to duress, including a backdrop to the execution of the separation agreement which included emotional abuse and intimidation directed at the claimant by the respondent. In that case, too, the respondent drafted the agreement without any input from the claimant. Against that backdrop, the Court set aside that agreement. I find the circumstances in this case to be sufficiently dissimilar that the analysis in *G.C.G.* is of little assistance.
- [107] I am not satisfied that there is any basis disclosed in the evidence before me to set aside the separation agreement on the basis of duress or other circumstances evincing vulnerability of Mr. De Medeiros which Ms. Hodgson used to her unfair advantage.

iii. Failure to Understand Agreement/Consequences

- [108] To some extent, this argument is answered at paras. 101 and 102 of these Reasons. In large measure, any failure to understand the agreement on the part of Mr. De Medeiros was, bluntly put, his own fault, in that he deliberately chose not to read it in its entirety. Moreover, I do not accept his evidence that he believed that the entire agreement was only concerned with the sale of the Strom House.
- [109] However, I find that there are two parts of the agreement which Mr. De Medeiros may not have fully understood, through no fault of his own. Those are the proceeds of sale from the Strom House to which he was entitled and the indefinite nature of the spousal support.

- [110] I have already found that Ms. Hodgson made a mistake in calculating the amount of the \$110,000.00 debt which should have been reflected in the agreement. In addition, the reference to the existence of the promissory note and the fact that the two clauses that deal with the original Strom House down payment are broken up within the agreement creates some potential confusion. I can understand how Mr. De Medeiros might have believed that there would be some additional accounting to credit him with some repayment of the debt on account of his payment for home renovations.
- [111] Also, I find that the portion of the agreement which covers "Spousal Maintenance" is both confusing and in part inaccurate. I intend to sever that part of the agreement and deal with it separately later in these Reasons. Under this heading, suffice it to say that the entire section of the agreement could cause confusion, and is only partly saved by the provision that it may be amended at any time by mutual agreement or by the court. Mr. De Medeiros may well not have understood that, in theory at least, he was agreeing to pay spousal support indefinitely.
- [112] On balance, I am not persuaded that Mr. De Medeiros failed to understand that the separation agreement was meant to effect a clean break between the parties, and was intended to settle all financial claims each might have against the other. To the contrary, I find that he knew that such were the intended purposes of the agreement, and that he understood the overall consequences of signing the document. In short, I would not set aside the entire agreement on the basis of any lack of understanding on the part of Mr. De Medeiros.

iv. Unconscionable/Voidable Agreement

- [113] This argument engages both the execution of the separation agreement and the content of it. I have already considered, under the headings above, the arguments concerning the circumstances in which the agreement was created and signed by the parties. I must next consider the substance of the agreement. I note the following from Miglin at para. 84:
- [84] Where the court is satisfied that the conditions under which the agreement was negotiated are satisfactory, it must then turn its attention to the substance of the agreement. The court must determine the extent to which the agreement takes into account the factors and objectives listed in the Act, thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown. Only a significant departure from the general objectives of the Act will warrant the court's intervention on the basis that there is not substantial compliance with the Act. The court must not view spousal support arrangements in a vacuum, however; it must look at the agreement or arrangement in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves.

- [114] In looking at the agreement as a whole, I must attempt to determine if it generally complies with the objectives of the FLA. In my view, apart from the provision for indefinite spousal support, it does.
- [115] Of note, the FLA permits the parties more freedom to structure post-relationship division of assets in a way which recognizes the autonomy of each. As the Court of Appeal noted in *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 1, "[t]he basic principle intended to be applied to the property of spouses on separation is that they 'keep what is theirs'".
- [116] The separation agreement here permits the parties to make a clean break and restructure their financial affairs post-relationship. Mr. De Medeiros retains the Savona House and its contents; Ms. Hodgson retains the bulk of her "nest egg" in anticipation of her fairly imminent retirement. As she envisaged at the time of separation, she has been able to downsize to a smaller residence, with a mortgage payment that is manageable for her. The parties each retain their own pensions and other retirement investments. By and large, the agreement reflects "an equitable sharing of the economic consequences of" the breakdown of the marriage-like relationship.
- [117] In my view, there is nothing unconscionable about the agreement as a whole, even as that legal term is understood in the context of matrimonial law, as distinct from pure contract law.
- [118] Even if I had given effect to one of the other arguments of the claimant, I would not have set aside the agreement in its entirety, since I would not replace it with an order that is "substantially different" from the terms set out in the agreement, per s. 93(4) of the FLA.
- [119] In summary, I decline to set aside the separation agreement in its entirety. Rather, I uphold it, and will endeavour to give it full legal effect, subject to two caveats. First, as noted, I intend to sever the spousal support component of the agreement and deal with it separately. Second, I intend to remedy the issue of the miscalculation of the down payment debt owed by Mr. De Medeiros to Ms. Hodgson.
- [120] On the latter point, I find that the common law of rectification permits me to make the correction at issue. I note s. 94(2) of the FLA, which reads as follows:
- 94 (2) The Supreme Court may not make an order respecting the division of property and family debt that is the subject of an agreement described in section 93 (1) [setting aside agreements respecting property division], unless all or part of the agreement is set aside under that section.
- [121] While I would prefer to correct what I have found to be a mistake in the relevant portions of the agreement through the remedy of rectification, if necessary, I would set aside only those portions of the agreement, at pages 4 and 5, which deal with the down payment for the Strom House and division of funds from the sale proceeds. Ms. Hodgson, in her evidence, conceded that she had made a mistake, and acknowledged that she owed Mr. De Medeiros \$16,500.00. Her counsel, in submissions, agreed that I could make an order to correct that mistake without setting aside the entire agreement. Her suggestion was that I offset that

amount against any lump sum spousal support order I am inclined to make.

[122] In my view, the matter is better left as an amount owing to Mr. De Medeiros because of mutual mistake in the separation agreement. That amount will either be offset against any lump sum spousal support award, or if need be, left as a stand-alone equalization payment owed to Mr. De Medeiros by Ms. Hodgson.

[123] Finally, I must consider s. 93(5) of the FLA, which reads:

93 (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

- (a) the length of time that has passed since the agreement was made;
- (b) the intention of the spouses, in making the agreement, to achieve certainty;
- (c) the degree to which the spouses relied on the terms of the agreement.

[124] In considering those enumerated factors, I would not set aside the entire agreement on the basis of significant unfairness. In my view, the overall agreement is not significantly unfair. I note the significant passage of time between execution of the agreement and Mr. De Medeiros' commencing this action. Moreover, it was clearly the intention of both parties to achieve certainty at the time they entered into the agreement.

[125] I have already noted the possible reliance by Mr. De Medeiros upon the misleading portions of the agreement, and found that such could only impact the obligation to pay spousal support. I have decided to treat the section of the agreement which deals with spousal support as a separate agreement. Thus, there is no need to set aside that portion of the agreement pursuant to s. 93(5). I can address the overarching issue of fairness between the parties without engaging in a full analysis of whether or not the spousal support agreement is "significantly unfair". In my view, Ms. Hodgson was entitled to some spousal support, a modest transitional award, but is not entitled to indefinite spousal support. It is thus the ongoing nature of the obligation which is unfair, not the initial agreement for support.

2. Equal vs. Unequal Division of Assets

[126] Since I have declined to set aside the separation agreement in its entirety, there is no need to address this issue.

[127] However, there is one submission of the claimant which is conveniently dealt with under this heading. Mr. De Medeiros pled unjust enrichment in his notice of family claim. This claim was not referred to in any way in his trial brief. However, counsel for Mr. De Medeiros made arguments in support of a finding of a trust claim based on the principle of unjust enrichment near the end of his submission on division of assets.

- [128] As I understand the argument, it is distinct from the argument that the net gain in equity for both the McKinley Townhouse and the Strom House should be considered family property and thus divided equally between the parties. The trust argument is that, because of the labour and other contributions made either solely or inordinately by the claimant to the improvements of both residences, Ms. Hodgson has been unjustly enriched by the manner in which the sale proceeds of those properties have been divided, pursuant to the separation agreement.
- [129] Mr. De Medeiros relied on paras. 138 to 144 of G.C.G., which, in part, distilled the principles set out in two Supreme Court of Canada cases: *Kerr v. Baranow*, 2011 SCC 10; and *Pettkus v. Becker*, [1980] 2 S.C.R. 834. At para. 138 of G.C.G., Mr. Justice Brown stated:
- [138] Recovery is now permitted whenever a plaintiff can establish three elements: an enrichment of the defendant by the plaintiff, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment.
- [130] At para. 139, Mr. Justice Brown noted that a valid contract, such as a separation agreement, would in some circumstances constitute a juristic reason for the enrichment. Because he had set aside the separation agreement in that case, he was left with an absence of a juristic reason. In this case, I have upheld the separation agreement, so the third criterion is not met.
- [131] Moreover, I cannot find the first two elements on the facts of this case. With regard to the McKinley Townhouse, the claimant's contributions to the residence were minimal, consisting of some interior painting and partially finishing a downstairs television room. By contrast, the respondent did the gardening and other upkeep, and most importantly, paid the mortgage, maintenance fees and all other hard costs associated with the townhouse, such as insurance and property taxes.
- [132] As for the Strom House, I have already dealt with the issue of the agreement between the parties as to extensive renovations and corresponding costs. I resolved the essential credibility contest in favour of Ms. Hodgson and found that Mr. De Medeiros, after the point at which Ms. Hodgson said she was no longer willing to contribute, nonetheless persisted with renovations, knowing that he alone would bear the cost. I accept Ms. Hodgson's evidence that he did so in part based on a desire to repay her for the time he had spent away from the family home over the years, and her role in managing all of their financial affairs in his absence.
- [133] In those circumstances, apart from the \$16,500.00 which I intend to credit to Mr. De Medeiros, I cannot find that Ms. Hodgson has been unjustly enriched, nor that Mr. De Medeiros has suffered deprivation.

3. Spousal Support

[134] In my view, the portion of the separation agreement which addresses "Spousal Maintenance", beginning at page 6, is severable from the rest of the contract. I intend to treat it as a separate agreement.

[135] The next questions which naturally arise are what are the limits of any review I undertake of the agreement, and which sections of the FLA apply to the review. The relevant sections read as follows:

164 (1) This section applies if spouses have a written agreement respecting spousal support, with the signature of each spouse witnessed by at least one person.

- (2) For the purposes of subsection (1), the same person may witness each signature.
- (3) On application by a spouse, the court may set aside or replace with an order made under this Division 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 income, 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 party's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would under the common law cause all or part of a contract to be voidable.
- (4) The court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the agreement with an order that is substantially different from that set out in the agreement.
- (5) Despite subsection (3), the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
 - (a) the length of time that has passed since the agreement was made;
 - (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
 - (c) the intention of the spouses, in making the agreement, to achieve certainty;
 - (d) the degree to which the spouses relied on the terms of the agreement;
 - (e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].

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

168 (1) An agreement or order respecting spousal support may provide for a review of spousal support, and for this purpose may provide for

- (a) the review to occur on or after a specified date, after a specified period of time or after a specified event has occurred,
- (b) the type of family dispute resolution by which the review will take place,
- (c) the grounds on which a review will be permitted, and
- (d) the matters to be considered for the purposes of a review.

(2) On review, a court, on application, may do one or more of the following:

- (a) confirm an agreement or order respecting spousal support;
 - (b) set aside all or part of an agreement, or terminate an order, respecting spousal support;
 - (c) make an order under section 165 [orders respecting spousal support].
- (3) In making an order under this section, the court is not required to consider any of the matters referred to in sections 164 [setting aside agreements respecting spousal support] and 167 (2) [changing, suspending or terminating orders respecting spousal support].

169 (1) This section applies if an agreement or order does not address whether spousal support may be reviewed under section 168 [review of spousal support] and if

- (a) a spouse who must pay spousal support starts receiving benefits under a pension, or
 - (b) a spouse who is entitled to receive spousal support becomes eligible to receive benefits under a pension.
- (2) In the circumstances set out in subsection (1), a court, on application, may do one or more of the following:
- (a) confirm an agreement or order respecting spousal support;
 - (b) set aside all or part of an agreement, or terminate an order, respecting spousal support;
 - (c) make an order under section 165 [orders respecting spousal support].
- (3) In making an order under this section, the court is not required to consider any of the matters referred to in sections 164 [setting aside agreements respecting spousal support] and 167 (2) [changing, suspending or terminating orders respecting spousal support].

- [136] Section 164 of the FLA applies to an application to set aside a written agreement, and contains similar language to s. 93(3). Section 168 of the FLA applies to a review of spousal support arising from a right of review contemplated within the agreement. It provides for a much broader power of review, and does not require the court to consider the matters referred to in s. 164.
- [137] The agreement here states as follows, in regard to review by the court:
- The amount payable can be reviewed at any time in the future by either party, and can be changed by mutual agreement, or by the Court.
- [138] Thus, the express review contemplated by the agreement only covers the "amount payable". The agreement is silent as to duration, or any other type of review. The portions of the agreement which surround the limited review provision are rife with inaccuracy. In particular, they refer to the mutually agreed upon early retirement plan by Ms. Hodgson, and voluntary income supplement to be provided by Mr. De Medeiros. I have already found that the plan was not mutual, and there was no agreement by Mr. De Medeiros to supplement Ms. Hodgson's income.
- [139] Moreover, the agreement also states that Mr. De Medeiros' income is "triple" that of Ms. Hodgson, and will be "quadruple" that of hers once her sole source of income is benefits from the CPP and OAS. The estimate of "triple" is at a minimum, an exaggeration. The reference to CPP and OAS as sole sources of income is misleading. Ms. Hodgson has both her portion of her first husband's pension and her own British Columbia Public Service Pension Plan income to draw on once she retires, in addition to CPP and OAS.
- [140] I thus find that both s. 164(3)(a) and s. 164(3)(c) apply to the spousal support agreement. Ms. Hodgson, in drafting the agreement, "failed to disclose income", her entitlement to a portion of her ex-husband's pension. In addition, given the overall inaccuracy of the surrounding assertions as to income, and the somewhat imprecise language regarding reviewability, I am satisfied that s. 164(3)(c) is engaged. Mr. De Medeiros did not understand that he was, from Ms. Hodgson's perspective, agreeing to pay her spousal support indefinitely, perhaps forever.
- [141] I therefore set aside the spousal support agreement, pursuant to s. 164(3), and I intend to replace it with a different order. For the reasons that follow, the order I make will be "substantially different" than that which is contained in the agreement. I have considered s. 164(4) of the FLA.
- [142] The three bases on which spousal support is generally awarded are compensatory, non-compensatory and contractual. Of these, I find that only non-compensatory would apply in this case. I have already found that there was no pre-existing agreement between the parties that Mr. De Medeiros would financially support Ms. Hodgson. To the extent that the February 2, 2015 agreement states otherwise, as I have noted, it was inaccurate and misleading. It obviously cannot be the basis for a contractual obligation to provide support.

[143] Compensatory support awards are normally made to reflect opportunities which one spouse has forgone during the marriage as a result of child rearing responsibilities. There were none in this relationship; thus there is no basis for an award under this heading.

[144] That leaves a consideration of an award of non-compensatory spousal support. In considering Ms. Hodgson's entitlement to such an award, I must have in mind both the provisions of the FLA and the common law, in particular the Supreme Court of Canada decisions of *Moge v. Moge*, [1992] 3 S.C.R. 813; and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

[145] Section 161 of the FLA sets out the objectives of spousal support in these terms:

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[146] In this case, the most applicable of these subsections are (c) and (d), relief of economic hardship arising from the breakdown of the relationship, and promotion of economic self-sufficiency within a reasonable time.

[147] I note what was said at 848 of *Moge*, that "it is important not to lose sight of the fact that the support provisions of the Act are intended to deal with the economic consequences, for both parties, of the marriage or its breakdown" (emphasis in original).

[148] Then, at 849, the Court stated:

Equitable distribution can be achieved in many ways: by spousal and child support, by the division of property and assets or by a combination of property and support entitlements .

[149] In this case, both parties were completely self-sufficient prior to their approximately eight-year common law relationship. Ms. Hodgson, in particular, had structured her affairs in contemplation of perhaps retiring in her mid-sixties and living on her "nest egg" and whatever cumulative pension income she would receive. Of note, she had never sought spousal support from either of her ex-husbands.

- [150] During the currency of the relationship, there was limited intermingling of funds between Ms. Hodgson and Mr. De Medeiros. They tended to share most expenses equally, although Mr. De Medeiros often funded additional items outside of the ordinary. To that extent, Ms. Hodgson's standard of living might be said to be negatively impacted by the breakdown of the relationship.
- [151] Obviously, there is continuing income disparity between the parties, although on the evidence before me, nowhere near as great as that set out in the written agreement. I note that income disparity simpliciter does not create entitlement to spousal support. In particular, it was unrealistic for Ms. Hodgson, at the time of the marital breakdown, to expect Mr. De Medeiros to fund her early retirement through an indefinite income supplement.
- [152] I also reiterate my earlier finding that, to a great extent, the balance of the separation agreement addressed Ms. Hodgson's long-term need for financial stability and certainty, by preserving the entire "nest egg", around which she had planned her retirement. The agreement, absent any provision for spousal support, went some distance to relieving her of the economic consequences of the marital breakdown.
- [153] In *Lee v. Lee*, 2014 BCCA 383 at para. 66, the Court recognized that in some circumstances, it may be appropriate for a party who experiences a marked decline in standard of living post-separation to be provided a "transitional" award to assist in adapting to changed circumstances. The Court noted that such could come in the form of reapportionment of assets or maintenance (or, presumably both, per *Moge* at 849).
- [154] In this case, I find that some form of transitional award, in the form of limited term spousal support would be appropriate. Spousal support should not continue indefinitely. In recognition of that fact, and with the acquiescence of counsel for Ms. Hodgson, I discontinued the payments at the conclusion of final submissions, and directed that any amount then in arrears be paid into the trust account of respondent's counsel.
- [155] At the time of separation, both parties, but in particular Mr. De Medeiros, had considerably greater income than at the time of trial. His income tended to fluctuate, based on work location and other variables, but on balance, Mr. De Medeiros tended to earn approximately \$120,000 per year. His employment at JV Driver, where he held a supervisory position, ended at almost the same time as the separation. Mr. De Medeiros testified that he was earning \$150,000 at the time. Since separation, his income has dropped to something closer to \$75,000. Ms. Hodgson earned approximately \$55,000 at the time of separation. Her income has decreased since that time based on her personal circumstances, including spending part of the year on disability, which nets her only a percentage of her normal earnings.
- [156] Neither party provided me with any calculations to show what would have been the range of potential spousal support payments based on their respective incomes at time of separation. However, based on the parties' incomes at that time, \$1,000.00 per month would

have been within the range, but at the high end. Both parties provided me with DivorceMate printouts based on different estimates of income for each of them at time of trial. The calculation that most closely mirrors the actual incomes, \$75,000 for him and \$45,000 for her, yields a range of support between \$300.00 and \$400.00 per month, for an indefinite duration.

[157] To date, Ms. Hodgson has received approximately \$30,000.00 in spousal support payments. In my view, that amount is an adequate and appropriate amount to discharge Mr. De Medeiros' support obligations, whether viewed as a lump sum transitional award, or a monthly amount payable for a fixed term. I note that, although the term indicated by the Spousal Support Advisory Guidelines would be "indefinite", that does not mean "forever". It is always open to the court to decrease the amount, based on changed circumstances, or to terminate payments. As I have already found, Ms. Hodgson was entitled to a transitional award. I therefore terminate the spousal support payments, effective July 31, 2017. Any amount paid by Mr. De Medeiros as payments pursuant to the agreement on or after August 1, 2017 presently held in the trust account of respondent's counsel, should be returned to Mr. De Medeiros.

[158] In addition, Ms. Hodgson should make an equalization payment to Mr. De Medeiros of \$16,502.40, which is the amount that she agreed she owed Mr. De Medeiros pursuant to the Strom House sale.

[159] In my view, in light of the mixed success of the parties in this action, each party should bear his or her own costs.

"Tammen J."

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