

CANADA / JUDGMENT

McConnell v. McConnell

2025 BCSC 2451

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 2451 McConnell v. McConnell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McConnell v. McConnell,

2025 BCSC 2451

Date: 20251210

Docket: E233400

Registry: Victoria

Between:

Ian McConnell

Claimant

And:

Katherine Flora McConnell

Respondent

Before: The Honourable Justice Young

Reasons for Judgment

Counsel for Claimant:

N.J.W. Reid

C. Favreau

Counsel for Respondent:

H. Froese

Place and Date of Trial/Hearing:

Victoria, B.C.

September 2 - 5, 2025

and November 7, 2025

Place and Date of Judgment:

Victoria, B.C.

December 10, 2025

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- [1] The respondent by amended counterclaim seeks to set aside the separation agreement entered into on July 15, 2021 (the Separation Agreement) in respect of spousal support, division of property and or debt. Initially she sought an order respecting the parties' child but those issues have been resolved and she no longer seeks orders with respect to parenting.
- [2] In the Separation Agreement the respondent waived her right to spousal support and her obligation to pay child support. She seeks to set aside this agreement on the basis that the claimant took unfair advantage of her vulnerability, ignorance, need and distress due to her mental health issues. She submits that she did not understand at the time the finality of the Separation Agreement and its consequences. She did not have legal representation. She submits she was under duress and coerced into signing the Separation Agreement.
- [3] The claimant brought an application to set aside the respondent's counterclaim by way of summary trial and the respondent brought an application to change the venue of the trial to New Westminster. Both applications were dismissed. Justice Gaul ordered that this matter proceed to trial on the sole issue of whether or not the separation agreement should be set aside. He ordered that if the respondent is successful in setting aside the Separation Agreement, she is at liberty to reapply for a change of venue. Both parties now reside in Maple Ridge, B.C.
- [4] The trial was extended for five days to allow the parties to lead evidence about the fairness of the Separation Agreement.

Overview

- [5] The claimant was born in 1964 and the respondent was born in 1971. The parties were married in 2005 and their one child Gavin was born in 2008. The parties separated in 2021. The parties were both employed in the early years of the marriage but the respondent was afflicted with numerous disabilities throughout the marriage and was receiving short-term and long-term disability benefits on and off from 2009. In 2018 she was diagnosed with bipolar II disorder and a general anxiety disorder and fibromyalgia. She was approved for CPP disability benefits and long-term disability benefits through her BC pension services plan. At the time the parties separated she had not been employed for three years. The claimant was employed throughout the marriage and was the main financial supporter for the family. His career advanced throughout the marriage.

- [6] The Separation Agreement was drafted by the claimant's counsel and forwarded to the respondent to review. There were concerning circumstances surrounding the execution of the Separation Agreement. Without the benefit of legal advice the respondent waived her claim for spousal support. The proceeds of sale from the family home were divided equally. The respondent kept her RRSP. The parties did not disclose the values of their employment pensions. The respondent was not aware that she had an employment pension when she signed the agreement. She knew the claimant had one but did not know its value.
- [7] The division of assets favours the respondent who received an unequal division of assets because she did not divide her RRSP. Factoring in the values of the parties' employment pension contributions as at 2021 (\$55,892 and \$15,093) and the respondent's locked in RRSP at 2021 (\$107,171), it appears that the respondent received \$33,186 more in assets than the claimant did.
- [8] I have replaced the waiver of spousal and child support in the Separation Agreement with an order for spousal and child support however the commencement date of that order is a concern. There was a delay in filing the counterclaim and advising the claimant of the respondent's intention to challenge the spousal support waiver. The claimant has organized his affairs relying on the Separation Agreement and so I must determine whether it would be fair to backdate spousal and child support orders.

The Test for Setting Aside the Separation Agreement

- [9] Section 93 of the Family Law Act, S.B.C. 2011, c. 25 applies to agreements respecting the division of property and debt. Subsection (3) gives the court jurisdiction to set aside or replace with an order made under Part 5 all or part of an agreement if the court is 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.
- [10] Under s. 93(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.

[11] The court also has jurisdiction to set aside an agreement even if the factors in subsection (3) do not exist if the court is of the view 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.

[12] Section 164 of the Family Law Act addresses setting aside agreements respecting spousal support. It says:

164(1) This section applies if spouses have a written agreement respecting spousal support, with the signature of each spouse witnessed by at least one person.

- (2) For the purposes of subsection (1), the same person may witness each signature.
- (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].
- (6) Despite subsection (1), the court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

[13] The objectives of spousal support are set out in s. 15.2 (6) of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.):

Divorce Act Factors

15(2)(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

Spousal misconduct

- (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Objectives of spousal support order

15(2)(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

- [14] The first basis for setting aside an agreement concerns procedural fairness in making the agreement. The second basis concerns substantive unfairness of the agreement itself. There is a high threshold for setting aside an agreement based on substantial unfairness.
- [15] As was set out in *Miglin v. Miglin*, [2003] 1 S.C.R. 303 (*Miglin*) an agreement fairly negotiated that represents the intentions and expectations of the parties and that complies substantially with the objectives of the Divorce Act as a whole should receive considerable weight. In an originating application for spousal support where the parties have executed a pre-existing agreement the court should look first to the circumstances of negotiation and execution to determine whether the applicant has established a reason to discount the agreement (*Miglin* at para. 4).
- [16] When looking at the circumstances surrounding the execution of the agreement at Stage One, the court should look at "the conditions of the parties, including whether there were any circumstances of oppression, pressure, or other vulnerabilities, taking into account all of the circumstances, including those set out in s. 15.2(4)(a) and (b) and the conditions under which the negotiations were held, such as their duration and whether there was professional assistance" (*Miglin* at para. 81).
- [17] The court cautioned in *Miglin* that they are not suggesting courts must look for unconscionability as it is understood in the law of contracts. The Supreme Court warned that there is a danger in borrowing terminology from the commercial context and applying it to family law context. In the family law context, one party may take advantage of the vulnerability of another party which falls short of unconscionability in a commercial context.
- [18] After considering the conditions of the execution of the agreement the court must also look at the substance of the agreement. The court must determine the extent to which the agreement takes into account the factors and objectives listed in the Divorce Act or Family Law Act reflecting an equitable sharing of the economic consequences of marriage and its breakdown (*Miglin* at para. 84).
- [19] It is only a significant departure from the general objectives of the Divorce Act or Family Law Act that will warrant the court's intervention. Does the agreement represent a significant departure from the general objectives of the Act? (*Miglin* at para. 85).
- [20] At Stage Two the court must ask whether the negotiations of the agreement are not impugned on the basis set out above and if the agreement was in substantial compliance with the general objective of the Act, whether there now exists circumstances that were not anticipated at the time of negotiation. The applicant must show that in light of new circumstances the terms of the agreement no longer reflect the parties' intention at the time of execution in the objectives of the act (*Miglin* at para. 88).

- [21] There is no absolute requirement to compare the spousal support provisions of the separation agreement with the range and duration of support calculated in accordance with the Spousal Support Advisory Guidelines. In determining whether an agreement substantially complies with the objectives of the Divorce Act the court must consider whether there was an equitable sharing of the economic consequences of the marriage or its breakdown. These consequences can be shared equitably through the division of assets and debt, in the way special and extraordinary expenses for children are divided between spouses, as well as by the provision for spousal support. The court must also consider the benefit of allowing spouses to settle their own affairs under terms that are agreeable to them (*Nicholl v. Nicholl*, 2020 BCCA 173 at paras. 45 and 46).
- [22] Circumstances of oppression pressure or vulnerability on their own may not be sufficient to warrant the setting aside of an agreement without evidence that one party exploited the other and as a result secured an agreement that deviated substantially from the objectives of the Divorce Act or Family Law Act (*Reiner v. Reiner*, 2021 BCSC 1514 at para. 16).
- [23] The absence of independent legal advice by itself does not invalidate an agreement (*Deboer v. Deboer*, 2017 BCSC 735 at para. 24).
- [24] The court in *Miglin* stressed the importance of respecting the parties' rights to decide for themselves what constitutes mutually acceptable sharing. This contractual autonomy depends on the integrity of the bargaining process. In *Rick v. Brandsema*, 2009 SCC 295 at paras. 45-46 the court said "decisions about what constitutes an acceptable bargain can only authoritatively be made if both parties come to the negotiating table with the information needed to consider what concessions to accept or offer. Informational asymmetry compromises a spouse's ability to do so".
- [25] The claimant argues that the respondent was not entitled to compensatory spousal support and relies on *Cphoon v. Stobo*, 2023 BCCA 497 where the court found there was no actual entitlement to compensatory support after a 24-year relationship despite the fact that wife spent seven years as a primary parent and homemaker. At para. 60 the court stated that not every sacrifice by one spouse or advantage conferred on another spouse leads to a compensatory support award. In that case Mrs. Stobo did not forgo any career opportunities nor was she handicapped by the marriage citing *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 39 and 40. She did not make economic sacrifices nor was her career advancement permanently reduced by the contribution she made to her child and husband as was the case in *Moge v. Moge*, [1992] 3 S.C.R. 813.
- [26] The respondent seeks the spousal support both on compensatory and non-compensatory models relying on *Bracklow* and *Chutter v. Chutter*, 2008 BCCA 507.

Application of the Facts of This Case

Circumstances of the Parties

- [27] Before examining the circumstances surrounding the execution of the separation agreement, I find it important to review the circumstances of the parties.
- [28] At the beginning of the marriage the claimant was employed with BC Communications in North Vancouver full-time and the respondent was employed by Erco Chemical also in North Vancouver full-time. They were residing in a home owned by the claimant and his mother and brother in Maple Ridge. The claimant lost his job with BC Communications and started up a home business doing installations of a nurse call system for use in care homes.
- [29] The respondent worked full-time until later in her pregnancy with their child. She developed gestational diabetes and high blood pressure. Her pregnancy was considered high risk and she had to stay home from work later in the pregnancy. She was then on maternity leave for one year and in addition took her unused vacation of 4 or 6 weeks. She went back to work in September 2009.
- [30] The respondent returned to work for six weeks and then was back on sick leave and on EI according to the claimant. The claimant's work took him out of town routinely and the respondent was primarily responsible for the care of their child.
- [31] The respondent says that she received disability benefits between 2009 until October 2012.
- [32] While working as an independent contractor the claimant was working exclusively for Omega Communications which operated out of Kelowna. Omega offered him a full-time job in 2012 in Kelowna so the family moved to Kelowna.
- [33] The respondent says that she was receiving long-term disability benefits and lost them when she moved to Kelowna and could no longer get her annual long-term disability medical forms filled in by her family doctor. She testified that she went to the doctor she had in Langley to fill in the annual disability claim form and his office had closed. She did not have a doctor to sign the form in Kelowna and so her disability claim was denied. The claimant says that he thinks the respondent was denied long-term disability because an investigator posed as the respondent's friend for several months and he speculates that is why she was denied benefits. He felt she was fine to go back to work but that she had more physical limitations because of weight gain affecting her mobility. The claimant appeared to me to be guessing.
- [34] I accept the respondent's explanation that the reason she was denied long-term disability benefits was that she could not find the family doctor to execute her medical form. Her employer Erco Chemical offered her position back to her as they were required to do and she had to turn it down because she was living in Kelowna. She said she had to move to Kelowna because the claimant's job was more important. He was making good income because his career had advanced and he was making double what he made when they first got together. She gave up the best job she had at Erco Chemical when they were in Kelowna. This is the decision she had to make for the family. They then terminated her services and

paid out her pension into a locked-in RRSP. Whether she would have been fit to return to work at Erco is uncertain.

- [35] The claimant's observations in the home were that the respondent had regressed. They were having more conflicts and she was having more conflicts with his daughter Amanda. The claimant's evidence focused a great deal on the division of household chores which was the main source of their conflict.
- [36] He had discussions with the respondent about getting another job. His perception was that she just did not want to go to work. When asked about the respondent's disabilities he acknowledged that she had some physical problems but he appeared to me to minimize the impact of her psychiatric disorders. He said that the respondent's bipolar disorder was not "full time" and he believed at points during which she was not working and was receiving disability benefits, she had some capacity to work.
- [37] I think it would be more accurate to say that the respondent's bipolar disorder was controlled by medication. It is a permanent condition. Also her family doctor wrote that it is unlikely that the respondent will ever return to work.
- [38] The respondent testified that the claimant belittled her when she was off work due to her disabilities.
- [39] The respondent obtained a job at Pine Acres Care Home in Kelowna on a part-time basis in their accounting department until she was let go. She did not say why. She was receiving employment insurance benefits when the parties moved again, this time to Vancouver Island in 2013.
- [40] In August 2013 the claimant was offered a full-time job with BC Ambulance in Victoria. He said it was a better job for his career. They agreed to move to Vancouver Island. They rented a house then bought a house in Sooke. With his assistance, the respondent was offered a position in the billing department at BC Ambulance on a full-time basis in the spring of 2014.
- [41] The respondent testified that in the beginning she was capable. She was initially offered a job at the front desk. After BC Ambulance tested her, they transferred her to the billing department. She started work at the end of April 2014. Toward the end of her employment there, she was taking a lot of sick time. She said she was immune deficient and picking up every cold that would turn into bronchitis, and she could not do her job. In March (I believe 2018) the employer pulled her aside and said that she had to go on extended leave. She went on sick leave in March 2018. She said she could barely walk by then. She gained a tremendous amount of weight. Her mental health was bad. She could not remember procedures in the procedure manual which she had helped to write. She said her mental ability was just not there. She knew that she had depression and anxiety.

- [42] The respondent was diagnosed with bipolar II disorder, anxiety disorder depression and later she was diagnosed with complex PTSD. Her cognitive ability and recall were affected. Her administrative skills had deteriorated and she felt useless. She was suicidal. She did participate in counselling at the mental health clinic. She did not feel that the claimant understood what she was going through and he would not participate in some of her therapies.
- [43] The claimant said that he researched bipolar disorder and tried to help the respondent become more physically active with swimming passes and equine therapy but she did not follow through.
- [44] The respondent describes this time as feeling like she was in a fight or flight mode or frozen for a number of years. It was hard to be around people. She received no understanding or sympathy from her husband. During Covid it was worse because everyone was working from home. She was struggling with suicidal ideation. She testified that her mental illness had highs and lows and were not necessarily always reflected in her medical charts. She would wear a mask in public.
- [45] The claimant relies on certain excerpts from clinical records after objecting to their admissibility. In *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2016 BCSC 1896 Justice Steves addressed the scope of evidence given by doctors who are not certified experts under the rules of court. In that case Justice Steves relies on *Seaman v. Crook*, 2003 BCSC 467 where Justice Metzger addresses clinical records. He concludes that without having met the requirement of Rule 40A (now Rule 11-1) the oral testimony of the doctor interpreting his clinical records does not change the nature of the evidence contained in those clinical records. The clinical records remain evidence of the fact that he made those notes, made that diagnosis and prescribed certain treatments. The opinions contained in the clinical records do not constitute independent standalone expert opinions.
- [46] The claimant relies on the May 18, 2021 clinical record of Dr. Gregson psychiatrist who discharged the respondent from the psychiatric clinic because the respondent had been reasonably psychiatrically stable. In an earlier note that month Dr. Gregson wrote that she told the respondent that she was leaving the clinic at the end of June and that it was possible that the respondent's care would be transferred to her family physician exclusively given the relative stability of the respondent's mental state. In that note dated March 31, 2021, Dr. Gregson added "however I do appreciate that she remains severely functionally disabled". In the same note Dr. Gregson states "Kathy's prognosis remains quite guarded. She has been chronically impaired with respect to her mood symptoms and has not made much progress despite pharmacotherapy trials and encouragement around engaging with some psychotherapy".
- [47] On May 18, 2021, Dr. Gregson noted that it has" become increasingly apparent that she has significant avoidant personality traits as well and, in fact, I think anxiety and avoidance are her primary impairing conditions more so than her mood disorder which has been for the

most part quite stable". She notes that the respondent often awaits her husband or son to invite her to do things. Regrettably this has led her to have increasingly strained relationships with them and her husband has expressed frustration with her limited level of functioning at home. At one time they were talking about separating. Apparently, the respondent told Dr. Gregson on May 18, 2021 that their relationship was stable and they are trying to improve their communication. The claimant asked the respondent for a divorce less than one month after this statement was made.

- [48] The claimant testified that the marriage was stressful. Towards the middle of the relationship he did approximately 70% of the labour in the household. He bought the groceries and prepared the food. It got worse when Kathy applied for short-term disability in 2018. She woke up in the morning and sat all day not participating in chores or childcare. He would set food up in the fridge so that Gavin could get his breakfast and lunch and then Gavin would walk home and hang out there until the claimant got home to make dinner. He recognized that the respondent had bipolar disease. She was overweight and had mobility issues. They did start counselling to try to mend their situation. He wanted her to meet him halfway with household duties and chores to make it easier on him. It did not work. She was closed and did not participate in the counselling.

The Separation Agreement

Evidence of the Claimant

- [49] In the spring of 2021 the claimant made a decision to separate from the respondent. The date of separation was originally set at June 20 but this is the respondent's birthday. She asked to back date it to June 6 when the claimant first told her he wanted a divorce. At the time of this proposed separation Gavin was 13 years of age and indicated that he wanted to live with the claimant. The claimant wished to return to the Maple Ridge area with Gavin and the respondent agreed to this and agreed that she would also relocate to the Maple Ridge area so that they could share parenting.
- [50] The claimant says "we wanted to make it easy so I asked for no child support and no spousal support. I wanted to keep the finances in my control". He testified that they wanted to sell the house before Gavin started school. The claimant instructed his counsel Ms. Reid to draw up the separation agreement.
- [51] The claimant denied needing the agreement signed prior to the house being sold. He later admitted in cross-examination that he did want the separation agreement signed before the house was sold and Gavin and he moved to Maple Ridge. In his Affidavit #5 the claimant deposed at para. 11 that "there was no urgency, we just needed to have a separation agreement in place before listing our home, so that we each knew where we would stand when we relocated to the mainland".

- [52] The parties signed a listing agreement for their house in Sooke on July 6, 2021. They made arrangements to show the home as early as July 10, 2021.
- [53] Counsel for the claimant sent correspondence to the respondent on July 9, 2021 enclosing the draft separation agreement and advising her that she could not give her legal advice and recommending that she get her own legal advice and giving instructions for the execution of the agreement.
- [54] The claimant testified that he talked to the respondent about getting her own legal advice. She said no. The respondent told him she wanted to use her uncle who had a law degree and that she would be more comfortable dealing with him. They read over the agreement together and the respondent asked to correct the date of separation and she also sought an amendment to ensure that the claimant would maintain Gavin's medical and dental insurance. The claimant instructed Ms. Reid to make these changes.
- [55] The respondent made arrangements to meet with her uncle Brian Locher to review the agreement. The claimant and the respondent drove to Mr. and Mrs. Locher's house in Lake Cowichan on July 15, 2025 with a copy of the agreement.
- [56] The claimant says they drove up and Brian Locher explained everything. They read each paragraph. They signed each page and witnessed each page so they knew exactly what they were signing and at the last page Brian witnessed it. They finished their dinner and it was very amicable. There was no anger. He drove Kathy home. He said: "We fully understood it" and "We were signing a binding contract at the time and we were both happy with it."
- [57] On further questioning the claimant agreed that the respondent was confused about the payment of the \$37,500 debt that was withdrawn from their line of credit for the claimant's children as a loan. He said Kathy was confused and Brian tried to explain it and Kathy did not understand the math but she signed it.
- [58] When asked if Mr. Locher was providing legal advice the claimant responded it was more just a family member who had a legal background giving us advice.
- [59] The claimant also said we understood that this would be a final contract signing and then they could apply for a divorce a year later and they did not have any changes at the time. It was all good. It was all understood.
- [60] It was agreed that Gavin would live with the claimant. The claimant said that he left visitation open so they could see each other any time. He left it between them to make those arrangements. He did not want to limit it. It was wide open like it was before but Gavin was going to reside with him.

- [61] In terms of the financial responsibility for Gavin the claimant said he would take full responsibility for Gavin's financials in the future. He was not asking for any money from Kathy at the time. He just wanted a smooth closure of this thing in their life. Gavin and he could move on and start a new life without any upsets or anything like that. He would take on full care of it.
- [62] The claimant says it is untrue that he told the respondent that it was not a final deal and they could change it later. They made changes prior to the dinner at Lake Cowichan and he thought they decided it was a final draft that night.
- [63] The claimant denies that he told the respondent that she would have to pay more in child support than she would get in spousal support. He said that they "had an agreement there was no spousal support and no child support and it would all balance out in the end and there was no pressure".

Evidence of the Respondent

- [64] The first time the respondent saw the Separation Agreement was when it was sent to her on July 9, 2021 in a letter from the claimant's lawyer. It was signed six days later on July 15, 2021. The contract for purchase and sale for their home was signed on July 25, 2021.
- [65] Originally the claimant and respondent were planning on staying in the house until Gavin started high school which was another year (if they stayed in Sooke) and wait until the mortgage renewed. Then they realized high school in Maple Ridge started a year earlier and they were in a rush to get the house cleaned up and ready to sell.
- [66] The claimant told the respondent that they could not sell the house without getting this agreement signed. She believed that there was urgency in getting this agreement signed.
- [67] The respondent agrees that she talked to the claimant about everything. She wanted to split everything 50-50. She wanted 50-50 custody. Her evidence is that the claimant told her they would work it out when they moved to Maple Ridge and they knew Gavin's schedule. Since the claimant would be working the respondent could pick Gavin up after school and spend time with him every day and he could come to her house for weekends. The claimant reassured her that they would figure that out later.
- [68] The Separation Agreement does not set up a coparenting arrangement, nor does it set up equal parenting time. The respondent testified that the claimant said it would be 50-50. The Separation Agreement says:
- A. Both parties remain guardians of Gavin.
- B. Gavin will reside with Ian.
- C. Katherine will have parenting time with Gavin as agreed from time to time, subject to the wishes of Gavin.

- [69] This is clearly not a shared parenting agreement.
- [70] The claimant told her that he talked to his lawyer and it had to be worded out that way but it means 50-50. The respondent signed the agreement thinking she was going to get her son half the time. They had discussed sharing him week on and week off.
- [71] She expressed concern about how the \$37,500 was going to be paid out. The way it was worded it looked like they had to increase the line of credit to pay her out so effectively they were taking the \$37,500 out of the line of credit twice. She still thinks it is not correct. The claimant had increased their line of credit to loan his children \$75,000. He agreed to pay the respondent's half of that loan at separation and to wait for payment of his half of the loan until 2026.
- [72] The respondent says that the claimant told her she could keep Gavin's child tax credit because she was supposed to have Gavin 50% of the time. She said every year they talked about this and he asked if she was going to use the credit. She said she would and she did. The claimant denies this. He says that he did not know she was claiming the tax credit until he applied for it in 2024. He was then advised that the respondent could not claim the tax credit because Gavin was not living with her. She has had to reimburse the entire tax credit that she received over three years.
- [73] The respondent was asked what her mental state was at the time the separation agreement was signed. She said she was a wreck emotionally. She was numb. She could barely function and she could barely talk. She just wanted to run away. The claimant kept saying do not worry about it. In September they could amend the agreement and figure it all out and add it later. She thought once Gavin was in school and they were moved to Maple Ridge they could attach an amendment to the agreement.
- [74] As things turned out the claimant and respondent ended up living a block from school so she could not even drive Gavin to and from school. Gavin did not spend any time with her.
- [75] In terms of the child support and spousal support waiver the respondent's testimony is that the claimant told her she would have to pay a lot of child support and it would be a lot more than she would get for spousal support. He knew she had anxiety about financial insecurity. She was raised by a single mother who could barely get by and it was always a fear of hers that she would not be able to afford things.
- [76] In cross-examination the respondent said as long as she got Gavin 50-50 she was okay with it. She was scared about paying child support because she could not afford it.
- [77] The respondent requested in addition to the agreement that Gavin would continue on the claimant's medical benefits that she would as well. She was asked why the agreement did not stipulate that she would continue on the claimant's benefits. The respondent said when they discussed her medical coverage the claimant indicated that she could stay on his medical as long as they were not divorced. He said that "your mom and dad never got divorced right? I don't have any intention of marrying a third time. We don't need to worry about the medical.

We don't need to finalize this".

- [78] The respondent testified that she had lost her medical benefits when they were both working for BC Ambulance. They met with a human-resources person who told him that they could not double dip. They agreed to use the claimant's benefits. That meant that the respondent had to waive her benefits. This decision cannot be reversed. They signed a little yellow card for benefits waving the respondent's benefits and relying on the claimant's benefits for the family.
- [79] The respondent was cross-examined on the fact that she knew Gavin was going to live with his father. She responded that she did not think that was the permanent thing. The claimant told her it had to be one person on the separation agreement (with respect to where Gavin lived). She thought they could work it out later.
- [80] She contacted her aunt and asked if her uncle Brian could witness their separation agreement. Her aunt reminded her that Brian was not a lawyer. She and the claimant drove together to Lake Cowichan started reviewing the agreement in her uncle and aunt Brian and Maggie Locher's living room. She recalls Brian saying that she should get a lawyer. She recalls that she said she could not afford a lawyer and they were in a rush to get the agreement done before the house went on the market. The claimant told her they had to get this agreement signed before they sold the house. She did not think she could get a lawyer to review the agreement before the house was sold.
- [81] The respondent agrees that she did read over the agreement and thought she understood it but believed it could be amended.
- [82] The respondent believed that in order to change the agreement they could just attach an amendment to the agreement as an attachment. She did not think this was final or "the gospel or the grail". She thought the "final final thing was a divorce". She thought they could add their visitation schedule or anything else after.
- [83] The certificate of independent legal advice is signed by the respondent but not signed by Brian Locher. The certificate was read out to the respondent in court and she was asked if it was accurate. She said it was not accurate. She did not understand it. There was a lot of legalese that went over her head. Her uncle Brian did not sign the top part of the certificate because he did not give her legal advice. She thought this form had to be signed with the Separation Agreement indicating they had looked it over, so she signed it and Mr. Locher witnessed her signature.
- [84] When asked why she did not get legal advice the respondent said she did not have money or time to do so. She did not know where to start.
- [85] The respondent was cross-examined about her access to funds to hire a lawyer. She agreed that she did have a credit card. She agreed that the bank accounts of the claimant and respondent were linked but she said she never touched the respondent's money. She thought it would cost thousands of dollars for a lawyer. The money in her chequing account was

assigned for bills for her household utilities and food. She was very frightened about financial instability. In her mind she did not have access to any funds. She agreed she did not call a lawyer. It was her idea to go to Brian for advice. She does not recall talking about the Separation Agreement with Brian before going to meet him.

- [86] When the Separation Agreement was signed the respondent did not know that she had a pension with BC Ambulance. She did not think she worked there long enough to get a pension. She thought the agreement was that she would keep her RRSP and the claimant would keep his pension.
- [87] The Separation Agreement says that there are no oral agreements but the respondent believed there were oral agreements. She believed that the claimant would keep her on his medical insurance which he did until last year. She believed that as long as they did not get a divorce he would continue to cover her benefits. When he had to take her off his benefits, she tried to get back on medical benefits but was told that she could not because she previously waived the benefits. She now has to pay for her own benefits which cost her \$117 per month.

Brian Locher

- [88] The respondent's uncle Brian Locher testified. He has a law degree and practised law in Alberta for three years between 1991 and 1993. After that he worked for an engineering company as project manager for over 40 years. He has drafted and negotiated contracts. Before his retirement he worked for land developers on Vancouver Island.
- [89] The respondent contacted Brian's wife and he was told by his wife that the respondent wanted to discuss the agreement she had received from Ian's lawyer. He believes that the respondent and claimant came to their house and brought the Separation Agreement with them. He believes that he may have looked at the Separation Agreement before the meeting. He spoke to the respondent before the meeting and told her there were a couple clauses that were vague. He advised her to retain her own counsel to review it before the meeting at the restaurant.
- [90] The meeting itself was friendly. His impression was that the respondent did not want a separation but she was willing to do it based on the claimant's need to move off the island. They reviewed the agreement at the restaurant. The issue of the \$37,500 was discussed at the restaurant but Mr. Locher does not have any direct recollection of that.
- [91] Mr. Locher was asked if he read the agreement page by page and signed each page. He said they did not. He admits that his memory is not what it used to be. He viewed his function as witnessing the signature. He did not give legal advice. He told the respondent to retain her own legal counsel. I am assuming that this occurred prior to the meeting at the restaurant. He said that she said she would think about it, and then she said she would sign the Separation Agreement and it had to be signed as soon as possible. It was her own decision not to get it reviewed by her own family lawyer.

- [92] Mr. Locher is not familiar with the Family Law Act. He told the respondent to get the Separation Agreement reviewed by a lawyer to make sure it was in compliance. She told him there were some urgency. His recollection is that the claimant was insistent that the agreement had to be signed to get the property on the market. He recalled it had something to do with the claimant's employment and relocation. Mr. Locher had never prepared or witnessed a separation agreement before. He had witnessed other types of contracts. He is not familiar with how spousal support works or how the court determines spousal support. He has no expertise in family law and he did not feel qualified to give advice about the contents of the agreement.
- [93] Mr. Locher did not sign the certificate of independent legal advice because he did not provide any advice and he did not feel that it was a correct statement.
- [94] As far as he could tell the respondent signed the agreement voluntarily. She did express some concerns but she said there was urgency.

Margaret Locher

- [95] Mrs. Locher arranged to have her husband look over the Separation Agreement. She did not look over at herself. The respondent told Mrs. Locher that the agreement had to be done quickly because the claimant wanted the house sold as fast as possible because they were moving to the mainland. Mrs. Locher believed that the agreement was signed in August. It was actually signed in July.
- [96] At the time of the separation Mrs. Locher thought the respondent seemed emotionally mentally and physically deflated. She helped the respondent clean the house after the claimant moved his items out of the house. Mrs. Locher helped the respondent move into her new apartment.
- [97] For the signing of the agreement they went to a restaurant in Lake Cowichan. Mrs. Locher took charge of getting food ordered and she was not really listening to the discussion about the agreement. She had the impression that everything was in a rush. She recalls there being something that the respondent did not understand but Ian said it was okay, his lawyer would take care of it. The respondent agreed and thought it would be okay. She thought the respondent was anxious. They sat in the back of the truck and the respondent held Mrs. Locher's hand all the way to the restaurant. She recalls the respondent being very anxious in the car and in the meeting. The respondent was "picking" which she does when she is anxious. She insisted that she wanted it done.
- [98] Mrs. Locher viewed her role as moral support. She said in cross-examination she was being the hostess and trying to be Switzerland. She was being a mom and an aunty. She did not want to know the details of the Separation Agreement. She does not recall them going through each page but she is sure they did.

[99] The tone of the meeting was amicable. Mrs. Locher did not give the respondent any advice. She said she had no opinion. She recalls Mr. Locher telling the respondent to get advice from her own lawyer.

Analysis

- [100] It is my view that the Separation Agreement was signed under false pretenses. I accept the respondent's evidence that she was misled into believing that she would have shared parenting of Gavin and that the details of the shared parenting arrangement would be worked out once they relocated and Gavin started school in Maple Ridge. That was her primary goal. The claimant took a very hands off approach to the respondent's parenting time which was doomed to fail given her avoidant personality disorder and Gavin's unwillingness to have visits with his mother. I do not think the respondent knew that at the time that she signed the Separation Agreement. Perhaps it was obvious to others but it was not obvious to her. She was moving back to Maple Ridge so that she could be an active parent to Gavin. In terms of the respondent's lack of awareness, I note that the respondent thought things were going better in her relationship with the claimant three weeks before he asked for a separation.
- [101] I find that she was misled into waiving her right to spousal support because of a threat made by the claimant that she would have to pay more in child support than she would get in spousal support. This is clearly not the case.
- [102] It appears to me on his evidence that the claimant's primary goal was to have a clean break from the respondent. He was in the driver's seat. It was his decision to separate. He contacted a lawyer and gave her instructions to draft an agreement which provided a waiver of spousal support and a waiver of child support, knowing that his spouse was disabled and had not worked in three years. He convinced the respondent to go along with the agreement because they could work out the details later.
- [103] I prefer the respondent's evidence over the claimant's when it comes to the discussion about child support being more expensive than spousal support. The respondent was very clear in her testimony that this was her belief, and she had a lot of anxiety over not being able to afford to pay child support. She was shocked when she found out it was not the case. The claimant was vague in his testimony when he was asked if he told the respondent that she would have to pay more in child support than she would get in spousal support. He said "That is not true. We had an agreement there was no spousal support and no child support and it would all balance out in the end and there was no pressure". This agreement did not balance out for the respondent.

- [104] The claimant testified that "We understood this would be the final contract we were signing and then we could apply for a divorce a year later. We didn't have any changes at that time it was all good." "It was all understood." He wanted a smooth closure of "this thing in our life" and he and Gavin "would move on and start a new life without any upsets or anything like that".
- [105] I believe the respondent was told that changes could be made to the agreement once the family relocated to Maple Ridge and they knew what Gavin's schedule was. She did not think the Separation Agreement was final but she had in her mind that it was a divorce that would be final.
- [106] It is apparent to me that the respondent did not know that the claimant was intending to apply for a divorce a year later. She was relying on his previous assurance that he had no interest in getting married a third time when they had a discussion about continuing her health benefits. She understood that health benefits could continue up until divorce.
- [107] The claimant uses words like "it was understood", but of course he could not read the respondent's mind nor did he know what level she understood. I believe it is more likely than not that he was cajoling the respondent into signing the Separation Agreement by promising her equal parenting time when he likely knew that it would not occur because he likely knew what Gavin's wishes were. He cajoled her into waving her spousal support by threats of financial ruin if she had to pay child support. He pressured the respondent into signing the agreement quickly so that they had agreement in place before the house sold.
- [108] I find that the respondent was very vulnerable at the time she signed the agreement. The fact that she was discharged from psychiatric care did not mean that she was functioning well. She was discharged from psychiatric care because the psychiatrist was leaving the clinic and because her mood disorder had been stable. The psychiatrist believed as did the respondent and the family physician that she could be adequately covered by her family physician. The respondent's bipolar mood disorder was stabilized with medication but she also suffered from a general anxiety disorder. The psychiatrist wrote on March 31, 2021 "we have discussed the possibility that her care will be transferred to her family physician exclusively given the relative stability of her mental state; however, I do appreciate that she remained severely functionally disabled".
- [109] The discharge note was signed on May 18, 2021. At that time the psychiatrist found avoidance personality as being a major challenge for the respondent. She said Kathy has an external locus of control and often awaits her husband or son to invite her to do things.
- [110] I believe the respondent when she said that at the time she was discussing the Separation Agreement with the claimant she was a wreck emotionally. She was numb. She could barely function and she could barely talk. She just wanted to run away. She obviously did not expect the separation nor she did not see the signs. Her marriage was ending and they had to prepare their house to sell on an expedited basis. The respondent has an avoidant personality which explains the poor decision she made to not to challenge what she was

being told and declining to get independent legal advice.

- [111] The absence of independent legal advice in and of itself does not invalidate an agreement but it certainly does invalidate an agreement if the agreement is unfair.
- [112] Despite what the claimant says about not rushing respondent, I find this Separation Agreement was presented to the respondent under pressure. The pressure was the claimant's strong desire to have the agreement signed before the house sold so that he and Gavin could start a new life in Maple Ridge.
- [113] I accept the respondent's evidence that she felt the time pressure and getting the Separation Agreement signed.
- [114] The respondent did have an opportunity to seek independent legal advice. She did not do so although she was advised to do so by counsel for the claimant and by her uncle Brian Locher. She thought it would be too expensive and she did not feel that she had access to funds to obtain a lawyer. She thought a lawyer would cost several thousand dollars. She had never accessed the claimant's bank accounts although they were linked to her account. They kept their money separate and she did not even think that she could access that money to hire a lawyer.
- [115] This was an error in judgment on the respondent's behalf. Under the circumstances of being pressured to sign the agreement quickly and on being misled about several aspects of the agreement, I do not find that her failure to seek independent legal advice should prevent me from setting aside the Separation Agreement with respect to spousal support.
- [116] I find that the waiver of spousal support for a person with a long-term disability and impaired ability to work after a 16-year marriage is not in keeping with the principles of the Divorce Act.
- [117] The McConnells' marriage has some similarities to the Bracklow marriage. At the beginning the parties were employed outside the home and shared household chores on an equal basis. When Gavin was born, I find the respondent assumed the primary responsibility for childcare during her maternity leave and in the early years of his life when she was off work on disability. I find it quite unlikely that her teenage stepdaughter Amanda who had a busy life contributed a great deal to childcare. However things dramatically changed when the respondent's health deteriorated. She contributed less financially and was only doing about 30% of the chores in the household and providing less and less childcare for Gavin. Her functional disabilities led to the breakdown of the marriage and certainly added to the burden on the claimant to support the household financially and to take on the lion's share of the chores and childcare.

- [118] The McConnells' marriage does not fit squarely into the compensatory or non-compensatory models of spousal support because there are aspects of both models. Earlier in the marriage the compensatory factors are stronger and later in the marriage they are virtually non-existent because of the respondent's illness.
- [119] In *Moge v. Moge*, [1992] 3 SCR 813 Madam Justice L'Heureux-Dube made it clear that no single objective for spousal is paramount and all must be borne in mind. She said in cases like those of sick or disabled spouses a support obligation might well lie even in the absence of the compensatory underpinning. In cases where it is not possible to determine the extent of the economic loss of the disadvantaged spouse, the court will consider need and the standard of living as a primary criteria together with the ability of the other spouse to pay. At para. 75 where compensation is not indicated and self-sufficiency is not possible the support obligation may nonetheless arise from the marriage relationship itself. At para. 76 Justice L'Heureux-Dube said:

In my view, an equitable sharing of the economic consequences of divorce does not exclude other considerations, particularly when dealing with sick or disabled spouses. While the losses or disadvantages flowing from the marriage in such cases may seem minimal in the view of some, the effect of its breakdown will not, and support will still be in order in most cases.

- [120] It is apparent that the respondent did not forgo career opportunities because of the functions performed by her in the marriage. She had to forgo career opportunities because of her ill health. During the marriage the parties moved twice because of the claimant's career. At both times the respondent was not working. I find she did lose her long-term disability benefits because of this move. It is not a significant factor because she was employed by the BC Ambulance service and did earn disability benefits again. I doubt that this move or the loss of her disability benefits contributed to her financial need in any significant way.
- [121] A great deal of testimony was led about the division of labour during the marriage. Prior to the respondent's disability diagnosis, the parties shared household chores more or less equally. The claimant describes her as withdrawing from the family and not contributing more than 30% of labour for household chores. He acknowledges that this did worsen once she was on long-term disability. Judging from the medical records it appears that this withdrawal from family activity and failure to initiate activity is a symptom of the respondent's disability. It is conduct evidence. I understand how stressful the respondent's disability was on this entire family and very stressful on the relationship between the claimant and the respondent. Her lack of motivation and initiative and contribution to family household chores led to the breakdown of the marriage and of her relationship with Gavin. The fact that the respondent did not or could not do as much housework as the claimant does not disentitle her to spousal support.

- [122] In *Bracklow* at para. 40 Justice McLachlin said:

Even if the spouse has foregone no career opportunities or has not otherwise been handicapped by the marriage, the court is required to consider the spouse's actual ability to fend for himself or herself and the efforts effort that has been made to do so, including efforts after the marriage breakdown. Similarly, "economic circumstances" invites broad consideration of all factors relating to the parties' financial positions, not just those related to compensation.

- [123] The first and second objectives in s. 15.2 of the Divorce Act recognize the economic consequences arising from the marriage or its breakdown and apportion between the spouse's financial consequences of childcare over and above child support payments. These primarily relate to compensation. The third objective addresses the hardship arising from the breakdown of the marriage which is capable of encompassing not only health or career disadvantages arising from the marriage breakdown properly the subject of compensation but the mere fact a person who formally enjoyed intra-spousal entitlement to support now finds herself or himself without it. The breakup may cause economic hardship in a larger non-compensatory sense (Bracklow at para 41).
- [124] The fourth objective in s. 15.2 (6) of the Divorce Act to promote economic self-sufficiency may or may not be tied to compensation for disadvantages caused by the marriage or its breakdown. A spouse's lack of self-sufficiency may be related to foregoing career and educational opportunities but it may also arise from completely distant different sources like ill health (Bracklow at para. 43).
- [125] I find the respondent was entitled to spousal support primarily on a non-compensatory basis due to the hardship she suffered on marriage breakdown when the claimant was no longer supplementing her income.
- [126] I set aside the spousal support and child support waivers in the Separation Agreement pursuant to s. 164 of the Family Law Act.
- [127] I find that the claimant took improper advantage of the respondent's vulnerability, including her mental health issues and her distress. I find that he actively misled the respondent about the finality of the agreement and the amount of child support in relationship to spousal support. I also find that the claimant pressured the respondent to sign the agreement so he could have a clean break from his obligations to her without regard to her ability to comprehend the nature and the consequences of the agreement. He cajoled her into signing an agreement that did not give her equal parenting rights with promises that it could all be sorted out once they moved.
- [128] I find that the respondent did not understand the nature or consequences of the agreement. I attribute her poor decisions to her avoidance personality disorder where she was overwhelmed by the thought of hiring her own lawyer and took the easy path of having her uncle witness the agreement. She believed the representations made by the claimant.

- [129] I find the agreement unfair and not in compliance with the objectives of spousal support and I would replace the spousal and child support waivers with an order that is substantially different from that set out in the Separation Agreement.
- [130] The division of assets favours the respondent likely because of the waiver of spousal support but the amount of the unequal division (\$33,186) does not adequately compensate her for the loss of spousal support even if she pays child support and special and extraordinary expenses. I will however consider the effect of this unequal division when I consider back-dating a spousal support order to the date the Separation Agreement was signed.
- [131] Neither party had their pensions evaluated. I am relying on their 2021 contributions to their employment pensions in my calculation. When I factor in their pension contributions in 2021 and the value of the respondent's locked in RRSP, it appears that the respondent ended up with \$33,186 more in assets than the claimant. Interestingly the respondent did not know she had an employment pension. I accept the submissions of the claimant that that respondent's employment pension continued to grow even during her long-term disability.
- [132] The net proceeds of sale of the family home were equally divided. There was an issue about the repayment of \$37,500 to the claimant's children and questions about how that was calculated. Prior to commencing the trial the respondent withdrew that claim.
- [133] Even though there were irregularities in the signing of this agreement, I do not find the division of the property to be so unfair that I think that aspect of the agreement should be set aside.
- [134] By the beginning of the trial the respondent had waived any challenge to the parenting arrangements. Gavin is now 17 years of age and she and Gavin have made their peace and have developed a good relationship. She does not intend to pursue formal parenting time but will arrange contact directly with Gavin.

Determination of Spousal Support

- [135] Although this trial was set for two days to determine whether the Separation Agreement should be set aside, I agreed with counsel for the claimant that it was necessary to hear all the evidence to determine whether the agreement complied with the objectives of the Divorce Act and Family Law Act. Accordingly, I am positioned to make a decision on what court order I should make to replace the section of the Separation Agreement that I have set aside. I have discussed this with the parties and they agree that it would be in the parties' best interests to make an order now rather than requiring them to litigate the issue of spousal support and child support.
- [136] I do find the spousal support advisory guidelines to be a very useful tool in determining the quantum of spousal support that I will apply them here.

- [137] Both parties prepared a lump sum spousal support calculation to show the present value of what the respondent had given up when she waived spousal support. Neither counsel could tell me how long the lump sum calculation projected spousal support to continue for. Counsel for the claimant said that the DivorceMate calculation projects support during the respondent's entire life with a life expectancy of 88 years but she could provide no proof of that.
- [138] The respondent is entitled to indefinite support because of the rule of 65. When I add her age of 49 at separation to the duration of the marriage of 16.5 years the sum exceeds 65. Indefinite support does not mean permanent support.
- [139] The claimant is 62 and has some cardiovascular concerns. It is unknown whether he will retire at 65 or work after that age. I will not set a termination date for spousal support now but do envision a variation application when Gavin ceases to be a child of the marriage and when the claimant does retire. For that reason a lump sum that goes on for some indeterminate length of time is not helpful to my analysis. I have instead calculated how much support the parties should have paid but for the waiver up to the present and I will make a prospective order for support.

2021

- [140] In 2021 the claimant's income was \$105,205 and he paid \$1,940 in union dues. His annual guideline income was \$103,265. I note in the claimant's child support and spousal support calculations counsel has included section 7 expenses that the claimant paid for on his own. He has not proven the amounts but I have accepted them at face value because they appear reasonable. Gavin plays sports and uses a gym membership. He had a shoulder injury and needed physio. I accept that he had some medical expenses that were not covered by extended health and that he had some modest education expenses. I have included the same amounts in the DivorceMate calculation that I prepared.
- [141] In 2021 the respondent's total income was \$33,594 from CPP and long-term disability benefits. She received a Canada Workers Benefit of \$2,010.25 which is a tax credit. She also retained the CPP dependent benefit of around \$3,200 which should have gone to Gavin. I agree with the claimant's submissions, and I have added this to her income and grossed it up for tax. I have added the employment income and interest income from her tax return. I do not think the respondent should add interest on the \$37,500 that was paid to her as part of her division of family assets. Any taxable interest will show on her income tax returns for the following year.
- [142] Taking this into account, the DivorceMate calculation shows that the spousal support payable to the respondent would be in the range of \$1,027-\$1,370 per month. The child support payable by the respondent is \$364 per month. It is not the case that the respondent would owe more in child support than she would receive in spousal support.

[143] I find the mid-range of support to be appropriate given the length of the marriage at 16.5 years which I would consider a mid-length marriage and the fact that the primary objective in this case is to meet the needs of the respondent due to her disability rather than to compensate her for lost opportunities because of the role she played in the marriage or ongoing child care responsibilities.

[144] Based on her guideline income of \$38,679 in 2021 the respondent should have paid the claimant the amount of \$364 per month for child support and the claimant should have paid her the sum of \$1,198 per month in spousal support. The set off amount is \$834 per month. This amount takes into account the fact that the claimant is paying the section 7 expenses. From August 1-December 1, 2021 the claimant should have paid the respondent the net amount of \$4,170.00.

2022

[145] In the 2022 the claimant's income was \$109,997.38. He paid union dues of \$2,030.76. His guideline income was \$107,966. I do not have a breakdown of the special and extraordinary expenses for Gavin each year so I will rely on the numbers from 2021. The s. 7 expenses remain at \$2,700 for the year.

[146] In 2022 the respondent's total income was \$34,483.57. This included \$76.80 employment income, \$19,554.33 other employment income for long-term disability benefits, \$14,563.44 for CPP benefits, \$289 interest income, and she received a Canada Workers Benefit of \$2046.21. She still retained Gavin's CPP benefit of approximately \$3,200 which I have grossed up and added to her income. The respondent's guideline income was \$39,583 in 2022.

[147] Mid-range spousal support payable is \$1,271. Child support is \$372. The net payable by the claimant to the respondent for the 12 months of 2022 is \$10,788.00.

2023

[148] In 2023 the claimant's income was \$117,183.70. He paid union dues of \$2,110.86. His guideline income for 2023 was \$115,073. I assume for the sake of this calculation that Gavin's section 7 expenses remained the same as in 2021.

[149] In 2023 the respondent earned \$37,235. This is from the same sources, employment income of \$76, CPP benefits of \$15,510, long-term disability benefits of \$21,450, and interest of \$199. She received the Canada Workers Benefit of \$463.25 and continued to receive Gavin's disability benefit. The respondent has produced the T4A form for this year in the amount of \$3,380.64. This was grossed up and added to the respondent's income. The respondent's guideline income in 2023 was \$42,507.

[150] The mid-range of spousal support is \$1,353. Child support would be \$400. The claimant owes the respondent the net amount of \$953 per month for 12 months which is \$11,436.00.

2024

- [151] In 2024 the claimant's income was \$124,769.57. He paid union dues of \$2,242.87. I have not changed the special expenses for Gavin. The claimant's guideline income for 2024 was \$122,527.
- [152] Until June 20, 2024, the respondent was receiving the Canada Child Benefit and BC Family Benefit. In June 2024 she was notified that she was not eligible to receive these benefits. She was ordered to pay back \$19,792.64 which she did. I have not added the amount into the respondent's income because she had to pay the entire amount back. I have not added it into the claimant's income for previous years because I am not sure when he started receiving it. In his financial statement he does claim he is receiving it in 2025 but I am not sure if he received a retroactive amount.
- [153] In 2024 respondent's total income was \$41,066 from all sources. I do not have her full tax return to break that amount into categories. She continued to receive the Canada Workers Benefit of \$173. The respondent continued to retain the CPP benefits payable to Gavin as a child benefit in the estimated amount of \$3,380.64 for 2024. I have grossed this amount up for income tax and added it to her income. The respondent's guideline income in 2024 was \$45,954.
- [154] The mid range for spousal support is \$1,424. The respondent should have paid \$432 for child support. The claimant owes spousal support net of child support in the amount of $\$992 \times 12 = \$11,904.00$.

2025

- [155] In 2025 the claimant predicts that his income will be \$116,436 on his financial statement. If I extrapolate his income from his July 31, 2025 year to day paystub by my calculation his gross income will be \$124,913. Using the same formula he will pay \$2,303 for union dues. He will be in receipt of the child tax benefit in BC family bonus in the amount of \$3,708. He claims special and extraordinary expenses of \$2,700 for Gavin.
- [156] The claimant's guideline income in 2025 for spousal support purposes is \$122,610.
- [157] The respondent's income for 2025 according to her financial statement is \$41,949. She continued to receive the CPP dependent benefit which I assume has increased slightly to approximately \$3,400. This amount will be grossed up and added to the respondent's income. The respondent's guideline income for 2025 is \$46,654.
- [158] The mid range of spousal support is \$1,398.
- [159] Child support from January 1-September 1 is \$439 and after October 1 2025 is \$435 per month.
- [160] The claimant owes the respondent the net amount of \$959 from January 1 to September 1 and \$963 from October 1 to December 1 2025.

[161] The claimant owes the respondent \$11,520.00 for 2025.

Going Forward

[162] The respondent is ordered to notify CPP that the disability benefit for Gavin should go directly to him after the date of this order. The claimant and Gavin may have to arrange a direct deposit. This amount does not satisfy the respondent's child support obligation. She is still obliged to pay child support based on her guideline income which will drop slightly because the CPP dependent benefit will no longer be paid to her.

[163] If the transfer of the benefits is delayed and the respondent receives Gavin's benefit she shall reimburse the amount to the claimant or Gavin.

[164] This will drop the respondent's guideline income to \$41,949 from January 1 2026. I will rely on the claimant's guideline income of \$122,610 going forward until a review of support.

[165] The claimant is ordered to pay the respondent spousal support in the amount of \$1,481 and the respondent is ordered to pay child support in the amount of \$369. The claimant should pay the respondent net spousal support of \$1,112 per month.

Annual Review

[166] The claimant's guideline income will remain at \$122,610 and the respondent's guideline income will remain at \$41,949 until reviewed in July 2026 when the parties' income tax returns are available.

[167] I order the parties to exchange their full income tax returns with schedules and their notice of assessment each year by no later than June 1. Child and spousal support shall be adjusted effective July 1 each year.

Retroactivity

[168] The total amount of support (net of child support) owed by the claimant to the respondent since 2021 is \$49,818 if I were to backdate the support order to the date the Separation Agreement was signed.

[169] DBS v. SRG, 2006 SCC 37 deals with retroactive child support but provides a test that is useful in evaluating retroactive spousal support as well (Kerr v. Baranow, 2011 SCC 10 at para. 207). Those factors are:

- a) The conduct of the payor party;
- b) The recipient's delay in seeking the retroactive award;
- c) The circumstances of the recipient; and
- d) Potential hardship to the payor.

- [170] In *Ducharme v. Rempel*, 2016 BCCA 926 at para. 17 Justice Fenlon said that the DBS factors are to be taken into account whether retroactive child or spousal support is in issue. It is the weighing of those factors that will differ: concerns about the applicant's delay and misconduct "carry more weight" in relation to spousal support (Kerr at para. 208). In contrast, the entitlement of a child to support is generally so compelling that those factors will be less significant in the exercise of the court's discretion to make a retroactive award. The underlying facts are, however, relevant to both types of support applications.
- [171] In terms of the payor conduct, I do think the claimant misled the respondent about the support issues and pressured her into signing an unfair agreement.
- [172] The respondent says that the reason for delay was that she was misled by the claimant about the amounts of spousal and child support. She started to look into it after the agreement was signed but she did not know how to challenge it. It was not until she was served with the Notice of Family Claim that she sought Legal Aid and was advised that she had been misled. She did file her response seeking to set aside the support waiver in her response and counterclaim.
- [173] By the time she filed her counterclaim she was aware also that she was not going share parenting time of Gavin. She also questioned the division of assets but has since withdrawn that complaint.
- [174] I do not think the delay in filing the counterclaim to be unreasonable given the respondent's mental health challenges and the circumstances surrounding the signing of the Separation Agreement.
- [175] I have considered the respondent's circumstances. She remains in need of support and is unlikely to ever work again.
- [176] I have considered the fact that the claimant took over full responsibility for Gavin's expenses relying on the Separation Agreement and has spend the money he received from the division of family assets. His lifestyle is more extravagant than the respondent's. He and Gavin have enjoyed expensive holidays. He is now possibly a few years from retirement and has some health concerns.
- [177] The fourth DBS factor is hardship on the payor. A large retroactive award would be a significant hardship on the claimant.
- [178] In fairness to the claimant, I think that he should receive some credit against the retroactive award because of the unequal division of the assets in favour of the respondent which was agreed to when she was not receiving spousal support. She retained her entire RRSP of \$107,171 plus the pension of \$15,095 that she did not know she had. The claimant retained his pension contributions which at the time were \$55,892. If these assets were divided equally each party would have received \$89,078. The respondent received \$122,264 which is \$33,186 over and above the equal division.

[179] If spousal support had not be waived, there would be no reason to give the respondent an unequal division of assets. The \$33,186 is insufficient to render the support waiver fair, but I think it should be taken into account in making the retroactive award.

[180] Accordingly I will replace the support waiver in the Separation Agreement with child and spousal support orders. I will fix the retroactive amount at \$49,818 and reduce that amount by the amount of the unequal payment of \$33,186. The amount the claimant owes the respondent after the December 1, 2025 support payment is \$16,632 plus ongoing support.

Divorce

[181] The parties have satisfied the requirements under the Divorce Act and are entitled to an order for divorce.

Costs

[182] The respondent has been substantially successful in this matter and is entitled to her costs.

Orders

[183] I make the following orders:

- i. Part 6 (a) and Part 8 of the Separation Agreement are set aside and replaced with the following orders.
- ii. Based on the claimant's guideline income of \$103,265 in 2021 and the respondent's guideline income of \$38,679 this Court orders that the claimant pay to the respondent spousal support in the amount of \$1,198 per month commencing August 1, 2021 and continuing to December 1, 2021.
- iii. This Court further orders that the respondent pay to the claimant child support in the amount of \$364 per month for the support of Gavin commencing August 1, 2021 and continuing to December 1, 2021.
- iv. Based on the claimant's guideline income of \$107,966 in 2022 and the respondent's guideline income of \$39,583 this Court orders that the claimant pay to the respondent spousal support in the amount of \$1,271 per month commencing January 1, 2022 and continuing to December 1, 2022.
- v. This Court further orders that the respondent pay to the claimant child support for the support of Gavin in the amount of \$372 per month commencing January 1, 2022 and continuing to December 1, 2022.
- vi. Based on the claimant's guideline income of \$115,073 in 2023 and the respondent's guideline income of \$42,507 this Court orders that the claimant pay to the respondent spousal support in the amount of \$1,353 per month commencing January 1, 2023 and continuing to December 1, 2023.

- vii. This Court further orders that the respondent pay to the claimant child support for the support of Gavin in the amount of \$400 per month commencing January 1, 2023 and continuing to December 1, 2023.
- viii. Based on the claimant's guideline income of \$122,527 in 2024 and the respondent's guideline income of \$45,954 this Court orders that the claimant pay to the respondent spousal support in the amount of \$1,424 per month commencing January 1, 2024 and continuing to December 1, 2024.
- ix. This Court further orders that the respondent pay to the claimant child support for the support of Gavin in the amount of \$432 for the support of Gavin commencing January 1, 2024 and continuing to December 1, 2024.
- x. Based on the claimant's guideline income of \$122,610 in 2025 and the respondent's guideline income of \$46,654 this Court orders that the claimant pay to the respondent spousal support in the amount of \$1,398 per month commencing January 1, 2025 and continuing until December 1, 2025.
- xi. This Court further orders that the respondent pay to the claimant child support for the support of Gavin in the amount of \$439 per month commencing January 1, 2025 and continuing to September 1, 2025. This Court further orders that the respondent pay to the claimant child support for Gavin in the amount of \$435 per month commencing October 1, 2025 and continuing until December 1, 2025.
- xii. This Court orders that the respondent shall notify Canada Pension Plan that the disability benefit for Gavin from the date of this order should be sent directly to him. In the event that the transfer of benefits is delayed then the respondent shall reimburse Gavin any benefits she receives on his behalf after the date of this order.
- xiii. Based on the claimant's continuing guideline income of \$122,610 in 2026 until the review of spousal and child support and the respondent's guideline income of \$41,949 this Court orders that the claimant pay to the respondent spousal support in the amount of \$1,481 per month commencing January 1, 2026 and continuing until further order of the court or agreement between the parties.
- xiv. This Court further orders that the respondent pay to the claimant child support for the support of Gavin in the amount of \$369 commencing January 1, 2026 and continuing until further order of the court or agreement between the parties.
- xv. This Court further orders that the respondent reimburse the claimant for 25% of Gavin's special and extraordinary expenses from January 1, 2026 onward.
- xvi. The parties shall exchange their full income tax returns with schedules and their notice of assessment each year by no later than June 1 commencing June 1, 2026. Child and spousal support shall be adjusted effective July 1 each year.

xvii. This order may be reviewed on a material change in circumstance. It is anticipated that when Gavin ceases to be a child of the marriage or the claimant retires this will constitute a material change in circumstance.

xviii. The total amount of support owed by the claimant to the respondent based on this order is hereby reduced by the sum of \$33,186.

xix. Subject to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp), the claimant Ian McConnell and the respondent Katherine Flora McConnell who were married at West Vancouver, British Columbia on May 5, 2005 are divorced from each other, the divorce to take effect on the 31st day after this order.

xx. The respondent is entitled to her costs of this action on a scale of ordinary difficulty.

"B. M. Young, J."

The Honourable Justice Young

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