
CANADA / JUDGMENT

L.E.M. v. D.M.I.

2013 BCSC 450

COURT

Supreme Court of British Columbia

DECIDED

15 March 2013

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2013 BCSC 450 L.E.M. v. D.M.I.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.E.M. v. D.M.I.,

2013 BCSC 450

Date: 20130315

Docket: E093803

Registry: Vancouver

Between:

L.E.M.

Claimant

And

D.M.I.

Respondent

Corrected Judgment: The front page of the judgment was amended to correct a typographical error in a date on March 22, 2013.

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

Counsel for the Claimant:

Todd R. Bell

Counsel for the Respondent:

Russell S. Tretiak, Q.C.

Lorraine M. Gerbig

Place and Date of Trial:

Vancouver, B.C.

September 10-14, 17-19, 2012

December 7, 2012

Place and Date of Judgment:

Vancouver, B.C.

March 15, 2013

Introduction

- [1] The claimant and the respondent were in a 16-year relationship, punctuated by their two marriages, two divorces, and two separation agreements.
- [2] The parties have a son who is autistic and has special needs. Custody and guardianship of their son is now not in issue. However, due to his vulnerability and the nature of some of the facts of this case, I have made the parties' names anonymous.
- [3] It is conceded that the first separation agreement dated for reference January 8, 2009, and signed May 2009 ("First Separation Agreement") is not valid. It was poorly drafted by the respondent and does not adequately disclose his assets. The respondent relies on the second separation agreement stated to be made as of August 4, 2009 ("Second Separation Agreement").
- [4] Both separation agreements provided that each party was to retain the property in their own names. The respondent has substantially more assets than the claimant. A rough calculation is that of approximately \$1.7 million worth of combined disclosed assets, the respondent retained \$1.676 million and the claimant retained about \$58,000, or a 97% to 3% ratio of division of assets.
- [5] The claimant seeks to set aside the Second Separation Agreement. She asserts that it was formed in circumstances where she was under the dominance of the respondent and the agreement is substantially unconscionable as well as unfair.

- [6] The respondent states that the Second Separation Agreement is not unfair because his assets are not family assets and he denies that he was ever dominating the claimant. He says that the agreement reflects a longstanding separation of finances followed during their relationship and it was not formed in unconscionable circumstances but after the claimant had independent legal advice.
- [7] If the Second Separation Agreement is set aside or varied, the court will have to determine what property division is appropriate.
- [8] Not only is property division contested, but so too is child support and spousal support, and the respondent's income which is relevant to both.
- [9] Both sides submit that the other's credibility is at issue.

Issues

[10] I will approach the issues as I see them in the following order:

- A. Background;
- B. Legal Framework of Property Division;
- C. Credibility;
- D. The Parties' Intentions and Contributions;
- E. The Parties' Finances;
- F. What Assets were Family Assets as of the Separation Agreements?
- G. Should the Second Separation Agreement be Set Aside or Varied?
- H. Property Division;
- I. Child Support;
- J. Spousal Support;
- K. Other Issues.

A. Background

- [11] The claimant is 48 years old and the respondent is 51 years old. There is one child of the marriage, a son born in 1999 who is now 13. The son is autistic and unable to live independently. He requires special programs and supervision.
- [12] Both parties were born in Romania. They met each other at university and both obtained degrees in Mechanical Engineering, and ended up working in the same place of work in Bucharest. In 1988 or 1989, the parties became romantically involved in an exclusive relationship.

- [13] Both parties thought about emigrating from Romania to Canada and obtained visas to do so.
- [14] In 1993, the claimant came into an inheritance when her mother passed away. Her inheritance was mostly comprised of two condominium properties in Romania.
- [15] Around the same time, in 1993, the parties moved permanently to Vancouver, B.C., and began living together. The claimant sold both of the properties she inherited in Romania, and with the respondent's assistance brought the net proceeds to her account in Canada.
- [16] Neither of the parties found employment when they first moved to Vancouver. They rented a one bedroom apartment and received social assistance to help them with their expenses. Both looked for work in their fields of mechanical engineering. The claimant decided to take a one year course at Vancouver Community College in accounting to assist her in getting a job. She completed the course and soon afterwards found employment in the bookkeeping field.
- [17] In around 1995, the respondent found his first employment in Canada, in his field of mechanical engineering.
- [18] In October 1998, the parties purchased a house on East 28th Avenue in Vancouver ("East 28th Property"). Both parties put in money from their respective savings towards the purchase of the house and as well, mortgage financing was obtained. The claimant made all of the mortgage payments. The respondent paid some other expenses. The purchase price was \$290,000.
- [19] In 1999 the parties' son was born.
- [20] By that time, the respondent was unemployed. He was unable to find work in his field in Canada and he started to look in the United States. He found a job in Minnesota and, after discussing it with the claimant, they both agreed he should take it. The agreement was that he would move there first and she would follow with their son once he was settled and had confirmed that he liked the job. Thus, in November 1999, the respondent moved to Minnesota.
- [21] In April 2000, the claimant and son joined the respondent in Minnesota. The claimant was required to give up her own employment in Vancouver. The East 28th Property was rented out to tenants, with the respondent controlling all of those arrangements and collecting the rent.
- [22] The parties lived in a one bedroom apartment in Minnesota.
- [23] Around the end of 2000, the respondent decided to accept another job, this time in Connecticut. The respondent moved to Connecticut near the end of 2000. By this time, the claimant had already obtained employment in Minnesota, in the accounting department of a company in the heating, ventilation and air conditioning (HVAC) field, Trane. Until his employment was considered stable, the claimant and son remained behind in Minnesota.

- [24] The claimant and son then joined the respondent in Connecticut in the spring or summer of 2001. Fortunately, the claimant was able to transfer her job from Trane in Minnesota to Trane in Connecticut. She soon was able to transfer from accounting work to mechanical engineering work for Trane and remains employed in that capacity today (although through a Trane division in California).
- [25] Originally the parties lived in a one bedroom rental apartment in Connecticut.
- [26] In December 2001, the parties purchased a property in Connecticut on Pinecrest Street ("Pinecrest Property"). The house was purchased in both parties' names but the respondent made all the arrangements and decisions. The claimant remembers contributing to the down payment; the respondent says she did not. The claimant made all of the mortgage payments for that property while they lived there.
- [27] When in Connecticut, the parties had their son tested and were informed that he was autistic.
- [28] On April 29, 2002, the parties married ("first marriage"). They were and had been living together as common-law spouses for approximately nine years by this time. Any periods of separation were only to allow the respondent to change employment and were not intended to break up their relationship.
- [29] What spurred on the formal marriage was the fact that the respondent had immigration difficulties after he travelled back to Canada and tried to return to the United States. The U.S. border officials would not let him in because his visa had expired. The claimant's visa was in order and they received advice that he would be able to return if they were married, and so they did.
- [30] After about a year and a half living at the Pinecrest Property, the respondent decided to sell it. As was typical in their relationship, he took charge of all of the steps necessary to sell the Pinecrest Property and the proceeds of sale. There were cash proceeds of approximately just in excess of \$35,000 in relation to that sale. The claimant did not receive any of this.
- [31] The Pinecrest Property was sold in July 2003 and the parties moved to a rental residence in another town in Connecticut.
- [32] In April 2004, the respondent moved to California and took a new job.
- [33] In May 2004, the respondent sold the East 28th Property. The sale price was \$428,000. The difference between the original purchase price in 1998 and the sale price was \$138,000. The evidence did not disclose how much profit was made but the property was originally financed with a mortgage which had been paid down over the years (first by the claimant and then by rental income), and it was at a balance of \$197,339 in November 2003 (the last produced mortgage statement). The mortgage balance was likely lower by the time of sale. The net proceeds of sale on the property therefore were likely in the range of \$200,000 to \$230,000.

- [34] When the respondent sold the East 28th Property, he wrote a cheque to the claimant for \$25,000. On the cheque he wrote that it was her share from the sale of the East 28th Property. He kept the rest.
- [35] The claimant was concerned about the cost of therapy for their son and felt that the son should continue in programs in which he was enrolled in Connecticut. She felt she needed the \$25,000 to pay for the extra expenses related to the son's autism. According to her evidence, the respondent would not contribute to the cost and was angry and violent with her for not giving him back the \$25,000 so that he could invest it.
- [36] While the respondent was in California, he and the claimant were communicating and occasionally visiting. For example, the claimant and the parties' son visited the respondent during a school break; and the respondent visited the claimant and son during the winter break.
- [37] Sometime in the spring or summer of 2004, the respondent told the claimant by telephone that she would be receiving divorce papers and that he had found a place that would allow a divorce without the parties being present.
- [38] The claimant received the papers in the mail which indicated that a court in the territory of Guam was prepared to pronounce a final decree of divorce and it simply required her consent. She signed the divorce order on June 21, 2004 and the decree of divorce was entered in August 2004 in the territory of Guam ("first divorce").
- [39] On July 30, 2004, the respondent bought a condominium property located on Seymour Street in Vancouver ("Seymour Street Property") for \$214,000. At least some of the profits he had gained on the sale of the East 28th Property were used towards this purchase, which was solely in his name. He was able to put down cash of approximately \$79,000.
- [40] In August 2005, the claimant and son moved to California and moved in with the respondent. According to the claimant's evidence, she wanted her son to have a family and for the three of them to be together and for the marriage to have another chance. She was afraid that if anything happened to her--for example if she died because of illness or accident--that their son would not know what to do as he was incapable of being left alone and he would eventually be a ward of the state if the father was not involved in his care.
- [41] From that time until the couple moved permanently to Vancouver in April 2008, they lived together in California in a one-bedroom apartment. The claimant was quickly able to find employment with the engineering division of Trane in California.
- [42] During the time that the parties lived together in California, the respondent became unemployed near the end of 2005. He has not worked for an employer since.

- [43] The respondent purchased a house in December 2005 on Ross Street in Vancouver ("Ross Street Property"). Part of the proceeds of the East 28th Property taken by the respondent alone was used in this purchase, which was in the respondent's sole name. The respondent was able to put \$185,000 down on the purchase price of \$457,000 and finance the rest.
- [44] In 1995, the respondent's mother, who had been living in Romania, died. The respondent inherited her property. There was no evidence at trial of the value of that property at the time of inheritance.
- [45] In 2005, the respondent travelled to Romania two or three times for extended periods (weeks or months, his evidence varied). His evidence was that he did so to fix up and to then rent his Romanian property.
- [46] In 2006, the respondent continued travelling from California to Romania on occasion while he supervised renovations of his property. He was quite proud that his renovation work increased the value of the property.
- [47] In September 2006, the respondent sold his property in Romania, earning proceeds of just over \$1 million. He transferred USD \$1,019,819 to his bank account in the United States, and after that invested the money in various investments.
- [48] In 2006 and 2007, the respondent also travelled from California to Vancouver, Canada from time to time to maintain or oversee his properties.
- [49] On August 1, 2007, the respondent sold the Seymour Street Property for \$321,500.
- [50] In January 2008, the respondent attempted to return to the United States after spending time in Vancouver addressing some matters with respect to the Ross Street Property, whether preparing to rent it or improve it. The claimant received a phone call from an immigration official at the U.S./Canada border, asking for information about the respondent and telling her that he was not allowed to return to the United States because he did not have a visa.
- [51] At his request and to assist him in returning to their home in the United States, the claimant came to Canada with the son and she and the respondent married in Canada on April 5, 2008 ("second marriage").
- [52] The couple then attempted to cross the border into the United States to return home and were not allowed. Since the claimant had been working on her visa but had been in the United States for more than eight years, the immigration officials informed her that she should apply for a green card.
- [53] The claimant had to rely on colleagues at her son's private school to help her in closing up the family's apartment in California and retrieving her car from the San Francisco airport. She and the respondent and son have lived in Vancouver ever since.
- [54] Fortunately, the claimant's employer in California, Trane, agreed to continue to employ her. The claimant now works for Trane by computer and telephone from home in Canada.

- [55] The parties continued to try to make their relationship work after they were married in April 2008 and living together in Canada.
- [56] The parties lived in Vancouver until they moved to North Vancouver in November 2008, renting a residence.
- [57] At some point the parties decided to call an end to their relationship. The precise timing of this was difficult to determine because the parties continued to live together until September 2009. However, it was either in July 2008 (the respondent's position) or by the end of 2008 during the holiday season after the relationship had worsened considerably (the claimant's position).
- [58] In April 2009, the respondent decided to place a mortgage against the Ross Street Property as collateral for a line of credit which he used to invest in other investment vehicles. The bank required him to obtain a waiver and release from his wife. This document was presented to the claimant and she signed it on April 16, 2009, in the presence of the respondent and his lawyer, releasing her interest in the Ross Street Property pursuant to the Family Relations Act, R.S.B.C. 1996, c 128 [FRA] to the extent necessary to allow the bank mortgages to have priority.
- [59] At the respondent's request, a separation agreement prepared by him was signed by the claimant on May 22, 2009. The parties were at that time still living together. The respondent did not disclose his assets prior to or in the First Separation Agreement.
- [60] The Second Separation Agreement was signed by the respondent on August 4, 2009, and by the claimant on August 7, 2009. It was prepared by the respondent's counsel. The parties were still living together. The respondent listed many more of his assets in the Second Separation Agreement.
- [61] The claimant went to an independent lawyer who provided her with approximately thirty minutes of legal advice each time she signed a separation agreement. She did not seek to make any changes to the documents.
- [62] On August 31, 2009, the parties had a dispute in their residence in North Vancouver. Police attended. The claimant did not report any physical abuse at the time.
- [63] Subsequently, on September 5, 2009, the claimant went to the police and reported that she had been assaulted by the respondent and that she was afraid for her safety. The respondent was charged and entered into a peace bond, preventing him from living in the rental townhome they had been sharing. The charges were later dismissed.
- [64] Thus, as of September 6, 2009, the claimant and the parties' son were living apart from the respondent.
- [65] In October 2009, the respondent bought a condominium unit on Melville Street in Vancouver ("Melville Property").

- [66] In November 2009 the respondent purchased a condominium unit on Burrard Street in Vancouver ("Burrard Property").
- [67] On November 26, 2009 the claimant commenced this proceeding. She sought a divorce but made no claim for property or support. She sought an order for joint guardianship and joint custody with the primary residence of the son to be with her.
- [68] The claimant filed an amended writ of summons and statement of claim on June 29, 2010. In it, she sought an order setting aside or varying the Second Separation Agreement, division of property and reapportionment of family assets, child support and spousal support.
- [69] On March 2, 2010, the parties were divorced by order of Allan J. made at a judicial case conference in this proceeding ("second divorce").
- [70] A further amended notice of family claim was filed on August 2, 2012. It pleads that the Second Separation Agreement:

...was and is "unconscionable" and substantially unfair at the time it was executed and now. It was negotiated in circumstances when the Claimant was under the dominance of the Respondent.

- [71] On August 1, 2012, the respondent sold the Ross Street Property for \$724,500. This was a substantial increase in the value of the property above its original purchase price of \$457,000. The respondent used the proceeds to: pay off the mortgage and line of credit secured against the property; place \$125,000 in the trust account of his lawyer currently representing him; and invest \$290,000 cash into his investment portfolio.

Summary of Assets as at the Separation Agreements

- [72] While the respondent did not disclose the details of his assets in the First Separation Agreement, following the advice of legal counsel he did list assets in the Second Separation Agreement. According to that disclosure, the respondent owned the following assets, worth the approximate following values as at the date of the Second Separation Agreement, August 2009:
- a) the Ross Street Property, purchased in December 2005 prior to the second marriage, and worth approximately \$528,000, with a mortgage debt against it of approximately \$121,000, leaving a net equity of approximately \$407,000;
 - b) an E-Trade Financial RRSP account valued at \$24,000;
 - c) shares in two tax shelters worth about USD \$25,000 and CAD \$10,000 which for ease of reference and due to a lack of evidence as to conversion rates, I will treat as totalling approximately CAD \$35,000 ("Tax Shelter Shares");
 - d) two brokerage accounts with Scotia McLeod with a present value of USD \$150,000 and \$100,000 respectively, which again for ease of reference I will treat as CAD \$250,000 ("Brokerage Accounts");

- e) a savings account with ICICI with a balance of \$105,000;
- f) a REIT investment with League Investments, valued at \$165,000;
- g) an investment in All Canadian Investment Corp. valued at \$50,000;
- h) an interest in Fisgard Capital Inc. valued at \$50,000;
- i) an interest in CareVest Capital Inc., a mortgage investment company, valued at \$75,000;
- j) an interest in a commercial mortgage fund with ACM Advisors Ltd., valued at \$50,000;
- k) an interest in a fund with Mandate Management Corp., valued at \$20,000;
- l) an interest in a fund with TD Mortgage, valued at \$20,000;
- m) a savings account with VanCity, valued at \$200,000;
- n) a chequing account with TD Canada Trust, valued at \$124,500; and
- o) a chequing account with TD Canada Trust, valued at \$101,000.

[73] At the time of the Second Separation Agreement, the claimant owned two savings instruments in relation to her work with Trane, valued at approximately \$58,000, namely some shares and a "401(k) account". She may also have had some modest RRSP savings against which she also had RRSP loans. I consider that if there is any net value of those RRSP investments it is not worth considering on the basis that the value would certainly be offset by the greater value of the respondent's US dollar investments above, if converted on a proper exchange rate to Canadian dollars.

[74] In addition, the two parties shared an RDSP account for their son's future needs.

[75] There is no dispute about any personal effects or motor vehicles and I will not consider them further other than to note that each party is to keep those items currently in their own names or possession.

[76] Just looking at the respondent's assets at the time of the two separation agreements, he had assets worth a value of approximately \$1,676,500.

[77] Of their combined assets totalling \$1,734,500, the respondent therefore had a ratio of almost 97% of the assets compared to 3% for the claimant.

B. Legal Framework of Property Division

[78] The main dispute between the parties has to do with property division.

[79] There are two intersecting areas of law at issue in this case: the common law regarding the enforceability of marriage agreements, which is a matter of contract law; and the statutory regime regarding property division in British Columbia governed by the FRA.

Common Law Doctrine of Unconscionability Applies to Marriage Agreements

- [80] The common law doctrine of unconscionability as it applies to marriage agreements was canvassed in the Supreme Court of Canada case of *Miglin v. Miglin*, 2003 SCC 24 [Miglin], and subsequently interpreted by the same court in *Rick v. Brandsema*, 2009 SCC 10 [Brandsema]. By marriage agreement, I mean an agreement between spouses entered into before or during marriage, or a separation agreement entered into on marriage breakdown.
- [81] In summary, a marriage agreement will not be enforceable at common law where it is unconscionable, either in the process leading up to its negotiation and execution, and, or, in its result if the result deviates substantially from the statutory objectives set out in the relevant statutes dealing with the consequences of marriage breakdown (Miglin "stage one").
- [82] The facts in *Miglin* dealt with a claim for spousal support in the face of an executed final separation agreement that dealt with all matrimonial breakdown issues and included a release of any future claim for spousal support under the Divorce Act. The Supreme Court of Canada emphasized the need to give considerable weight to parties' final agreements, as this furthers the policy goals of respecting the autonomy of individuals as well as the need for certainty and finality. However, it made clear that a court has the discretion to override a domestic agreement in some circumstances and should approach the analysis in two stages.
- [83] The first stage identified in *Miglin* includes two parts, which may be described as reviewing the agreement to analyse whether it is procedurally and/or substantively unconscionable. The Supreme Court of Canada in *Miglin* held that a court may intervene to override a domestic agreement dealing with spousal support in circumstances where there was a "fundamental flaw in the negotiation process" (at para. 82), also described as a "power imbalance" that "did vitiate the bargaining process" (at para. 83). As well, it held that a court has discretion to override a domestic agreement where the substance of it represents a significant departure from the relevant statutory objectives, or to put it another way, where there is not "substantial compliance" with the objectives of the statutory regime (at para. 84).
- [84] The first stage in *Miglin* is an application of the common law of contract and the doctrine of unconscionability in the context of a domestic contract, as noted in *Brandsema* at para.43.
- [85] The second stage of analysis identified in *Miglin*, after the above two-part first stage, requires consideration of whether the circumstances of the parties at the time of the application for spousal support are such that the terms of the domestic contract no longer "reflect the parties' intentions at the time of execution" and the objectives of the relevant statutory regime (at para. 88). Where the "current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of [the relevant statutory regime]", then the court may depart from the agreement (at para. 91). This second stage of the *Miglin* analysis may be seen as based on the court's exercise of its discretion under s. 15.2(1) of the Divorce Act, R.S.C. 1985, c. 3, to award spousal support notwithstanding an agreement between the parties, and is not based on the common law doctrine of unconscionability.

- [86] If there was a question following Miglin as to whether or not the stage one analysis in that case was limited to spousal support applications under the Divorce Act, or would be extended to domestic agreements dealing with property division where there is a statutory regime dealing with property division and marriage agreements on marriage breakdown, as in B.C., this question was answered in Brandsema.
- [87] The facts in Brandsema involved a couple in B.C. who entered into a negotiated separation agreement dealing with property division almost two years after their marriage breakdown. As I will touch on next, B.C. has a statutory regime dealing with property division on marriage breakdown, as set out in the FRA, which gives discretion to the court to reapportion assets differently than as set out in parties' marriage agreement. Nevertheless, the Supreme Court of Canada in Brandsema upheld the trial judge's decision that the separation agreement itself was invalid because it was unconscionable based on the stage one, two-part test in Miglin. The Supreme Court of Canada agreed that it was therefore unnecessary to go on to apply the statutory regime applicable to the reapportionment of assets under valid marriage agreements.

Statutory Regime in B.C. Where There is a Marriage Agreement

- [88] The FRA provides in s. 65 that a court has discretion to not enforce the terms of a marriage agreement dealing with property division, where it would be "unfair" to do so, and to reapportion the division of property based on a number of factors set out in s. 65(1).
- [89] Section 65(1) of the FRA presents a lower threshold than the contractual defence of unconscionability to challenge a marriage agreement's terms as to property division, as noted in Brandsema at para. 35. This is because circumstances which may be unfair may be less oppressive than circumstances which are unconscionable. In other words, a court may, under the FRA, determine that the division of assets in a marriage agreement is unfair and should be re-apportioned but at the same time, the marriage agreement is otherwise enforceable.
- [90] The Supreme Court of Canada in *Hartshorne v. Hartshorne*, 2004 SCC 22, considered the interpretation of unfairness under s. 65 of the FRA in the context of a marriage agreement entered into between two lawyers at the time of their marriage. The Court held:

67 Once an agreement has been reached, albeit a marriage agreement, the parties thereto are expected to fulfill the obligations that they have undertaken. A party cannot simply later state that he or she did not intend to live up to his or her end of the bargain. It is true that, in some cases, agreements that appear to be fair at the time of execution may become unfair at the time of the triggering event, depending on how the lives of the parties have unfolded. It is also clear that the FRA permits a court, upon application, to find that an agreement or the statutory regime is unfair and to reapportion the assets. However, in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement,

particularly where independent legal advice has been obtained. They should not conclude that unfairness is proven simply by demonstrating that the marriage agreement deviates from the statutory matrimonial property regime. Fairness must first take into account what was within the realistic contemplation of the parties, what attention they gave to changes in circumstances or unrealized implications, then what are their true circumstances, and whether the discrepancy is such, given the s. 65 factors, that a different apportionment should be made.

[Emphasis added.]

- [91] In B.C. there is not a clear dividing line between the factors that may be considered when determining whether or not an agreement is unconscionable, and when addressing the statutory test of whether or not the division of property in the agreement is unfair. Determining unfairness in the context of the FRA to an extent overlaps with the approach of determining whether an agreement is unconscionable, in that it considers the perspective of the parties at the time they entered into the agreement, and any procedural unfairness in the context of the negotiations, as well as the degree to which the agreement deviates from the statutory objectives, and any changes in the parties' circumstances not contemplated by them and not in accord with statutory objectives: *Hartshorne; M. (R.S.) v. M. (M.S.)*, 2006 BCCA 362 at para. 25 [*M. v. M.*].
- [92] If a court determines that a marriage agreement is not unconscionable and is therefore enforceable, it may nonetheless vary the agreement's terms as to spousal support and property division applying the applicable statutory regime for either spousal support or property division. This is akin to the Miglin stage two test because the court will look at the circumstances of the parties at the time of the application to vary the agreement: *Hartshorne; M. v. M.*
- [93] But if a court first determines that a marriage agreement is unconscionable and wholly unenforceable, the court may then ignore the contract and simply apply the statutory regime for property division with respect to the parties' respective rights and obligations, as in *Brandsema* and in *W.H. v. I.R.*, 2012 BCSC 1483 [*W.H.*].
- [94] The difference in approach between finding a marriage agreement unconscionable and unenforceable and then applying the statutory regime to determine if equal division of family assets would be unfair, versus finding a marriage agreement enforceable but unfair and subject to reapportionment, is very subtle but it is important from the perspective of the onus of proof and the starting presumption of what is fair. These are not flipsides of the same fairness test, applying the reasoning of the British Columbia Court of Appeal in *M. (S.B.) v. M. (N.)*, 2003 BCCA 300 at para. 23.
- [95] Under the statutory regime for property division in B.C., absent a valid marriage agreement, the starting point is that equal division of family assets is presumed fair, and a party who seeks to reapportion the division has the onus of showing that equal division would be unfair.

- [96] But where there is a valid marriage contract, the FRA presumes that the division of property under that marriage contract is fair, and a party seeking reapportionment of that division must demonstrate that it is unfair pursuant to s. 65(1). As noted above in the passage quoted from Hartshorne, a marriage agreement will not be unfair simply because it varies from the otherwise presumed equal division that would occur absent a marriage agreement.
- [97] Nevertheless, in both situations, whether challenging presumptive equal division where there is no valid marriage agreement, or challenging the division in the parties' valid marriage agreement, unfairness is determined by looking at the same factors set out in s. 65(1), which I will touch on next.

Statutory Regime for Property Division Absent a Marriage Agreement

- [98] The FRA provides in s. 56 that each spouse is entitled to an undivided half interest in family assets (absent a marriage agreement to the contrary). Pursuant to s. 65, if the division of property between spouses under the prescribed equal division would be unfair having regard to a number of factors, the court may order that the property covered by s. 56 be divided into shares fixed by the court.
- [99] The factors to consider in determining unfairness of s. 56 equal division, or for determining whether property division under a marriage agreement is unfair, are, pursuant to s. 65(1) of the FRA:
- (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[.]
- [100] In order to determine how assets might have been presumptively divided under the FRA absent the separation agreement, it is necessary to first determine which assets of the parties were family assets.
- [101] The date of the triggering event for determining family assets, pursuant to s. 56(1) of the FRA, will be when the separation agreement was made, if the Second Separation Agreement is valid, which will be August 7, 2009. If there is not a valid separation agreement, the triggering event will be the date of the second divorce, in March 2010.

[102] A family asset is a defined term in the FRA. There are several ways, relevant on the facts here, that an asset could become a family asset:

- a) pursuant to s. 58(2), if it is ordinarily used for a family purpose by both spouses, or by a single spouse or by a minor child;
- b) pursuant to s. 58(3)(c), if it is money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;
- c) pursuant to s. 58(3)(d) if it is a right of a spouse under a retirement savings plan;
- d) pursuant to s. 58(3)(e) if it is 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;
- e) pursuant to s. 59, if it is owned by only one spouse and used primarily for business purposes, but the other spouse made a direct or indirect contribution to the business. An indirect contribution includes savings through effective management of the household or child rearing responsibilities: s. 59(2).

[103] It is important to appreciate that the claimant's claim for property division pursuant to the FRA is a claim based on the second marriage, of April 2008.

[104] The law is clear that use of an asset for a family purpose prior to marriage does not make the asset a family asset. The asset has to be ordinarily used for a family purpose during the marriage to become a family asset: *Bindley v. Muliner*, 2001 BCCA 380.

[105] However, indirect or direct contributions by one spouse to the other's business interests or venture, can make that business interest or venture a family asset pursuant to s. 58(3)(e) and s. 59. This is so even with respect to pre-marriage contributions to a venture or business asset, which pre-marriage contributions can convert such an asset to a family asset after marriage: *McIntosh v. McIntosh* (1982), 38 B.C.L.R. 133 at 136 (C.A.).

[106] Assets purchased after a triggering event cannot be family assets, even if purchased from the proceeds of a family asset: *Foster v. Foster*, 2007 BCCA 83 at paras. 34-35.

Analytical Approach

[107] In order to appreciate the position the parties were in at the time of the Second Separation Agreement, and whether that agreement's terms regarding property division might be unconscionable or unfair, it is necessary to first consider what assets may have been family assets under the FRA, to which there was a presumptive entitlement to equal division. I will therefore look at the parties' use, intentions and contributions to their assets and their finances during their relationship and make a determination of what assets were family assets at the time of the Second Separation Agreement.

- [108] I will next consider whether or not the Second Separation Agreement is unconscionable at common law. This requires considering the process and circumstances surrounding the negotiation and execution of the agreement, from the perspective of the parties, and the substance of the Second Separation Agreement.
- [109] As will be seen in the Reasons that follow, I have concluded that the Second Separation Agreement is entirely unconscionable. There is therefore no need to go on to consider whether or not the division of assets under it is unfair pursuant to a s. 65 analysis.
- [110] Rather, my next step will be to consider property division under the FRA absent the Second Separation Agreement. The question becomes: would presumptive equal division of assets be unfair, having regard to the factors in s. 65, and if so, how should property be divided?
- [111] After I have dealt with the dominant issue in this case, property division, I will then address child support, spousal support, and any remaining issues.

C. Credibility

- [112] I pause to address briefly the matter of the parties' differing evidence on the circumstances of their marriage.
- [113] The actual duration of the parties' second marriage, which is the foundation for the claimant's property claims under the FRA in this proceeding, was short: they married on April 5, 2008, and they either separated in late July of 2008 or around the end of December 2008. Their divorce was in March 2010. Without more to the parties' relationship, this short duration of marriage could be a factor that might substantially limit the claimant's property claims in this case.
- [114] As fairly observed by Abella J. on behalf of the Supreme Court of Canada in *Brandsema* at para. 30:

It is inherent in disputes generally, and matrimonial conflicts in particular, that parties have inconsistent versions of the underlying events. It is the trial judge's job as judicial historian to sift through the record, watch and listen to the parties, and determine which version of disputed events is the most reliable.

- [115] The respondent's position is that there was nothing more beyond the short second marriage which would make his assets family assets. The essence of the respondent's position is that he and the claimant were only romantically involved for a short time at the beginning of their common law relationship, not having a sexual relationship after their child was born; that throughout they agreed to keep all of their assets and debts separate, with agreed but fair sharing of some living expenses only; and that their second marriage, like the first, was for immigration purposes only but not any indication that they intended to share their property. Thus the two separation agreements, by which the respondent kept his assets representing approximately 97% of the parties' total assets, was fair as this reflected what they had always agreed and how they lived.

- [116] The claimant's position is that she and the respondent were in a committed relationship and, together with their son once he was born, were a family for approximately 16 years, from 1993 until the end of the second marriage, whether that was in July 2008 or closer to the end of 2008. The only exception to their committed relationship was an approximately 17 month split between the parties when the respondent moved to California and the claimant stayed behind with their son in Connecticut, before joining him, from April 2004 to August 2005 (although they did have reunions during this time).
- [117] The claimant's position concedes that the parties' two formal marriages were spurred on by the respondent's immigration needs, but the effect of her evidence is that they also reflected the fact of the couple's commitment to be together as a family. The thrust of the claimant's evidence is that during the relationship the respondent was domineering and that the claimant did not challenge him on financial issues but went along with what he wanted and directed. She contributed directly to the purchase of the first property, the East 28th Property, as well as to the purchase of the Pinecrest Property. It appears according to her evidence that her agreement was not sought on the financial arrangements made by the respondent with respect to the purchase and sale of either of these properties or subsequent investments.
- [118] The claimant's evidence is that during the relationship the claimant bore the majority of their living expenses and almost all of the expenses for their child, and in this way she indirectly contributed to the respondent's acquisition and maintenance of his assets. When the second marriage broke down the parties continued to live together but she was being abused psychologically and physically by the respondent and so to keep the peace, and to get him to move out of their home and leave her safe with the child, she was willing to sign any documents or separation agreement he put in front of her, and she did so. While she went to a lawyer, she did so just because the respondent told her to and she was just going through the motions of getting independent legal advice, as she wanted to sign whatever he wanted her to sign so that he would move out of the home.
- [119] Here, having heard both parties' extensive evidence, and considering all of the facts of their actual conduct since they first moved in together as a couple in 1993, I find the claimant's version of events the most reliable and most consistent with the preponderance of evidence and conduct of the parties.
- [120] I also found the claimant to be by far the more credible witness. Where the claimant and respondent's evidence conflicts, I prefer the claimant's evidence. I will touch on this more when I delve into the relevant areas of factual dispute.
- [121] This is not to say that I have rejected all of the respondent's evidence or accepted all of the claimant's evidence.
- [122] There were some problems with the claimant's evidence, especially concerning the date of separation. She testified at trial that she had previously gone along with swearing under oath that the date of July 2008 was their separation date because the respondent told her

this date would make it easier to divorce right away, since they had to be separated for one year. Her evidence at trial was that in fact they continued to act as a couple even though the relationship was rocky until they finally agreed to call an end to their relationship at the end of 2008.

- [123] Whenever a party tries to distance herself from evidence given under oath, that party's evidence must be closely scrutinized: if willing to lie under oath one time, the person may be willing to lie under oath another time. Here, I have carefully considered the claimant's evidence based on this admission. It seems to me that this admission by the claimant was not seeking to gain any advantage at trial. The second marriage was short no matter what way you look at it. Rather, this admission of previous untruthfulness was more likely to hurt her overall credibility before the court and the fact that she brought it up was consistent with my overall impression that she was trying to be absolutely truthful in her evidence at trial.
- [124] The First Separation Agreement, prepared by the respondent, set out that the date of separation was January 2009, which is consistent with the claimant's trial evidence. At the time of the Second Separation Agreement in August 2009, things were very tense between the parties, although they were living together. I find it most likely that the claimant went along with the respondent's change of separation date to July 2008 in that agreement, just as she went along with everything else in it, because she wanted him out of the house. He was using the Second Separation Agreement as his leverage before he would leave. Later, because she had accepted that separation date as set out in the Second Separation Agreement, she stuck to it throughout most of the litigation, including on discovery, until giving her evidence in court when in the witness box she explained that it wasn't true. There was an insignificant benefit to the claimant to change her evidence, and potentially this could be to her detriment given that it would reflect poorly on her credibility. I have concluded that her evidence at trial was true although I remain of the view that it is not material on the facts here.
- [125] I also want to comment on the subject of conduct of parties within the marriage relationship. The courts are loath to hear evidence of the details of the parties' bad behaviour towards each other in the marriage relationship. The law is quite well-established that the rights of spouses on marriage breakdown, whether to support or to property, are not affected by either party's conduct during the marriage: *Tratch v. Tratch* (1981), 30 B.C.L.R. 98 (S.C.) at 108-109. It is simply not relevant whose fault it is that the marriage broke down.
- [126] However, that does not mean that conduct is never relevant to an issue in a matrimonial case. Where evidence of a party's conduct during the relationship helps to prove or disprove a necessary element of a claim or defence, it may indeed be relevant.

- [127] Here the respondent's defence to the claim for division of assets argues that the two parties had an agreement throughout their relationship to keep their assets separate, and this ultimately was confirmed in the parties' written separation agreements. The claimant disagrees with this version of events. The claimant says that the respondent's conduct toward her as a domineering and controlling bully is relevant to the issue of what was her state of mind at the time she signed the separation agreements. I agree that the evidence of the parties' relationship, and possible domination or abuse of the claimant by the respondent, may be relevant to that limited extent. However, such evidence is of limited value. What this court cannot and will not do is use the division of property or orders for support to punish a party to a matrimonial proceeding for bad conduct during the marriage or after the marriage breakdown, nor does the claimant seek this.
- [128] I find on the whole of the evidence, including my assessment of each party's credibility, that the claimant was bullied and abused by the respondent during the relationship and that this abuse was escalating at the time that the respondent demanded she sign the two separation agreements. I found the claimant's evidence on this fact of the relationship to be entirely credible. She did not seek to amplify her criticism of the respondent and indeed she explained how she loved the fact that he was a strong man, and felt that she could accommodate his needs because she was more easygoing. She explained how she gradually became more and more put-down by him: first by insults about her intelligence, which over time she started to believe; and then by physical abuse as well; and she explained how she wanted to make sure her disabled son had his father in his life especially in case something happened to her. Her demeanour in giving her evidence seemed to me to be sincere: she broke down in tears at times which were consistent with the subject matter of her evidence, and especially in talking about her fears and concerns for her son.
- [129] The respondent's demeanour and evidence unwittingly corroborated the claimant's description of the dynamic of their relationship. The respondent in his evidence found subtle but numerous ways to put down the claimant's abilities as inferior, for example in terms of her employment, in dealing with finances, and in pursuing therapies for their son. I found him insincere as a witness, seemingly seeking to ingratiate himself with the court, but often rambling and contradicting himself from one moment to the next. He often raised his voice in volume in cross-examination. He also frequently raised the pitch of his voice as though to mimic the claimant speaking.
- [130] The respondent's dominance and the claimant's acceptance of this dominance is consistent with the parties' conduct: she followed the respondent to the places where he chose to seek to live; she took on the responsibility for the major living expenses such as rent or mortgage and their child's expenses; she took on the responsibility for caring for the child and paying for expenses while the respondent was unemployed but seeking to improve his real estate assets in Romania or Canada; and when he asked her to drop everything to help him immigrate to the United States, she did so. The same thing happened when it came to signing the separation agreements: he told her to sign and she did so without questioning

the content.

- [131] The claimant's evidence that the respondent was domineering and controlling of her and often abusive was corroborated by the respondent's conduct when he was ultimately forced out of their residence by police officers in September 2009. The respondent began a campaign of email messages to everyone that the claimant knew: her employer, her son's school, and other contacts. These email messages grossly invaded the claimant's privacy in an attempt to humiliate and degrade her. The respondent also took photographs of his son lying on the bed with sex toys, and circulated it, apparently in the hopes that recipients of his messages would conclude that the claimant was responsible for these grotesque photographs. I find that the respondent's vindictive behaviour was consistent with the claimant's description of how he would control and punish her during the relationship.

D. The Parties' Intentions and Contributions

- [132] I will now address the question of what were the parties' intentions and contributions towards their assets during the marriage.
- [133] The respondent gave evidence that at practically the beginning of their domestic relationship, the claimant told him she wanted to keep their assets separate. He says this occurred after she inherited the Romanian properties from her mother in 1993. He says that the claimant gave him a power of attorney to go to Romania to deal with selling the properties, which required him to go there three times and bring back money three times, in the 1995-1996 time period, bringing back \$9,000 then \$8,000 and \$3,000 respectively for a total of "around \$20,000". He claims that he suggested to her that they use the money towards the down payment to buy a house in Vancouver and she told him in strong terms that he could not tell her what to do with her money. He says that they argued about it for some time and then he told her that he would agree, and that if that was her point of view, she could keep her money forever and he could keep his money forever.
- [134] The respondent referred to this discussion as the basis for the parties' agreement and conduct throughout their relationship to keep their property separate from each other. He went out of his way to portray the agreement as being at the claimant's insistence. He brought it up in his evidence even when it was not responsive to questions he was being asked, trying to indicate it was the claimant's fault and choice if they kept their money separate after this. I found his evidence self-serving and incredible and did not believe it.
- [135] There are several reasons I did not believe the respondent's evidence that the claimant insisted on keeping their assets separate when she had available money from the sale of Romanian properties inherited from her mother. The first and most obvious reason is that it was contradicted by the conduct of the claimant.
- [136] What the claimant did with at least a significant part of her savings was agree that it could go towards the deposit on the purchase of the couple's first major asset, the East 28th Property, which was purchased in 1998. This was property purchased in both parties'

names, and the claimant went along with the respondent making all of the arrangements with respect to that property. She was not given paperwork to keep on that property's purchase or eventual sale nor did she think to keep proof of how much she contributed, how much the respondent contributed, and how much was financed. The claimant thus was not keeping her assets separate from the respondent nor was she behaving in a way that suggested she was concerned to do so. Rather, her behaviour suggests that she deferred to the respondent to do what was prudent with respect to that property investment.

- [137] That she was willing to put her assets in the respondent's hands and trust him to do what was right with them was also evident from the fact that when the claimant inherited the Romanian properties from her mother, she gave the respondent a power of attorney to deal with selling the properties and left all of the details in his hands.
- [138] The respondent's evidence as to how much the claimant contributed to the East 28th Property was also not credible and was self-serving.
- [139] The claimant estimates her financial contribution to the East 28th Property was approximately \$25,000 of her savings; the respondent says that she only put in \$12,500. The respondent testified that he put in approximately \$50,000 towards the property, plus an additional \$15,000 was borrowed on his credit card. Given the length of time that has passed, neither party had documents at trial to corroborate their version of the contributions towards the East 28th Property.
- [140] The market value noted on the property transfer of the East 28th Property was \$290,000 and the mortgage was in the amount of \$217,500 when the parties purchased it in 1998. This evidence is suggestive of total cash purchase costs in excess of the mortgage being in the range of at least \$75,000. If the respondent's claim that he put in cash of \$50,000 is correct, the claimant's recollection that she put in approximately \$25,000 sounds accurate. The only difference is the respondent's evidence that he borrowed an additional \$15,000 on his credit card to put towards the deposit.
- [141] However, the respondent's evidence on this varied in cross-examination, when he agreed that in an affidavit he had sworn quite recently he described the total down payment on the East 28th Property as being \$70,000 of which he put down slightly over \$50,000 and the claimant put down \$18,000 to \$19,000. Earlier on his examination for discovery on November 22, 2010, he claimed that she put in a "few thousands" of dollars, and that he did not recall whether her contribution was \$5,000 or \$10,000 or \$12,000 or \$8,000.
- [142] I do not believe the respondent's evidence as to the initial contributions to the East 28th Property purchase. His explanation at trial of how much the claimant contributed was very much an exercise in reconstruction but an unbelievable reconstruction at that. Because he gave her a cheque for \$25,000 on the sale of the East 28th Property several years later, I conclude that he most probably worked backwards to give evidence that he returned to her double her initial investment so that he would appear generous. Generosity was not the hallmark of the respondent's character during the relationship and he would have seen this

as very generous.

- [143] What the respondent tried to do at trial is buttress his evidence by providing details that did not ring true. He suggested that he remembered precisely the amount of money he brought back to the claimant from the sale of her inherited properties, although at one time he said \$22,000 and another time \$20,000, and he testified that the claimant fought with him about using it to purchase a home and insisted on spending \$5,000 of the money on eye correction surgery and probably another \$1,000 on clothes and women's things like powders and creams. The latter point was made in an attempt to portray the claimant as frivolous, which is one of the subtle put-downs I referred to earlier.
- [144] But the home was purchased in 1998, which was a couple of years at least after the claimant's Romanian properties were sold. The claimant was employed and so one would have thought that she had the opportunity to save some money from her employment by that date, as she testified she did.
- [145] The respondent further argued in his cross-examination that he knows that the claimant's down payment on the East 28th Property was less than \$20,000 because both were "penniless" at that time and had no savings. This is interesting, because it unintentionally undermines the respondent's evidence that he contributed \$50,000 and an additional amount which he raised by way of credit card debt. If there is a kernel of truth in this it is more likely that his contribution, if it was \$50,000, was partly financed by credit card debt as he would not have had significant savings based on all the evidence. Furthermore, given that both parties were contributing to their mutual expenses, a credit card debt that might have been incurred by the respondent is not the same as cash any more than is the mortgage debt paid by the claimant. Also, it would have been repaid, in part, by the claimant's contributions in paying living expenses for the couple.
- [146] I do not accept that the respondent put in significantly more money than the claimant did towards the East 28th Property purchase or that the claimant put in only \$12,500 and that the respondent gave her back double her investment on the sale of the property.
- [147] I prefer the claimant's evidence as to her contribution. Unlike the respondent who continually revised his evidence, the claimant did not attempt to buttress her evidence with after-the-fact details. She readily agreed in cross-examination that she once had laser surgery to correct her vision, but said it cost \$3,000. This is not inconsistent with her also spending \$25,000 on the East 28th Property using proceeds from her inheritance and savings from employment.
- [148] With respect to the purchase of the Pinecrest Property in Connecticut, the claimant estimated her contribution was approximately \$5,000. She also made all the mortgage payments.

- [149] The respondent denied that the claimant made any contribution towards the purchase of the Pinecrest Property, but said that when he sold that property, he paid her approximately \$4,000 to \$5,000 out of the net proceeds and kept the rest, approximately \$35,000. He said that he paid her because she kept the house clean and opened the door for people going in to see it. Later, in cross-examination the respondent said that he put the claimant's name on the purchase of the Pinecrest Property because their relationship was good and to give her confidence in the future with him.
- [150] Again, I prefer the claimant's evidence that she contributed to the purchase of the Pinecrest Property and received nothing on its sale.
- [151] The respondent did admit in cross-examination that he used at least part of the proceeds of the sale of East 28th Property to purchase the Seymour Street Property and the Ross Street Property. The respondent then collected rent on those properties, which could be used towards their mortgage financing and as his income.

E. The Parties' Finances

- [152] Both parties agreed in their evidence that they maintained separate bank accounts during the relationship and did not have a joint account. They also took different responsibilities for paying for expenses.
- [153] As mentioned, the respondent testified that early on in their relationship, at the time when the claimant refused to share her inheritance from her mother (a story I do not accept), they also agreed that they would split expenses where she would pay rent, which he described as "a small portion" of their expenses and only one bill per month, and he would "pay for everything else". He testified that the other expenses he paid for exceeded rent, because they included purchase of his car, car expenses, food and entertainment.
- [154] The claimant agrees that the respondent would pay for the food and often (but not always) the utilities.
- [155] It is agreed that whenever the parties lived together, the claimant paid the entire rent for their residence, with the exception of the East 28th Property and Pinecrest Property, when she paid the mortgage during the time they resided in these properties (these were the only two properties they owned which they lived in).
- [156] The couple rented out a suite in the East 28th Property while they lived there, and the respondent collected the rent. Thus, the respondent had the rent to assist him in paying his share of expenses while they lived there.
- [157] Once both moved out of the East 28th Property, the respondent rented the whole of the house, and collected the rent. This paid for any mortgage and other related expenses.

- [158] When the claimant moved to Minnesota to join the respondent there, until she found employment she was unable to pay rent or some of her personal expenses. The respondent kept track of these expenses and once the claimant found employment, she was required to pay him back for the rent, as well as for any other personal expenses she had incurred while she was without income. The same thing happened on any other moves.
- [159] In addition to paying for rent the whole time the couple were together, the claimant also says that she always paid for all expenses in relation to their son. The respondent disagrees and says that he paid a share of their son's expenses. He also suggests in his evidence that he did not agree with some of the therapies that the claimant wanted for their son and so he did not pay for the expenses, for example, for vitamins.
- [160] I accept the claimant's evidence that she bore the vast majority of expenses related to their son as it fits with the rest of the evidence as to the overall dynamic of the relationship and the respondent's attitude towards their son's condition. The respondent made it clear that as the mother she was responsible for the majority of the child's expenses. Furthermore, once the son was diagnosed as autistic, the respondent saw it as a waste to spend money on programs unless there was evidence that the program presented a cure. He also blamed the claimant for causing the child's disorder. The respondent's position was that he was not paying for anything that was not guaranteed to help the child. The claimant's position was that autism is a varied disorder, and various therapies had to be tried to see what would help.
- [161] The claimant spent a great deal of her time outside of her work hours pursuing tests and therapies for the parties' son, or taking their son to and from caregivers who would care for him while she was working. It fell to her to do this even when the respondent was not working. For a short time, no more than a few months when they lived together in Connecticut and the respondent was not working, he stayed home with the child while a therapist would spend four or five hours a day working with the child.
- [162] The claimant was required to limit her hours of work in order to spend more time to care for the child. Every time the respondent moved or travelled, it was the claimant who remained behind taking care of the child.
- [163] The respondent argues that the parties had an agreed "separate property regime", much like the couple with the "modern" marriage in *Lye v. McVeigh* (1991), 56 B.C.L.R. (2d) 158 (C.A.). I disagree. I find on the evidence that the regime between these parties was not a matter of negotiated agreement between equal partners.
- [164] As with any child, the parents had a shared duty to care for their child. I find that this couple's child required extra care and the greater share of the responsibilities fell on the claimant. She did not mind, but her greater burden of working and taking care of the child and his expenses, as well as the rent and other expenses, left her with little or no extra time or energy and little ability to save money. She simply went along with this as a matter of duty but I do not find that this equates to an agreement between equals to keep a separate

property regime.

- [165] As for the respondent's intentions regarding his assets during their relationship, it does seem clear that he did not want the claimant to have any legal title to the majority of his assets other than the East 28th Property and Pinecrest Property (it is likely that the facts that the claimant was employed and that they needed to obtain mortgage financing made this a requirement).
- [166] While the respondent had short periods of employment, he gave up employment altogether in 2005. That was the year he had taken several leaves from his employment to go to Romania and fix up his inherited property.
- [167] Once the respondent sold his Romanian property and brought the approximately USD \$1 million to the United States in 2006, he decided that he would spend his time managing his money and his properties as his own investment advisor. When he was not let back in to the United States in 2008 and the parties married, he moved his money to Canada.
- [168] The respondent intermingled his various sources of money: savings from his earlier years while employed; the profits on the sale of the East 28th Property and Pinecrest Property; rental income earned on his real estate properties; equity in other real estate investments; and the funds he received on the sale of his inherited Romanian property.
- [169] For example, the respondent used part of the proceeds of the sale of the East 28th Property to purchase the Seymour Street Property in 2004, and the Ross Street Property in 2005, and also used some of his other savings from employment during the years towards these purchases. When he received the proceeds of sale of his Romanian property, he paid off the mortgage on the Seymour Street Property. He took out a line of credit secured by the Ross Street Property at one point and used the line of credit to invest in other investments (whether mutual funds or securities or money market accounts of some sort). He used part of the net proceeds of sale of the Seymour Street Property to pay off the mortgage on the Ross Street Property.
- [170] Even after bringing the proceeds of the Romanian property to the U.S.A. in 2006, the respondent mingled it with money from all sources and moved it between various investments. Thus, his investments included proceeds from the real estate sales, real estate rentals, his employment income from earlier years and the sale of the Romanian property, and these sources of funds were not segregated. Some of the investments were conservative such as bank instruments earning interest, some were a little bolder, such as mutual funds or securities. He regularly monitored and moved these investments around, investing them in amounts of \$100,000 or less approximately, and monitored the varying maturity dates of savings instruments. He took out money when he found he needed money for expenses. In more recent years, he invests more in the stock market and as he describes it, he "buys and sells all the time".

[171] The respondent claims that he is a very successful investment manager and has spent several hours a day at it for years and currently, and that this explains why it would make no sense for him to seek out employment.

[172] The respondent's evidence was also that he uses the money he has saved from his assets to grow more assets, and to pay for his own expenses and to pay for things for his son. He admitted in cross-examination that his intention with respect to his assets was to grow them and use them for the care and use of his son, to build up their financial security, and that will remain his intention until he dies.

F. What Assets Were Family Assets as of the Separation Agreements?

[173] It is clear that during the parties' second marriage they did not physically live in any of the real estate properties owned by the respondent. As for the respondent's financial investments in securities or bank accounts, it is also clear that the claimant had no direct involvement in those investments during the second marriage. It is therefore fair to conclude therefore that during the second marriage the claimant did not directly use the respondent's assets for a family purpose.

[174] Also, during the period of the second marriage, the claimant did not make a direct contribution to the assets in the respondent's name: she did not, for example, give him money to invest in property or financial instruments.

[175] The respondent says that because the assets were not used by the claimant during the second marriage, and she made no direct contribution to them, none of his assets are family assets.

[176] The problem with the respondent's position is that it fails to take into account two things:

- a) his own intentions with respect to his assets, during the marriage; and
- b) indirect contributions by the claimant to his assets before and during the marriage.

[177] Here, I find that the nature of the parties' relationship was such that any intentions and contributions regarding property that existed prior to the second marriage continued after the second marriage. In other words, there was nothing about the occurrence of a formal second marriage which created a new beginning for the couple: they were operating on the same basis before and after the second marriage, until they ultimately split up.

[178] The respondent's continuing intentions with respect to his assets prior to and continuing into the second marriage were to use them for the support of himself and his son, and in part, to pay for shared living expenses with the claimant. He knew that his son would always be dependent. The unemployed respondent had no other means of contributing to family expenses.

- [179] The respondent used some of the money from his investments (he did not distinguish between capital or income) to pay for whatever family expenses he contributed towards during the second marriage, such as food or utilities.
- [180] All of the respondent's assets were pooled by him as a source for investing, including growing capital and earning income. He looked at his management of this pool of assets as equivalent to employment and intended that with his skill managing them, these assets would grow in value and he would be able to use them to support himself and his son and provide for their future financial security, both on a day to day basis and for the rest of their lives.
- [181] This intention and use of the respondent's assets made them family assets within the meaning of the FRA. It is not necessary that he intend the claimant to use them.
- [182] In addition, I find that the respondent's investments in property and financial instruments constitute a "venture" within the meaning of the FRA s. 58(3)(e), as he has always managed these as a single portfolio, balancing the type of investment and risk so as to best earn income and grow the capital.
- [183] The meaning of "venture" within the context of the FRA was canvassed in *Kalasz v. Kalasz*, [1998] B.C.J. No. 3022 at para. 15 (S.C.), *aff'd* 2000 BCCA 47:

15 In the text, Family Law Sourcebook for British Columbia (Continuing Legal Education Society of British Columbia, 1997 Revision) at para. [9.24] the following appears under the heading, "Definition of a Venture":

"Venture" as used in s. 58(3)(e) includes any business of a spouse to which the other spouse has directly or indirectly contributed money or money's worth (*Robertshaw v. Robertshaw* (No. 2) (1979), 17 B.C.L.R. 137 (S.C.)). See also 9.27 regarding excluded business assets.

A venture is often defined as an "undertaking attended with risk". In *Richardson v. Richardson*, [1983] B.C.D. Civ. 1591.8-01 at 1650-01 (S.C.), the Court adopted this as being the plain and ordinary meaning of the term. The definition was endorsed in *Lawrence v. Lawrence* (1985), 69 B.C.L.R. 268 (C.A.), where the Court also referred to Black's Law Dictionary, saying that a venture is an undertaking accompanied by risk. This definition has been interpreted liberally to include "... any investment in which there is an element of risk, and which has the potential for profit, even though its primary function may be to serve some other purpose .." (*Joki-Hollanti v. Joki-Hollanti*, [1990] B.C.W.L.D. 862 (S.C.)).

- [184] There was no other function to the respondent's assets other than as a part of his investment portfolio. None of the respondent's assets were for recreation or for use as a personal residence. He has no attachment to any of them, and buys and sells them at will, managing risk and return so as to grow their value and generate income.

- [185] I find that the claimant contributed to the maintenance and acquisition of the respondent's assets, both directly and indirectly. Her direct contributions occurred prior to the second marriage, when she contributed to the acquisition of the East 28th Property and to the Pinecrest Property. These contributions can be traced into other properties, as the equity taken by the respondent on the sale of East 28th Property was part of the capital he used to buy other properties, such as the Ross Street Property and the Seymour Street Property. The equity in those since-sold properties was in turn used to invest in other types of investments existing in his investment portfolio during the second marriage.
- [186] I find also that the claimant made indirect contributions to the growth of the respondent's assets in two key ways during the whole time they were together:
- a) she always paid the rent or mortgage for their residence, allowing him to accumulate savings and greater equity in assets;
 - b) by taking care of the majority of their child's needs and expenses, the claimant freed up the respondent's money and time to devote to improving and growing his assets.
- [187] The claimant and respondent both started out with virtually nothing by way of assets at the start of their relationship. They had similar professional qualifications, but the claimant had a better employment record. How is it that the respondent ended up with 97% of the assets by the end? It was not, as he would suggest, simply because of his inheritance or particular investment skill.
- [188] The respondent was able to accumulate savings from employment, and turn the proceeds of sale from the East 28th Property into two other real estate purchases in Vancouver: the Ross Street Property and the Seymour Street Property. While the Vancouver real estate market grew in value over time, the respondent rode the tide of increasing property values, which he did not fairly share with the claimant. The reason he was able to invest in real estate in Vancouver was because the claimant remained in steady employment and was able to pay the bills through her employment income and she looked after their son while the respondent travelled to Vancouver. He was also able to leverage these real estate investments into other assets, again because of the claimant's indirect contributions.
- [189] Further, the respondent was able to devote significant time to renovating and increasing the value of his Romanian property so that it could be sold for approximately USD \$1 million, precisely because the claimant was staying behind in the United States taking care of their child and paying the bills for their child and their common residence with her employment income. We do not know what the value of that Romanian property was when he received it, or anything about the Romanian property market over the years because the respondent called no evidence on this. But there is no doubt that the respondent took pride and credit for significantly increasing the value of his inherited Romanian property through his efforts, during a time when the claimant was looking after everything else.

- [190] The claimant's indirect contributions occurred before the second marriage but they did not stop at the second marriage, they continued seamlessly. She did not stop paying the bills from her employment income or stop looking after their child.
- [191] It matters not that the second marriage was short in terms of determining which assets are family assets. Duration of marriage comes into it when considering reapportionment of family assets.
- [192] I conclude that the respondent's entire pool of assets were family assets as at the time of the Second Separation Agreement due to:
- a) first, his intentions during the second marriage to use capital and income from his investment portfolio to fund his and his son's present and future living expenses; and
 - b) second, the claimant's contributions before and after the second marriage to the respondent's investment portfolio, which portfolio of assets was treated by him as one investment pool which he managed, and constitutes a "venture" within the meaning of the FRA.
- [193] These conclusions are consistent with the analysis of the courts in: *Brainerd v. Brainerd*, 22 R.F.L. (3d) 113, [1989] B.C.J. No. 1223 (C.A.); *Evetts v. Evetts*, 85 B.C.A.C. 19, [1996] B.C.J. No. 2614 (C.A.); *Eng v. Eng*, 2006 BCSC 1353; and *Hartshorne v. Hartshorne*, 2004 SCC 22 at para. 97.
- [194] Also, the respondent's RRSP is a family asset due to application of s. 58(3)(d) of the FRA.
- [195] The claimant advances an alternative constructive trust and tracing argument, should the claim that the respondent's investment assets are family assets fail. Given my conclusion that the respondent's investment assets are family assets, I find it unnecessary to address this argument.

G. Is the Second Separation Agreement Unconscionable?

- [196] The claimant argues that the circumstances surrounding the agreement render it unconscionable, both in terms of the dominance that the respondent was exerting over the claimant and in terms of the respondent's lack of disclosure, and also that the agreement is substantively unconscionable, with the result that the agreement should be set aside on the principles enunciated by the Supreme Court of Canada in *Brandsema*.
- [197] The claimant also argues that division of assets under the agreement is substantively unfair in that it fails to accord with the principles and objectives of the FRA, and therefore it should be varied by application of s. 65.
- [198] I will approach this issue by first reviewing the circumstances surrounding the Second Separation Agreement.

Process of Negotiating the Second Separation Agreement

- [199] The circumstances surrounding the Second Separation Agreement require consideration of the First Separation Agreement as well.

The Claimant's Evidence

- [200] The claimant testified that after the second marriage the parties' relationship became unbearable by the end of 2008. Whereas she used to go to her paid employment outside of the home, now she was working from the home. While the respondent had always been verbally and physically abusive, she claimed that he became even more so as they were in the house together much of the day. The constant abuse was making it very hard for her to work from the home. Also she said that she realized that it was not good for their child to be witnessing her being hit by the respondent or to witness the screaming and yelling in the house. She said that by the end of 2008 she begged the respondent to move out of the house for everyone's sake. She said she understood he had money and owned a property, and so she felt he could afford to move.
- [201] The claimant said that eventually the respondent told her that he would move if she agreed to sign a paper and so she said she would do so.
- [202] The respondent presented the claimant with the First Separation Agreement in its present form as the paper she needed to sign so that he would move out. There were no negotiations about it or exchange of ideas. He told her that she had to find her own lawyer and sign it in front of that lawyer. The claimant admitted reading the agreement but said she paid little attention to it other than she was relieved to see that he had agreed that their son would live with her.
- [203] The claimant found a lawyer through the yellow pages and a referral promotion whereby the first half-hour would only cost approximately \$15. According to the claimant, she met with the lawyer, Ms. Louise Johnston. The meeting with Ms. Johnston was very short and although they talked a little bit about the agreement, the claimant does not remember telling Ms. Johnston anything about the nature of her relationship with the respondent. Although she did not deny that she may have received legal advice, she just did not pay attention to it and did not recall it. The claimant's mindset was simply that she had to get the agreement signed to get the respondent out of the home.
- [204] The First Separation Agreement did not set out any details regarding the parties' relationship, other than the fact that they were married on April 5, 2008 and had been living separate and apart since January 8, 2009.
- [205] The First Separation Agreement stated that the parties would live separate and apart and "be free from the control of each other". It provided that sole custody and primary residence of the son would be with the claimant and otherwise the parties would have joint guardianship.

[206] As for property the First Separation Agreement listed as the property of the respondent "household items" for a value of "\$300,000". That was all that was disclosed with respect to the respondent's assets. The claimant did not know to what this referred. There were no assets disclosed under her name in the First Separation Agreement.

[207] Paragraph 17 of the First Separation Agreement stated:

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.

[208] In fact, the parties had not negotiated the terms of the First Separation Agreement but instead they were simply presented to the claimant by the respondent.

[209] The First Separation Agreement provided that each would retain their own property and be responsible for their own debts.

[210] Even prior to the First Separation Agreement being presented to and signed by the claimant, the respondent asked her to sign a consent and waiver of her rights to the Ross Street Property. This document was requested by the respondent's bank in order for him to obtain a new mortgage on the Ross Street Property, which he wanted so that he could invest in other investments. The claimant was taken to the respondent's lawyer, Mr. Catalin Mitelut, and she signed the document in front of him with the respondent present. The legal significance of the document was not explained to her, nor did she question it because the respondent told her she needed to sign it, according to her evidence.

[211] After the claimant signed the First Separation Agreement, the respondent did not move out, contrary to his earlier promise. The claimant asked him for a date when he would move and he said he needed time to look for a place.

[212] As for the Second Separation Agreement, the claimant signed it on August 7, 2009, in front of the same lawyer, Louise Johnston.

[213] The claimant said that the respondent presented the Second Separation Agreement to her shortly before she signed it. She said they had no discussions about the contents. He simply told her that she had to sign a separate agreement so they were clear on money matters between them. She did not know why the document was changed from the first agreement but she did see that it now included a date when the respondent would move out of the house, which was to be December 31, 2009.

[214] The claimant admits giving the Second Separation Agreement a cursory reading and noticing that the respondent listed many more assets. However, she had no basis for knowing if what he said was true or not because he had never given her any background documents.

- [215] The claimant's evidence was that she did not ask for access to the respondent's financial information because she knew it was a taboo subject. She said that she knew that he had an obsession with money and she would get a slap in the head if she asked about it. She did not question him about his assets because it was always his attitude that what was hers was hers and what was his was his and she never had questioned that. The tenor of her evidence was that she would be regularly physically abused by the respondent during the relationship if she ever questioned anything he did and did not follow his rules and so she tried to avoid questioning him at all costs. I accept her evidence and do not find this evidence amounts to acquiescence but rather it amounts to avoidance of dispute.
- [216] Once again, the claimant went to Ms. Johnston for a thirty minute appointment. She told the lawyer she had no concerns about the agreement because she wanted to sign it. The claimant proposed no changes to the agreement and simply signed it. She knew it was a legal document. The claimant said she went to a lawyer to get the document signed, not to spend too much time or pay money for it.

The Claimant's Independent Legal Advice

- [217] When considering the circumstances of the negotiation and execution of a marriage agreement, the presence of independent legal advice may be a factor which helps to balance out the bargaining power and correct any inherent vulnerability. However, this depends on all of the circumstances. As noted in Brandsema:
- 61 ... Given that vulnerabilities are almost always present in these negotiations, the parties' genuine wish to finalize their arrangements should, absent psychological exploitation or misinformation, be respected. One way to help attenuate the possibility of such negotiating abuses is undoubtedly through professional assistance. But exploitation is not rendered anodyne merely because a spouse has access to professional advice. It is a question of fact in each case.
- [218] Ms. Johnston, the lawyer who the claimant met with prior to signing the separation agreements, testified at trial as a witness called by the claimant. She confirmed that she saw the claimant on only two occasions, each time for approximately a half hour. She said that the claimant was concerned not to go beyond the half hour. The first visit was on May 22, 2009 and dealt with the First Separation Agreement. The second visit was on August 7, 2009, and dealt with the Second Separation Agreement.
- [219] The first meeting was arranged at a discount fee for the first half-hour pursuant to a lawyer referral service. Ms. Johnston confirmed that normally she spends more time than this to go through a separation agreement with a client, but she did not do so here because the claimant was determined to keep within the half hour.
- [220] Ms. Johnston was not informed of the living circumstances of the claimant or the nature of her relationship with the respondent. The First Separation Agreement showed the claimant and respondent as having different addresses. At her first meeting with the claimant Ms. Johnston did not know that the parties were still living together and so she did not probe

how that might have affected the claimant's ability to act independently. She had the impression that they had two separate households, given that the First Separation Agreement said that they had been living separate and apart since the beginning of the year.

- [221] Ms. Johnston said that the claimant was very flat in her affect and withdrawn and did not volunteer information. Her answers to Ms. Johnston's questions were limited and vague and not animated. She described the claimant as being not terribly informative and very reticent.
- [222] Ms. Johnston said she walked the claimant through the terms of the First Separation Agreement at the first meeting. Ms. Johnston said that she gave the claimant an explanation of the concept of family assets under the FRA and the claimant just nodded and did not say anything.
- [223] Ms. Johnston then said that she told the claimant that the agreement was inadequate because it was one-sided and giving the claimant nothing and the respondent everything, and that she could not recommend that the claimant sign it. The claimant said she would not change it. At that point the half hour was over and the claimant wanted to get the document signed.
- [224] It was clear to Ms. Johnston that the claimant was determined to sign the agreement and had made up her mind to do so. The claimant signed the agreement in front of her.
- [225] Ms. Johnston was asked in cross-examination by counsel for the respondent whether or not the claimant told her that the parties had an agreement to keep their assets and finances separate. Ms. Johnston denied that she was told this.
- [226] At the second visit, according to Ms. Johnston's evidence, the claimant was very concerned about keeping the visit short because now they were not under any discounted fee arrangement. Ms. Johnston's only opportunity to see the Second Separation Agreement was during the meeting which again only lasted approximately thirty minutes. There were no negotiations with the respondent or his lawyer about the terms of the document.
- [227] Ms. Johnston said she ran through the preamble facts with the claimant and asked her if they were accurate and the claimant said she had no issue with them.
- [228] Ms. Johnston testified that she felt that the essential terms of the First Separation Agreement were still in effect in the Second Separation Agreement: there would be no spousal support; no claims by the claimant on the respondent's property; and the parenting arrangements were pretty much the same. She observed that there was a new term in that there was some property identified as the claimant's.
- [229] In the Second Separation Agreement, the claimant was stated to be earning more than the respondent.

- [230] From Ms. Johnston's perspective, the claimant had already given up rights to spousal support and an interest in the respondent's assets by way of the First Separation Agreement, and so the impact of the Second Separation Agreement was pretty small. Ms. Johnston described it as being anti-climatic.
- [231] In cross-examination, Ms. Johnston was asked if she addressed whether or not the assets listed under the inheritance section of the Second Separation Agreement were used by the claimant. Ms. Johnston explained that she did not get into that issue with the claimant because the claimant had already waived all her rights to the respondent's assets (under the First Separation Agreement) and she was stuck with that whether she did or did not sign the Second Separation Agreement. According to Ms. Johnston, it was quite obvious that the claimant was not getting anything no matter what.
- [232] This of course was not strictly correct: if the First Separation Agreement was invalid due to lack of disclosure or other reasons, the claimant had not given up her rights to the respondent's assets.
- [233] Ms. Johnston was not asked if she canvassed with the claimant the subject of the claimant's indirect contributions to the assets shown in the Second Separation Agreement as being derived from the respondent's inheritance. I infer however that it is likely she did not, for the same reasons: she had concluded that the claimant had already given up all of her rights.
- [234] Ms. Johnston said that the claimant expressed no concerns with the Second Separation Agreement. She stated that the claimant was essentially mute through the process, seemed to her to be calm and unconcerned, and wanted to sign it and so she did.
- [235] Ms. Johnston explained it is her practice to ask clients to speak up if they have questions when she is taking them through a separation agreement. However, she could not recall the claimant asking any questions during the review of the First Separation Agreement or the Second Separation Agreement.
- [236] Ms. Johnston did not have any indication that the claimant had any involvement in the drafting of either separation agreement.

The Respondent's Evidence

- [237] The respondent's evidence regarding the Ross Street Property waiver and release signed by the claimant was that the document was signed at a meeting between the two of them and a lawyer. The respondent said he could not recall exactly what was said at the meeting, but he said he told the lawyer they had a separation agreement. The lawyer said it did not matter, that he still needed to ask if she agreed to give up her right and the claimant said she agreed and then she signed the paper.

- [238] The respondent's evidence on this was so vague as to be unreliable. Furthermore, it was not credible that he referred to a separation agreement at the time the Ross Street Property waiver was signed, as there was no signed separation agreement then.
- [239] The respondent's evidence regarding the First Separation Agreement was at first that he got the form off the internet after going to a family law lawyer who referred him to the online source. That lawyer was Mr. John Paul Boyd, a witness called by the claimant at trial.
- [240] The respondent then changed his evidence to suggest that he obtained the agreement online prior to ever seeing Mr. Boyd. This was more likely accurate.
- [241] The respondent testified in his direct evidence that the First Separation Agreement was prepared by both him and the claimant. He says that he signed it in front of Mr. Boyd five or ten days prior to when the claimant signed it on May 22, 2009. I note that Mr. Boyd's records and evidence indicate that he and the respondent met on May 15, 2009, with respect to the First Separation Agreement.
- [242] The respondent testified that the claimant said to him "don't think you'll take [our son] from me" and he said he would not. He said that the provision in the First Separation Agreement that the claimant would have sole custody was what the claimant wanted. The respondent said that Mr. Boyd explained to him that guardianship was more important from a legal point of view and that is why he wanted to have joint guardianship.
- [243] The respondent said that his estimate of his income in the First Separation Agreement of \$50,000 was not a precise amount but an estimate based on a brief calculation including how much income he earned from renting the Ross Street Property. I note that the First Separation Agreement does not say anything about the income being earned by the Ross Street Property, but instead suggests that the respondent is working as a mechanical engineer with Dragos Consulting Co. earning an annual income from that work.
- [244] The respondent said that the reference in the First Separation Agreement to "household items" of \$300,000 was meant to be an estimate of the equity in the Ross Street Property. He did not list the assets he claims to have accumulated based on his inheritance. He testified that at that time he did not believe he needed to do so. He tried to offer up the excuse that the claimant did not disclose everything either. I note that he had knowledge of her savings connected to her employment because she had previously discussed them with him.
- [245] The respondent says he discussed with the claimant that the \$300,000 figure was equity in the Ross Street Property.
- [246] The First Separation Agreement is dated January 8, 2009, and at Clause B states the parties have been living separate and apart since that date. The respondent's evidence regarding the date of the agreement and the date of separation was that they started talking about the separation agreement in January 2009 and so they dated the agreement and the date of separation that date. However, it was signed in May 2009, and clearly, on its face, was not a complicated agreement that would take much time to prepare. I do not believe that the

respondent prepared the agreement and discussed it with the claimant approximately five months in advance of when it was signed.

- [247] The respondent testified that he asked the claimant if she wanted him to give her spousal support and she said she was not interested in spousal support or the assets, that all she was interested in was having enough money for her and her son. When the respondent gave this evidence, he used a high voice, approaching falsetto, as if to mimic the voice of the claimant. I found this evidence unbelievable. It may be true that the claimant did not ask for spousal support or assets but I do not believe that she volunteered that she was not interested in these things.
- [248] The respondent took the agreement to Mr. Boyd and according to the respondent, Mr. Boyd told him he was stupid. In any event, it is clear that Mr. Boyd gave the respondent advice that the agreement was unlikely to be enforceable, but if he wanted it signed the claimant should sign it in front of her own lawyer.
- [249] As for the circumstances giving rise to the Second Separation Agreement, the respondent asserted in his direct evidence that Mr. Boyd told him he had to amend the First Separation Agreement because the claimant was doing something in the bedroom with a boyfriend. This evidence was not credible but it illustrates a pattern in the way the respondent often answered questions at trial, seeking to put down the claimant as a way of rationalizing the respondent's behaviour.
- [250] I find that the respondent initiated the Second Separation Agreement because he was jealous towards the claimant who was starting to break free of the relationship and he was concerned that he might not have a valid First Separation Agreement based on Mr. Boyd's earlier advice to him.
- [251] The respondent said he asked Mr. Boyd to prepare a new separation agreement around June of 2009. According to him, he told the claimant he was doing so and her response was that he could do whatever he wanted. Again, the respondent gave this evidence using a high voice to mimic (and seemingly mock) the claimant.
- [252] The respondent agreed that the claimant asked him for a specific date when he would move out of the premises and he said he would need at least six months and that is why he put December 31, 2009, in the Second Separation Agreement as the date he would move out. No explanation was given at trial as to why it would take so long for the respondent to leave the home, and I find this is an indication of the continuing control he was trying to assert over the claimant.

The Respondent's Legal Advice

- [253] Mr. Boyd gave evidence at trial, called by the claimant. He confirmed that he was the respondent's family law lawyer who witnessed the respondent signing both separation agreements. Mr. Boyd also assisted the respondent in preparing the Second Separation Agreement.
- [254] The respondent's first meeting with Mr. Boyd was on May 15, 2009. The respondent brought the First Separation Agreement and signed it in front of Mr. Boyd.
- [255] The next communication between the respondent and Mr. Boyd was in July 2009. The respondent asked Mr. Boyd to prepare a new separation agreement and told him that his top priority was to keep his assets and the claimant's assets separate.
- [256] Mr. Boyd agreed that in terms of what the claimant would receive under the separation agreement with respect to property, and with respect to her waiving spousal support and receiving child support, the Second Separation Agreement operated relatively similarly to the First Separation Agreement.
- [257] As well, Mr. Boyd confirmed that the drafting of the agreement was not a matter of give and take between the parties. He could not recall any component of his client's instructions communicating that the claimant was asking for various things in the agreement.
- [258] On July 24, 2009, Mr. Boyd sent an email message to the respondent telling him that given the disparity in the parties' assets and the length of their relationship, the proposed asset split in the Second Separation Agreement was "grossly unfair". He advised him that:
- While you and [the claimant] are free to contract as you like, you need to know that the agreement will probably be found to be unfair if [the claimant] decides to challenge it.
- [259] He explained this opinion in a further email message on July 28, 2009.
- [260] In cross-examination, Mr. Boyd agreed that he then learned that the respondent claimed that USD \$1 million came from his inheritance and that this might change his opinion. Nevertheless, he remained concerned about the Second Separation Agreement operating unfairly.
- [261] Mr. Boyd did not testify as to having any knowledge of the degree to which the purported inherited funds were intermingled with other sources of funds directly or indirectly contributed to by the claimant.
- [262] The respondent's emails to Mr. Boyd described the atmosphere at the party's home at the time of the Second Separation Agreement this way: "[t]he situation in the house is still very tense".

Was the Process of Negotiating the Second Separation Agreement Fundamentally Flawed?

- [263] As I have noted earlier in these Reasons in setting out the legal framework, the courts may consider the negotiation process leading up to a separation agreement, and if that process has fundamental flaws in it, may conclude that the resultant separation agreement is unenforceable as unconscionable. Examples of where the negotiation process leading up to a separation agreement was found to be fundamentally flawed include where there was a vulnerability on the one party and a lack of financial disclosure by the other party: Brandsema at paras. 46-48; W.H. at paras. 71-72.
- [264] As noted, the respondent has conceded that the First Separation Agreement is not valid as it failed to disclose the respondent's assets. This concession recognizes the case law that such non-disclosure will usually be fatal when the opposite party does not have independent knowledge of the non-disclosing party's considerable assets. Furthermore, the respondent clearly intended to revoke the First Separation Agreement, as is stated in the terms of the Second Separation Agreement.
- [265] The respondent argues that the process leading up to the Second Separation Agreement was not flawed because there was full disclosure of the respondent's assets in it and the claimant had independent legal advice. Furthermore, the respondent denies that the claimant was in any way vulnerable.
- [266] I do not accept the respondent's arguments. I find that the process leading up to the Second Separation Agreement was seriously flawed and did not reflect a fair and equal negotiation. I base this conclusion on the following findings of fact:
- a) The claimant was vulnerable at the time of the Second Separation Agreement. The history of their relationship shows she was dominated by the respondent and she had no independent sense of being able to stand up to his demands. She was still living with the respondent, and found the living situation unbearable due to his abusive conduct towards her. This was affecting her ability to work from the home, which employment was necessary so that she could afford the services and living expenses for herself and her son. The claimant was very concerned about the well-being of her son in such an unhappy home environment, especially given the son's challenges, and desperately wanted the respondent out of the house. Both the First Separation Agreement and the Second Separation Agreement were seen as the condition precedent to the respondent leaving the house and to the claimant being free of the respondent's oppression.
 - b) There was no disclosure of the respondent's many assets at the time of the First Separation Agreement. By the time of the Second Separation Agreement, the situation of the claimant giving up any interest in those assets was viewed by her and her lawyer as a fait accompli due to the First Separation Agreement. They felt that even if she did not sign the Second Separation Agreement, the situation under the First Separation Agreement would continue.

- c) Likewise, by the time of the First Separation Agreement, the claimant had already signed a document waiving her rights to the Ross Street Property, without the benefit of disclosure of her contributions or independent legal advice.
- d) Any disclosure in the Second Separation Agreement was limited by the fact that there was no disclosure to the claimant of any supporting documents that would verify the facts asserted in that document. There was no way of the claimant knowing whether or not she had directly or indirectly contributed to the respondent's assets.
- e) There were no negotiations as to the terms of the Second Separation Agreement or the First Separation Agreement, or the earlier Ross Street Property waiver. These documents were signed by the claimant as presented.
- f) The respondent knew of the claimant's vulnerability and all of the above facts. The respondent was determined not to let the claimant benefit from what he saw as his assets. He had the benefit of legal advice that brought home to him that the agreement might subsequently be seen as unfair, and he did nothing to remedy that. While he tried to decrease that risk by having a Second Separation Agreement signed, he still knew that he was taking a risk but he must have concluded that it was worth taking. A reasonable inference from their relationship is that he felt that the claimant would never have the courage to stand up to him.

[267] The fact that the claimant went to a lawyer and received thirty minutes legal advice before signing each agreement is an important factor to consider. It is true that in a situation where there is no vulnerability, a party can choose to limit the legal advice she receives and this will not necessarily create a defence to the enforceability of the contract. But here, due to the claimant's vulnerability, she simply did not feel she could question the agreements as presented by the respondent. In the circumstances of this case, the legal advice that the claimant received was limited due to the claimant's own vulnerabilities and did not remedy the imbalance of power or oppressiveness of her circumstances.

[268] In *Gurney v. Gurney*, 2000 BCSC 6, the court observed:

29 In the family law context, providing independent legal advice must mean more than being satisfied that a party understands the nature and contents of the agreement and consents to its terms. The solicitor should make inquiries of the party so as to be fully apprised of the circumstances surrounding the agreement. The party should be advised of his or her legal rights and obligations in relation to the subject matter of the agreement and advised of the consequences associated with a refusal to sign. The solicitor should offer his or her opinion on the question of whether it is appropriate for the party to sign the agreement in all of the circumstances. It is only with that kind of advice that the party can make an informed decision about the advisability of entering into the agreement as opposed to pursuing some other course. In this regard, the cases of *Turyk v. Derby*, [1980] B.C.J. No. 773 (B.C.S.C.), *Inche Noriah v. Shaik Allie Bin Omar*, [1929] A.C. 127 (H.L.) and *Brosseau v. Brosseau* (1989), 63 D.L.R. (4th) 111 (Alta. C.A.) are of assistance.

[269] The respondent argued in closing submissions as follows:

Further, in the case at bar, a lack of disclosure from the Respondent would not be a determinative factor for the Claimant on whether or not she would have entered into the agreement. The fact is that the Claimant would have entered into the agreement regardless of whether the Respondent had \$10,000, \$1,000,000 or \$10,000,000 in assets. It simply was not an important factor for her upon negotiating this agreement. The only factors that she cared about were custody of [the son] and having the Respondent move out of the house.

[270] The respondent fails to recognize that these facts emphasize the claimant's vulnerability and the flaws in the negotiating process.

[271] In the circumstances of this couple, in order for the Second Separation Agreement to be fairly negotiated, the claimant needed to know what she was giving up, namely, a potentially valid claim to the assets in the respondent's name. This required receiving advice from a lawyer who had a fairly in-depth understanding of the couple's history and who was able to give her a sophisticated legal analysis based on that history, which never occurred. The claimant also needed to know that she and her son would be safe and she could get the respondent out of their home even if she did not sign the Second Separation Agreement, which in her vulnerable state she did not think was an option.

[272] Perhaps had the respondent moved out of the home, entered into reasonable arrangements with respect to the parties' son, and had a civil relationship with the claimant, the claimant would not have been so vulnerable. But since he insisted on having a separation agreement signed before he would move out, exploiting these volatile and tense circumstances, he must bear the consequences of the manifestly unfair process.

[273] I conclude that the process leading up to the Second Separation Agreement was fundamentally flawed so as to be unconscionable and to invalidate the agreement. This is sufficient to justify setting it aside. However, I will also consider the second prong of the claimant's argument, namely, that the substance of the agreement was also unconscionable and failed to comply with the objectives of the legislative scheme. The respondent argues for the same reasons that the substance of the agreement was so unfair as to justify the court's reapportionment of assets under it, pursuant to s. 65.

Substance of the Second Separation Agreement

[274] There are several problems with the substance of the Second Separation Agreement.

[275] The preamble to the Second Separation Agreement contains the following misstatements:

- a) That the respondent was self-employed as a mechanical engineer through his company Dragos Consulting, and that this work requires him to spend time in the United States. In fact, he had not worked as a mechanical engineer in years. His company was being used to receive the claimant's income from her U.S. employer only.

- b) That their child was "mildly" autistic. In fact he is not likely to ever be independent and the claimant's greater devotion to his needs explains why the claimant was disadvantaged during the parties' relationship.
 - c) That only the respondent purchased the Pinecrest Property, but that the proceeds were divided between themselves to their mutual satisfaction. In fact both contributed to the purchase, the claimant did not receive any of the proceeds of the Pinecrest Property and had no say in how the proceeds were used.
 - d) The preamble is set out in a way that suggests it is chronological and mentions the respondent's purchase of the Seymour Street Property before mentioning the sale of the East 28th Property. In so doing, it is misleading and does not disclose that at least part of the proceeds of the sale of the East 28th Property were used by the respondent towards the purchase of the Seymour Street Property.
 - e) That the East 28th Property was sold and the proceeds divided to the parties' mutual satisfaction. In fact, the claimant had no say in the way the proceeds were divided and the proceeds were not divided fairly, as the respondent took more than a fair share.
 - f) That the respondent moved back to Vancouver in 2004 after the first divorce, and remained living in Vancouver when the claimant and the parties' son moved to California, but that he visited them there. The preamble suggests that only in 2007 did the respondent move to California to live with the claimant but that the parties "did not reconcile and their relationship was not marriage-like". This was untrue and an attempt to minimize the relationship. In fact the respondent moved to California, and then the claimant and the parties' son joined him there and they all lived there together. While the claimant agreed on examination for discovery that the relationship was not marriage-like, she was not asked to define this or to explain the level of commitment to each other. The fact is that she and the respondent shared a bed and a residence and for all purposes were living as a family with their son during this time. It was in fact like a marriage, albeit an unhappy one.
 - g) That the parties separated after the second marriage on July 25, 2008, and although they continued to live together under the same roof, "they did not reconcile and their relationship was not marriage-like" after this. I have set out above that I accept the claimant's evidence at trial that the separation date was in fact later, towards the end of that year.
- [276] Perhaps individually these misstatements in the preamble to the Second Separation Agreement were not material. But taken together they created an impression that minimized the parties' relationship and minimized any contributions that the claimant had made to the assets, wrongly suggesting she had been paid back her share of the profits gained on the East 28th Property and the Pinecrest Property.

- [277] The Second Separation Agreement listed property owned by the respondent in detail, at clause U. However, there had been no prior disclosure of documents to enable the claimant or her lawyer to confirm or contest this information. Furthermore, the respondent listed the bulk of his assets as having been purchased with the inheritance he received from his mother. The agreement completely failed to acknowledge that he had intermingled these funds with his own savings and profits from real estate accrued during the time the parties were together. The agreement also failed to acknowledge any indirect or direct contribution by the claimant to the respondent's assets.
- [278] Most importantly, the division of assets under the Second Separation Agreement was a division of 97% in the respondent's favour. I have set out above my finding that these were family assets. A division of family assets in this proportion is so far from the goals of the FRA that, combined with the flawed process of its negotiation, I have little difficulty in concluding that the agreement was substantively unconscionable as well.
- [279] It is also clear on the analysis in *Miglin and Moge v. Moge*, [1992] 3 S.C.R. 813, that the claimant would be entitled to compensatory spousal support if she ended up with no assets at the end of the relationship, in contrast to the respondent's large asset base. The fact that the agreement provided that the claimant had no claim to the respondent's assets and no claim to spousal support is also unconscionable. Given the rest of my findings, I do not find it necessary to expand on this point further.
- [280] The respondent had no reason to rely on the agreement in the circumstances. The respondent was cautioned of its fundamental unfairness by his lawyer before the Second Separation Agreement was signed but he nevertheless went ahead with it.
- [281] As noted in *Brandsema*, at para. 50:
- ...the best way to protect the finality of any negotiated agreement in family law is to ensure both its procedural and substantive integrity in accordance with the relevant legislative scheme.
- [282] The respondent chose to have the Second Separation Agreement negotiated in circumstances where he sought to exploit the vulnerability of the claimant. He entered into it without any reasonable expectation that it would be considered fair and enforceable. In the circumstances, he is not entitled to expect that the agreement would provide him with certainty or finality.
- [283] I have concluded that the Second Separation Agreement is so fundamentally flawed procedurally and substantively as to be wholly unconscionable and unenforceable.
- [284] Even if I had not reached this conclusion, I would conclude that the division of assets under it is so substantively unfair as to justify being completely ignored and reapportionment of assets to occur as though starting from a blank slate and presumptive equal division, based on all of the factors in s. 65 of the FRA. I find it unnecessary to set out this alternative analysis in any further detail.

H. Property Division

- [285] Given my conclusion that the Second Separation Agreement is not valid, the triggering event for determining what assets are family assets is when the parties received their second divorce on March 2, 2010.
- [286] Between the date of the Second Separation Agreement and the second divorce, the respondent bought two condominium properties: the Melville Property and the Burrard Property. There were no other acquisitions or sales of real estate properties between those dates.
- [287] The respondent also moved around some of his investment accounts. As but one example, he closed his investment accounts with ScotiaMcLeod and opened accounts with TD Waterhouse.
- [288] The question is, therefore, whether these new assets, in existence at the triggering event, were family assets.
- [289] The claimant argues that the Melville Property and the Burrard Property and any new investment accounts opened after separation are family assets. They of course were not used by the claimant. But these properties were part of the respondent's ongoing investment strategy, part of his investment portfolio. The argument is that the fact some items in the portfolio changed from date of separation to date of the divorce, does not change their character to something other than family assets.
- [290] I agree. The respondent had no other source of capital or income to use to acquire these assets other than the investment portfolio which existed at separation, the entire content of which I have found to be family assets. His method of managing this portfolio did not change post-separation. His intentions to use his investment portfolio as his and his son's source of income and future financial security had not changed either. It was simply a continuing pattern that he bought and sold investments. The claimant's indirect contributions to the respondent's investments also can be considered indirect contributions to the investment assets existing at the date of the second divorce. I conclude that the respondent has not satisfied the onus of proving that the assets in his entire investment portfolio, real estate and otherwise, were not family assets as at the triggering event.

Value of Assets as at Trial

- [291] As mentioned, according to the respondent's most recent Form F8 financial statement provided as at August 13, 2012, he made a number of changes to his assets between the date of separation and trial, including the sale of the Ross Street Property and investment of some of these proceeds into other forms of investments in his portfolio. His assets listed at trial were:

- a) Melville Property with a 2012 assessed value of \$488,000 and a mortgage of \$192,165 and line of credit of \$99,996 for a net value of \$92,169;
 - b) Burrard Property with a 2012 assessed value of \$619,000 and a mortgage of \$165,789 and a line of credit of \$149,998, for a net value of \$303,213;
 - c) various savings accounts with total balances of approximately \$6,700;
 - d) TD Waterhouse securities account in Canadian dollars, \$928,580.72;
 - e) TD Waterhouse securities account in US dollars, \$103,964.13 (for ease of reference and because of the lack of exchange rate evidence, I will treat this as though it was a Canadian dollar amount);
 - f) an interest in Fisgard Capital Inc. valued by him at \$25,000 (in the Second Separation Agreement it was valued at \$50,000);
 - g) an interest in CareVest Capital Inc. still valued at \$75,000 (the same as in the Second Separation Agreement);
 - h) a REIT investment with League Investments was valued by him at \$30,000 (in the Second Separation Agreement it was valued at \$165,000);
 - i) funds held in trust with his lawyer in respect of the sale of the Ross Street Property, in the amount of \$125,000; and
 - j) an RRSP investment with TD Waterhouse in the amount of \$9,230.37.
- [292] The above asset values total \$1,698,857 after taking into account the debt secured against the Melville Property and the Burrard Property. It would be unfair not to take the debt into account. Thus, the respondent had assets at the time of the two separation agreements in his investment portfolio with a value of approximately \$1,652,500, or approximately \$46,000 less than at trial.
- [293] At the time of the triggering event the respondent did not own some of the specific items that are currently part of his investment portfolio, such as the TD Waterhouse securities account, which he acquired after the triggering event.
- [294] The law is clear that if family assets are sold after the triggering event, and new assets are purchased with the proceeds, the new assets do not then become family assets. Nevertheless, I find that comparing the value of the investment portfolio as at the time of the separation and at trial is of assistance in drawing inferences as to the value of the total investment portfolio as at the triggering event, the divorce in March 2010. Unfortunately, not enough documents were produced to be able to determine the precise breakdown of assets and values of those assets in the investment portfolio as of March 2010. While some of the assets are the same, such as the Burrard Property and Melville Property, as at the triggering event date, the respondent was using ScotiaMcLeod to carry out some of his investments and this had changed to TD Waterhouse by the time of trial. However, both at

the time of the divorce and at trial the respondent held the interests in Fisgard Capital, CareVest Capital, and the REIT investments.

[295] Comparing the assets at the time of the separation agreement and at trial, I am able to conclude from the evidence that the value of the family assets in the respondent's investment portfolio held at the time of the triggering event, March 2010, was approximately \$1,660,000.

[296] The claimant's assets at trial are virtually the same as at the time of the Second Separation Agreement, approximately \$58,000 worth of savings through her employer, Trane. She does not dispute that these would be family assets.

Factors to Consider in Favour of Reapportionment, if Equal Division Would be Unfair

[297] The starting position under the FRA is equal division of family assets. The respondent says that if his assets are declared to be family assets, equal division would be unfair taking into account the factors set out in s. 65(1).

[298] I will now review the factors in s. 65(1).

Short Duration of Marriage

[299] The short duration of the second marriage is a factor to be weighed in determining whether or not equal division of assets pursuant to s. 65(1)(a) would be unfair. Normally such a short marriage as the marriage between these parties would weigh in favour of reapportioning assets in favour of the party who brought them into the marriage.

[300] I do not infer from the fact of the short marriage and the immigration difficulty preceding it that it was for convenience only. That conclusion is contrary to the long relationship that the couple had together and their continued attempts to act like a family.

[301] The Family Law Sourcebook (Catherine Branch et al., Family Law Sourcebook for British Columbia, 3rd ed. by Laura C. Selby (Vancouver: Continuing Legal Education Society for British Columbia, 2013)) concisely summarizes the case law thus at § 4.79:

A short marriage does not necessarily make an equal division unfair, but will tend to increase the significance of the relative contribution of each spouse to the acquisition of the assets.

[302] In my view, the shortness of the second marriage is not a significant factor in this case as it is balanced out by other factors in s.65(1)(f), which refers to other circumstances relating to the acquisition and maintenance of the property, namely, in this case, the long history of contributions by the claimant, which I will address shortly. In all the circumstances, I find that the short duration of the marriage is not a factor that makes equal division of the family assets unfair, on the unusual facts of this case.

Duration of Separation

- [303] The duration the parties have lived separate and apart can be a factor which can make equal division of family assets unfair in some circumstances.
- [304] Here, there has been no significant growth in the value of family assets due to one party's sole contributions during the period of separation. I do not consider the duration of separation after the second marriage breakdown and the divorce to be a significant factor that would make equal division of the family assets unfair.

Date When Property Was Acquired or Disposed Of

- [305] I do not consider the date when property was acquired or disposed of to be a significant factor here weighing in favour of unequal division. Rather, the respondent's investment portfolio was contributed to by the claimant, directly and indirectly, long before the second marriage.

Property acquired by one spouse through inheritance or gift

- [306] If property was acquired by one spouse through inheritance or gift, this can be a factor that may lead a court to consider that equal division of that family asset might be unfair.
- [307] The respondent inherited the Romanian property in 1995, two years into the parties' common law relationship. The claimant's direct and indirect contributions to the growth in that asset started then, increased after their son was born in 1999, and continued at least until the parties formally moved apart in September 2009.
- [308] I conclude that the fact that some of the capital in the respondent's investment portfolio originated by way of his inheritance in 1995 is not a significant factor which makes it unfair to equally divide assets in the investment portfolio at the time of the triggering event, given the following:
- a) The claimant has directly and indirectly contributed to the respondent's venture, his investment portfolio, for a long time, namely, for more than ten years;
 - b) The claimant contributed her own inheritance to the respondent's investment portfolio. The purchase of the East 28th Property in 1998 was funded in part by the claimant's inheritance and was the seed investment in the respondent's investment portfolio;
 - c) The respondent has not disclosed how much his Romanian property was worth at the time of the inheritance. We only know what it was worth eleven years later when it was sold in 2006, after he had the opportunity to put time and effort into renovating it. He has taken considerable credit for increasing the value of that property during that time. He was able to do so because during this entire period he had the financial support of the claimant and she was expending significant time and money on raising their child.

[309] Given the claimant's role in the parties' relationship, I am unable to conclude that her contributions to the growth of the investment portfolio were significantly less than the value of the respondent's inheritance.

[310] The authorities are clear that when considering the division of family assets, the courts are not to treat a marriage like a ledger: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 882-883.

[311] In *Livingstone v. Livingstone*, 1999 BCCA 295, the British Columbia Court of Appeal made the following observations with respect to predecessor sections of the FRA, which apply equally here:

26 Little more needs to be said about the preservation and maintenance of the R.R.S.P. as a relevant factor. No unfairness arises in an equal division because of the husband's contributions to and successful management of the fund. The accumulation of wealth in any other form by the effort and ability of a spouse should not be unequally divided to reward that effort and ability. I refer to the remarks of Lambert J.A. in *Galbierz v. Galbierz* (1996), 22 R.F.L. (4th) 177 at 181 (B.C.C.A.):

[20] The new Family Relations Act introduced 15 years ago endorsed the social view that marriage is a true partnership, that each party makes a total commitment to the other and each surrenders individual aspects of their personal lives in the interests of their joint partnership. It is that view that was adopted by the Legislature in the Family Relations Act and which has been carried out in the application of the Act since that time.

[21] Counsel for the appellant invited this Court to establish a new application of s. 51(f) based on the particular success of the business ventures of one of the partners and to say that where there has been that particular success the partnership should not be regarded as having been an equal one but should be regarded as one where the person who is most directly responsible for that success should deserve a greater than equal share. Counsel was frank in saying that he was unable to refer to any authorities to that effect and I do not believe that any could be found. Nor do I think that such an application of the Act could be consistent with the concepts on which the Family Relations Act is based.

[Emphasis Added.]

[312] I am satisfied that the claimant's indirect and direct contributions over the period of time the parties were together were so significant that the fact that the respondent put his inheritance into the investment portfolio does not weigh in favour of reapportionment of family assets.

The Needs of Each Spouse to Become or Remain Economically Independent

[313] Both spouses have similar training and professional qualifications as mechanical engineers.

[314] Certainly without an equal division of family assets, the claimant would have a far greater difficulty achieving close to the degree of assets that the respondent has in his name. Most of her income has gone to paying for family expenses including for expenses for the parties' son. She has placed the family's needs ahead of her own, and thus suffered an inability to accumulate assets during the relationship, unlike the respondent. The claimant would be extremely financially vulnerable at retirement and might not be self-sufficient if the family assets were not divided equally.

[315] Both parties will have a lifelong and equal responsibility to provide for their son.

[316] There is no evidence on which to base a conclusion that either party needs a greater share of family assets than the other in order to become or remain economically independent.

Any Other Circumstance Relating to the Acquisition, Preservation, Maintenance, Improvement or Use of Property

[317] The respondent did not raise any other circumstance weighing in favour of unequal division of family assets.

[318] What weighs strongly in favour of the presumptive equal division and counterbalances any of the other factors that might lean towards unequal division, are the circumstances of the claimant's long contribution to the assets during the entire course of the parties' relationship, which was similar to a marriage. For the majority of the period from 1993 until they separated, some fifteen or sixteen years, they were a family unit. They shared a bed and a residence for most of this time, other than times when the respondent moved cities to obtain new employment, or pursued matters in relation to his property investments in other locations. After the first six years together, the parties had a child. Their lives were as intertwined as any married couple.

[319] I find that the only break the parties had in their relationship which could be characterized as a separation or breakdown of the marriage-like union, was during some part of the period from around April 2004 until August 2005, when the respondent moved to California and before the claimant and their son joined him there. Even then, they spent two school holidays together during that period. After that period, their relationship as a family unit continued.

[320] The respondent suggested in evidence and submissions that after their son was born, the parties' sexual relations ceased. The claimant disputed this. I do not find this a significant factor one way or the other.

[321] History is better viewed through conduct. Most relevant is the conduct of the parties in continuously seeking to make a home together over the course of so many years. Corroborative of the committed and exclusive nature of the relationship is the conduct of the respondent in writing explosive and jealous emails in September 2009, when he wrote to strangers he believed to be romantically involved with the claimant. In those email messages he alluded to the fact that he and the claimant had been together as a couple for

twenty years and were going through a difficult time of their marriage.

[322] I find that the parties had a committed relationship for close to sixteen years, equivalent to a marriage.

[323] Most importantly, I find that the claimant's direct and indirect contributions to the maintenance and growth of the family assets were significant and continuous throughout the parties' relationship. These circumstances outweigh any of the other factors that might influence unequal division, and justify applying the presumptive equal division of the family assets in this case.

Conclusion on Property Division

[324] Here, both parties made significant contributions to the family assets that they had at the time of the second marriage and at the time of the triggering event. While the marriage was short, the contributions were significant and longstanding.

[325] I find that equal division of family assets would not be unfair, having regard to all of the factors set out in s. 65(1).

Method of Division of Property

[326] This raises the question of what orders are appropriate to provide for equal division of family assets, or an equivalent result.

[327] Given that the respondent has disposed of some family assets since separation, and acquired other assets, equal division of family assets is no longer possible. I conclude that compensation orders that achieve a result equivalent to equal division of family assets should follow.

[328] The claimant seeks that the RDSP account held for their son be divided equally into two accounts to be managed by them each separately. This makes sense and is not contested and so I will grant this order.

[329] None of the family assets have sentimental value. They simply represent investments. The respondent called no evidence and made no submissions that he would suffer adverse tax consequences as a result of any compensation order.

[330] The value of the family assets totals \$1,718,000 (\$58,000 in the claimant's name plus \$1,660,000 in the respondent's name). One half of this value is \$859,000. I conclude that the appropriate order here is an order pursuant to s. 66 that the respondent compensate the claimant for her equal share of family assets by way of a payment to her, and that until this payment is made, the claimant will have a charge on the assets that are in the respondent's name.

[331] I order that:

- (a) the claimant is to keep the \$58,000 worth of family assets in her name alone, and the respondent will henceforth have no interest in them;
- (b) the respondent is ordered to pay to the claimant forthwith the sum of \$125,000 currently held in his lawyer's trust account; and,
- (c) the respondent is ordered to make a payment to the claimant of the balance of the claimant's remaining share of \$676,000 (\$859,000 less \$58,000 less \$125,000).

[332] I now turn to support issues.

I. Child Support

[333] There is no dispute that the respondent must pay child support to the claimant on the basis that the child spends over 60% of his time in the claimant's care.

[334] Where the dispute lies is in determining the respondent's income and in addressing s. 7 extraordinary expenses.

Respondent's Income

[335] Since 2005, the respondent has chosen to devote his time to managing his investment portfolio, rather than earning employment income.

[336] The average of the respondent's annual income earned from his investments for the three years 2009, 2010 and 2011 is \$68,229.

[337] Once the division of family assets occurs, the respondent will of course earn less from his investments. Historical averages are therefore of little assistance.

[338] However, I find that there is nothing to prevent the respondent from seeking and obtaining employment.

[339] The claimant's gross income before deducting business expenses (some of which have a personal element) is \$71,000. Some of her business expenses should not be included as she still retains the benefit of those monies for purposes of child support. If half of her expense deductions are accounted for, her income reduces to \$65,096.

[340] Despite having similar professional qualifications as the claimant, as a mechanical engineer, the respondent argued that "his employment history is not as successful" as that of the claimant. However, he has not proven any disability that prevented him from seeking full-time employment in the last several years, it has just been a matter of choice.

[341] Each party has a responsibility to earn income to support their child.

[342] The respondent submitted that while he did previously earn as much as \$75,000 US as a mechanical engineer, he cannot earn more than \$50,000 in employment in Canada.

- [343] Given that the respondent has professional qualifications, but has chosen to be out of the workforce for some years, it may be that he will not find as high paying employment as the claimant in the immediate term.
- [344] Given my orders dividing family assets, and the period of time that the respondent has been out of the work force, I accept that a fair income to impute to the respondent is \$50,000 per year as of 2013. Pursuant to the Federal Child Support Guidelines, SOR/97-175 [Guidelines], the amount of child support payable based on this income is \$458 per month.
- [345] Neither party seeks any retroactive orders regarding child support, which has been paid by the respondent since the Second Separation Agreement.
- [346] On the basis of a \$50,000 annual income in 2013, I order that the respondent's child support obligation as of March 15, 2013 will be \$458, payable to the claimant on the 15th of each month.
- [347] Each party will be required to exchange with the other copies of their complete income tax returns by May 1 of each year. I would hope that their incomes will grow and that when that happens, the parties will be able to reach agreement to adjust payment of child support accordingly, based on the Guidelines.

Extraordinary Expenses

- [348] The parties' son needs more support than the average child. The parties often have disagreements as to what therapies are best for him but both agree that he does need additional therapies.
- [349] In this case, it will be in the child's best interests to minimize the conflict between the parents when it comes to paying for extraordinary expenses. Both propose a process whereby a monthly amount for extraordinary expenses would be paid, and then there would be an annual adjustment when compared to actual expense receipts.
- [350] Based on the parties submissions, I find that the following categories of expenses are s. 7 extraordinary expenses:
- a) a behavioural consultancy report, which the parties were in the process of obtaining at the time of trial;
 - b) behavioural interventionist and other child care costs, net of any contribution from government or NGO funding;
 - c) music lessons;
 - d) summer, spring and winter camps, net of any bursary coverage the claimant may be able to find;

- e) significant community centre activities (swimming or trampoline lessons for example, distinct from one-off drop-in events);
- f) speech therapy;
- g) tutors as needed;
- h) MSP premiums attributable to the parties' son; and
- i) any other arising expenses as agreed to by the parties or pursuant to court order, and neither party shall incur an expense without the consent of the other if they expect contribution from other.

[351] The respondent agreed in final submissions that an equal sharing of extraordinary expenses is appropriate for the sake of simplicity.

[352] I order that the respondent shall pay one-half of the behavioural consultancy report as soon as the invoice is provided to him by the claimant. If the respondent has paid any portion of the behavioural consultancy report pending receipt of these reasons for judgment, the parties are to adjust any other payments due from him to account for the same in accordance with these reasons.

[353] For the rest of the extraordinary expenses, the claimant argues that the respondent should pay \$575 per month; and the respondent argued that he should pay \$250 per month, both subject to annual adjustment based on actual expenses.

[354] The trouble is that it is hard to estimate these costs from year to year, and also hard to know what government or charitable subsidies the claimant will find for her son.

[355] On balance, I consider it fair and in the best interests of the parties' son that the respondent pay \$350 per month towards s. 7 extraordinary expenses (other than the behavioural consultancy report which I have already addressed). This amount will be adjusted annually, following this process:

- a) the claimant will pay all the extraordinary expenses up-front and will be the person to claim tax benefits or credits, grants and subsidies in relation to these costs;
- b) once per year, the claimant will provide to the respondent a reconciliation (with source documents attached), setting out for the prior calendar year:
 - i. actual s. 7 expenses incurred;
 - ii. tax benefits or credits, grants and subsidies received which related to these expenses; and
 - iii. the balance relative to the respondent's monthly payments totalling \$4,200 annually.

- [356] Once the annual reconciliation is provided, if one-half of the total net costs exceeds the amount that had been paid by the respondent, then the respondent will pay the balance of his half share within thirty days. If, on the other hand, the respondent has overpaid his half share of the extraordinary expenses, he will be credited with this through an adjustment to the amount of his monthly Guidelines child support until his overpayment is accounted for.
- [357] I have assumed that the respondent has been paying for a share of extraordinary expenses in 2012, and so this order will be effective as of January 1, 2013, subject to adjustment for any extraordinary expenses paid by the respondent so far this year.

J. Spousal Support

- [358] The claimant seeks an order for spousal support, even if a nominal amount, to preserve her right to claim it in the future.
- [359] She is worried about the following possibilities.
- a) Her employer could terminate the relationship with her and she would be without any safety net. She has no formal contractual relationship with her employer and has no extended benefits.
 - b) Her son could require home care at a level not supported by funding and resulting in her being required to work less.
- [360] I accept that the claimant has an entitlement to spousal support based on the compensatory principles reviewed in *Moge*. However, while the above are legitimate concerns, I am satisfied that based on the division of family assets, the claimant will now be adequately compensated and have a safety net and I do not consider additional spousal support necessary. Based on the division of assets I have ordered, the parties are equally able to achieve self-sufficiency given their professional qualifications and income-earning histories.

K. Other Issues

- [361] The claimant called evidence from two witnesses, Katie MacKenzie and Valerie Brady, regarding the respondent's conduct after the parties separated. The claimant argued that the evidence was corroborative of the claimant's theory that the respondent has little to no respect for women and is a dominator and bully.
- [362] The respondent objected to the evidence at trial, but agreed that the witnesses could testify subject to the court's ruling as to admissibility and weight.
- [363] I have concluded that the evidence is not of any value for the purposes tendered and I have ignored it. Some of the evidence may be relevant to respond to evidence of the respondent as to actions taken by him post-separation, and to that limited extent it is admissible.

- [364] However, I did not consider these witnesses' evidence in determining the issues regarding the enforceability of the Second Separation Agreement and any vulnerabilities of the claimant at the time she signed it.
- [365] During closing submissions, the respondent raised an argument that some of the claimant's claim relates to assets that would have been subject to a claim during the first marriage, for which a limitation period has long expired. Neither party dealt with this argument in any detail or provided any authorities. The parties did not divide property after the first marriage. I have not considered any limitation period to have expired because I have simply considered the assets in existence at the time of the second marriage and any claims that flow from the fact of the second marriage, which does include the facts of any prior contributions to those assets.
- [366] Lastly, the parties agreed to consent terms regarding joint custody and joint guardianship of their son, including with the claimant having default decision-making under what is known as a "Joyce model" and retaining primary residence with the parties' son. I have therefore not set out the terms of this custody and guardianship order in these reasons, as I expect the parties to be able to incorporate the agreed detailed terms in the final order.

Conclusions

- [367] I have found that the separation agreements are invalid.
- [368] I have concluded that all of the assets in the investment portfolio held by the respondent at the time of the parties' divorce in March 2010 are family assets.
- [369] Likewise the claimant's savings instruments are also family assets.
- [370] As well, an RDSP held by the parties for their son is also a family asset.
- [371] I have concluded that equal division of family assets is not unfair.
- [372] I order that the claimant is to keep the assets in her name alone, and the respondent will henceforth have no interest in them.
- [373] I order that the respondent make a compensation payment to the claimant as follows, and until he does the claimant will have a charge on his assets:
- a) the respondent is to pay to the claimant the sum of \$125,000 held in his lawyer's trust account; and
 - b) the respondent is to pay the claimant \$676,000.
- [374] For purposes of child support, the respondent's income is deemed to be \$50,000. Pursuant to the Guidelines, the respondent must pay the claimant child support of \$458 per month, payable on the 15th of each month, commencing March 15, 2013.

- [375] The parties are to exchange with each other copies of their complete income tax returns by May 1st of each year.
- [376] I have identified the categories of expenses to be considered as s. 7 extraordinary expenses.
- [377] As of January 1, 2013, the respondent is ordered to pay \$350 per month on the 15th of every month towards s. 7 extraordinary expenses, subject to an annual reconciliation based on information provided by the claimant, who shall pay such expenses up front and who will receive any related government subsidies or tax benefits.
- [378] The claimant has an entitlement to spousal support but no amount is awarded, on the basis that she will be able to be self-sufficient based on the orders I have made as to property division.

"S.A. Griffin, J."

The Honourable Madam Justice Susan A. Griffin

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