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CANADA / JUDGMENT

## Reiner v. Reiner

2021 BCSC 1514

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1514 Reiner v. Reiner

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Reiner v. Reiner,

2021 BCSC 1514

Date: 20210804

Docket: E91091

Registry: Nanaimo

Between:

Robert Marcus Reiner

Claimant

And

Shannon Leah Bremner Reiner also known as Shannon Leah Bremner Harper

Respondent

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the Claimant:

P. Dwyer

Counsel for the Respondent:

T. Luchies

**Place and Dates of Hearing:**

Nanaimo, B.C.

June 1-2, 2021

**Place and Date of Judgment:**

Nanaimo, B.C.

August 4, 2021

**INTRODUCTION**

- [1] The parties to this family law case, both now approaching the age of 60 years, were married in July 1989 and separated in the same month 30 years later. They raised two children who are now independent adults. It was a traditional marriage. The claimant, a veterinarian and businessman, earned the family income. The respondent, though she engaged in business activities here and there over the years, was mostly responsible for the family home and day-to-day care of the children.
- [2] The parties entered into a written separation agreement on May 29, 2020 ("the separation agreement") dealing with property division and spousal support. Each was represented by counsel in its negotiation and execution. Not long after it was completed, the claimant filed his Notice of Family Claim. The respondent filed no response, all matters between the parties having been settled consensually. In due course the claimant filed for a divorce which was granted on July 31, 2020.
- [3] The respondent now applies under ss. 93 and 164 of the Family Law Act, S.B.C. 2011, c. 25 (the "Act") for an order that the separation agreement be set aside on the basis, essentially, that the claimant took improper advantage of the respondent's vulnerable mental health during the negotiations, and failed to disclose property. She seeks leave to file pleadings and to pursue different outcomes concerning property division and support.

**PRELIMINARY REMARKS**

- [4] The respondent claims to have suffered from depression for many years, and more recently to have been diagnosed with bipolar disorder, a major mental illness. She told me during the hearing that she has been under the active care of a psychiatrist for years. The claimant's alleged exploitation of the vulnerabilities created by this illness is the mainstay of the respondent's application to have the separation agreement set aside. The claimant denies knowledge of any such diagnosis, and no expert medical evidence was submitted to confirm it.
- [5] The only evidence concerning mental health that I have received, other than from the respondent herself, came in the form of a letter attached to an affidavit from a clinical counsellor, who is also a yoga instructor, confirming that she conducted 34 counselling

sessions with the respondent between October 1, 2018 and October 5, 2020. In other words, the respondent has advanced her case on the basis of serious alleged psychiatric vulnerabilities, but these have not been shored up by proper medical evidence that would be readily available, it seems to me, if her specific claims had substance. The absence of such evidence raises doubts in my mind about their authenticity.

- [6] I am prepared to accept, however, that in 2018 and 2019 the respondent experienced significant problems in her emotional or mental health, even if the record of evidence is oddly silent concerning their precise nature. On two separate occasions in 2018, the respondent was involuntarily admitted to hospital, the second time for a period of six weeks at a facility in Calgary, AB. I have no idea why. I was given no medical evidence related to either admission. According to the respondent's clinical counsellor, however, these hospitalisations were followed by a lengthy period of emotional turmoil from various causes, including the stress of the respondent's marital breakdown, and the ensuing financial negotiations with the claimant.
- [7] The claimant, I find, was fully aware of these difficulties, whatever their nature or source. Notwithstanding my doubts about the quality of the respondent's evidence, I approach the case from the footing that the respondent was in a state of heightened vulnerability throughout the round of offers and counter-offers that resulted in the separation agreement. The questions that I have to deal with are, first of all, whether the claimant exploited the respondent's vulnerability; secondly, whether the claimant failed to disclose significant property or relevant financial information; and lastly, in either case, or both, whether he drove a deal that was unconscionable or significantly unfair.
- [8] I would emphasise that the respondent was represented throughout her negotiations with the claimant by a well-known family lawyer from Victoria, BC, with decades of experience behind her. The claimant started off acting for himself, but engaged counsel towards the end of the process largely, I think, because he was not satisfied with the pace of negotiations. The correspondence on file between the lawyers reveals an active round of give and take, and the usual exchange of proposals and counter-proposals. Having searched carefully for any sign of it, I have uncovered no meaningful indication of disadvantage to the respondent during any of this. In fact, counsel informed me that it was the respondent's lawyer who drafted and proposed the final version of the separation agreement signed by the parties.
- [9] I have also been shown electronic correspondence exchanged directly between the parties during the relevant period. The impression certainly emerges that the claimant wished to move ahead with a minimum of expense and delay, but this is neither unusual nor objectionable. The respondent's protests that the claimant's conduct amounted to pressure tactics and bullying strike me as overwrought. The claimant's correspondence, though persistent and occasionally condescending, could not be characterised as aggressive, abusive or dishonest. The respondent, for her part, was articulate and determined in stating her case, she gave as good as she got, and she held her own throughout, although I do not doubt that, in common with most family litigants, she found the process stressful, upsetting,

and demoralising.

[10] Finally, when the separation agreement was completed, both parties signed certificates of independent legal advice in similar terms. The respondent's reads as follows:

#### **CERTIFICATE OF INDEPENDENT LEGAL ADVICE**

THIS IS TO CERTIFY that I, Deborah A. Todd, have been retained by Shannon Reiner, of Victoria, British Columbia, to advise and have advised her in regard to her signing the within Separation Agreement. I fully read over and explained to her the contents of the said Separation Agreement and advised her of the nature and effect thereof, including her rights as distinguished from those of Robert Reiner and that she expressed herself to me as understanding and appeared to me as fully understanding the nature and the extent of this Separation Agreement and that she stated to me and it appeared to me that she entered into the said Separation Agreement not under any stress exercised by or on behalf of Robert Reiner and without any pressure or undue influence or compulsion on the part of the said Robert Reiner or anyone on his behalf.

I believe upon entering into the Separation Agreement, Shannon Reiner, was fully advised and informed with regard to all the foregoing matters mentioned, and may fairly be said to have acted independently therein.

DATED at Victoria, British Columbia, this 4 day of June, 2020.

Deborah A. Todd, Counsel

#### **RELEVANT STATUTORY PROVISIONS**

[11] Sections 93 and 164 of the Act are parallel provisions titled, respectively, "Setting Aside Agreements Respecting Property Division" and "Setting Aside Agreements Respecting Spousal Support". The sections apply if, as here, spouses have a written agreement on the named subjects countersigned by at least one other person. The relevant provisions of both sections are in substantially similar terms, namely:

- (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
  - (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
  - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
  - (c) a spouse did not understand the nature or consequences of the agreement;

- (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.
- (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
  - (a) the length of time that has passed since the agreement was made;
  - (b) the intention of the spouses, in making the agreement, to achieve certainty;
  - (c) the degree to which the spouses relied on the terms of the agreement.
- [12] As for agreements concerning spousal support, s. 164(5) provides two additional factors to those enumerated in s. 93(5):
  - (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
  - (e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].

## LEGAL PRINCIPLES

- [13] In assessing whether a separation agreement ought to be set aside, the British Columbia Court of Appeal in *Reid v. Reid*, 2017 BCCA 73, restated and applied the two-stage inquiry set out in *Miglin v. Miglin*, 2003 SCC 24. The first stage includes an assessment of the procedural and substantive fairness of the agreement: see *Young v. Sherk*, 2019 BCSC 312 at para. 68; also *Gibbons v. Livingston*, 2018 BCCA 443 at paras. 46-47.
- [14] In assessing procedural fairness, I must consider the circumstances that existed at the time the agreement was entered into, paying particular attention to:
  - a) whether there were any circumstances of oppression, pressure or other vulnerabilities;
  - b) the conditions under which the negotiations were held;
  - c) whether a party suffered from informational deficits of the other party's making;
  - d) whether there was professional assistance; and
  - e) whether one party exploited an unfair negotiating advantage.

See *Reid* at para. 56; *Miglin* at para. 81; and *Gibbons* at para. 47.

- [15] In assessing the substantive fairness of the agreement, I must ask myself whether the agreement is in "substantial compliance" with the underlying legislation: Miglin at para. 85. "Substantial compliance" is determined by considering whether the agreement represents a significant departure from the general objectives of the underlying legislation or the parties' statutory remedial entitlements. Along the way, I must bear in mind the important objectives of finality, certainty, and the parties' autonomy in determining their own affairs: Miglin at para. 85; Reid at para. 57; and Gibbons at para. 47.
- [16] Circumstances of oppression, pressure, or vulnerability are generally not sufficient on their own to warrant the setting aside of an agreement. There must be evidence that the one party exploited the other and, as a result, secured an agreement that deviated substantially from the result that would have followed upon a judicial application of the Act: Young at para. 75.
- [17] As noted, ss. 93(5) and 164(5) require me to consider whether the separation agreement is "significantly unfair" based on the enumerated factors. In *Deboer v. Deboer*, 2017 BCSC 735 at para. 26, citing *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44, this court noted that "significantly" is understood to mean "more than a regular impact - something weighty, meaningful, or compelling". Miglin at para. 83 enjoins me to be cautious in evaluating the question, and to be reluctant to interfere with agreements that conform to the parties' substantive intentions:
- [83] Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.
- [18] At the second stage of the inquiry, the court should assess events that occur after the agreement was entered into. This is necessary in regards especially to spousal support because, even if the agreement was entirely proper at its inception, unforeseen circumstances may lead a court to award or vary spousal support terms notwithstanding a separation agreement that purported to finally determine the issue: Reid at para. 58. The court should assess the extent to which enforcement of the agreement still reflects the original intention of the parties and whether it continues to comply with the objectives of the Act: Miglin at para. 87.
- [19] In *Rick v. Brandsema*, 2009 SCC 10, the Supreme Court of Canada specifically addressed the failure of a party to disclose financial information at the time an agreement was negotiated. The court noted that "informational asymmetry" impairs a party's ability to negotiate successfully and to properly consider what concessions to offer or accept. Judicial intervention may be necessary to set aside an agreement if a party deliberately failed to make disclosure, resulting in a negotiated agreement that is "substantially at variance from

the objectives of the governing legislation": Brandsema at paras. 46-47.

## PROPERTY DIVISION

### General

[20] The parties' assets subject to division comprise savings, real estate, and joint ownership of Reiner Holdings Ltd. (the "Company"). I will say at the outset that I am satisfied on all of the evidence that the parties' personal and household property was equally divided as were their joint bank accounts and pension funds. I am not persuaded that the claimant failed to disclose relevant personal banking information, or that the respondent negotiated from a deficit of knowledge in connection with such information.

### Real Estate

[21] As for real estate, the separation agreement provides that the claimant will keep the parties' matrimonial home in Crofton, BC. The value ascribed to it, \$1.4 million, came from an arm's length market appraisal conducted by Cunningham and Rivard, a reputable local firm, on September 3, 2019, nine or so months before the separation agreement was completed.

[22] In early 2020, the respondent wrote to the claimant saying that she felt the appraisal did not reflect the property's fair market value. She wanted an evaluation done by a realtor of her choice. The claimant was not interested in this. The subject was not broached again and in the end the respondent signed off on the appraised value. She now argues that an updated appraisal should have been done nearer to the completion of the separation agreement. The problem is that she did not require or commission one, even though she was a joint owner of the property, and, perhaps more pertinently, she led no evidence to suggest that the value of the property rose significantly over the interval in question.

[23] The respondent, meanwhile, retained her ownership of a clear-title condominium in Duncan valued by the parties at \$460,000, and a parcel of land in Mexico to which they ascribed a value of \$264,000. It is not part of the respondent's application that either of these properties was wrongly valued. The result was that the respondent got \$724,000 worth of real estate, compared to the claimant's \$1.4 million in the matrimonial home. The separation agreement provided appropriately for an equalisation payment to account for this. The equalisation payment was made in full on June 2, 2020, after a deduction for an excluded property claim that the respondent did not dispute.

[24] The parties also own a home in Mexico which, at the time of the hearing before me, had been on the market for some time and was then the subject of a pending offer to purchase at a price of USD \$1.75 million, or something in excess of CAD \$2 million. The separation agreement provides that the net proceeds from the sale of this property are to be divided equally between the parties.

## Company Assets

- [25] The Company's main assets are a small strip mall in Duncan, B.C. (the "Mall"), and financial instruments in the form of mortgage loans to individuals. The Company's revenues are derived from mortgage loan repayments, rent from Mall tenants, and also fees from the claimant's part-time veterinary practice. Neither party provided me with detailed evidence about the Company's revenues or expenses. I was merely told that its principal source of revenue was from mortgage loan repayments, and that for years prior to separation the Company was the source of all family income, which was always divided equally between the parties. The separation agreement calls for a "butterfly transaction" in which half the Company's assets are to be transferred into a newly established corporation ("Newco") which is to be wholly owned by the respondent.
- [26] The filed materials included a table showing that the Company holds 10 mortgage loans in a cumulative total amount of over \$3.6 million, with interest rates ranging from 7 to 11.5 per cent. I note, in passing, that a number of these loans matured last year. I will assume, in the absence of evidence to the contrary, that the loans were renewed or paid out, and that, in the latter case, the Company retained the funds to be "butterflied" with the rest of its assets in accordance with the separation agreement.
- [27] I was provided with no specific information concerning any revenue produced to the Company from ownership of the Mall. It was suggested to me by claimant's counsel that the rental money from the Mall's tenants did not amount to much in the scheme of things. In any event, the respondent has not complained of any lack of disclosure where Mall revenues are concerned. As for the claimant's professional activities, he deposed that his veterinary practice is restricted to one day per week, mostly as a locum, and he earns only a modest income therefrom, perhaps \$30,000 per year. It has never been any part of the respondent's case that the claimant is wilfully under-employed or that veterinary income should be imputed to him.
- [28] The separation agreement recitals specify, the claimant's sworn evidence confirms, and the respondent's evidence does not dispute, that in the years before separation, the Company paid each party an equal annual dividend income of \$125,000. The objective of the "butterfly transaction" provided for in the separation agreement is to divide Company assets equally between the parties. In the end, the claimant agreed to retain the Company after it transferred 50% per cent of its assets to Newco. The parties' joint intention was that they should continue to receive an equalised annual income from their divided corporate holdings.
- [29] The parties retained accountants to achieve these purposes, and their work was underway when the respondent brought the present application. One of the challenges from an accounting perspective was the best way to maneuver around the parties' mutual decision that the Mall should not be divided, but that it should "run with the Company." This decision had to do with tax considerations, I think, but also with the parties' mutual disinclination to

continue to be engaged together in the operation and maintenance of a commercial property, which would, of course, involve ongoing collaboration and agreement.

- [30] I find as a fact that the claimant had no brief for retaining the Company or the Mall. His position was that the respondent could take both if she wanted them. The respondent seriously considered this. She had the market value of the Mall professionally appraised. She refused to share this appraisal with the claimant, even though he asked to see it. Her response, apparently, was to say that she had commissioned it for her own information, and she invited the claimant to "make an offer". The claimant, mindful as always, I find, of unnecessary expenditure, came up with his own homespun assessment of the Mall's worth, and offered the respondent \$575,000 for her share. On April 6, 2020, in the midst of settlement correspondence, the respondent took the initiative and said that she would like to keep the Mall herself for this amount.
- [31] The claimant agreed to this. Later in the negotiations, however, the respondent proposed instead that the claimant should keep the Mall on the same terms. He accepted. The respondent alleges that she changed her mind because the negotiations were negatively affecting her mental health, and she produced some email correspondence in which she said as much to other people at the time. This evidence, assuming it is admissible, is not persuasive. My strong overall impression, to the contrary, is that when it came to the division of this particular asset, the respondent was operating from a position of strength. She knew how much the Mall was worth because she had it professionally appraised. I can only infer that she first agreed to buy the claimant's share and later to sell her own for the price named because she thought it represented good value. She has produced no evidence to suggest otherwise. The appraisal itself was not included in the materials filed on this application, presumably because it did not assist the respondent in making her case of significant unfairness.
- [32] In short, I can see nothing in the parties' property settlement negotiations or the resulting agreement that can be characterised as exploitative or unfair. Their goal was an equal split of family property, and this, in my view, is substantially what the separation agreement accomplished.

## SPOUSAL SUPPORT

- [33] During most of the parties' negotiations the claimant denied that the respondent had any entitlement to spousal support. His position was that all family income had always been routed through the Company, the respondent had always received an equal draw, and that the "butterflying" process would yield the same result to each party on an ongoing basis. The Company's assets and income would be equalised and, in effect, the respondent would suffer no economic disadvantage from the breakdown of her marriage. Her financial and material life would carry on as before.

- [34] Towards the end, however, the claimant agreed to pay the respondent \$1,000 per month in support, based on a veterinary income of approximately \$30,000, for as long as he retained his veterinary licence. He argued that this was the mid-range amount payable on such an income under the Spousal Support Advisory Guidelines. He seems to have decided that it would be better to pay support in this amount directly to the respondent rather than stream a portion of his professional income into Newco. The respondent, it bears emphasising, agreed to this arrangement with the benefit of well-briefed legal advice.
- [35] The respondent says that, in the run-up to the separation agreement, the claimant wilfully refused to disclose information concerning his veterinary income. His response is that this income had always flowed in its entirety through the Company and the respondent was fully conversant with the financial results: \$125,000 per annum paid to each party. I was given no reason to believe that there was anything misleading or dishonest about the claimant's conduct. The respondent and her lawyer resolved to continue in the absence of further particulars, and I am unable to find on the evidence before me that the separation agreement would have been different if they had insisted on receiving them.
- [36] In short, the evidence adduced on this hearing does not establish that the separation agreement failed to fulfil the spousal support objectives set out in s. 161 of the Act, namely:
- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
  - (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
  - (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.
- [37] I acknowledge that, from September 2019 until the end of May 2020, the claimant failed to deposit his veterinary income in the Company's accounts as he had for many years previously. I have concluded, on all of the evidence, that this would have amounted to an inconsequential sum of money in the midst of a multimillion dollar property and financial settlement.

## MISCELLANEOUS

- [38] For the sake of completeness, and while on the subject of the claimant's alleged failures to disclose property or income, I accept that his temporary failure to account to the claimant for her equal share of loan repayments from their son-in-law - who borrowed money from them for reasons not specified - was an oversight that was swiftly corrected. The allegations that the claimant failed to disclose personal banking information and to account for mortgage lender's fees were not made out in evidence.
- [39] Furthermore, I find that the respondent was well aware that the Company was paying management fees to the claimant during their negotiations, and in fact she expressly agreed to this in an email to the claimant dated January 30, 2020. Finally, I accept the claimant's evidence that the only reason why his name appears on title to a residential property on College Drive in Nanaimo, BC, is to secure a mortgage loan made by the Company to James Snider, the property's owner. The loan documents specify that, upon repayment of the loan, the claimant's name will be removed from title.

## CONCLUSION

- [40] There is no persuasive evidence in this case of oppression, pressure, or psychologically exploitative conduct on the part of the claimant, or that the claimant created financial "informational asymmetry" resulting in an unfair separation agreement, or a significant deviation from the respondent's statutory entitlement to equitable property division and adequate support.
- [41] Both parties were represented by capable and experienced lawyers. The playing field was level. The respondent's lawyer drafted the final version of the separation agreement, with its clear language emphasising finality. The respondent's signed certificate of legal advice speaks clearly to fully informed and voluntary consent. In all of the circumstances, I conclude that there is no legal cause to set aside these private arrangements. The separation agreement may not be perfect, but I am unable to conclude that either the negotiations leading to its creation, or its substantive terms, were significantly unfair to the respondent.
- [42] I note, furthermore, that the separation agreement has already been partially implemented. In particular, the equalisation payment on the real property settlement has been paid in full. Important steps have been taken towards dividing the parties' property and finances in reliance upon the terms of the separation agreement. This is an additional weight in favour of leaving matters as they are.
- [43] The onus under ss. 93 and 164 of the Act rests with the respondent. It is her burden to establish by evidence that the claimant took improper advantage of her mental or emotional vulnerability, or failed in his duty to disclose income or property, and that the separation agreement in its totality is significantly unfair due to such factors, or a combination of them. I have concluded that the respondent has failed to discharge this onus of proof.

[44] Instead, it seems to me that the separation agreement constitutes an equitable sharing of family property and income between the parties. Such deviations as have been alleged by the claimant are minor. In any case, referring once again for emphasis to ss. 93(4) and 164(4) of the Act, I am not satisfied on all of the evidence that this court would replace the separation agreement with an order that differs substantially from its terms.

## DISPOSITION

[45] The respondent's application is dismissed. The claimant will have costs on Scale B.

"Baird J."

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