

CANADA / JUDGMENT

Nicol v. Lau

2024 BCSC 1866

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1866 Nicol v. Lau

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nicol v. Lau,

2024 BCSC 1866

Date: 20241011

Docket: E230396

Registry: Vancouver

Between:

Peter Herbert James Nicol

Claimant

And

Kathy Kit Ha Lau

Respondent

Before: The Honourable Justice Hamilton

Reasons for Judgment

Counsel for the Claimant:

J.M. Cochrane

The Respondent, appearing on her own behalf:

K. Lau

Place and Dates of Trial:

Vancouver, B.C.

June 17-21 and 24-26, 2024

Place and Date of Judgment:

Vancouver, B.C.

October 11, 2024

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[1] The primary claim is to set aside a cohabitation agreement made between the claimant, ("P.") and the respondent, ("K.") under ss. 93 and 164 of the Family Law Act, S.B.C. 2011 c. 25 [FLA]. If successful, P. seeks (i) to divide the family property in accordance with the provisions of the FLA including unequal division of family property in his favour; and (ii) spousal support. K. opposes the application to set aside the agreement. If it is set aside, she maintains that P. should receive nothing for property division or spousal support. K. seeks a fine against P. for his conduct in the proceedings.

[2] The primary claim can be broken down into the following four issues:

- a) Is the agreement procedurally fair pursuant to ss. 93(3) (regarding property) and/or 163(3) (regarding spousal support) of the FLA?

- b) If so, substantially, are the terms of the agreement "significantly unfair" pursuant to ss. 93(5) (regarding property) and/or 164(5) (regarding spousal support) of the FLA?
- c) If the agreement is either procedurally or substantially unfair, should it be set aside in whole or part?
- d) If the agreement is set aside in whole or in part:
 - i. What is the appropriate property division under the FLA?
 - ii. Is P. entitled to spousal support and if so what is the appropriate amount?
- [3] The notice of family claim does not formally seek to set aside the agreement nor does it seek unequal division of family property in P's favour. However, the parties invited me to treat the pleadings as if they were amended to reflect the evidence and claims made at trial including P's claim to set aside the agreement. K. anticipated these claims, so there was no prejudice in proceeding as if these amendments had been made.

Overview of the FLA and Agreements

- [4] Division 1 of Part 2 of the FLA highlights the importance of out of court resolutions in family law matters. Specifically, relevant portions of ss. 4 and 6 of the FLA state:

Purposes of Part

4 The purposes of this Part are as follows:

- (a) to ensure that parties to a family law dispute are informed of the various methods available to resolve the dispute;
- (b) to encourage parties to a family law dispute to resolve the dispute through agreements and appropriate family dispute resolution before making an application to a court;

Agreements respecting family law disputes generally

6 (1) Subject to this Act, 2 or more persons may make an agreement

- (a) to resolve a family law dispute, or
- (b) respecting
 - (i) a matter that may be the subject of a family law dispute in the future,
 - (ii) the means of resolving a family law dispute or a matter that may be the subject of a family law dispute in the future, including the type of family dispute resolution to be used, or
 - (iii) the implementation of an agreement or order.
- (2) A single agreement may be made respecting one or more matters.
- (3) Subject to this Act, an agreement respecting a family law dispute is binding on the parties.

- (4) Subsection (3) applies whether or not
 - (a) there is consideration,
 - (b) the agreement has been made with the involvement of a family dispute resolution professional, or
 - (c) the agreement is filed with a court.
- [5] In *Anderson v. Anderson*, 2023 SCC 13, the Supreme Court of Canada reiterated that family law agreements are to be encouraged:
- [33] As a starting point, domestic contracts should generally be encouraged and supported by courts, within the bounds permitted by the legislature, absent a compelling reason to discount the agreement (*Miglin*, at para. 46; *D.B.S.*, at para. 76; *Rick*, at para. 45). This deference flows from the recognition that self-sufficiency, autonomy and finality are important objectives in the family law context (*Miglin*, at para. 28).
- [6] While out-of-court agreements are encouraged and prima facie binding, it is still important that they be consistent with the objectives of the FLA, such as the presumption of equal division of family property. As such, ss. 93 and 164 of the FLA permit the court to intervene even where the parties have signed a written agreement.
- [7] Pursuant to the FLA, the court may set aside or replace all or part of an agreement respecting property or spousal support if the court finds the agreement to be either procedurally or operationally unfair.
- [8] Sections 93(3) and 164(3) of the FLA provide that the court may set aside or replace a property agreement or spousal support agreement in whole or in part if one or more of the following circumstances existed when the parties entered into the agreement:
 - (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement; or
 - (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- [9] Even if none of the above occurred when the parties entered into an agreement, the court may still set aside or replace a property agreement in whole or in part if the agreement is significantly unfair in substance. To assess whether a property agreement is significantly unfair, the court must consider the factors set out in s. 93(5) of the FLA:
 - (a) the length of time that has passed since the agreement was made;

- (b) the intention of the spouses, in making the agreement, to achieve certainty;
- (c) the degree to which the spouses relied on the terms of the agreement.

[10] Like property agreements, even if a spousal support agreement is procedurally fair, the court may nonetheless set aside or replace an agreement or part of it, if the agreement is in effect significantly unfair, considering the following factors under s. 164(5) of the FLA:

- (a) the length of time that has passed since the agreement was made;
- (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
- (c) the intention of the spouses, in making the agreement, to achieve certainty;
- (d) the degree to which the spouses relied on the terms of the agreement; or
- (e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].

[11] The factors in s. 164(5) (a), (c) and (d) for spousal support agreements mirror the factors in s. 93(5) (a), (b) and (c) for property agreements. The factors in s. 164 (b) and (e) are additional factors to be considered in assessing the substantive fairness of a spousal support agreement.

[12] To summarize, both ss. 93 (relating to property) and 164 (relating to spousal support) contemplate a two-stage inquiry regarding whether or not to set aside an agreement. The first stage addresses the formation of the agreement and the second stage considers the substance or effect of the agreement. If the procedural formation of the agreement was fair considering the factors in FLA ss. 93(3) and 164(3), the court then assesses whether the agreement is significantly unfair according to the factors set out in ss. 93(5) (property) and 164(5) (spousal support): see

S.B.F. v. D.G.F., 2022 BCSC 2231 at paras. 18 and 24.

[13] Notably, even if the court finds that an agreement is procedurally or substantively unfair, the court may decline to set aside an agreement if, having regard to all the evidence, it would not replace the agreement with an order that substantially differs from its terms: H.J.S. v. K.C.S., 2013 BCSC 998 at paras. 39 and 44-46; S.B.F. at para. 25.

[14] Finally, on finding procedural or substantive unfairness, as mentioned, the court may set aside or replace an agreement either in whole or in part. However, when varying only a portion of an agreement, the court must be cautious and should not just consider particular terms of the agreement in isolation. The court must consider the agreement as a whole to ensure that any order modifying only a portion of the agreement produces an overall fair result consistent with the objectives of the FLA: see *Young v. Sherk*, 2019 BCSC 312 at para. 116; and *Li v. Liang*, 2021 BCSC 862 at para. 202.

Credibility and Findings of Fact

Credibility

- [15] The parties each testified and called several witnesses. Much of the factual background is not in dispute. However, I will make some comments on credibility before turning to specific findings of fact.
- [16] P. testified in a straightforward manner and readily made admissions contrary to his interests. At times his memory was admittedly poor, which appeared to be result of a head injury he suffered in a motor vehicle accident during the relationship. P's evidence was balanced and reasonable overall. He admitted when he could not recall. Throughout, he appeared to try to be assisting the court as opposed to his case. During both direct evidence and cross-examination, P. volunteered additional information contrary to his legal position. For example, during his direct examination P. said that he did not expect to be paid by K. for tiling work he did for the Graveley Property (defined below) because he considered that the parties' cohabitation agreement applied to that property. Another example was when he stated that he did not want spousal support. Overall, I have no concerns about P's credibility. I generally accept his evidence as both credible and reliable except where noted below.
- [17] The assessment of K's credibility is more challenging. K. presented as sophisticated, organized and strategic. Her testimony was often extremely detailed when it assisted her position but vague when it did not. At times, K's testimony sounded deliberately rehearsed. For instance, she repeated the phrase 'I relied on the cohabitation agreement' each time she testified about events such as getting married, purchasing the Naramata Property (defined below), building the Naramata Property, cashing her investments, selling the Graveley Property to her son and borrowing funds from her siblings. She appeared to shape her testimony to match the legal factors. In addition, K. was generally defensive on cross-examination and reluctant to make even minor, obvious admissions. For these reasons, I approach K's evidence with caution.
- [18] K's testimony about certain incidents is also concerning. For example, despite signing an interim agreement post-separation to allow P. to use of a vehicle for six months, she surreptitiously retrieved the truck from P. and sold it. She seemed unapologetic and offered no legitimate reason for breaching the agreement. Similarly, K. sold wood to a neighbour which the neighbour spent significant time hauling to his property. K. then changed her mind and snuck into the neighbour's yard at night to retrieve the wood despite the deal. When describing these instances K. seemed unabashed/proud of sneakily retrieving the items and outsmarting P./neighbour. The impression I formed was that K. is willing to go to great lengths to get what she wants. This causes me some concern with respect to K's evidence as a whole.
- [19] Ultimately, where the parties differed in their evidence, I prefer the claimant's evidence except where noted below.

Facts

- [20] P. is 69 years old and retired. He attended engineering school previously but did not formally become an engineer. He worked for many years on jobs relating to the design of boats and designing or renovating homes.
- [21] K. is 65 years old and is retired. She was previously a lab technician with Life Labs.
- [22] P. and K. met when they were in their late fifties/early sixties. Each party was previously divorced and has two adult children from their previous marriage. K's son was called by K. as a witness.
- [23] The parties lived together in a marriage-like relationship commencing January 2017, when P. moved into K's home located on Graveley Street, Vancouver, BC (the "Graveley Property"). I accept K's and K's son evidence that P. was not living at the Graveley Property until after K's son's winter school break in December 2016.
- [24] K. purchased and built the Graveley Property with her father in 1993 and later inherited her father's half of the Property.
- [25] The parties married in October 2020 and separated on or about April 28, 2022. Their relationship lasted approximately five years.
- [26] In the fall of 2018, K. approached P. about signing a cohabitation agreement to protect her assets. At the time, K. owned the Graveley Property mortgage-free. She also owned savings and investments as well as her employment pension. P. owned far fewer assets. P's assets included a boat he sold for \$5,000, a truck, and work tools which he estimated to be worth \$75,000. He also had an unspecified amount of debt.
- [27] P. testified that he understood that K. wanted to protect her assets and he was fine with signing a cohabitation agreement. He did not want any of her assets at the time and readily agreed to signing an agreement at K's request. There was no evidence that K. nor anyone else pressured P. to sign an agreement.
- [28] The parties attended K's lawyer's office to discuss drafting a cohabitation agreement. K's counsel then drafted the agreement and told P. to obtain independent legal advice ("ILA").
- [29] P. obtained ILA and signed the cohabitation agreement (the "Agreement") in the presence of a lawyer on November 12, 2018.
- [30] P. made vague reference in his testimony to his ILA being inadequate. However, he did not expand on this and his lawyer was not called as a witness.
- [31] Both P. and his lawyer signed a certificate of ILA acknowledging that the lawyer read and explained the Agreement to P., P. understood the Agreement and he was not pressured to sign. K. signed the Agreement in front of her lawyer a few days later.

- [32] The Agreement states that each party's assets will remain separate and continue to be solely owned by that party in the event of a separation or on death. The party's separate assets include any increase in value of their existing assets and any assets later acquired using a party's separate assets. The Agreement attaches Schedules disclosing each party's assets.
- [33] Furthermore, the Agreement states that if the parties wish to co-own any assets, they must: (1) register the property in joint names; or (2) record in writing that they co-own the property. As well, co-owned property is considered co-owned in proportion to the direct monetary contributions made by each party as opposed to indirect contributions such as labour.
- [34] The Agreement also includes a waiver with respect to any and all future spousal support claims.
- [35] The Agreement states that it continues to apply regardless of any material changes in circumstances including if the parties get married.
- [36] P. testified in his direct examination that he did not understand that the Agreement would continue to apply after the parties were married. However, on cross-examination, K. confronted P. with the specific wording of the Agreement and P. could not plausibly explain how he could think that the Agreement ceased to apply on marriage.
- [37] In 2019 after signing the Agreement, the parties discussed moving to Naramata and living there during their retirement years. They agreed to purchase bare land on which to build their dream home. K. did not have any experience with designing or building homes. They planned to utilize P's experience designing and building homes.
- [38] In accordance with their plan, in the fall of 2019, K. purchased bare land in Naramata for \$260,000 (the "Naramata Property") taking out a mortgage registered against the Graveley Property. K. also discovered that P. was eligible for the first-time home buyer's plan ("P's HBP") so she asked him to contribute \$5,000 of his savings to a registered retirement savings plan ("RRSP") in his name to be used for the purchase of the Naramata Property. K. also contributed \$30,000 to P's RRSP so a combined \$35,000 was used in the purchase of the Naramata Property pursuant to P's HBP. The Naramata Property was registered in K's name.
- [39] I accept P's evidence that he had extensive skills and experience relating to designing and building homes. Witnesses called by P. testified as to P's superior skills at building design and construction and his longstanding relationships with tradespeople and contractors. None of this evidence was seriously challenged on cross-examination.
- [40] I also accept that P. spent significant time over a period of months designing and tweaking the design of the home to build on the Naramata Property to make it the parties' dream home. I accept P's evidence that the unique lot made both the design and construction of the home complex.

- [41] In 2020, the parties obtained a building permit and commenced building. They set up a trailer on site to live in while they worked on the Naramata Property. P. worked on site most days. K. was working at Life Labs in the Lower Mainland on weekdays but also was much involved.
- [42] When the parties planned to build, they consulted an accountant (the "Accountant") who testified at trial. I accept K's evidence that the Accountant advised them to start a construction company in P's name as shareholder and director. The Accountant helped the parties set up a company called Sarabande which was to be used by them as a 'flow-through' for the construction expenses of building their home on the Naramata Property. The Accountant testified that P. could also use Sarabande to bill third party clients for other construction projects.
- [43] I accept K's evidence that the parties intended P. to be the sole shareholder and director of Sarabande. Indeed, Sarabande was initially set up this way. However, when the parties attempted to open a corporate account, the bank refused because P. had previously claimed bankruptcy. I accept K's evidence that she then became the sole director and shareholder of Sarabande and operated its bank account.
- [44] There is no evidence of any discussions between the parties at the time as to how, if at all, the Agreement might apply to the Naramata Property or to the ownership of Saraband. The parties do not appear to have discussed the Agreement after they signed it.
- [45] In any event, K. obtained an RBC construction loan for \$445,000 secured against the Graveley Property. The amount was based on the original budget to build the Naramata home. K. deposited the draws from the construction loan into Sarabande's account as she received them between approximately August 2020 and December 2021. Sarabande's account was used to pay the costs of building the home.
- [46] P. also contributed funds to the Sarabande account, albeit to a much lesser extent than the construction loan or other funds contributed by K.
- [47] For example, P. completed a large residential renovation project for a client M. on Bowen Island which he invoiced through Sarabande. M. was a witness at trial. M. was not certain but recalled that he paid P. approximately \$26,000 through Sarabande for labour for the Bowen Island project. The Accountant testified P's was paid \$17,000 for labour, which I accept as accurate because the Accountant maintained Sarabande's records and prepared its financial statements.
- [48] P. did not actually receive the moneys he earned for M's Bowen Island project or moneys he earned doing smaller projects for clients. The funds were instead deposited to Sarabande's account which was used to fund the Naramata construction.
- [49] In the summer of 2020, P. was struck in a serious motor vehicle accident. His truck was totalled and he suffered significant soft tissue injuries and a head injury.

- [50] P. purchased a replacement truck for approximately \$45,000 (the "Replacement Truck"). He paid \$16,500 of his own funds toward the Replacement Truck and financed the balance, with K. co-signing the loan. There is no evidence that the parties discussed how, if at all, the Agreement would apply to the Replacement Truck or the loan at the time.
- [51] P. and several witnesses at trial testified and I accept that the accident affected P's ability to do math and complete measurements and his efficiency in construction work generally.
- [52] Despite his limitations, however, P. resumed working on the construction of the Naramata home only a few days after the accident.
- [53] At the time of the accident, K. was working at Life Labs but she became so anxious and stressed about P's injuries and the construction of the Naramata home that she took disability leave. She continued to earn her full salary for the first few months and 66% of her salary thereafter. I accept K's evidence that she remained on leave due to mental health issues until she retired.
- [54] After the accident, both parties lived in the trailer on site and worked at the Naramata Property almost daily until construction was complete. I accept the evidence of P. and other witnesses who visited the site that K's primary role was to feed the contractors and do clean up work, while P's primary role was to oversee and work alongside the tradespeople. Both parties worked very hard together on the build.
- [55] Witnesses called by P. who visited the site during construction testified that P. and K. both spoke about building "our" home or "our dream home" or "our" retirement property when speaking about the Naramata Property and the home they were building.
- [56] K. does not deny referring to the Naramata Property and home as "ours" as opposed to hers, but she maintains that such language was not used to confer legal co-ownership. Again, however, the parties did not appear to have any discussions regarding how the Agreement might apply to the Naramata Property/the home.
- [57] The construction of the Naramata Property ran significantly over the original budget of \$445,000. In addition to the RBC construction loan, the respondent used a variety of sources to fund the construction and cover the carrying costs of the Naramata Property which included:
- a) P's \$17,000 from the Bowen Island project plus funds from smaller projects;
 - b) K's investments that she owned before the relationship and cashed throughout 2020;
 - c) funds drawn on two unsecured lines of credit in K's name; and
 - d) certain loans K. secured from her siblings during the parties' relationship.

- [58] K. called three of her siblings as witnesses. They testified that they each loaned K. money at her request. K. told them that she needed the money to finish construction of the Naramata home. Documentary evidence including emails between K. and her siblings at the time confirm the amounts advanced and that they were loans not gifts to K.
- [59] K's siblings testified K. is required to pay the loans back but has so far only repaid each of them a nominal \$50. I accept the siblings' evidence that there continue to be amounts owing. However, there is an issue with respect to whether all of the moneys lent were used towards the Naramata Property.
- [60] K's siblings were cross-examined at length as to the purpose of the loans and, understandably, they were unable to personally confirm that K. used the moneys they lent her for the construction of the Naramata home.
- [61] K's siblings lent K. a total of \$90,000 between December 2020 and March 2021 during the time that the Naramata home was being constructed. K's brother lent K. a further \$50,000 in July 2022, which was post-separation and long after the occupancy permit on the Naramata Property was granted in December 2021.
- [62] Based on the evidence, I find it likely that the \$90,000 lent by K's siblings before December 2021 was used in the construction of the Naramata home or otherwise toward the expenses/maintenance of Naramata Property. However, I find it unlikely the moneys lent in July 2022 were used in the construction or maintenance of the Naramata Property. I accept P's evidence that the construction of the home was largely done by December 2021 and that little was required thereafter to complete the home.
- [63] K's evidence is that by August 2021 she needed more funds to finish the Naramata Property so she approached her son (who was living in the Graveley Property) to purchase the Graveley Property from her. K. and K's son testified that the son purchased the Graveley Property for \$1,000,000 and it was transferred to K's son's name.
- [64] K. admitted during cross-examination that the \$1,000,000 purchase price was at least \$500,000 less than fair market value at the time. Indeed, the BC tax assessment value for the Graveley Property was approximately \$1,509,000 at the time.
- [65] Furthermore, while K. and K's son describe the transfer as a purchase and sale, K's son did not actually pay the \$1,000,000 or even a down payment. K. and K's son testified that K's son could not afford to pay any down payment. He could only afford to pay \$2,200 per month toward the purchase price. As such, he has only paid approximately \$73,000 to K. for the Graveley Property to the trial date.
- [66] In addition, K. and K's son testified that K. still owes K's son \$10,000 for moneys that he lent her previously in 2020 for the construction of Naramata home. I find it odd/incredible that K. would still owe her son \$10,000 when she subsequently sold the Graveley Property to him for at least \$500,000 less than it was worth.

- [67] K. and K's son's evidence that K. transferred the Graveley Property to K's son to raise money to complete the Naramata Property is also not credible. No funds were actually raised nor did K's son even take over responsibility for the debts registered against the Graveley Property. If as K. claims, she was desperate for further funds in August 2021 to complete the construction, she could have sold the Graveley Property to a third party at fair market value who would have paid in full upfront and allowed K. to distinguish the secured debt and retain the net proceeds.
- [68] Interestingly, despite K. allegedly selling the Graveley Property to K's son, in her updated 2024 form 8 financial statement for trial, she states that she owns both the Graveley Property and the Naramata Property and states the values of the Graveley Property and the Naramata Property as their BC tax assessment values of \$2,055,500 and \$1,394,500 respectively, totalling \$3,450,000 under K's real estate holdings. When cross-examined as to why she states she owns the Graveley Property at its updated value when she claims to have previously sold it to her son, K. claimed she made a mistake in her financial statement in that her interest in the Graveley Property is simply the moneys owed by her son, namely \$927,400, calculated as the \$1,000,000 sale price less her son's monthly payments to date totalling approximately \$73,000.
- [69] As mentioned, K. remains responsible for the mortgage and the RBC construction loan which are still secured against the Graveley Property despite the property transfer to K's son. The balance of the mortgage for the purchase of the land in Naramata is currently approximately \$233,000 (originally \$260,000) and the balance of the construction loan is currently \$442,000 (originally \$445,000).
- [70] As mentioned, by December 2021, the construction of the Naramata Property was essentially complete and the parties were granted an occupancy permit.
- [71] After receiving the occupancy permit, P. and K. had a discussion in December 2021 at the Naramata Property in which K. announced she wanted to leave the Naramata Property to her daughter in her will. P. was shocked and upset by K's statement. He testified and I accept that he had understood that the Naramata property was their shared home and that they would live there forever. It is clear that P. believed the Naramata Property was owned by the parties and would continue to be owned by the parties, not K's daughter.
- [72] Taken aback by the conversation, P. gathered his thoughts in an email he sent to K. on December 25, 2021 (the "Christmas Email") in which he expressed his shock that K. would consider the Naramata Property as her own property after he had devoted so much of his time, skill and effort on its design and build, without compensation. I will address the Christmas Email and K's response further below.
- [73] After the Christmas Email, the parties continued to live in the Naramata Property but their relationship was strained due to their differences regarding the ownership of the Naramata Property. Ultimately, P. moved out in April 2022.

- [74] K. was not sure if the separation was permanent, but by mid-May, 2022, when the claimant returned to retrieve his belongings, she realized he was not returning. K. remained at the Naramata Property in the master suite for some time post-separation and continued to collect rent from a smaller suite in the home pursuant to Airbnb.
- [75] Later, K. moved back to the Graveley Property where she lives with her son. She testified that currently she permits a couple to stay in the master suite at the Naramata Property rent-free in exchange for housesitting.
- [76] Post-separation, K., with the assistance of the Airbnb moneys has continued to pay the expenses relating to the Naramata Property including property taxes, home insurance and the monthly payments towards the mortgage and RBC construction loan registered against the Graveley Property which were used for the purchase and construction of the Naramata Property.
- [77] Post-separation, the parties signed a written interim without prejudice agreement to address the use of the Replacement Truck. The parties agreed P. could use the Replacement Truck for at least six months.
- [78] Unfortunately, K. almost immediately changed her mind and surreptitiously retrieved the Replacement Truck and its contents including some of P's tools. She unilaterally sold the Replacement Truck for \$25,000, paid off the vehicle loan and kept the remaining \$5,000. P. was once again without a vehicle and was forced to borrow from friends to purchase another truck (the "Second Replacement Truck").
- [79] At the time of separation, P. had an outstanding ICBC claim for damages for the motor vehicle accident. He subsequently settled the claim and received approximately \$100,000. After repaying his friends for their loans towards the Second Replacement Truck, he had \$35,000 left in his account, plus the value of the Second Replacement Truck of approximately \$35,000.
- [80] I now turn to the analysis of the law as it applies to the facts. I will first address P's argument that there was an oral agreement between the parties varying the terms of the Agreement before assessing the procedural and substantive fairness of the Agreement.

The Claimant's Submission of a Subsequent Oral Agreement

- [81] The Agreement states that if the parties wish to vary its terms, they must do so in a signed, written agreement in the same manner as the Agreement.
- [82] The Agreement also states that if the parties wished to co-own any assets, they were required to either: (1) register such property in joint names; or (2) record in writing that they co-owned such property. Further, co-owned property would be considered to be co-owned in proportion to the direct monetary contributions made by each party as opposed to indirect contributions such as labour.

- [83] Despite this, P. testified that the parties made an oral agreement that he would own an interest in the Naramata Property. P. did not testify specifically as to when the parties allegedly reached an oral agreement nor as to its specific terms. P. did not testify as to what exact interest they allegedly agreed he would have in the Naramata Property. P. merely points to the Christmas Email and an exchange of texts between the parties around the time they separated as evidence of the alleged oral agreement.
- [84] I will address the Christmas Email first. As mentioned, after the parties received the occupancy permit in December 2021, K. told P. that she planned to give the Naramata Property to her daughter which made P. upset. The parties had just finished building the Naramata Property. P. had just spent the past year and a half working on its design and the construction. He considered it their dream home and thought that they would reside there together indefinitely. The parties were even married at the Naramata Property because it was a special place to them. He was in disbelief, after pouring in so much of his time and energy into the project without compensation, K. apparently did not consider the Naramata Property to be a shared asset. P. expressed this to K. in the Christmas Email.
- [85] K. responded to the Christmas Email. In her response email, K. stated that she would consider either paying P. for his work on the Naramata Property or sharing the profit of the Naramata Property on some basis in the future.
- [86] Neither email provides evidence of an agreement between the parties to share ownership of the Naramata Property. The parties' emails demonstrate that P. was shocked and unhappy and expressed that to K. In turn, K. indicated she was willing to discuss shared ownership of the Naramata Property in some fashion. These emails are not evidence that the parties reached an agreement to vary the Agreement. There is no specific offer or acceptance. There is no evidence of a meeting of the minds as to any specific terms of a new agreement. At best, K's response shows an openness to negotiate an agreement.
- [87] Similarly, the texts the parties exchanged around the time of separation are not evidence that the parties reached a new agreement. In the texts, K. expresses that she is willing to consider giving the claimant something in exchange for his work on the Naramata Property, but the amount and terms were clearly still yet to be negotiated and agreed upon. I accept that P. was under the impression that he owned an interest in the Naramata Property, but that does not mean that there was an agreement between the parties.
- [88] To determine whether there was a binding and enforceable oral agreement, the court considers whether the parties indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract: *Liou v. Tseng*, 2024 BCSC 603 at para. 71, citing *Voitchovsky v. Gibson*, 2022 BCCA 428 at paras. 32-34.
- [89] In *Voitchovsky* at paras. 32-34, the Court of Appeal set out that the court should consider the parties' conduct and communications before and after the purported agreement to assess whether the parties reached consensus on the essential terms of an agreement. If the

parties objectively failed to reach consensus or "meeting of the minds", the agreement will fail for lack of certainty. The question is not what the parties subjectively had in mind but whether a reasonable person would conclude they intended to be bound based on their conduct.

[90] P. has the onus to prove on a balance of probabilities that an oral agreement existed: Liou at para 72.

[91] P. has not discharged this onus. Objectively, considering the parties' conduct and communication, as set out above, there was no oral agreement reached between the parties.

[92] I will now address whether the Agreement was procedurally fair.

Is the Cohabitation Agreement Procedurally Fair?

[93] As the party seeking to set aside the Agreement, the onus is on P. to establish procedural or operational unfairness: S.B.F. at paras. 54, 60, and 73.

[94] The factors to consider in assessing procedural fairness of the Agreement are the same for both property division and support pursuant to ss. 93(3) and 164(3). As a result, I will consider these together.

[95] The first factor is whether a spouse failed to disclose income, significant property debts, or other information relevant to the negotiation of the agreement.

[96] P. does not specifically allege that K. failed to disclose her income, assets, debts or other relevant information. Further, as I have found above, the parties had general knowledge of the other party's assets and financial circumstances. Indeed, the Agreement itself actually contains asset and debt schedules.

[97] The second factor is whether a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress. P's own evidence is that K. requested a cohabitation agreement to protect her assets and that he readily agreed. He understood that she wanted to protect her assets and he did not want any of her assets. There is no objective evidence that K. pressured P. to sign. To the contrary, K's lawyer encouraged P. to obtain ILA which he did.

[98] Further, clause 21 of the Agreement states that each party is signing the Agreement voluntarily without undue influence or coercion by the other or anyone else. P's lawyer was not called as a witness at trial. However, he signed a certificate of ILA at the time P. signed the Agreement which specifically states that P. signed the Agreement "freely and voluntarily" and "as his own act and deed without fear, threat, influence or compulsion of, from or by any person or persons".

[99] Similarly, there is no evidence that K. rushed P. into signing. There was no apparent time pressure. P. had full opportunity to review the Agreement with his own lawyer. P. signed the Agreement first and K. did not sign the Agreement for a few days after.

- [100] The third factor to consider is whether a spouse failed to understand the nature or consequences of the Agreement.
- [101] Here, P. signed the Agreement in front of his own lawyer after receiving ILA. Clause 21 of the Agreement states that parties have read the Agreement and are fully aware of the effect, purpose and intent of the Agreement. The certificate of ILA signed by P's lawyer states that the Agreement was "fully and plainly" put before P. and that P. declared that he fully understood the nature and effect of the Agreement. As mentioned, P's lawyer was not a witness at trial. Further, as mentioned, P. did not testify specifically about any aspect of the ILA being inadequate.
- [102] In his testimony, P. briefly alluded to having had concussions historically, implying that this may have affected his understanding of the terms of the Agreement. However, he did not elaborate as to when he had concussions, what symptoms he may have experienced from them or how this may have affected his ability to understand the Agreement. He also did not tender any expert evidence or medical records. He suffered a head injury in the motor vehicle accident after he signed the Agreement, not before.
- [103] Furthermore, while none of P's witnesses were expert witnesses, several testified that P. was exceptionally intelligent, well-read and capable until the motor vehicle accident. The individual they described would not have struggled to understand the terms of the Agreement before the accident. Furthermore, as already mentioned, P. had a lawyer to explain the terms and the effects of the Agreement and the alternatives to signing.
- [104] One of the specific aspects of the Agreement that P. claims to have misunderstood is that the Agreement continues to apply after marriage. However, as indicated above, I do not accept P's testimony on this point. The wording of the Agreement is clear and unambiguous that the Agreement continues to apply regardless of any material circumstance, specifically including if the parties marry.
- [105] It is not credible that P., who was described by witnesses as exceptionally intelligent, acknowledged that he read and understood the Agreement before signing, and had ILA on the Agreement, could believe that the terms ceased to be of effect upon marriage. I find that at the time P. signed the Agreement in November 2018, he understood the Agreement's terms including the term that states the Agreement would continue to apply if the parties married. It is quite possible that now, after the motor vehicle accident, P. has difficulty understanding the Agreement, but at the time he signed it, I find that he understood.
- [106] The fourth factor is whether there are any other circumstances that would, under the common law, cause all or part of a contract to be voidable. P. did not lead evidence or make specific submissions relating to this factor. I find that there is no evidence of other circumstances that would under the common law cause all or part of a contract to be voidable.

[107] Overall, I find that the Cohabitation Agreement is procedurally fair pursuant to ss. 93(3) and 164(3) of the FLA.

Is the Cohabitation Agreement Significantly Unfair With Respect to Property?

[108] The Court in *S.B.F.* describes the process to determine the substantial fairness of an agreement:

[21] Even if none of the above-mentioned circumstances existed when the parties entered into an agreement, the Court may nonetheless set aside or replace an agreement in relation to property division, or part of it, if the agreement is significantly unfair in consideration of the following factors under s. 93(5) of the FLA:

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

[Emphasis in original.]

[109] In *Jaszczewska v. Kostanski*, 2016 BCCA 286, the Court of Appeal explained what is meant by "significantly unfair":

[41] The test of "significant unfairness" imposes a more stringent threshold than the mere "unfairness" test of the FRA to allow unequal division by a court. As Mr. Justice Butler observed in *Remmem v. Remmem*, 2014 BCSC 1552, "significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is "weighty, meaningful or compelling." He concluded that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": *Remmem* at para. 44.

[110] As with an allegation of procedural unfairness, the onus of proving that an agreement is significantly unfair rests on the party seeking to set aside an agreement: *Reiner v. Reiner*, 2021 BCSC 1514 at para. 43.

[111] The first factor to consider is the length of time that has passed since the Agreement was made. The Agreement was signed on November 12, 2018, and the parties separated only three and a half years afterwards. The time frame is relatively short. However, much changed between the parties during this time frame that was not contemplated at the time of the Agreement.

[112] First, the parties decided to move to Naramata and build their dream home together. The designing and the building of the home appears to have been treated by both parties as a joint venture despite the land having been registered in the respondent's name. It was designed by the parties as their retirement home where they would live indefinitely. It was referred to by the parties to visitors and guests as "our home" and "our property". As mentioned, P. was under the impression that Naramata was the parties' dream home that

they were building together.

- [113] Second, P. devoted an inordinate amount of time and energy to designing and building the Naramata Property. He spent significant time designing the house, and devoting his skills, expertise and energy to the project. It was not an easy design as the lot was not easy to build on. P. also devoted significant labour to the building of the Naramata Property. He worked almost daily on the project over the course of the home's construction, overseeing and working alongside the tradespeople. Between designing and building the home, P. devoted more than a year and a half of his time, energy and skills to the Naramata Property.
- [114] Third, P. contributed his own RRSP funds to the Naramata Property. Although K. provided most of the funds to purchase the land, P. contributed \$5,000 of his savings to an RRSP in his name that the parties then used pursuant to P's HBP to purchase the Naramata Property. K. did not adequately explain why, if the Naramata Property was intended to be her property, she would use P's HBP/RRSP towards the purchase.
- [115] Fourth, the parties set up Sarabande to flow through the construction costs and save taxes on the Naramata construction. P. contributed the funds he earned doing work for third parties to the building costs of the Naramata Property through the Sarabande account used to pay for the costs of construction. P. was the intended shareholder of Sarabande but could not hold the shares because of his previous bankruptcy.
- [116] K. admits that P. contributed funds to the Sarabande account but says that P. did not prove that his funds in Sarabande actually paid for construction costs. She also says that P. did not contribute as much as she did to Sarabande and that Sarabande paid for some tools for P. With respect, these submissions miss several key points. K's own evidence is that Sarabande was used by her as the vehicle to pay for the construction costs. On the one hand, she expects the court to find that the funds that she deposited to Sarabande's account were used for construction costs but at the same time argues that P's funds in Sarabande were not used for construction costs. Clearly, the parties pooled funds within Sarabande account to pay for construction. The Sarabande account was primarily used to fund the Naramata Property construction costs. However, it is artificial and unfair on the evidence before me to suggest that K's funds in the Sarabande account were used for construction and P's funds in the same account were used for other expenses. Both parties were pooled in Sarabande for the same purpose--to build their home in Naramata.
- [117] Furthermore, while P's deposits to Sarabande were less than K's, the fact is that P. contributed funds to Sarabande which was the vehicle to build on the Naramata Property. P. was a person of nominal means yet he left his income for the Bowen Island project for M and other smaller projects within Sarabande to fund the Naramata home.
- [118] Despite the Agreement stating that the parties were to maintain their separate assets and only co-own assets if they registered or otherwise recorded them in writing as co-owned, following the Agreement: (1) the parties decided to build a dream retirement home together; (2) P. devoted approximately one and a half years, full time to the design and build

of the home; (3) P. provided funds through his HBP to the purchase of the property; and (4) the parties started Sarabande to build the home, to which they both contributed funds. Sarabande was supposed to be solely owned by P. initially but was registered in K's name out of necessity. These were significant changes not contemplated by the Agreement. For example, there is no provision in the Agreement that would say how to divide the shares of Sarabande which were supposed to be owned by P. and ended up being registered to K. It was as if the parties did not think about the Agreement after it was signed until December 2021 when the Naramata Property was construction was complete.

- [119] Despite this, K. maintains that the Naramata Property is hers because it is registered in her name, she contributed the vast majority of funds and non-monetary contributions do not count for anything under the Agreement. Her position is that P. designed and built her a house voluntarily in exchange for room and board.
- [120] I disagree with K. As stated above, P. believed that the Naramata Property was a joint venture and that he owned an interest in the property. I find that he would not have designed and built the home or contributed funds if he thought that the Naramata Property was solely K's asset. Both parties referred to the Naramata Property as their property amongst themselves and others. P. was shocked in December 2021 after the home was complete that K. wanted to gift the property to her daughter. It would be significantly unfair based on the changes that happened for the Agreement to apply to the Naramata Property.
- [121] K. however calculates that she has suffered financially worse since the time of the Agreement and that P. has benefitted since the time of the Agreement, even without owning a share of the Naramata Property. I disagree. By my calculations, K. is significantly better off as a result of building a home on the Naramata Property, even considering her debt incurred in building the home and in maintaining the home during the relationship and post-separation. I disagree with K's calculations for three main reasons: (1) she calculates her interest in the Graveley Property at the reduced value for which she chose to sell it to her son; (2) she deducts her post-separation/post-construction debt to her brother as if it is joint debt to fund the Naramata build; and (3) she includes P's personal injury award as part of his assets as if it is family/joint property. It is unfair to use the reduced value of \$1,000,000 (or \$927,000) for the Graveley Property when K. unilaterally chose to transfer the property to her son for less than market value. As I will address further below, these are flaws in K's calculations. I will set out what I consider the appropriate calculation below.
- [122] Overall, in terms of the first factor, while the length of time between the Agreement and the separation was only three and a half years, the major changes that occurred during this period tend to render the terms of agreement significantly unfair to P.
- [123] The second factor, under s. 93(5)(b) of the FLA, is the intention of the spouses in making the agreement to achieve certainty. K. submits the very reason she requested the Agreement was to protect her assets in the event of separation.

[124] K. relies on S.B.F., in which the Court states:

[88] Ms. F.'s argument suggests that in order for a prenuptial agreement to be upheld, the parties must both need it to achieve certainty. That cannot be true. Rarely do people of equal means and financial holdings come together in a marriage. Most prenuptial agreements are entered into to protect the spouse with the most assets.

[89] Here, Mr. F. sought to protect the assets he was bringing into the marriage for his children and his retirement. I do not accept the argument that because Ms. F. did not have assets to protect that she did not share the intention to achieve certainty through the agreement.

[125] Specific portions of the Agreement lend support to K's submission that the parties intended to achieve certainty. For example, Recital T of the Agreement states "each party intends the Cohabitation Agreement to be effective notwithstanding any change of circumstance, no matter how unforeseen or radical." On the other hand, however, the Agreement also contains a clause in which the parties acknowledge that the Agreement may be set aside in the event of court intervention.

[126] Based on both parties; testimony regarding the purpose of entering the Agreement and the clear wording of the Agreement itself, I find that both parties intended to achieve certainty initially when they signed the Agreement. However, their actions subsequent to the Agreement of engaging in a project together to build their dream home and pooling their money, labour and skills to do so call into question whether achieving financial certainty remained their goal subsequent to the Agreement, at least with respect to the Naramata Property.

[127] The third factor, in s.93(5)(c), is the degree to which the spouses relied on the terms of the Agreement. To this end, K. highlights the wording of the recitals to the Agreement as confirming the parties intended to rely on the Agreement:

- a. Recital R(i) - each party relies on this Agreement for enforcement according to its terms;
- b. Recital R(iii) - neither party would have entered this Agreement, or continued their relationship based on it, had it been anticipated that the other would ever apply to vary this Agreement;
- c. Recital S - the parties acknowledge that the importance of being able to rely on the Agreement far outweighs the risk that it may operate unfairly at some future date; and
- d. Recital T - each party intends the Agreement to be effective notwithstanding any change of circumstance, no matter how unforeseen or radical.

[128] K. submits that she relied on the following substantive terms of the Agreement when making all financial decisions during the relationship:

- a) Clause 2: if the parties' relationship ends, neither party will claim spousal support (whether contractual, compensatory, or non-compensatory), or any other form of compensation from the other based on actual or perceived economic prejudice suffered by reason of the relationship.
- b) Clauses 3(a) and 4: all property acquired by a party before the date of the Agreement is that party's separate property and will remain so after the relationship ends, including any income produced by the property, any increase in value of the property, any increase in a party's equity in the property arising from payments of principal on a mortgage or other financial obligation registered against the property, and any property acquired in exchange for the property or with the proceeds from sale of the property or its substitute.
- c) Clause 6: any property acquired by a party during the relationship is the separate property of the party who acquired, unless it is registered in both parties' names or the parties record in writing that it is co-owned.
- d) Clauses 7 and 8: ownership of co-owned assets will be in the same proportion as the contribution made by each party to the purchase, with "contribution" to mean a direct financial contribution and not value for labour unless otherwise agreed in writing.

[129] As mentioned, during the respondent's direct examination, she testified that she relied on the Agreement when she:

- a) purchased the Naramata property land and planned to build a home instead of purchasing a property with a fully built house;
- b) borrowed funds against the Graveley Property to fund the purchase of the Naramata Property, accepting the risk that comes with incurring secured debt;
- c) collapsed most of her investments and savings to fund the construction;
- d) borrowed money from her family members in her sole name to finish the Naramata Property;
- e) paid the vast majority of the parties' daily and household expenses and did not demand contribution from the claimant; and
- f) sold the Graveley Property to her son.

[130] As indicated above, K's testimony that she relied on the Agreement in making financial decisions at all of the above-listed stages during the relationship sounded rehearsed and lacked in credibility. She appeared to shape her evidence to help her legal position as opposed to genuinely describing her thought process.

[131] On the evidence, it is not credible that K. relied on the Agreement to keep the Naramata Property as her separate asset. K. is intelligent, sophisticated, organized and detailed. If K. continued to rely on the Agreement I do not believe that she would risk muddying the waters by seeking P's monetary contributions to the Naramata Property. If K. continued to

rely on the Agreement when she purchased the Naramata Property and did not intend to share ownership with P, surely she would not have had P. use his HBP to purchase the land. If K. was relying on the Agreement to ensure that the Naramata Property was hers solely, she would not have set up Sarabande for/with P. and had him invoice his clients through that same account being used to pay the construction costs of the Naramata Property. Sarabande was intended to be owned solely by P. but for necessary banking purposes was put into K's name, yet the Agreement does not address what happens in that scenario.

- [132] The parties decided to purchase and build Naramata together after the Agreement was signed. Once the parties decided to build their dream home in Naramata, that became their focus, not the Agreement. There is no evidence that the parties even discussed the Agreement with each other from the time it was signed until the Christmas discussion in December 2021, which ultimately led to their separation. There is no evidence that the parties discussed the legal ownership of the Naramata Property until December 2021 after the home was almost fully constructed and they had an occupancy permit. It is clear, however, from the evidence that the parties talked about the Naramata Property being theirs/ours not K's sole property. P. was certainly under the impression that he was entitled to an interest in the Naramata Property.
- [133] K. claims that P. spent almost every day for one and a half years designing and building the Naramata Property, including returning to the site just days after his motor vehicle accident because he volunteered his labour in exchange for not having to pay for rent or food. I disagree. That is not credible in the circumstances. P. clearly thought that he owned an interest in the Naramata Property. The parties held out to their friends and neighbours that the property was theirs together, and not K's property. Prior to December 2021, the only time that K. stated the Naramata Property belonged to her and mentioned the Agreement was when she approached her siblings to obtain loans to finish the construction of the Naramata Property. She needed the funds, and to secure the loans, the siblings wanted assurances that they were loaning moneys to her solely and there would be no issue with enforcement. P. was not aware of these emails or loans at the time.
- [134] Overall, I find that neither party relied on the Agreement with respect to the ownership of the Naramata Property, Sarabande or even the Replacement Truck/loan.
- [135] Overall, considering the factors in s.93(3) of the FLA, while the parties originally intended to achieve certainty by signing the Agreement and only three and a half years passed between the signing of the Agreement and the parties' separation date, so much happened during that same period regarding building the Naramata Property that the Agreement is significantly unfair. The parties objectively did not rely on the Agreement with respect to building their dream home together in Naramata. As a result, the Agreement ought to be set aside in whole or in part as it is significantly unfair to P.
- [136] In considering whether to set aside all or a portion of the Agreement, I must consider what is fair to both parties in light of the property and debt division provisions of the FLA.

Division of Property

[137] Given my conclusion that the Agreement shall be set aside in whole or part, the family property and family debt must be divided consistent with the FLA.

[138] Section 81 sets out the presumption that spouses are equally entitled to family property and equally responsible for family debt, regardless of their respective use or contribution.

[139] The definition of "family property" is comprehensively set out at s. 84 of the FLA. Section 84(1)(a) of the FLA sets out that, subject to s. 85 of the FLA, "family property" constitutes all real property and personal property that, at the date of separation is owned legally or beneficially by at least one spouse.

[140] "Family debt" is defined in s. 86:

86 Family debt includes all financial obligations incurred by a spouse

- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
- (b) after the date of separation, if incurred for the purpose of maintaining family property.

[141] In turn, s. 85 of the FLA governs the determination of excluded property. The onus on proving an exclusion under s. 85 lies with the spouse seeking to rely on this provision: s. 85(2).

[142] To summarize thus far, all property that a spouse owns legally or beneficially at the date of separation is presumptively considered family property and is presumptively equally divisible pursuant to s. 81 of the FLA. However, if a spouse can prove, on the balance of probabilities, that property meets the definition of "excluded property" set out in s. 85 of the FLA, then that property is set aside and dealt with differently.

[143] Section 95(1) of the FLA permits the court to divide family property unequally in a spouse's favour if that spouse proves that equal division would be significantly unfair considering the factors set out in s. 95(2):

- (a) the duration of the relationship between the spouses;
- (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
- (c) a spouse's contribution to the career or career potential of the other spouse;
- (d) whether family debt was incurred in the normal course of the relationship between the spouses;
- (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;

- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
- (g) the fact that a spouse, other than a spouse acting in good faith,
- (i) substantially reduced the value of family property, or
- (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
- (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
- (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

[144] Both parties seek unequal division of family property in their favour. Neither party addresses the specific factors in section 95(2) in detail in their submissions. In my view, only factors (a), (d) and (g) are potentially relevant. Factors (b), (c), (e), (f) and (h) are not applicable.

[145] Pursuant to s. 87 of the FLA, the valuation date for property division is presumptively the date of trial. Section 87 provides as follows:

Valuing family property and family debt

87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

- (a) the value of family property must be based on its fair market value, and
- (b) the value of family property and family debt must be determined as of the date
- (i) an agreement dividing the family property and family debt is made, or
- (ii) of the hearing before the court respecting the division of property and family debt.

[146] Any change in the valuation date requires a finding that the trial date valuation would be "significantly unfair": *Blair v. Johnson*, 2015 BCSC 761 at paras. 68-69. In other words, using a date for valuation other than the trial date/current date is in essence considered an unequal division of property.

[147] K's position is that even if the Agreement is significantly unfair, which I have found, each party should keep their own assets in their own names, including her keeping the entirety of the Naramata Property without any compensation to P. K. provides charts detailing her assets and debts at the beginning of the relationship/time of Agreement and currently.

- [148] P's position is that he seeks whatever the court considers fair. He seeks a compensation payment for his interest in the family property as opposed to a percentage interest, but does not suggest any particular amount.
- [149] There are some gaps in the evidence. There is only one expert appraisal report for the current value of the Naramata Property. There are no appraisals for the Graveley Property at the time of commencement of the relationship, the time of the Agreement, the time of transfer to K's son or currently. There is limited evidence regarding the values of the parties' assets and debts at the commencement of the marriage-like relationship as well, however, there is better evidence regarding the parties' assets at the date of the Agreement. Given these gaps, precise calculations are not possible. I will do my best to effect a fair result on the evidence before me.
- [150] I will deal with the property and debts in K's name first, outlining the evidence with respect to her pre-relationship assets and her current assets and debts. I will then address P's assets and debts at the commencement of the relationship and currently. Where there are gaps regarding the values of assets at the commencement of the relationship, I will use the evidence of the values of the assets at the date of the Agreement which was signed approximately one year later so the values are not likely too far off.
- [151] K. owned the following assets prior to the relationship: the Graveley Property, investments, savings, a vehicle, some gold and jewelry, and her employment pension. The Graveley Property was worth approximately \$1,509,000 based on its BC Tax Assessment value around that time. Her savings, investments, gold and jewelry, vehicle and employment pension at that time totalled approximately \$340,000. Therefore, K's owned a total of approximately \$1,850,000 in assets and had no debts at the beginning of the relationship. Under the FLA, K's pre-relationship assets are K's excluded property provided she can show that her assets still exist today in the same form or in the form of other assets she owns.
- [152] K testified and I accept that she used the equity in her Graveley Property for the mortgage used to purchase the land in Naramata and the RBC construction loan for the construction on the Naramata Property. She also proved on a balance of probabilities that she had to cash her savings and investments in order to fund the construction on the Naramata Property. In my view, she should get credit for all her pre-relationship property as her excluded property, namely \$1,850,000. Only the increase in value in K's excluded property is subject to division as family property.
- [153] I will next address K's current assets and debts, starting with debts.
- [154] K. incurred both secured and unsecured debt during the relationship to finish the construction of the Naramata home and pay expenses including carrying costs on the debt for the Naramata Property.

- [155] Under ss. 86 and 81 of the FLA, family debt includes the debt of either party existing on the date of separation unless a party can prove that the debt is not family debt. Family debt is divided equally unless a party can prove it would be significantly unfair to divide it equally: s. 95(1).
- [156] Again, the evidentiary record is not perfect. However, K. paid the vast majority of the parties' expenses during the relationship, including the vast majority of expenses for the Naramata Property. While P. questions whether all K's debts existing at the date of separation were used towards the Naramata Property, K. testified in detail how the debts were incurred towards purchasing the land, constructing the home, paying expenses such as insurance and property taxes and paying the monthly carrying costs of the debts. I accept K's evidence in this regard. It is consistent with documentary evidence. It is also not controverted that the construction costs exceeded the original budget by a large margin. The only debt of K's at the date of separation that I do not accept still existed is, as mentioned, the \$10,000 debt she claims she still owes her son. That debt ought to be removed from the calculation of family debt and considered repaid.
- [157] In terms of the rest of K's debt existing at the separation date, P. has the onus of proving that such debts are not a family debt. He has not discharged this onus. As such, all of the debts existing at the date of separation are family debts including the secured debts against the Graveley Property, K's unsecured line of credit existing as at separation and the \$90,000 owed to K's siblings as at separation.
- [158] There is no reason to divide these family debts other than equally considering the relevant factors in section 95(2) including (d). They were all incurred during the course of the relationship in funding the joint venture of purchasing, building and maintaining the parties' dream home in Naramata. The debts all relate directly to a property in which P. seeks an interest. I see no reason to depart from an equal division of the family debt.
- [159] However, it is fair to use the current balances of the debts even though K. has paid down some debt post-separation. K. occupied the master suite of the Naramata Property for some time post-separation which is a financial benefit. By contrast, P. pays rent. K. has also had the Airbnb income from the smaller suite to apply to debt. As well, K's income was higher than P's income post-separation until she retired.
- [160] The debt incurred by K. after separation, namely, the \$50,000 lent by her brother, is not family debt. I am not persuaded that the post-separation debt was used to finish construction on the Naramata Property or otherwise to maintain family property. As mentioned above, the Naramata Property was almost complete in December 2021 when the parties received their occupancy permit.

- [161] As such, using K's calculation of the current debt in her name of approximately \$1,000,000, but deducting the \$10,000 debt to her son and the post-separation \$50,000 from her brother, means that there is \$940,000 of family debt. This \$940,000 in family debt ought to be deducted from the current value of family assets held by K. before calculating the compensation payment owing to P.
- [162] In terms of K's current assets, K. admits that she has an interest in the Graveley Property but says her interest is only worth \$927,400, which she calculates as the \$1,000,000 reduced price for which it was transferred to her son less the payments her son has made to date. Using the K's reduced value for the Graveley Property and the current appraised value of the Naramata Property of \$1,394,500 plus the current value of the respondent's investments, savings, vehicle and employment pension of approximately \$168,000, K's current assets would total \$2,489,900 before deducting family debt. If I deduct the family debt of \$940,000, this would make K's net assets approximately \$1,550,000. In that scenario, there would be no increase in the value of K's excluded property.
- [163] However, as mentioned above, it is unfair to value K's interest in the Graveley Property at only \$927,400. She chose to transfer it to her son far below fair market value only approximately four months before the Christmas discussion that led to the parties' separation. By K's own evidence, the Graveley Property was worth at least \$1,500,000 at the time of transfer in August 2021, which is essentially the same value it was as of the date of the Agreement based on the BC Tax assessment value of \$1,509,000. Notably, in K's July 2024 financial statement, she estimates her interest in the Graveley Property to be worth \$2,050,000 based on a more recent BC Tax Assessment value.
- [164] Again, P. did not make specific submissions as to the calculation of his compensation payment. However, by my calculations, K's current total net worth is approximately \$2,060,000 if her interest in the Graveley Property is valued at \$1,509,000 (i.e., the best evidence of fair market value at the time she transferred it to her son). Therefore, K's assets increased in value by approximately \$210,000 (\$2,060,000 minus \$1,850,000) during the relationship. The increase in value of K's excluded property is family property pursuant to the FLA which is presumptively divided equally.
- [165] Turning to P's side of the equation, P's assets at the commencement of the relationship consisted of a boat worth \$5,000 and tools he valued at \$75,000 in the asset schedule attached to the Agreement. P. has the onus of proving his excluded property. Unlike K. who provided at least some objective evidence of her real property using BC Tax Assessment values, and her statements for her investments, savings and employment pension, P. did not provide any evidence as to the value of the tools at the commencement of the relationship or currently. Nor did he provide evidence of his debts at the commencement of the relationship.

- [166] I find that P. had nominal assets at the commencement of the relationship including a vehicle and some tools less debt. P. testified that he is missing some of his pre-relationship tools because K. took them when she retrieved the Replacement Vehicle; however, P. did not provide objective evidence of the value of the tools he is missing. In addition to the tools that he still possesses, P. currently owns the Second Replacement Truck worth \$35,000 and savings of \$35,000, both of which were derived from his personal injury settlement.
- [167] P's personal injury settlement is P's excluded property except for any portion representing past wage loss during the relationship, which would be family property. Unfortunately, P. did not provide a breakdown of his settlement nor did he call his personal injury lawyer to testify, despite K's repeated requests. However, given the serious nature of his injuries, I find it likely that a significant portion of the settlement was for non-pecuniary damages. By contrast, given P's age and income history, his past and future wage claims would not likely have been significant. It is possible that a nominal portion of the settlement would have been a family asset. However, considering K. retained the net proceeds of sale of the Replacement Truck, I consider these items a wash. As such, P. shall retain his current assets without division, namely the Second Replacement Vehicle and his savings derived from his personal injury settlement funds as his excluded assets as well as his tools which were mostly pre-relationship excluded assets. As all P's assets are excluded assets, they are not subject to division.
- [168] As such, the only property to be divided is the family property in K's name. As mentioned, under the FLA, the increase in value of K's excluded property is family property. Assets acquired during the relationship are also family property. P. is presumptively entitled to one half of the value of family property after accounting for family debt. I have calculated the increase in value at \$210,000. As such, based on the presumptive equal division in the legislation, K. would owe P. \$105,000 as a compensation payment, subject the parties' respective claims for unequal division.
- [169] Turning now to consider whether an equal division of family property would be significantly unfair, the only factors that are potentially relevant in section 95(2) are (a), (d) and (g). Subsection (a) is the duration of the relationship. K. relies on this factor in support of seeking an unequal division of property in her favour. The parties were together for five years which is not a long relationship. However, as mentioned above, much happened during the relationship including the parties embarking on a joint venture to build a property together in Naramata. In my view, the duration of the relationship is a neutral factor in this case. The onus is on K. to prove why an equal division of family property would be significantly unfair to her. She has not discharged her onus.

- [170] P. relies on the remaining two potentially relevant factors under section 95(2). I have already addressed 95(2) (d) above in terms of why the family debt is to be divided equally. Subsection 95(2) (d) does not affect my view of property division either for the same reasons mentioned above. That leaves subsection 95(2)(g): a spouse's disposal, conversion, or reduction in value of family property other than if done in good faith.
- [171] As mentioned, K. disposed of the Graveley Property to her son for \$1,000,000 which was at least \$500,000 less than its fair market value at the time. She transferred the property only a few months before separation. If she had kept the Graveley Property, according to her financial statement, it is now worth even more than when she transferred it to her son.
- [172] However, I have used the fair market value for the Graveley Property at the date of transfer of \$1,509,000 in my above calculations, not \$1,000,000 in fairness to P. Interestingly, the Graveley Property was worth \$1,509,000 at the time of the Agreement/commencement of the relationship as well as the date of transfer to K's son. That is, the Graveley Property did not increase in value before it was transferred. As a result of the values being the same, the Graveley Property is essentially removed from the division of family property because it did not increase in value. In my view, that is fair to both parties because what is divided is the net increase in value attributed to the Naramata Property project, which was the parties' joint venture. However, the Graveley Property is kept separate, which is consistent with the parties' original intentions in regard to that property.
- [173] P. had no issue entering the Agreement at K's request to protect her assets, the largest of which was the Graveley Property. If the parties had simply kept the same assets and not engaged in purchasing and building the Naramata Property together, the Agreement would likely have continued to be substantially fair. The compensation payment calculated above based on equal division of family property effectively respects the intent of the Agreement with respect to the Graveley Property, leaving any increase in value of the Graveley Property subsequent to the transfer to benefit K or K's son as the case may be.
- [174] Finally, subsection 95(2)(g) applies to disposals/conversions/reductions in value of property that are not done in good faith. I am not able on the evidence to determine whether K. transferred the Graveley Property in good faith to benefit her son or whether it was done to prevent it from being shared with P. Again, however, P. has the onus in proving that an equal division of property would be significantly unfair to him based on the factors in section 95. He has not discharged his onus.
- [175] Overall, considering all the relevant factors in section 95(2), I see no reason to divide family assets or debts unequally in favour of either party. An equal division would not be significantly unfair to either party.

[176] In conclusion, the Agreement is set aside such that K. shall forthwith pay P. \$105,000 in compensation for all claims he has in or to the Naramata Property or any other property in K.'s name. Each party shall retain all other assets in his or her name and each party shall be responsible for any and all debt in his or her name as set out in the Agreement.

[177] I will now address P's claim to spousal support.

Is the Cohabitation Agreement Significantly Unfair With Regards to Spousal Support?

[178] The factors to consider in determining whether an agreement is significantly unfair respecting spousal support pursuant to s.164(5) of the FLA are similar to those in s. 93(5) respecting property division. However, ss.164(5) has two additional factors:

- (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse; and
- (e) the degree to which the agreement meets the objectives set out in section 161 ["objectives of spousal support"].

[179] Factors 164(5)(a), (c), (d) have been addressed above. I will now turn to the Agreement's fairness considering any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse and the degree to which the Agreement meets the objectives of spousal support in the FLA.

[180] Under s.164(5)(e) of the FLA, the court is to consider the degree to which the agreement meets the objectives set out in section 161. The relevant portions of section 161 state:

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[181] At the beginning of their relationship and at the time of the Agreement, K. was employed by Life Labs with an approximate gross annual income of \$65,000. After P's motor vehicle accident, K. took short-term sick leave from July to December 2020 receiving her full income, and then long-term disability in 2021 receiving 66% of her normal income. She retired on May 10, 2024, when she turned 65 and now receives retirement income of CPP and OAS income of \$1,875 per month or \$22,500 annually. She has also received Airbnb income from renting a portion of the Naramata Property which has gone towards the expenses of the Naramata Property. The Naramata Property is listed for sale currently and the Airbnb income will cease on its sale.

- [182] P. did not set out his income on his F8 Financial Statement sworn June 18, 2024. However, he testified that his monthly income was \$1,800 from CPP and OAS, which is \$21,600 annually.
- [183] P's income is similar to his income at the beginning of the relationship and at the time of the Agreement according to his Notices of Assessment was:
- a) 2017 = \$20,797;
 - b) 2018 = \$19,279; and
 - c) 2019 = \$5,314.
- [184] P. testified that his injuries in the motor vehicle accident impacted his income-earning abilities. However, he received a personal injury settlement which presumably contained compensation earmarked for his past and future earnings. As noted, he did not provide a breakdown of the settlement despite the respondent's requests before and during the trial.
- [185] A settlement for past or future wage loss is relevant to spousal support as it relates to the means, needs and circumstances of the claimant: see for example *A.E.W. v. B.E.W.*, 2015 BCSC 23 at paras. 86-88.
- [186] P's personal injury lawyer was not called as a witness. K. admitted to contacting the personal injury lawyer after separation to caution him about P's veracity. However, there is no evidence that she contacted ICBC. There is no evidence that the amount of the P's settlement was somehow less because K. spoke to his lawyer.
- [187] In the absence of evidence as to the breakdown of the settlement, I infer that P. reached a settlement on his personal injury lawyer's advice that adequately compensated him for past and future wage loss caused by the accident and there is no basis for needs-based spousal support from the respondent on a retroactive or ongoing basis.
- [188] P. is currently 69 years old. His friend AG testified and conceded in cross-examination that he would not have involved P. in his new project if it went ahead because P. is semi-retired and in his late 60s.
- [189] The parties had a five-year relationship. They were both previously divorced. They commenced their relationship when they were in their late fifties or early sixties. They did not have children together. They are now both of retirement age and earn similar incomes. K. has greater financial means in terms of her assets, but that was the case before the parties met and not a result of the relationship or its breakdown. Any economic disadvantage suffered by P. as a result of the relationship has been addressed by the compensation payment I have awarded above.
- [190] The Agreement is not significantly unfair as it relates to spousal support. If I am wrong, I would exercise discretion not to set aside the Agreement as it relates to spousal support. P's claims for spousal support are dismissed.

Fine

- [191] K. seeks a fine against P. for his conduct in the action. K. did not set out in her submissions what legislation she relies on in seeking a fine. However, s. 213 of the FLA provides that the court may, among other things, impose a fine of up to \$5000 against a party for failing to disclose information contrary to the Supreme Court Family Rules, B.C. Reg. 169/2009 for providing incomplete information.
- [192] K. complains that she did not receive a book of documents index from P's counsel or notice of what documents P. planned to rely on at trial until trial. Furthermore, despite the Supreme Court Family Rules, requiring each party to file an updated Form 8 financial statement with all applicable attachments prior to trial, P. only produced his updated statement when directed by me to do so on the second day of trial and even then, it was missing his income and most recent tax return information.
- [193] In addition, K. submits that she made repeated requests to examine P's cell phone to assess the authenticity of text messages but was only provided the opportunity to do so once the trial started.
- [194] Section 213 of the FLA permits the court to impose a fine on a party for failing to comply with requirements to disclose information in accordance with the Supreme Court Family Rules. The decision whether to impose a fine is fact-specific and will depend on the circumstances of the case: J.D.G. v. J.J.V., 2013 BCSC 1274 at para. 28; M.A.M. v. D.L.L., 2018 BCSC 2114 at para. 98.
- [195] I decline to impose a fine for several reasons.
- [196] First, I do not want to upset the balance reached with respect to property division.
- [197] Second, it was clear from both parties' evidence that P. struggled with paperwork and this became worse after he suffered a head injury in the motor vehicle accident. After the accident until the parties' separation, K. had to handle P's paperwork including communicating with his personal injury lawyer. After the separation, P. obviously no longer had K's assistance.
- [198] Third, P. also had a heart incident following his examination for discovery in March 2024, and has been recovering since. P. testified and I accept that this made gathering documents, updating his financial statement and preparing for trial even more difficult.
- [199] Fourth, despite his shortcomings, P. appears to have tried his best to provide all documents to his lawyer. He also brought his cell phone to his lawyer's office and provided it to the lawyer's assistant, but unfortunately, K. was not given the opportunity to review the cell phone before trial.

- [200] In any event, P. did not rely on many documents for trial. By contrast, K. relied extensively on documents, all of which were neatly organized for trial. None of the documents relied on by P. at trial seemed to take K. by surprise except for a transcript of the telephone call between K. and P's personal injury lawyer. With respect to that transcript, K. was a party to the call, was given the opportunity to review the transcript during the trial and confirmed that it accurately represented their conversation.
- [201] Ultimately, P's shortcomings with paperwork/information, while no doubt frustrating to K. did not objectively affect K's preparation or presentation or delay or lengthen the trial.
- [202] For all these reasons, I decline to order a fine.

Summary of Orders

[203] The orders I have made are summarized as follows:

- a) Pursuant to the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) the parties are divorced, such divorce is to take effect 31 days after the date of these reasons.
- b) The agreement dated November 18, 2018, is set aside such that the respondent shall forthwith pay to the claimant a compensation payment of \$105,000 for his interest in and to family property including the Naramata Property and in satisfaction of all other claims.
- c) Subject only to the compensation payment set out in b) above, each party shall retain his or her own assets in his or her own name or possession. Each party shall be solely responsible for any and all debts in his or her own name.
- d) The claimant's claim for spousal support is dismissed.
- e) The respondent's claim for a fine against the claimant for his conduct during the action including for non-disclosure or failure to provide an updated Form 8 financial statement before trial is dismissed.
- f) The balance of the parties' claims in this action are dismissed other than the parties' respective claims for costs which are addressed below.

Costs

- [204] Costs are awardable in the discretion of the trial judge. Under Rule 16-1(7) of the Supreme Court Family Rules the general principle is that costs are awarded to the successful party unless the court otherwise orders.
- [205] The standard of "success" required for the award of the costs is "substantial success". The Court of Appeal in *Harras v. Lhotka*, 2016 BCCA 246 described the substantial success standard:

[48] "Success" for the purposes of costs means substantial success. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, endorsed by this Court in *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16:

Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham*, Mr. Justice Bouck described this standard as follows:

- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when [looking] at all the disputed matters globally.
- [206] In considering the various matters in dispute, P. was successful at trial in setting aside the Agreement as it related to the Naramata Property. K's position was that the claimant was entitled to absolutely nothing, despite his monetary and non-monetary contributions to the Naramata Property. P. was unsuccessful in setting aside the Agreement for the purposes of spousal support but this claim did not add much time to the trial as the focus was the Naramata Property. K's request for a fine for non-disclosure or the late filing of the claimant's form 8 financial statement was dismissed but this claim did not add much time to the trial either. I am inclined to order that the parties bear their own costs. Success was divided. Also, I am concerned that a costs award may upset the balance struck in the compensation award herein.
- [207] As such, each party shall bear their own costs of the action, subject only to arguments that either party may make regarding any formal offers to settle.
- [208] In the event that there are formal offers which warrant the court's consideration, the party seeking to rely upon the formal offer shall file written submissions within 14 days of receipt of these reasons for judgment and the responding party shall respond within seven days thereafter. Upon receipt of written submissions, the court reserves the right to require the parties to attend at a mutually agreeable date for brief oral submissions. Failing receipt of written submissions within this timeframe, the presumptive order that each party shall bear their own costs shall govern.

"Hamilton J."

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