
CANADA / JUDGMENT

K.D.R.A. v. Y.J.A.A.

2014 BCSC 2310

COURT

Supreme Court of British Columbia

DECIDED

8 December 2014

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

2014 BCSC 2310 K.D.R.A. v. Y.J.A.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.D.R.A. v. Y.J.A.A.,

2014 BCSC 2310

Date: 20141208

Docket: E2725

Registry: Courtenay

Between:

K.D.R.A.

Claimant

And

Y.J.A.A.

Respondent

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Claimant:

B. E. Bate

Counsel for the Respondent:

B. L. Day

Place and Date of Trial/Hearing:

Courtenay, B.C.

September 8 - 12, 2014

and

Victoria, B.C.

September 23 - 25, 2014

Place and Date of Judgment:

Courtenay, B.C.

December 8, 2014

Background. 3

The Period of Cohabitation. 4

The Agreements of the Parties. 5

1. The Cohabitation Agreement 5

2. The Marriage Agreement 7

The Execution of the MA. 7

The Terms of the MA. 11

3. The Respondent's Will 13

Analysis Concerning the Marriage Agreement. 14

The Position of the Parties. 14

The Relevant Law. 15

Stage 1: What are the parties' financial entitlements under the MA?. 17

Stage 2: Does the MA operate unfairly under s. 65 of the FRA?. 18

A. Circumstances surrounding the execution of the MA. 18

B. Problematic Provisions. 21

C. Consideration of the s. 65(1) Factors. 23

1. Duration of the marriage. 23

2. The duration of the period the parties have lived separate and apart 23

3. The date the property was acquired. 23

4. The extent to which property was purchased through inheritance or gift 24
5. The needs of each spouse to become or remain economically independent and self-sufficient 24
6. Any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of the property or the capacity or liabilities of a spouse. 24

Determination of Family Assets. 32

Conclusion regarding s. 65 "unfairness" analysis. 34

Reapportionment of Family Property. 34

If the MA has operated unfairly, should the court reapportion the family assets?. 34

Spousal Support. 37

Stage 1: Circumstances of Execution and Substance of the MA. 38

Stage 2: Unforeseen Changed Circumstances. 39

Entitlement to Spousal Support 39

Lump Sum Spousal Support 41

Conclusion. 43

- [1] This is a family law claim in which the claimant seeks a divorce, spousal support and an order dividing family assets.
- [2] The major issue at trial concerned whether the provisions of a marriage agreement entered into between the parties are fair in light of the factors set out in s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] and, if not, the relief to which the claimant is entitled.
- [3] I will briefly review the background facts and comment on the credibility of the witnesses before addressing the property issues which arise under the FRA and the spousal support issues under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [Divorce Act].

Background

- [4] The parties met in November 2001 and commenced cohabiting at the respondent's home in Courtenay, BC (the "Kingsley Residence") in or around July 1, 2003.
- [5] They subsequently married on August 1, 2004, and lived together until they separated on July 1, 2011, thus ending an eight year spousal relationship.
- [6] On February 22, 2012, at a Judicial Case Conference, the court issued a consent order pursuant to s. 57 of the FRA declaring that the parties had no reasonable prospect of reconciliation.

- [7] At the time the parties met and commenced a romantic relationship, the claimant was 27 years old and a single mother with primary parenting responsibilities for her six year old daughter, K.E.W., born October 30, 1995. She was working as a server at a local golf club. The respondent was a 44 year old retired RCMP officer. He had been married twice before and had two children from his second marriage: a son, N.J.A., born June 30, 1996, and a daughter, D.K.A., born September 1, 1997, as well as a third adult child from his first marriage. At the time he was working as a Fisheries Officer. He subsequently became a Staff Servant for the BC Ministry of the Environment.
- [8] At the time they commenced cohabitation, the respondent and his former spouse, L.R., shared parenting of N.J.A. and D.K.A. on a week on/week off rotational basis. Thus, the respondent had parenting responsibilities for N.J.A. and D.K.A. every second week.

The Period of Cohabitation

- [9] The parties struck up a relationship shortly after they first met, which led to the claimant eventually staying overnight at the Kingsley Residence. Their children, being close in age, got along well together. The parties commenced living together in July 2003, about one and a half years after they met.
- [10] Although the respondent tried to discourage her from doing so, his former wife, L.R., bought and moved into a house adjacent to the Kingsley Residence. As stated, she shared parenting time with the respondent and apparently thought moving closer to his house would be a good idea.
- [11] The respondent and L.R. had separated in 2001 and the respondent, at that time, had bought out her interest in the Kingsley Residence.
- [12] For some time prior to L.R.'s move next door, the claimant and respondent had been discussing the purchase of a farm for boarding horses. The respondent testified that he had been raised in rural Quebec and had always dreamed of owning a farm. The move by his former spouse into a nearby residence hastened the parties search for farm property. They found and the respondent bought a 25 acre farm (the "Farm Property") in Black Creek, a municipality to the south of Courtenay. In order to do so, the respondent sold the Kingsley Residence.
- [13] The Kingsley Residence sold within days of the listing; the transaction completed on July 31, 2003. The Farm Property was purchased on June 17, 2003, with a completion date of August 29, 2003. The Farm Property was purchased in the name of the respondent alone. I will return to a discussion of the Farm Property later in this decision when I discuss the parties' respective contributions to the marriage.
- [14] The parties resided on the Farm Property until July 2008 when they moved back to Courtenay and the respondent bought a house on Waddington Crescent (the "Waddington Residence"). They did so because of the distance between the Farm Property and the

children's activities and school which resulted in a great deal of driving to and from Courtenay. The claimant assisted in searching for and selecting their new residence. She testified that she requested her name be put on title on more than one occasion, but the respondent refused. Although the Waddington Residence was closer to the children's activities and more convenient, the move meant that the parties' horses had to be boarded.

- [15] In September 2009, the parties moved to a rented premises on Clark Road in Courtenay, which was a larger property where the claimant could keep her horses. The Waddington Residence was and remains rented to a tenant who pays rent to the respondent.

The Agreements of the Parties

- [16] I will now turn to the marriage agreement and related matters.

1. The Cohabitation Agreement

- [17] In or about July 2003, in contemplation of his cohabitation with the claimant, the respondent requested that his lawyer prepare a cohabitation agreement. He testified that he did so with a view to protecting his assets, the major one being his interest in the Kingsley Residence.
- [18] One of the provisions of the cohabitation agreement drafted by his lawyer (the "CA") was that the claimant would pay \$500 per month as a contribution to expenses. The respondent testified that when he presented the draft CA to the claimant, she became angry and refused to sign it. He understood that she was upset particularly about the provision that she would pay an amount to live with the respondent and with the wording of a clause which provided that neither party would stand in the place of a parent to the other party's child(ren). The respondent testified that the claimant particularly objected to these two provisions as it was her view that she and the respondent would each have parenting responsibilities in their new blended family.
- [19] The respondent testified that he had the CA which he had originally presented to the claimant redrafted, but said that he did not present the redrafted copy to her. The only CA the court has in evidence is the redrafted CA which, I assume, parallels the first version, with the exception of the contribution to expenses. In short, the redrafted CA provided:
- each party would maintain their separate property during their cohabitation, in the event of death or if the relationship ended;
 - each relied on the terms of the agreement and would not have entered into cohabitation "had it been anticipated that the other would ever apply to vary" the CA;
 - the "Family Residence" which is defined as "where the parties ordinarily reside together at any given time" was the respondent's separate property unless he transferred an interest to her and it was registered in her name;
 - during their relationship "each party will be self-supporting";

- each would have "sole financial responsibility" for their respective children; and
- if the parties married, the CA would be replaced with a marriage agreement.

[20] Clause 5, which was in the initial draft, as well as the redrafted version, read:

- (1) [The respondent] will not stand in the place of a parent to [the claimant's] child.
- (2) [The claimant] will not stand in place of a parent to [the respondent's] Children.

[21] Notwithstanding the fact that the claimant refused to sign the CA, the parties commenced and continued cohabitation.

[22] The respondent says that they were separated in the fall of 2003 when the claimant travelled to the Lower Mainland, but he agreed that the separation was for a short duration. I find that the separation was of such short duration (about one week) that it does not impact on the length of the parties' relationship, as the respondent seems to suggest.

[23] The respondent proposed to the claimant at Christmas 2003 and they made plans to marry the following August 1, 2004.

2. The Marriage Agreement

[24] The parties entered into a marriage agreement dated July 31, 2004 (the "MA"). Because the claimant argues that the agreement was entered into under unconscionable circumstances and is unfair, it is necessary to examine the circumstances under which the agreement was signed and its contents.

[25] The terms of the MA are similar in nature to those of the CA. I will discuss the provisions of the MA shortly, but will first outline the evidence of the witnesses who testified with respect to it.

The Execution of the MA

[26] The respondent testified that in about June 2014, he told the claimant that he was going to see a lawyer to prepare a marriage agreement. He said that he was advised by his lawyer that he would need an appraisal of the Farm Property. He said he had the appraisal done and that he provided it to his lawyer so she could include the value of the Farm Property in a schedule of assets in his name attached to the MA. The appraisal is dated July 12, 2004. It valued the Farm Property at \$410,000 "as though renovations are complete".

[27] The respondent testified that he gave a copy of the MA to the claimant "about three weeks" prior to the wedding date and that he did so "perhaps" the day after the appraisal was done. He said he advised her she should get independent legal advice and that, if she did not know who to see, she should go to the lawyer who had drafted the MA and the lawyer would provide her with the name of a lawyer who could advise her on the MA. The claimant knew the lawyer who had drafted the MA since the lawyer had assisted her several years earlier in pursuing a child support claim related to K.E.W. The respondent testified that the claimant

told him she would look at the MA. He said that sometime after the two initially discussed it, the claimant told him she did not like the provisions whereby she would not be involved in parenting decisions concerning the respondent's two children and the provision whereby she would not be entitled to support from him should their relationship end. He said that she repeatedly told him she was not going to "come after" his assets.

- [28] When asked by his counsel if he ever told the claimant that he would not marry her unless she signed the MA, the respondent replied, "Yes - this was important to protect me and my kids". He said he did "not know how I said it - I may have said the wedding will not take place" but he "made it clear this needed to be dealt with".
- [29] In cross-examination, the respondent agreed that he knew the issues the claimant had with the MA were over money and the provision related to "standing in the place of a parent". He testified that the claimant did not understand those issues, that she "did not listen to me" when he tried to explain them to her. The respondent also agreed that he left the signing of the MA until July 31, 2004, (that was the date he signed the MA) because he "hoped" she would sign it. He testified that he asked his friend, Mr. Southern, to approach the claimant on July 31 because "maybe she would listen to him".
- [30] Mr. Southern is a retired RCMP officer, a long-time friend of the respondent and his best man at the wedding.
- [31] He testified that he and the respondent had discussed the MA prior to Mr. Southern arriving in Courtenay to attend the wedding but did not recall when. He said that when he arrived in Courtenay the Friday before the wedding, the respondent asked him to present the MA to her and to return it to him before the wedding ceremony. He said that he approached her that evening and asked her if she would put time aside so they could review it and "take care of business". He testified that she responded that she was tired and busy and asked if they could talk about it the next day. Mr. Southern said he did not recall the specific conversation.
- [32] He testified that he approached her the following evening when she was busy preparing the reception hall and asked her if she could sit down with him to discuss it. He said that she responded that she was busy and asked if they could sit down later. He testified that she later approached him and that the two sat at a table and she signed the MA. He said she did so without reading it and that when he asked her if she wanted to read through it, she responded "no, I know what is in it; I've read it" and then she initialed each page, signed the document and gave it back to him. He testified that she seemed "very busy and perhaps even distracted" but did not seem upset. He testified that he did not recall telling her that the marriage would not proceed if she did not sign the MA and that he would have recalled if he did say this because to do so would have been "coercive".
- [33] In cross-examination, Mr. Southern testified that the respondent asked him to take the MA to the claimant because the respondent trusted him, as a former police officer, to be professional. He did not recall Ms. Cuthbert or anyone else being present when the MA was signed. He also agreed that he had met with the respondent and his counsel on July 31 when

the respondent had signed the MA and they had discussed the importance of having it signed before the wedding. When it was suggested to him that the claimant had no opportunity to get legal advice at the time he presented the MA to her on July 31, he responded, "I believe she had every opportunity in the world".

- [34] The claimant testified that she understood the respondent wanted a marriage agreement to be signed before the wedding, but she had not signed and the respondent was aware of her position. She said that whenever the respondent broached the subject, she and the respondent would argue about their respective responsibilities bringing up a blended family. She testified that she did not discuss the contents of clauses to be included in a marriage agreement. She testified that while it may have been possible that she saw a draft agreement before the wedding, she did not specifically recall seeing it; she said that the first recollection she had of seeing the MA was the evening before the wedding while she was busy setting up the reception hall and was approached by Mr. Southern.
- [35] The claimant testified that about 6 p.m. on that evening, while she and friends were setting up the hall, she was approached by Mr. Southern, who handed her the MA and said words to the effect that she needed to sign it or there would be no wedding the following day. The claimant, who was with her maid of honour, Ms. Jennifer Cuthbert, said she was in "shock and disbelief". She said that Ms. Cuthbert, after reading the MA with her, advised her not to sign it. The claimant said she signed the MA, telling Ms. Cuthbert she felt she didn't have a choice. She recalled the respondent being in the vicinity, but did not talk to him. She did not recall Ms. Beata Wojtalik, who witnessed her signature on the (undated) waiver of independent legal advice, being present at the time.
- [36] Ms. Cuthbert testified and described the plaintiff's reaction to receiving the MA from Mr. Southern as being "completely surprised - she had no idea it was coming". Ms. Cuthbert said she reviewed the MA with the claimant. She concluded from her review that the MA "said she was not entitled to anything" and provided that the claimant waived her right to any legal recourse. She said she told the claimant "don't you dare sign" and that, if she did, she would refuse to witness her signature. She said that the claimant said she "had to" sign the agreement. When asked to describe the claimant's state of mind at the time, she said the claimant was already stressed out about the wedding and she did not think the claimant was in a state of mind to understand the MA, saying "there was a lot (of information) in it". Ms. Cuthbert did not recall being present when the claimant signed the agreement.
- [37] In cross-examination, Ms. Cuthbert agreed that the claimant had told her she had seen "some type of agreement" before that evening and had refused to sign it. Although she agreed that she could not recall all the details of the event, she said she recalled Mr. Southern telling the claimant that if she "didn't sign the MA, there would be no wedding tomorrow". She described these as his exact words.

[38] Ms. Wojtalik witnessed the claimant's signature on the waiver of independent legal advice attached to the MA. She described herself as a friend of both parties and had known the claimant for some 15 years. She testified that the claimant asked her to witness her signature on the MA. She said the claimant told her she had no choice: that if she did not sign, there would be no wedding. She described the claimant's emotional state as "very, very upset - she was so in love (with the respondent)".

The Terms of the MA

[39] I will now describe the terms of the MA.

[40] The MA is structured in terms of a separate property regime whereby each party retains the property each brought into the marriage and each is responsible for their own debts. Their respective assets are set out in schedules attached to the MA with values attributed to many of those assets.

[41] The MA contains these introductory "whereas" clauses:

J. The parties are entering into this Agreement to:

- (a) determine ownership, management, and division of all property either or both of them own or may acquire,
- (i) during their marriage,
- (ii) after their marriage ends, and
- (iii) if one of the parties predeceases the other while they are married
- (b) specify their intentions about their children.
- (c) determine spousal and child support obligations should the parties' relationship end; and
- (d) avoid acrimony and litigation in the unlikely event that their relationship ends.

K. (1) The parties are aware that the law provides for judicial intervention in some circumstances if this Agreement is found to be unfair now or in the future.

(2) The parties wish to confirm that:

- (a) each of them relies on this Agreement to be enforced according to its terms,
- (b) neither of them would have entered into this Agreement, or continued their relationship on the basis of it, had it been anticipated that the other would apply to vary the Agreement, and
- (c) either of them may choose not to pursue economic opportunities because of their relationship but each party recognizes that certain sacrifices will be made within, and because of, the relationship, and the consequences of those choices will not be used to avoid the terms of the Agreement.

- (3) The parties acknowledge that each of them is prepared to abide by the terms of this Agreement because each recognizes that:
- (a) the importance to each of them of being able to rely on the Agreement far outweighs the risk that it may operate unfairly at some future date, and
 - (b) the impossibility of returning the parties to the positions they occupied before they entered this Agreement would make any variation, however fair viewed solely in the changed circumstances, unfair on the whole because all dealings on the property during the course of their relationship will have been based on the building nature of this Agreement.
- [42] The MA provides that neither will "stand in the place of parent" to the other's child(ren); that each will be self-supporting; that each "gives up forever" both any claim for support against the other and any further claim to an interest in any property owned by the other; that their respective pensionable earnings under the Canada Pension Plan (CPP) would not be equalized; and that the parties would review the terms of the MA every five years commencing August 31, 2009.
- [43] The "Family Residence" is defined in the MA as "the residence where the parties ordinarily reside together at any given time." The MA provides that unless the respondent transfers an interest in the Family Residence to the claimant and registers that interest in her name, the property remains his "separate property".
- [44] The MA provides:
22. Unless otherwise provided in this Agreement, neither party will:
- a) obtain any interest in, or
 - b) have the right to compensation by reason of any direct or indirect contribution to property owned by the other
 - c) whether or not savings occur through effective management of the household, or child raising responsibilities, and
 - d) despite the use of the property for a family purpose.
- [45] Under the section entitled "Property Settlement", the MA provides that, upon the breakdown of the marriage, the respondent would pay the claimant \$5,000 for each year which elapsed between the marriage date and the date the parties' relationship ended, with a maximum payment of \$100,000. In return, the claimant would forsake any claim to an interest in the respondent's property.
- [46] The MA also contains a provision for spousal support wherein the respondent is to pay the claimant \$500 per month for 12 months if the relationship ends before he retires and if the claimant is earning less than \$20,000 gross per year.

[47] There are several problematic clauses in the MA which I will review below in my discussion concerning the fairness of the MA, the circumstances under which it was signed and the reviews that were to occur every five years.

3. The Respondent's Will

[48] On July 31, 2004, the respondent also revised his last will and testament. The will, witnessed by his lawyer and Mr. Southern, provided that it was "made in contemplation" of his marriage to the claimant. The will provided that the claimant, should she survive him for 30 days, was to have possession of the Farm Property for one year after his death, after which the property was to be sold and added to the residue of his estate. He then provided that she was to receive 25% of the residue of his estate. The balance of his estate would be divided into equal shares with each share to go to his three natural children.

[49] After the parties moved into the Waddington Residence, the respondent gave instructions to his lawyer in or about October 2009 to revise his will again. While he never did execute the new will, he changed the provision allowing the claimant to reside in the then family home for only three months and providing her with no interest in the residue of his estate.

Analysis Concerning the Marriage Agreement

The Position of the Parties

[50] The respondent says that he discussed the MA with the claimant in advance of the marriage; she was aware of his position that he wanted to maintain the assets in his name as his own, and not as family assets; and thus she understood this was a condition of their marriage. He denies exercising any undue influence over the claimant in her signing of the MA. The respondent says that the provisions of the MA are fair under s. 65 of the FRA because the claimant brought no assets into the marriage, knew the respondent's position throughout the marriage and, while she did contribute to the marriage, the amount she might have received under the FRA due to her contribution does not exceed what she is entitled to under the MA.

[51] The claimant says that she does not recall receiving a copy of the MA prior to Mr. Southern approaching her on the evening before the wedding, although she acknowledges arguing with the respondent over some of the proposed terms. She testified that she signed the MA after briefly reviewing it with Ms. Cuthbert. She testified that she understood the general purpose of the agreement, that is, that she and the respondent would keep their assets separate. She testified that she felt under pressure to sign the MA because the arrangements for the wedding had all been made for the following day and a large number of guests, including family and friends, had attended from out of town. The claimant says that the MA should be set aside on the basis of the common law principle of unjust enrichment (see *Kerr v. Baranow*, 2011 SCC 10) and other contract principles considered in the analysis of Mr. Justice Butler in *G.G. v. M.A.*, 2014 BCSC 1023 at paras. 103-113 [G.G.]. Further the claimant says that even if the MA is a valid agreement, the provisions are unfair given her

contribution to the marriage and the factors outlined in s. 65 of the FRA.

[52] I do not need to consider common law principles in determining the issues in this case as the claimant has satisfied me that the MA is unfair having regard to the factors set out in s. 65(1) of the FRA.

The Relevant Law

[53] Marriage agreements are defined in s. 61 of the FRA:

61 (1) This section defines marriage agreement for the purposes of this Part and this definition applies to marriages entered into, marriage agreements made and to property of a spouse acquired before or after March 31, 1979.

- (2) A marriage agreement is an agreement entered into by 2 people before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for
 - (a) management of family assets or other property during marriage, or
 - (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.
- (3) A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons.
- (4) Except as provided in this Part, if a marriage agreement is made in compliance with subsection (3), the terms described by subsection (2) (a) and (b) are binding between the spouses whether or not there is valuable consideration for the marriage agreement.
- (8) A provision of a marriage agreement that is void or voidable is severable from the other provisions of the marriage agreement.

[54] The court has discretion under s. 65(1) of the FRA to reapportion property covered under a marriage agreement if the provisions of the agreement concerning such property are unfair:

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when property was acquired or disposed of,
 - (d) the extent to which property was acquired by one spouse through inheritance or gift,
 - (e) the needs of each spouse to become or remain economically independent and self sufficient,
- or

- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

[55] The approach to be followed in determining whether the division is "unfair" is set out by the Supreme Court of Canada in *Hartshorne v. Hartshorne*, 2004 SCC 22 [Hartshorne]. This approach was recently discussed by Mr. Justice Macaulay in *Hanan v. Anderson*, 2014 BCSC 96 at paras. 119 - 121:

In *Hartshorne*, the Supreme Court of Canada stated that fairness is the primary policy objective guiding the court's role respecting the division of assets upon marriage breakdown. Fairness may be achieved by reviewing the presumptive division under the FRA or the marriage agreement, in light of the factors governing reapportionment (para. 8).

The majority accepted the proposition that courts should respect private agreements that parties make for the division of their property on the breakdown of their relationship, particularly if they negotiated the agreement with independent legal advice, but only so long as the agreements are fair (paras. 8, 9). The fact that such agreements lead to a different result than the statutory regime does not, by itself, constitute unfairness (para. 9). Fairness within the context of the regime also requires, however, that the agreement operate fairly at the time of distribution (para. 9). See also paras. 34-36.

Fairness is determined in two stages. First, the court applies the agreement in order to determine what financial entitlements would be provided to each spouse under the agreement. In the second stage, the court applies the factors from s. 65 of the FRA to determine whether the contract operates unfairly (para. 47). In doing so, the court must consider the way in which the parties' personal and financial circumstances evolved over the course of the relationship and determine whether the current circumstances were within the parties' contemplation when the agreement was signed. If they were, the burden to establish unfairness is heavier. Where the agreement is found to operate unfairly, the court may then reapportion the family assets, again by reference to the factors in s. 65(1).

See also G.G. at para. 115.

Stage 1: What are the parties' financial entitlements under the MA?

[56] The first stage of the "fairness" analysis involves a determination of the financial entitlements of each spouse under the MA upon the breakdown of their marriage.

[57] The respondent in this case would be entitled to retain his interest in the Waddington Residence, rental income derived from the Waddington Residence (approximately \$1,350 per month), his bank accounts (\$10,000), two vehicles (\$14,000), his RCMP and DVA pensions, his Ministry of Environment Public Service Pension Plan (value of which was not disclosed) and an inheritance from his mother, the value of which was again not disclosed.

- [58] The respondent would end up achieving what was clearly his objective in entering into the MA. The respondent denied requests made by the claimant at various times throughout the marriage to have her name put on title to the parties' family residence and to revise the MA.
- [59] Under the MA, the claimant would receive a "property entitlement" of \$40,000 (eight years of cohabitation x \$5,000) as well as retain her personal property. She had very little by way of personal property at the time the parties' relationship ended, probably less than \$5,000 which would include the value of two horses which she gave away for \$1.00. As she was earning in excess of \$20,000 gross income, she would not be entitled to spousal support. The respondent takes the position that a loan in the claimant's name in the amount of \$26,694 at the date of separation would be her sole responsibility. If the respondent's position is accepted, the claimant would receive very little from the parties' eight year spousal relationship.
- [60] The claimant's expectation when she entered into her relationship with the respondent was to partner with him in all aspects of their relationship, including playing a role in parenting the three children (within the context of the two weeks per month that the respondent's children resided with them) and, as will be discussed, playing a role in generally improving their living circumstances. Her expectations were communicated to the respondent and are demonstrated by her refusal to sign the CA and her reluctance to sign the MA. I accept, however, that she brought very little, if anything, into the relationship in 2003.

Stage 2: Does the MA operate unfairly under s. 65 of the FRA?

- [61] I next turn to the second stage of the analysis which is to consider the factors set out in s. 65 of the FRA to determine whether the MA operates unfairly. In G.G., Mr. Justice Butler was faced with a similar analysis. He said at para 118:

The next step in the analysis is to apply the factors from s. 65 of the FRA to determine whether the contract operates unfairly. In doing so, I must consider the way in which the parties' personal and financial circumstances evolved over the course of the relationship and determine whether the current circumstances were within their contemplation when the Marriage Agreement was entered into. Before considering the specific factors, I will comment on the particular circumstances surrounding the execution of the Marriage Agreement, as well as the way the parties' personal and financial circumstances evolved in comparison to the circumstances that were within their contemplation when the agreement was signed.

- [62] Similarly, before considering the specific factors, I will comment on the circumstances surrounding the execution of the MA, as well as on how the parties' situation evolved.

A. Circumstances surrounding the execution of the MA

- [63] I earlier described the evidence surrounding the circumstances under which the MA was executed. I prefer the evidence given by the claimant, Ms. Cuthbert and Ms. Wojtalik about the circumstances surrounding the signing of the MA over that given by Mr. Southern. Their

evidence is consistent with the claimant being surprised and shocked by Mr. Southern's approach and request. Their evidence is inconsistent with that given by Mr. Southern: that he approached the claimant the day before (on the Friday) and she told him she would talk to him the next day and that, on the Saturday, she approached him and said she was willing to sign.

- [64] Both Mr. Southern and the respondent were aware that the claimant had not sought legal advice prior to signing the MA. They knew or ought to have known that by approaching her on the eve of the wedding with a considerable number of guests, many of whom had travelled to Courtenay from the Lower Mainland and elsewhere, they were creating a situation which would, in reality, leave her no choice but to sign the MA.
- [65] The respondent was aware from the onset of his relationship with the claimant that she was interested in blending their families and working with him to build their future together. He was aware of the contribution she had made to the Farm Property and of her desire to be included on title to it. He was aware that she had contributed to their business, A. Acres, and that she regularly picked up all of the children after school and took them to their activities (when his children were not with their mother). While the respondent attempted to downplay her contribution to family life, the witnesses who testified on behalf of the claimant substantiated her contribution to, not only the Farm Property, but also to pick up and drop off at school and, generally, to her involvement in family activities on behalf of all members of the blended family.
- [66] The respondent had not succeeded in having the claimant sign the CA and, over the year before they married, chose to continue living with the claimant well knowing she objected to signing any agreement pertaining to separate property rights or which would minimize her role in parenting responsibilities in their blended family.
- [67] Although he consulted a lawyer and testified that he had told the claimant that he wanted the parties to sign a marriage agreement, I find, based on the evidence, that he gave her no prior copy of the agreement. Even if I am wrong in this conclusion (the claimant testified she did not recall such an agreement being given to her), he did not press the issue until the day before the wedding when he gave her an ultimatum that the wedding would not proceed if she did not sign it. He chose a time when the claimant was most vulnerable, finalizing the wedding after months of preparation with numerous family members and friends visiting from out of town. He likely chose Mr. Southern to approach the claimant as his proxy because he wanted to avoid being involved in what he knew would be a highly charged emotional situation.

[68] The wedding day had been set for months. At no time before the evening before the wedding was to take place had the respondent advised the claimant that the marriage would not occur if she did not sign a marriage agreement. He knew she had refused to sign the CA. He had participated in various dinners and other social events leading up to the wedding. He knew guests were in town. He was at the same location as the claimant assisting with the setup of the hall when Mr. Southern approached the claimant.

[69] I find that the circumstances under which the MA was signed were coercive and that her signature was obtained under undue influence. I do not need to decide if the circumstances meet the common law threshold for undue influence; instead, this finding is relevant to my consideration of the s. 65 factors in the fairness assessment.

[70] In *Hartshorne*, the Court stated at para. 44:

Thus, the determination that a marriage agreement operates fairly or unfairly at the time of distribution cannot be made without regard to the parties' perspectives. A contract governing the distribution of property between spouses reflects what the parties believed to be fair at the time the contract was formed (presuming the absence of duress, coercion, and undue influence). The parties would usually not be expected to deal with their present situation without any consideration of how they expect their situation will evolve over time. If the parties' lives unfold in precisely the manner they had contemplated at the time of contract formation, then a finding that the contract operates unfairly at the time of distribution constitutes, in essence, a substitution of the parties' notion of fairness with the court's notion of fairness, providing that nothing else would suggest that the parties did not really consider the impact of their decision in a rational and comprehensive way. Thus, central to any analysis under s. 65(1) of the FRA is consideration of how accurately the parties predicted, at the time of contract formation, their actual circumstances at the time of distribution, whether they truly considered the impact of their decision and whether they adjusted their agreement during the marriage to meet the demands of a situation different from the one expected, either because the circumstances were different or simply because implications were inadequately addressed or proved to be unrealistic.

[71] In my view, the MA is problematic not only in the circumstances under which it was presented to and signed by the claimant, but also in several of its recitations and provisions.

B. Problematic Provisions

[72] A waiver of independent legal advice is attached to the MA. It provides that the claimant had been advised by the respondent's lawyer that she was entitled to and should obtain legal advice before executing the agreement. The claimant did not have the opportunity to seek legal counsel before signing. The agreement was presented Saturday evening with the wedding the following day; there was no opportunity to consult a lawyer about her family law rights and the effect of the various clauses upon which the respondent now relies.

[73] The MA provides:

29. While negotiating this Agreement, a variety of ideas and tentative arrangements were explored, but all of these are replaced by this Agreement, which is the entire agreement between the Parties.

[74] In fact, the parties had no negotiations leading to the drafting of the MA.

[75] The MA provides that it will be reviewed every five years:

25. (1) The parties will review the terms of this Agreement every five years commencing August 31, 2009.
- (3) If the parties do not review this Agreement as provided under subclause (1), or review the Agreement and do not amend or revise either document both parties are deemed to consider the terms of the Agreement to continue to operate fairly.

[76] The claimant testified that she had requested that the respondent review the MA, particularly when the parties purchased the Waddington Residence in July 2008. There was no meaningful review. The claimant testified that the respondent simply responded by telling her there would be no changes.

[77] The import of a review clause in an agreement requires the parties to conduct a good faith review of such matters as to whether the agreement was, at that time in their relationship, fair within the context of their obligations to one another. As the Court in Hartshorne stated at para. 8: "To give effect to legislative intention, courts must encourage parties to enter into marriage agreements that are fair, and to respond to the changing circumstances of their marriage by reviewing and revising their own contracts for fairness when necessary." They did not do this. There were no changes made at all, even to the extent of updating the schedules of their respective assets and liabilities. One is left with the distinct impression that the above provision, as with a number of others, was inserted into the MA simply as a matter of legal form, rather than as an indication of a substantial intent to conduct a real review.

[78] Even had the claimant fully understood the terms of the MA and had signed it voluntarily, she would have been grossly misled in relation to this provision.

[79] The recital provisions of the MA provide that the parties warranted and relied on certain statements of fact. The evidence during the trial showed there were a number of material facts not disclosed or which were disclosed incorrectly:

1. The claimant's income was approximately \$4,100 in 2004, not \$12,000 as stated.
2. The claimant did not plan to train as a real estate sales agent. The respondent's former wife was a realtor; the evidence which I accept is that the claimant had advised the respondent that she was not interested in pursuing such a career at the time.

3. The claimant was not receiving \$175 per month child support from K.E.W.'s natural father.
4. The agreement makes reference to the claimant's pension. The claimant did not have a pension. The agreement also provides that the respondent will maintain the claimant as beneficiary of his survivor benefits under his pension. This was not done.

C. Consideration of the s. 65(1) Factors

1. Duration of the marriage

[80] The parties were married for seven years and cohabited for eight years. While this is not a long marriage, it is not a short one either. At para. 133 in G.G., Butler J. was of the view that a seven year cohabitation was "not lengthy, but it is beyond the cusp of marriages classified as short term".

2. The duration of the period the parties have lived separate and apart

[81] By the time of trial, the parties had been living separate and apart for just over three years.

3. The date the property was acquired

[82] The evidence is clear that the Farm Property was purchased with proceeds from the sale of the Kingsley Residence, which was owned by the respondent at the time the parties met and registered in his name alone. The claimant made no direct financial contribution to the purchase of the Farm Property.

[83] The proceeds from the sale of the Farm Property were then used to purchase the Waddington Residence in which the claimant claims to have an interest. Despite the urging of the claimant, this property too was registered in the respondent's name alone.

[84] The claimant also claims an interest in such other property owned by the respondent including investments, savings, loans, his inheritance, other monetary dispositions of the respondent and the respondents' employment pensions, including the respondent's CPP.

[85] The respondent's RCMP and DVA pensions were vested prior to when the parties met while the respondent's accruing Public Service Pension with the BC Ministry of Environment was acquired during the parties' marriage. The parties' CPPs have been accruing both before and during the marriage.

[86] The claimant testified that the loan she took out in her name was to purchase a vehicle which she used to transport the children to and from school and their activities. The vehicle was registered in the respondent's name.

4. The extent to which property was purchased through inheritance or gift

[87] The respondent received an inheritance from his mother's estate in about 2011. The amount he received was not disclosed, notwithstanding frequent requests for disclosure. Nor was the use to which the funds were put disclosed.

5. The needs of each spouse to become or remain economically independent and self-sufficient
- [88] It has been three years since the separation of the parties. The respondent continues to have stable employment, pension income from the RCMP and DVA, accruing pension from CPP and his Public Service Pension Plan and financial assets with which he can support himself and meet his obligations. He does have financial obligations to his two children from his second marriage as they pursue their education.
- [89] While the claimant is now getting on her feet with employment which enables her to sustain herself, the separation caused her substantial financial hardship. She was unable to make payments on the loan in her name and had to sell the horses she could no longer afford to keep. She does not presently have full time work but is working towards building her seniority, which will provide her with guaranteed hours.
6. Any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of the property or the capacity or liabilities of a spouse.

The claimant's contribution to the improvement of the Farm Property

- [90] The respondent received net proceeds from the sale of the Kingsley Residence in the amount of \$91,408 (after paying out a mortgage he had placed on the property to assist him buy out his former wife, L.R.).
- [91] He paid \$255,000 for the Farm Property, using the monies received from Kingsley Residence and financing the balance by way of a first mortgage in the amount of \$172,500.
- [92] The Farm Property contained old outbuildings, fencing that needed replacing and an 80 year old farmhouse that needed renovations. The parties spent the following two years renovating the farmhouse and property.
- [93] The respondent hired a contractor to gut the upstairs down to the studs and replace the drywall.
- [94] The respondent, being handy with tools, did much of the renovation work himself, working on the premises during his non-employment hours replacing decking, windows, cupboards and much else.
- [95] The claimant assisted in the renovations by attending various retailers with the respondent to select new fixtures and furnishings and by helping the respondent deliver various products to the Farm Property. She assisted in replacing windows, painting, laying and grouting tiles, installing the laminate flooring and generally assisted the respondent in modernizing the farmhouse. She also assisted in removing and replacing the posts and rails in and about the Farm Property, removing old barbed wire from fencing and in otherwise improving the Farm Property.

- [96] While the respondent claims that the claimant's participation in these various projects was minimal, I prefer the claimant's evidence of her participation as it was supported by the evidence of others who had occasion to attend the Farm Property to visit the parties during or following the renovations. A number of those witnesses, including Ms. Bogart and Ms. Hawkes, testified that at that time both parties were quite proud of the job they had done and recognized the contribution of the other.
- [97] Ms. Hawkes testified that she had been to the Farm Property for a social event after the renovations to the farmhouse were complete. She recalled a conversation with both the claimant and the respondent in which the respondent told her that they had worked together on the project.
- [98] The renovations to the farm house were done within the first year of the parties moving in. They then turned their attention to the balance of the property, renovating the barn and building a riding arena and paddocks. Of the 25 acres of land, roughly 20 acres were seeded with hay. When the rebuilt barn and immediately adjacent property was properly fenced, they commenced boarding horses.
- [99] The farm they purchased was operated as a business with a GST number. They continued to operate the farm as a business called "A. Acres". The claimant was the "barn manager" of the business and charged various clients for boarding their horses. They boarded two to three horses in addition to their own horses for several years. The claimant gave the little income they received to the respondent.
- [100] The parties also owned their own horses. The claimant, the respondent and K.E.W. each had horses. The respondent testified that, because of her attitude, the claimant drove most of the customers away. The claimant testified that she had a good relationship with the customers. To the extent that the evidence is relevant, I accept the evidence of the claimant, which is supported by the evidence of Ms. Bogart, who testified that she boarded two horses on the Farm Property between 2005 and 2007 and attended the Farm Property regularly. She testified that she moved her horses off the property when they were moved to a different barn as a result of a decision made by the respondent.
- [101] As stated, the parties also had some 20 acres on which they grew and sold hay. The claimant testified that she helped during the harvesting of the hay by loading it on the truck. The respondent testified that the claimant did not assist to any great extent in the farm work or with the haying. Ms. Bogart testified that, during the period of time she and her husband assisted with the haying, the claimant was in the fields throwing bails into the back of a truck or looking after the children or preparing food for those who were working. She testified that she was involved with the claimant in helping her install cross fencing; in her words, the claimant was "full force" with "all of that".

- [102] Wherever the evidence of the respondent conflicts with that of the claimant regarding the claimant's contribution to the Farm Property, I accept the evidence of the claimant as her evidence was supported by other witnesses who had no vested interest in the outcome of this case.
- [103] As stated, the Farm Property was purchased for \$255,000 in August 2003. It was appraised on July 12, 2004, for \$410,000 (before the renovations were complete on the basis they would be completed).
- [104] At the time the parties commenced cohabitation, the children were aged 6, 7 and 8. The parties separated eight years later when the children were between 14 and 16. While the parties lived together, and although the respondent shared joint parenting time with L.H., the evidence established that the claimant performed many parenting responsibilities for both her own daughter and the respondent's children. The claimant's involvement was described by a number of witnesses. Ms. Johnston, her employer, said she regularly left early from work to pick up the children from school; Ms. Gastis, Ms. Hawkes, Ms. Leith-Mills and Ms. Bogart each described her as an involved parent with all three children, as regularly picking them up from school, taking them to their activities and to attending D.K.A.'s hockey practices and games along with the respondent, who was in regular attendance at each game.
- [105] K.E.W. testified that her relationship with the respondent was "like a father". She used an email address with a hyphenated last name (using the last names of both parties) and the respondent agreed he was a "father figure" to her. The respondent claimed K.E.W. as a dependent on his employment related forms and received an enhanced pension income because K.E.W. and the claimant were named as his dependants. K.E.W. described that they all lived "like a family"; she said that the claimant and the respondent shared the cooking and the cleaning throughout the eight years they were together. She described the involvement the claimant had in each of the children's activities: at various times, the claimant took them to piano and swimming lessons. Each was in a separate level and lessons were at different times. K.E.W. also took dancing and riding lessons and the claimant did most of the driving to and from those lessons as well.
- [106] I find, as a matter of fact, that the enhanced value in the Farm Property arose from the improvements the parties jointly made to the property and that the claimant assisted both directly and indirectly in those improvements. I have discussed her direct contribution. Her indirect contribution consisted of taking care of the three children while the respondent was at work, thereby enabling him to earn a sufficient income so that they could finance the renovations and the operation of A. Acres through the purchase of a tractor and farm equipment and other expenses of the family. She limited her employment hours for the sake of the family and I find that the claimant did contribute a portion of the income she earned to family expenses, such as food, activities for the three children, vet bills for the horses and expenses incurred in the operation of the business.

Use of the proceeds of the Farm Property

[107] When the respondent sold the Farm Property for roughly \$598,000 and purchased the Waddington Residence for about \$470,000 plus costs, he provided approximately \$300,000 in equity from the sale of the Farm Property and took out a mortgage of about \$170,000. Since the proceeds of sale on the Farm Property were approximately \$375,000, there was about \$74,000 left over from the sale of the Farm Property. The respondent stated that this excess money was used to pay down a line of credit which had accumulated due to renovations made, property taxes paid on the Farm Property, the purchase of a Dodge Ram in 2004 and other "living expenses". I note that I find the respondent's evidence concerning the proceeds of the farm property to be both confusing and conflicting.

The claimant's income

[108] In conducting the fairness assessment, it is also useful to consider the parties' earnings over the course of their relationship. Some of the income amounts were not produced in evidence.

[109] The claimant's line 150 income over the years of her relationship with the respondent was:

2003

\$9,823

2004

(\$147)

(operated a home business)

2005

\$4,236

2006

\$12,291

2007

\$19,591

2008

\$36,136

2009

\$35,436

[110] Subsequent to separation, the claimant's income has been:

2010

\$34,955

2011

\$36,619

2012

\$42,084

2013

\$48,416

[111] When the parties met in 2001, the claimant was working as a server at Crown Isle Resort and worked on call as a part-time care aid from 2001 to 2003. When the parties commenced living together she was also involved, with respondent's support, in selling a product in a pyramid-type arrangement, as well as earning a small amount of income from the farming and horse boarding operations, A. Acres. Between 2006 and 2008, she worked for a feed company in Courtenay. She testified that she used her earnings for gas, groceries and activities for the three children. The claimant testified that during their marriage, the respondent encouraged her not to pick up shifts at her work since he made more money than she did so the household income would be higher if he worked outside the home more instead of her.

[112] In 2009, she commenced working as a registered care aide for Island Health Authority (IHA) and has continued doing so following her separation. She testified that her permanent full time position which she held in 2013 was eliminated and she now has a permanent part time position with a guarantee of 27-28 hours per week. She estimates her wages for 2014 will be \$26,000. The claimant now resides in the Victoria area.

The respondent's income

[113] The respondent formally retired from the RCMP in March 2003, just before the parties began cohabiting. He had been with the police since 1981. From November 2002 until 2010, he was the Chief Fisheries Inspector for the Province. At the time of trial, he was a Conservation Officer with a rank of staff sergeant.

[114] Since his retirement from the RCMP, the respondent has collected an RCMP pension and a pension related to his police service from the Department of Veterans Affairs ("DVA").

[115] His line 150 income since 2004 has been:

2004

\$111,386

(included \$31,766 RRSP withdrawal)

2005

\$76,138

2006

not provided

2007

not provided

2008

\$108,240

2009

\$90,679

[116] Subsequent to separation, his income has been:

2010

\$93,842

2011

\$98,932

2012

\$94,151

2013

\$95,022

[117] The respondent's income above includes employment income (as a conservation officer), RCMP pension income and rental income from the Waddington Residence. In addition, the respondent receives \$881 per month as a non-taxable disability pension from the DVA, which increases his annual income by approximately \$10,000 each year.

[118] In 2014 to the date of trial, the respondent was earning \$2,798.81 biweekly which would give him an annual employment income of \$72,769. His employment income in 2013 was \$73,625.

[119] It is notable that the respondent claimed K.E.W. as a dependant on his income tax return and claimed entitlement to split his RCMP pension with the claimant, thereby "splitting" a portion of his pension income and reducing his income tax payable. As previously mentioned, the respondent also received an enhanced pension income because the claimant and K.E.W. were named as dependents during the marriage.

Lack of review of the MA not reasonably anticipated

[120] In my view, the claimant was entitled to expect that her participation in and contribution to the family unit would be recognised through reviews of the MA. Much of the source of the friction which developed between the parties in the later years of their relationship seems to come from the claimant's general disenchantment with the manner she was being treated by the respondent and his refusal to consider or discuss granting her an interest in the Waddington Residence. As was described by Butler J. in G.G. at para. 165: "There is no question here that the circumstances which have made enforcement of the Marriage Agreement inappropriate are causally connected to the marriage and its breakdown." The respondent's refusal to review the MA in good faith every five years beginning in 2009 placed the claimant in a position she had not anticipated.

[121] I find that, for the reasons outlined above, the MA executed between the parties on July 31, 2004, is unfair.

Determination of Family Assets

[122] Section 58 of the FRA defines family assets as including:

- (2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.
- (3) Without restricting subsection (2), the definition of family asset includes the following:
 - (d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;
 - (e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.

[123] The relevant s. 56(1) triggering event for interest in each family asset in this case was the declaratory judgment under s. 57 made by the court on February 22, 2012.

[124] In my view, the following assets are family assets:

1. The Waddington Residence which remains registered in the name of the respondent and which was purchased with the proceeds from the sale of the Farm Property is a family asset as it was the family residence until they moved to the rented premises;
2. The net rent derived from the Waddington Residence;

3. Both parties' Canada Pension Plans, pursuant to s. 58(3)(d) of the FRA;
4. The respondent's Public Service Pension Plan (no particulars provided) with his current employer, the BC Ministry of Environment, pursuant to s. 58(3)(d);
5. At the time of separation, the parties had a 2002 Volkswagen Jetta with an estimated worth of \$5,000 (according to the respondent), a 2002 Dodge Dakota with an estimated worth of \$4,000 (according to the claimant) and a 1980 Road Runner horse trailer with an estimated worth of \$500 (according to the claimant). All of the vehicles were used for a family purpose at various times or were used in the context of the business, A. Acres, to which both parties contributed. However, it appears that the vehicles were divided substantially equally at the time of separation.
6. Although it is difficult to ascertain the balances as of the triggering date of February 22, 2012, the respondent appears to have had approximately \$8,000 - \$10,000 in bank accounts which were used for a family purpose. The claimant had less than \$1,000 in such an account.

[125] I find that the following were family debts as of February 22, 2012:

- a. the line of credit for the Waddington Residence in the amount of \$154,726 (as of the date of separation);
- b. the respondent's line of credit in the amount of \$4,256;
- c. the claimant's credit card debt of \$1,000; and
- d. the claimant's line of credit of \$25,694.

[126] Although the respondent claims that the debt on the Waddington Residence is approximately \$254,000, in fact, after separation he refinanced the mortgage on the Waddington property. At the date of separation, the mortgage principle outstanding was \$154,726. On February 11, 2014, the principle balance stood at \$254,000. The respondent testified that he refinanced to pay out the mortgage, to purchase household goods to set up his residence after the separation and to pay for a trip to Quebec. He provided no satisfactory explanation for such a large amount of expenses which resulted in a reduction in equity of the Waddington property to the detriment of the claimant.

The claimant stopped paying on the line of credit of \$25,694 in her name in July 2011; the respondent took over payments on this loan. The loan was originally used to buy a family vehicle and a horse for K.E.W. The claimant sold the horse after separation in March 2012 and did not apply the proceeds to the loan but instead to her own credit card indebtedness.

Conclusion regarding s. 65 "unfairness" analysis

[127] Under s. 56 of the FRA each spouse is entitled to an undivided half interest in a family asset as a tenant in common.

- [128] In my view, the MA has clearly operated to the claimant's disadvantage. Under the provisions of the MA, she is foreclosed from any claim to participation in any family assets.
- [129] She is also prevented from claiming spousal support under s. 89 of the FRA. The evidence establishes that she curtailed her working hours to enable her to pick up the children from school and take them to their various activities. She obtained her licence as a care aide in 2001 and has, since separation, taken fuller advantage of her qualifications to obtain regular part time work. Although she did begin working as a care aide in 2009 during their relationship, it has only been since the separation that she could begin to take on more hours, as reflected in the increase in her income in the past two years. She would not have been able to pursue such work during the marriage given her parenting and farm responsibilities.
- [130] Given the claimant's direct and indirect contributions to the improvement of the Farm Property, her assistance in the operation of A. Acres, her indirect parenting contribution to the family household and the respondent's refusal to review the MA as outlined in the agreement, I conclude that the property terms of the MA are unfair.

Reapportionment of Family Property

If the MA has operated unfairly, should the court reapportion the family assets?

- [131] The facts in the present case are somewhat similar to those before Butler J. in G.G. In that case, the respondent was 52 years old and the claimant was 40 years old at the time of trial. The respondent had a number of financial assets going into the relationship and had been unhappy with the settlement he had arrived at with his former wife. The claimant came into the marriage with no assets and student loan debt. The family home, in particular, had been purchased by the respondent in his name alone before the marriage.
- [132] Similarly, the respondent presented the claimant with a marriage agreement, days before the scheduled date of their wedding, which outlined that each party would remain financially independent and no spousal support would be paid by either party upon the breakdown of the marriage. The claimant was not prepared to sign the marriage agreement, the wedding was postponed, and ultimately, she signed a revised version of the agreement a few days before their wedding. Of note, the claimant in G.G. did receive independent legal advice, in contrast to the claimant in this case. Of importance to Butler J. in G.G., the marriage agreement between the parties made no reference to children or the possibility that the parties would have children.
- [133] As stated, the parties in G.G. had a seven year spousal relationship, after three years of dating. The parties had two children together; the claimant returned to work after the birth of their children, however she remained the primary caregiver for the children and homemaker as the respondent was frequently overseas with his consulting business. Mr. Justice Butler varied the marriage agreement and granted the claimant a 30% interest in the equity of the former family home stating at para. 141:

I have already explained the manner in which the parties' lives unfolded to prevent the claimant from acquiring an interest in a matrimonial home as contemplated by the Marriage Agreement. It is appropriate that the primary family asset to be reapportioned is the Family Home. I conclude that the claimant should receive a 30% interest in the equity in the family home.

Reapportionment at this level takes into account the length of the marriage along with all of the other circumstances I have outlined, including the fact that the claimant has been living in the Family Home for some time without paying rent. It also provides the claimant with slightly more than 50% of the increase in value of the home since the parties commenced living there. I have included an amount in excess of 50% to take account of the fact that the claimant has not been able to build up her financial assets and retirement savings while the respondent has been able to do that.

[134] In this case, the claimant is now 39 years old and the respondent is 58 years old. The main assets in question are the family home and the parties' pensions. The respondent says that the amount of the claimant's pension is unknown, that he only has some seven years until retirement and the claimant has some 26 more working years to build her pension and, hence, he should keep the entirety of his Public Service Pension.

[135] I agree with the respondent that his pensions from the RCMP and DVA are not family assets as they had vested at the time the parties commenced cohabiting. They are income sources which have been and continue to be included in the calculation of his annual income.

[136] I disagree that he should keep the entirety of his Public Service Pension Plan or his CPP given the claimant's contribution to the parenting of the children and to the household during their marriage. I order that the increase in value of these plans from the date of their cohabitation (July 1, 2003) to the date of the s. 57 declaratory judgment (February 22, 2012) be apportioned equally between the parties. This should be offset by the respondent's 50% interest in the increase in value for the same time period of the claimant's CPP

[137] I award the claimant a 30 per cent interest in the Waddington Residence as a tenant in common with the respondent. This amount is intended to compensate her for her direct and indirect contribution to the increase in value of the Farm Property, which enabled the respondent to purchase the Waddington Residence. It is also meant to compensate her for rental income from the Waddington Residence and her interest in the bank balances.

[138] In ordering this reapportionment of the Waddington Residence, I also take into account the details outlined above regarding the parties' debts (*Stein v. Stein*, 2008 SCC 35 at para. 9) and recognize the respondent's failure of and late disclosure (*Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 at paras. 9-11 (S.C.)).

[139] I note that the Waddington Residence was appraised on September 18, 2014 for \$395,000. Unless the parties agree otherwise or the market has changed substantially, the value of the Waddington Residence should be determined by this appraisal amount or an actual sale price of the property.

Spousal Support

[140] I have set out the parties' employment histories above. In my view, both are optimally employed at the present time. I find the claimant has taken all steps necessary to obtain employment and is continuing to work toward full time work. There is no need to impute income to either party.

[141] The determination of spousal support when that issue has been dealt with by the parties in a marriage agreement is subject to the same two stage analysis, outlined in *Miglin v. Miglin*, 2003 SCC 24 [Miglin], as that applied in determining whether the application of the agreement is "fair" under s. 65 of the FRA. In the first stage of the analysis, the court must assess the circumstances under which the agreement was negotiated and the substance of the agreement to determine whether the provisions represent a significant departure from the objectives of the Divorce Act.

[142] The second stage is described at para. 88 of Miglin:

The parties' intentions, as reflected by the agreement, are the backdrop against which the court must consider whether the situation of the parties at the time of the application makes it no longer appropriate to accord the agreement conclusive weight. We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. Although the change need not be "radically unforeseen", and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.

Stage 1: Circumstances of Execution and Substance of the MA

[143] I have already discussed a number of factors relevant to the first stage of the analysis, in particular, the coercive circumstances in which the MA was signed. I find that the negotiations surrounding the formation and the execution of the MA, which were marked by pressure and vulnerability, were unfair to the claimant. I could stop here; however, I will also turn my mind to the substance of the MA.

[144] Section 15.2 (4) and (6) of the Divorce Act provide:

- (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.
- (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.

[145] As noted earlier, the MA sets a threshold of \$20,000 gross income above which the claimant is not entitled to spousal support in any amount. After eight years of cohabitation and having made a significant contribution to the marriage, I am of the view that the spousal support provisions of the MA are a marked departure from the provisions of the Divorce Act. They simply did not take the factors listed in s. 15.2(4) into account.

[146] Again, I could end the analysis here; however, I wish to make a few further comments regarding stage 2 of the Miglin analysis.

Stage 2: Unforeseen Changed Circumstances

[147] The difficulty faced by the respondent in the second stage of the analysis is that this stage is premised on the circumstances under which the agreement was entered into in the first instance. The premise of the second stage is that the agreement was negotiated and the analysis depends on whether new circumstances no longer reflect the parties' intentions. Here, as I have discussed above, the agreement was forced on the claimant without the benefit of legal advice; notwithstanding the fact that she signed it, the contents did not reflect what she intended. There were no negotiations of the MA's terms. Further, the respondent, notwithstanding his promise to review the terms of the MA every five years, refused to do so, thus frustrating any attempt by the claimant to negotiate any change to the agreement.

[148] In these circumstances, it is not appropriate to enforce the spousal support provisions of the MA. Accordingly, I will assess the claimant's entitlement to spousal support pursuant to the s. 15.2 factors set out above.

Entitlement to Spousal Support

- [149] The objectives of a spousal support order as provided in s. 15.2(6) of the Divorce Act above are reflected in the three conceptual models for entitlement to spousal support recognized by the Supreme Court of Canada: compensatory, needs-based and contractual: *Bracklow v Bracklow*, [1991] 1 S.C.R. 420 at para. 15 [Bracklow]. A compensatory claim relates primarily to the first two objectives of s. 15.2(6) while a needs-based or non-compensatory claim relates primarily to the third and fourth objectives. Many spousal support claims involve aspects of both models.
- [150] The overarching principle in determining entitlement to spousal support is the doctrine of equitable sharing between the parties of the economic advantages and disadvantages of the marriage and breakdown of the marriage: *Chutter v. Chutter*, 2008 BCCA 507 at para. 49, reconsideration denied 2009 BCCA 177, leave to appeal ref'd [2009] S.C.C.A. No. 41(QL) [Chutter]. This does not involve equalizing the parties' net disposable incomes, particularly where the marriage has not been long-term: *Armstrong v. Armstrong*, 2012 BCCA 166 at para. 74.
- [151] A finding that the marriage agreement provision regarding spousal support is unfair to the claimant presupposes her entitlement to spousal support. However, I will address this more directly.
- [152] The marriage break down was, like most, traumatic. The claimant's daughter moved out of the family home because of the tension between the parties. On the same day, the respondent moved from the Clarke Road premises into new rental premises.
- [153] When they separated on July 1, 2011, the respondent was working part time. Her income was about \$35,000 in both 2010 and 2011. She was left with a line of credit in her name in excess of \$25,000, credit card debt of \$1,000, little in her bank account, a vehicle and two horses which she could not afford to keep and ultimately sold, one for \$1.00. In contrast, the respondent was working full time, as well receiving income from two pensions. He owned the former family home and a truck and had between \$8,000 and \$10,000 in bank accounts.
- [154] Had the claimant foreseen the circumstances she would have been in on her separation, she would have taken a very different course in her life. She would likely have advanced her career as a care aide earlier than she did. She would have sought options once she became aware that the respondent was not prepared to review and renegotiate the MA. His refusal to do so was a significant source of the discontent which ultimately led to the marriage breakdown. The refusal of the respondent to renegotiate the MA significantly disadvantaged the claimant.
- [155] I find that the claimant was entitled to spousal support at the date of separation on a compensatory and non-compensatory (needs) basis.

Lump Sum Spousal Support

- [156] In my view, this is a case where a lump sum spousal support should be ordered.
- [157] In *Robinson v. Robinson*, 2011 BCSC 1489, aff'd 2012 BCCA 497 [Robinson], Madam Justice Watchuk canvassed the law on lump sum awards at para. 96, adopting *Davis v. Crawford*, 2011 ONCA 294 [Davis]. Judges are conferred broad discretion through s. 15.2(1) of the Divorce Act to make an award of periodic or lump sum spousal support, or to make an award comprised of both forms of support. An important consideration in determining whether to make a lump sum award is whether the payor has the ability to make a lump sum payment without undermining their future self-sufficiency. The court must weigh perceived advantages of making a lump sum award against any presenting disadvantages.
- [158] While advantages are highly case-specific, the Ontario Court of Appeal in *Davis* pointed to the termination of ties between the spouses, provision of capital to meet an immediate need of the dependant spouse, the assurance of support where there is real risk of non-payment of periodic support, a lack of proper financial disclosure, the reality that the payor has the ability to pay a lump sum but not periodic support and satisfaction of an award of retroactive spousal support.
- [159] Para. 68 of *Davis*, as quoted at para. 96 of *Robinson*, states:
- Similarly, the disadvantages of such an award can include: the real possibility that the means and needs of the parties will change over time, leading to the need for a variation; the fact that the parties will be effectively deprived of the right to apply for a variation of the lump sum award; and the difficulties inherent in calculating an appropriate award of lump sum spousal support where lump sum support is awarded in place of ongoing indefinite periodic support.
- [160] In this case, the respondent is 58 years of age and, to the claimant's knowledge, had always intended to retire at age 65. While he has the ability to make a lump sum award at this time, after retirement, payments may become more difficult. The respondent does have financial responsibilities to his two children from his second marriage as they pursue education, however, his annual income and the added income from the non-taxable DVA pension, are sufficient to meet his personal and familial obligations at this time. The claimant is 39, her income is increasing and she is now working toward self-sufficiency. The parties do not have children together. Bringing finality to their financial relationship would be beneficial to both parties and a lump sum award is particularly fitting because, in essence, much of the award is retroactive spousal support.
- [161] I have chosen to use the Without Child spousal support formula of the Spousal Support Advisory Guidelines (SSAG) as a guide because, at this time, the parties have no financial obligations to each other's children.
- [162] The range of spousal support which the claimant would have been entitled to at the time of separation, based on the parties' respective 2011 incomes of \$36,619 and \$98,932 is \$623 to \$831 per month for a period of 4 to 8 years. Using the low end of the range, the claimant

would be entitled to \$30,000 over a period of four years up to \$60,000 over eight years. Because compensation to the claimant was already a factor in the reapportionment of the Waddington Residence and because the claimant has been able to become reasonably self-sufficient since the time of separation, I will use the low end of the range for a period of four years.

- [163] However, the provisions in the SSAG in chapter 10 on "Restructuring" provide that, when making a lump sum award, it is an error just to convert the periodic payments under the SSAG into a lump sum. The total of periodic payments must be discounted to reflect the non-deductible, non-taxable nature of the lump sum.
- [164] At para. 113 of Robinson, Madam Justice Watchuk considered the principles and application in a number of cases in order to assist in arriving at an appropriate quantum of lump sum spousal support.
- [165] Using the low end of the range for a period of six years, the total of spousal support payments would be \$45,000. Taking into consideration the after-tax costs and benefits to the parties and a discount rate of 0.6%, the net present value of a lump sum spousal award, as calculated with the assistance of spousal support software, is \$30,000. I find this to be the appropriate spousal support award for the claimant.

Conclusion

- [166] I am satisfied that the parties have lived separate and apart for in excess of one year and, accordingly, there will be an order for divorce.
- [167] The MA will be varied pursuant to s. 65(1) of the FRA in the following ways:
- a. The claimant is entitled to a 30 percent interest in the Waddington Residence as a tenant in common. I give her leave to apply for an Order of Sale under s. 66 of the FRA.
 - b. The claimant is entitled to a 30 percent interest in the net rents collected from the Waddington Residence since the date of the s. 57 declaratory judgment (February 22, 2012), if any. If the parties are unable to agree on the net rental amount to which the claimant is entitled, the matter will be referred to the registrar for accounting.
 - c. The claimant is entitled to a 50% interest in the increase in value from the date of their cohabitation (July 1, 2003) to the date of the s. 57 declaratory judgment (February 22, 2012) of the respondent's Public Service Pension Plan and CPP. This should be offset by the respondent's 50% interest in the increase in value for the same time period of the claimant's CPP.
 - d. The claimant is entitled to a lump sum spousal support award of \$30,000.
- [168] If the parties are unable to settle the issue of costs, they are at liberty to file written submissions to the court within 15 days of the release of this decision.

"Greyell J."

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/14/23/2014BCSC2310.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/k-d-r-a-v-y-j-a-a-2014>

Prepared on 29 October 2026 · Esheria