

CANADA / JUDGMENT

F.C.A.S. v. C.E.S.

2025 BCSC 622

COURT

Supreme Court of British Columbia

DECIDED

3 April 2025

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2025 BCSC 622 F.C.A.S. v. C.E.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

F.C.A.S. v. C.E.S.,

2025 BCSC 622

Date: 20250403

Docket: E203099

Registry: Vancouver

Between:

F.C.A.S.

Claimant

And:

C.E.S.

Respondent

And:

EHL

Corporate Respondent

(By Counterclaim)

Corrected Judgment: Counsel appearance on the cover page and the text of the judgment at paras. 9 and 125 have been corrected on April 15, 2025

Before: The Honourable Justice G.C. Weatherill

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

September 23-27

October 17-18, 28-31

November 6-7, 2024 and

March 10-14, 2025

Place and Date of Judgment:

Vancouver, B.C.

April 3, 2025

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Introduction

- [1] The respondent met the claimant in late July 2012. Shortly thereafter, the parties began living together in a marriage-like relationship. They were married on June 13, 2015. There are two children of their relationship currently aged 7 and 5. The respondent has two children from a previous relationship: A., who was born in 2005 and is currently aged 19, and L., who was born in 2008, currently aged 16.
- [2] On October 11, 2016, the parties executed a post-nuptial marriage agreement (the "M.A.").
- [3] The parties separated on May 5, 2020.
- [4] The claimant filed a notice of family claim on December 7, 2020, seeking a Divorce Order as well as orders relating to the children and various properties. He also seeks a declaration that the M.A. is binding on the parties and is enforceable.
- [5] On February 9, 2021, the respondent filed a response to family claim as well as a counterclaim seeking, inter alia, an order setting aside the M.A.
- [6] Prior to this trial commencing, there were no less than 55 orders made, and 11 separate reasons for judgment issued by this court. Needless to say, the parties' acrimonious relationship and litigation tactics have occupied a substantial amount of court time.
- [7] On May 19, 2023, the Trial Management Judge, Madam Justice Murray, ordered that the issue of the validity of the M.A. was to be severed, heard, and determined prior to the hearing and determination of the other issues raised in the pleadings. The trial of the issue of the validity of the M.A. before me commenced on September 23, 2024 and continued intermittently over the course of several months. The trial concluded on March 14, 2025, after occupying 18 court days. These are my reasons for judgment in respect of that issue.

Evidence at Trial

- [8] The respondent gave birth to A. at the age of 18 and to L. at the age of 21. The respondent's relationship with A.'s and L.'s biological father was turbulent and she felt she was unable to provide the stability and security her children needed. As a result, A. was raised primarily by the respondent's parents who were granted guardianship in April 2007. L. was adopted by another family shortly after his birth.
- [9] The claimant's father is Dr. H.S. ("Dr. S."). By any measure, Dr. S. has been financially successful. He holds a PhD in Biochemistry and has been involved in various pharmaceutical companies, several of which he took public and received "founders shares", some of which he allocated to his wife, F., and to his two sons, the claimant and J. He testified that, despite these allocations, he was the one who ultimately received the proceeds from the sale of the shares.

- [10] On March 13, 2012, Dr. S. created a trust called the S. Family Trust (the "Trust"). He testified that the purpose of the Trust was to protect his assets "for generations". The Trust Deed is a lengthy, formal and comprehensive document. The Trust's beneficiaries are Dr. S., F., the claimant and J., as well as his grandchildren and any other person or entity of Dr. S.'s choosing. The Trust gives Dr. S. the "absolute and uncontrolled discretion" to distribute the Trust's income and/or capital to any beneficiary, at any time and in any manner of his choosing. At all material times, Dr. S. maintained control over all of the Trust's assets.
- [11] Dr. S. testified that all of the Trust's capital was contributed by him.
- [12] Dr. S. has been and continues to be involved in real estate development and investment, including the purchase of houses for demolition, reconstruction, and sale. Since at least 2011, the claimant has assisted Dr. S. in these enterprises, acting as Dr. S.'s "right-hand man", managing the projects under Dr. S.'s direction. The claimant was paid a modest salary from the Trust for this work.
- [13] Title to the various development properties was registered in the joint names of Dr. S. and/or F. together with the claimant or J.. Dr. S. testified that he did so for convenience, because he and/or F. often travelled outside of BC and it was important that one of his sons be able to transact whatever business was necessary in his absence. He testified that neither the claimant nor J. ever contributed financially to the purchase of any of the properties and that it was never his intention to gift any of the properties to either of them.
- [14] The claimant and the respondent began living in a marriage-like relationship in early August 2012. At that time, the claimant was 27 years of age and the respondent was 26 years of age, respectively. The respondent testified that she was a painter who was able to sell some of her art but, otherwise, throughout their relationship, she had no employment and the claimant financially supported her, paying all of her living expenses and bills, including credit cards, with cash that the claimant kept in a safe.
- [15] Dr. S. testified that the claimant regularly asked him for financial assistance and that he and F. habitually provided it to him in various forms, including by gifting him cash, by paying his bills and expenses, and by allowing him to live rent-free in the houses that had been constructed prior to their sale. Both Dr. S. and the claimant testified that the claimant had no money other than what he was paid by the Trust or received from his parents.
- [16] The respondent conceded on cross-examination that she had no direct knowledge of the source of funds the claimant used to pay their living and other expenses.
- [17] Dr. S. testified that one of his hobbies was luxury cars, several of which he owned including a Ferrari that he allowed the claimant to drive. He testified that none of his vehicles were ever gifted to the claimant.

[18] Dr. S. testified that, commencing in 2014, as the relationship between the claimant and the respondent became more serious, and on the advice of his lawyer, he required that the claimant sign promissory notes in respect of significant funding he was providing to him, whether in respect of the properties/construction projects he was managing or transfers of money to him for his living expenses. He testified that he did so as a means of protecting his assets against potential claims by the respondent.

[19] During the course of their relationship the parties lived together at the following locations:

8326 110th Avenue, Delta, BC (August 2012 to April 2014)

- a) A house built on a lot purchased by Dr. S. and registered in his and the claimant's name as joint tenants. The claimant was living in this house when the parties met, and this is where they began living in a marriage-like relationship. The Delta house was sold in March 2013. All of the sale proceeds were received by Dr. S.--none were received by the claimant. The parties moved to an apartment and then into the claimant's parent's home, pending completion of a house Dr. S. was funding at 66 West 62nd Avenue, Vancouver.

66 West 62nd Avenue, Vancouver, BC (April 2014 to September 2014)

- b) This property was purchased by Dr. S. in 2012 as another "tear down and rebuild" project. It was registered in the names of F and J. The claimant was involved in the construction of this house when the parties met. The lot and the construction expenses were funded by Dr. S. The respondent testified that she assisted with the interior design by helping the claimant and his interior designer pick out some of the furnishings. The house had a "laneway house" at the back, a portion of which was used by the respondent for her painting activities. The house was sold in September 2014. All of the sale proceeds were paid to F.

49 West 62nd Avenue, Vancouver, BC (September 2014 to March 2016)

- c) This was a project located across the street from the 66 West 62nd Avenue House. The claimant was also involved in its construction. Registered title was in the name of the claimant and F. as joint tenants. The 49 West 62nd Avenue house was sold in March 2016 for \$2,520,000. Dr. S. testified that he directed his lawyers to pay the net sale proceeds of \$2,440,598 to the claimant because both he and F. were travelling.

#703 - 1169 Cordova Street, Vancouver, BC (April 2016 to March 2017)

- d) An apartment rented by the parties pending completion by the claimant of construction of the Highbury House described below.

6120 Highbury Street, Vancouver, BC (November 2017 until Separation)

- e) On November 4, 2014, Dr. S. purchased a house at 6120 Highbury Street, Vancouver (the "Highbury House") for \$1,630,000, again with the intent of tearing down the existing structure, building a new home and selling it. Although title to the Highbury House was registered in the names of Dr. S. and the claimant, the entire purchase price was funded by

Dr. S., as was the case with all of the other houses. Dr. S. required the claimant to sign a promissory note in the amount of \$1,573,250 (the purchase price less the deposit) in order to protect his interest from a potential claim by the respondent.

Construction of the Highbury House project began in early 2016. As was the case with other projects, the claimant acted as the construction manager on the Highbury House project. The source of the funding for construction was the sale proceeds from 49 West 62nd Avenue project which, together with the proceeds of sale of an apartment that had been owned by the Trust, was ultimately deposited into a joint bank account in the names of the claimant and Dr. S. Dr. S. testified that "every penny" that went into the Highbury House came from him. The respondent testified that she participated in the interior design of the house, including picking out the finishes, furnishings, and landscaping.

Art Studio

[20] The house the parties moved to at 49 West 62nd Avenue in 2014 (described above) did not have space for the respondent's painting activities. Dr. S. arranged for her to use a small space at the back of the commercial space he owned at 1538 West 2nd Avenue, that was being used as a hair salon. Access to the space was through the hair salon. The respondent testified that this space became her "Art Studio" which she considered her "safe place".

The Family's Financial Structure

[21] Dr. S., the claimant, and the family's accountant, Mr. Brant Grondin, all testified regarding the S. family's holdings, financial arrangements, tax-driven transactions and the flow of funds in and around the time that the M.A. was executed. That evidence disclosed that:

The Trust

- a) Other than as set out below, the Trust was and is the sole shareholder of EHL, EML, and NCC:
 - i. EHL was incorporated on March 15, 2012. It owns and earns rental income from various real estate properties. It also owns the Art Studio space;
 - ii. EML was incorporated on June 12, 2012. Until its dissolution on May 31, 2023, EML provided management services to EHL;
 - iii. NCC was incorporated on June 1, 2011. It is in the business of providing IT and website consulting services. The claimant is its sole employee. On November 30, 2011, Dr. S. transferred one share of NCC to the claimant. On March 15, 2012, as part of a tax planning arrangement (s. 85 rollover), the claimant transferred his share in NCC to EHL in exchange for 100 class D preferred shares in EHL. On May 30, 2021, EHL redeemed those shares in exchange for the payment of \$40,000 to the claimant.

iv. The Trust also owns 50% of ASI, which was incorporated on June 17, 2020. In March 2023, EHL purchased the other 50% of ASI from the claimant's business partner, Michael Wong. The claimant participates in the management of ASI.

ECL

- b) ECL was owned 50% by the claimant and 50% by Mr. Wong. ECL provided consulting services on various construction projects. ECL was dissolved on May 31, 2023.

CCI

- c) CCI was incorporated on October 8, 2019. The sole shareholder of CCI was the claimant. It was dissolved on September 17, 2021.

EHI

- d) EHI is a public company controlled by Dr. S. At all material times until July 2017, the claimant held shares in EHI. In July 2017, EHI was sold to a third party.

Claimant's Reported Income and Capital Gains

- e) The claimant declared on his income tax returns the following income and capital gains (losses) from employment, investments, dividends and property transactions:

Year

Employment

Dividends

Capital Gain

Net Income

2012

\$35,742

\$5,647

\$35,742

2013

\$36,000

\$2,583

\$38,744

2014

\$36,000

\$239,775

\$155,887

2015

\$36,000

<\$7,985>

\$35,902

2016

\$36,000

\$55,143

\$69,421

2017

\$36,000

\$184,045

\$129,223

2018

\$36,000

5,102

\$40,195

2019

\$28,500

\$784

\$124,336

2020

\$40,000

<\$4,281>

\$149,689

2021

\$40,000

<\$3,834>

\$99,759

2022

\$0

\$116,730

<\$16,255>

\$111,168

2023

\$0

\$95,885

<\$1,615>

\$93,887

[22] The claimant testified that all of the capital gains he reported were in respect of the disposition of properties or shares that, although registered in his name, were owned by Dr. S., that Dr. S. received all of the net proceeds of sale and that he received none of them. Counsel for the respondent called Dr. S. as an adverse witness. He confirmed the claimant's evidence in this regard.

[23] Dr. S. also testified as part of the respondent's case that EHL owns one residential and two commercial real estate properties:

- a) 1538 West 2nd Avenue, Vancouver, BC, rented to a hair salon;
- b) #207-1540 West 2nd Avenue, Vancouver, BC, in which ASI operates; and
- c) #1005-7360 Elmbridge Way, Richmond, BC.

[24] Dr. S. testified that he directed the claimant regarding all business affairs and compensated the claimant based upon the advice he received from his accountant. He testified that the claimant "had no money other than what I gave him" or caused him to be given. He testified that if the claimant needed more money, he provided it to him by way of either a gift or a loan. He testified that he was the source of all of the funding in respect of the various financial transactions involving the claimant that were recorded on the books of EHL, NCC, or other entities controlled by him. He testified that all such transactions were directed by him with advice from his accountants. None of the money belonged actually to the claimant.

Alleged Incidents of Family Violence and Drug Use

The Respondent's Story

- [25] The respondent described the parties' early times together living in the Delta house as "touch and go". She testified that the claimant was controlling and would often get angry with her when she was not punctual. She testified that, on several occasions, the claimant cancelled her cell phone account when she did not answer his calls promptly. She testified that, on occasion, the claimant's anger "got out of hand" and escalated to "physical altercations" during which she was hit and kicked to the point where she bled. She testified that there were times when she felt partially responsible for the claimant's anger because "he was very good at making me think it was my fault". She testified that she continued with the relationship because she loved the claimant and wanted to start a family with him.
- [26] A friend of the respondent's, Elizabeth Cantor, described the claimant's behaviour toward the respondent as "controlling". Ms. Cantor testified that, in late 2012 or early 2013, she picked up the respondent at the Delta house because the respondent told her she did not feel safe. She testified that while the parties were living in either the house at the 66 West 62nd Avenue or the one across the street, she witnessed the claimant throw a bottle of pills at the respondent, heard them inside the house having a "heated" argument and from her outside vantage point witnessed the respondent disappear from view shortly after the claimant approached her.
- [27] The respondent testified that, in 2014, despite the parties' volatile relationship, she felt her life with the claimant was secure enough to allow then 9-year-old A. to return to her care. A. moved in with the parties at the end of June 2014.
- [28] Things did not go particularly well with A. living in the house. There were behavioral challenges with A. and conflicts arose. The respondent did not agree with the claimant's strict manner of dealing with those behavioral challenges. The respondent described the claimant as overbearing. The tension in the parties' relationship increased.
- [29] In late 2014, the parties began attending counselling with a registered clinical counsellor, Ms. Elaine McCaw, who testified that the objective of the counselling sessions was to help the parties improve their communication and parenting skills, with the goal of creating a good home and environment for A. Ms. McCaw conducted sessions with the parties both individually and together. During Ms. McCaw's individual sessions with the respondent in 2015, the respondent described several events that had traumatized her during her childhood, which she said had led to her drug use. The respondent testified that she had experimented with crystal methamphetamine when she was 16.
- [30] The parties were married on June 13, 2015.

- [31] Ms. Cantor testified that, after the parties were married, she met with the respondent on two or three occasions "in secret" because her understanding was that the claimant did not want Ms. Cantor in the respondent's life. She testified that, during these meetings, the respondent told her she did not feel safe, that she was afraid, and that she seemed on "high alert". Ms. Cantor testified that she was concerned for the respondent's wellbeing.
- [32] The respondent testified that, by November 2015, the relationship between A. and the claimant had deteriorated to the point that A. told the respondent she wanted to move out due to the claimant's controlling behaviour. The respondent testified that she was "devastated", "angry", and "confused". She testified that she felt as though she had failed A. A. left to live with L. and his adoptive parents.
- [33] The respondent testified that fighting between her and the claimant increased after A. left, that he got angry whenever she tried to communicate with A., and that they discussed ending their marriage.
- [34] Ms. McCaw described A.'s departure from the parties' home as a "massive turnaround" for the respondent and her relationship with the claimant. She testified that the respondent's levels of happiness, self-care, and grooming declined. She testified that the respondent had difficulty articulating her feelings, expressed thoughts of despair, was unable to focus, and gained weight. During their sessions, the respondent described the claimant as controlling and relentless about what he wanted from her. She testified that the respondent disclosed several incidents of physical and emotional violence at the hands of the claimant that caused her to be terrified of him. Ms. McCaw testified that she encouraged the respondent to call the police. Around this time, the respondent began using methamphetamines.
- [35] Dr. Paul Beveridge was the respondent's family physician from March 20, 2015 to July 13, 2016. His clinical records disclose that, on November 27, 2015, he diagnosed the respondent with symptoms of anxiety and depression. Over the course of the next several months, he prescribed various medications for the respondent, including Cipralex, Wellbutrin, and Ativan.
- [36] By April 8, 2016, the respondent reported to Dr. Beveridge that her mood had improved and she felt much better, although two months later she reported that her anxiety and depression symptoms had increased.
- [37] On May 22, 2016, the claimant was arrested by police at the parties' Coal Harbour apartment building after the respondent reported that he had assaulted her. She testified that, during the altercation, the claimant told her she was no longer welcome in the apartment. She testified that, later in the evening, the claimant called her and apologized and told her he would never physically assault her again. He asked her to recant her statements to the police. She testified that, the following day, she did so, explaining to the police that she had been drunk and had exaggerated what had happened.

- [38] Two years later, the respondent gave the police an entirely different version of the May 22, 2016 incident, proclaiming that the claimant had not physically touched her at all. She also told the police that the claimant was an "amazing" person and that there had been no incidents of physical abuse prior to the M.A. being executed. She testified that she lied to the police on this occasion and when she recanted her first statement because she did not want the claimant to get into trouble and took him at his word that he would seek anger management counselling.
- [39] On June 27, 2016, the respondent was involved in a car accident.
- [40] On July 1, 2016, the respondent was found by police in her apartment to be disoriented, animated, and displaying behaviour consistent with her being high on methamphetamines. The respondent admitted during her testimony that she had taken crystal methamphetamines and was in a "drug-induced psychosis". She was transported by ambulance to the hospital where she was certified by a doctor under the Mental Health Act, R.S.B.C. 1996, c. 288 [Mental Health Act] for a period of four hours. She lied to hospital staff about her drug use. The respondent testified that, on July 2, 2016, the claimant recorded a video of the respondent while she was "out of it" during which she admitted having used crystal methamphetamines. She testified that the claimant would often use the video to "put me down". The claimant denied having recorded any such video.
- [41] On July 7, 2016, the respondent admitted to Dr. Beveridge that she had been using crystal methamphetamines. He recommended that she attend a Detox program.
- [42] On July 13, 2016, she advised Dr. Beveridge that she was off all of her prescribed medications and that she was feeling much better. However, she testified that she was still using Ativan and taking crystal methamphetamines, but did not remember how often she was doing so.
- [43] Ms. McCaw testified that, a "few months" after the car accident, the respondent had "a big turnaround therapeutically". The respondent advised her that she wanted to "clean up her life" and work on her life skills and tasks of day-to-day living. Ms. McCaw testified that the respondent seemed to have made "a fresh start".

The Claimant's Story

- [44] In marked contrast to the respondent's evidence, the claimant described the parties' early relationship as a "fairy tale". He testified that, although they had the occasional argument, the respondent was his "first love". He denied having ever threatened or been physically violent with her prior to the M.A. being executed.
- [45] The claimant described the respondent as "the strongest woman I have ever met", a woman who cannot be controlled and who "does what she wants". He described the respondent as "very sexual". He testified that it was she who controlled him, not vice versa, as the respondent and Ms. Cantor testified. The claimant denied having thrown a bottle of pills at the respondent while they were living at one of the West 62nd Avenue houses. He also

denied Ms. Cantor's evidence that he was aggressive and controlling towards the respondent and had grabbed the respondent's arm in the presence of Ms. Cantor.

- [46] The claimant testified that he encouraged the respondent to renew her relationship with A. and supported her efforts to have A. live with them. He testified that after A. moved in, the respondent was rarely around or involved with her and that he was tasked with most of the day-to-day parenting of A., including making her meals, transporting her to and from school, helping her with her homework, taking her to her sporting activities, etc. He denied being strict with, controlling of, or physically abusive of A. The claimant testified on cross-examination that, while living with him and the respondent, A. began acting up, misbehaving, and engaging in "bizarre behaviour". Her poor behaviour included being involved in fights at school, lying, not submitting her homework, and locking up the family dog and hiding it. He testified that he and the respondent ultimately determined that A.'s continued residence with them was not going to work out. The claimant testified that the respondent was disappointed when A. moved out but was somewhat relieved by it.
- [47] The claimant testified that the May 22, 2016 incident did not involve any physical violence on his part and that the respondent's recanting of her story to the police was not at his behest.
- [48] The claimant testified that he "paused" the respondent's cell phone account "many times", each time at the respondent's request after she had misplaced her phone.

The Marriage Agreement (M.A.)

- [49] The claimant testified that, because Dr. S. was concerned about the need to protect the family's assets, he and the respondent began discussing a marriage agreement shortly after their engagement in 2014. Dr. S. testified that he insisted that J. and his girlfriend also sign a marriage agreement.
- [50] The claimant described his discussions with the respondent regarding a marriage agreement as "fluid" and "non-contentious". He testified that the respondent repeatedly stated that she knew the claimant did not own any significant assets, that she did not want anything from the claimant's parents, and that they had nothing to worry about. Dr. S. testified that he never had direct discussions with the respondent about the M.A.
- [51] The respondent testified that the claimant initiated discussions with her about the parties entering into a post-nuptial marriage agreement in April 2016 because Dr. S. wanted to "protect family assets". She testified that she told the claimant that Dr. S. had nothing to worry about and that she "didn't want his money", but that the claimant was insistent. She testified that she loved the claimant, that she wanted to make him happy and their life together better. She testified that she was afraid that he was going to hurt her if she refused to sign an agreement. She testified that she had no money of her own and was completely dependent on the claimant for financial support.

- [52] The claimant retained a lawyer named Jane Reid to prepare a draft marriage agreement. The draft provided that the respondent would receive no spousal support or any interest in the Art Studio if the parties separated. Ms. Reid sent the draft to a lawyer the respondent had been using to advise her regarding A., Gordon Kopelow. The respondent testified that Mr. Kopelow advised her not to sign the M.A. She testified that the claimant got upset and told her he would find her another lawyer. The claimant denied doing so.
- [53] The respondent was referred by Ms. Reid to Annie Kaderly. At the time of the M.A. negotiations, Ms. Kaderly had been called to the bar for approximately ten years, specialized in family law, and was experienced in assessing the ability of her clients to understand the advice she was providing.
- [54] Ms. Reid prepared various drafts of the M.A. and sent them to Ms. Kaderly. The respondent testified that she told Ms. Kaderly that she wanted the M.A. to be executed quickly and requested that Ms. Kaderly not spend any more time reviewing the drafts "than was necessary" because the claimant was paying her fees and he did not want to spend much money. Ms. Kaderly testified that the respondent instructed her to spend no more than 30 minutes reviewing the first draft. The claimant denied having placed any limits on the respondent's time with her lawyer.
- [55] The respondent met with Ms. Kaderly on May 31, 2016. She was given a "Mandatory Client Identification & Verification Sheet" to complete. It included the following:

Under the Family Law Act, we are required to screen for family violence. If you feel that any of the following applies to you or your children, please indicate by circling yes or no. The lawyer will then discuss the details and implications with you.

1.

Physical, sexual, psychological or emotional abuse or attempted abuse:

Yes

No

2.

Forced confinement:

Yes

No

3.

Deprivation of the necessities of life:

Yes

No

4.

Restrictions on financial or personal autonomy:

Yes

No

5.

Intimidation, harassment, coercion or threats, including other persons, pets or property:

Yes

No

6.

Stalking or following of a family member:

Yes

No

7.

Intentional damage to property:

Yes

No

8.

In the case of a child, direct or indirect exposure to family violence:

Yes

No

[56] The respondent circled "No" to questions 6 and 8 and "Yes" to question 7, but did not provide any answers to questions 1 through 5. She testified that she "didn't know how to answer the [other] questions". She testified that she did not want to deny that abuse existed because it would not have been honest, and she did not want to disclose the abuse because "it would raise questions and take longer to explain", she was "afraid Ms. Kaderly would not sign" and she did not want Ms. Kaderly's legal bill to be too high. She testified on cross-examination that she "just didn't want to have any more issues with [the claimant]" and "be left with nothing". She testified that Ms. Kaderly made no enquiry as to why she had not answered questions 1 through 5. Ms. Kaderly testified that she has no recollection of having had any conversations with the respondent in that regard. However, Ms. Kaderly testified that she

was alerted by the affirmative answer to question 7 that there was a "risk factor" and recalls speaking to the respondent about it and about the respondent feeling pressure from the claimant's parents but does not recall the content of the discussions.

- [57] During the meeting on May 31, 2016, Ms. Kaderly reviewed the draft M.A. "page-by-page" with the respondent, and provided her with advice related to it. The respondent testified she did not sign the draft M.A. right away because "it was unfair" and that she wanted it to be "a little bit fair", including providing for her to receive an interest in the Art Studio. She asserted on cross-examination that "I felt I was entitled to at least a little bit". Ms. Kaderly confirmed that the respondent was not prepared to sign it and wanted Ms. Kaderly's advice and for her to negotiate more favourable terms on her behalf, including an assurance that the respondent would, upon separation, be entitled to spousal support, use of the Art Studio, and to share joint property. The respondent also instructed Ms. Kaderly to obtain better financial disclosure. She testified that she was not prepared to give up any rights to anything in the claimant's name because "I don't want him to think that it will be easy exit should [something serious happen] in the future. I would rather he be afraid to [lose money]".
- [58] Ms. Kaderly testified that she conducted her own searches regarding properties and investments that were in the claimant's name, but was ultimately instructed by the respondent not to pursue those searches.
- [59] The respondent testified that the claimant demanded she share the communications she was having with Ms. Kaderly and that, after reading them, he drafted several of the respondent's emails to Ms. Kaderly, including an email on August 2, 2016, advising Ms. Kaderly that "no further information is necessary" and "I would like to get this done asap please". The respondent testified on cross-examination that she was being pressured by the claimant to sign the M.A., that the fighting between them was escalating and felt she had "no choice but to sign it". The claimant denied each of these allegations.
- [60] On August 5, 2016, Ms. Kaderly met with and provided to the respondent a lengthy opinion letter in which she detailed the respondent's rights and her concerns with the terms of the M.A. The letter included the following comments on the draft M.A.:

At paragraph 5.5, it states that you are agreeing to value the property, assets, and debts as [the claimant] has listed them in the Schedules. You should note that you have the right to have any assets in which [the claimant] has an interest (companies, trusts, property) valued, so that you know exactly how much you are potentially walking away from in the event of a separation.

[]

To summarize, my advice to you is that you not sign the marriage agreement as it is currently drafted, as it has the potential to operate in a way that is significantly unfair to you.

- [61] The respondent acknowledged that Ms. Kaderly advised her of her rights, and she understood what she would be entitled to if she separated without having signed a marriage agreement. She advised Ms. Kaderly that the parties had already been talking about getting a

divorce and that the respondent wanted the claimant to be "fucking scared". Despite this advice, the respondent advised Ms. Kaderly that she did not want to seek any more financial disclosure from the claimant. She testified that she did so because the claimant told her "it was none of my business", that "it was not my money" and that "you have no rights".

- [62] By letter dated August 8, 2016, Ms. Kaderly wrote to Ms. Reid suggesting numerous amendments to the draft M.A., including material changes to the provisions regarding the payment of spousal support after separation, the respondent receiving ownership in the Art Studio, and 50% of the claimant's interest in the Highbury House. With the exception of minor amendments, each of the changes suggested by Ms. Kaderly was rejected by the claimant.
- [63] The respondent testified that, during the course of the negotiations, she and the claimant continued to fight about the M.A. and she felt she "had no say". She testified that she advised Ms. Kaderly during a meeting on September 12, 2016 that the pressure she was under from the claimant and his parents to sign the M.A. was such that "I don't want to deal with it". She testified on cross-examination that she was in love with the claimant, allowed him to control and manipulate her, and that she was afraid of him.
- [64] Ms. Kaderly does not recall the respondent ever indicating to her that she was afraid of or under pressure from the claimant--only (as reflected in her notes) that she was feeling pressured by the claimant's parents. There is no indication in any of Ms. Kaderly's notes of the conversations she had with the respondent that she was afraid of the claimant.
- [65] Ms. Kaderly advised the respondent that she would not sign a certificate of independent legal advice if the respondent was being pressured by anyone.
- [66] The respondent testified that both the claimant and Dr. S. represented to her that the Art Studio would be transferred to her if the parties separated. Dr. S. testified that he never spoke directly to the respondent about the M.A. but he told the claimant to tell Ms. Reid he was agreeable to a clause in the M.A. providing that the respondent would be entitled to continued use of the Art Studio such that "she can legally work there" by having access to the space she was using. By letter dated September 13, 2016, Ms. Kaderly wrote to Ms. Reid advising, *inter alia*, that:

[C.E.S.] advises that [F.C.A.S.] and his father have agreed that in the event of the parties' separation or if [F.C.A.S.] passes away prior to separation, [C.E.S.] will receive a legal interest in the art studio portion of the West 2nd Avenue property. I am advised that Dr. S. has agreed to execute the necessary paperwork to add [C.E.S.] as shareholder of EHL, or perhaps as a beneficiary to the discretionary trust that owns EHL, so that her interest in the West 2nd Avenue property is preserved in the event of a marriage breakdown or [F.C.A.S.'s] passing.

A term to that effect was inserted by Ms. Reid into the next draft of the M.A.

[67] On September 28, 2016, an email was sent from the respondent's email account to Ms. Kaderly which read:

Hi Annie,

I read the 25 page agreement and everything is fine.

I want to come on Friday and sign it.

Thanks

[C.E.S.]

[68] The respondent testified that she was afraid to answer the claimant's phone calls to her because he was continuing his abuse and pressuring behavior and she was overwhelmed. On October 2, 2016, the respondent's cell phone account was again cancelled by the claimant.

[69] On October 5, 2016, an email was sent from the respondent's email account to Ms. Kaderly's legal assistant which read:

Hi Christina,

I am just emailing to confirm my appointment for next Tuesday October 11th @ 10:00am. I look forward to meeting with Annie so I can finally getting [sic] this agreement signed!

See you next Tuesday.

Thank you

[C.E.S.]

[70] The M.A. was executed by the parties on October 11, 2016. Ms. Kaderly signed a Certificate of Independent Legal Advice ("ILA") which stated, in part:

I acted only for [C.E.S.] and fully explained to her the nature and effect of the [M.A.]. [C.E.S.] acknowledged that she completely understood the nature and effect of the [M.A.]. [C.E.S.] executed the [M.A.] in front of me and confirmed that she was entering into the [M.A.] of her own volition without any fear, threats, compulsion or influence by [F.C.A.S.] or any other person.

[71] The respondent testified that she signed the M.A. knowing she had not received full disclosure from the claimant and without knowing the value of the claimant's assets that were disclosed in the M.A. She acknowledged having received legal advice, that the M.A. was not a fair document, that she was under no obligation to sign it and that, by doing so, she would be giving up her rights. She testified that she signed the M.A. because the claimant controlled "every aspect" of her life, because she was being pressured by the claimant and his parents to do so, because she was afraid of the claimant, and because she was afraid of what would happen to her if she did not. She testified that the claimant had made it clear to her that, if she did not sign it, he would ensure that she ended up with

nothing. She stated that "I was more afraid of not signing it than of signing it".

- [72] The respondent testified that her confirmation to Ms. Kaderly, that she was signing the M.A. without coercion, was not true. She testified that she did not disclose the coercion because Ms. Kaderly would not have signed the ILA.
- [73] Ms. Kaderly, who was called as part of the respondent's case, testified that throughout her dealings with the respondent, she had no concerns about the respondent's ability to understand the advice she was receiving, her ability to negotiate the terms of the M.A. and to make her own decisions. Ms. Kaderly testified that the M.A. contained the terms that the respondent had instructed her to include which the respondent was prepared to accept. Ms. Kaderly testified that she had no reason to believe that the respondent had signed the M.A. under pressure or that the respondent's confirmations as set out in the ILA were inaccurate. Ms. Kaderly testified that, if she had had any concerns in this regard, she would not have signed the ILA.
- [74] On cross-examination, the respondent admitted that she was the dominant sexual partner in the parties' relationship. She also admitted that she had threatened to leave the claimant several times prior to signing the M.A. and to knowing that if she did so, she would have "fared better" financially than under the terms of the M.A. She stated that she did not leave the claimant because she was in love with him.
- [75] The claimant testified that he was completely unaware of the respondent using drugs (other than her admission to him of a "one-off" use of methamphetamines shortly after the June 27, 2016 car accident). He testified on cross-examination that he had no knowledge of the respondent having mental health or addiction issues. He also testified that he never pressured the respondent to sign the M.A., or threatened her if she did not sign it. He testified that the entire process was "non-contentious" and that the respondent was in favour of the M.A. because she wanted to demonstrate to the claimant's parents that they had nothing to worry about in terms of her going after their money.

Material Terms of the Marriage Agreement (M.A.)

[76] The M.A. provides, in relevant part:

1.5 EHL owns a commercial property located at 1538 West 2nd Avenue in Vancouver, British Columbia ("West 2nd") from which [the respondent] operates an art studio. The Parties would like [the respondent] to have the security of knowing that she will be able to continue to operate her art studio from West 2nd, regardless of whether their relationship ends or [the claimant] predeceases [the respondent]. Consequently, [Dr. S.] has represented to the Parties that if the Parties' relationship ends or [the claimant] predeceases [the respondent], he will do what is necessary to give [the respondent] a legal interest in the art studio portion of West 2nd.

[]

1.12 Each party agrees with the other to be bound by the terms of this Agreement.

[]

3.2 Except as provided by this Agreement, with respect to property, [the claimant and the respondent] intend by this Agreement:

- (a) to waive any and all rights and obligations relating to property that have arisen or that may arise under the Family Law Act, an any other applicable legislation or law, now or in the future, at law or in equity, from their marriage and/or in the event of a breakdown of the relationship;
- (b) to elect and affirm that none of the property of either of them will be divided between them, except according to ownership; and
- (c) to release each other from all claims against the estate of the other.

[]

5.1 The Parties agree that:

[]

- (c) each of the Parties waives all rights under Parts 5 and 6 of the Family Law Act and all other rights that each has or may acquire under any other applicable legislation or law, now or in the future, in law or in equity, to property owned by the other.

[]

5.5 The Parties agree that:

[]

- (b) the values of their property and debts as set out in Schedules A and B to this Agreement are deemed equivalent to the fair market value of those property and debts.

5.6 Paragraph 5.1 through 5.5 of this Agreement may be pleaded as a complete defence to any claim, application or other court proceeding by either party for a division of property or its value.

[]

11.1 If the Parties' relationship ends on or before June 13, 2021, regardless of whether the Parties have children or not, [the claimant] will pay spousal support to [the respondent] of \$4,000 per month commencing on the 1st of the month immediately after the Parties' relationship ends, and continuing on the 1st day of each month thereafter until the duration equivalent to half the length of the Parties' relationship from the date of cohabitation to the date the relationship ends, or if [the respondent] commences living in a marriage-like relationship, whichever occurs first.

[]

14.2 [The claimant] will make a will that provides the following:

- (a) If [the claimant] predeceases [the respondent], [the respondent] is entitled to have full control over the Highbury Property, which form part of [the claimant's] Separate Property, and reside there from time to time rent-free for a period of five years from the date of [the claimant's] death on the following terms and any other terms as are provided by the will:

[]

14.3 If the Parties' relationship has not ended when [the claimant] dies and his will does not contain the testamentary benefit required by [clause 14.2], [the claimant's estate] will be liable to [the respondent] in the amount of \$240,000 and for reasonable expenses incurred by [the respondent] to enforce this claim in debt.

14.4 Paragraphs [14.2 and 14.3] will apply to a property in substitution of the Highbury Property that is the Parties' primary residence.

[]

15.15 The Parties:

- (a) have fully and completely disclosed to the other their respective income and the nature, extent and probable value of all of their respective assets, debts or other liabilities existing at the date of this Agreement, as set out in Schedules "A" ([the claimant's] disclosure) and "B" ([the respondent's] disclosure) attached to this Agreement.
- (b) have made such investigation of the financial circumstances of the other as each considers reasonable;
- (c) have given all of the information and particulars about their respective income, assets and liabilities as has been requested by the other;
- (d) are satisfied with the information and particulars received from the other;
- (e) acknowledges that there are no requests for further information or particulars that have not been met to each party's complete satisfaction.

15.16 (a) the Parties have both had independent legal advice, [the claimant] from Jane M. Reid and [the respondent] from Annie C. Kaderly.

(b) The Parties:

- (i) have read the Agreement in its entirety and have full knowledge of the contents;
- (ii) understand his or her respective rights and obligations under this Agreement and its nature and consequences;
- (iii) acknowledge that this Agreement is fair and reasonable;
- (iv) acknowledge that they are not under any undue influence, duress or coercion; and
- (v) acknowledge that each is signing this Agreement voluntarily.

[77] The Schedule of Assets appended to the M.A. listed properties, bank account balances, vehicles, and other assets as being owned by the claimant. Ms. Reid testified that all of the financial disclosure set out in the M.A. was obtained from the claimant, his accountant, and/or property assessments. Both the claimant and Dr. S. testified that all of the listed assets that had any material value belonged to Dr. S. and not to the claimant and that the claimant did not contribute to any of those assets. The claimant testified that the reason they were listed in the M.A. as his assets was because he was asked by his lawyer to provide a list of all bank accounts, investments, properties, and other assets held in his name and he did so. The claimant testified that he was fully transparent in this regard and disclosed everything in that was in his name, whether owned beneficially by Dr. S. or otherwise.

After the Marriage Agreement (M.A.)

[78] The Highbury Property was listed for sale in 2017.

[79] In 2017, the claimant sold all 412,600 shares in EHI that were held in the claimant's name at the time of the M.A. Dr. S. received all of the proceeds of sale.

[80] The respondent gave birth to two children in 2017 and 2019, respectively. They are currently seven and five years of age (the "Children"). Dr. S. testified that, after the oldest child was born, he stopped paying for the claimant's living expenses by way of gift and, instead, provided him funds by way of loans which were annually documented in the form of promissory notes. He testified that he did so because he felt it was time for the claimant to become more fiscally responsible and self-sufficient. He testified that he expects repayment of these loans when the claimant is in a financial position to do so. The claimant corroborated this testimony.

[81] Dr. S. testified that, in 2018, he was going to be out of the country and he wanted to invest some of his money. He provided \$1.24 million to the claimant by way of loan with instructions that the claimant was to transfer the money to EHL and for EHL to use the money to purchase a specific property near West 2nd Avenue in Vancouver. The claimant transferred the money to EHL by way of loan. As matters transpired, EHL was unsuccessful in acquiring the property. Ultimately, EHL used the money to invest in private mortgages with at 5% rate of return. The loans were since repaid. Dr. S. testified that the claimant was merely a conduit for the money and that it was never intended that the claimant would be entitled to it or to any of the proceeds.

[82] In 2019, after the respondent had not used the Art Studio for approximately two years, Dr. S. was asked by the hair salon tenants if they could use the Art Studio space. He testified that he spoke to the respondent and she accepted his proposal that she move her studio to a space in the detached garage of a rental building owned by Dr. S. on Yukon Street (the "Yukon Studio").

[83] Shortly before the parties separated, Dr. S. provided the claimant with \$500,000 secured by a promissory note, to allow the parties to fund a "summer home" at Sheridan Lake, BC (the "Sheridan Lake Property"). Dr. S. testified that the money was never intended to be a gift to the parties.

After the Parties' Separation

[84] The parties separated in early May 2020.

[85] The Highbury Property was sold in October 2020 for a total of \$5.6 million. Dr. S. received all of the net proceeds of sale.

[86] After separation:

a) the respondent received:

i. spousal support of \$4,000/month until April 2024, totalling \$192,000;

ii. 50% of the net proceeds of sale of the Sheridan Lake Property;

b) the Children have been living with the claimant and in his sole care, with the respondent entitled to supervised parenting time for four hours each Sunday. On May 28, 2024, the respondent was ordered to pay child support to the claimant of \$389/month.

[87] In November 2020, the claimant found several large sealed boxes in the Yukon Studio. He testified that he opened them, and it was quite apparent that they contained illicit drugs and associated materials. The boxes were moved by the claimant to a warehouse owned by Dr. S. Dr. S. testified that he opened one of the boxes and saw that it contained several bottles of liquid. He had one of the bottles analyzed in his lab. It contained diluted "MDMA", a substance used in the manufacture of crystal methamphetamines. Dr. S. testified that the respondent told him that the boxes belonged to "some dangerous people" and that they had paid her \$20,000 for the storage and that she was sorry for what she had done. The claimant testified that the respondent was "frantic" when she learned that the boxes had been removed. She told him that he had no idea what he had done. The claimant testified that he began receiving threats. He received a phone call from a man who told him that the contents of the boxes were worth \$400,000. The claimant dropped the boxes off at a secluded location in South Vancouver and later observed the respondent and a male pick them up.

[88] On cross-examination, the respondent denied any knowledge of the contents of the boxes. She also denied having told Dr. S. that she had received \$20,000 for allowing them to be stored in the Yukon Studio or having apologized to Dr. S. for her conduct. She claimed that she had never opened the boxes and had assumed they contained "cleaning products". She testified that she had loaded the boxes into her vehicle and dropped them off at an industrial location in South Vancouver but denied having any knowledge of what happened to them thereafter.

- [89] Dr. S. testified that he considered the respondent's conduct to have been a breach of his trust and asked her to vacate the Yukon Studio. The claimant testified that the respondent never asked for access to the Yukon Studio again.

Credibility and Reliability

- [90] In assessing the credibility of each witness, I have considered the following summary of the law in *Bradshaw v. Stenner*, 2010 BCSC 1398:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); [*Faryna*] v. Chorny, [1952] 2 D.L.R. [354] (B.C.C.A.)) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).
- [91] I have also relied on the following comments from *Hardychuk v. Johnstone*, 2012 BCSC 1359, which provide an overview of the differences between reliability and credibility:
- [10] The typical starting point in a credibility assessment is to presume truthfulness: *Halteren [v. Wilhelm]*, 2000 BCCA 2]. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.
- [92] The respondent was not a good witness. Her evidence was vague, disjointed, contradictory, exaggerated, and rife with uncertainty and confusion. She had difficulty recalling events, explaining that "I don't have the best memory for certain things because of how hard [the situation] has been on me"; however, she often resorted to guesswork and speculation. On many occasions, she was unable to provide her direct evidence without substantial prompting and guidance from her counsel who often asked leading questions in an effort to

elicit the testimony. Throughout her cross-examination, the respondent resorted to obfuscation as a means of justifying her untruthful conduct or the inconsistencies in her evidence. Her explanation for why she had not produced notes and emails she was ordered to produce was incomprehensible. She conceded that some of the evidence she had given during her examinations for discovery was not true. She admitted having lied to the police about the claimant physically abusing her in May 2016. She admitted having lied to her doctor and to the hospital and other medical staff about her use of drugs. She admitted to not having been truthful in a sworn affidavit regarding her use of drugs, explaining that her denial of drug use was due to the guilt and shame she felt. The respondent testified after Ms. Cantor gave her evidence and was present in the courtroom throughout it. She conceded on cross-examination that her recollection of the events of aggression and violence that Ms. Cantor referenced in her evidence was refreshed by it.

- [93] The respondent's explanation for the presence of boxes in the Yukon Studio was incomprehensible. Her story, that she was unaware of the contents of the boxes and that she dropped them off at a random industrial location with no inkling as to why, defied credulity.
- [94] It was apparent to me during her testimony that the respondent is a person who is prepared to say almost anything to advance her perceived interests. In the result, I do not believe much, if any, of her evidence as it relates to anything controversial in this proceeding. To the extent that there is conflict between her testimony and that of any other witness, I accept that latter.
- [95] Ms. Cantor presented as a well-intentioned witness; however, I find that she was not objective. I find that her memory of the events in question was tainted by what she had been told by the respondent (the veracity of which I have rejected) and by her resulting concern for the respondent's well-being. Ms. Cantor admitted on cross-examination to having possession of text messages she exchanged with the respondent, yet when claimant's counsel had requested production of them prior to trial, she was told that there were none. As a consequence of the foregoing, I find Ms. Cantor's testimony to be generally unreliable and give it little weight.
- [96] Ms. McCaw was a clinical psychology counsellor. She has had more than 1000 clients in her practice. She was not called as an expert witness. She testified via video conference as to events that occurred more than eight years earlier. She had no clinical records or notes of her sessions with the respondent. She admitted that, while giving her evidence, she was reading from notes she had recently made after having spoken to the respondent and her counsel. Much of her evidence was inadmissible hearsay and I find that, like that of Ms. Cantor, her evidence was tainted by what she was told by the respondent. Her evidence of the timing of the respondent's mental health concerns during the period from after the June 27, 2016 car accident to October 12, 2016 was vague and uncertain. She had no independent knowledge of any family violence between the claimant and the respondent and her evidence in that regard was based entirely upon what she had been told by the respondent. She conceded on cross-examination that all of those events of violence occurred before the

June 27, 2016 car accident. On balance, I give her evidence little weight.

- [97] Each of Mr. Grondin, Dr. Beveridge, Ms. Kaderly, and Ms. Reid testified in an articulate, sincere, and credible manner. I accept their evidence.
- [98] The respondent called several police officers regarding the incident of violence she reported on May 22, 2016. Each of the officers testified in an objective and professional manner and I accept their evidence in its entirety.
- [99] Dr. S. was a witness with a charming and down-to-earth demeanour who testified in a forthright, forceful, and genuine manner. His credibility was only enhanced during his cross-examination. His evidence regarding the source of funding and the various financial transactions at issue was fully corroborated by the extensive financial exhibits. His evidence was matter of fact, made sense and I accept it in its entirety.
- [100] The claimant presented as a somewhat unsophisticated witness who has always been dependant on his father's wealth and, consequently, was throughout a faithful participant in the financial dealings and arrangements his father put in place. Although he occasionally became argumentative during cross-examination with questions that were repetitive, confusing and/or suggestive of financial impropriety, his frustration was, in my view, understandable. Overall, I found the claimant to be an open, forthright, and sincere witness who testified honestly. Respondent counsel's attempts on cross-examination to impugn his credibility and the veracity of his and Dr. S.'s financial records fell flat. Indeed, the claimant's credibility, like that of his father, was only enhanced during cross-examination. The few examples relied upon by respondent's counsel to impugn the claimant's credibility (such as credit and tenancy applications containing inflated statements of income and/or net worth and other broad statements made in non-specific contexts) fell short of establishing actual financial circumstances inconsistent with his M.A. disclosure. I accept the explanations the claimant provided to the Court, including in respect of the evidence he deposed to in an affidavit sworn August 9, 2021, regarding the respondent's use of drugs as being knowledge gained after the parties' separated.
- [101] To the extent there was any conflict between the claimant's evidence and that of the respondent, I accept the claimant's evidence in its entirety.

Grounds for Setting Aside the Marriage Agreement (M.A.)

- [102] The only pleading filed by the respondent that is relevant to the M.A. is set out in the counterclaim, Schedule 5 - Other Orders, which pleads, in relevant part:

The respondent is asking for the following orders:

[X] the following orders under the Family Law Act:

1. Pursuant to s. 93 and s. 164, an order that the marriage agreement dated October 11, 2016 with respect to property division and spousal support be set aside on account of:

- i. the claimant failing to disclose property or debts and other financial information relevant to negotiations of the agreement;
- ii. the claimant took advantage of the respondent's vulnerability;
- iii. the respondent did not understand the consequences of the agreement;
- iv. other circumstances that under common law cause all or part of the agreement to be voidable; or
- v. in the alternative to the above, on account that the agreement being [sic] significantly unfair pursuant to s. 93 (5).

[103] Section 93 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] applies when a party is seeking to set aside an agreement respecting the division of property. Section 164 applies when a party is seeking to set aside an agreement respecting the payment of spousal support.

[104] On October 3, 2023, Madam Justice Murray ordered, inter alia, that:

- a) The respondent, [C.E.S.] shall file a notice of application to set aside the Marriage Agreement dated October 11, 2016 (the "Marriage Agreement") by January 19, 2024 and such notice of application shall set out:
 - a. all of the grounds for setting aside the Marriage Agreement;
 - b. the legal bases for setting aside the Marriage Agreement, including the cases upon which counsel intends to rely; and
 - c. a list of witnesses, including experts.

(the "Notice of Application").

- b) [C.E.S.'s] Notice of Application shall not exceed 20 pages in length.
- c) By January 19, 2024, [C.E.S.] shall provide Will Say statements of all witnesses including expert witnesses and expert reports, and such Will Say statements shall:
 - a. set out detailed summaries of the evidence of each witness that counsel intends to elicit from each witness; and
 - b. set out what documents that counsel intends to proffer through each witness.

[105] The Notice of Application was filed on January 22, 2024 (the "Notice of Application"). It is 37 pages in length. It seeks:

- a) an order pursuant to s. 15 of the Divorce Act that the claimant pay spousal support to the respondent for a duration exceeding the stipulations outlined in the M.A.; and
- b) an order setting aside the M.A. with respect to Property and Debt Division on the basis that:
 - i. there is some defect in the process of making the agreement (s. 93(3)); or

ii. there is significant unfairness in the agreement, having regard to the factors set out in s. 93(5).

[106] Under the grounds for the spousal support order under s. 15.2(4) of the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3, the Notice of Application states:

5. The Respondent is currently suffering from a number of health issues rendering her unable to be gainfully employed full time.

[]

7. A court is not bound by any agreement between the parties when it exercises a statutory power to award support. In *Miglin v. Miglin*, 2003 SCC 24, the Supreme Court of Canada affirmed the power of the court to order spousal support inconsistent with an agreement.

8. The Claimant's income far exceeded that which he disclosed in the Marriage Agreement in October of 2016, and his income continued to far exceed the amount disclosed on his tax returns in the following years.

9. The Marriage Agreement terms were negotiated prior to the Respondent giving birth to and looking after two children full time until May 2020. The Respondent seeks spousal support that deviates from the terms of the Marriage Agreement on a compensatory and needs basis. The Respondent was a stay at home mother, and home maker throughout the 8 years of marriage.

[107] Despite s. 164 of the FLA having been pleaded in the counterclaim, the Notice of Application does not seek any order under s. 164 of the FLA as a basis for setting aside the M.A.'s provisions regarding the payment of spousal support.

[108] Under the grounds for setting aside the M.A. pursuant to s. 93 of the FLA (the division of property), the Notice of Application duplicates and/or particularizes the allegations pleaded in the counterclaim, namely, the failure to disclose relevant financial information, that the claimant took improper advantage of the respondent's vulnerability, that the respondent did not understand the nature and consequences of the M.A., and that she signed the M.A. under duress as a consequence of intimate partner violence, pressure from the claimant's parents and the claimant's threats of harm.

[109] The respondent also alleges that the M.A. should be set aside on the basis that it is significantly unfair, relying on the provisions of s. 93(5) of the FLA.

[110] The respondent has the onus of demonstrating that the M.A. should be set aside on the basis of one or more of the provisions of s. 93.

Analysis

[111] Section 93 of the FLA contemplates a two-pronged inquiry as to the enforceability of a marriage agreement. The first inquiry is directed at the formation of the agreement ('procedural unfairness'). The second inquiry is directed at its operational effect ('operational unfairness'): *Miglin v. Miglin*, 2003 SCC 24; *Reid v. Reid*, 2017 BCCA 73 at paras. 56-58; *A.L.A. v. C.F.W.*, 2023 BCSC 1888 at para. 72.

Was the Marriage Agreement (M.A.) Procedurally Unfair such that it should be set aside under s. 93(3)?

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

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93 (1) []

[]

- (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.

Did the Claimant Fail to Disclose Significant Property or Debts or Other Information Relevant to the Negotiation of the Marriage Agreement (M.A.)?

[113] Financial disclosure in family law is critical. A lack of financial disclosure can undermine the fairness of the negotiation process. A court is entitled to intervene where a failure to disclose is deliberate and coupled with misinformation, or where the failure to disclose led to an agreement that departs substantially from the objective of the governing legislation. The focus is on prejudice resulting from uneven access to information: *Anderson v. Anderson*, 2023 SCC 13 at para. 67.

- [114] Where the party complaining of non-disclosure has general knowledge of the other party's assets and their value, non-disclosure of the exact value may not result in an agreement being set aside where the non-disclosure is not a deliberate attempt to avoid addressing the division of those assets or to deprive the other party of information he or she should have in making the agreement. The non-disclosure must be significant and material: A.L.A. at para. 76, quoting with approval Y.L. v. G.L., 2020 BCSC 808 at para. 285(c)(ix) and (x).
- [115] The respondent married into a wealthy family. She and the claimant lived an affluent lifestyle, had luxurious tastes in such things as clothing, cars, homes, furnishing, and travel. Their monthly living expenses were significant, well beyond what could have been paid for with the claimant's reported income. The respondent admitted during her evidence-in-chief that she was fully aware that the claimant's access to money was substantially more than what he was reporting, yet never asked where the money was coming from. She specifically instructed Ms. Kaderly not to request disclosure of the claimant's finances beyond what was set out in the M.A.
- [116] The thrust of the respondent's case is that the claimant failed to disclose significant assets at the time of the M.A. and that the various transfers of money back-and-forth among Dr. S.'s and the claimant's various accounts, joint accounts, trading accounts, and loan records since the M.A. were sham transactions for the purpose of thwarting the respondent's legitimate financial claims. In support of these assertions, respondent's counsel points to the claimant's filed income tax returns, various of the claimant's bank statements, various apartment rental and credit applications the claimant signed indicating high monthly incomes and net worth, and that various properties were "owned by him". The claimant admitted some of the financial and ownership information he provided in these documents was not accurate. He readily conceded that his first Form F8 Financial Statement, sworn in this proceeding on May 21, 2021, was not as fulsome as it should have been. The omissions were remedied in his second Form F8 sworn on August 9, 2023.
- [117] Respondent's counsel pointed to the March 2012 transfer of the claimant's share in NCC to the Trust, arguing that this amounted to a contribution to the Trust and a beneficial interest in the Trust that was not excluded property and which the claimant failed to disclose (relying on s. 85(1)(f) of the FLA). The evidence was clear that the claimant's share in NCC was transferred to him by Dr. S. in November 2011 and then transferred to the Trust as part of the s. 85 rollover (referred to above) that was driven by Dr. S.'s professional tax advice. I reject respondent's counsel's submission that the claimant held a beneficial interest in the Trust as a result.
- [118] I am satisfied that the context in which the information was provided was such that the errors were not as nefarious as respondent's counsel suggests. For example, the claimant's evidence as a Crown witness in an unrelated criminal proceeding--involving a man to whom the claimant had rented the house at 66 West 62nd Avenue before it was demolished for reconstruction--that he was the "owner" of the property was plainly inaccurate and made in the context of him having rented the property as agent on behalf of his mother, F,

and his brother, J., who had nothing to do with the matter. Regardless, these documents pale in comparison to the overwhelming evidence that the claimant's financial disclosure in the M.A. significantly inflated his actual financial circumstances.

- [119] On the whole of the evidence, I find that the parties' lifestyle and assets, both before and after the M.A., were funded almost entirely by Dr. S., who structured his financial affairs and distributed his money as he deemed appropriate, based upon the advice of his professional financial advisors. I have no difficulty accepting that Dr. S. was and is an astute businessman who, as the claimant's father, did what he considered was best for the claimant. I also have no difficulty finding that the claimant made no contributions to the Trust that could be construed as any form of family property.
- [120] Respondent counsel's submissions that the claimant was the actual beneficial owner of the properties, stocks, and other assets are founded on nothing more than unsubstantiated suspicion with little, if any, evidentiary support. Respondent's counsel complains that her examination for discovery requests on August 22, 2024, on the eve of trial, for production of additional financial records, which claimant's counsel took "under advisement" were not complied with and that her inability to prove her theories lies at the claimant's feet. With respect, respondent's counsel could easily have made an application for those documents over the course of the many months since she made her request but failed to do so.
- [121] Regardless, there is no evidence to suggest that the claimant concealed important financial information from the respondent or, otherwise, misled her. Indeed, the evidence presented by the respondent as part of her case was clear that the claimant's source of money in all respects (income, living expenses, etc.) was Dr. S. The shares held by the claimant in EHL were acquired by him in March 2012 as part of an estate freeze, the value of which were fixed at \$40,000 and later redeemed at that same value.
- [122] The claimant disclosed that he held 412,600 shares in EHI with a value of \$22,809. In 2015, he received \$156,232 from the sale of EHI shares and, in 2016, he received \$240,669 from the sale of additional shares. The uncontroverted evidence is that Dr. S. was the beneficial owner of these shares and these funds.
- [123] There is no evidence that the claimant held a beneficial interest in property held by the Trust to which the claimant contributed. There is no evidence that the services provided by the claimant to the Trust or its entitles were not compensated for appropriately. There is no evidence to support the respondent's assertion that the monies provided by Dr. S. to the claimant to support his and the respondent's lifestyle should be treated as the claimant's income. Respondent counsel's attempts to demonstrate that the promissory notes and transfers of funds among bank and investment accounts were "all smoke and mirrors" were met with full and substantiated explanation from Dr. S. and the claimant. On professional advice, Dr. S. structured his financial transactions for tax and estate planning reasons such that the claimant was the registered owner of assets that were beneficially owned by Dr. S. To rebut the presumption of resulting trust, the respondent had the onus of proving that Dr.

S. intended to provide gifts to the claimant: J.D.G. v. J.J.V., 2016 BCSC 2389 at paras 144-145. She failed to do so. Likewise, the respondent led no cogent evidence to suggest that the claimant in fact had a beneficial interest in any of the transactions in question.

[124] In my view, it is reasonable for wealthy parents to be desirous of (a) wanting to financially assist their children by way of loans and/or gifts and (b) wanting to document that assistance by way of promissory notes for estate planning and asset protection reasons.

[125] During her closing submissions, respondent's counsel did not provide any specifics as to what was not disclosed by the claimant or what was undervalued. Moreover, there is no evidence that the claimant intentionally withheld material financial information. Finally, there is no evidence that the asset valuations set out in the M.A. were materially misstated.

[126] In short, the respondent has failed to demonstrate that the claimant failed, intentionally or otherwise, to disclose material property or debts relevant to the negotiation of the M.A. To the contrary, I find that the overall value of the claimant's assets as reported in Schedule "A" to the M.A. was higher than the actual value. There is no evidence that the respondent was prejudiced in any way by this overvaluation.

Did the Claimant take Improper Advantage of the Respondent's Vulnerability, including her Ignorance, Need, or Distress?

[127] Vulnerabilities are not simply to be presumed because the agreement was negotiated in an emotionally stressful context. A finding of vulnerability must be grounded in the evidence: Anderson at para. 69.

[128] Vulnerability is a question of fact in each case. As was stated by the Supreme Court of Canada in Rick v. Brandsema, 2009 SCC 10:

[60] It may well be that in a particular case, professional assistance will effectively compensate for vulnerabilities. But the Court of Appeal appears to have assumed that the mere presence of professional assistance automatically neutralized vulnerabilities in this case. This interpretation does not, with respect, accord with a plain reading of para. 83 of Miglin, which states:

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.

[61] This passage indicates that when vulnerabilities have been compensated for by the presence of professionals, the agreement should be respected. This is an important observation. Given that vulnerabilities are almost always present in these negotiations, the parties' genuine wish to finalize their arrangement should, absent psychological exploitation or misinformation, be respected. One way to help attenuate the possibility of such negotiating abuses is undoubtedly through professional assistance. But exploitation is not rendered

anodyne merely because a spouse has access to professional advice. It is a question of fact in each case.

[62] In this case, the trial judge found that the wife's vulnerabilities were not compensated for. On the contrary, he concluded that her emotional and mental condition left her unable to make use of the professional assistance available to her. Moreover, and significantly, he found that her mental instability was well known to her husband.

[129] As was stated by this court in *S.B.F. v. D.G.F.*, 2022 BCSC 2231:

[25] A finding of oppression, pressure, or other vulnerabilities with respect to a property division or spousal support agreement alone is not generally sufficient to set aside the agreement. There must also be evidence that the other party exploited the vulnerability and, as a result, secured an agreement that deviated substantially from the result that would follow upon an application of the applicable legislation. []

[Citations omitted.]

[130] The onus is on the respondent to demonstrate that, at the time of the M.A., the claimant took advantage of her, the advantage was improper, and the advantage taken was of her vulnerability: *Donnelly v. Weekley*, 2017 BCSC 529 at para. 109. An incident of abuse that took place a significant length of time prior to when the agreement is made must be distinguished from a situation where the party is in active fear at the time the agreement is made. A relevant factor to be considered is whether the party who asserts vulnerability had input into the content of the agreement: *A.L.A.* at para. 76, quoting with approval *Y.L.* at para. 285(d)(iii) and (vii).

[131] Moreover, the mere presence of vulnerabilities alone will not justify the court's intervention, particularly where the vulnerabilities are effectively compensated by the involvement of counsel or have not been taken advantage of: *Miglin* at para. 83.

[132] On the strength of the evidence of the respondent and Ms. McCaw, respondent's counsel submits that, at the time the respondent was consulting with her lawyer in respect of the M.A., she was vulnerable, the claimant knew she was vulnerable, and he took advantage of that vulnerability. Respondent's counsel cautioned the court against what she described as the use of myths and stereotypes when assessing the respondent's evidence of family violence, maintaining that it makes no sense that the respondent would make up such a story and confide in Ms. McCaw about it if the violence had not occurred.

[133] I have considered the myths and stereotypes that the courts have long recognized exist in cases of domestic violence and have assessed the evidence before me in that context.

[134] The incidents of domestic violence alluded to by Ms. Cantor were during the period from 2012 to 2014. The last incident of violence that the respondent and Ms. McCaw alluded to was in May 2016. There is no suggestion of any other incidents having occurred prior to the M.A. being executed. There is no temporal connection between the incidents of family

violence alleged by the respondent and her signing the M.A. after more than three months of negotiations through her lawyer. The respondent led no cogent medical evidence that she was suffering from depression, anxiety or any other mental health issues during the four and a half month period that the M.A. was being negotiated.

- [135] The respondent led no cogent evidence that the claimant was aware of any vulnerability she had. She admitted on cross-examination that she repeatedly denied during the parties' relationship that she was using drugs. I accept the claimant's evidence that the incident of her drug use on July 1, 2016 was the first and only time he was aware of it. Neither of them was aware that the respondent had been certified under the Mental Health Act on that occasion until after this litigation had been commenced.
- [136] In my view, the fact that the respondent, when given the family violence questionnaire by Ms. Kaderly, did not answer questions 1 through 5, and answered "Yes" to question 7, is not sufficient to establish that the claimant took improper advantage of her vulnerability. I accept Ms. Kaderly's evidence that she was alerted by the affirmative answer to question 7 that there was a "risk factor", spoke to the respondent about it, but ultimately had no reason to believe that the respondent had signed the M.A. under pressure or that the respondent's confirmations as set out in the ILA were inaccurate.
- [137] I have concluded on the whole of the evidence that, while the respondent may have been distraught over A. not wanting to live with her and the claimant and moving out in late 2015, she had full opportunity to provide meaningful and substantive input into the M.A. I accept that the respondent disclosed her drug use to Ms. McCaw in early 2016; however, over the months that followed, I am persuaded by the evidence as a whole that the respondent's level of distress between July and October 2016 was not such that she was incapable of understanding the negotiations in respect of the M.A. or incapable of properly instructing her lawyer regarding it. As noted above, Ms. McCaw testified that, a "few months" after the June 27, 2016 car accident, the respondent had "a big turnaround therapeutically" and seemed to have made "a fresh start". It is noteworthy that Ms. McCaw's calendar shows that she had sessions scheduled for one or both of the parties on September 3, 2016 and October 12, 2016, contemporaneously with the M.A. negotiations and its execution. The respondent advised her family doctor on July 13, 2016 that she was "feeling much better". She admitted that she told her lawyer, Ms. Kaderly, that "I don't want him to think that it will be easy exit should [something serious happen] in the future", and that she wanted the claimant to be "fucking scared". That evidence suggests the antithesis of vulnerability.
- [138] In my view, the level of vulnerability demonstrated by the evidence was minimal, at best, and insufficient to warrant interfering with the M.A.
- [139] Moreover, the respondent has failed to establish that the claimant knew that she was in a vulnerable state and exploited it to her disadvantage.

[140] On the whole of the evidence, I find that the respondent was a strong woman well able to assert herself and take advantage of the professional advice that was available to her throughout the period from July 13, 2016 to October 12, 2016. I accept claimant's counsel's description of her: "She was no wallflower".

Did the Respondent Understand the Nature or Consequences of the Marriage Agreement (M.A.)?

[141] The respondent received competent legal advice throughout the negotiations that led to the M.A. The negotiations extended over a period of four-and-a-half months. The respondent advised her lawyer to negotiate terms related to the Art Studio, spousal support, and the Highbury House. Those terms were included in the M.A. and the respondent was satisfied with them. She was fully advised regarding her rights both under and in the absence of the M.A. I find that the advice she received was thorough and careful. The respondent understood her options and was told by her lawyer that she was under no obligation to sign the M.A.

[142] On the whole of the evidence, I have no difficulty concluding that, having specifically reviewed its shortcomings with her lawyer, the respondent understood the nature, implications, and consequences of the M.A. and made a conscious choice to sign it.

Are there Other Circumstances that Would, Under the Common Law, Cause All or Part of the Marriage Agreement (M.A.) to be Voidable?

[143] The respondent contends that the following common law factors render the M.A. voidable:

- a) Fundamental breach - non-disclosure;
- b) Capacity - her mental and physical health issues;
- c) Duress - intimate partner violence and threats of harm; and
- d) Undue influence - pressure from the claimant and his parents.

[144] The onus is on the respondent to prove the existence of one or more of these factors: *Babijowski v. Wolanicki*, 2022 BCSC 2126 at paras. 59-61, 66.

[145] To constitute duress, there must be coercion of will so as to vitiate consent: *Babijowski* at para. 61. The respondent has not discharged the onus upon her to demonstrate that she had no alternative course available to her. She received ILA and took no steps to avoid the M.A. until after she had received all of her entitlements under it.

[146] As set out above, on the whole of the evidence, I am not persuaded that any of these factors were present at the time the respondent signed the M.A. In this regard, I accept the claimant's evidence and reject that of the respondent.

Section 93(4) of the FLA - Saving Provision

[147] Given my determination that the M.A. was not procedurally unfair, there is no need for me to consider the saving provision in s. 93(4) of the FLA.

[148] Nevertheless, even if I had found that the respondent had established procedural unfairness pursuant to the provisions of s. 93(3), s. 93(4) provides that the Court may decline to set aside the M.A. if it would not replace it with an order that is substantially different from its terms. Repeating the statement of this Court in S.B.F.:

[25] A finding of oppression, pressure, or other vulnerabilities with respect to a property division or spousal support agreement alone is not generally sufficient to set aside the agreement. There must also be evidence that the other party exploited the vulnerable party and, as a result, secured an agreement that deviated substantially from the result that would follow upon an application of the applicable legislation [] A court can decline to set aside an agreement if, having regard to all the evidence, it would not replace the agreement with an order that substantially differs from its terms []

[Citations omitted.]

[149] As part of her closing submissions, claimant's counsel provided a Scott Schedule (which I accept as reasonably accurate) setting out what the division of family property and debt would likely have been had the parties separated without the M.A. The respondent was unquestionably better-off financially under the terms of the M.A.

[150] Had I determined that the claimant exploited the respondent's vulnerabilities in having her execute the M.A. on the facts of this case, I would not have replaced the M.A. with an order that substantially differed from its terms.

Is the Marriage Agreement (M.A.) Significantly Unfair such that it should be set aside under s. 93(5) of the FLA?

[151] Notwithstanding that the respondent has the onus of proof under s. 93(5) of the FLA, respondent's counsel focused her submissions on s. 93(3) and, apparently, chose not to raise or rely upon the provisions of s. 93(5). Nevertheless, s. 93(5) was raised in the respondent's notice of application and, hence, warrant's consideration.

[152] To begin with, the mere fact that an agreement is structured such that the division of the parties' property is unequal does not make the agreement unfair. Section 92 of the FLA specifically permits such an unequal division.

- [153] In *Hartshorne v. Hartshorne*, 2004 SCC 22, the Supreme Court of Canada held that, to be enforceable, a marriage agreement governing the division of property must operate fairly at the time of distribution; otherwise, judicial reapportionment of property will be available to achieve fairness: para. 35. A marriage agreement might have been fair at the time it was executed but be unfair at that time it is triggered by the separation. For example, a contract might be fair if the marriage lasts one year but unfair if it lasts 30 years.
- [154] *Hartshorne* was decided nine years before the FLA was enacted. Section 93(5) changed the law in BC regarding the basis upon which the court may set aside an unfair agreement. That section provides as follows:

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[]

- (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of the 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.

[155] The test of significant unfairness imposes a more stringent threshold than mere unfairness. It means that the unfairness must be "extensive or important enough to merit attention" and refers to something that is "weighty, meaningful or compelling": *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 41, quoting with approval *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44.

[156] When considering this "operational unfairness stage" of the analysis, this Court compares what the division of assets is under the M.A. with what would have been the case be under the FLA in the absence of a marriage agreement: *Reiner v. Reiner*, 2021 BCSC 1514 at para. 15, citing *Miglin* at para. 85. If the division of assets under the M.A. significantly deviates from the principles and objectives of the FLA, that factor may militate in favour of a finding of operational unfairness.

The Length of Time that has Passed Since the Marriage Agreement (M.A.) was Made

[157] The parties' marital relationship was relatively short. It lasted less than eight years. The parties separated less than four years after signing the M.A. During that time, their circumstances did not materially change. This factor weighs in favour of a finding that the M.A. is not significantly unfair.

The Intention of the Parties, in Making the Marriage Agreement (M.A.), to Achieve Certainty

- [158] The topic of a marriage agreement was raised by the claimant in the context of Dr. S. wanting to protect the family's assets. The respondent told him that Dr. S. had nothing to worry about and that she was not interested in them.
- [159] The M.A. provided certainty to both parties. To the respondent, it provided certainty as to the spousal support she would receive, certainty as to her legal interests in the Art Studio and Highbury House, and certainty that she would have no responsibility for debt.
- [160] After signing the M.A., the parties continued their relationship as they had previously. The respondent did not contribute significantly or at all to the family's income or property.
- [161] I find, on the whole of the evidence, that it was the intention of both the claimant and the respondent in entering into the M.A. to achieve certainty. This factor also weighs in favour of a finding that the M.A. is not significantly unfair.

The Degree to which the Parties Relied on the Terms of the Marriage Agreement (M.A.)

- [162] The parties conducted themselves after execution of the M.A. and after separation in accordance with the terms of the M.A. The M.A. anticipated that the parties would have children together--they had two children. The claimant paid and the respondent accepted the stipulated spousal support. The parties split equally the net proceeds of sale of the Sheridan Lake Property. There is no evidence that the respondent objected in any way to the Highbury Property being listed for sale prior to the parties' separation.
- [163] The respondent executed the M.A. with the expectation that she would be entitled to a legal interest in the Art Studio as well as a right to live rent-free in the Highbury House for five years if the claimant predeceased her. In my view, her conduct in not objecting to the Highbury House being listed for sale, along with her conduct in storing illegally obtained drugs at the Yukon Studio and, subsequently, never requesting access to it again, is inconsistent with any continuing rights in respect of those properties.
- [164] I am not persuaded that upholding the M.A. would be substantially unfair.

Conclusion

- [165] The respondent's application for an order setting aside the M.A. is dismissed. It follows that the M.A. is an enforceable agreement.

Costs

- [166] Subject to any submissions the parties wish to make, the claimant is entitled to his costs of this proceeding at Scale B.

"G.C. Weatherill J."

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