

CANADA / JUDGMENT

Honce v. Honce

2024 BCSC 2256

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 2256 Honce v. Honce IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Honce v. Honce, 2024 BCSC 2256 Date: 20241212 Docket: E135142 Registry: Kelowna Between: Tracy Marie Honce Claimant And Aaron Myles Honce Respondent Before: The Honourable Justice A. Ross Reasons for Judgment The Claimant, appearing in person: T. Honce The Respondent, appearing in person: A. Honce Place and Date of Trial/Hearing: Kelowna, B.C. August 6-7, 2024 October 1-2 & 30, 2024 Place and Date of Judgment: Kelowna, B.C. December 12, 2024 Table of Contents Introduction.. 3 Issues. 3 Background Facts. 4 The Parties and the Relationship. 4 Since Separation. 6 The Separation Agreement 8 Discussion Regarding the Events of September 16, 2022. 11 Legal Basis and Analysis. 14 Circumstances of Execution. 16 The Substance of the Agreement 17 Miglin Test Stage-Two. 19 Return to Miglin Test 21 Conclusion on Spousal Support 22 Order 23 Divorce. 24 Costs. 24

Introduction

- [1] This family law trial proceeded before me over five days in August and October 2024.
- [2] The issues at trial were limited to a claim for spousal support and a claim for divorce. The main point of dispute relates to a separation agreement signed by the parties (the "Separation Agreement"). The terms of that agreement provided that both parties waived all claims for spousal support.
- [3] The claimant's position is that she is deserving of spousal support after a 10-year relationship. She says that the Separation Agreement was supposed to have provision for spousal support. She says that, during the drafting process, the respondent removed the spousal support provisions without her knowledge. She says that she signed the agreement without noticing that the provision for spousal support had been removed.
- [4] The respondent denies that the claimant was misled. I address his evidence below.

- [5] Both parties were self-represented at trial. In my opinion, the claimant had more than one legal basis to argue that she was entitled to spousal support. As I discuss below, although I do not accept the factual underpinning of the claimant's case, I find that there is a basis in law to set aside or excise the term of the Separation Agreement that waived her claim to spousal support.
- [6] The parties agree that they should be divorced.

Issues

- [7] The Issues for me to decide are:
- a) Does the evidence establish a basis for the variation or setting aside of a portion of the parties' Separation Agreement?
 - b) Should the parties be divorced? Background Facts The Parties and the Relationship
- [8] The claimant was born in 1973. She has a son by a prior relationship. He is 18 years old and not considered to be a child of this marriage. (The notice of family claim includes a claim for child support, but that claim was abandoned at trial.)
- [9] Prior to this relationship, the claimant worked as a custodian. During the marriage she took a Dental Office Administration course (2013-2014). She has been employed in that capacity since 2014. In addition, she works in a clothing store to supplement her income. She earns approximately \$39,000 per year at her full-time job and \$2,300 per year at the other.
- [10] The respondent was born in 1971. He has three children from a former marriage. They were born 2005 (twins) and 2007. He continues to have financial obligations to support them.
- [11] At the commencement of the relationship, the respondent was employed as a dental hygienist. He continues in that capacity although he has, at times, ventured into the realm of selling dental products. There is a dispute over his earnings and his earning potential.
- [12] The parties began dating in July 2012 and began cohabiting in a marriage-like relationship in October 2012. They were married on August 2, 2013. They separated on September 16, 2022. The relationship was 10 years. September 16, 2022, is also the date of the Separation Agreement which is at issue. As discussed below, upon separation, there were few assets to divide.
- [13] Through the course of the parties' relationship, the respondent was involved in family litigation against his first ex-wife. That litigation is relevant to the current litigation due to the respondent's ongoing obligations.
- [14] I consider the parties' living arrangements during the marriage to be relevant:
- a) During the marriage, the couple purchased a house on Blondeaux Crescent in August 2017. They spent months renovating it and moved into that house in December 2017.

- b) During the course of those renovations:
 - i. the respondent injured his hand, causing a period of disability from his work as a dental hygienist; ii. the respondent continued to have child and spousal support obligations to his first ex-wife and their three children; iii. those obligations, along with day-to-day expenses, and the drop in the respondent's income, put significant financial strain on the parties' finances.
 - c) As a result, the parties were unable to pay their bills, and they were forced to sell the Blondeaux house in August 2018.
 - d) As of August 2018, the parties moved in with the claimant's parents.
 - e) In the Spring of 2019, the parties did two things:
 - i. They made a consumer proposal to Grant Thornton. As part of the consumer proposal, they turned over all leased vehicles; ii. They purchased, and moved into, a 5th wheel trailer (the "Trailer"). The trailer was purchased for \$48,000. That amount was 100% financed with monthly payments of \$449 per month. (The Trailer plays a significant role in the narrative of the separation.)
 - f) In 2020 they moved out of the Trailer and into low income housing. They ultimately moved out of that housing because their incomes exceeded the limit.
 - g) The parties moved to a rental house on Nickel Road. They were living in the Nickel Road house at the date of separation in September 2022.
 - h) After separation the claimant moved in with her parents. The respondent stayed in the Nickel Road house. He says that he had to pay the landlord to break the lease. He moved out in July 2023.
- [15] I discuss the parties' finances on the date of separation below. There were few assets to divide. They were still under the yolk of the consumer proposal. Since Separation
- [16] The claimant, with some disruptions, has continued to work as Dental Office Assistant. As noted, she earns in range of \$40,000-\$43,000 per year. Since separation, the claimant has lived with her parents in a home of approximately 1,200 square feet. Her son also lives in that residence.
- [17] The respondent has moved a couple of times since separation. He now lives in a rented house that he shares with his first ex-wife. The respondent resides in a basement suite. His first ex-wife occupies the upper floors. Their three children reside in the rented house, sharing time upstairs and downstairs based upon the parenting arrangements.

- [18] The respondent continues to have financial obligations to his first ex-wife in the form of child support of (\$750 per month). However, the shared housing arrangement mitigates his financial obligations. Under the current agreement, the respondent pays the utilities and other expenses for the entire house. He pays those amounts in lieu of child support.
- [19] The respondent's income has fluctuated. His income tax returns disclose the following earnings: Year Gross Income Expenses Net Income 2021 \$120,041 \$9,013 \$111,028 2022 \$105,948 \$31,436 \$74,513 2023 \$106,916 \$15,971 \$90,945
- [20] The claimant alleges that, in addition to the income listed above, the respondent has earned unreported income. The parties agree that in the years 2021 -2023, the respondent worked in association with the claimant's mother, who runs a pet grooming business. The respondent undertook cleaning of dogs' teeth as a side-business when he was trying to find other work.
- [21] The claimant sought to introduce ledgers showing the amount of the extra income. Those ledgers were from her mother's business. I did not allow them into evidence because no witness could verify the figures. The respondent disputed the amounts in the documents. From her own knowledge of the finances of the dog grooming business, the claimant believes that the respondent earned yearly income of in the range of \$8,000-\$35,000 from cleaning dogs' teeth.
- [22] The respondent does not dispute that he had income from dog grooming. He says that he was trying to do any type of work that would help to pay the family's bills. He also says the income was limited, he reported those amounts on his returns, and the income stream has stopped.
- [23] Based upon the evidence admitted at trial, I am unable to determine whether the respondent had significant unreported income either before or after separation. As a result, I make my determination based upon the respondent's income as reported to the Canada Revenue Agency.
- [24] I discuss below certain amounts that the respondent eventually paid (post-separation) to the benefit of the claimant. These amounts were paid outside of the terms of the Separation Agreement:
- a) From September 2022 until April 2024, he paid the remainder of the amount owing under the couple's Consumer Proposal. He paid \$125 for approximately 20 months. He is entitled to credit for half of that amount (\$1,250).
 - b) In 2023, at the request of the claimant, he paid \$230 per month toward the Trailer loan. Those payments went for nine months (\$2,070).
 - c) He paid the penalty for the early termination of the lease on the couple's Nickel Road house. He testified that penalty was \$2,700. The claimant would have been responsible for half of that amount (\$1,350).

- [25] I return to discuss the post-separation events below. The Separation Agreement
- [26] Neither party had legal advice or counsel leading up to the signing of the Separation Agreement. Based upon the testimony of both parties, it is evident that the marriage was at an end in the months leading up to September 16, 2022. The events of September 16, 2022, were simply the formal delineation that the claimant was moving out and the marriage was over.
- [27] It is not disputed that, on or about September 9, 2022, the claimant prepared a draft separation agreement on her laptop computer. She gleaned the necessary information off the internet. The couple had few assets to divide. They had some debt. The claimant's original draft of the agreement provided for spousal support of \$2,000 per month to begin in January 2023. Those payments would continue until the parties agreed to stop them.
- [28] Although there was some dispute about the details of the events of September 16, 2022, it is generally agreed that:
- a) The claimant approached the respondent and indicated that she was leaving the marriage.
 - b) She presented the respondent with a typed (paper) version of the first draft of the Separation Agreement. They had a discussion at the kitchen table.
 - c) The document was amended on the claimant's laptop. A new version was printed and then signed.
 - d) The claimant took the signed Separation Agreement to her parent's home where her father "witnessed" both signatures.
 - e) She then filed the Separation Agreement at the Kelowna Supreme Court Registry.
- [29] The parties' versions of events diverge on the nature of the edits between the first and the final draft.
- [30] The claimant testified that:
- a) The respondent took control of her laptop and started making changes. She was not aware of the edits he was making. He went upstairs and printed a new copy of the document. The parties then signed the document. She says that she did not read the amended document before or after signing. She took it to her father to "witness" and then filed it in court.
 - b) She did not think about the terms of the Separation Agreement until she was sitting in a support group many months later. Someone in the group suggested that she should be entitled to spousal support. She went home and looked at the Separation Agreement. She then realized that the terms had been altered from what she expected. Specifically, there was no provision for spousal support.
 - c) Following on that realization, she commenced this action on September 20, 2023.

- [31] In addition to the information set out above, the claimant asserts that she was under duress at the September 16, 2022 meeting. She says that the atmosphere was tense and fraught.
- [32] The respondent's version of September 16, 2022 does not accord with the claimant's:
- a) He says that when the claimant approached him, he read through the draft document.
 - b) He says:
 - i. He told the claimant that one of the primary purposes of a separation agreement is to divide the assets of the couple. Hence, they discussed which items each party would take out of the marriage. This was achieved through new clauses (the "Additional Clauses") inserted at page 4.
 - ii. During the discussion, he raised the fact that he could not afford to pay any spousal support.
 - iii. He told the claimant that, in lieu of spousal support, he would transfer full ownership to the only potential asset owned by the couple: the Trailer.
 - iv. He says the claimant was well-aware of the changes he made to the body of the Separation Agreement. She signed the document indicating her agreement.
- [33] In answer to the claimant's evidence regarding the mood of the discussions, he says that it was calm, although overlaid with the seriousness that their marriage was coming to an end.
- [34] For context, the claimant's first draft of the agreement contained clause 5 which stated: Aaron Honce will pay spousal support in the amount of \$2,000.00 monthly to Tracy Honce. Spousal support payments will commence on January 1, 2023 and will be paid on the 1st day of each and every month. Spousal support will end when both Parties agree.
- [35] The final, signed, Separation Agreement contains clause 3 entitled "Spousal Support". It states: Neither Party claims entitlement to spousal support. Both Parties expressly waive spousal support now and in the future, regardless of any change in circumstances experienced by either Party.
- [36] Under the heading "Additional Clauses", Clause 11 states: 11 In leu (sic) of present and future spousal support Aaron agrees that Tracy will be the sole owner of the RV and responsible for its maintenance and asset value. Parties will split all maintenance costs until full ownership is established by Tracy.
- [37] The "RV" was the Trailer. I note that the respondent's father was also on title to the Trailer, but claimed no beneficial interest in it.
- [38] In addition, under the "Additional Clauses":
- a) the respondent agreed to keep the claimant and her son on his health insurance "for as long as possible";
 - b) the respondent agreed that he would not remove the claimant as beneficiary on any currently held life insurance;

- c) the claimant indicated that she would be taking four paintings plus some small furniture and small appliances.
- [39] I also note that clause 17 provides that if a portion of the agreement is found by a court to be invalid or void, then that provision can be read-down or struck. Discussion Regarding the Events of September 16, 2022
- [40] There is a clear dispute between the parties as to the unfolding of events on September 16, 2022. The claimant submits that, based upon her version of events, the signed Separation Agreement did not record her understanding of the terms between the parties.
- [41] The parties' two versions of the events on September 16, 2022, cannot be reconciled. Hence, I must choose one version or the other.
- [42] In resolving this factual dispute between the parties, I accept the respondent's evidence over the claimant's evidence. I prefer the respondent's version over the claimant's version on the following bases:
- a) It is clear from the two versions that the Additional Clauses have been added to the original draft. Those new terms include the distribution of certain small items. There is no dispute that the claimant, in fact, took those small items. Hence, there is objective support for the idea that she knew that those terms had been included in the final draft. Hence, she knew that some changes had been made.
 - b) The claimant's first draft of the document included spousal support of \$2,000 per month to be paid until the parties agreed to stop. In cross-examination, the claimant agreed that she had done no research and had no specific rationale for the figure of \$2,000 per month. She had picked that number out of the air. That evidence leads to three points:
 - i. The claimant had no reason to think that the respondent would (or could) accept her proposed figure for spousal support.
 - ii. It is unlikely that the respondent would have hidden his disagreement from the claimant. As noted, he specifically told the claimant that a separation agreement should divide assets. It would be incongruous for him to discuss and edit some terms, but hide his deletion of the spousal support clause.
 - iii. It is also not disputed that the claimant did, in fact, take full ownership of the Trailer, which was the putative consideration for waiving her spousal support claim.
- [43] Further, in my opinion, the claimant's own narrative does not support her contention. According to the first draft of the agreement, the claimant was entitled to receive \$2,000 per month starting in January 2023. However, she says she did not read the signed document until September 2023. By that time (on her version) the respondent owed her more than \$16,000 in spousal support. She had taken no steps during those intervening months to ask him about her spousal support payments. This time gap suggests to me that she knew the Separation Agreement contained no spousal support.

- [44] Thus, in my opinion, the claimant was not misled about the ultimate terms of the Separation Agreement. I find that the most likely set of events involved:
- a) the claimant presenting the first draft to the respondent;
 - b) the respondent advising the claimant that he could not afford to pay her spousal support;
 - c) the respondent coming up with the idea of transferring the Trailer to the claimant;
 - d) the claimant accepting that concept on the understanding that she would see some financial benefit.
- [45] Hence, in my opinion, the claimant has failed to establish the underpinning of her claim for spousal support. I find that she was not misled by the respondent.
- [46] However, my finding on the events leading to the signing of the Separation Agreement does not end the matter. As I discuss below, the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and the cases that interpret it, guide me to undertake a further inquiry. Legal Basis and Analysis
- [47] The legal question I must address relates to whether the claimant is entitled to vary or set aside the specific terms of the Separation Agreement in which she waived a right to claim spousal support.
- [48] The legislative authority to make an order requiring the payment of spousal support is found in s. 15.2(1) of the Divorce Act.
- [49] Section 15.2(4) instructs me to consider the following factors in making determining whether spousal support is warranted: Factors 15.2 (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- [50] As discussed below, the Supreme Court of Canada in *Miglin v. Miglin*, 2003 SCC 24, provides guidance on when the court can set aside an agreement regarding spousal support. In *Miglin*, the Court referred to the objectives set out in s. 15.2(6). They are: Objectives of spousal support order 15.2 (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

- [51] The leading case in this area is *Miglin*. In that decision the Supreme Court of Canada dealt with a couple who separated after a 14-year marriage. Following separation, the parties negotiated for a year and then executed a separation agreement. Both parties waived all rights to spousal support. However, the parties also divided significant assets and agreed that the wife would be retained as a consultant in the family business for five years. After four years, the wife applied for spousal and child support as well as parenting relief. The wife was successful at trial, and at the Ontario Court of Appeal. She was awarded spousal support of \$4,400 per month.
- [52] The Supreme Court of Canada overturned the lower court decisions and found for the husband. In doing so the Court recognized two countervailing interests: the desire to enforce negotiated bargains must be balanced against the desire to do fairness between the parties.
- [53] The Court provided guidance that when discussing the language and purpose of the Divorce Act, a contextual approach is required: 46 Nevertheless, the language and purpose of the 1985 Act militate in favour of a contextual assessment of all the circumstances. This includes the content of the agreement, in order to determine the proper weight it should be accorded in a s. 15.2 application. In exercising their discretion, trial judges must balance Parliament's objective of equitable sharing of the consequences of marriage and its breakdown with the parties' freedom to arrange their affairs as they see fit. Accordingly, a court should be loathe to interfere with a pre-existing agreement unless it is convinced that the agreement does not comply substantially with the overall objectives of the Divorce Act. This is particularly so when the pre-existing spousal support agreement is part of a comprehensive settlement of all issues related to the termination of the marriage. Since the issues, as well as their settlement, are likely interrelated, the support part of the agreement would at times be difficult to modify without putting into question the entire arrangement.
- [54] The Court in *Miglin* introduced a two-part test where a party sues seeking relief that was waived in a separation agreement: 64 An initial application for spousal support inconsistent with a pre-existing agreement requires an investigation into all the circumstances surrounding that agreement, first, at the time of its formation, and second, at the time of the application. In our view, this two-stage analysis provides the court with a principled way of balancing the competing objectives underlying the Divorce Act and of locating the potentially problematic aspects of spousal support arrangements in their appropriate temporal context.

- [55] The discussion in Miglin focusses upon the factors that may lead the court to place less weight on a separation agreement. The two steps are:
- a) to look at the fairness of the agreement at the time it was executed; and
 - b) to look again at the circumstances as of the time of the application being heard by the court.
- [56] Further guidance from Miglin breaks that assessment of a separation agreement into two parts:
- a) the circumstances of execution, and
 - b) the substance of the agreement. Circumstances of Execution
- [57] Miglin notes that the circumstances of the execution are relevant to the inquiry: for example, whether the parties had professional advice, and the length of the negotiations. Further, the Court held that the applicant need not establish that the terms rise to the level of unconscionability. Instead, vulnerability, if established, is sufficient to reduce the weight that will be placed on the agreement. However, that vulnerability must be assessed in the context of the negotiations, their duration and whether the parties had professional advice.
- [58] I have outlined the circumstances of the execution of the Separation Agreement above.
- [59] It is common ground that the entirety of the negotiations occurred on September 16, 2022. The claimant prepared the first draft. The respondent amended it. Then they signed the second draft. Neither party had legal advice regarding their rights.
- [60] I noted above that the claimant asserts that she was under duress. I am unable to make that finding, but I accept that, at the time, the claimant was vulnerable. The respondent had significant experience in matrimonial matters. He purported to correct the claimant on the proper terms to include in the Separation Agreement. I accept that she was vulnerable to his pronouncements about the law. The Substance of the Agreement
- [61] I also find that the substance of the Separation Agreement was less than fair. The unfairness lies in the absence of spousal support.
- [62] The respondent's rationale (at trial) for eliminating the claim for spousal support was that he could neither bear to, nor afford to, pay it. I simply note that neither of these reasons comprise a rationale that is accepted in this Court. Put another way, if the parties had legal advice, it is unlikely that the claim for spousal support would have been waived.
- [63] This is not a case where the parties could make "other" financial arrangements. Despite the respondent's attempts to ascribe value to the Trailer, they had no assets that could be transferred to compensate the claimant for waiving her right to spousal support.

- [64] As noted above, the respondent says that he proposed that he transfer the only potential asset (the Trailer) to the claimant in lieu of spousal support. The financial analysis of that transaction bridges the time gap between the date of execution and the date of the claimant's application.
- [65] Under the terms of the Separation Agreement, in lieu of spousal support, the claimant received full beneficial title to the Trailer. However, she also became responsible for the monthly payments on the Trailer. When purchased in the Spring of 2019, the Trailer had been 100% financed. The payments were \$449 per month. Hence, the claimant received the asset and the liability.
- [66] In December 2022 (three months after the execution of the Separation Agreement), the claimant contacted the respondent and told him that she was having difficulty maintaining the payments on the Trailer. She was considering turning it in to the dealer. At that point, the respondent agreed to pay half the monthly loan payment on the Trailer. He paid \$230 per month between January and September 2023, a total of \$2,070 toward the trailer debt.
- [67] In September 2023, the parties negotiated a sale of the Trailer to a third party for approximately \$35,000. That was also the amount owing on the Trailer loan. The terms of the sale were that the purchaser would take over the outstanding loan and, when fully paid, the Trailer will be transferred to him. As a result of that sale:
- a) neither party has had any ongoing liability related to the Trailer;
 - b) the claimant does not have the Trailer.
- [68] Hence, when assessing the substance of the Separation Agreement (viewed at the time of execution), the claimant was getting an "asset" that had a net value of zero. The Trailer was burdened by the loan.
- [69] As matters played out, that turned out to be true. Over the course of time, the claimant paid approximately \$3,400 toward the Trailer loan, and the respondent paid approximately \$2,070.
- [70] Hence, by my assessment of the substance of the Separation Agreement, the claimant received an asset worth less than zero value when the Trailer was transferred to her.
- [71] As noted above, at the time of separation, the respondent's income exceeded the claimant's:
- a) His income was approximately \$74,000 in 2022. However, he had ongoing child support obligations in the range of \$750 per month. Those obligations would have reduced his income to approximately \$65,000.
 - b) The claimant's income was approximately \$41,000.

- [72] Based upon those gross figures, and all other things being equal, the claimant would be entitled to spousal support from the respondent if the rights of the parties had been litigated in September 2022.
- [73] Based upon the Spousal Support Advisory Guidelines ("SSAG"), using the income figures above (and accounting for the respondent's child support payments), the mid-range spousal support would be \$306 per month.
- [74] I have noted the other payments undertaken by the respondent, but those were not included in the negotiations toward the Settlement Agreement. I consider them in the second stage.
- [75] Hence, in my opinion, the waiver of spousal support in the Separation Agreement was unfair. Miglin Test Stage-Two
- [76] The second part of the Miglin test requires a view of the circumstances at the time of the application. The question for the court is whether the terms of the Separation Agreement have been fair given the developments since the signing.
- [77] Looking at the first three months after September 2022, if no Separation Agreement had been reached, then the respondent would have been liable to pay \$306 per month ($\$306 \times 3 = \$918$). From that amount I deduct the amounts he paid toward the Consumer Proposal ($\$65 \times 3 = \$195$).
- [78] Using those figures, the claimant would have been entitled to \$723 in 2022.
- [79] Moving into 2023:
- a) the claimant's income remained at \$41,000;
 - b) the respondent's income increased from \$74,513 in 2022 to \$90,045. That represents approximately 20% improvement in the respondent's income.
- [80] I note that it is not a great surprise that his income increased. He had a period of unemployment in 2022 which lowered his income. However, there was no evidence that the parties took that potential increase into account when drafting the Separation Agreement.
- [81] As noted above, the respondent and his first ex-wife have come to an accommodation regarding child support. As of mid-2023, they live in the same house. He pays utilities and other expenses in lieu of child support. His obligation (by court order) is \$750 per month. I use that figure in my calculations.
- [82] Based upon the increase in the respondent's income, the SSAG mid-level support would increase to \$529 per month (\$6,348 for the year). I am assessing fairness in retrospect, looking backward from the application. As a result, I must deduct from the respondent's income the amounts that the respondent paid to the claimant's credit:

- a) For the year 2023, the respondent continued to make payments in respect of the couple's Consumer Proposal. Those payments have been in the area of \$125 per month since separation. He is entitled to credit of \$63 per month in 2023 (\$756).
- b) From January to September (nine months) the respondent contributed \$230 per month toward the Trailer loan (\$2,070).
- c) He also paid the penalty for the early termination of the lease (\$2,700). The claimant's share of that penalty was \$1,350.

[83] Hence, if the parties had not reached the Separation Agreement,

- a) in 2023:
 - i. the respondent would have paid \$6,348 in spousal support, but ii. he did pay approximately \$4,176 (\$756 + \$2,070 + \$1,350); iii. thus, the spousal support entitlement would have been \$2,172.

[84] Moving to 2024,

- a) the parties' incomes did not change significantly;
- b) there was no payment toward the Trailer loan;
- c) the Consumer Proposal was paid out in April ($\$63 \times 4 = \$252$).

[85] The claimant would have continued her entitlement to spousal support at \$529 per month ($\$529 \times 8 = \$4,232 - \$252 = \$3,980$). Hence:

- a) in 2024, to the beginning of the trial in August, the claimant would have been entitled to spousal support of \$3,980;
- b) for the last four months, September to December 2024, the amount would be a further \$2,116.

[86] Viewing the fairness of the Separation Agreement in the period since its execution to the date of trial, the claimant has been deprived of support payments in the realm of \$6,875 (\$723 in 2022, \$2,172 in 2023, and \$3,980 in 2024).

[87] Looking ahead, given the length of the relationship, the claimant would be entitled to support for at least five years. In my opinion, a duration of five years would have been appropriate given the length of the relationship and the circumstances of the parties. Hence, assuming the parties' incomes remain in place, the claimant would be entitled to three further years (August 2024-August 2027) at \$6,348 per year (total: \$19,044). Return to Miglin Test

- [88] The Miglin test requires me to review the Separation Agreement to determine whether it was fair. In that regard, I must assess whether it substantially complies with factors and objectives described in the Divorce Act. Those factors and objectives are set out in s. 15.2(4) and (6) (above).
- [89] First, addressing the overall fairness of the Separation Agreement, in my opinion, it under-compensated the claimant by approximately \$26,000 (past and future). That figure is based upon five years of spousal support, less other financial contributions by the respondent.
- [90] As to the factors, I give the greatest weight to the "means" and "needs" of both spouses:
- a) Neither party has gone on to any degree of luxury. The claimant lives with her parents and teen son. The respondent lives in the basement suite of a house he shares with his first ex-wife.
 - b) I accept that the claimant earns according to her means. She is fully employed. I further accept that the respondent is earning to his means at present. He was not earning to his means in 2022.
- [91] Under the objectives, I note:
- a) although she earns less than the respondent, the claimant is more employable now than she was before the marriage;
 - b) the financial consequences of the marriage are largely in the past;
 - c) I am to promote economic self-sufficiency. Conclusion on Spousal Support
- [92] Taking all of the above considerations into account, I do not accord significant deference to the Separation Agreement for the following reasons:
- a) At the time of execution:
 - i. it was negotiated in the span of less than an evening; ii. neither party received professional or legal advice; iii. the claimant was in a vulnerable state; and iv. there was no legally recognized rationale for the waiver of spousal support.
 - b) The circumstances since the execution have indicated that the terms were unfair:
 - i. The purported consideration for the claimant waiving her right to spousal support ended up being a financial burden (the Trailer with the attached loan); and ii. The respondent's income increased in 2023.
- [93] On those bases, I find that the terms of the Separation Agreement dealing with spousal support should not continue to govern the parties' post-separation obligations. Order

- [94] I have set out above the amounts of spousal support to which the claimant would be entitled if she had commenced an action and obtained judgment in 2022 or 2023. On the basis of those calculations, the respondent is ordered to pay spousal support in the following amounts: For 2022: \$723 For 2023: \$2,172 For 2024 (to the date of judgment in December): \$6,096 Total Arrears: \$8,991 (I note that the 2024 figure is increased from para. 88 because my calculation is now through December.)
- [95] In addition, the respondent is ordered to pay ongoing spousal support of \$549 per month, on the first day of every month, commencing January 1, 2025, to continue until September 1, 2027. Divorce
- [96] Both parties consent to an order for divorce. I am satisfied that the requirements of the Divorce Act are met. Accordingly, I order that subject to s. 12 of the Divorce Act, the claimant and the respondent, who were married at on August 2, 2013, are divorced from each other. The divorce is to take effect on the 31st day after the date of this order. Costs
- [97] The claimant has been successful. However, as noted above, I did not accept as true the evidence she put forward as her rationale for the claim. I order that each party bear their own costs. "A. Ross J."

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