

CANADA / JUDGMENT

Mussfeld v. Mussfeld

2024 BCSC 2048

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 2048 Mussfeld v. Mussfeld

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mussfeld v. Mussfeld,

2024 BCSC 2048

Date: 20241108

Docket: E18655

Registry: Smithers

Between:

Laura Jeanne Mussfeld

Claimant

And

Eberhard Richard Josef Mussfeld

Respondent

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for the Claimant:

D. Allen

Counsel for the Respondent:

C. Greening

Place and Date of Trial:

Smithers, B.C.

July 9-12, 19, 2024

and October 23, 2024

Place and Date of Judgment:

Smithers, B.C.

November 8, 2024

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I. INTRODUCTION

- [1] In this family law matter, the main issue is the enforceability of a marriage agreement that would both govern the issue of support and greatly simplify the property division. For the reasons expressed below, I have found that the agreement is enforceable.

II. BACKGROUND

- [2] The claimant was born on September 8, 1983. She is a pharmacist.
- [3] The respondent was born on August 21, 1978, and is a contract labourer. The respondent studied business in a post-secondary institution for three years, but did not obtain a degree. He pursued a career in construction instead, largely as a heavy equipment operator. The respondent was diagnosed with depression when he was 21 years old. He has been treated with anti-depressants since that time.
- [4] The parties began to live together in a marriage-like relationship in Edmonton on October 1, 2005. At the time, (a) the respondent was working in construction, and (b) the claimant had two years left to complete on her studies to become a pharmacist. The claimant was paying for university through a mix of scholarships and savings from summer jobs.
- [5] On July 1, 2006, about two weeks before they planned to marry, the claimant presented the respondent with a proposed agreement she prepared (the "Agreement"). She testified that she wanted to put a deal in place to manage their finances both during the marriage and upon any breakdown. The agreement addressed her concerns that the respondent had substantial debt and was not good with money. She was aware at the time that the respondent was being treated for depression.
- [6] The claimant presented the Agreement to the respondent and asked him to execute it. He had not been previously provided with a draft of the agreement, nor was he involved with its drafting.
- [7] The Agreement provided as follows:

I Hardy Mussfeld do not hold Laura Fyten accountable for any of my debts. All money & possessions before our relationship is the property of each individual. Our finances are separate and we are entitled to only what we earn and not to each others [sic] earnings now and always. Anything bought jointly will be split 50/50. (From July 17, 2005 onwards).

The document makes all others null. Any legal actions towards one of us will not be towards both of us.

- [8] At the time the Agreement was executed, all that the claimant owned was an assortment of household items. She says the respondent would have seen these items in their apartment. She also had a limited amount of money saved up to cover her upcoming school year. The respondent was aware that she was returning to school.

- [9] Although the respondent was not involved in the drafting of the Agreement, the claimant says that they had discussed their finances in the past, particularly in the context of choosing rental accommodation they could afford. They had also had several conversations about keeping their finances separate. She says the respondent indicated that he was agreeable to keeping their finances separate because he felt he would likely end up making more money than her through his business ventures.
- [10] The respondent asserts that he felt pressured to sign the Agreement given the pending wedding date. He said he had imbibed three alcoholic beverages prior to being presented with the Agreement. The respondent agreed that he thought both of them would be successful in their careers when the agreement was signed. He also agreed that his understanding of the Agreement was that it would protect both parties from trying to obtain an unfair share of what they created together if their relationship were to fall apart. However, he declined to adopt the answers he gave on discovery in which he indicated that he signed the Agreement in part to protect himself from having to pay the claimant support if they separated.
- [11] The Agreement was signed by both parties and witnessed by Barbara Fyten, the claimant's mother.
- [12] The parties married on July 17, 2006. Consistent with the Agreement, they did generally keep their finances separate after their marriage, although the claimant says that she actually ended up having to provide support to the respondent on occasion when he ran into financial difficulties. The parties shared certain limited expenses as follows: (a) the claimant would pay the mortgage using her after-tax income, and (b) the respondent would contribute to the household by purchasing tools, equipment, and supplies through his business and using these tools to make home improvements.
- [13] The parties had no children. They moved throughout Alberta and BC after their marriage. They initially rented, but later purchased a series of homes. The equity from each home would be rolled into the next. Eventually, on July 5, 2019, the parties purchased a home in Smithers, BC (the "Home"). The parties jointly own the Home and are jointly responsible for the mortgage. An appraisal dated November 27, 2023, concluded that the Home was worth \$765,000. There is a Scotiabank mortgage on the Home with a balance on June 14, 2024 of \$455,907.56, leaving \$309,092.44 of equity. The parties agree that the equity in the Home should be divided equally whether or not the Agreement is enforced, subject to certain arguments about occupation rent and compensation for home expenses incurred since separation. They also agree that the claimant will purchase the respondent's interest in the Home as part of any final order.
- [14] In terms of the parties' incomes up to separation:
- a) Shortly after their marriage in 2006, the respondent started his own business called Norwolf Contracting Ltd. (in BC) or Velocity Contracting Ltd. (in Alberta) (collectively "Nornwolf"). This business provides heavy equipment services, largely to the oil and gas industry. The

business has only ever had one employee - the respondent. Norwolf effectively operated as a personal service corporation through which the respondent provided services as a sub-contractor. The respondent worked his way up to supervisor contracts. At the time of separation, he was working for Kyah Resources ("Kyah") as a heavy equipment supervisor. The respondent testified that at the time of separation, and for two years afterward, he was earning \$1,000 a day from Kyah - \$800 a day for his labour and \$200 a day to compensate him for the use of his truck. Norwolf grossed \$117,668 in revenue in its financial year before separation.

- b) The claimant qualified as a pharmacist shortly after their marriage. She generally earned within the range of \$125,000-\$135,000.
- [15] The parties separated on October 19, 2020. The respondent says that he was asked to leave the Home.
- [16] In terms of their living expenses since separation:
 - a) the respondent says that he has incurred \$43,213.26 in hotel charges and rent. He currently shares the rent with his new partner, and his share is about \$1,000 per month; and
 - b) the claimant says that she has paid \$129,600.19 in mortgage expenses, upkeep costs and taxes on the Home.
- [17] The claimant complains that the respondent has effectively used the Home as a storage facility for his various vehicles, tools and equipment since separation. The parties dispute whether reasonable arrangements were ever made to allow the respondent to pick up this property.
- [18] The claimant commenced this claim on April 30, 2021. She filed the Agreement on March 9, 2022. On May 29, 2023, the parties were divorced.
- [19] The respondent has re-partnered and is raising a child with his new partner.
- [20] In 2023, the respondent says that he was generally unable to work due to a worsening of his mental health challenges. For this period, the respondent says the following about his health situation:
 - a) he began seeing a counsellor regularly;
 - b) he enrolled in a treatment program for his drinking;
 - c) he sought a referral from his general practitioner to a psychiatrist; and
 - d) at the advice of his doctor and counsellors, he kept busy with hobbies such as woodworking and gardening.

- [21] A psychiatrist, Dr. Oladele Odubote, provided a report dated November 26, 2023, reviewing the respondent's condition as of that date. He found that the respondent suffered from depression, anxiety and ADHD, and that he would require treatment and management for months or years. Dr. Odubote concluded that his capacity to work, relative to what he was previously able to do, would be diminished.
- [22] In terms of his work activities during his alleged period of disability in 2023, the respondent:
- a) was still able to work on his woodworking, and he attempted to sell some of his projects;
 - b) helped his landlord maintain the house and property to offset his family's rent, including building a fence to offset his family's rent down to \$1,200 for that month;
 - c) sold 3-5 cords of wood;
 - d) built a shed;
 - e) made a stand;
 - f) helped care for his son, who was born on April 27, 2022; and
 - g) was caught seeking additional work in a "sting"-type operation carried out by the claimant and her new partner Mr. Shoemaker. Mr. Shoemaker spoke with the respondent under the pretence that he needed help with his car. Mr. Shoemaker was not previously known to the respondent. During their discussion, they discussed the respondent's work, and the respondent said that he was available to do a variety of handyman-type jobs. The respondent argued that he intentionally overstated his actual capacity to Mr. Shoemaker, but agreed that he was open to doing what he could during that year. (I note that such clandestine operations are not to be encouraged in family litigation, which suffers from enough hostility and distrust without the parties engaging in their own covert evidence-gathering. However, given the relevance of the information, I felt it was necessary to allow it to be admitted in this case.)
- [23] The respondent's final submissions assert that his income since separation has been as follows:
- 2020 - \$117,688 (gross corporate revenue)
- 2021 - \$86,976 (gross corporate revenue)
- 2022 - \$125,034 (gross corporate revenue)
- 2023 - \$13,000 (gross personal and corporate income)

[24] In the spring of 2024, the respondent met the owners of Woodward Vineyards, a vineyard near his rental accommodation. He was eventually hired as a crew supervisor building and maintaining the infrastructure. He works 40-hour weeks. He testified that at his current earnings pace, he would gross \$60,000 by the end of the year. He also testified that he had two other existing contracts which would pay \$15,000 by the end of 2024.

[25] In his Financial Statement filed on July 8, 2024, but sworn on February 14, 2024, the respondent claimed that his self-employment income was only \$6,905. However, in an updated Financial Statement sworn June 6, 2024, the respondent reported self-employment income of \$60,000.

[26] The claimant's most recent F8 Financial Statement indicated that she is earning \$134,866 in salary with \$3,204 in union dues, yielding an income for spousal support purposes of \$131,622. Her yearly income since separation has been as follows:

2020 - \$125,196

2021 - \$131,704

2022 - \$146,961

2023 - \$172,151

[27] In terms of the parties' property and debts other than their Home:

- a) The claimant has a 2013 Ford F150 truck. The parties disagreed as to its value. The claimant valued the truck at \$10,000, while the respondent valued it at \$19,000.
- b) The claimant has about \$19,731.15 in RBC bank accounts.
- c) The claimant has two Manulife RRSPs valued at \$99,506 and \$15,079.32.
- d) The claimant has TFSAs and RRSPs at Edward Jones valued at \$398,027.
- e) The claimant has a municipal pension valued at \$36,734.19.
- f) The claimant has a Visa card with a small balance of \$15.72.
- g) The claimant disposed of a piano after separation for \$400.
- h) The claimant claims two items of excluded property, being certain art and horse tack valued at \$1,200.
- i) The respondent has an RBC account that held \$2,654.34 at the time of separation.
- j) The respondent had an RBC credit card at the time of separation that had a \$6,252.25 balance.
- k) The respondent claims that he owes \$98,500 to his mother, but this loan was received after separation and the respondent agrees that it should not be part of any equalization calculation.

- l) The respondent claims two excluded property items being some gift guns and a boot dryer said to be worth about \$2,510.
- m) The respondent owns Norwolf. In terms of the value of Norwolf, the following points should be noted:
 - i. Norwolf's financial records are a mess. There were no properly audited financial statements. The parties agreed that there was no distinction possible between Norwolf's property and the respondent's property. Much of the equipment said to be Norwolf's was also used for personal purposes, at least in part. The parties agreed that determining Norwolf's financial situation as a separate corporation was sufficiently problematic, and that its assets and liabilities should simply be allocated directly to the respondent rather than try to account for Norwolf's separate corporate identity in a formal share valuation.
 - ii. Norwolf had a business bank account at RBC with a balance of \$886.69 at the time of separation.
 - iii. Norwolf's value of property and equipment, according to the respondent's October 31, 2022 Financial Statement, is \$40,683. The respondent says that Norwolf's other assets are in the range of \$113,358.
 - iv. Norwolf's available reports indicate a further \$95,204 loan, although it is not entirely clear whether this is due to the respondent or from the respondent.
 - v. According to an October 31, 2022 financial statement, Norwolf is said to be owed \$202,199, and it is not clear whether the \$95,204 noted above is included in this figure.
 - vi. Norwolf claims to have the following debts:
 - (1) An automobile loan on a 2019 Ford F350 truck driven by the respondent in the amount of \$78,791.97;
 - (2) \$28,780.74 to the Canada Revenue Agency ("CRA") under account RC001;
 - (3) \$10,644.89 to CRA under account RT001;
 - (4) \$6,509.03 to the Alberta taxation authority;
 - (5) an RBC visa on which \$3,337.42 was said to be owing;
 - (6) about \$40,000 for a CEBA loan, although the details regarding this loan, including the extent to which it has already been repaid, were quite opaque; and
 - (7) an overdraft account with RBC which was sitting at \$18,000 at the time of separation.
- [28] The parties engaged in an absurd level of disagreement regarding the value of their household items. The claimant went through a ridiculous exercise of separately valuing over 500 possessions, including, for example, boxes of random hardware and fasteners. She valued the personal property at \$339,254. The respondent then, unfortunately, felt the need

to respond in kind by valuing each piece of property himself rather than propose one of the many practical solutions reached in the vast majority of family law cases (ex. each party keeps what is presently in their possession, the parties take turns choosing household items until they are distributed, etc.). The respondent asserted that the personal property was overvalued by the claimant, particularly the equipment used by Norwolf. He valued the property at \$199,857.

[29] As it turns out, the Court's decision below in relation to the enforceability of the Agreement renders the parties' wasteful (and borderline obsessive) valuation moot. Had I the power to make an award of costs in favour of the court for the time wasted by both sides on this exercise, I would have.

III. ANALYSIS

A. Property Division

[30] As noted, the appropriate property division in this case largely turns on the question of whether the Agreement should be enforced. The respondent did not aggressively contest the interpretation of the Agreement's terms, but largely relied on the question of whether the Agreement should be enforced at all.

1. Enforcement

[31] The applicable statutory provisions to determine whether the Agreement should be enforced differ as between the provisions governing property division and those applicable to spousal support.

[32] The parties agreed that the Family Relations Act, RSBC 1996, c. 128 [FRA], applies to the question of enforceability regarding property division. This is due to the operation of the transitional provisions set out in s. 252 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].

252 (1) This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.

(2) Unless the spouses agree otherwise,

(a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or

(b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

[Emphasis added.]

[33] The parties agree that the Agreement is a marriage agreement pursuant to s. 61 of the FRA. Under the FRA, a written marriage agreement that has been signed by both spouses in the presence of a witness is presumptively binding: FRA s. 61(4). Those requirements are met here. As such, the burden is on the respondent to set aside the Agreement.

[34] In terms of the provisions specifically addressing the enforceability of such agreements, s. 65 of the FRA applies:

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

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

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

(2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

(3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

[35] The respondent argues that the provisions of the Agreement governing property issues should not be enforced in light of both procedural and substantive concerns.

2. Procedural Concerns

[36] There is no specific aspect of the s. 65 test that defines the procedural concerns that can invalidate an agreement. However, the parties accepted that I should apply traditional common law principles in this regard, including a consideration of the concepts of undue influence, material non-disclosure, duress and unconscionability: *Dilley v. Hall-Dilley*, 2006 BCSC 794 at para. 38.

[37] In *Azanchi v. Mobrhan-Shafiee*, 2019 BCSC 1392, rev'd in part on other grounds 2021 BCCA 55, this Court considered the question of procedural fairness in relation to an agreement governed by the FLA. The concerns were similar to the common law considerations applicable under the FRA. In reviewing the concerns raised in that case, I stated as follows:

A. Was the Execution of the Agreement Procedurally Flawed?

[105] I find that none of the circumstances in s. 93(3) are present in this case. The claimant is a university educated professional. He was familiar with contracts through his work. He had been married and divorced previously.

[106] I accept the respondent's evidence that the general terms of the Agreement were discussed, at least in broad strokes, in advance of execution.

[107] The claimant had the ability to insist on further time to seek legal advice but did not. Indeed, he aggressively rejected the respondent's repeated suggestions that he seek legal advice. He was not taken advantage of.

[108] The claimant's credibility as to the circumstances surrounding his execution of the Agreement was generally undermined by a claim that while he now understands what "child support" means, he did not understand the concept back then. Anyone who has lived in Canada for a material period of time would be aware of the concept of child support.

[109] Further, the key clauses transferring his interest in the Home to the respondent were written in reasonably plain English, and were further reinforced by the claimant's execution of the Form A transfer document, and his later endorsement of the document removing him as mortgagor.

[110] The claimant's evidence as to his (1) lack of understanding and (2) pressure to sign, were also undermined by the fact that, on his request, three amendments were made to the Agreement before it was signed.

[111] I find the claimant had sufficient understanding of the Agreement to be held to his bargain. I am unable to conclude that there was anything akin to unconscionability, even as that term is interpreted in the unique context of matrimonial agreements: *Rick v. Brandsema*, 2009 SCC 10 at para. 43. In particular, given their repeated dramatic arguments over the entire relationship, I do not believe the claimant would have been sufficiently distressed by the respondent's alleged threat to throw E and herself off the balcony if he did not sign the Agreement. Indeed, the claimant contradicted himself by testifying both that he was in a state of emotional vulnerability due to the respondent's threats, while at the same time stating this was all 'business as usual' such that he did not take the separation effort particularly seriously.

[112] The claimant relies on *Asselin v. Roy*, 2013 BCSC 1681. That case is distinguishable as:

1. the claimant in the present case did have an opportunity to review the draft Agreement in advance;
2. the claimant was given the opportunity to seek legal advice and specifically rejected it;
3. the claimant was the dominant breadwinner in the household and was not financially dependent on the respondent;
4. the respondent was not in possession of the Agreement "for months" and then "sprung it" upon the claimant; and
5. the claimant was given an opportunity to make changes to the Agreement, and in fact did so.

[113] The claimant also relies on *Dobson v. Dobson*, 2016 BCSC 1874, aff'd 2017 BCCA 390. With respect to procedural fairness, the court found no defect, despite the presence of emotional pressure. The trial court held in terms relevant to the present case:

[161] I find there was no procedural unfairness at the time the Marriage Agreement was entered into. The respondent was able to obtain legal advice and to understand the content of the agreement .

[114] The next decision relied upon by the claimant was *L.H. v. D.H.*, 2009 NLTD 153. However, this case is distinguishable in that the claimant in the present case was not:

1. suffering from severe health problems (*L.H.* at para. 6);
2. the "weaker of the parties" financially (*L.H.* at para. 55);
3. under pressure to sign in order to obtain subsidized housing (*L.H.* at para. 15);
4. presented with an agreement that was "take it or leave it". In fact, he sought and obtained changes (*L.H.* at para. 19).

[115] Nor was the respondent guilty of material non-disclosure that could undermine the Agreement: s. 93(3)(a) of the FLA; *Rick* at paras. 45-49. The only issue raised in this respect is the funds held for E by the respondent's mother. I find the claimant was aware that funds had been placed with the respondent's mother, but simply did not know the precise amount. His failure to investigate this issue further falls primarily on his shoulders

[116] As such, I do not find any procedural unfairness that would trigger s. 93(3)(a)-(c) of the FLA.

[38] In the present case, I accept that the fact that the Agreement was drafted by the claimant is some evidence in support of the respondent's effort to avoid enforcement of the Agreement he signed. However, this factor is more than offset by the following considerations:

- a) The respondent was not financially dependent on the claimant at the time of execution, given that they generally kept their finances separate.
- b) The parties had roughly equal bargaining power.

- c) The parties were both competent adults who each had at least three years of post-secondary education.
- d) The respondent had been running his own business for several years before the execution of the Agreement, establishing some level of financial understanding.
- e) I accept the claimant's evidence that the parties had at least discussed the concept that each party would keep their own property prior to the execution of the Agreement, such that this aspect of the Agreement was not "sprung" on the respondent.
- f) There is no evidence that the claimant placed undue pressure on the respondent to sign the Agreement. The mere fact that the claimant presented the agreement cannot be viewed as undue pressure. Otherwise, virtually all contracts would be invalidated, given that every negotiation begins with an offer presented by one side.
- g) The fact that the marriage date was approaching is insufficient evidence of undue pressure. There would be no purpose in asking for such an agreement until it was certain that the marriage would proceed. A marriage is almost always in view when such contracts are negotiated. Further, the discussion took place 16 days before the event, giving the respondent more than enough time to consider the Agreement, seek legal advice, and decide whether or not to sign.
- h) The fact that the claimant may not have gone through with the marriage absent an agreement is an insufficient basis to invalidate the Agreement. It was well within the claimant's rights to present the respondent with a condition that he sign an agreement before agreeing to marriage: *Reischer v. Reischer*, 2006 BCSC 772 at para. 24. The threshold to establish duress is high. Duress has been defined as "a form of oppressive contractual conduct directed by one party towards another to compel them to act to their disadvantage" that ultimately vitiates the consent of the oppressed party: *S.B.F. v D.G.F.*, 2022 BCSC 2231 at para. 55. Threatening to call off a wedding unless the other party signs a marriage agreement has been found not to constitute duress: *S.B.F.* at paras 53-64 citing *Reischer* and *C.M.M. v. D.R.M.*, 2014 BCSC 2123. Establishing duress requires demonstrating more than mere emotional difficulty or strain. For example, duress can include threats of physical harm or imprisonment: *S.B.F.* at para. 55. Here, there was no evidence that the respondent was under physical threat if he did not sign the Agreement.
- i) Although the respondent was suffering from depression, I do not find that it was sufficiently severe to undermine his voluntary assent to the Agreement.
- j) I find that the respondent was not sufficiently intoxicated from three drinks to undercut his capacity to consent to the Agreement. I base this finding on, among other things, the fact that he had eaten within the relevant time frame and that it was his regular habit to have three drinks in the evening.

- k) There is no evidence of any material non-disclosure of assets. A material non-disclosure is "a misrepresentation of fact that causes a person to enter into an agreement on terms that they would not have otherwise agreed to had the material fact been disclosed." More than a mere "technical" non-disclosure is required: *Dilley* at para. 44. Even misstating income or omitting assets in a marriage agreement is not fatal to the agreement if the party attempting to set aside the agreement would still have signed it: *S.B.F.* at paras. 49-50. As such, it is not sufficient for the respondent to simply assert that formal financial disclosure did not occur. He must identify a specific asset, debt, or piece of information that he was not aware of when he signed the Agreement, and he must demonstrate that he would not have signed the Agreement had he been aware of it. He did not meet this test.
- l) There is no evidence that the respondent was deprived of the opportunity to speak to a lawyer. I accept the claimant's evidence that the parties discussed whether they needed a lawyer, but that they both decided this was unnecessary. The Agreement was quite short and put in layman's terms. When negotiating domestic agreements, legal advice is not always required to ensure a fair bargaining process: *Anderson v. Anderson*, 2023 SCC 13 at para. 69-71. While courts are more likely to enforce marriage agreements negotiated with independent legal advice, a lack of legal advice is not a reason in itself to set aside an otherwise fair agreement: *C.C. v. S.P.R.*, 2022 BCSC 1817 at paras. 52-53, *aff'd* 2023 BCCA 422.
- m) I accept the claimant's evidence (and reject the respondent's) regarding the respondent's understanding of, and interest in, the execution of the agreement. I find that the respondent was not credible in his denial of his earlier discovery evidence that he signed intending to protect himself from claims by the claimant. His evidence had a strong taste of "sour grapes," i.e. he expected to be the primary income earner and save money through the operation of the Agreement, and only sought to challenge it when the shoe ended up landing on his other foot, largely due to his own mismanagement of his financial affairs.
- [39] In light of the paucity of evidence supporting any procedural concerns about the execution of the Agreement, I find that its property division provisions should not be set aside due to any procedural difficulties.

3. Substantive Concerns

- [40] Are the substantive aspects of the property division provisions of the Agreement sufficiently unfair so as to engage the operation of s. 65 of the FRA? The question of fairness is examined at the time of the FRA triggering event: *Dhaliwal v. Dhaliwal*, 2021 BCCA 72 at para. 25. In this case, the triggering event is the date of divorce order - May 29, 2023.
- [41] Where there is a valid marriage contract, "the FRA presumes that the division of property under that marriage contract is fair, and a party seeking reapportionment of that division must demonstrate that it is unfair pursuant to s. 65(1)": *L.E.M. v. D.M.I.*, 2013 BCSC 450 at para. 96.

- [42] To determine whether a marriage agreement is substantively fair, the Court must assess "whether the circumstances of the parties at the time of separation were within the reasonable contemplation of the parties at the time the agreement was formed, and, if so, whether at that time the parties made adequate arrangements in response to these anticipated circumstances": *Hartshorne v. Hartshorne*, 2004 SCC 22 at para. 43. Where the circumstances were in the parties' contemplation at the time the agreement was made, and where the agreement reflects a consideration and response to those circumstances, the burden to establish that the agreement is unfair becomes heavier. The goal is to strike an appropriate balance between deference to the parties' intentions and the assurance of an equitable result: *Hartshorne* at para. 47.
- [43] The claimant prepared a chart purporting to show the equalization payment payable to the respondent with or without the Agreement. If the Agreement was enforced, the claimant calculates that the respondent would receive an equalization payment of \$89,746.13. If the Agreement was not enforced, the claimant accepts that the equalization payment would increase to \$137,309 if the assets were valued as at the date of separation or \$151,385 if valued at the date of trial. The respondent takes issue with the figures on both sides of this equation, but the claimant's analysis nonetheless indicates that the change in the respondent's position is not particularly material.
- [44] The following points about the parties' intentions at the time of execution should also be considered:
- a) The claimant only felt compelled to seek an Agreement because the respondent was not good with money and was coming into the marriage with debts. These are reasonable grounds to seek an agreement. This good faith motivation suggests that the claimant was not trying to take substantive advantage of the respondent, but was merely seeking to protect herself. Parties to a marriage agreement often seek to protect themselves financially in the event of a separation, and courts must show a degree of deference to that intention: *Hartshorne* at paras. 38-47.
 - b) It is also notable that the claimant's concerns turned out to be prophetic - she was able to save more than \$400,000 over the course of their marriage, whereas the respondent saved little and had very poor financial management skills.
 - c) It is worth noting that the respondent had a similar motivation to the claimant in signing the Agreement. He sought to protect himself from future claims by the claimant, as he expected to be the more financially successful party in the marriage. It simply didn't work out that way.
- [45] Directly applying the statutory factors:
- a) The marriage was of a medium duration - 14-15 years.

- b) As of the date of trial, the parties have already lived separate and apart for some time - almost 4 years.
 - c) A significant portion of the parties' net worth is tied up in the Home, which was purchased jointly during their relationship, and hence will be divided equally in any event.
 - d) Neither party received a significant gift or inheritance during the relationship.
 - e) Both parties were economically independent and generally self-sufficient during the relationship.
 - f) The respondent's needs have increased somewhat, given that his medical condition has worsened to some degree. That said, he had many of the same mental health concerns at the time of the execution of the Agreement, and his condition did not worsen until several years following the separation. I find that his relatively good condition at separation and at trial was within the parties' reasonable contemplation at the time the Agreement was made. Even the flare-up of his condition over 2023 was not beyond reasonable contemplation. Mental health conditions ebb and flow.
 - g) Furthermore, and in any event, the respondent's re-partnering eases his needs given the available emotional and financial support.
 - h) Most importantly, the respondent has now been able to return to full-time work. (I note that this fact casts doubt on Dr. Odubote's opinion, whose earlier assessment of the respondent's capacity was more negative than has turned out to be the case.)
- [46] The case law supports my finding that the Agreement's terms on property division should not be set aside on substantive grounds. In *Hartshorne*, the husband entered the relationship with assets worth approximately \$1.6 million, while the wife had no assets and was heavily in debt. Both parties were lawyers, and it was a second marriage for both. Following the birth of their first child, the wife left the practice of law and remained home to raise the children. On the day of their wedding, the husband insisted that the wife sign a marriage agreement that provided that the parties would keep their assets separate, but that the wife would be entitled to a 3 percent interest in the family home for each year that the parties were married, to a maximum of 49 percent. The wife received legal advice that the agreement was grossly unfair but signed it anyway, with a few amendments. After the parties separated, pursuant to the agreement, the wife was only entitled to property worth \$280,000 and the husband was entitled to property worth \$1.2 million. Nonetheless, the Supreme Court of Canada found the agreement to be enforceable, in part because the parties had lived out their initial intention to "remain completely independent of the other as regard to their own property, both real and personal": *Hartshorne* at para. 45. I find that the same general intention existed here, save for property which they specifically decided to purchase jointly.

[47] In *Gershkovitch v. Bailey*, 2021 BCSC 2065, both parties had relatively established careers at the start of their relationship. Mr. Gershkovitch owned a successful brewery and restaurant business. The parties entered into a marriage agreement that provided that the separate property each party owned at the execution of the agreement would remain their separate property, and that the corporations through which they carried on their respective businesses would not be considered shared property. Justice Veenstra found that the agreement as it related to property was fair, subject to an adjustment to the amount Ms. Bailey was to receive for a down payment on a new property, which he increased to account for the unforeseen rise in property values during the relationship (at para. 322). At para. 309, he held that:

In this case, the respondent embarked upon marriage with the claimant premised upon the financial independence of each party. She understood that the claimant intended to protect his assets. She made no direct financial contribution to those assets and her indirect contributions were not substantial. Both parties committed themselves on a full-time basis to their respective careers and businesses - which was part of the fundamental underlying premise of the Marriage Agreement.

[48] In *Johnstone v. Wright*, 2005 BCCA 254, the parties signed a cohabitation agreement that kept their assets separate during their six-and-a-half-year relationship. There was a large disparity between their financial situations: the appellant earned \$30,000 a year and had no substantial assets, while the respondent was a wealthy business owner with assets worth more than \$60 million. After the relationship ended, the appellant brought an action seeking to set aside the agreement under the FRA on the basis of unfairness. The trial judge decided the agreement was unfair since, "After a relationship of approximately 6½ years, the agreement offers the plaintiff no share whatsoever in the family assets": para. 17. However, the Court of Appeal held that the trial judge erred by concluding the agreement was unfair. In particular, the Court noted that the trial judge's conclusion that the agreement was unfair because it left the appellant with no share of the family assets was "perplexing because it characterizes as unfair the central purpose of many if not most cohabitation agreements": at para. 31. Further, the Court cited *Hartshorne* for the proposition that "[Courts] should not conclude that unfairness is proven simply by demonstrating that the marriage agreement deviates from the statutory matrimonial property regime": para. 32. The court relied on the fact that nothing unexpected had occurred: para. 28.

[49] In sum, I find that there is insufficient concern raised by the evidence to conclude that the Agreement is unfair as it relates to the provisions applicable to the property division.

4. Interpretation

[50] As noted above, the respondent advanced little, if any, argument on the interpretation of the Agreement in his oral submissions on closing. However, given that this issue was raised briefly in his written submissions, I will address it.

[51] The respondent's written brief suggests that the Agreement, including the statement that, "Our finances are separate and we are entitled to only what we earn and not to each others earnings now and always," was unclear in the following ways:

- a) Parties may separate their finances, but still have an obligation to spousal support following the breakdown of a relationship.
- b) "Entitlement to earnings" is not language that either a layperson would associate with support, and there are no words that are commonly associated with support, such as "Spousal Support," "Family Maintenance," or "Alimony".
- c) The statement "Anything bought jointly will be split 50/50. (From July 17, 2005) onwards)" is unclear insofar as the claimant is relying on this term to indicate that the parties' assets were separate because:
 - i. the term only contemplates assets bought jointly, and the agreement is otherwise silent on family assets that the parties buy separately; and
 - ii. the term is nonsensical in that it would have the effect of requiring a 50/50 split of assets even if they were to agree on a different division of ownership.

[52] I disagree that the Agreement is unclear. I will address the respondent's first two points later in these reasons given that they relate to spousal support rather than property division. Regarding the respondent's argument that the language "Anything bought jointly will be split 50/50 " is unclear, I note the following:

- a) The interpretation of the Agreement as a whole also requires a consideration of the language "Our finances are separate ". This helps inform the interpretation of the other terms. These words signal the parties' intention not to share property brought into the relationship. One's "finances" would reasonably be treated as including one's assets, liabilities, and income.
- b) The language "Anything bought jointly will be split 50/50", in conjunction with the earlier language, clearly signals that the opposite conclusion applies to "anything" not purchased "jointly", i.e. that it will not be split 50/50. Given that there is no other percentage designated, the most logical interpretation is that anything not "purchased jointly" will not be "split" at all.
- c) The fact that the parties could have agreed to a different division of property begs the point. There is no evidence of them ever having so agreed in relation to any asset. Again, this implies that the intention was, and continued to be, that there would be no "split" at all of property not purchased jointly.

[53] As such, I find that the Agreement should be interpreted as providing that each party would keep all property they owned individually upon separation, and that only jointly held property (such as the "Home") would be divided.

5. House Expenses and Occupational Rent

- [54] The parties agreed that any final order should result in the claimant obtaining ownership of the Home in return for the equity in the Home being divided equally.
- [55] However, there were two residual issues to consider. These issues are outside the scope of the Agreement, as they arose from the parties' conduct after separation and flow from the need to fairly manage the effects of the delay in getting this matter to trial.
- [56] The supplementary issues are (1) the proper management of house expenses incurred by the claimant, and (2) whether there should be an accounting for occupational rent in favour of the respondent. Neither party suggested that these claims were governed by the Agreement, and therefore I treat them as being advanced through the more general reapportionment lens of s. 65.
- [57] The claimant seeks an accounting for ½ of her mortgage payments of \$101,603.56 and the \$27,996.63 she spent on Home maintenance, property taxes and Home insurance. I agree that this is reasonable. It would be unfair for the claimant's sole responsibility for these expenses post-separation to not be recognized since the Home is a joint asset. These expenses are relevant to reapportionment as circumstances "relating to the acquisition, preservation, maintenance, improvement or use of property": FRA s. 65(1)(f).
- [58] The respondent did not aggressively challenge the claimant's ability to seek reimbursement for half of these expenses. Instead, the respondent seeks to offset his liability for reimbursement through his own claim for occupational rent, representing the period over which the claimant lived alone at the Home while the respondent allegedly incurred \$43,213.26 in hotel bills and rent.
- [59] The claimant complains that the claim for occupational rent was not expressly made in the respondent's pleading. However, occupational rent can be considered as part of a reapportionment analysis, instead of as a stand-alone claim, thereby obviating the need for a formal claim for occupational rent to be made in a pleading. In *Dhaliwal v. Dhaliwal*, 2017 BCSC 2083 at para. 73, this Court stated:

In *Holland v. Holland*, 2017 BCCA 75 at para. 24, the court recently confirmed that the concept of "occupational rent" can properly be considered as part of a reapportionment analysis, rather than as a stand-alone order. As such, there is no issue arising from the fact that the respondent did not make a formal claim for "occupation rent" in his pleading. He is entitled to raise the issue of the parties' respective living arrangements as part of his opposition to any claim for unequal division made by the claimant, particularly in light of the various factors set out in s. 95(2) of the FLA, notably (d), (f) and (i). The proper use of the concept of occupational rent is as a discretionary tool to achieve fairness: *McFarlen v. McFarlen*, 2017 BCSC 1737 at paras. 16-20.

- [60] In *Lennox v. Lennox*, 2022 BCCA 44, the Court noted the following regarding the availability of occupational rent in response to a claim for expenses:

- [46] Determining whether to award occupational rent involves the exercise of judicial discretion to do equity between the parties in all the circumstances of the case: *Stasiewski v. Stasiewski*, 2007 BCCA 205 at para. 33.
- [48] In *Dacyshyn*, Humphries J. made a number of points that support Groves J.'s decision. Chief among these points is: if a co-owner in possession claims expenses, that co-owner is not always required to pay occupational rent to a co-owner not in possession. A claim for expenses by an owner in possession merely "opens the door" to a claim for occupational rent by an owner not in possession: *Dacyshyn* at para. 30. Once the door is opened, a determination of what is just and equitable will depend on the circumstances of each case: *Dacyshyn* at para. 40.
- [61] That said, occupational rent is an equitable remedy to be used cautiously: *Gershkovitch* at para. 345. The party seeking an equitable remedy must come with clean hands and be making the claim in good faith.
- [62] The claimant argues that the respondent has not come to Court with clean hands, as the respondent admitted that he deducted some of the money he incurred for housing as a business expense.
- [63] Secondly, the claimant complains that the respondent was not clear at trial as to exactly how much rent he has paid, particularly given that he was given some credit for work he performed for his landlord.
- [64] Thirdly, the claimant says that any occupational rent claim should be set off against the rent he would otherwise have had to incur to store his construction equipment and possessions at the Home.
- [65] I accept that all of these factors should be considered, but I accept that the claim can be advanced.
- [66] If I am going to give credit for the claimant's mortgage and other household expenses incurred while she was in the Home, I find that it is fair that the respondent receives some credit for occupational rent given that the claimant had use of the Home rent-free, and the respondent was compelled to incur costs elsewhere. However, in recognition of the various factors noted by the claimant, I decline to award the respondent the full amount claimed for occupational rent. In determining the appropriate amount, I am guided by the decision in *Parmar v. Parmar*, 2024 BCSC 402 where Justice Sharma noted at para. 63 that "I am wary of relying too heavily on speculative scenarios and precise mathematical calculations, which may not appropriately represent a holistic assessment meant to achieve equity and fairness". Assessing all the relevant factors in an effort to achieve fairness, I would reduce the occupational rent claim to \$500 per month or \$22,000 over the 44 months from separation to trial.

6. Pensions

[67] It was agreed at trial that the claimant's pension with the Municipal Pension Plan would not be divided.

[68] The parties also agreed that their unadjusted pensionable earnings under the Canada Pension Plan should not be divided.

7. Final Division

[69] I find that a compensatory payment is payable to the respondent in the amount of \$111,746.13 calculated as follows:

Value of the Home

\$765,000.00

Less the outstanding mortgage as of June 14, 2024

-\$455,907.56

Home equity

\$309,092.44

Divided 50/50 pursuant to the Agreement

\$154,546.22

Minus half the mortgage payments the claimant made between separation and June 14, 2024 (\$101,603.56/2)

-\$50,801.78

Minus half of the home maintenance, property taxes, and home insurance payments claimant made between separation and June 14, 2024 (\$27,996.63/2)

-\$13,998.31

Plus occupational rent of \$500 per month for 44 months

+\$22,000

Total compensatory award to the Respondent

\$111,746.13

B. Spousal Support

[70] The claimant asserts that, if the Agreement is upheld, the respondent cannot advance a claim for spousal support given the following language:

Our finances are separate and we are entitled to only what we earn and not to each others [sic] earnings now and always

- [71] Again, the respondent raises procedural, substantive, and interpretive concerns.
- [72] There was some confusion as to the governing legislation when assessing the enforceability of the Agreement in relation to spousal support. The parties initially submitted that enforceability should be assessed under the ss. 163-164 of the FLA. At a supplementary hearing to address this issue further, the parties agreed that the governing legislation is the Divorce Act, RSC 1985, c. 3 [DA]. I agree that the DA is the governing legislation in this context. The respondent's counterclaim and closing submissions indicated that he was seeking spousal support pursuant to the DA. Spousal support orders in divorce proceedings are typically granted under the DA even if similar relief is available under the FLA, unless the parties request otherwise: *Domirti v. Domirti*, 2010 BCCA 472 at para. 7.
- [73] As noted, the respondent's original written closing challenged any waiver of spousal support in the Agreement under s. 164 of the FLA. Section 164 of the FLA allows a court to set aside a written agreement respecting spousal support due to procedural or substantive unfairness. The respondent now argues that the legal test regarding the enforceability of spousal support provisions in an agreement is effectively the same under s. 164 of the FLA and the DA. This is because s. 164 of the FLA "essentially codifies the analysis in *Miglin v. Miglin*, 2003 SCC 24" which outlined the framework for assessing agreements for spousal support under the DA: *Goldstone v. Clarke*, 2019 BCSC 243 at paras. 50.
- [74] The respondent's closing submissions accepted that the Agreement was "a marriage agreement pursuant to the definitions set out in the FRA and FLA". The respondent now argues that the Agreement must be considered as a factor under s. 15.2(4)(c) of the DA, that is "any order, agreement or arrangement relating to support of either spouse."
- [75] While I do not agree that the test under the FLA and DA are identical, I do find that in this case given the similarities between the statutory regimes, the result would be the same regardless of whether the DA or FLA is applied: *Goldstone* at para. 67.
1. Interpretation
- [76] As noted above, the respondent argues that the Agreement is unclear regarding spousal support. As a reminder, the respondent's written brief suggested that the Agreement was unclear in that:
- a) Parties may separate their finances, but still have an obligation to spousal support following the breakdown of a relationship.
 - b) "Entitlement to earnings" is not language that either a layperson would associate with support, and there are no words in the Agreement that are commonly associated with support, such as "Spousal Support", "Family Maintenance", or "Alimony".
- [77] I find that the appropriate interpretation of the Agreement is that it was intended to prevent either party from receiving support:

- a) There would have been no reason to mention that the parties were not entitled to each other's "earnings now and always" if the intention was only to address property issues.
- b) Contrary to the respondent's suggestion, I find that a layperson would assume and understand that support is a claim on the other spouse's earnings. Indeed, that is the entire design of the Spousal Support Advisory Guidelines, i.e. once entitlement is established, the other spouse is generally entitled to a share of the other parties' earnings.
- c) There is no formal statutory entitlement to a portion of a spouse's earnings during the course of a marriage (beyond perhaps a more amorphous obligation not to deprive one's spouse of the necessities of life). Hence, any discussion about sharing earnings, especially in this case where the parties otherwise kept their finances separate, is more properly treated as addressing the support implications of a separation.

2. Enforcement

[78] The relevant provisions of the DA are as follows:

Spousal support order

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Factors

- (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.

Objectives of spousal support order

- (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.

[79] Under the DA, when deciding whether to award spousal support, a court must take into consideration any pre-existing agreement related to support: s. 15.2(1)(4)(c). Miglin provides the appropriate framework to determine whether a court should defer to the parties' mutual waiver of spousal support: paras. 2, 29, 46.

[80] In *Nicholl v. Nicholl*, 2020 BCCA 173, the Court of Appeal summarized the Miglin test as follows:

[40] In summary, a court undertaking a Miglin analysis should:

Stage One

1. Inspect the circumstances at the time the agreement was entered into to determine if there is evidence of "oppression, pressure, or other vulnerabilities". If such negative circumstances existed, the "agreement will merit little weight".
2. If there are no such negative circumstances, determine whether the agreement considered the Divorce Act factors and complied with its objectives. If the agreement does not comply with those objectives, the intervention of a court is only warranted where the agreement operates in a way that reflects a "significant departure from the general objectives" of the Divorce Act.

Stage Two

If the court has not intervened at stage one, the court must still analyze the agreement at the time of the application for spousal support to consider whether it represents the parties' original intentions and whether it continues to comply with the Divorce Act. The claimant needs to demonstrate that new circumstances, not reasonably anticipated at the time of the agreement, warrant the court's intervention. The change in circumstances needs to be significant but need not be "radically unforeseen". However, the focus is not on whether a change occurred, but whether the agreement continues to represent the parties' intentions and continues to be in substantial compliance with the objectives.

[81] Although Miglin and Nicholl concerned separation agreements, the Miglin test applies more broadly to any "pre-existing agreements" respecting spousal support: Miglin at para. 60; Hartshorne at paras. 40-42. The mutual waiver of spousal support in the Agreement, a marriage agreement, should still be assessed using Miglin: *G.G. v. M.A.*, 2014 BCSC 1023 at para. 162, *aff'd* 2015 BCCA 383

[82] However, as Justice Veenstra noted in *Gershkovitch*, there are differences between marriage agreement and separation agreements that this Court must keep in mind:

[280] As noted in *Hartshorne* at para. 39, there are key distinctions between marriage agreements and separation agreements:

[39] Marriage agreements define the parties' expectations from the outset, usually before any rights are vested and before any entitlement arises. Separation agreements, by contrast, purport to deal with existing or vested rights and obligations, with the aggrieved party claiming he or she had given up something to which he or she was already entitled with an unfair result.

[281] A separation agreement is agreed to in an environment of greater understanding and certainty as to the parties' economic status at the time of separation - although also one of great emotional vulnerability: *Miglin* at para. 75. Marriage agreements, on the other hand "are anticipatory and may not fairly take into account the financial means, needs or other circumstances of the parties at the time of marriage breakdown": *Hartshorne* at para. 39.

[282] This has particular implications for consideration of the need for spousal support after a medium to long-term marriage, where the marriage agreement contained a waiver of spousal support, and careful consideration must be given to the waiver's reasonableness and compliance with statutory objectives.

[83] I move then to apply the *Miglin* test to the Agreement.

3. Stage One

Circumstances of Execution

[84] The first step of stage one of *Miglin* is to consider the circumstances under which the Agreement was negotiated and executed to determine whether "any circumstances of oppression, pressure, or other vulnerabilities" exist.

[85] In *Miglin*, the Court did not provide a definitive list of factors to consider when assessing the negotiation and execution of a pre-existing agreement. The Court noted the following points at para. 82: (1) a court should be wary of transplanting concepts, such as unconscionability, directly from other areas of law without appreciating the unique context of family law; (2) a court should not presume either party is vulnerable and should not presume that an imbalance of power exists or was used without evidence; (3) the presence of vulnerabilities will not, in and of itself, justify the court's intervention; and (4) professional assistance received by the parties will often overcome systemic imbalance between the parties.

[86] The Court concluded that:

83 Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation

and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.

[87] I find that there is insufficient concern about the procedural aspects to justify setting aside the Agreement's spousal support provisions, largely for the same reasons expressed above in relation to its property terms. Considering the factors from Miglin:

- a) I find that the fact that marriage was approaching, and that the claimant might not have gone through with the marriage absent an agreement, is insufficient evidence of pressure or oppression so as to challenge the fairness of the negotiation.
- b) I do not find that the respondent was under any particular vulnerability at the time of the execution of the Agreement. Persons who suffer from depression and anxiety are still able to enter into binding contracts. The respondent was not sufficiently intoxicated from three drinks so as to make him vulnerable. There was nothing about the respondent's situation that made him particularly or uniquely vulnerable.
- c) I do not find that the claimant and respondent had an imbalance of power or that the claimant took improper advantage of the respondent.
- d) Because there were no vulnerabilities present, I do not find that legal advice was required to overcome any imbalance between the parties. Further, as noted, I accept that the parties discussed whether to obtain legal advice, but both decided it was unnecessary.
- e) I find that the Agreement represented the parties' genuine intentions to keep their finances largely separate and to finalize their obligations ahead of time in the event of a divorce.

Substance of the Agreement

[88] Given that I find the conditions in which the Agreement was negotiated are satisfactory, the next step is to analyze the substance of the Agreement. This requires determination of "the extent to which the agreement takes into account the factors and objectives listed in the Act, thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown.": Miglin at para. 84. The Agreement must be assessed "in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves.": Miglin at para. 84.

[89] In Miglin, the Court stated the following regarding the process of assessing an agreement against the objectives of the DA:

85 When examining the substance of the agreement, the court should ask itself whether the agreement is in substantial compliance with the Divorce Act. As just noted, this "substantial compliance" should be determined by considering whether the agreement represents a significant departure from the general objectives of the Act, which necessarily include, as well as

the spousal support considerations in s. 15.2, finality, certainty, and the invitation in the Act for parties to determine their own affairs. The greater the vulnerabilities present at the time of formation, the more searching the court's review at this stage.

86 Two comments are necessary here. First, assessment of an agreement's substantial compliance with the entire Act will necessarily permit a broader gamut of arrangements than would be the case if testing agreements narrowly against the support order objectives in s. 15.2(6). Second, a determination that an agreement fails to comply substantially with the Act does not necessarily mean that the entire agreement must be set aside and ignored. Provided that demonstrated vulnerability and exploitation did not vitiate negotiation, even a negotiated agreement that it would be wrong to enforce in its totality may nevertheless indicate the parties' understanding of their marriage and, at least in a general sense, their intentions for the future. Consideration of such an agreement would continue to be mandatory under s. 15.2(4). For example, if it appeared inappropriate to enforce a time limit in a support agreement, the quantum of support agreed upon might still be appropriate, and the agreement might then simply be extended, indefinitely or for a different fixed term.

[90] Therefore, this Court must consider the extent to which, when assessed in its totality, the Agreement considers the objectives and factors of the DA. The relevant objectives of the DA include finality, certainty, an invitation for parties to determine their own affairs, and the objectives set out in s. 15.2(6). Section 15.2(6) states that the objectives of a spousal support order include: (a) recognizing economic advantages or disadvantages arising from the marriage or its breakdown, (b) apportioning the financial consequences of children, (c) relieving economic hardship arising from the breakdown of the marriage, and (d) promoting economic self-sufficiency of each spouse.

[91] I find that the following factors cause me to conclude that the Agreement complies with the objectives of the DA:

- a) I have already found that no particular vulnerabilities were present during the formation of the Agreement. Given this, "my review of the substance of the agreement, at formation, need not be to an exacting standard.": *Robins v. Robins*, 2023 BCSC 1353 at para. 50.
- b) The Agreement is short and does not explicitly reference the DA.
- c) I accept that the Agreement does not take into account all of the objectives set out in s. 15.2(6). The waiver does not address any "economic advantages or disadvantages" or "economic hardship" arising from the breakdown of the marriage. The waiver does, however, promote "the economic self-sufficiency of each spouse".
- d) Considering the Agreement in its "totality", the Agreement splits joint property 50/50. This may relieve some disadvantage or hardship associated with the breakdown of the marriage.

- e) Considering the broader objectives of the DA, I find that the Agreement significantly promotes finality and certainty. The Agreement demonstrates the parties' clear intention to remain economically independent and self-sufficient during cohabitation and in the event of the breakdown of their marriage. The Agreement shows the parties' intention "to determine their own affairs".
- [92] In conclusion, I accept that the Agreement adequately promotes the broader objectives of the DA. In *Miglin*, the Court held that only a "significant departure from the general objectives of the Act will warrant the court's intervention on the basis that there is not substantial compliance with the Act": at para. 84. Given this, I find that the Agreement was substantially in compliance with the DA at the time of formation. While it did not explicitly make provisions to reduce any inequality or hardship following marriage breakdown, it did promote finality, certainty, and the parties' intentions.
4. Stage Two
- [93] Given that I have found that the Agreement cannot be challenged based on the facts known at the time of formation, this Court "should defer to the wishes of the parties and afford the agreement great weight": *Miglin* at para. 87. This deference to the Agreement is not absolute however. This Court must consider whether the parties find themselves in circumstances that were not contemplated. "[T]he court should assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act": *Miglin* at para. 87.
- [94] In *Nicholl*, the Court of Appeal summarized stage two of the *Miglin* test:
- [38] Where a court determines that the agreement is not impugned based on the circumstances at the time of formation and was in substantial compliance with the general objectives of the Act, "the court should defer to the wishes of the parties and afford the agreement great weight": at para. 87. Nevertheless, at stage two of the *Miglin* analysis, a court can interfere after it assesses the extent to which enforcing the agreement still reflects the original intentions of the parties and the extent to which the agreement remains in substantial compliance with the Divorce Act objectives.
- [39] At stage two, the court may intervene if there has been a "significant change in the couple's circumstances": at para. 88. A claimant must show that because of the new circumstances, the terms of the agreement no longer reflect the couple's original intentions and the Divorce Act objectives. The claimant must show that the new circumstances were not reasonably anticipated by the parties and the new circumstances "have led to a situation that cannot be condoned". However, the test is not "strict foreseeability", as the question is the extent to which the agreement "can be said to have contemplated the situation before the court at the time of the application": at para. 89. However, the Court emphasized that it is important not to focus exclusively on whether a change occurred as that may obscure the inquiry that lies at the heart of the analysis:

90 The court's focus should be on the agreement's continued correspondence to the parties' original intentions as to their relative positions and the overall objectives of the Act, not on whether a change occurred per se.

[Emphasis in original.]

[95] As part of assessing whether the Agreement is still in compliance with the DA, this court must conduct a comparative analysis of what the respondent would be entitled to under the Agreement and without the Agreement. The approach required here was summarized by the Court of Appeal in Nicholl:

[48] While a judge is not required to explicitly compare an existing agreement's spousal support provisions with the SSAG, the judge must nonetheless analyze how the terms of the agreement accommodate an equitable sharing of the economic consequences of the marriage and its breakdown. Such an analysis is essential to properly assess whether the agreement substantially complies with the objectives of the Divorce Act. That analysis will usually require the judge to consider the couple's incomes after separation. This is particularly the case where the marriage was of long duration. As noted in *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813 at 870, the longer a marriage endures, the greater the presumptive claim to equal standards of living:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin* (1991), *supra*, and *Linton v. Linton*, *supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution

[49] This Court has also repeatedly observed that after a long marriage, spouses should have approximately the same standard of living upon separation without unreasonably encroaching on capital: see *McKenzie v. McKenzie*, 2014 BCCA 381 at para. 108; *Bell v. Bell*, 2009 BCCA 280; and *Chutter v. Chutter*, 2008 BCCA 507.

[50] Applying these principles to the present situation, the judge did not err in principle by failing to compare the spousal support provisions of the Agreement with the ranges for amount and duration of spousal support that would be obtained by using the SSAG for spouses in similar circumstances. However, given Ms. Nicholl's arguably strong claim to compensatory support and the length of the relationship, the judge was required to analyze the extent to which the Agreement provided for an equitable sharing by the couple of the economic consequences of the marriage and its breakdown. In order to do so, it was not enough to determine that the couple shared the family property equally, even where that equal division left each with property worth in excess of \$8 million. The judge needed to assess whether the Agreement would also provide the couple with a roughly equal standard

of living taking into account their past and ongoing incomes, return from investment, and their obligations under the Agreement including spousal and child support. As I will explain, the judge did not carry out that analysis. This, in turn, meant that he was unable to consider in a meaningful way whether the Agreement was (and remains) in substantial compliance with the objectives of the Divorce Act, including the spousal support objectives in s. 15.2.

[Emphasis in original.]

- [96] I find that it is useful to assess whether I would have found entitlement to spousal support absent the Agreement. If I would not have done so, it is difficult to see how the respondent could complain about the enforcement of the Agreement under stage 2.
- [97] In *Eldridge v. Eldridge*, 2024 BCCA 21, the Court of Appeal summarized the legal principles regarding entitlement to spousal support:
- [43] Canadian courts have identified three grounds for entitlement to spousal support: compensatory, non-compensatory (also referred to as needs-based), and contractual: *Chutter v. Chutter*, 2008 BCCA 507 at para. 47, citing *Bracklow v. Bracklow*, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420 at paras. 15, 41-42.
- [44] In this Court's recent decision in *Cphoon v. Stobo*, 2023 BCCA 479, Justice Voith described the principles underlying compensatory support as follows:
- [31] The Supreme Court of Canada first laid out the theoretical principles and basis for compensatory spousal support in *Moge* and later in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 1999 CanLII 715. Since then, a long line of cases from this Court have applied those principles. It is now well-settled that the underlying goal of compensatory support is the equitable sharing of the economic consequences of a marriage or its breakdown. It is intended to provide "redress from economic disadvantages arising from the marriage (such as diminished earning capacity and sacrificed career opportunities to take on childcare responsibilities) or the conferral of an economic advantage upon the other spouse (such as contributions to enhanced career development)": *Hague v. Hague*, 2022 BCCA 325 at para. 36, citing *Parton v. Parton*, 2018 BCCA 273 at para. 39 and *Chutter* at paras. 50-51. See also *Moge* at 864; *Marquez v. Zapiola*, 2013 BCCA 433 at para. 33 and *Zacharias v. Zacharias*, 2015 BCCA 376 at para. 44.
- [32] Marriage, in the eyes of the law, is an economic partnership. If one partner makes economic sacrifices, it is generally to improve the circumstances of the family as a unit. This arrangement of mutual benefit is disturbed upon the breakdown of a marriage. Absent some form of compensation, a spouse's financial sacrifices will often be borne exclusively by that spouse in the form of diminished earning capacity, and the financial benefits conferred on the other spouse will, absent compensation, exclusively benefit the advantaged spouse. Compensatory support, therefore, attempts to equitably share the economic consequences of a couple's roles and their choices during the marriage: *Rozen* at para. 34, citing *Zacharias*

at para. 44; Moge at 863-865.

- [49] Non-compensatory support is intended to address the gap between the needs and means of spouses resulting from the breakdown of a marriage: Chutter at para. 54. It arises from the principle that, by virtue of marriage, spouses have some ongoing responsibility to care for one another: *Zacharias v. Zacharias*, 2015 BCCA 376 at para. 27. The degree to which non-compensatory principles apply depends on the nature and duration of the marital relationship and the standard of living enjoyed by the parties before and after separation: Chutter at paras. 54-61; *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 41, 48-50; *Hodgkinson v. Hodgkinson*, 2006 BCCA 158 at para. 69; *Tedham* at para. 55; *Fisher* at para. 53.
- [54] To achieve a fair and equitable distribution of resources, each of the objectives in s. 15.2(6) must be examined in light of the means, needs and other circumstances of each spouse, including the factors set out in s. 15.2(4): Chutter at para. 46, citing *Moge* at 850-853. The manner in which family property has been divided is also relevant, because the division of property affects the relative condition, means and needs of the parties: Chutter at para. 75.
- [98] The respondent is making a claim for spousal support on non-compensatory grounds only. Because of this, the respondent submits that ss. 15.2(6)(c) and (d) of the DA (relieving economic hardship and promoting economic self-sufficiency) are particularly relevant, but that all the objectives of ss. 15.2(6) must be considered and no single object is paramount.
- [99] When assessing entitlement to non-compensatory support based on need, it is an error to define "need" too narrowly. As explained in *Lee v. Lee*, 2014 BCCA 383:
- [55] In my view, the Court's comments in *Keller v. Black* aptly describe the approach that has been adopted in this province as well. In addition, this court, like many other provincial appellate courts, has expanded the concept of "need" far beyond what is necessary to ensure that the applicant for support will not become a burden on "the government". (*Bracklow*, at para. 23.) In *Yemchuk*, for example, the Court reasoned:

In considering the concept of "need" in the context of a long-term marriage involving a sharing of resources, I am satisfied that it should take into account the relative standards of living of the spouses following the marriage breakdown. In many cases, like this one, where the parties have relatively modest assets at their disposal and no realistic prospect of increasing those assets given their retirement (and pending retirement), it is often not possible to replicate the standard of living enjoyed by the parties when they were living together. The most a support order can do is to attempt to alleviate a significant disparity in their relative standards of living following marriage breakdown.

While equalization of the standards of living of the parties is not a stated objective of spousal support, in long-term marriages in which the parties have approached their roles as a partnership where each contributed their various resources, both economic and non-economic, to the relationship, equality of standard of living (which is not the same as equality of income) may well be the just result. (I leave aside those cases in which the parties, or one of them, are wealthy, since other considerations may apply.)

In the result, I am satisfied that, not only was there a compensatory aspect to Mr. Yemchuk's claim for support which was overlooked by the trial judge, but that Mr. Yemchuk also demonstrated a need for support, taking into account the economic consequences of the marriage breakdown, and the significant disparity in the relative standards of living of the parties following the breakdown.

[Emphasis in original.]

[100] Although the default presumption of marriage is a partnership of socio-economic "mutuality and interdependence", parties can alter this expectation either by explicit agreement or "through the unequivocal structuring of their daily affairs": *Bracklow v. Bracklow*, 1999 CanLII 715, [1999] 1 SCR 420 at para. 20. Here, I find that the parties embarked upon a relationship premised on economic independence and lived in accordance with that intention. That said, "a party who experiences a marked decline in standard of living due to divorce should receive some financial assistance (either in the form of re-apportionment of assets or maintenance) in adjusting to his or her new situation": *Lee* at para. 66.

[101] The respondent bases his entitlement to support on his diminished standard of living following the breakdown of the marriage, in particular:

- a) The respondent says he assumed all of the family debt following separation, and that he has struggled to make ends meet. This is contrasted with his standard of living during the relationship which involved disposable income to spend on vacations, hobbies, eating out, and hiring a house cleaner. His financial struggles have continued with his current partner.
- b) The respondent was able to manage his depression and anxiety during the 15-year relationship as the claimant provided financial and emotional support. Following separation, the respondent's mental health suffered due to the demands of work, concerns about debt and his living situation, and the stress of litigation. Due to the respondent's mental health challenges he says his capacity to work has diminished.
- c) The 15-year relationship is a "mid-term relationship" and gives him a strong entitlement to support on that basis.

[102] The claimant agrees that a party can be entitled to support based on financial need, but notes that there is no automatic entitlement to support based on income disparity since marriage breakdown does not activate a "general tool of redistribution": *Lee* at paras. 65-66.

[103] The claimant argues that the respondent has no entitlement to support, based on:

- a) The respondent failed to submit convincing evidence of a marked decline in his standard of living following the breakdown of the marriage. He failed to provide details about his new partner's financial situation or his current bank account balances. Further, his current lifestyle is the same or better as it was during the marriage in terms of housing, expenses, and hobbies.
- b) The respondent inconsistently and incorrectly calculated his income for spousal support purposes. Once corrected, there is not a sufficient disparity in the parties' income to warrant a spousal support award.
- c) The respondent was intentionally underemployed between December 2022 and March 2024, and continues to work for less than he is able to earn. Alternatively, any mental health challenges that caused him to lose income were not causally connected to the breakdown of the marriage and were more likely connected to his new family and the birth of his son.

[104] I find that the respondent has no entitlement to non-compensatory spousal support absent the Agreement. If I am incorrect in that, I find that any entitlement would have been at the low end. I find this in light of the following:

- a) I do not agree that the respondent "took all the family debt following separation". The evidence establishes that Norwolf was the respondent's business, and given the Agreement, its debts should not be treated as the claimant's responsibility. In contrast, the claimant shouldered the exclusive burden of paying for the mortgage post-separation, which was undoubtedly a family debt.
- b) The respondent has failed to provide sufficient and credible evidence regarding his financial situation so as to allow this Court to find that he suffered from a marked financial decline following the separation.
- c) The respondent had a lower income than the claimant in 2020-2023, but the disparity in their income was not particularly dramatic until 2023, and then became less dramatic again in 2024.
- d) The respondent's needs have arguably increased somewhat given that his medical condition, but:
 - i. The evidence suggests that the respondent had some material capacity to work in 2023, a greater capacity than he communicated to Dr. Odubote, and he may have misrepresented his capacity generally given the results of the "sting" operation;
 - ii. The evidence also suggests that part of the reason for the respondent not working in 2023 was to support and care for his young child with his new partner;

iii. His re-partnering in July 2021 has eased his needs. The respondent says that he splits the rent with his new partner and has been able to borrow money from her when necessary. When assessing a parties' needs, a court should consider how their re-partnering has impacted their needs and lifestyle: Lee at paras. 64-65; and

iv. The evidence suggests he has had a good recovery from the problems he experienced in 2023.

[105] I find that the Agreement both continues to represent the parties' original intentions and continues to comply with the DA. The question is ultimately "the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application": Miglin at para. 89.

[106] In Miglin, the Court outlined the approach a court should take when assessing whether an agreement continues to represent the parties' original intentions:

88 [It] is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. Although the change need not be "radically unforeseen", and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.

89 We stress that a certain degree of change is foreseeable most of the time. The prospective nature of these agreements cannot be lost on the parties and they must be presumed to be aware that the future is, to a greater or lesser extent, uncertain. It will be unconvincing, for example, to tell a judge that an agreement never contemplated that the job market might change, or that parenting responsibilities under an agreement might be somewhat more onerous than imagined, or that a transition into the workforce might be challenging. Negotiating parties should know that each person's health cannot be guaranteed as a constant. An agreement must also contemplate, for example, that the relative values of assets in a property division will not necessarily remain the same. Housing prices may rise or fall. A business may take a downturn or become more profitable. Moreover, some changes may be caused or provoked by the parties themselves. A party may remarry or decide not to work. Where the parties have demonstrated their intention to release one another from all claims to spousal support, changes of this nature are unlikely to be considered sufficient to justify dispensing with that declared intention. That said, we repeat that a judge is not bound by the strict Pelech standard to intervene only once a change is shown to be "radical". Likewise, it is unnecessary for the party seeking court-ordered support to demonstrate that the circumstances rendering enforcement of the agreement inappropriate are causally connected to the marriage or its breakdown. The test here is not strict foreseeability; a thorough review of case law leaves virtually no change entirely unforeseeable. The question, rather, is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application.

[Emphasis added.]

[107] I find that the Agreement continues to represent the parties' original intentions to remain financially independent. I do not find that there has been a change in circumstances that was not reasonably anticipated at the time of negotiation and that operates to create a situation that cannot be condoned. During their relationship, the parties generally lived out their intention to remain economically independent and self-sufficient. I do not find that the respondent's business troubles, or deteriorating mental health over 2023, were circumstances that make the Agreement no longer reflective of those intentions. In fact, as mentioned, the parties' clearly intended that the Agreement would protect them from having to share assets with or support the other if the marriage failed and they were the more financially successful party. Further, the respondent's mental health challenges were within the parties' contemplation at the time of marriage. As mentioned, although the respondent's needs have arguably increased (at least for a period), his re-partnering will have partially ameliorated those concerns to an extent, and his income has since increased again.

[108] I find that the Agreement remains in substantial compliance with the DA.

[109] Considering all these factors, I find that the Agreement's waiver of spousal support is enforceable.

[110] Again, the case law supports this conclusion.

[111] In *Gershkovitch*, the marriage agreement waived Ms. Bailey's entitlement to spousal support. The Court declined to enforce this waiver and awarded Ms. Bailey spousal support on a non-compensatory basis arising primarily from Ms. Bailey unforeseen inability to return to work in the months immediately following separation due to health problems: *Gershkovitch* at paras. 347-349. These health problems stemmed from Ms. Bailey's significant physical and emotional reaction to the separation in July 2017, which involved her leaving her employment, having difficulties eating, sleeping, and suffering panic attacks, and eventually being hospitalized. Ms. Bailey only returned to work in February 2018: paras. 115-119. The Court held that given that Ms. Bailey had since begun a new relationship "in which she experiences a standard of living that appears no different from that she which she experienced prior to separation", the award of spousal support would be limited to 17 months: para. 360. There are a number of differences between Ms. Bailey's entitlement to support in *Gershkovitch* and the present case. Here there was greater knowledge of the respondent's mental health problems and poor financial management skills at the time of execution of the Agreement. Further, his most severe health difficulties were not as serious, and, most importantly, not as prolonged as Ms. Bailey's. Finally, the parties in *Gershkovitch* had a much larger disparity in income and assets.

[112] Given the Agreement's enforceability and my conclusion as to its proper interpretation, I find that the respondent waived any claim for spousal support.

IV. CONCLUSION

[113] Based on the findings above and the parties' agreements, the following orders shall issue:

- a) The parties will communicate with each other only in writing, including electronic communication.
- b) Laura Jeanne Fyten (aka Mussfeld) is the owner of the following property:
 - i. The Home;
 - ii. All property held in her own name, including bank accounts, investment accounts, RRSP, and TFSA accounts.
- a) Eberhard Richard Josef Mussfeld is the owner of all property held in his own name, including bank accounts, investment accounts, RRSPs, TFSAs, and Norwolf Contracting Ltd. and its property.
- b) If there is any dispute as to what property is held in the name of each party, that shall be referred to the Registrar for final determination.
- c) Eberhard Richard Josef Mussfeld will transfer title to the Home to the sole name of Laura Jeanne Fyten (aka Mussfeld) within 60 days of this order.
- d) Laura Jeanne Fyten (aka Mussfeld) will secure a release in favour of Eberhard Richard Josef Mussfeld, or fresh financing in her name alone, for the Scotiabank mortgage account number ending in 949 on title to the Home within 60 days of this order.
- e) Laura Jeanne Fyten (aka Mussfeld) shall pay compensation in the amount of \$111,746.13 to Eberhard Richard Josef Mussfeld within 90 days of this order.
- f) Laura Jeanne Fyten (aka Mussfeld) will place all of Eberhard Richard Josef Mussfeld's property left at the Home inside or near the sea can and/or at the new saw mill site located on the property of the Home within 30 days of this order.
- g) After 30 days from the date of this order have passed, on 48 hours written notice to Laura Jeanne Fyten (aka Mussfeld), Eberhard Richard Josef Mussfeld may attend at the Home to remove his remaining property that has been placed inside or near the sea can and/or at the new sawmill site located on the property of the Home. Eberhard Richard Josef Mussfeld may only go onto the Home's property to retrieve his personal property from inside or near the sea can or the new sawmill site. Eberhard Richard Josef Mussfeld may not enter any other parts of the Home's property, including the Home itself.
- h) Eberhard Richard Josef Mussfeld will remove his personal property from the Home as set out in this order within 180 days of the date of this order at his own expense. Any personal property Eberhard Richard Josef Mussfeld has not retrieved from the Home after 180 days from the date of this order will be deemed to be abandoned and Laura Jeanne Fyten (aka Mussfeld) may dispose of the property.

- i) Laura Jeanne Fyten (aka Mussfeld) will be solely responsible for the following debts:
- i. The mortgage account number ending in 949 on title to the Home.
 - ii. All personal debts listed in her name.
- a) Eberhard Richard Josef Mussfeld will be solely responsible for the following debts:
- i. All personal debts listed in his own name.
 - ii. All debts listed in his name or in the name of Norwolf.
- a) Laura Jeanne Fyten's (aka Mussfeld's) pension benefits administered by the Municipal Pension Plan will not be divided.
- b) The parties' unadjusted pensionable earnings under the Canada Pension Plan will not be divided under ss. 55, 55.1, and 55.2 of the Canada Pension Plan (Canada). Neither party will apply for division of the parties' unadjusted pensionable earnings. A party who makes an application in breach of this Order must indemnify the other for all losses and costs arising from the application.
- [114] Eberhard Richard Josef Mussfeld's claim for spousal support is dismissed.
- [115] Absent either party seeking to make further submissions, I would order that the claimant receive her costs given that she was substantially successful in defending the integrity of the Agreement, a point which largely controlled the property division and the determination of support. If either party wishes to make further submissions on costs, they may arrange a 9 a.m. Teams hearing before me.

"The Honourable Mr. Justice Branch"

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