

CANADA / JUDGMENT

Isfeld v. Isfeld

2022 BCSC 1925

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Supreme Court of British Columbia

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2022 BCSC 1925 Isfeld v. Isfeld

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Isfeld v. Isfeld,

2022 BCSC 1925

Date: 20221103

Docket: E01925

Registry: Abbotsford

Between:

Jaime Lea Isfeld

also known as Jaime Lea Hedberg

Claimant

And

Carson Christopher Isfeld

Respondent

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Claimant:

A.B. Watkins

Counsel for the Respondent:

N.B. Allen

Place and Date of Hearing:

New Westminster, B.C.

June 22, 2022

Place and Date of Judgment:

Abbotsford, B.C.

November 3, 2022

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I. INTRODUCTION

[1] The Virtual Family Mediation Project is a pilot project by Access Pro Bono that offers free online family mediation and advice to low- and modest-income families. The project aims to facilitate early resolution of family law matters, while saving participants' money and freeing up court resources.

[2] The issue on this summary trial application is whether the parties, who participated in the Virtual Family Mediation Project, reached a legally binding settlement on the terms of a memorandum of understanding drafted by their pro bono mediator (the "Memorandum of Understanding").

- [3] I have concluded that the parties created a contract at the mediation to enter into a formal separation agreement based on the terms of the Memorandum of Understanding. In these reasons for judgment, I will set out my decision on the facts and the law, followed by my reasons for why this issue is suitable for disposition on a summary trial application.

II. BACKGROUND

- [4] Jaime Hedberg and Carson Isfeld began living together in 1996. They married in 2000, and Ms. Hedberg took Mr. Isfeld's surname. They had one child together. They separated on December 1, 2019.
- [5] Mr. Isfeld is a firefighter. His income is approximately \$140,000 per year. Ms. Isfeld is a medical office assistant. Her income is approximately \$46,000 per year.
- [6] Following the separation, Mr. and Ms. Isfeld shared parenting of their child on an equal basis. Mr. Isfeld began making informal support payments to Ms. Isfeld without distinguishing between child or spousal support. The parties could not agree on long-term parenting arrangements, the amount of child and spousal support, property division or who should pay for expenses related to the former family home.
- [7] The parties applied to participate in the Virtual Family Mediation Project through Access Pro Bono. They were accepted into the program, likely based on Ms. Isfeld's modest income. They were assigned Kendelle Pollitt, an experienced family law lawyer and certified mediator, to act as their pro bono mediator. They were also each matched with a pro bono lawyer to provide them with independent legal advice and to prepare for the mediation.
- [8] The parties attended two mediation sessions with Ms. Pollitt in August 2020, at which they were unable to reach an agreement. The mediation sessions occurred over video on the Zoom platform. Neither party was represented by legal counsel during these sessions.
- [9] The parties attended a third mediation session on December 16, 2020. The third session also occurred over Zoom. It lasted from approximately 10:00 am to 8:30 pm that evening. Over the course of the third mediation session, the parties and the mediator created a document entitled "Memorandum of Understanding". Shortly after the session concluded, the mediator sent the parties an email that read:

Please see attached draft Memorandum of Understanding arising from today's mediation.

Congratulations and thank you for trusting me to be of assistance!

- [10] Ms. Isfeld was represented during the third mediation session by legal counsel she had retained outside the Access Pro Bono program. Mr. Isfeld did not have legal counsel present with him or on video; however, he informed the other participants that, if there was something to raise with counsel, he would try to reach his pro bono counsel by telephone. During a break in the mediation, Mr. Isfeld spoke with his counsel and obtained advice.

[11] The Memorandum of Understanding is seven pages long. It sets out the particulars of a parenting schedule, child and spousal support payments and property division, including an agreement to list the former family home for sale. The recitals include the following:

G. The parties attended mediation sessions with Ms. Kendelle Pollitt on August 5, 2020, August 19, 2020 and December 16, 2020 and these Memorandum of Understanding are to be the formal Memorandum of Understanding reflecting the settlement reached between the parties.

H. The terms of these Memorandum of Understanding are a final agreement addressing:

- a. Parenting;
- b. Child Support;
- c. Spousal Support;
- d. The division of property and debts; and
- e. Any and all issues arising from the parties' separation.

[12] On December 30, 2020, Ms. Isfeld's counsel provided Mr. Isfeld with a copy of a draft separation agreement incorporating the terms of the Memorandum of Understanding.

[13] On January 4, 2021, Mr. Isfeld proposed "an additional mediation in hopes of finalizing the agreement". On February 2, 2021, he wrote that he had obtained legal advice on the separation agreement and spoken to Ms. Pollitt and she was not willing to "offer an end to the mediation process" on a pro bono basis. Mr. Isfeld subsequently retained counsel outside the Access Pro Bono program.

[14] The parties have reached an impasse. They have not signed a separation agreement. While he has resumed undifferentiated payments in the amount he was paying before the mediation, Mr. Isfeld has not made child or spousal support payments in accordance with the Memorandum of Understanding. Without child or spousal support payments in place, Ms. Isfeld has declined to sign a listing agreement to sell the former family home.

III. POSITIONS OF THE PARTIES

[15] Ms. Isfeld takes the position the parties reached a legally binding agreement at the mediation on December 16, 2020, that was recorded by the mediator in the Memorandum of Understanding.

[16] Mr. Isfeld takes the position the parties reached a "tentative arrangement", and the Memorandum of Understanding reflects the terms they discussed which were "subject to the Claimant's counsel drafting a separation agreement, and subject to my obtaining legal advice concerning [the] same".

[17] Mr. Isfeld also argues that the issue of whether the parties entered into a settlement agreement is not suitable for disposition under the summary trial rule.

IV. ANALYSIS

A. Is the Memorandum of Understanding an Enforceable Contract?

i. Legal Principles

[18] The test for whether a contract was formed is whether it would be clear to an objective reasonable bystander, informed of the material facts, that the parties intended to contract, and whether the essential terms of that contract can be determined with reasonable certainty: *Lacroix v. Loewen*, 2010 BCCA 224, at para. 36.

[19] A contract arises from the outward manifestation of the parties' intentions - from their words and their actions - and not from their subjective beliefs or unspoken understandings. In G.H.L. Fridman, *The Law of Contract in Canada* (Toronto: Thompson Carswell, 2006), the author states, in a passage cited by the Court of Appeal in *Lacroix*, at para. 35:

The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms :

The parties will be found to have reached a meeting of minds, in other words, *be ad idem*, where it is clear to the objective reasonable bystander, in light of all of the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty.

[20] To the same point, the Court of Appeal said in *Berthin v. Berthin*, 2016 BCCA 104, leave to appeal to SCC ref'd, 37338 (9 March 2017) at para. 46:

The test, of course, is not what the parties subjectively intended but "whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": see G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 15.

[21] These principles were summarized recently by the Court of Appeal in *Oswald v. Start Up SRL*, 2021 BCCA 352 at para. 34, quoting with approval from the respondent's *factum*:

- (a) there must be an intention to contract;
- (b) the essential terms must be agreed to [by] the parties;
- (c) the essential terms must be sufficiently certain;
- (d) whether the requirements of a binding contract are met must be determined from the perspective of an objective reasonable bystander, not the subjective intentions of the parties; and

- (e) the determination is contextual and must take into account all material facts, including the communications between the parties and the conduct of the parties both before and after the agreement is made.

ii. The Memorandum of Understanding

- [22] The Memorandum of Understanding is unambiguous. The document states that it is a "final agreement" reflecting a "settlement reached by the parties". It is not written in the language of a tentative understanding.
- [23] The Memorandum of Understanding is notably different from the document at issue in *Fewer v. Fewer*, 2011 BCCA 502, which was non-binding until the parties consented in a subsequent exchange of correspondence between counsel. In *Fewer*, the memorandum of understanding said:

We understand that this Memorandum of Understanding is not a written agreement, a separation agreement or a court order, and that the Mediator has recommended to us that we seek independent legal advice and [sic] before we make a formal and binding agreement.

- [24] In this case, the Memorandum of Understanding contains all of the essential terms of a final agreement. It does not contain any written clause that would make the agreement subject to either party obtaining legal advice or communicating their acceptance following the mediation.
- [25] The parties agreed that Ms. Isfeld's counsel would prepare a separation agreement incorporating the terms of the Memorandum of Understanding. However, there are no essential terms of which I was made aware that still required negotiation or agreement. As in *Sudmant v. Campbell*, 78 B.C.L.R. (2d) 361, 1993 CanLII 787 (C.A.), all that was left for the parties was to review and sign a separation agreement containing the terms set out in the Memorandum of Understanding.
- [26] If the parties were *ad idem* that they would sign a separation agreement on the terms of the Memorandum of Understanding, a contract was formed to enter into a separation agreement on those terms (which is not to be confused with "an agreement to agree"): *Fewer* at paras. 25 and 27.
- [27] Mr. Isfeld notes that the mediator described the Memorandum of Understanding as a "draft" in the email she sent to the parties at the end of the mediation. On its face, the mediator's use of the word "draft" is consistent with the arrangement that Ms. Isfeld's counsel would prepare a formal separation agreement incorporating the terms of the Memorandum of Understanding.
- [28] I would not attribute any further meaning to the mediator's email. The mediator did not provide an affidavit and her email is not admissible as evidence of her understanding of the parties' intentions, as it would be hearsay for that purpose.

[29] Mr. Isfeld also notes that the Memorandum of Understanding is not signed. Since the mediation occurred online, over video, the parties were not in the same room. There is no evidence they discussed using electronic signatures or circulating the Memorandum of Understanding for their signatures. Had the mediator asked the parties to sign the document, their signatures or lack of signatures may have provided additional evidence of their intentions. However, there is no requirement for a settlement agreement to be signed to result in a binding agreement: *Johnson v. Johnson*, 2015 BCSC 1783, at paras. 50-51.

iii. The Parties' Conduct and Communications

- [30] The parties' conduct before, during and following the mediation indicates an intent to enter into a contract that was not subject to further legal advice or subsequent acceptance.
- [31] The parties attempted twice to reach an agreement through mediation without legal counsel to assist them. They scheduled the third mediation session for a date when they both could have counsel available to assist them during the mediation.
- [32] Approaching the original date of the third mediation session, Ms. Isfeld retained legal counsel outside the Access Pro Bono program and asked if her counsel could attend. The mediator agreed, and the date was rescheduled to accommodate Ms. Isfeld's counsel.
- [33] Mr. Isfeld then indicated that he too would like to have legal counsel present during the mediation, and asked that the date be changed to accommodate her schedule. Mr. Isfeld subsequently learned that attending the mediation was outside the mandate of his pro bono counsel. Instead, he asked that the date of the mediation be changed to a date when his pro bono counsel could be available by telephone. Eventually, he agreed to a mediation date on December 16, 2020.
- [34] On a number of occasions prior to the mediation, Mr. Isfeld communicated to Ms. Isfeld that he had obtained legal advice, set out his position based on his legal advice and encouraged Ms. Isfeld to come to an agreement. In a text message, he wrote: "[The mediator] doesn't come up with an agreement she writes up an agreement that YOU and I have worked together to agree on". In another text message, he wrote: "Lawyers don't make agreements they ensure that the agreement we come to is lawful".
- [35] In an email to the mediator's office, Mr. Isfeld wrote: "My lawyer has laid out the basic guidelines for an agreement that I'm willing to sit with [Ms. Isfeld] and [the mediator] and talk about in hopes of coming to a fair legal agreement".
- [36] In my view, the common purpose of the parties approaching the third mediation session as reflected in these text messages was to come a final agreement. Mr. Isfeld indicated that he was prepared to proceed, even if his pro bono counsel could not attend in person or by video. At no time did he place conditions on the upcoming negotiations.

- [37] As stated, Mr. Isfeld did not have counsel present during the third mediation session, but he informed the other participants that, if there was something to raise with counsel, he would try to reach her by telephone. Mr. Isfeld spoke with his counsel during a break and confirmed that he had obtained advice. He did not ask for any further breaks to consult with counsel.
- [38] The mediation lasted over 10 hours. The parties began with a working document prepared by Mr. Isfeld and went through the terms of a potential settlement, line by line, with the mediator's assistance. Their efforts culminated in the Memorandum of Understanding prepared by the mediator.
- [39] Mr. Isfeld deposes:
- a) "At no time did I agree that the terms set out in the Memorandum were the final agreement between us."
 - b) "I was listening to the terms, knowing that I would have an opportunity to have the final version reviewed by my Access Pro Bono counsel prior to signing and finalizing anything."
 - c) "It was always understood and I was clear that I would get the final document reviewed by counsel prior to signing and finalizing anything".
 - d) "The process that was discussed at the mediation was that the Claimant's counsel was going to draft a comprehensive separation agreement, which I would then take to a lawyer for review."
 - e) "I did not receive legal advice concerning the final amounts set out in the Memorandum of Understanding, as I assumed that I would have an opportunity to obtain advice once I received the draft Separation Agreement."
- [40] Notably, Mr. Isfeld does not depose that he told the mediator or Ms. Isfeld that his participation in the negotiations was subject to additional legal advice following the mediation or that he would only be communicating his acceptance of the terms of a possible settlement following the mediation.
- [41] Mr. Isfeld communicated to the other participants that he intended to take legal advice on the formal separation agreement before he signed the document. This is understandable as the separation agreement may have contained additional terms to give effect to the settlement and Mr. Isfeld would want to ensure that it faithfully implemented the essential terms of the Memorandum of Understanding.
- [42] Mr. Isfeld did not, however, communicate to the other participants that his agreement to the essential terms of the settlement itself was subject to additional legal advice, further consideration of the terms of the settlement or his subsequent acceptance of the terms.

- [43] Mr. Isfeld's conduct immediately following the mediation is consistent with having accepted the essential terms of a settlement, and inconsistent with his only having listened to terms that still required his acceptance.
- [44] Shortly after the mediation, and before he received the separation agreement, Mr. Isfeld insisted that Ms. Isfeld comply with the new pick up time for their child that was set out in the Memorandum of Understanding.
- [45] On December 29, 2020, Mr. Isfeld wrote asking Ms. Isfeld's counsel to provide him with a copy of the "final agreement" so that he could have time to have it reviewed before signing. In asking for a copy of the separation agreement, Mr. Isfeld referred to support payments on which the parties "had agreed", and not proposed amounts that he still needed to consider and accept. He wrote:

My concern at this time is that the support payments we have agreed to are set to begin on January 01, 2021, however, without a signed agreement in place it affects the tax on the amount that we agreed to pay as my employer is unable to make adjustments without an agreement in place.

[Emphasis added.]

- [46] Mr. Isfeld did not express uncertainty about the amount of support to which the parties agreed in the Memorandum of Understanding. His concern was with the delay in providing him with a separation agreement to review and sign. Indeed, he did not make a regular support payment in mid-December, he says, because he anticipated putting the separation agreement in place.
- [47] Ms. Isfeld's counsel provided Mr. Isfeld with a draft of the separation agreement on December 30, 2020. Mr. Isfeld acknowledged receipt of what he described as "your amended version of the agreement" (emphasis added). He indicated that he would have the draft reviewed and would provide his comments soon.
- [48] Mr. Isfeld did not raise any specific concern with the terms of the Memorandum of Understanding following the mediation. Instead, on January 4, 2021, he proposed a further mediation "in hopes of finalizing the agreement". He did not identify what needed to be finalized.
- [49] On January 7, 2021, Mr. Isfeld indicated that he would provide his feedback on the separation agreement once he had the opportunity to have the "amended draft" reviewed. In subsequent correspondence through counsel, he did not raise any objection with the terms of the Memorandum of Understanding. He simply did not make the support payments as contemplated commencing January 1, 2021.

- [50] In my view, an objective bystander would conclude from all of the material facts, including the communications between the parties and their conduct immediately following the mediation, that Mr. Isfeld accepted the essential terms of the settlement set out in the Memorandum of Understanding, subject only to legal advice on a formal separation agreement implementing the settlement.
- [51] Mr. Isfeld may have an argument that the separation agreement presented to him on December 30, 2020, did not accurately incorporate the terms of the Memorandum of Understanding. He deposes that the draft separation agreement contained additional terms that were not discussed at the mediation. If the draft included additional terms, he did not accept those terms and is not obliged to sign it. However, he cannot frustrate the settlement to which he agreed by refusing to sign a separation agreement that accurately incorporates the terms of the Memorandum of Understanding.

iv. Subsequent Communications Between Counsel

- [52] Mr. Isfeld argues that subsequent correspondence between counsel demonstrates that the parties did not have a final agreement but efforts were being made toward a resolution. I do not agree.
- [53] To some extent, both parties accused the other of failing to abide by their agreement. Ms. Isfeld objected when Mr. Isfeld did not pay the agreed amounts of support. Mr. Isfeld complained when Ms. Isfeld did not move forward to list the home for sale.
- [54] Through counsel, the parties exchanged 2020 financial information and debated the amount of support payable based on the updated information. Mr. Isfeld's counsel took a position on support that differed from the amounts set out in the Memorandum of Understanding.
- [55] Ms. Isfeld's counsel agreed that, based on the parties' 2020 incomes, the child and spousal support payments from January 1, 2021, should be adjusted, and proposed a change. Ms. Isfeld's counsel also proposed some minor adjustments to the parenting schedule.
- [56] Mr. Isfeld's counsel disagreed with the calculation of support based on the parties' anticipated 2021 incomes. Mr. Isfeld's counsel also raised a concern with the parenting schedule, which required a degree of flexibility. Counsel indicated Mr. Isfeld would like to move toward a regular and fixed schedule on a 50/50 basis.
- [57] The fact that the parties could not agree on the level of support in 2021 does not mean there was no consensus on the terms of the Memorandum of Understanding. The 2020 financial information was not available at the time of the mediation. The Memorandum of Understanding contemplated a review of spousal support on May 1, 2021, and of child support on June 1, 2021. Changes in the parties' employment or income could be dealt with by way of a review as agreed.

- [58] Likewise, proposed adjustments to the parenting schedule do not indicate a failure to reach agreement on the essential parenting arrangements. It is not uncommon for parents to encounter difficulties with a parenting schedule and request changes. It is the nature of settlements in cases involving young children that some flexibility is always required.
- [59] Viewed objectively as the law requires, these issues do not indicate a failure to reach an agreement on the essential terms of a settlement. They are, instead, matters that can and should be addressed within the parameters of the Memorandum of Understanding and a separation agreement appropriately reflecting its terms.

C. Is the Issue Suitable for Summary Trial?

- [60] Rule 11-3(15)(a) of the Supreme Court Family Rules, B.C. Reg. 169/2009 provides that, on the hearing of a summary trial application, the court may grant judgment unless: (i) the court is unable to find the facts necessary to decide the issues; or (ii) it would be unjust to decide the issues on the application.
- [61] First, I find that the Court is able to find the facts necessary to decide the issues on this application.
- [62] The presiding judge on a summary trial application must be able to resolve any material disputes in the evidence on the critical issues, for example, by referring to documentary evidence, evidence of independent witnesses or undisputed evidence. A summary trial judge cannot "simply choose between one affidavit and another": *Cory v. Cory*, 2016 BCCA 409 at para. 10. However, conflicts in the evidence do not necessarily mean the issues are unsuitable for a summary trial: *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15, at para. 182.
- [63] In this case, I have found that the parties entered into a contract based on the Memorandum of Understanding and undisputed evidence of the parties' conduct and communications. As a matter of law, it is not necessary for me to resolve the conflict in the evidence of the parties' subjective understandings of whether they reached an agreement.
- [64] I acknowledge that there is conflict in some of the parties' evidence of their communications. Most importantly, Mr. Isfeld deposes that he "did not agree the terms set out in the Memorandum were the final agreement", whereas Ms. Isfeld deposes that Mr. Isfeld "explicitly confirmed that we had reached an agreement and that he approved the Memorandum".
- [65] However, I have found the facts necessary to decide whether the parties formed a contract without needing to resolve this conflict in the evidence. Mr. Isfeld's evidence that he "did not agree the terms set out in the Memorandum were the final agreement" is evidence that he did not say those words during the mediation, but it is not determinative of whether he entered into a contract. I have found that an objective bystander would conclude that Mr. Isfeld accepted the essential terms of the settlement, subject only to legal advice on the separation agreement implementing the settlement. It is not necessary for me to find that

Mr. Isfeld expressly confirmed that the parties had reached an agreement in order to conclude that he entered into a contract.

- [66] Second, I find that it would not be unjust to decide the issues on the application in a summary trial.
- [67] Summary trials are available under Rule 11-3 to promote the just, speedy and inexpensive resolution of family law disputes. Used appropriately, summary proceedings advance the underlying values of timely, affordable and fair access to justice: *Hudema v. Moore*, 2021 BCCA 482, at paras. 47-50.
- [68] The Virtual Family Mediation Project also aims to facilitate timely, affordable and fair resolution of family law disputes. Members of the legal profession volunteer their time to help low- and modest-income families to reach settlements and avoid costly trials.
- [69] Like any person who enters into negotiations to resolve a dispute, participants in the Virtual Family Mediation Project are entitled to legal advice and an opportunity to consider whether to accept an offer to settle.
- [70] In this case, having participated fully in the process, taken legal advice prior to and during the mediation, and given the outward appearance of having reached a settlement, Mr. Isfeld asserts that the terms he negotiated with Ms. Isfeld are not legally binding. For the reasons stated, I do not agree.
- [71] In my view, the interests of justice do not require a full trial to resolve this issue. A decision on this issue, so that the parties can move on and finalize their separation is consistent with the values of timely, affordable and fair access to justice.

IV. CONCLUSION

- [72] The parties entered into a legally binding contract at the mediation on December 16, 2020. The language of the Memorandum of Understanding is clear and unambiguous. There are no conditions precedent to the settlement. Mr. Isfeld did not communicate to the other participants that he was only listening to the terms of the settlement and reserving his acceptance for a later date following further legal advice. He conducted himself immediately following mediation as though the substantive negotiations were concluded and he needed only a formal separation agreement to review and sign.
- [73] Ms. Isfeld is entitled to a declaration that the parties have agreed to enter into a separation agreement based on the terms of the Memorandum of Understanding dated December 16, 2020.
- [74] Ms. Isfeld is entitled to costs of this application in any event of any remaining issues in the family law case.

"Elwood J."

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