

CANADA / JUDGMENT

Eckert v. Garnham

2023 BCSC 55

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Supreme Court of British Columbia

DECIDED

11 January 2023

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2023 BCSC 55 Eckert v. Garnham

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Eckert v. Garnham,

2023 BCSC 55

Date: 20230111

Docket: E213114

Registry: Vancouver

Between:

Kimberly Dawn Eckert

Claimant

And

Royston Joseph Garnham

Respondent

Before: The Honourable Justice Tammen

Reasons for Judgment

Counsel for the Claimant:

M. Ossudallah

Counsel for the Respondent:

M. Lott

Place and Date of Hearing:

Vancouver, B.C.

September 14, 2022

Place and Date of Judgment:

Vancouver, B.C.

January 11, 2023

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INTRODUCTION AND OVERVIEW

- [1] The applicant, Kimberley Dawn Eckert, seeks to set aside a separation agreement, dated December 10, 2020 (the "Agreement"). The parties were in a spousal relationship for approximately five-and-a-half years, from August 2014 to late January 2020. They were formally married on October 10, 2015. There are no children of the marriage.
- [2] From the time of marriage until separation, the parties lived in a house owned by the respondent, Royston Joseph Garnham, in Ladner, BC (the "Ladner Home"). Also living in the Ladner Home were the parties' children from previous relationships. At the time, Ms. Eckert had a daughter born in 2002 and a son born in 2006. Mr. Garnham had a son born in 2011. The parties separated on January 20, 2020, when Ms. Eckert moved out of the Ladner Home.
- [3] At the time the spousal relationship commenced, Ms. Eckert owned a home on First Nation reserve land in North Vancouver, BC. For a time, she rented it to her brother, and in 2017 transferred title to him in exchange for \$110,000. Ms. Eckert deposes that Mr. Garnham pressured her into doing so. Mr. Garnham deposes that he discouraged her from transferring title. I am unable to resolve that conflict in the evidence, but do not think the reason for the transfer is legally significant.

- [4] The parties agree that some of the funds received from Ms. Eckert's brother were used to pay down Mr. Garnham's line of credit, but disagree as to whether the root cause of that debt was related to Ms. Eckert's credit card debt. Again, nothing turns on this evidentiary conflict, which I am unable to resolve. Ms. Eckert does not state the amount paid toward the line of credit, and deposes that the balance of the funds was deposited in her savings account.
- [5] During the time they lived together, the parties jointly acquired a recreational property near Princeton, BC (the "Recreational Property"). In order to finance the purchase, Mr. Garnham remortgaged the Ladner Home. At the time the Agreement was executed, the assessed value of the Recreational Property was \$128,000.
- [6] The parties began discussing a separation agreement, via email communications, in summer 2020. On October 13, 2020, Ms. Eckert delivered a lengthy email to Mr. Garnham, in which she set out her proposal for final settlement. Near the conclusion of the email, Ms. Eckert requested \$138,000, which she broke down as:
- a) \$110,000 for the sale of her North Vancouver home;
 - b) \$18,000 for a trailer on the Recreational Property; and
 - c) \$10,000 for expenses and debts incurred by her.
- In that email, Ms. Eckert stated that she did not want spousal support, any portion of the equity in the Ladner Home, or any portion of Mr. Garnham's pension.
- [7] Mr. Garnham responded to that email on November 3, 2020, advising that he had taken steps to have a law office prepare a separation agreement that would include a payment by him to Ms. Eckert of \$138,000.
- [8] On December 4, 2020, Ms. Eckert advised Mr. Garnham that she had reconsidered the amount of the settlement, and requested that it be adjusted upward. Ms. Eckert referred to having discussed the matter with a lawyer. There followed an exchange of emails on that topic, in which Mr. Garnham recounted his difficulty in obtaining financing for the settlement.
- [9] The Agreement is dated December 10, 2020. It was signed by Ms. Eckert on that day, and by Mr. Garnham on December 15, 2020.
- [10] On December 9, 2021, Ms. Eckert filed a Notice of Family Claim, seeking various relief, including that the Agreement be set aside.
- [11] The present application was filed August 10, 2022.
- [12] The grounds on which Ms. Eckert seeks to set aside the Agreement are these:
- a) There was significant non-disclosure of assets and income by Mr. Garnham at the time of the Agreement; and

- b) The Agreement is significantly unfair.

RELEVANT STATUTORY PROVISIONS

[13] Ms. Eckert relies on ss. 93(3), 93(5), 164(3) and 164(5) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], which I here reproduce:

Setting aside agreements respecting property vision

93(1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

- (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
- (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- (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.

Setting aside agreements respecting spousal support

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.

- (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.
- (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]. . . .

[14] With respect to ss. 93(3)(b) and (d), Ms. Eckert says she was in a particularly vulnerable state, and that Mr. Garnham took advantage of her vulnerability. Ms. Eckert also relies on the common law of duress, undue influence and unconscionability. Finally, Ms. Eckert submits that she did not receive independent legal advice (ILA) prior to signing the Agreement, and that the lawyer who drafted the Agreement was in a disqualifying conflict, having previously acted for her in an unrelated matter.

[15] In *Reid v. Reid*, 2017 BCCA 73, the Court of Appeal refined the test adopted by the Supreme Court of Canada in *Miglin v. Miglin*, 2003 SCC 24, on an application to set aside a separation agreement. At paras. 56-58, Justice Groberman said this:

[56] The Court divided the inquiry into two stages. At the first stage, a judge must consider the circumstances that existed at the time the agreement was entered into. Particular attention must be paid to circumstances in which one party exploited an unfair negotiating advantage:

[81] It is difficult to provide a definitive list of factors to consider in assessing the circumstances of negotiation and execution of an agreement. We simply state that the court should be alive to the conditions of the parties, including whether there were any circumstances of oppression, pressure, or other vulnerabilities, taking into account all of the circumstances,

including those set out in s. 15.2(4)(a) and (b) [of the Divorce Act] and the conditions under which the negotiations were held, such as their duration and whether there was professional assistance.

- [83] Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.
- [57] The next inquiry within the first stage of the Miglin test is an examination of whether the agreement, at the time it was entered into, comported with the goals of the underlying legislation:
- [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.
- [85] When examining the substance of the agreement, the court should ask itself whether the agreement is in substantial compliance with the Divorce Act. As just noted, this "substantial compliance" should be determined by considering whether the agreement represents a significant departure from the general objectives of the Act, which necessarily include, as well as the spousal support considerations in s. 15.2, finality, certainty, and the invitation in the Act for parties to determine their own affairs. The greater the vulnerabilities present at the time of formation, the more searching the court's review at this stage.
- [58] The second stage of the Miglin inquiry is concerned with events that occur after the agreement is entered into. Even if the agreement was entirely proper at its inception, unforeseen circumstances may lead a court to award spousal support notwithstanding a separation agreement that purported to finally determine the issue:
- [87] Where negotiation of the agreement is not impugned on the basis set out above and the agreement was in substantial compliance with the general objectives of the Act at its time of creation, the court should defer to the wishes of the parties and afford the agreement great weight. Nevertheless, the vicissitudes of life mean that, in some circumstances, parties may find themselves down the road of their post-divorce life in circumstances not contemplated.

Accordingly, on the bringing of an application under s. 15.2, the court should assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act.

- [16] At paras. 59-61, Groberman J.A. quoted *Rick v. Brandsema*, 2009 SCC 10 [Brandsema], which dealt with the potential consequences of failing to disclose financial information at the time an agreement is negotiated. In Brandsema, at para. 47, the Court noted that "the deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation."

FINANCIAL NON-DISCLOSURE

- [17] Ms. Eckert's principal submission on this point is that the recitals of the Agreement are inaccurate, coupled with an argument that Mr. Garnham deliberately did not disclose significant assets and income. The non-disclosure is said to relate to bank accounts, ownership of a business, the value of a pension, annual income, and ownership of real property.
- [18] There is only merit to this submission insofar as Mr. Garnham's income is concerned. It is listed in the recitals as \$124,068, when in fact it was \$129,509.23. Mr. Garnham does not adequately explain this error in his affidavit. However, the difference (approximately \$5,500), although not insignificant, is not vast. Mr. Garnham's income would be primarily relevant to determining the quantum of spousal support. By the terms of the Agreement, Ms. Eckert expressly waived any claim to spousal support. Further, she has not persuaded me that she was legally entitled to spousal support under the FLA. Nor am I persuaded that, had she known Mr. Garnham's correct income, such would have impacted her decision to waive her potential spousal support claim.
- [19] As for the remainder of the items about which Ms. Eckert says there was non-disclosure, I disagree.
- [20] The Agreement was clear that the parties' respective pensions were not being valued, and each waived any claim to the other's pension.
- [21] I accept Mr. Garnham's evidence that the sole proprietorship is a hobby venture, and in any event, it generates no income.
- [22] Finally, the non-disclosed interest in real property is fully explained in Mr. Garnham's affidavit. The property is part of Mr. Garnham's deceased father's estate, and thus is excluded property. The property was owned in a joint tenancy by Mr. Garnham's father and his father's second spouse. Mr. Garnham is registered on title as a fifty percent owner in his capacity as executor of the estate. By the combined terms of the father's will and an agreement reached between the beneficiaries and the surviving spouse, Mr. Garnham will,

at a future date, inherit one third of one half of the property.

- [23] In summary, I find that there was not significant non-disclosure of assets on the part of Mr. Garnham at the time the Agreement was prepared and executed.

PROCEDURAL AND SUBSTANTIVE FAIRNESS

- [24] Under the first stage of the Miglin test, the court must assess both the procedural and substantive fairness of the negotiated agreement: Brandsema at para. 50. The overarching question is whether, in light of all the circumstances, the Agreement meets the objectives of the legislative scheme. Those objectives include attempting to ensure that the parties share equally in the economic consequences of the relationship and its breakdown, while promoting economic self-sufficiency. In addition, courts must respect the parties' contractual autonomy and strive to promote certainty, while also recognizing that there are inherent emotional vulnerabilities at play in all matrimonial litigation. Such vulnerabilities inevitably leads to a level of judicial scrutiny that is more robust than in the commercial context.

Procedural Fairness

- [25] The court must first consider the circumstances surrounding the negotiation and execution of the agreement: Reid at para. 56. The focus is on whether one party exploited the other's vulnerabilities and acquired an unfair negotiating advantage: Reid at para. 56; Miglin at paras. 82-83.
- [26] Here, Ms. Eckert submits that she was in an extremely vulnerable state at the material time.
- [27] Ms. Eckert had become pregnant in March 2020 and thus was in the final trimester of her pregnancy at the time the Agreement was negotiated. She gave birth seven days after signing the Agreement.
- [28] Additionally, Ms. Eckert was experiencing significant financial hardship. As a result of her taking maternity leave, she had no source of income and consequently struggled to find and maintain suitable accommodation for herself and her children. Ms. Eckert deposes that she occasionally sold her personal belongings to pay her bills and relied on gifts from her brother to afford necessities such as food. When Ms. Eckert advised Mr. Garnham of the precariousness of her financial situation, Mr. Garnham offered her some money for food, which Ms. Eckert declined, she deposes out of shame.
- [29] In October 2020, Ms. Eckert sent her children to live with their father because she was unable to provide for them. She described this as the only option available to her "to avoid homelessness." In late October 2020, Ms. Eckert moved out of her rental home because she was unable to satisfy her monthly rental payments.
- [30] Ms. Eckert was also grieving the death of her mother, which occurred in May 2020.

- [31] On December 4, 2020, Ms. Eckert sent Mr. Garnham an email, in which she advised that she had reconsidered her position, and suggested that they both take some further time over the holidays to think about things. Mr. Garnham responded on December 7, 2020, setting out his view that they should proceed with the Agreement then extant. In her reply, sent the same day, Ms. Eckert agreed to sign the Agreement as drafted. In that same email, Ms. Eckert advised Mr. Garnham that she had lost her home and her children, whom she could no longer afford to feed and clothe, and that she was "not in the best place to make decisions."
- [32] Ms. Eckert did not have legal representation at the time the Agreement was executed. In late November 2020, Ms. Eckert did obtain ILA from a lawyer, Ms. Severide. That advice was that she should not sign the Agreement on account of it being too one-sided in Mr. Garnham's favour. Ms. Severide ultimately declined to sign a certificate of ILA, stating that the Agreement was "just too far off." When Ms. Eckert subsequently requested to meet with Ms. Severide, Ms. Severide declined. In order to execute the Agreement absent legal representation, Ms. Eckert signed a waiver of her right to ILA.
- [33] I agree that Ms. Eckert was in a vulnerable state at the relevant time. She was in the final trimester of her pregnancy, lacked stable living arrangements, could not afford to provide for her children, and did not have legal representation at the time the Agreement was executed. It is the cumulative effect of these factors that rendered Ms. Eckert vulnerable.
- [34] I am also satisfied that Mr. Garnham took advantage of Mr. Eckert's vulnerability. That exploitation is most evident in his December 7, 2020 email. However, it commenced prior to that, when Mr. Garnham retained a law firm to draft the Agreement. He selected a lawyer who had acted for Ms. Eckert in the past, both with respect to a former divorce action, in 2015, and in regard to two motor vehicle accident claims, sometime prior to 2020. That lawyer, Mr. Buchanan, drafted the Agreement, advised Mr. Garnham about it, and witnessed Mr. Garnham's signature.
- [35] Ms. Eckert raises disqualifying conflict as a discrete basis to set aside the Agreement. I do not agree with that submission. Certainly, Mr. Buchanan owed Ms. Eckert an ongoing duty of loyalty, but I cannot conclude on the basis of the evidentiary record before me that he was in a disqualifying conflict: see *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 at para. 33. Mr. Buchanan in an email to Ms. Eckert clearly communicated the need for her to receive ILA prior to signing the Agreement. He also confirmed his understanding, as conveyed to him by Mr. Garnham, that Ms. Eckert did not object to him drafting the Agreement, based on Mr. Garnham's instructions.
- [36] Nonetheless, in subsequent communications between the parties, Mr. Garnham both denigrated the ILA received by Ms. Eckert and told Ms. Eckert that Mr. Buchanan did not agree with that advice. Both communications form part of the conduct which in my view amply demonstrates that Mr. Garnham took advantage of Ms. Eckert's vulnerability.

- [37] As discussed, Ms. Eckert obtained ILA from Ms. Severide, who advised that she should not sign the Agreement since it was too one-sided. Ms. Eckert conveyed that information to Mr. Garnham. Mr. Garnham replied by expressing surprise and stating that Mr. Buchanan believed the Agreement was "not that far off." Thus, Mr. Garnham used the previous solicitor-client relationship between Ms. Eckert and Mr. Buchanan to his advantage in the negotiation.
- [38] In his email to Ms. Eckert on December 7, 2020, Mr. Garnham openly questioned Ms. Severide's motives and professionalism, suggesting that she was motivated by financial gain. He described her refusal to sign the certificate of ILA as a "greasy" tactic and stated that lawyers do not make money from uncontested separation agreements. This was a clear attempt by Mr. Garnham to undermine the legal advice received by Ms. Eckert.
- [39] In addition, Mr. Garnham was aware of Ms. Eckert's vulnerabilities and pressured her to sign the Agreement in spite of them. In Ms. Eckert's December 4, 2020 email, she advised Mr. Garnham of her precarious housing and financial situation and requested additional time over the holidays to consider her position. In response, Mr. Garnham stated that the process of negotiating the Agreement was causing him severe anxiety, stating "I need this to end." Ms. Eckert responded later that day, and said she would sign the Agreement, and did so on December 10, 2020.
- [40] By taking advantage of the relationship of trust that existed between Mr. Buchanan and Ms. Eckert, expressly undermining Ms. Severide's legal advice, and pressuring Ms. Eckert to sign the Agreement despite her request for additional time, Mr. Garnham exploited Ms. Eckert's vulnerabilities. In doing so, he acquired an unfair negotiating advantage.

Substantive Fairness

- [41] Having found that Mr. Garnham took advantage of Ms. Eckert's circumstances of vulnerability, I must next consider whether the Agreement was substantially unfair. In my view, it was.
- [42] In considering the substance of the Agreement, the court must consider whether the agreement is in substantial compliance with the general objectives of the FLA: FLA, s. 93(4); Miglin at para. 85. An agreement will be set aside only if the court would replace it with an order containing substantially different terms.
- [43] Under the FLA, Ms. Eckert was entitled to a division of Mr. Garnham's pension and to share in the increase in equity in the Ladner Home. In addition, the Recreational Property was clearly a family asset, and she was entitled to fifty percent of it. Although Ms. Eckert in her initial email said she did not seek any portion of the equity in the Ladner Home nor a division of Mr. Garnham's pension, this does not affect her statutory entitlements.

- [44] Based on the evidence, it is difficult to calculate Ms. Eckert's precise entitlement. However, it was certainly far in excess of \$138,000. The increase in equity in the Ladner Home during the marital relationship was approximately \$600,000. Ms. Eckert was presumptively entitled to half of that amount. Fifty percent of the assessed value of the Recreational Property is \$64,000. Ms. Eckert claims that her portion of Mr. Garnham's pension is \$45,000. Although I believe that amount is somewhat inflated, for certain, Ms. Eckert was entitled to some portion of the pension.
- [45] In those circumstances, the amount Ms. Eckert actually received under the Agreement (\$138,000), is a significant departure from her statutory entitlement. Therefore, the Agreement is substantively unfair, a conclusion I reach without factoring in Ms. Eckert's claim for spousal support, which, in any event, I find rather tenuous.
- [46] In his submissions, Mr. Garnham emphasizes that the total registered charge owing against the Ladner Home at the time of separation was \$646,000. On the evidence before me, it appears the majority of this amount stems from debt incurred by Mr. Garnham prior to the commencement of the parties' spousal relationship. Under the FLA, Ms. Eckert is only required to share debts that were incurred by Mr. Garnham during their marriage.
- [47] I acknowledge that, during the marriage, the parties remortgaged the Ladner Home in order to purchase the Recreational Property. While this would have created a shared family debt, the Recreational Property is a shared family asset. Therefore, any part of the charge owing on the Ladner Home that Ms. Eckert is required to share with Mr. Garnham is offset by the equity in the Recreational Property that Mr. Garnham is required to share with Ms. Eckert. Consequently, the fact there is a sizeable charge against the Ladner Home does not alter my conclusion on substantive fairness.
- [48] Given the substantial unfairness of the Agreement, I decline to exercise my discretion pursuant to s. 93(4), which reads:

The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.

- [49] For the foregoing reasons, Ms. Eckert's application to set aside the separation agreement, dated December 10, 2020, is allowed. The substantial unfairness of the Agreement arose in the circumstances of Mr. Garnham's exploitation of Ms. Eckert's vulnerabilities and, as a result, the Agreement is hereby set aside.
- [50] If this were a trial, I would replace the Agreement with an order that is substantially different than the terms set out in the Agreement.
- [51] Because this application was brought without a request to make a replacement order for the Agreement, I simply award costs to Ms. Eckert in the cause. There remains a need for the parties to resolve the remaining issues through the standard trial processes.

"Tammen J."

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Prepared on 25 October 2026 · Esheria