
CANADA / JUDGMENT

M.N.M. v. W.E.M.

2025 BCSC 1649

COURT

Supreme Court of British Columbia

DECIDED

25 August 2025

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

2025 BCSC 1649 M.N.M. v. W.E.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.N.M. v. W.E.M.,

2025 BCSC 1649

Date: 20250825

Docket: E49189

Registry: Penticton

Between:

M.N.M.

Claimant

And

W.E.M.

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for claimant:

P. Moore

Counsel for respondent:

N. Bauder

Place and Date of Hearing:

Penticton, B.C.

March 31 - April 1, 2025

Place and Date of Judgment:

Penticton, B.C.

August 25, 2025

Table of Contents

Overview.. 3

Application Materials. 4

Factual Background.. 5

Date of Separation.. 7

Financial Arrangements Post-Separation.. 8

Separation Agreement. 9

Events leading up to the Separation Agreement 9

The Separation Agreement 12

Certain Steps Taken Pursuant to the Separation Agreement 19

Procedural History. 20

This Proceeding. 20

The Separate Action. 21

Appraisals. 22

Positions of the Parties. 22

Discussion.. 24

Enforcing Written Agreements and Bona Fide Triable Issues. 24

Law.. 24

Sections 93, 94 and 95 of the FLA. 28

Section 93(3)(a) - Non-disclosure. 33

Section 93(3)(b) - Vulnerability. 35

Section 93(3)(c) - Understanding. 35

Section 93(3)(d) - Other Circumstances. 36

Analysis re Section 93(a) to (d) of the FLA. 36

Sections 164, 165 and 166 of the FLA. 39

Analysis re Section 164 of the FLA. 40

Section 163(4) - Saving Provision. 41

Spousal Support Pending Trial. 43

Procedural Orders. 44

Costs. 45

Schedule "A" - NOA Orders Sought. 48

Overview

- [1] The parties in this family law action continued to maintain intermingled finances for an extended period of time after separation before finally entering into a written agreement. That written agreement has unfortunately not resolved the issues as between the parties and has instead resulted in a complete breakdown in communication. The manner in which this proceeding finds its way before the court further complicates matters to some degree.
- [2] The claimant, M.M., who is a trained paralegal but with somewhat limited experience in family law matters, drafted the separation agreement that both parties executed on or about September 22, 2023 (the "Separation Agreement"). This was done effectively at the insistence of the respondent, W.M., who had grown tired of their intermingled post-separation finances. The respondent was afforded the opportunity to obtain independent legal advice in respect of the Separation Agreement but gave up on hiring legal counsel after the lawyer he had an initial consult with stopped responding to his messages and subsequently gave him a partial refund. He made no efforts to secure alternative counsel even with the benefit of that refund.
- [3] The Separation Agreement, as I will detail, was not well drafted. It contains some quite unconventional contractual language, incorrectly references the former Family Relations Act, R.S.B.C., c. 121 [FRA] on multiple occasions and does not appear to reflect an understanding of the legal distinction between recitals and covenants. Further, the Separation Agreement purports to "cap" the respondent's equity in the former family home (which I will define in due course) as of October 2021 based upon a "snapshot recollection" and imposes an indefinite spousal support obligation on the respondent without specifically addressing the taxation treatment of that support.

- [4] Notwithstanding the drafting issues and the respondent's decision to forego independent legal advice (a decision which I find he made independently and not at the behest of the claimant), both parties initially abided by the Separation Agreement and completed contemplated steps such as obtaining an order for divorce and refinancing the former family home. However, the respondent now seeks to have the Separation Agreement set aside.
- [5] Specifically, the notice of application filed by the respondent on December 5, 2024 (the "Application"), seeks, among other things, orders setting aside the Separation Agreement, orders determining and dividing family property and debt, and orders replacing the spousal support payable pursuant to the Separation Agreement. Alternatively, the Application seeks an order referring this matter to the trial list pursuant to Rule 10-3(7)(d) of the Supreme Court Family Rules [Rules], if necessary. Attached to these reasons for judgment as Schedule "A" is Part 1 of the Application setting out the specific relief sought.
- [6] The application response filed by the claimant on February 28, 2025, opposes the relief sought in the Application in its entirety and takes the position that the court may dismiss this application summarily as there is no "triable issue" and the respondent is "bound to lose". In this regard, the claimant relies significantly on the decision of Justice Verhoeven in *Partington v. Brown*, 2020 BCSC 2075.

Application Materials

- [7] The materials relied on by the parties in arguing the Application are quite extensive and include the following:
- a) Affidavits #1, 2, and 3 of the respondent;
 - b) Affidavits #2, 3, 5, and 6 of the claimant;
 - c) The Form F8 Financial Statement of the claimant, filed February 10, 2025;
 - d) Portions of the examination for discovery transcripts of the claimant, conducted on March 10, 2025; and
 - e) three joint appraisals of a residential residence located in Penticton, B.C. (the "Former Family Home"). One historical appraisal as of October 21, 2021, one historical appraisal as of September 22, 2023, and one effectively current appraisal as of March 10, 2025.
- [8] I will summarize the evidence from these materials that are relevant to my decision in this action. There is, however, considerable repetition in the affidavit material and, at times, considerable focus placed on what I conclude are fairly minor ancillary issues. My failure to comment on certain portions of the application record thus does not mean I did not review same but rather, reflects my focus on determining whether I can find the facts necessary to determine the issues as between the parties on the record before me.

- [9] Finally, my failure to reference a financial statement of the respondent in the materials provided is not an inadvertent omission on my part. Despite seeking to set aside the Separation Agreement and replace it with final orders regarding the division of family property/family debt and spousal support, the respondent has never sworn nor affirmed a Form F8 Financial Statement in this proceeding.

Factual Background

- [10] This was a long-term relationship between the parties. Their romantic partnership began in September 1999, they commenced residing in a marriage-like relationship on or about April 1, 2000 and they were married approximately five months later on September 3, 2000.
- [11] The claimant is currently 52 years old. She obtained a bachelor's degree from the University of the Fraser Valley in 1990. This was approximately nine years before the parties' relationship commenced. From in or about 2007 to in or about 2015, the claimant worked part-time as a realtor around the parties' children's schedules. The claimant started working in law offices in 2015 and, after obtaining the requisite post-secondary training, commenced working as a paralegal in or about 2019. Her work as a paralegal was primarily in the area of civil litigation with some quite limited experience dealing with family law matters. The claimant commenced receiving employment insurance benefits on or about August 31, 2024, after the lawyer she was working for retired from practice. However, she had recently secured employment again in the legal field as at the date of the hearing and generally, based on her resume, has been consistently employed in positions commensurate with her skillset since in or about 2019.
- [12] The respondent is 57 years old. He obtained a bachelor's degree in English literature from St. Thomas University after completing high school. The respondent has held supervisory roles working in the oil field for over 20 years. He is currently employed as a safety manager by "TSS Ltd." in Fort St. John, B.C. It is not disputed that the respondent was the primary breadwinner during the marriage.
- [13] The parties have three adult children, the oldest of whom is technically a stepchild to the respondent. However, the respondent entered her life when she was approximately two years of age and played an important role in her life. That daughter now has a child of her own whom the parties' both equally regard as their grandson. The adult children were collectively aged 28, 23, and 21 as of the date of the hearing. Of significance, the youngest child turned 19 on November 23, 2022 (which, for reference purposes, is after the separation but before the Separation Agreement was executed).
- [14] On or about January 31, 2006, approximately two-and-a-half years after they married, the parties purchased the Former Family Home as joint tenants. Although the respondent frequently lived away from Penticton for extended periods of time due to the nature of his employment, the Former Family Home was the shared home base through until 2021.

- [15] The Former Family Home is presently encumbered with a mortgage in favour of CIBC (the "Mortgage"). Both parties are named as mortgagors. The Mortgage has a face value of \$550,000, a fixed interest rate of 3.34%, and monthly periodic payments of \$2,354.17 due until June 1, 2026.
- [16] During the marriage, the parties, as I noted above, maintained interrelated finances. Their paycheques, when both were working, were paid into a joint account from which the claimant would pay certain family bills and then transfer funds to personal satellite accounts maintained by each party for use as and when required according to their individual needs. The satellite accounts were "technically" joint accounts such that the other could access the funds and there were survivorship rights, but that was not how the parties operated. Rather, monies transferred into each spouses' satellite account was free to be spent by that spouse at their discretion. It was the claimant who attended to the distribution of funds but it appears there was at least some dialogue between the parties reflective of a mutual understanding of the need to appropriately manage the income coming into the household to ensure that bills were being paid.

Date of Separation

- [17] As I alluded to above regarding the Former Family Home being the "home base" until 2021, there is some discrepancy between the separation dates claimed by the parties.
- [18] The claimant asserts the parties separated on February 1, 2021, when she told the respondent she agreed to separating, something which the respondent had previously expressed a desire to do. The claimant says she told the respondent at that time that she would move out of the Former Family Home. This did not happen, although the claimant spent considerable time at the residence of a friend who became her new and now continuing romantic partner. In contrast, the respondent says that although the parties had discussed the possibility of separation on multiple occasions before September/October of 2021, they did not actually separate until October of 2021, when the claimant actually did move out of the Former Family Home.
- [19] The evidence of both parties is consistent that the marriage was disintegrating by the start of 2021. Having regard to the fact that the respondent worked out of town, there being other family remaining living at home, including the parties' minor son and infant grandson, and their complete financial interdependence, there is a ring of truth to the respondent's position which, in my view, amounts to his subjective belief that the parties were continuing to limp the marriage along until the defining event in October of 2021 when the claimant actually did move out of the Former Family Home.
- [20] However, balanced against that subjective belief are the following objective facts:

- a) The parties obtained a comparative market analysis of the Former Family Home in April 2021. This is consistent with the parties having separated and beginning to take some steps to address the financial issues arising from same;
 - b) The Separation Agreement (signed by both parties) lists the date of separation as February 1, 2021;
 - c) Consistent with the Separation Agreement, the notice of family claim, which was served on the respondent, lists the date of separation as February 1, 2021; and
 - d) Apart from the Former Family Home continuing to be the joint "home base" and the continued intermingled finances, which practice, as indicated, continued well beyond October of 2021, there is no evidence whatsoever of any indicia of continuing a marital type relationship between the parties between February 2021 and October 2021. Indeed, the respondent's own evidence is that by September/October 2021, the claimant had just "stopped answering messages or texts".
- [21] Accordingly, on a balance of probabilities, I conclude that the parties separated on February 1, 2021.

Financial Arrangements Post-Separation

- [22] As already noted, the parties' intermingling of finances continued post-separation. Specifically, the practice continued throughout most of 2021, continued through all of 2022 and continued until mid-way through 2023.
- [23] Importantly, since October 2021, despite moving out, the claimant remained the one actually tasked with the responsibility for paying the Mortgage on the Former Family Home and otherwise paying the bills to financially maintain the property. However, until the summer of 2023 the arrangement continued to be that the parties' paycheques were deposited in their primary joint account, with the claimant transferring funds deposited from the respondent's paycheques into his satellite account after familial obligations were paid. The respondent's contributions to the familial expenses were not made pursuant to a written agreement and so the respondent did not receive a tax deduction for any payments on account of spousal support. The respondent was also not, by virtue of the Separation Agreement, entitled to the benefit of any paydown of the Mortgage or other increase in the value of the Former Family Home during this period despite his financial contributions.

Separation Agreement

Events leading up to the Separation Agreement

- [24] The claimant asserts that the Separation Agreement is a codification of an oral agreement reached between the parties as of October 2021 on the issues of property and debt division, child and spousal support, and household finances generally. A primary term of that agreement, according to the claimant, was that she would buy out the respondent's half-interest in the Former Family Home, with the parties determining the available equity in the Former Family Home to be \$90,000.
- [25] There was no appraisal conducted of the Former Family Home prior to entering into the Separation Agreement. Rather, the parties apparently calculated the equity in the Former Family Home by:
- a) obtaining an April 2021 Comparative Market Analysis report (referred to above) that the claimant affirms placed the market value of the Former Family Home in the range of \$600,000 to \$625,000. The hard copy of this report was destroyed in a flood at the Former Family Home according to the claimant, but she was able to locate an email sent by the realtor on April 13, 2021, providing recent sales in the neighbourhood involving superior properties that she says were incorporated in the report. This apparent comparative market analysis is also somewhat consistent with the 2021 BC Assessment value of \$635,000 but considerably lower than the joint historical appraisal which sets the fair market value of the Former Family Home as of October 21, 2021 at \$735,000; and
 - b) subtracting the following amounts from the estimated market value of the Former Family Home following a hypothetical sale:
 - i. the approximate costs involved in selling the home, including \$30,000 realtor fees and \$10,000 in sales costs;
 - ii. the approximately \$480,000 remaining owing on the Mortgage as of that date; and
 - iii. a \$10,000 penalty for collapsing the Mortgage early.
- [26] On June 23, 2022, the respondent sent an email to the claimant requesting her to write up a "divorce agreement" that provides, amongst other things, the following:
- I [pay] alimony and child support (obviously) but have no other financial obligation to the payment and upkeep of the house going forward;
 - I am excused from all of our outstanding debt in exchange for having no claim on any equity in the house;
 - I remain on the mortgage but it is clearly stated in the agreement that the house is sold if you cannot afford it or if you cannot get a mortgage for it when the mortgage for it when the mortgage is up for renewal. Again, you get all the equity if that happens.

- [27] On July 19, 2022, just shy of one month later, the respondent sent an email to the claimant stating that he wanted to "leave their agreement as it was at that time" so that his motorcycle financing application would not be impacted. In the email, the respondent also acknowledges that:
- a) breaking up their finances in 2022 was probably no longer appropriate;
 - b) him walking away on a "debt for equity trade" would have to be "reimagined"; and
 - c) 2021 was not a representative year for him financially so it would be an unfair year for calculating support.
- [28] The parties finally took steps to finalize some sort of written agreement between them in earnest in 2023.
- [29] The respondent affirms in his first affidavit that he began to discuss with the claimant how he would like to proceed with the separation of their finances and personal effects in the few months leading up to July 2023. He says he was interested in selling the Former Family Home and paying off joint debts with the proceeds but the claimant would not agree to this. Instead they decided she would write up a separation agreement. He says she wrote up a template of a separation agreement and advanced the idea of capping the respondent's interest in the Former Family Home.
- [30] In August 2023, the respondent sent a text message to the claimant that said:
- I am perfectly happy giving you all of my equity if I only walk away owing you spousal support. Make that happen with a guarantee that I don't get burned if you can't afford the house before my name comes off the mortgage when it matures on 1 May 2024 and I am happy.
- [31] Continuing in August 2023, the respondent sought to pressure the claimant into selling the Former Family Home or finalizing a written agreement by unilaterally separating his finances from her.
- [32] In this regard, the respondent deposes that he "frequently pressed" the claimant to complete the Separation Agreement but was "regularly rebuffed" by her. Because of this, he diverted his pay cheques away from the parties' joint account and "finally opened [his] own bank account to which [his] pay cheque was deposited, transferred [his] vehicle, insurance, cell phone and subscription payments to, and informed [the claimant] that [he] would give her no money until an agreement was formalized." The result of this, the respondent says, is the Separation Agreement drafted by the claimant.
- [33] Later in the same affidavit, the respondent deposes that he had been asking the claimant to formalize a separation agreement since the fall of 2021 and separated his finances from her in August of 2023, to "motivate [the claimant] to create an agreement instead of being content to benefit from forcing the continuance of a financial relationship" that was unfair after separation.

The Separation Agreement

- [34] The Separation Agreement includes a very lengthy "Recitals and Considerations" section before setting out the covenants the parties agreed to. The relevant recital paragraphs, in a summarized format, include:
- a) Recital 1: confirming the parties' wish to make a complete and effective settlement of all the respective rights, interest and claims in and to the property of each other and to any property held by them jointly; all outstanding debts and liabilities owed by them jointly; and claims to support by each party against the other;
 - b) Recital 2: confirming that the agreement is a separation agreement "in pursuance of the [FRA] and the Divorce Act, 1985";
 - c) Recitals 6 and 7: confirming the parties' present employment and their approximate current incomes of \$50,000 and \$175,000 per annum respectively;
 - d) Recital 8: confirming the parties have joint debts in the form of family loans, including a \$55,000 debt to the claimant's mother, and two other loans totalling approximately \$17,500 (collectively, the "Joint Debts");
 - e) Recitals 11 -25: describing certain negotiations and discussions between the parties regarding the Former Family Home, arrangements for support and payment of household expenses to date and future intentions with respect to the Former Family Home as follows:
 - i. the respondent having agreed to "cap his interest" in the Former Family Home as at October 2021 pursuant to their agreement at that time;
 - ii. the respondent's "cap[ped]" interest having been determined based upon a "snapshot recollection of what would be involved if the home were sold and that time [which] provided a total equity value of approximately \$90,000, or \$45,000 each";
 - iii. the parties agreeing that the claimant would accept the respondent's payments towards the Former Family Home in lieu of spousal support "as his interest in the home stopped at October 2021";
 - iv. acknowledging that the household expenses had been divided "equally", with the claimant paying one-quarter and the respondent paying three-quarters with a written breakdown confirming this for the period February 1, 2021 to October 1, 2023, being attached as Schedule "A";
 - v. confirming the respondent's preference to transfer his portion of "capped equity" in the Former Family Home to the claimant on the condition that the claimant retain his portion of the shared debt;

- vi. the parties agreeing to adjust the terms of the Mortgage to allow their bank to release \$100,000 to facilitate the transfer of the respondent's portion of the capped equity in the Former Family Home, which the parties intended to use to pay the Joint Debts and divide the remainder between them;
 - vii. the respondent, who was still periodically living in the Former Family Home, vacating the residence by no later than October 1, 2023;
 - viii. the claimant being solely responsible for the Mortgage and other household expenses as of October 1, 2023;
 - ix. the respondent being indemnified from liability for the Mortgage and title to the Former Family Home transferring to the claimant, at her convenience, on or before May 2026;
 - x. the claimant receiving "title" to the Former Family Home and the remaining contents at the time the respondent vacates the home on October 1, 2023; and
 - xi. the claimant, if unable to assume title or the Mortgage being allowed to "determine the outcome as though the transfer had been perfected" with the respondent not interfering with or hindering any decision she makes with respect to the property, including providing any necessary signatures in dealing with the Former Family Home;
- f) Recitals 26 - 39: describing certain background facts regarding the parties' relationship relevant to confirming the claimant's entitlement to compensatory spousal support and setting out future intentions with respect to the payment of spousal support as follows:
 - i. the respondent confirming his agreement, commencing October 1, 2023, that he shall pay "maintenance to [the claimant] in the amount of \$3,000 per month, as determined by tables of calculation generally accepted and relied on by courts in BC";
 - ii. confirming that the quantum of support was calculated on year to date earnings for 2023 as 2022 did not accurately represent the earnings accrued to date for the current year;
 - iii. confirming the intention to renew support annually based upon an exchange of notices of assessment but have the quantum of support remain the same "unless there is a change representing an increase or decrease of 10%" or written agreement of the parties;
 - g) Recitals 39 & 40: Confirming a mutual intention with respect to transfer of title to the Former Family Home in the event that either party were to die before transfer of title being perfected;
 - h) Recitals 41 & 42: Confirming the respondent's agreement not to alter his employment insurance policy such that the claimant shall remain the designated irrevocable beneficiary and the respondent's obligation, if necessary, to obtain a replacement life insurance policy for no less than \$250,000 with the claimant as the irrevocable beneficiary;

- i) Recital 45: Confirming the parties' agreement that any part of the Separation Agreement "can be altered at any time by written agreement between them or by order issued by the court";
 - j) Recital 47: confirming each party has been fully informed about the "estate and prospects" of each other and had the opportunity to be advised by a solicitor acting for each of them alone of their respective rights and liabilities.
- [35] I next turn to reviewing the "Covenants" section of the Separation Agreement.
- [36] Before addressing what is included in the covenant section, I will address what is not included. There is nothing in the covenant section of the Separation Agreement specifically concerning the Former Family Home or the Mortgage except in the context of some retroactive inclusion of spousal support and in relation to claimant's waiver of her right to seek division of the respondent's Canada Pension Plan credits.
- [37] In terms of what the covenants section does include, the relevant paragraphs, again in a summarized format, include:
- a) Para. 1(d) - General Preliminary Matters: the parties intend that each clause to the agreement is to be construed as a separate agreement under ordinary contract law and is enforceable as such;
 - b) Para. 1(e) - General Preliminary Matters: the agreement is a post-nuptial settlement for the purposes of s. 68 of the FRA;
 - c) Para. 3 - Spousal Support: the parties agree that the criteria in s. 162 of the FLA are met and that they will rely on the factors which the court relies on in determining the quantum of spousal support. The agreement refers decision of the court in *Chutter v. Chutter*, 2008 BCCA 507 at paras. 50 -52 summarizing the law surrounding compensatory spousal support;
 - d) Para. 4(a) - (d) - Assets and Liabilities: each party shall have exclusive ownership of their property and be responsible for their debt, including an obligation to indemnify the other from any liability. Specifically, the claimant retained the car and is responsible for the car loan whereas the respondent "assumed" a truck and motorcycle after separation and agreed to be responsible for costs and expenses of those vehicles;
 - e) Para. 4(e) - Assets and Liabilities: pursuant to s. 167(1) of the FLA (which pertains to changing, terminating or suspending orders respecting spousal support), "spousal support will be retroactively included in the division of equity allocations based on [the claimant's] and [the respondent's] actual income from February 1, 2021 until the date this agreement is signed";

- f) Para. 6 - Pensions: "neither party will apply for equalization of the unadjusted pensionable earnings under the Canada Pension Plan of the other party. [The claimant] has waived her right to divide [the respondent's] CPP in consideration of the security he has afforded to her by agreeing to transfer his portion of the equity in the family home in exchange for his CPP contributions remaining in tact, for [the claimant's] assumption of the family debt and for the ongoing reduction to indefinite spousal support";
 - g) Para. 10 - Final Satisfaction: the parties accept the terms of the Separation Agreement in satisfaction of all claims and causes of action against each other, except for claims arising under or to enforce the provision of the Separation Agreement or the obtaining of a divorce.
 - h) Para. 13 - Disclosure: the parties agree they made full disclosure of "assets and liabilities, means and income" and that the terms of the agreement are fair and reasonable. They further agree not to commence an action to vary the terms of the agreement under ss. 61 and 68 of the FRA;
 - i) Para. 16 - Independent Legal Advice: the parties acknowledge various facts regarding receiving independent legal advice, such as acknowledging that:
 - i. each party was afforded the opportunity to receive "thorough independent legal advice" with respect to the legal effect of the agreement and with respect to "alternatives available" in "lieu of signing [the] agreement";
 - ii. the respondent met with a lawyer in Fort St. John on August 4, 2023, to obtain independent legal advice and that in September of 2023, the respondent advised the claimant that he had obtained legal advice, was content to execute the agreement, fully understood the agreement and wanted to "obtain a divorce in a civilized and non-litigious manner";
 - iii. the parties are aware of the provisions of the FRA, specifically Part 5;
 - iv. the parties are executing the agreement without intimidation, pressure, inducement, threat, compulsion, coercion or duress applied against them; and
 - v. the parties fully comprehend and understand the meaning and significance of every clause of the preamble and contents of the agreement and the effect thereof.
- [38] On or around September 22, 2023, the parties signed the Separation Agreement in the presence of two separate lay witnesses.
- [39] The respondent also signed a confirmation of independent legal advice appended to the Separation Agreement wherein he further confirmed that he:
- a) had obtained independent legal advice in respect to the Separation Agreement;
 - b) fully understood the terms and legal effect of the Separation Agreement; and
 - c) reviewed the agreement independent of the claimant and was signing it of his own free will.

- [40] The "solicitor's certificate of independent legal advice" contained on the same page is crossed out and initialed by the respondent.
- [41] In this regard, as I touched on above, the respondent claims that although he explained his situation to a lawyer during a 45-minute meeting, this lawyer never responded to his emails or calls to have them proceed with addressing his concerns. Therefore, he deposes that he "convinced [himself] that to walk away after whatever agreement was settled on, was preferable to try to negotiate with [the claimant] anymore".
- [42] There is neither a confirmation of independent legal advice nor a solicitor's certificate of independent legal advice appended to the Separation Agreement from the claimant.

Certain Steps Taken Pursuant to the Separation Agreement

- [43] In September 2023, the parties refinanced the Mortgage to pay the Joint Debts and to notionally pay out the respondent the \$45,000 for his interest in the Former Family Home. As part of the refinancing, CIBC obtained an independent property valuation of the Former Family Home. The summary of assets and liabilities included in the Mortgage refinancing documents lists the asset value of the Former Family Home as \$975,000 and the Mortgage balance, before refinancing, as \$447,898 as of September 14, 2023. The respondent did meet independently with a lawyer to review all documents related to the refinancing before signing off on same as the bank required him to do so.
- [44] When the claimant received the funds from the Mortgage refinancing she paid the respondent \$14,000, consisting of the \$45,000 notionally owing for his equity in the Former Family Home minus his equal portion of the Joint Debts.
- [45] This \$14,000 represents all of the "cash" that the respondent received pursuant to the Separation Agreement.
- [46] The respondent fully moved out of the Former Family Home in October 2023 and initially paid spousal support to the claimant as set out in the Separation Agreement. The claimant used the spousal support payments to pay the Mortgage and property expenses. She also received some limited rent from the parties' eldest daughter, until she and their grandson moved out of the Former Family Home in September 2024.
- [47] Moving back in the chronology, in February 2024, the respondent ceased making spousal support payments to the claimant. The claimant registered the Separation Agreement with British Columbia Family Maintenance Agency ("BCFMA"), and approximately three months later, BCFMA advised the respondent they were about to enforce the support obligations in the Separation Agreement through garnishment, presumably on the basis that the taxation treatment of the payments is outside of the scope of BCFMA's mandate. Upon being given notice by BCFMA of impending attachment efforts, the respondent made the payments in full. In the interim, however, the Mortgage fell three months in arrears and the claimant asserts this delayed her ability to assume the Mortgage as contemplated in the Separation

Agreement.

- [48] The arrangement of the respondent paying the \$3,000 per month in tax neutral "maintenance" and the claimant paying the monthly payments on the Mortgage continued for a period of time until the claimant started falling behind as a result of her income being reduced to employment insurance benefits.
- [49] In January 2025, due to deteriorating financial circumstances of the claimant, the respondent made without prejudice payments to bring the Mortgage in good standing. However, in February 2025, the respondent notified the claimant that he could not afford to continue making mortgage payments and the Mortgage went in arrears.
- [50] As of the date of the hearing, the Former Family Home was listed for sale pursuant to a court order made by Associate Judge Schwartz on February 24, 2025. Under that order, the claimant has sole conduct of sale but is obligated to keep the respondent informed; the sale is subject to written agreement of the parties or court approval; and the respondent has a right to apply to vary the order if this court orders that the Separation Agreement is to be set aside and he can establish that the Former Family Home has not been properly marketed.

Procedural History

This Proceeding

- [51] On September 22, 2023, the claimant filed the Separation Agreement by requisition pursuant to R. 2-1(1). The requisition opened this court file for registry purposes.
- [52] In respect of the provisions respecting spousal support, the Separation Agreement became specifically enforceable as if it were an order of the Court: see FLA s. 163(3).
- [53] On November 9, 2023, the claimant filed a notice of family claim in this court file seeking only a divorce (the "NOFC").
- [54] The respondent was served with the NOFC in accordance with the Rules and did not file a response to family claim.
- [55] The claimant then applied for a desk order divorce pursuant to R. 10-10. The affidavit in support of the desk order divorce contains a rather curious paragraph. Specifically, at paragraph 4 the claimant deposed that:

The spousal support payment is paid monthly as a specific purpose payment. It is a tax-neutral payment, intended specifically to supplement my monthly costs of living. In the event an annual review of incomes causes the amounts of the payment to exceed the total cost of my living expenses (defined as mortgage/rent, property taxes, property insurance and utilities) that amount will be paid and received as a taxable support payment to me and tax-deductible to [the respondent].

[56] Due to a correction notice, a further desk order divorce affidavit was required. That affidavit contains the same language regarding spousal support, albeit split into paragraphs 11 and 12.

[57] A final order for divorce was made by desk order on June 7, 2024.

The Separate Action

[58] In May 2024, the respondent retained counsel.

[59] On June 27, 2024, the respondent filed a notice of family claim commencing a separate action, namely Penticton Registry File No. 49872 (the "Separate Action").

[60] In the notice of family claim in the Separate Action, the respondent (obviously as the claimant therein) sought to set aside the Separation Agreement and further sought orders with respect to the division of family property and/or debt and spousal support.

[61] The claimant's position in the Separate Action was that it was procedurally incorrect to start a new action to set aside and/or vary the Separation Agreement.

[62] A judicial case conference in the Separate Action was scheduled for October 10, 2024. However, on October 9, 2024, the respondent filed a notice of discontinuance and adjourned the JCC.

[63] On November 5, 2024, the respondent filed a notice of intention to proceed in the present action and subsequently filed the Application. The claimant is, as noted, substantively opposed to the relief sought but procedurally is content with the process of how the matter has come before the court. I will return to this issue as it is important to my ultimate orders in respect of the Application.

Appraisals

[64] On March 10, 2025, joint historic appraisals of the Former Family Home were completed for the purposes of the Application. Those appraisals opine that the fair market value of the property was:

- a) \$735,000 as of October 21, 2021;
- b) \$975,000 as of September 22, 2023; and
- c) \$960,000 as of March 10, 2025.

Positions of the Parties

[65] In the Application, the respondent takes issue with various terms of the Separation Agreement and seeks to have it set aside in its entirety.

[66] To summarize his position:

- a) the respondent does not believe the Separation Agreement was procedurally sound, or in compliance with the FLA, particularly the sections relating to financial disclosure and those referring to the FRA, which was replaced by the FLA in 2011;
 - b) the respondent does not consider the Separation Agreement fair because of his lack of knowledge of the value of the equity of the Former Family Home at the time of the separation and the signing of the Separation Agreement; and
 - c) the respondent also takes issue with the fact that he is not receiving an income tax credit from his payment of spousal support.
- [67] The respondent also seeks, as set out in Schedule "A", to replace the Separation Agreement with certain final orders on the determination and division of family property and family debt and spousal support. This aspect of the respondent's case was very underdeveloped and the thrust of the submissions before the court related to having the Separation Agreement set aside.
- [68] The claimant's position is that the Separation Agreement is not perfect but it is substantially appropriate. More specifically, the claimant argues that the Separation Agreement:
- a) is a binding agreement under the FLA and enforceable as a court order after being filed;
 - b) was not the result of non-disclosure that would undermine the agreement;
 - c) is not so vague that it is incapable of being reasonably interpreted;
 - d) was not entered into under duress or mistake;
 - e) is not significantly unfair due to the changing value of the Former Family Home changing; and
 - f) appropriately provides for spousal support.
- [69] To clarify the last point, the claimant's position is that she takes no issue with the respondent receiving a tax benefit for his spousal support payments, provided the appropriate amount of spousal support is paid pursuant to the Spousal Support Advisory Guidelines. The amount currently being paid, the claimant asserts, is a lesser amount that was negotiated on the basis it would be tax neutral as between the parties.
- [70] Ultimately, as I summarized above, the claimant submits that there is no bona fide triable issue before this court in enforcing the terms of Separation Agreement and that I should dismiss the Application without referring the matter to the trial list because the respondent is "bound to fail".

Discussion

Enforcing Written Agreements and Bona Fide Triable Issues

Law

- [71] The Separation Agreement was, as noted, filed pursuant to R. 2-1(1). An agreement filed with the court pursuant to R. 2-1(1) may be enforced pursuant to R. 2-1(3) by an application pursuant to Part 10 of the Rules.
- [72] In Partington, the decision relied upon by the claimant, Justice Verhoeven considered an application squarely brought within those two subrules. Specifically, the claimant brought an application pursuant to R. 2-1(3) for an order enforcing a written agreement previously filed with the court pursuant to R. 2-1(1).
- [73] There are several key takeaways from Partington:
- a) Rule 10-11(1) provides that in order to obtain a final order, other than at trial, in a defended family law case begun by the filing of a notice of family claim, a party must apply by way of summary trial in accordance with R. 11-3;
 - b) an order enforcing an agreement filed under R. 2-1(1) is not a "final order in a defended family law case begun by the filing of a notice of family claim " within the meaning of R. 10-11(1). Therefore, a written agreement under the FLA may be enforced pursuant to R. 2-1(3), without the necessity of a trial or summary trial;
 - c) Rule 2-1(3) incorporates the procedures under Part 10, including R. 10-3 which governs "Chambers Proceedings". Pursuant to R. 10-3(7)(d), the court may order a trial of the chambers proceeding, either generally or on an issue, and order a pleading to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding;
 - d) Quite apart from R. 2-1(3), the court has jurisdiction to summarily enforce settlement of an action by way of an application to court: see *Thiessen v. 492907 B.C. Ltd. et al*, 2006 BCSC 373, at paras. 32-40 (citing, among other authorities, s. 10 of the Law and Equity Act, R.S.B.C. 1996, c. 253, and *McKenzie v. McKenzie* (1975), 55 D.L.R. (3d) 373 (B.C.S.C.); *aff'd* 69 D.L.R. (3d) 765, (B.C.C.A.); *L.M.U. v. R.L.U.*, 2004 BCSC 95, at paras. 64-66, 82-83 [L.M.U.]; *Sandhu v. Hennessy*, 2020 BCSC 515 at paras. 30-39. On such applications referred to above, the test generally applied is whether there is a material, triable issue: see *L.M.U.*, at para. 64; *Roumanis v. Hill*, 2013 BCSC 1047, at para. 57; *Carlton v. Carlton*, 2017 BCSC 603 at para. 45; and
 - e) the test for summary enforcement of a settlement agreement under R. 2-1(3) is the same as that generally applicable on chambers applications. Namely, if there is a bona fide (that is, real or genuine) triable issue, then the application should be dismissed, or referred to a trial. Put another way, if the application respondent is bound to lose, then there is no bona fide triable issue and the application should be granted: see *C.M.R. v. L.F.R.*, 2019 BCCA 371 at para. 16.

- [74] What primarily distinguishes this case from Partington, however, is that the Application does not seek to enforce the Separation Agreement. Rather, the respondent seeks to set aside the Separation Agreement. Further, while the claimant relies on the Separation Agreement as a defence to the relief sought in the Application, there is no cross-application by the claimant to enforce the Separation Agreement.
- [75] Moreover, unlike the other scenario discussed in Partington, this is not a "defended" family law proceeding to which R. 10-11(1) applies. The NOFC only sought a divorce. The respondent never filed a response to family claim. This action still must technically constitute an "undefended" family law proceeding.
- [76] Accordingly, even though R. 11-3 of the Rules is not cited in the "legal basis" of the Application, that is the only way, I conclude, that this matter can be before me seeking final orders.
- [77] Specifically, R. 11-3(2) applies to:
- a) A family law case in which a response to family claim has been filed;
 - b) A family law case that has been transferred to the trial list under R. 10-3(7)(d);
 - c) A family law case by way of counterclaim in which a response to counterclaim as been filed; or
 - d) An undefended family law case (emphasis added).
- [78] That R.11-3 is the operative rule under which the respondent must seek the relief in the Application effectively accords, in my view, with the ratio of the Court of Appeal in C.M.R. C.M.R. stands for the proposition that, in defended family law cases that are brought by the filing of a notice of family claim, final orders can only be obtained at a trial or by way of summary trial (emphasis added). If a party subsequently seeks to change a final order he or she must do so by way of application. An application to change or set aside a judgment is by definition a chambers' proceeding (R. 10-3(1)(b)(i)): see para. 12.
- [79] In C.M.R., Justice Goepel concluded that the chambers judge erred in considering whether the cross applications before the court concerning prospective and retroactive child support could be decided on conflicting affidavit evidence or must be referred to the trial list. The proper question, instead, was whether the applications raised a triable issue: see para. 11.
- [80] Importantly, C.M.R. was decided prior to the amendment to R. 11-3(15) which extended the scope of its application to undefended family law cases.
- [81] This approach also accords, I find, with that taken by Mr. Justice G.P. Weatherill in *Babijowski v. Wolanicki*, 2022 BCSC 2126 wherein the claimant, who had also filed a separation agreement with the court dealing with division of family property (but not spousal support as the agreement was silent on that issue) brought an application to set aside the agreement. Although Mr. Justice G.P. Weatherill referred to the claimant's

application as a summary judgment application, it was clearly heard and decided upon under R. 11-3, the summary trial rule.

[82] Returning to the Rules, on the hearing of a summary trial application, the court may, pursuant to R. 11-3(15)(a), grant judgment in favour of any party, either on an issue or generally, unless:

- a) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- b) the court is of the opinion that it would be unjust to decide the issues on the application.

[83] Pursuant to R. 11-3(17), if the court is unable to grant judgment under the aforementioned R. 11-3(15) and considers that the family law case ought to be expedited, the court may order the trial of a family law case generally or on an issue and may:

- a) order that the parties attend a judicial case conference;
- b) make any order that may be made under R. 7-1 (15) [the "what happens at a judicial case conference" rule]; or
- c) make any other order the court considers will further the object of the Rules.

[84] For the reasons I will articulate below, I am not satisfied that I am able, on the whole of the evidence before me, to find the facts necessary to determine whether the provisions of the Separation Agreement pertaining to the division of family property and family debt were negotiated in a manner that was procedurally fair and further, that it would be unjust to decide that issue based on the current evidentiary record. Given that conclusion, I need not engage in the analysis as to whether said provisions of the Separation Agreement are significantly unfair.

[85] Rather, the appropriate remedy is to order a trial pursuant to R. 11-3(17), together with certain procedural orders that I will later specify.

[86] For the reasons I will articulate below, I am satisfied that I am able, on the whole of the evidence before me, to find the facts necessary to conclude that the negotiation of the provisions of the Separation Agreement pertaining to spousal support were procedurally flawed pursuant to s. 93(2)(c) of the FLA and those provisions are not capable of being saved by the court pursuant to s. 93(4) of the FLA.

[87] I am not, however, on the evidence before me, able to find the necessary facts to replace the provisions of the Separation Agreement pertaining to spousal support.

[88] That issue must also be remitted for trial pursuant to R. 11-3(17), together with certain procedural orders that I will later specify.

Sections 93, 94 and 95 of the FLA

[89] In the Application, the respondent relies on s. 93 of the FLA with respect to setting aside the provisions of the Separation Agreement addressing the division of family property and family debt.

[90] The Separation Agreement is a written agreement with the signature of each spouse witnessed by at least one other person and so s. 93 is appropriately engaged.

[91] The material provisions of s. 93 are ss. (3) to (5) which provide as follows:

93(3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

- (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.
- (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
- (a) the length of time that has passed since the agreement was made;
 - (b) the intention of the spouses, in making the agreement, to achieve certainty;
 - (c) the degree to which the spouses relied on the terms of the agreement.

[92] Section 93 contemplates a two-pronged approach for assessing enforceability under which courts consider both formation and substantive fairness of an agreement: see *Hudema v. Moore*, 2021 BCCA 482 at para. 17 and *Spanell v. Spanell*, 2024 BCSC 733 at para. 15.

[93] At the first stage, if any of the factors identified in s. 93(3) existed when the parties entered the agreement, then it was unfairly reached: see *A.K.K. v. A.S.K.*, 2021 BCSC 1602 at para. 50.

[94] The court must assess each of the s. 93(3) considerations holistically. As very helpfully summarized by Justice Matthews in *Y.L. v. G.L.*, 2020 BCSC 808 at para. 285:

[285] With regard to the s. 93(3) considerations, on review of *Miglin*; *Rick v. Brandsema*, 2009 SCC 10; *Asselin*; *Bartch*; *De Medeiros*; *B.L.S. v. D.J.S.*, 2019 BCSC 846; and *Bradshaw v. Bradshaw*, 2011 BCSC 1103, the following principles emerge:

- a) the court should consider the s. 93(3) considerations holistically, and not in isolation to each other as the combination of certain factors may lead to setting aside the agreement where each of the factors alone would not, or where the presence of a factor in favour of setting aside the agreement may be ameliorated by the absence of another factor;
- b) the fact-specific nature of the inquiry, particularly the relative vulnerabilities of the parties and/or the relative amount of information they have about each other's financial affairs is such that the cases are not necessarily readily comparable;
- c) with regard to failing to disclose significant property, debts or other relevant information:
 - i. failure to disclose financial information or incomplete disclosure impacts the integrity of the bargain made. The extent and nature of the failure determines whether the court will intervene;
 - ii. a party's assertion that he or she did not believe the other party had a claim to the assets and so did not disclose is not an answer if the party has a claim or an arguable claim. Disclosure is mandatory separate from any argument or negotiation around whether there is a legal interest in the property;
 - iii. failing to disclose any value for property cannot be defended on the basis that there is no misrepresentation because no value is given;
 - iv. where an asset's value is uncertain, the party with the duty to make disclosure should disclose the facts that will allow the other party to make a decision as to the value or as to whether further investigation is required;
 - v. if a party waives the right to financial disclosure in making a separation agreement but does so in the context of having been misled about the existence of assets and/or their value, the waiver may not be informed and therefore not determinative, especially if it is paired with a representation that the facts disclosed are true, accurate and complete;
 - vi. failure of a party to act in good faith and to act in accordance with an agreement made is not an answer to the other party's failure to disclose financial information;
 - vii. failing to disclose includes incomplete financial disclosure such as not providing the values of assets that both parties know to be in existence, not advising of the true income stream of a business, and providing estimates of the values of an RRSP;

- viii. failing to ask for greater financial disclosure does not prevent the party who did not receive it from relying on s. 93(3)(a);
- ix. where the party complaining of non-disclosure has general knowledge of the other party's assets and their value, non-disclosure of the exact value may not result in an agreement being set aside where the non-disclosure is not a deliberate attempt to avoid addressing the division of those assets or to deprive the other party of information he or she should have in making the agreement;
- x. the non-disclosure must be significant and material;
- d) with regard to one spouse taking advantage of the other's vulnerability, including the other's ignorance, need or distress:
 - i. the parties' relative abilities to understand financial matters is relevant to the assessment of whether one party took advantage of the other's vulnerabilities;
- ii. vulnerability of a less powerful party should not be presumed, there must be evidence to support a finding of vulnerability;
- iii. whether the party who asserts vulnerability had input into the content of the agreement is relevant to assessing this factor;
- iv. legal advice may negate vulnerability but does not necessarily do so and the absence of legal advice does not lead to a presumption that a vulnerability has not been exploited;
- v. the parties' respective bargaining power is relevant to vulnerability and includes whether one of the parties was at an immediate economic disadvantage because the other party controlled the cash or had better access to cash;
- vi. physical and/or emotional abuse is relevant;
- vii. the timing of emotional or physical abuse in relation to the time at which the agreement was made is relevant in the sense that if a party is living in active fear and makes the agreement to get away from an abuser, that is different than a situation where there was an incident of abuse a significant length of time prior to when the agreement was made, especially if the parties were living in different locations when the agreement was made;
- e) with regard to whether one of the spouses did not understand the nature or consequences of the agreement:
 - i. whether the party received independent legal advice is relevant, but not determinative;
 - ii. persons who do not take advantage of the ability to receive legal advice may not be held to unfair agreements despite their own failures especially where the party seeking to enforce it withheld information or the person is vulnerable;

- iii. if a party received legal advice but it was affected by incomplete financial disclosure, it may be not fair to hold the party to the agreement;
- iv. similarly, failure to read an agreement when there was an opportunity to do so will be taken into account in assessing whether failure to understand the agreement is a basis on which to set it aside;
- f) with regard to other circumstances that would, under the common law, cause all or part of a contract to be voidable;
- i. unconscionability can be based on information asymmetry; and
- ii. unconscionability does not have to result in the same type of power imbalance that would void a commercial contract but can arise out of any circumstances of oppression, pressure or other vulnerabilities.

[95] A court may still decline to set aside an agreement that was unfairly reached if the terms that the court would substitute are not substantially different than those contained in the agreement: see Y.L. at para. 283.

[96] As very succinctly stated by Madam Justice Murray in *S.B.F. v. D.G.F.*, 2022 BCSC 2231 at para. 25:

[25] A finding of oppression, pressure, or other vulnerabilities with respect to a property division or spousal support agreement alone is not generally sufficient to set aside the agreement. There must also be evidence that the other party exploited the vulnerable party and, as a result, secured an agreement that deviated substantially from the result that would follow upon an application of the applicable legislation: ss. 93(4) and 164(4). A court can decline to set aside an agreement if, having regard to all the evidence, it would not replace the agreement with an order that substantially differs from its terms: *H.J.S. v. K.C.S.*, 2013 BCSC 998, at paras. 39 and 44-46.

[97] Assuming it that the Separation Agreement reaches the second stage of the analysis, s. 93(5) requires the court to consider whether the agreement is "significantly unfair", including consideration of the three factors listed in s. 93(5)(a) - (c). Those factors are:

- a) the length of time that has passed since the agreement was made;
- b) the intention of the spouses, in making the agreement, to achieve certainty; and
- c) the degree to which the spouses relied on the terms of the agreement.

[98] In some circumstances, the factors listed in s. 93(5)(a) - (c) will affect the fairness of the agreement, but more often they will affect whether or not a significantly unfair agreement should be left in place or set aside: see *Azanchi v. Mobrhan-Shafiee*, 2021 BCCA 55 at para. 52.

- [99] While certainty is a desirable objective, it should not trump either procedural or operational fairness as defined in s. 93: see Asselin at paras. 130-131. As further explained in Y.L. at para. 284:
- [284] A touchstone in the analysis is whether the legislative objectives of the Family Law Act, namely, to encourage resolution of family law disputes through agreements (s. 4(b)) and the certainty, predictability and clarity created by the simplified equal division regime (Jaszczywska at para. 36), are met. The analysis must also respect contractual autonomy while recognizing the unique nature of negotiating agreements for the dissolution of spousal relationship and the inherent vulnerabilities in play as they relate the concept of unconscionability: Miglin at paras. 66, 82.

Section 93(3)(a) - Non-disclosure

- [100] With respect to financial disclosure, under s. 5(1) of the FLA, a "party to a family law dispute must provide to the other party full and true information for the purposes of resolving a family law dispute."
- [101] Further, if a spouse fails to comply with their disclosure obligations, the court may, among other things, draw an adverse inference against that party. The FLA specifically addresses this in the context of the imputation of income for support purposes in s. 213(2)(b), but the ability of the court to draw adverse inferences from non-disclosure has much wider breadth than simply that provision.
- [102] The ability of the court to set aside an agreement due to inadequate financial disclosure under s. 93(3)(a) recognizes that contractual autonomy in family law is constrained by the integrity of the bargaining process. Parties can only determine what constitutes an acceptable bargain if both have the information required to decide what concessions to accept or offer. Inadequate information constrains a spouse's ability to do so: see Rick v. Brandsema, 2009 SCC 10 at para. 46 and Bartch v. Bartch, 2019 BCSC 1643 at para. 220.
- [103] At the same time, when considering non-disclosure within the context of a domestic contract, the test is whether there was material non-disclosure that would undermine the agreement: see Rick at para. 45 - 49.
- [104] Where disclosure is not a legislative requirement, the lack of disclosure is only relevant if it undermined the fairness of the negotiation process. A court can intervene when a failure to disclose is deliberate and coupled with misinformation, or where a failure to disclose leads to an agreement that departs substantially from the objectives of the governing legislation: see Anderson v. Anderson, 2023 SCC 13 at para. 67.

- [105] In *Asselin v. Roy*, 2013 BCSC 1681, the first decision to substantively consider the relevant provisions of the FLA after it was brought into force, the Court concluded that because of incomplete financial disclosure and the failure to provide details of liabilities and value of assets, the claimant did not have the information necessary to consider her position prior to entering into the subject agreement.
- [106] In *Azanchi*, the Court made a differentiation between a technical omission versus a material omission. Specifically, the Court refused to overturn a separation agreement by virtue of s. 93(3)(a) on the basis that they found that the claimant knew of the existence of a specific bank account, but did not know the amount that was held in the account. This constituted a technical omission as opposed to a material omission as the claimant would have had the ability to determine the approximate magnitude of earnings that would have gone into the account. Such an omission is not sufficient to overturn the agreement in question.

Section 93(3)(b) - Vulnerability

- [107] Section 93(3)(b) recognizes that courts must be alive to situations of spousal vulnerability and dependence: see *Miglin v. Miglin*, 2003 SCC 24 at para. 81; and *Liu v. Xu*, 2020 BCSC 92 at paras. 90-94.
- [108] Whether a party's emotional state rendered them "vulnerable" such that they were incapable of making a binding agreement is ultimately a factual determination: see *Ma v. Liu*, 2023 BCSC 283 at paras. 139 and 141; and *Anderson* at para. 69.

Section 93(3)(c) - Understanding

- [109] As stated by Justice Watchuk in *Young v. Sherk*, 2019 BCSC 312 at para. 78:
- [78] Receiving independent legal advice at the time of negotiation is an important means of ensuring an informed decision to enter an agreement: *Hartshorne v. Hartshorne*, 2004 SCC 22 at para. 60. As such, in considering whether a party understood the nature and consequences of an agreement, the court must consider whether independent legal advice was obtained and if so, the quality of that advice.
- [110] A failure to receive legal advice will not necessarily result in a written agreement being set aside. However, it is a relevant consideration in cases of financial disparity between the spouses and where financial disclosure has been inadequate: see *Liu* at paras. 95-96. It is also relevant to the question of whether a spouse understood the nature and consequences of the agreement under s. 93(3)(c): see *Asselin* at para. 141.

- [111] The test for vagueness articulated in *Hoban Construction Ltd. v. Alexander*, 2012 BCCA 75, which provides that "only where the essential terms of an agreement are so uncertain as to be incapable of reasonable interpretation will the contract be void for vagueness" applies in the family law context: see *Azanchi* at para. 36. Ultimately in *Azanchi*, the Court concluded that the subject clause was not vague as it was "not incapable of being reasonably interpreted": see para. 36.
- [112] A miscalculation as to the exact scope of a clause in an agreement does not amount to a failure to understand the nature or consequences of an agreement. Most, if not all, contracts include words whose meanings are somewhat elastic, and clauses whose ambit can be the subject of debate. If the mere presence of such words and clauses allowed the contract to be set aside, there would be little scope for binding private contracts: see *Azanchi* at para. 37.

Section 93(3)(d) - Other Circumstances

- [113] Section 93(3)(d) of the FLA incorporates other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- [114] Several such circumstances, such as mistake and capacity, are not put into issue by the respondent. There is, however, at least an intimation of duress by the respondent which is recognized by the claimant in their submissions.
- [115] In the family law context, the court has defined duress as "a form of oppressive contractual conduct directed by one party towards another to compel them to act to their disadvantage" and the underlying question to be "whether the oppressor's action vitiated the consent of the oppressed party": see *G.C.G. v. M.J.T.*, 2016 BCSC 1277 at para. 104.
- [116] The onus is on the party alleging duress to prove they entered the separation agreement because of duress on the part of the other spouse: see *Roberts v. Roberts*, 2000 BCSC 611 at para. 32.
- [117] Mere emotional difficulty or strain is generally insufficient to establish duress to set aside a family agreement: see *A.B. v. T.R.*, 2013 BCSC 1798 at para. 19.

Analysis re Section 93(a) to (d) of the FLA

- [118] As I indicated above, I have concluded that I am unable, on the whole of the evidence before me, to decide whether the negotiation of the Separation Agreement was procedurally unfair given that the analysis of the factors set forth in s. 93(3) must be done holistically. I further consider it would be unjust to decide the issue in these particular circumstances.
- [119] Specifically, weighing in favour of concluding that the negotiation of the Separation Agreement was not procedurally unfair:

- a) The parties only significant asset was the Former Family Home. Both parties were clearly aware of its existence. Obtaining an appraisal to establish its fair market value was something that both parties were equally capable of arranging and by virtue of the financial arrangements between the parties in place, I am satisfied both had access to sufficient means to pay for an appraisal even if they could not agree to obtain one jointly;
 - b) Instead, the parties apparently obtained a comparative market analysis in April 2021. That comparative market analysis, of which there is not even a copy of in the evidentiary record, supposedly concluded that the fair market value of the Former Family Home was less than the BC Assessment value. However, the BC Assessment value was information again fully available to the respondent at no cost given he is a registered owner of the property;
 - c) From the range provided in the comparative market analysis, a value of \$620,000 was apparently used and then certain notional adjustments were apparently applied. These notional adjustments are not enumerated in the Separation Agreement but they are based upon information that was equally available to both parties. As I addressed in Spanell, at para. 65, the reduction of a notional commission is usually only made where a sale of the subject property is imminent but that is a potential fairness issue and not a disclosure issue as the calculation of notional real estate commission once a value is agreed upon is a very simple mathematical exercise;
 - d) At the same time that the parties were finalizing and signing the Separation Agreement, they were cooperating with refinancing the Mortgage as contemplated in the Separation Agreement. As part of that process, CIBC obtained an independent property valuation. The respondent had access to that information as part of the refinance documents he signed after meeting with a lawyer - albeit not a family law lawyer;
 - e) The respondent was clearly aware of his right to obtain independent legal advice (as confirmed in the terms of the Separation Agreement) and indeed initially took positive action in that regard. When the counsel hired did not provide advice in a timely way, the respondent simply abandoned his efforts. Even after receiving a partial refund. The claimant did not discourage the respondent from obtaining legal advice;
 - f) The respondent was the one that made the unilateral change to the long-standing post-separation finances to effectively force the claimant's hand in moving forward with drafting an agreement. He was not the vulnerable party in that regard; and
 - g) There was no conduct on the part of the claimant that was so oppressive that it vitiated the respondent's consent.
- [120] In contrast, weighing in favour of concluding that the negotiation of the Separation Agreement was procedurally unfair:

- a) The respondent obviously placed a significant degree of trust and confidence in the claimant's skills as a paralegal to draft the Separation Agreement. This created a power imbalance between them;
 - b) Notwithstanding this trust and confidence, the Separation Agreement is very poorly drafted as will be apparent from my above review of the provisions. Amongst other things, the Former Family Home is, with the exception of two paragraphs, not even included within the covenants portion of the agreement and there it is referenced indirectly;
 - c) Para. 4(e) of the Separation Agreement, which does form part of the covenants portion of the agreement, purports to retroactively include spousal support in the division of equity allocations in the Former Family Home. This provision is incapable of reasonable interpretation. That is but one key example of a provision in the Separation Agreement that is incapable of reasonable interpretation;
 - d) The Separation Agreement, albeit in the recital provisions, contemplates the claimant retaining the respondent's portion of the shared debt. However, in those same recital provisions, the parties agreed to use the proceeds of refinancing the Former Family Home to pay their joint debts. The latter is what occurred and why the respondent only received \$14,000 from that refinance as his total interest in the equity in the Former Family Home; and
 - e) Although the claimant did not discourage the respondent from obtaining independent legal advice, the practical reality is that he did not receive any such advice. I strongly suspect that any family law counsel who reviewed the Separation Agreement would have identified certain problems with the provisions pertaining to the division of family property and family debt and would have recommended revisions to the agreement before signing.
- [121] Simply put, I cannot weigh these competing factors on the conflicting and, at points, incomplete record before me. I further consider it would be unjust to do so. This issue requires a trial with more fulsome document disclosure and most importantly, both viva voce evidence and corresponding cross-examination of both parties.

Sections 164, 165 and 166 of the FLA

[122] Turning to the next key issue, respondent relies on the s. 164 of the FLA with respect to setting aside the provisions of the Separation Agreement addressing spousal support.

[123] Again, the Separation Agreement is a written agreement with the signature of each spouse witnessed by at least one other person and so s. 164 is appropriately engaged.

[124] The material provisions of s. 164 are ss. (3) to (5) which provide as follows:

164(3) On application by a spouse, the court may set aside or replace with an order made under this Division all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

- (a) a spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other party's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would under the common law cause all or part of a contract to be voidable.
- (4) The court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the agreement with an order that is substantially different from that set out in the agreement.
- (5) Despite subsection (3), the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
- (a) the length of time that has passed since the agreement was made;
 - (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
 - (c) the intention of the spouses, in making the agreement, to achieve certainty;
 - (d) the degree to which the spouses relied on the terms of the agreement;
 - (e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].

[125] The law with respect to the application of s. 93(3) of the FLA which I have laid out in considerable detail is substantially the same, with some nuances, as the law in respect of s. 164(3) of the FLA. For reasons that will be apparent below, those nuances are not relevant in this case.

Analysis re Section 164 of the FLA

[126] Leaving aside that the substantive spousal support provisions of the Separation Agreement are contained in the recital section, the operative provision provides that the respondent shall pay "maintenance" to the claimant "in the amount of \$3,000 per month, as determined by tables of calculation generally accepted and relied on by courts in BC".

[127] While the term "maintenance", much like the term "alimony", has generally been replaced with "support", there is nothing in the above recital that would sustain the definitive interpretation that the \$3,000 payable by the respondent was intended to be tax neutral. To the contrary, the reference to "tables of calculation generally accepted and relied upon" would suggest, in my view, that the \$3,000 was intended to be taxable in the claimant's

hands and tax deductible to the respondent which is the norm with respect to support orders made by courts in this province. This court does not and has not for many years made tax-neutral spousal support orders except very occasionally on an interim without prejudice where necessary. Further, on occasion this court has to deal with written agreements or oral agreements between litigants which contain specific language as to the tax treatment of support. However, where a final order for spousal support is ordered by this court, it accords with the tax treatment contemplated under the Income Tax Act.

- [128] Accordingly, without needing to consider the issues of disclosure or vulnerability or other circumstances, the spousal support provisions of the Separation Agreement cannot sustain the scrutiny of the court's review under s. 164(3)(c). The essential terms of the Separation Agreement regarding spousal support are so uncertain as to be incapable of reasonable interpretation: see Azanchi at para. 36.

Section 163(4) - Saving Provision

- [129] Furthermore, the spousal support provisions of the Separation Agreement cannot be saved on the basis that the court would not replace the agreement with an order that is substantially different from that set out in the Separation Agreement.
- [130] As a starting point, if one prepares a DivorceMate calculation using the Guideline incomes set forth in the Separation Agreement of \$50,000 and \$175,000 per annum respectively for the parties, with a length of marriage of 23 years, the range of monthly support under the Spousal Support Advisory Guidelines [SSAG] is between \$3,594 on the low end and \$4,792 on the high end with a mid-point of \$4,193. However, those amounts are premised upon the support being tax deductible to the respondent.
- [131] The actual after-tax cost to the respondent of that same monthly support is between \$2,144 on the low end and \$2,884 on the high end with a mid-point of \$2,514. In this regard, the DivorceMate calculation I prepared is attached as Schedule "B" to these reasons for judgment.
- [132] What this means, practically speaking, is that if the \$3,000 paid by the respondent is considered to be tax neutral, the respondent is paying in excess of the high end of the range provided for under the SSAG. If the \$3,000 paid by the respondent is considered to be tax deductible to the respondent and taxable in the claimant's hands, the respondent is paying below the low range provided for under the SSAG.
- [133] Neither of those results accords with the evidentiary record before me and accordingly, a substantially different order than that set out in the Separation Agreement is required.

- [134] Compounding the court's difficulties is the fact the respondent takes issue with the Guideline income provided for in the Separation Agreement but does give evidence of what his income actually was then or is now. Specifically, as noted above, the respondent has not delivered a Form 8 Financial Statement despite the fact that one is clearly required under R. 5-1.
- [135] Accordingly, whilst the provisions of the Separation Agreement pertaining to spousal support are set aside, the issue of what spousal support provisions to replace it with must be remitted to trial.

Spousal Support Pending Trial

- [136] For the reasons articulated, I have concluded that the spousal support provisions of the Separation Agreement must be set aside pursuant to s. 93(3) of the FLA. Further, I am not in a position to replace those provisions of the Separation Agreement given the state of the evidentiary record before me.
- [137] The respondent, however, has an obligation to pay spousal support to the claimant. Entitlement to support has always been conceded. That is one fact that is clear and obvious on the evidentiary record.
- [138] Further, the critical difficulty the court faces in considering the issue of spousal support substantively is the woefully inadequate financial disclosure from the respondent.
- [139] In the circumstances, I consider it appropriate to make an interim order that the respondent shall continue to pay spousal support to the claimant in the amount of \$3,000 per month and that this shall continue to be paid on a tax-neutral basis, on a strictly without prejudice basis, pending further court order or written agreement. The respondent is at liberty to bring on an application to vary the interim support pending trial provided the application is supported by the necessary financial disclosure.
- [140] The above is the fairest way, in my view, to address the issue of ongoing support whilst the parties move forward with this litigation in light of these reasons for judgment. The claimant cannot be deprived of spousal support and the respondent has demonstrated an ability, with I accept some personal sacrifice, to be able to pay the \$3,000 per month currently being enforced by BCFMA. An order that the \$3,000 per month be treated as taxable in the claimant's hands mid-way through this taxation year would, in addition to being prejudicial to the claimant, also complicate matters. In comparison, if an adjustment from tax neutral to tax deductible support were potentially made by further court order in due course, the Income Tax Act permits a comprehensive retroactive correction in these circumstances.

[141] Although not on all fours, I consider this interim solution to be generally consistent with that fashioned by the Court of Appeal in *Armstrong v. Armstrong*, 2012 BCCA 166 at para. 76, wherein Justice D. Smith set aside portions of a summary trial order regarding determining Guideline income and quantum of support and reverted the support arrangements to a prior without prejudice consent order pending final orders being made.

Procedural Orders

[142] As noted above, R. 11-3(17) provides that where the court is unable to grant judgment under subrule (15) and considers that a family law case ought to be expedited, both of which apply here, the court may order that the parties attend a judicial case conference and has broad discretion to make orders the court considers appropriate to further the object of the Rules, including any order that may be made under R. 7-1(5) [the - "what happens at the judicial case conference rule"].

[143] One complicating factor in crafting such orders in this action is the reality that the respondent has been, of late, effectively assuming the role of the claimant in these proceedings. However, with the benefit of these reasons, I am confident counsel will be able to draft their respective pleadings without the necessity of changing the style of cause.

[144] Accordingly, pursuant to R. 11-3(17), I make the following additional orders:

- a) The parties shall schedule a judicial case conference at the earliest mutually convenient available date;
- b) Within 21 days of these reasons, unless otherwise agreed, the claimant shall file an amended notice of family claim;
- c) Within 40 days of these reasons, unless otherwise agreed, the respondent shall file a response to family claim and a counterclaim;
- d) Within 55 days of these reasons, unless otherwise agreed, the claimant shall file a response to counterclaim; and
- e) Within 30 days of these reasons, unless otherwise agreed, the respondent must file a Form F8 Financial Statement with all required attachments; and
- f) No less than 14 days prior to the scheduled judicial case conference, unless otherwise agreed, the claimant must file an updated Form 8 Financial Statement with all required attachments.

Costs

- [145] The outcome of the Application illustrates that a little bit of family law knowledge can unfortunately be a bad thing. It is not a desirable result for the parties to be pitched into ongoing litigation that I accept they were both initially striving to avoid. However, it is the only appropriate result when the law is applied to the Separation Agreement with its requisite frailties and failings.
- [146] In that context, the court must still consider the issue of costs.
- [147] Costs are awardable at the discretion of the hearing judge pursuant to R. 16-7. The general principle is that costs are awarded to the successful party, but the hearing judge has the discretion to depart from the prima facie rule that the successful litigant should be awarded costs.
- [148] This discretion to "otherwise order" must of course be exercised judicially, not arbitrarily or capriciously. An error in principle in an order departing from the usual rule will justify intervention: *Brito (Guardian ad litem of) v. Woolley*, 2007 BCCA 1. Subject to such an error, however, the discretion is very broad.
- [149] The standard of "success" required for the award of the costs of an action under Rule 16-1(7) is "substantial success". The Court of Appeal in *Harras*, described the substantial success standard:
- [48] "Success" for the purposes of costs means substantial success. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, endorsed by this Court in *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16:
- Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham*, Mr. Justice Bouck described this standard as follows:
- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when [looking] at all the disputed matters globally.
- [150] The claimant was not the substantially successful party. The claimant opposed the Application in its entirety and took the position that the respondent was "bound to fail". That is not what the court ultimately concluded.
- [151] The respondent did achieve some success in having the court order a trial of the issue of his claim to set aside the provisions of the Separation Agreement pertaining to the division of family property/family debt and did set aside the provisions of the Separation Agreement

regarding spousal support. However, the court was not in a position to make any orders regarding spousal support due to the state of the respondent's financial disclosure. Further, if this court had set aside the provisions of the Separation Agreement pertaining to the division of family property/family debt, the court still would have had to order a trial to determine what the appropriate division of family property/family debt should be given the state of the evidentiary record and the lack of submissions in that regard.

[152] I am satisfied that, notwithstanding that the respondent was arguably the substantially successful party, when one considers the above threshold for determining same, this is an appropriate situation for me to exercise my discretion to "otherwise order" that the parties shall bear their own costs of the Application in any event of the cause.

"Hardwick J."

Schedule "A" - NOA Orders Sought

- [1] An Order pursuant to Section 93(3) of the Family Law Act setting aside the Separation Agreement with respect to the division of family property and debt made between the parties September 23, 2023 ("the Separation Agreement");
- [2] An Order pursuant to Section 93(5) of the Family Law Act replacing the Separation Agreement with respect to the division of family property and debt and ordering:
 - a) An Order for determination of family property and family debt and the value of family property and family debt pursuant to Sections 84, 86, 87 and Section 97 of the Family Law Act, including any necessary accounting or tracing of family property; and
 - b) An Order pursuant to Section 91 of the Family Law Act prohibiting the respondent from disposing of, transferring, converting, or exchanging into another form, property in which the Applicant may have an interest; and
 - c) An Order pursuant to Section 94 dividing family property and family debt at issue between the Applicant and respondent;
- [3] An Order pursuant to Section 164(3) of the Family Law Act setting aside the Separation Agreement with respect to spousal support and replacing the Separation Agreement with respect to spousal support and ordering:
 - a) An Order determining Spousal Support paid, and payable by the Applicant to the respondent
 - b) An Order that spousal support paid, or payments made in lieu of spousal support by the Applicant to the respondent or for the benefit of the respondent are deemed to have been paid and received pursuant to subsections 56.1(3) and 60.1(3) of the Income Tax Act. The Applicant will deduct these payments from his taxable income and the respondent will include them in her taxable income;

- c) An Order that the Applicant and respondent will register any Order or Agreement for spousal with the Canada Revenue Agency by filing Form T1158 "Registration of Family Support Payments" with the Canada Revenue Agency;
- [4] An Order pursuant to Rule 10-3(7)(d) of the Supreme Court Family Rules that this application and matter be referred to the trial list if deemed necessary by this Honourable Court; and
- [5] Costs, payable by the respondent to the Applicant.

Schedule "B"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/25/16/2025BCSC1649.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/m-n-m-v-w-e-m-2025>

Prepared on 29 October 2026 · Esheria