
CANADA / JUDGMENT

Klopfstein v. Klopfstein

2021 BCSC 498

COURT

Supreme Court of British Columbia

DECIDED

19 March 2021

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2021 BCSC 498 Klopfstein v. Klopfstein

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Klopfstein v. Klopfstein,

2021 BCSC 498

Date: 20210319

Docket: E39561

Registry: New Westminster

Between:

Jost Klopfstein

Claimant

And

Gloria Anne Klopfstein

Respondent

Before: The Honourable Mr. Justice Groves

in Chambers

Reasons for Judgment

Counsel for the Claimant:

M. Brandon

Appearing on her own behalf:

G.A. Klopstein

Place and Date of Hearing:

New Westminster, B.C.

December 9-11, 2020

Place and Date of Judgment:

New Westminster, B.C.

March 19, 2021

- [1] This is a high conflict matrimonial dispute. The claimant is Jost Klopstein and the respondent is Gloria Anne Klopstein.
- [2] The parties met in 1993 and began a common-law relationship in 1994. This was in Switzerland, the claimant's home country and a country that the respondent moved to in 1992. They married on July 15, 1995. They separated in March 2011, long after the respondent returned and the claimant settled in Canada.
- [3] The parties have three children: Jason Andreas Klopstein, born February 24, 2001, who is soon to be 20 years of age; Lucas Alexander Klopstein, born October 3, 2002, who has just turned 18; and Janine Elissa Klopstein, who was born on August 26, 2005 and is 15 years of age.
- [4] There are currently no applications before the court in regards to the children. The parties have had significant litigation over the issues of child support and s. 7 expenses related to these children, whose custody they share equally. The factual information before the court relevant to this application related to the children suggests that from the time of the second child's birth in 2002, the respondent, because of child rearing responsibilities, did not work outside of the home. Her evidence is that prior to separation the last paid work she had in Canada was in 1992.
- [5] Mr. Klopstein was, until the date of separation, the breadwinner for the family. He works in the IT industry and is self-employed through a corporation that was then called Axos Technology Inc. Since separation the corporate entity seems to have changed but his status as a self-employed person running his contracts through a corporate entity has not. His income has consistently been that of a modestly high earner. Most notably, at the time of the parties' final order, the order of Mr. Justice Armstrong granted March 3, 2014 (the "2014 Order"), the key order in the application before the court, the parties agreed that the claimant's income was \$100,000. The parties further agreed, in what was effectively a compromise, or so I find, that the income imputed to Ms. Klopstein for child support purposes was \$40,000. I will have more to say on the income issue later in these reasons.

- [6] One document that was before the court at this application in December 2020 was a book of orders prepared by Mr. Brandon, counsel for the claimant. The book of orders begins with the interim order of Mr. Justice Williamson on March 29, 2012 and ends with my order on June 12, 2020. Over this eight-year period of time, there are 18 court orders. The 2014 Order was the fourth of 18 orders to date (the 2014 Order is attached as Schedule 1 to these reasons).
- [7] Needless to say, this matter has regularly been before the court and the parties have never seemingly resolved their outstanding issues.
- [8] In brief, the application brought on by Ms. Klopstein, who is self-represented, is an application to set aside certain aspects of the 2014 Order, an order interestingly referred to as the "final order." Specifically, she seeks to set aside the provision of the 2014 Order which ends her spousal support claim, and further she seeks to set aside the property orders related to the numerous parcels of real property owned and acquired by the parties during their marriage.
- [9] The 2014 Order grants, inter alia, a divorce. There are numerous orders regarding the children, parenting time, exclusions and variations to parenting time orders, travel consent issues and issues related to passports for the children. There are orders related to the determination of both parties' incomes, a determination of the amount of child support to be paid by Mr. Klopstein to Ms. Klopstein based on his income and her imputed income. The children were from that date forward going to spend equal time with both parents.
- [10] In brief, she seeks to set aside the 2014 Order for division of property, as it relates to real property, and her waiver of spousal support, on the basis of material misrepresentation or mistake, and, as I understand her argument, on the basis of unconscionability.
- [11] The facts leading up to the 2014 Order are important to understand and form the basis, at least in part, for the application before the court.
- [12] These parties separated on March 4, 2011. At the time, they lived in Surrey, British Columbia in a family residence. In addition to that family residence, they owned 22 pieces of property in Edmonton, Alberta, consisting of 14 units in a condominium development and eight other units, being traditional homes. Some of these eight home units had more than one suite in them, at the time.
- [13] In addition to the Edmonton properties and the home in Surrey, they also owned a recreational lot at Scotch Creek, British Columbia.

- [14] The origins of the purchase of the 14 condominium units in Edmonton is a crucial factor. As I understand the evidence, these are condominium/apartment units which were originally to be purchased by a third party, although in fact the original offer to purchase was in the name of Gloria Klopstein. She was on the contract as agent for this third party. It seems that the Klopsteins and this third party had an understanding that the respondent would assign her interest in the contracts of purchase and sale to this third party.
- [15] For reasons which are uncertain to me, the third party failed to provide the entirety of deposits and complete on the agreement. He paid part of the deposit, the evidence suggests, in the amount of \$70,000. He could not get his partial deposit back. Ms. Klopstein felt there was some advantage in completing the purchase of these properties because the partial deposit advanced from the third party could be applied to the Klopsteins' joint credit. Although it appears that Mr. Klopstein did not necessarily agree that this was prudent, the parties nonetheless went ahead with the purchase of the 14 condominium units.
- [16] I may have some of the facts leading up to this unique purchase arrangement wrong, but suffice it to say that I conclude on the evidence that initially Mr. Klopstein was reluctant to purchase these condominium units and Ms. Klopstein was keen to do so. Although the parties eventually agreed to purchase these condominium units and that Mr. Klopstein consented to the purchase, he very much felt that this was Ms. Klopstein's investment. At separation, he was anxious that she end up with "her" assets, these 14 condominiums.
- [17] At the time of separation, this case was almost immediately high conflict. One of the sources of conflict was that the parties continued to reside in the same home, the matrimonial home in Surrey. Ms. Klopstein lived in the larger part of the house with the primary care of the children. Mr. Klopstein resided in one of two basement apartments in this home. The other was rented to a third party.
- [18] Staying in the matrimonial home was the only option for Ms. Klopstein. She had no independent source of income other than the fact that throughout the marriage she managed the parties' investment properties in Edmonton, and this was at separation her only source of income. It had to that point never amounted to more than about \$20,000, although in the 2014 Order she agreed, reluctantly it appears, to \$40,000 in imputed income.
- [19] Almost immediately upon separation, there was the stress of the parties not getting along and living in the same home. This stress was felt directly by the children. It was felt by Ms. Klopstein. This is confirmed in the report in evidence of her family doctor, Dr. Hui.
- [20] I am satisfied on the evidence that Mr. Klopstein had control of most of the family bank accounts, that he withdrew funds and transferred funds for reasons for which were not explained. He also changed a number of accounts to a different institution. The evidence suggests this was an effort to hide assets. There is an email before the court, authored by the claimant, to a third party, in which he says in part:

need to figure out what I do with new business account, and how I start to transfer funds without a trace. We have most of the Real estate accounts with BMO and bank clerk told me that I could open new accounts just for me under the same umbrella and only I would have access. However, she knows the branch managers of BMO Langley and I am able to see into accounts that she only has access to and never signed me up to at BMO... BMO would be fastest but there are risks.

- [21] This clearly shows an effort at subterfuge and a level of dishonesty. It shows that he had access to her accounts, at least to review. There is no evidence she had the same advantage or exercised it.
- [22] Additionally, in terms of financial pressure, the claimant paid no child support or spousal support, although he continued to pay the housing costs, such as mortgage, utilities, tax and insurance. While paying these housing costs, he also lived in the home and he collected the rent from the third suite. While they all lived in the home and he paid for the home, Ms. Klopstein received substantially less income than Mr. Klopstein, netting around \$20,000 annually from managing the investment properties, and Mr. Klopstein's income was in the \$100,000 range.
- [23] Additionally, there was significant personal conflict in the home. The evidence suggests at one point Mr. Klopstein broke into Ms. Klopstein's part of the residence and helped himself to some documents. This evidence is challenged as he alleges she did the same. It appears the police got involved in these "break-ins". Then there were reports by Mr. Klopstein that Ms. Klopstein was physically abusive of him throughout the marriage, something she adamantly denies and views as yet another desperate deceitful act of Mr. Klopstein designed to advance his interests in the litigation at her expense.
- [24] Not surprisingly, Ms. Klopstein had limited to no financial means and, as such, had difficulty retaining counsel. She had one counsel at the beginning of the court case who she decided she could no longer retain, as she could not afford to pay. She then began working with a second lawyer who was more inspired to approach the litigation more from a collaborative resolution manner than others were. When the collaborative desire of Ms. Klopstein and her second lawyer did not come to fruition, the second lawyer determined that she could not represent Ms. Klopstein at trial.
- [25] In mid-January 2014, just less than two months prior to the trial date of March 3, 2014, Ms. Klopstein retained her third counsel. This was Christine Eiler, a lawyer at Lindsay Kenney LLP in Vancouver. There is an affidavit in this proceeding from Melissa Bryden, another lawyer at Lindsay Kenney LLP, which is confirmative of what is noted below about the time leading up to the March 3, 2014 court appearance, which resulted in the 2014 Order.
- [26] I am satisfied on the evidence before me that Ms. Klopstein's mental health at this time was not particularly stable. There is before the court an expert report, attached to affidavit #14, of the respondent's family doctor, Dr. Hui. This report attests to the difficulties the respondent was having leading up to trial. She was under stress associated with the children. She was under stress associated with the joint occupancy of the home. She was

under stress managing finances. She was under stress related to the litigation, and what she described, and I accept, of the aggressive and hostile actions taken by Mr. Klopstein. This action is described in Dr. Hui's report as "harassment, threats and false accusation from her ex-husband." She was at that time treated with anti-anxiety medication, and she suffered from insomnia and fatigue.

- [27] It is fair to say that Mr. Klopstein was litigating this matter aggressively and purposefully. He appears to have wanted to have little to do with the Edmonton condominium properties that the parties had jointly agreed to purchased. He clearly viewed those as something that the respondent should ultimately be responsible for. He very much wanted to remain in the Cloverdale home. He wanted half-time with the children. He wanted to eliminate his financial responsibility towards Ms. Klopstein, or in some fashion cap it.
- [28] None of these desires are in fact inappropriate and no negative implications can be drawn from the desires themselves. However, some actions of Mr. Klopstein in support of those desires are worthy of rebuke.
- [29] To begin with, Mr. Klopstein clearly was exerting financial pressure on Ms. Klopstein. He had the higher income. He collected the rent for the property they both lived in. Although he paid the mortgage, utilities, tax and insurance on the home, he contributed nothing towards Ms. Klopstein's interim support, nor did he contribute anything to the interim support of his three children, other than providing for the home.
- [30] In hindsight, his staying in a basement suite in the family home was unnecessary and a clear pressure tactic in itself. He used that position to enter into her part of the home without consent and steal documents. Since the 2014 Order Ms. Klopstein has confirmed, and it is not denied, that during this time he also rented another premises, another residence. His continued exertion of pressure on Ms. Klopstein from the basement suite can, as such, be viewed as purposeful.
- [31] The evidence satisfies me that Mr. Klopstein also changed bank accounts and had control over the parties' joint funds, such that Ms. Klopstein had no financial resources to rely on other than the modest income she could generate from managing the properties in Edmonton. He opened new accounts, and did so, to use his own words, to "transfer funds without a trace."
- [32] Thirdly, and most notably, despite the matter being litigated with strong intentions from the date of separation through to the early months of March 2014, it was only on February 28, 2014, five days before the trial, that Mr. Klopstein produced in excess of 643 pages of documents, notice of which he had been given by delivery of a fourth amended list of documents on February 25, 2014, about one week before trial.
- [33] I am satisfied that the effect of this was somewhat overwhelming for Ms. Klopstein and her then counsel. They clearly did not have time to review these documents and prepare for trial. An adjournment was inevitable. The parties had been exchanging offers to settle and,

though they were far apart, they were not miles apart in terms of their positions on the litigation. When faced with late disclosure, a lawyer who felt correctly, she could not prepare properly for the trial, and faced with the prospect of the trial being adjourned for a substantial period of time, with no interim support and no prospects for resolution, it is fair to say that Ms. Klopstein reluctantly capitulated in this litigation. I note again the evidence before me of Dr. Hui in regards to her mental health at the time.

- [34] The 2014 Order is not an order adjudicated by the court except as to the divorce. It is a consent order. The parties, through counsel, no doubt called evidence only in regards to the divorce, and spoke to the balance of the order as a consent order.
- [35] In regards to the issues before the court, the question of division of property and spousal support in the 2014 Order are dealt with in essentially three ways.
- [36] The parties agreed in paragraphs 25 to 35 on an equal division of a number of relatively minor assets, although I use the term "minor" somewhat reluctantly. Better put, the parties agreed on the equal division of assets which were not real property. Those paragraphs deal with the non-real estate assets.
- [37] No issue is taken with those divisions before me today. Although not a lot of values are attributed to the individual assets noted, the division set out divided those assets equally, or close to it.
- [38] What was allocated between the parties on a seemingly equal basis were things like vehicles, a Winnebago, Ms. Klopstein's company called Principled Recovery Investments Corp., Mr. Klopstein's company called Axos Technology Inc., the household contents, some expropriation funds held by an Edmonton lawyer, funds in a Swiss bank account in Ms. Klopstein's name and the like.
- [39] There is of note an error which subsequently arose about funds that were in the trust account of an Edmonton lawyer related to an expropriation. This is referred to in paragraph 30 of the 2014 Order. The parties agreed in getting to an equal division that those funds would be the property of Ms. Klopstein. More on this later.
- [40] I will pause here to say that even this equal division called on Ms. Klopstein to compromise. Her company, noted above, was valued it appears at \$20,000, when in fact it was a shell company, had no assets, generated no income, and really had no prospects for the same. This company had nothing to do with the investment properties but was a failed effort of the respondent and a friend.
- [41] In regards to the other two resolutions, the real properties and the issue of spousal support, they appear to be intertwined. The 2014 Order provides that Ms. Klopstein is to retain ownership of all but two of the Edmonton properties, and the Scotch Creek lot. Mr. Klopstein retains the Surrey home and remaining two Edmonton properties. According to Appendix A attached to the 2014 Order, the equity in properties retained by Mr. Klopstein is \$362,872. The equity in properties retained by Ms. Klopstein, declared in the 2014 Order, is

\$528,705. This represented a 59% to 41% division of property.

- [42] There is then with this "unequal" division, a waiver of her claim for spousal support in paragraph 21 of the 2014 Order. In other words, she was to receive 59% of the real property assets, and would then waive her claim for spousal support. That intention was not disputed by anyone before me.
- [43] Although the 2014 Order is silent as to these offsets, the "without prejudice" letters exchanged by the parties before the court, letters which were not objected to in this proceeding, show that the parties clearly desired two things. First off, they desired an equal division of property. Secondly, Mr. and Ms. Klopstein each acknowledged that there was a claim for spousal support. An offer of Mr. Klopstein was to pay spousal support in the amount of \$550 per month for eight and half years. Ms. Klopstein's response was that she requested \$2,000 per month in spousal support for an indefinite period of time.
- [44] This evidence clearly shows that the parties understood there was a spousal support obligation. Neither party disputes. I find the 2014 Order was designed to deal with the claim of Ms. Klopstein for spousal support, as well as an attempt to divide property equally.
- [45] It is also important to note that in regards to values of the numerous pieces of property, the only property to be properly appraised was the home in Cloverdale, which Mr. Klopstein retained. The parties appeared to have discussed on the eve of trial evaluations of these properties for the purposes of settlement. The parties appear to have agreed to something close to the 2013 notices of assessment, or their Alberta equivalent, related to the properties. Appendix A to the 2014 Order shows the agreed values of assets, the agreed indebtedness associated with those assets, the agreed equity in those assets, and the ultimate agreed division of those assets.
- [46] In regards to the Alberta properties and particularly the condominiums, it is the position advanced by Ms. Klopstein that Mr. Klopstein was very much desirous of her taking these properties and he not having any responsibility for them. That appears clear on the evidence. Ms. Klopstein alleges, however, that Mr. Klopstein, who had been on the board of the condominium development, had a much greater knowledge and, in fact, had investigated the value of the condominiums. He had gone so far as to speak to an appraiser about that, though there is a general denial in his evidence in support of this application that he had greater knowledge of the condominiums' value than appears to be apparent. I conclude, based on a review of the materials, that it seems more likely than not that Mr. Klopstein had the greater knowledge of the values of these condominiums, particularly related to his status as a member of the condominium board.

- [47] One of the first things that happened post-2014 Order is that it became apparent almost immediately to Mr. Brandon, who acts for Mr. Klopstein, that the \$95,696 asset given to Ms. Klopstein in the division of other properties, the expropriation funds, noted in paragraph 30, was in fact approximately \$105,696, \$10,000 more than the parties had estimated. As a result of this, Ms. Klopstein almost immediately agreed to Mr. Brandon's request that the parties split these additional funds equally between the parties.
- [48] However, approximately four months later, through counsel, Ms. Klopstein pointed out to Mr. Brandon and to Mr. Klopstein, her concern about what she had discovered about the properties post-separation. There was a significant glaring error as to the amount of indebtedness on one property - that is unit 105 in the condominium development. The parties agreed that the debt on this unit was \$73,489.91. It was soon apparent that in fact the indebtedness was \$80,225.12. Ms. Klopstein noted this four months post-2014 Order. Ms. Klopstein, when faced with an error that benefited her, immediately made a concession and agreed to an adjustment. Mr. Klopstein, when advised of an error that benefited him, refused to adjust. He remained silent and did not respond, despite evidence that the valuation of one piece of property was incorrect.
- [49] As a result of an order I granted on September 5, 2019, all the properties have been appraised. They were all appraised at of February 1, 2014. These appraisals show that, in fact, rather than getting something for spousal support, Ms. Klopstein got nothing. Rather than getting an equal division of property, she got nothing. The crucial evidence in support of this are the appraisals themselves, in evidence, and the summary which incorporates both the Appendix A numbers attached to the 2014 Order and the values obtained by the court-ordered appraisal. This helpful summary is attached to the respondent's 18th affidavit sworn November 6, 2020 at exhibit page 356.
- [50] The parties agreed that Mr. Klopstein would receive equity in the properties he retained of \$362,872. The appraisals suggest that it was in fact \$328,373 in equity. The parties agreed that Ms. Klopstein would get equity in the properties she retained of \$528,705. The appraisals suggest that there was no value in these assets, the equity was in the negative to the tune of - \$9,029. She did not receive equal division of property, nor did she receive any accounting for spousal support.
- [51] Although the notice of application is complex and wordy, it appears that Ms. Klopstein seeks to vary the 2014 Order on the basis of common mistake and unconscionability. Specifically, she seeks to vary the 2014 Order to provide her a lump-sum payment equal to 59% of the true value of the family properties as at the date of that order or an equivalent amount as equitable compensation. In the alternative, Mrs. Klopstein seeks retroactive and on-going spousal support.
- [52] It was agreed at the start of the application that the application would deal with the threshold issue of whether the two challenged aspects of the 2014 Order could be set aside. The two basis advanced for this are common mistake and unconscionability.

- [53] Dealing first with a somewhat preliminary issue, it is settled law that a consent order, being the formal expression of an underlying agreement reached between the parties, may be set aside or varied only in circumstances that justify the same treatment to the underlying agreement: *Rick v. Brandsema*, 2009 SCC 10 [Brandsema] at para. 64; *Shackleton v. Shackleton*, 1999 BCCA 704 at para. 12.
- [54] Ms. Klopstein's first argument is that the 2014 Order does not reflect the parties' intention for a 59/41% property division in her favour in lieu of spousal support because the parties were both mistaken as to the true value of the properties as at the time of the order. As a result, Ms. Klopstein received nothing for the properties and nothing for spousal support.
- [55] A common mistake occurs when the parties to the agreement make the same mistake. Where common mistake is pleaded, the existence of the agreement is admitted; that is, the rules of offer and acceptance are satisfied and the parties are of one mind. What is urged is that, owing to a common error as to some fundamental fact, the agreement is robbed of all efficacy: *Hannigan v. Hannigan*, 2007 BCCA 365 at para. 63.
- [56] The court can rectify a common mistake if it is established that (i) the written instrument does not reflect the true agreement of the parties and (ii) the parties shared a common intention continuing up to the time of signature that the provision in question stand as agreed rather than reflected in the instrument: *Valaire v. Valaire*, 2000 BCSC 1491; *Buschau v. Rogers*, 2004 BCCA 142; *Bank of Montreal v. Vancouver Professional Soccer Ltd.* (1987), 15 B.C.L.R. (2d) 34 at 36 (C.A.).
- [57] Courts have varied consent orders, separation agreements, and minutes of settlements on the basis of common mistake in *Valaire*; *Buschau*; *Teather v. Kawashima*, 2016 BCSC 2231; and *Hannigan v. Hannigan*, 2002 BCSC 719, *aff'd* 2007 BCCA 365.
- [58] In *Valaire*, the parties entered into an agreement for equal division of most of their family assets. The terms of their agreement were implemented through a consent order. However, the parties had made errors in the valuation of the company and assets, which resulted in an unequal division of family assets.
- [59] The court in *Valaire* found as follows with respect to the parties' intention and the errors in valuation:
- [18] In the case before me, it is clear from having heard counsel's trial opening, and having reviewed Exhibit 1 from the trial, and the consent order, and all material filed in respect of the motions before me now, that the manifest intention of the parties was to equally divide the assets they had agreed were family assets. It is equally clear that the consent order incorporated errors in effecting an equal division. Counsel for Mr. Valaire has attempted to characterize the errors as errors of counsel for Mrs. Valaire, rather than mistakes common to both sides, but I must reject that suggestion. One of Mr. Valaire's affidavits filed on the application denies that the order contains any error, but does not assert that an unequal division of agreed family assets was intended. It clearly was not intended, yet did result.

- [19] This is clearly a case of common mistake. Furthermore the mistakes are obvious and all the essentials for rectification of written agreements are present. (See Snell's Principles of Equity, 28th edition, 1982, Chapter 4, and *Juliar v. Canada (Attorney General)* [1999] O.J. No. 3554.) The fact that part performance has occurred does not preclude rectification, because part performance has not prejudiced the parties, or obscured the elements that require rectification.
- [60] Accordingly, the court in *Valaire* rectified the errors and amended the defective consent order to bring it into conformity with the manifest intention of the parties.
- [61] The facts in *Buschau* arose out of litigation involving the merger of pension funds. The parties agreed on a formula for and amount of interest repayment, which was incorporated into a court order. The parties later discovered that the interest had been calculated using erroneous asset values, resulting in one party overpaying the other. The Court of Appeal held that both parties had accepted the erroneous figure in the court order as correct and, as a result of the mistake, the written document failed to express what the parties had intended. The court rectified the order by replacing the erroneous figure with the correct one and ordered the return of the overpaid amount.
- [62] As noted above, the parties in the case at bar intended equal division of property evidenced by the "without prejudice" letters exchanged by the parties. The "unequal" division of 59/41% in favour of Ms. Klopffstein was in lieu of spousal support. They based their property division on the Alberta assessments, which did not represent the true market value of the Edmonton properties, and the erroneous mortgage amount owing against one of the Edmonton condominium properties. The erroneous values were listed in Schedule A to the 2014 Order, resulting in Ms. Klopffstein receiving nothing for the properties and spousal support.
- [63] What is abundantly clear on the facts before me is that the parties intended to offset the otherwise agreed to equal division of their real estate holdings substantially in Ms. Klopffstein's favour so as to meet the agreed to obligation that Mr. Klopffstein had to her for spousal support. It is equally clear that the parties were mistaken as to the value of assets. This mistake has led to a circumstance that the parties did not contemplate or agree to, a circumstance where Ms. Klopffstein received no division of property and no spousal support. Based on the principles articulated in *Valaire*, I find the 2014 Order related to division of real estate assets and waiver of spousal support does not reflect the true agreement of the parties. Further, I find the parties always had the intention to recognize Ms. Klopffstein's claim for spousal support and to substantially alter the otherwise prima facie equal division of their real estate assets in her favour to deal with her spousal support claim. They were mistaken as to the values of the real estate and thus the equity or lack thereof in the real estate. This was a common mistake. As such, those aspects of the 2014 Order need to be set aside. I make that order.
- [64] Having made that determination, I do not necessarily have to deal with the unconscionability argument. However, I will do so.

- [65] Ms. Klopstein also argues that the 2014 Order is unconscionable due to the vast difference between the values assigned to the properties in the 2014 Order and the true market value of those properties. As well, the conduct of Mr. Klopstein leading up to the 2014 Order, she argues, was unconscionable. In light of that difference, she seeks equitable compensation from Mr. Klopstein.
- [66] In *Klassen v. Klassen*, 2001 BCCA 445 at para. 59, the Court of Appeal held that a finding of unconscionability requires (i) proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left the weaker in the power of the stronger and (ii) proof that the purchase was made from the weaker party at a considerable undervalue. An agreement is voidable for unconscionability: *Klassen* at para. 64.
- [67] While rescission is historically the remedy for a contract voidable for unconscionability, courts may impose damages in the form of equitable compensation to provide relief to the wronged party where rescission is unavailable because restitution, as a practical matter, cannot be made: *Brandsema* at paras. 66-68.
- [68] In *Brandsema*, the parties separated after their 27-year marriage and agreed to divide the family assets equally. The trial judge concluded that the husband, an experienced, astute businessman, took advantage of his ex-wife's mental instability and knowingly presented misleading financial information at the outset of the negotiations by hiding cheques, undervaluing assets, claiming inappropriate tax liabilities, and overstating debt figures. The resulting agreement was unconscionable and deviated substantially from the objectives of the governing legislation. The Court of Appeal allowed the husband's appeal and reversed most of the trial judge's findings.
- [69] On appeal to the Supreme Court of Canada, Justice Abella, for the Court, reiterated that, because separation agreements are negotiated during one of the most emotionally charged junctures of the parties' relationship, "bargains entered into between spouses on marriage breakdown are not, and should not be seen to be, subject to the same rules as those applicable to commercial contracts negotiated between two parties of equal strength": *Brandsema* at para. 40. Judicial intervention would be justified where "there were any circumstances of oppression, pressure, or other vulnerabilities", and if one party's exploitation of such vulnerabilities during the negotiation process resulted in a separation agreement that deviated substantially from the legislation": *Brandsema* at paras. 42-44. Flowing from these principles is the duty to make full and honest disclosure of all relevant financial information to ensure the integrity of the negotiation of separation agreements: *Brandsema* at para. 47.
- [70] With respect to the role of professional assistance, the Court noted that while in some cases professional assistance will effectively compensate for vulnerabilities, the mere presence of professional assistance does not automatically neutralize the vulnerabilities. Whether vulnerabilities have been compensated for by the professional assistance is a factual inquiry: *Brandsema* at paras. 59-61.

- [71] The Court upheld the trial judge's finding that the wife's vulnerabilities were not compensated for by professional assistance and that the misleading informational deficits and psychologically exploitative conduct rendered the agreement unconscionable.
- [72] Here, I find Ms. Klopstein, based on the evidence before me, to have been in a vulnerable state, a state which was made much worse by the purposeful and deceitful acts of Mr. Klopstein.
- [73] It seems clear that Mr. Klopstein was waging a significant war of attrition with Ms. Klopstein. This involved continuing to occupy a portion of the family home when it was unnecessary for him to do so. This involved him maintaining to her exclusion the assets of the family, and the income of the family, almost exclusively; forcing her to support herself and three children that she had primary care of with approximately \$20,000 of annual income. He would have known that this would be a struggle for her. He could have surmised that this would make it virtually impossible for her to retain counsel.
- [74] Then, through duplicitous and underhanded means, including entering into her home and taking documents, and including moving funds around and opening new bank accounts so as to move funds without there being "a trace", Mr. Klopstein further created difficulty for Ms. Klopstein.
- [75] I am satisfied, based on the evidence of Dr. Hui, that Ms. Klopstein was not in an equal bargaining position with Mr. Klopstein. Like the husband in Brandsema, Mr. Klopstein took advantage of Ms. Klopstein's weakened financial position and her vulnerabilities. His last-minute financial disclosure was the final example of inappropriate pressure placed on Ms. Klopstein. That seems clear from the evidence.
- [76] All that being said, this is fundamentally a case about common mistake and about the consequences thereof. It is abundantly clear to me that neither party anticipated that the real property holdings that they were dividing were valued at what the appraisal evidence confirms they are. They both clearly wanted to divide these properties initially equally, and then create compensation to Ms. Klopstein for her spousal support claim. Based on the values now known, that was not achieved. The remedy is to set aside, as noted above, the provisions of the 2014 Order as they relate to division of the real estate holdings and spousal support. That is my order.
- [77] The respondent has been successful in this application and is entitled to her costs.

"J.R. Groves J."

Schedule "1"

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