

CANADA / JUDGMENT

Gray v. Gray

2000 BCSC 1664

COURT

Supreme Court of British Columbia

DECIDED

17 November 2000

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

Source record

2000 BCSC 1664

Citation:	Gray v. Gray
Date:	20001117 2000 BCSC 1664
Docket:	98 3946 Registry: Victoria IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN:	MARIE SHARRON LYNNE GRAY PLAINTIFF
AND:	ALLEN KENNETH GRAY DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE LOO

Counsel for the Plaintiff

B.A. Marlatt

The Defendant

Appeared In Person

Date and Place of Hearing/Trial:

13 to 15 September 2000

Victoria, B.C.

INTRODUCTION

- [1] Following the breakdown of a 21 year marriage, the parties entered into a separation agreement in 1993. They each had separate legal representation. In 1996 the parties signed a written agreement varying the 1993 agreement. Neither had legal representation. The plaintiff claims that the 1996 agreement is unenforceable under the Ontario Family Law Act, R.S.O. 1990, c. F.3; alternatively, she claims that the agreement should be set aside as unconscionable as it was obtained for the defendant's benefit through duress or coercion.

FACTS

- [2] The parties were married in Ontario in August 1972. Ms. Gray was 21 years old and working as a registered nurse. Mr. Gray was 20 years old and completing his last two years of an undergraduate degree at the University of Waterloo. On his graduation in 1974, they moved to St. Catharines where he worked as a teaching assistant at Brock University and she worked full-time at a hospital in intensive and coronary care. Two years later, Mr. Gray decided to enter the police force so they moved to Windsor. Ms. Gray found work as an emergency room nurse. Their daughter Devon was born May 8, 1979 and their son Cameron was born August 28, 1981. After the birth of each child, Ms. Gray returned to work. In the summer of 1984, Mr. Gray was promoted and the family moved to Toronto. Ms. Gray worked full-time from the fall of 1984 to May 1985 when the parties separated and she returned to her position in Windsor.
- [3] The parties reconciled in November 1986 and moved to Brampton. Ms. Gray found part-time work at a hospital in Etobicoke where she worked until the summer of 1988. The family then moved to Fergus where she could only find casual hospital work. She found other employment with the Victorian Order of Nurses and worked at both jobs part-time. In September 1990, Mr. Gray was promoted and transferred to district headquarters in Mount Forest. Ms. Gray obtained part-time work at the local hospital. As with all of the other positions she had over the years, Ms. Gray accumulated no pension benefits or registered retirement savings plan contributions.
- [4] On February 1, 1993, the parties separated and on June 14, 1993, they entered into a separation agreement. At the time, Mr. Gray was earning about \$53,000 annually, while Ms. Gray was working part-time but hoping to find full-time work. The agreement provided for joint custody of the children; primary residence of the children with Ms. Gray; \$1,300 a month in child support to be paid by Mr. Gray; proportionate contributions by each party towards tuition costs; spousal support of \$500 per month until Ms. Gray's annual income reached \$40,000; indexing of child and spousal support starting July 1, 1994; health care expenses through Mr. Gray's employment as long as the parties continued to be married; and, possession and title to the matrimonial home to Ms. Gray. Under the terms of the agreement, Ms. Gray would be responsible for insurance, payments under the existing mortgage, taxes, and other expenses related to the home. In addition, Ms. Gray received the 1990 Pontiac Bonneville worth about \$9,500, and "an equalization payment of \$25,000" to

offset the value of Mr. Gray's pension entitlement.

[5] The relevant clauses in the 1993 separation agreement provide:

4. SPOUSAL SUPPORT

- (a) Commencing on July 1, 1993 and continuing on the first day of each and every month thereafter, the husband shall pay to the wife for her support and maintenance the sum of \$500.00 per month until one of the following events occurs:

...

(iv) The total income of the wife, apart from any income received by her under the terms of this agreement, exceeds \$40,000 in Canadian dollars per annum. The wife shall provide to the husband annually, a copy of her tax return filed pursuant to the Income Tax Act of Canada or any other tax returns filed pursuant to legislation in any other jurisdiction, upon request, for the purpose of demonstrating that her total income does not exceed \$40,000 per annum.

...

11. HUSBAND'S PENSION PLAN

The husband acknowledges that through his employment with the Ontario Provincial Police, he is enrolled in the Ontario Public Service Superannuation Plan and will become entitled to a substantial pension upon his retirement. The husband's pension is the most valuable of all assets owned by either the husband or the wife. In order to equalize the net family properties of the parties, the parties have agreed that the wife would receive the family automobile and have the matrimonial home transferred to her. As such transfers are still not sufficient to offset the value of the husband's pension, in order to equalize the net family properties of the parties, the husband and wife agree that the balance of the amount required to be paid by the husband to the wife as a final equalization payment, is the sum of \$25,000 (hereinafter referred to as the "equalization payment"). The parties agree that such amount shall be satisfied in the following manner:

- (a) In the event that the wife is no longer entitled to support payments pursuant to the provisions of paragraph 4 hereof, the husband shall continue to pay such payments of \$500.00 per month without interest in reduction of the equalization payment of \$25,000.00 till satisfied. The said payments of \$500.00 shall not be deductible for income tax purposes by the husband and are not taxable in the wife's hands; Or
- (b) In the event that the monthly payments of \$500.00 to the wife on account of the equalization payment have not been commenced by January 1, 2000, and the husband has not otherwise paid any of the equalization payment of \$25,000.00 to the wife by that date, the parties shall direct in writing, that payments in the amount of \$308.00 per month or \$3,696.00 per annum, shall be paid from the Ontario Pension Board or the Ontario Public Service Superannuation Plan directly to the wife when the husband starts to become entitled to pension benefits, and the wife shall be legally entitled to such portions of the husband's

pension.

- (c) In the event that part of the \$25,000.00 equalization payment has been made by January 1, 2000, by the payment of periodic amounts of \$500.00 per month or otherwise, the monthly payment of \$308.00 per month or \$3,696.00 per annum shall be reduced by the same percentage that the portion of the equalization payment previously paid by the husband bears to \$25,000.00
- (d) The parties further agree that a copy of this agreement will be filed with The Ontario Pension Board and the Ontario Public Service Superannuation Plan, and the Board or the Plan is to pay the sum of \$308.00 per month or such lesser amount calculated in accordance with subparagraph (c), from the husband's superannuation benefits, directly to the wife at 157 Melissa Crescent, Mount Forest, Ontario, N0G 2L3, or at such other address as the wife may direct from time to time, assuming that they have been directed to do so in accordance with subparagraph (b) above.

[Bolding in original. Underlining added.]

- [6] The matrimonial home in Mount Forest was purchased by the parties in August 1990 for \$141,500. At the time of the 1993 separation agreement the outstanding mortgage was \$110,000, leaving \$31,500 in equity. On August 5, 1993, title to the home was transferred to Ms. Gray. Mr. Gray, however, continued to guarantee the mortgage payments which were being met by Ms. Gray.
- [7] In July 1994, Ms. Gray listed the house for sale because she was indebted to Revenue Canada for \$10,000 and having difficulty finding full-time work. She said she needed to find a smaller house in order to pay off her debts.
- [8] It is also clear that Ms. Gray did not like living in Mount Forest and wanted to leave. She described it as a small town of 6,000 where the only industry was farming and the biggest money maker was the Ontario Provincial Police. She felt alienated within the community. When she applied for a job at the local drugstore and grocery store, she was not hired because she was a nurse and other people in the community needed the employment. She said a sergeant spit on her feet outside of the post office.
- [9] In addition to feeling pressured by the community, Ms. Gray said she was feeling pressured by Mr. Gray. She said that when she was trying to discipline the children, they would call him and he would come over and contradict whatever it was she had said. Consequently, there would be "blow-ups".
- [10] On cross-examination she conceded that she would call Mr. Gray when she was having an argument with the children. He would arrive, only to be ordered by her to leave the house when he did not agree with her.

- [11] Mr. Gray says that from the time of their separation until 1996 he and Ms. Gray were on fairly friendly terms. He helped prepare her resume, mowed the grass, did other household tasks, and came to the house whenever she asked him to intervene in a dispute she was having with the children. He never arrived unannounced. This view is supported by Devon. On cross-examination, Ms. Gray consistently said that she did not remember Mr. Gray helping her prepare her resume, mowing the lawn, or doing other household tasks.
- [12] I find that for the most part the parties were generally on friendly terms. Mr. Gray made all of the support payments on time. He did not pay any indexing of support according to the terms of the 1993 agreement; however, this failure would be cancelled out by the child support payments he continued to make to Ms. Gray even though Devon moved out of the house for about six months in 1995.
- [13] In May 1996, after the house had been on the market for almost two years, Ms. Gray approached Mr. Gray and asked him if he would take over the house. She reiterated her belief that she was alienated within the town, that no one liked her, and that she had no friends. She wanted to move to British Columbia for a fresh start. She proposed that Mr. Gray live in the house with the children who were already living with him, pay the mortgage, and pay her alimony. Mr. Gray was reluctant to assume the mortgage payments on the house because the payments were twice the amount he was paying in rent. However, Ms. Gray told him that she was willing to walk away from the house. That caused Mr. Gray a great deal of concern because he was still a guarantor under the mortgage.
- [14] The parties negotiated and Mr. Gray offered to purchase the house for the cost of the mortgage. He agreed to take out a new mortgage and to provide her with \$10,000 cash before she left for the west coast.
- [15] From discussions with both of his parents, Cameron knew about the plans to transfer title to the house to his father a couple of months before the transfer took place.
- [16] Mary Gail Trapp is a friend of Ms. Gray's. Ms. Trapp was a lawyer until she stopped practising in April 1996. Ms. Gray told Ms. Trapp that she was dying in Mount Forest, could not stand living there, and was anxious to leave and move out west. She also expressed concern about being able to make the house payments. Around the beginning of July 1996, Ms. Gray telephoned Ms. Trapp and expressed relief that she and Mr. Gray had come to an agreement under which he would take over the house. She asked Ms. Trapp to arrange for the transfer. After Ms. Trapp confirmed with Mr. Gray that he and Ms. Gray had agreed to transfer the house to him, she prepared the deed transferring title to him on July 3, 1996. There was a lien against the property for Ms. Gray's unpaid solicitor's fees of approximately \$1,600 which Mr. Gray paid. Ms. Trapp says that she was careful not to give legal advice to Ms. Gray because she had resigned from practise.
- [17] Mr. Gray drafted an agreement which reflected the items the parties had agreed on. He did not want to give Ms. Gray the \$10,000 without "some formal recognition of it". On August 16, he went to the house where Ms. Gray was still living and gave her the agreement he had

prepared. At the kitchen table, they each signed four copies of the agreement. Ms. Gray was asked on direct examination what she said to Mr. Gray about the agreement when he presented it to her for signing. Her answer was: "Nothing". She was asked what Mr. Gray said to her. Again, her response was: "Nothing". Mr. Gray, when asked why there was no witness to the agreement, indicated that Ms. Gray said they were on good terms and it was not necessary to have a witness. This statement was not denied by Ms. Gray.

[18] The 1996 agreement reads:

AGREEMENT

Between:

MARIE SHARON [sic] LYNNE GRAY

hereinafter called Lynne Party of the 1st part;

- and

ALLEN KENNETH GRAY

hereinafter called Allen Party of the 2nd part;

WHEREAS the Parties hereto entered into a separation agreement on or about May 1993, which agreement provided in part that the matrimonial home located at 157 Melissa Crescent, Mount Forest would be transferred to Lynne solely:

AND WHEREAS by deed numbered 697680 registered August 5th, 1993 the said property was so transferred;

AND WHEREAS the Parties hereto have had further discussions and now wish to amend their separation agreement as herein provided;

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the mutual trust, covenants and conditions contained herein, and the sum of TWO DOLLARS (\$2.00) given by each of the Parties to the other, (the receipt whereof is hereby acknowledged), the Parties hereto agree as follows:

1. Joint Custody: Effective 01 July 1996, paragraph 2 (b) of the previous agreement is modified to reflect that the principle residence of the children will be with Allen Gray. Lynne Gray shall have reasonable and generous access. Such access will take into consideration Lynne Gray's new residential location. Allen Gray will be responsible for the support of Cameron Gray.
2. Alimony: Effective 01 July 1996, Allen Gray will cease alimony payments to Lynne Gray and she agrees not to apply for same ever again.

3. Education Costs: Allen Gray agrees to be responsible for all costs incurred in the education of Devon Gray and Cameron Gray through the first four years of college or university. Lynne Gray will contribute if she so wishes.
4. Matrimonial Home:
 - a) The residence located at 157 Melissa Crescent, Mount Forest, shall be transferred into the name of Allen solely and he agrees to be solely responsible for the mortgage which is currently registered against the subject property, namely one to Canada Trustco Mortgage Company, registered as number 98946 on the 1st day of August, 1990, in the original amount of \$111,500. Lynne Gray relinquishes all claim to said residence.
 - b) Further Allen agrees to be solely responsible for all other house related expenses, including but not limited to property taxes and agrees to indemnify and save Lynne harmless from any mortgage liabilities and such other house related liabilities.
 - c) It is acknowledged by the parties hereto that there is a lien filed with the sheriff's office in Guelph against Lynne, namely a Writ of Seizure and Sale, numbered 1677A-94 by Moon, Heath in the amount of \$1,693.17 plus interest at 8%, pursuant to a court order dated January 12, 1995. Lynne confirms that she has been paying on this debt and agrees to be responsible for the same and to indemnify and save Allen harmless from this liability.
 - d) Lynne agrees to vacate the premises by 31 August 1996 unless an alternate date is arranged with Allen.
5. Pension Claim: The previous agreement held Allen Gray responsible to begin payment of \$25,000 to Lynne Gray against her claim on his pension benefits by 01 Jan 2000. This agreement modifies the previous agreement in the following manner;
 - a) Allen agrees to pay to Lynne the sum of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00) as follows:
 - 1) TEN THOUSAND DOLLARS (\$10,000.00) will be paid immediately to Lynne.
 - 2) FIFTEEN THOUSAND DOLLARS (\$15,000.00) will be paidin a lump sum on or by 01 September 2001, unless the parties hereto mutually agree otherwise.
 - b) The parties hereto further agree that in the event there remains an outstanding balance on the said lien described in paragraph 5 c) above at the time the \$15,000.00 is to be paid that this debt will be retired firstly from the said \$15,000.00.
 - c) In exchange for these moneys, Lynne Gray shall jointly and severally release, discharge, acquit, and forgive Allen Gray now and forevermore, from any and all claims, actions, suits, demands, agreements, liabilities and proceedings of every nature and description, whether at law or in equity, arising from the beginning of time to the date of this agreement and more particularly related to a claim against the Ontario Government Civil Servant Pension Plan benefits of Allen Gray that arose out of a separation agreement entered into May 1993.

6. In all other respects the terms of the original separation agreement are in full force and effect. Both parties acknowledge by their signatures, that they have had opportunity to consult with legal counsel but of their own violation, [sic] have decided not to.

Dated at The Town of Mount Forest, this "16" day of August, 1996.

"Marie Sharon [sic] Lynne Gray"

"Allen Kenneth Gray"

[19] Ms. Gray used some of the \$10,000 towards her outstanding debts and bought a computer for Cameron. She sold the 1990 Bonneville for \$3,500, and her father gave her a new 1996 Toyota Camry. She left Ontario on September 3, 1996 with Cameron and drove to British Columbia. Cameron returned home the next month and has continued to live with his father except for a one year period.

[20] Ms. Gray first stayed with friends in White Rock, but decided there might be better job prospects in Victoria, so she moved there in November 1996. From November 5 to December 1, 1996, Ms. Gray stayed at a transition house in Victoria. In March 1997, she found employment and has remained employed.

[21] Ms. Gray has developed type two diabetes which she monitors with strips four times a day, at a cost of \$1.00 a strip. She says that because of her diabetes there are days when she is unable to work; moreover, she has fallen many times at work, her feet go numb, and she feels dizzy.

[22] Dr. Ed Curran was Ms. Gray's family physician from the summer of 1997 until he sold his practise in 1999. When he last saw Ms. Gray in about April of that year, her diabetes was under control. It can be controlled by diet, medication and exercise. There is no evidence that Ms. Gray has been treated by any other physician other than Dr. Curran and so I accept his evidence that Ms. Gray's diabetes, although not cured, is under control.

[23] Ms. Gray currently works a total of 16 to 24 hours a week in casual positions at both the Royal Jubilee and Victoria General Hospitals. There was no evidence regarding whether she could obtain additional hours of work. Her total income for the years 1996 to 1999 as shown on her tax returns is as follows:

1996 \$26,115.00

1997 \$33,247.00

1998 \$36,223.00

1999 \$36,499.91

[24] In addition, in 1998, she received \$10,289 which included a \$1,000 gift from her employer, \$5,289 from her father's insurance policy, and a gift of \$4,000 from her stepfather.

- [25] In 1999, Ms. Gray received \$16,719 from her father's estate. Therefore, in 1998 she had a total income of \$46,512 and in 1999 a total income of \$53,218.91.
- [26] In 1996 through to 1999, Mr. Gray's total income has fluctuated with overtime, as follows:
- 1996 \$72,195
- 1997 \$71,626
- 1998 \$91,940
- 1999 \$76,489
- [27] In 1998, Mr. Gray cashed in \$18,004 in RRSP's; otherwise his employment income was \$73,936. He has supported Cameron who is now 19 years old, even during May 1998 to May 1999 when Cameron lived with a pastor and his wife. Mr. Gray has also supported Devon, who is now 22. Devon moved to Toronto in October 1997 to attend school and Mr. Gray continued to fully support her until fairly recently.
- [28] In April 1999, Mr. Gray sold the former matrimonial home in Mount Forest. The net proceeds from the sale were \$12,000.
- [29] In 1998, Ms. Gray had discussions with Mr. Gray indicating that she wanted alimony and spousal support. Consequently, this action was commenced in October 1998.
- [30] Ms. Gray filed a Property and Financial Statement on February 4, 1999. It shows a net annual income of \$28,284.36 and expenses of \$30,144 annually. She claimed \$1,200 annually for the children's expenses.
- [31] On July 26, 2000, Ms. Gray filed a Financial Statement. This time it shows an annual income of \$36,000 and annual expenses of \$45,995, or an increase of \$15,851 in expenses. She testified that the major change in expenses between 1999 and 2000 were related to her diabetes and the expenses for the children. She says that she sent the children monies and paid for all of their trips and airfare - presumably to British Columbia. However, by her own evidence, the diabetes expenses total \$4.00 a day or \$1,460 annually, and she has not paid any access costs this year, as neither Devon nor Cameron have been to see her. It is agreed that from April 22, 1997 to May 7, 2000, Ms. Gray paid a total of \$4,053.20 in child support and access costs, an average of only \$1,350 each year, even though from 1996 to 1999 she claimed Cameron as an equivalent to spouse exemption on her income taxes.
- [32] It is fair to say that in preparing her Financial Statement for this year, Ms. Gray has exaggerated her expenses.

ANALYSIS

[33] Ms. Gray seeks to set aside the 1996 agreement and enforce the 1993 agreement. Counsel for Ms. Gray says that the issues are two-fold: First, does the 1996 agreement meet the legislative requirements of essential validity; second, if the agreement is valid under the law of Ontario, should the 1996 agreement be set aside or varied on other grounds.

[34] The 1996 agreement was entered into in Ontario and purports to amend the 1993 agreement. The 1993 agreement provides that the agreement is to be governed by and construed according to the laws of Ontario.

[35] With respect to Ontario law, Ms. Gray relies on the written expert opinion of Linda Silver Dranoff, a family law lawyer in private practice in Ontario for the past 25 years.

[36] Section 55.(1) of the Family Law Act, R.S.O. 1990, c. F.3 provides:

55.(1) A domestic contract and an agreement to amend or rescind a domestic contract are unenforceable unless made in writing, signed by the parties and witnessed.

[37] This section was carefully considered in *Geropoulos v. Geropoulos* (1982), 35 O.R. (2d) 763 (at 769) (Ont. C.A.):

...

No purpose is to be served in compelling agreements of this kind to comply with the formalities of s. 54(1) [now s. 55.(1)] and, if not, permitting parties to withdraw at will from compromises properly entered into by their legal representatives before trial of their action or, if the appellant's position were to be accepted, compromises concluded even during the trial of the action. It may well be that, given the nature of matrimonial litigation, prudence would dictate that lawyers ensure that settlement agreements are signed by the parties personally witnessed. But I cannot construe the section as requiring that an otherwise valid compromise of an action must be rendered void and defeated on this ground alone, nor do I believe that the legislation could have contemplated or intended that result. Such a construction would be wholly inconsonant with the established policy of encouraging the settlement of disputed claims and recognizing and preserving the validity of settlements freely and properly entered into under advice.

...

[38] The foregoing passage was adopted in *Campbell v. Campbell* (1986), 52 O.R. (2d) 206 at 210 (Ont.H.C.J.):

... The requirement of the witnessing of an agreement under s. 54 [now s. 55.(1)] is to ensure that the parties in fact signed it and that there was no duress or other grounds to refuse its enforcement. The words of s. 54 do not require that the signature of each party be expressly witnessed but only that the agreement be witnessed. In the present case, the agreement was prepared and signed by the plaintiff's solicitor. He was the witness to it. It is undisputed that the parties accepted the agreement and signed it. It would defeat the intent of the Act encouraging

settlement of disputes to hold, in this case, that the absence of a specific witness to the defendant's signature would allow him to escape the very settlement that he made.

- [39] Ms. Gray said she knew any change to the agreement had to be witnessed in front of a lawyer and that she did not sign with the same signature she had used in the 1993 agreement, so "it was not an agreement", but "a null and void agreement".
- [40] Before she left Ontario at the beginning of September 1996, Ms. Gray stayed with Ms. Trapp. Ms. Trapp says that Ms. Gray spoke about signing "something". Ms. Trapp specifically asked her about it and Ms. Gray's response was "ah, I don't know".
- [41] Ms. Gray insists that the \$10,000 Mr. Gray paid her was "payment in lieu of alimony". That contradicts her evidence in an affidavit filed February 1, 1999, where she deposed that she received the \$10,000 pursuant to the equalization payment provisions in the 1993 agreement.
- [42] Ms. Gray said she was told by Mr. Gray that if she did not sign the 1996 agreement, he would not take over the house. I do not accept her evidence on this point. It does not make sense. It was Ms. Gray who arranged to have the house transferred to Mr. Gray on July 3, 1996. It was not until August 16, 1996 that she signed the agreement. By that time, the house had already been transferred to him.
- [43] Ms. Gray admitted that between the time they reached an agreement in May or June and the time she signed the agreement, she had an opportunity to seek legal advice.
- [44] Ms. Gray also relies on s. 56.(4)(b) and (c) of the Ontario Family Law Act which provides:

Section 56(4)

A court may, on application, set aside a domestic contract or a provision in it,

...

- (b) if a party did not understand the nature or consequences of the domestic contract; or
- (c) otherwise in accordance with the law of contract.

- [45] It is argued that Ms. Gray thought the agreement was not valid because it was not witnessed and therefore she did not understand the consequence of signing.
- [46] Even though Ms. Gray says that she did not want to enter into the agreement and was forced to do so because of financial pressures, I cannot conclude that Mr. Gray obtained her agreement through duress or coercion or that he took advantage of any ignorance, need or distress on her part. I find that Ms. Gray knew that what she was signing was an agreement, she intended to sign it, and she understood that the \$10,000 was part of the equalization payment referred to in the 1993 agreement. It was she who took steps to initiate the bargain they made. There is no suggestion that her thinking was so impaired or clouded that she did not know what it was she was signing. While Ms. Gray complains that she has no pension, that was taken into account in the 1993 agreement by providing for an equalization payment

which remains in effect under the terms of the 1996 agreement. I cannot conclude that the 1996 agreement is substantially unfair.

[47] Accordingly, the action is dismissed with costs.

"Loo J."

Loo J.

Vancouver, B.C.

17 November 2000

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/00/16/s00-1664.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/gray-v-gray-2000>

Prepared on 29 October 2026 · Esheria