

CANADA / JUDGMENT

Schrader v. Schrader

2025 BCCA 50

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 50 Schrader v. Schrader

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Schrader v. Schrader,

2025 BCCA 50

Date: 20250219

Docket: CA49590

Between:

Tyler Vernon Schrader

Appellant

(Respondent)

And

Cynthia Ragnhild Schrader (also known as Cynthia Ragnhild Klyne)

Respondent

(Claimant)

Before:

The Honourable Chief Justice Marchand

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Voith*

On appeal from: Orders of the Supreme Court of British Columbia dated

December 21, 2023 (Schrader v. Schrader, 2023 BCSC 2254, Kamloops Docket E56969); and March 6, 2024 (Schrader v. Schrader, 2024 BCSC 460, Kamloops Docket E56969).

Counsel for the Appellant:

B.S. Sandhu

Counsel for the Respondent:

D. Komori

Place and Date of Hearing:

Kamloops, British Columbia

November 15, 2024

Place and Date of Judgment:

Vancouver, British Columbia

February 19, 2025

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable the Chief Justice Marchand

Summary:

Following a family trial, the trial judge issued orders 1) setting aside the parties' separation agreement under s. 93(5) of the Family Law Act, and 2) awarding retroactive spousal support. The appellant challenges these orders and applies to introduce fresh evidence on appeal.

Held: Appeal allowed in part. The trial judge should have used the appellant's actual income for calculating retroactive spousal support for 2022 and the order is adjusted accordingly. The judge committed no reviewable errors in setting aside the separation agreement. The fresh evidence application is dismissed.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

- [1] The appellant Mr. Schrader challenges two orders made following a family law trial: 1) an order setting aside a separation agreement (the "Agreement") under s. 93(5) of the Family Law Act, S.B.C. 2011, c. 25 [FLA] on the basis that it was significantly unfair, and 2) an order for retroactive spousal support.
- [2] With respect to setting aside the Agreement, Mr. Schrader argues that the trial judge erred by incorrectly applying the factors in s. 93(5) of the FLA when assessing whether the property aspects of the Agreement were significantly unfair. In the event this Court finds the Agreement was properly set aside, Mr. Schrader argues that the judge erred in dividing family property by: 1) apportioning the parties' vehicles; and 2) by reopening his decision to correct a "calculation error", which he says changed the substance of the original judgment.
- [3] With respect to the retroactive spousal support order, Mr. Schrader argues that the judge erred by failing to take into account disability benefits the respondent received in 2018 and by not basing the award on Mr. Schrader's actual income in 2022.
- [4] In addition, Mr. Schrader seeks to adduce fresh evidence which relates to his 2023 income and the current state of his health.
- [5] For the reasons that follow, I would allow the appeal to the limited extent of varying the award for retroactive spousal support to take into account Mr. Schrader's actual income for 2022. Otherwise, I would dismiss the appeal as well as the fresh evidence application.

Background

- [6] The parties lived in a marriage-like relationship between September 1993 and November 2003. They were married on November 7, 2003, and separated on September 1, 2014. There are no children of the marriage. At the time of trial, the respondent Ms. Klyne was 62 years old and Mr. Schrader was 70 years old.
- [7] Mr. Schrader worked for most of his career as a truck driver; he retired in December 2021 for health reasons. Ms. Klyne has held various jobs over the years, including welder's assistant, waitress, and hairdresser. She has not worked since sustaining injuries in a motor vehicle accident in November 2014. In 2018, Ms. Klyne received temporary total disability benefits ("TTDs") from the Insurance Corporation of British Columbia as a result of the motor vehicle accident.
- [8] Ms. Klyne commenced the underlying proceeding on January 16, 2019 by filing a notice of family claim. She sought an order for equal division of family property and family debt, as well as an order for spousal support. The notice of family claim stated that there was "no prior agreement, court order or court proceeding relating to any of the claims save and except there is a verbal agreement that [Mr. Schrader] pay [Ms. Klyne] \$300 per month spousal support, which he has been doing since approximately 2017".

- [9] On May 10, 2021--one year after the notice of family claim was filed and five years after their separation--the parties signed the Agreement. For the purposes of this appeal, the key provisions were:
- Ms. Klyne would receive \$200,000 for her interest in the family residence and in full satisfaction of her claims under Parts 5 and 6 of the FLA.
 - Upon completion of the Agreement, the parties acknowledged that they were financially independent and released each other from any claims for division of property and spousal support.
- [10] Pursuant to the Agreement, Ms. Klyne received \$200,000 from Mr. Schrader and transferred her interest in the family residence to him. This was a house in Maple Ridge, referred to by the trial judge as the "Acadia Street Residence", and which I will refer to as the "Property". The Property was purchased by the parties in May 2005, after another residential property owned by Mr. Schrader was sold in 2004. Mr. Schrader and Ms. Klyne established a marijuana grow operation in the lower floor of the Property pursuant to personal use production licences issued to each of them. They lived in the Property until their separation.
- [11] In September 2021, only four months after the parties entered into the Agreement, Mr. Schrader sold the Property for \$1.18 million. This was a much higher price than suggested by previous valuations, which placed the market value of the Property between \$600,000 and \$730,000.
- [12] On March 2, 2022, Ms. Klyne amended her notice of family claim. She sought to have the Agreement set aside pursuant to ss. 93(3) and 164(3) of the FLA. In the alternative, she sought to have the Agreement set aside pursuant to ss. 93(5) and 164(5) of the FLA on the basis of significant unfairness, and replaced with orders for equal division of family property and debt, as well as spousal support. In his response to family claim, Mr. Schrader's position was that the Agreement was final and binding and should not be set aside.

The Trial

- [13] At trial, Ms. Klyne testified that she did not personally read the Agreement, but had someone else read it to her: *Schrader v. Schrader*, 2023 BCSC 2254 at para. 68 [Trial Reasons]. She said that she took the Agreement to a lawyer but did not receive independent legal advice about it. Instead, she signed the Agreement, initialed each page and signed a waiver of independent legal advice: Trial Reasons at paras. 70-71.
- [14] The trial judge identified a two-step process to determine whether to set aside the Agreement (Trial Reasons at paras. 17-20):
- 1) Determine whether there is a basis to set aside the Agreement under s. 93(3)(a)-(d) of the FLA (for property division) and s. 164(3)(a)-(d) (for spousal support); and, if not,

- 2) Determine whether the Agreement can be set aside or replaced on the basis of significant unfairness, under s. 93(5)(a)-(c) of the FLA (for property division) and s. 164(5)(a)-(e) (for spousal support).
- [15] The judge found that for both steps, he must analyze the property division and spousal support issues absent the Agreement to determine whether an order would substantially differ from the Agreement, or whether the Agreement was significantly unfair.
- [16] The judge held that the Agreement accurately reflected the arrangement agreed to by the parties with respect to the Property. He also found that Ms. Klyne had not established that the Agreement should be set aside on any of the bases in s. 93(3) of the FLA. Ms. Klyne does not challenge the judge's conclusions on these points.
- [17] The judge then turned to an analysis of s. 93(5) of the FLA and concluded that the property division portions of the Agreement were significantly unfair and should be set aside. With respect to spousal support, the judge found that the Agreement did not reflect the arrangements made between the parties, and set those provisions aside pursuant to s. 164(3)(d) of the FLA. Accordingly, the judge made orders for property division and spousal support (both retroactive and prospective). I shall refer to the judge's analysis and conclusions on these issues in greater detail below, when I address the related grounds of appeal.

On Appeal

- [18] I would reframe the issues identified by Mr. Schrader as follows:
- 1) Did the judge err in his award for retroactive spousal support by:
 - (a) not calculating the award based on Mr. Schrader's actual income earned in 2022; and/or
 - (b) not including Ms. Klyne's receipt of \$39,337 in June 2018 for TTDs when calculating her income for retroactive spousal support?
 - 2) Did the judge err by setting aside aspects of the Agreement on the basis of significant unfairness under s. 93(5) of the FLA?
 - 3) If the judge did not err in setting aside the Agreement, did he err by apportioning the parties' vehicles?
 - 4) If the judge did not err in setting aside the Agreement, did he err by exercising his discretion to make what Mr. Schrader says was a substantive change, rather than a mere mathematical correction, to the property division?

Standard of Review

- [19] It is well-settled that the standard of review for family law matters is highly deferential and of a "strict and limited scope": *Naimi v. Yunusova*, 2023 BCCA 124 at para. 29. As was recently set out in *Chapman v. Chapman*, 2024 BCCA 372:

- [41] An appellate court may only intervene where there has been a material error, misapprehension of the evidence, or an error of law (*Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12) and will defer to the decision of a trial judge except where there has been an error of law or a palpable and overriding error of fact: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 22-23.
- [42] This restraint recognizes the importance of final resolutions--a factor that is especially salient in the family context--and the fact that trial judges have significant advantages in assessing evidence and drawing conclusions of fact: *Naimi* at para. 29; *Barendregt v. Grebliunas*, 2022 SCC 22 at paras. 100-104. As this Court recently emphasized in *Naimi*, it is inappropriate--and misapprehends the role of this Court--to attempt to relitigate the decision below on appeal: *Naimi* at para. 32.
- [43] A judge's discretionary decision will only be interfered with if it can be demonstrated that they misdirected themselves on the applicable law, made an error in principle, made a palpable error in assessing the facts, or otherwise made an award that is so clearly wrong as to amount to an injustice: *Gichuru v. Purewal*, 2021 BCCA 91 at para. 13. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at pp. 76-77.

Analysis

Issue 1: Retroactive Spousal Support

The Trial Reasons

- [20] The trial judge set aside the spousal support terms in the Agreement pursuant to s. 164(3)(d) of the FLA. The Agreement provided that both parties would release their right to spousal support after the property settlement was completed; however, this contradicted other evidence. Specifically, Mr. Schrader gave evidence that he discussed paying spousal support to Ms. Klyne until he retired, and Ms. Klyne alleged that he agreed to pay spousal support indefinitely. Because of this discrepancy, the judge found that the Agreement "[did] not reflect a meeting of the minds": Trial Reasons at para. 152.
- [21] After setting aside the spousal support terms, the judge found that Ms. Klyne was entitled to spousal support on both compensatory and non-compensatory grounds based on the considerations outlined in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 1999 CanLII 715. He ordered spousal support in the amount of \$658 per month for an indefinite period, subject to a review after Ms. Klyne's 65th birthday.
- [22] The judge also considered Ms. Klyne's claim for retroactive spousal support payable from February 2018. He concluded that an award of support at the mid-range was appropriate, noting that while she did not suffer significant economic disadvantage as a result of her role in the marriage, Ms. Klyne was in need of financial support because of her age and her

inability to work due to a disability. He made the award dating back to February 2019, based on the principle in *Kerr v. Baranow*, 2011 SCC 10 that the usual commencement date for retroactive spousal support is the start of proceedings for spousal support: Trial Reasons at para. 170. This resulted in an award of \$106,468, less the \$21,450 already paid by Mr. Schrader, for a total of \$85,018.

- [23] In coming to these figures, the trial judge relied on both parties' incomes as reported in their income tax returns from 2018 to 2022, with the exception of 2019. Mr. Schrader earned \$3,600 in 2019 which was not included on his tax return, so the judge added this amount to his reported income. Ms. Klyne did not produce her 2019 income tax return, so the judge imputed a 2019 income that was the average of her 2018 and 2020 incomes.
- [24] While the trial judge acknowledged Ms. Klyne had a disability when he was determining the proper spousal support range, he did not account for the \$39,337 in TTDs she received in 2018 when he calculated her 2019 income. He only took into account the amount on her 2018 income tax return of \$8,720.

Discussion

Mr. Schrader's 2022 Income

- [25] The first ground of appeal relates to Mr. Schrader's 2022 income. Mr. Schrader points out that the judge calculated retroactive child support for each year based on the previous year's income. This meant that although the judge acknowledged that Mr. Schrader's actual income in 2022 was \$31,059, when he calculated the support owed for 2022 he used Mr. Schrader's 2021 income of \$74,179. Mr. Schrader says that the judge should have used the actual income earned in 2022, which would have resulted in spousal support of \$658 per month for 2022 rather than \$1,991.
- [26] It appears that the judge was not referred to *Tedham v. Tedham*, 2003 BCCA 600, which applies to this issue and was explained in *Hsieh v. Lui*, 2017 BCCA 51:
- [51] The parties asked the judge to make a lump sum award, and thus to hypothesize regarding their likely future incomes. However, it was unnecessary to hypothesize regarding past income and, as this Court held in *Tedham*, it was incumbent on the judge to award retroactive spousal support based on the parties' actual incomes. Accordingly, in my view the retroactive portion of the spousal support award must be recalculated on this basis and reduced to the cumulative extent of the difference.

[Emphasis added.]

- [27] Ms. Klyne acknowledges that the judge did not follow the correct approach in calculating retroactive spousal support. However, she argues that Mr. Schrader should not be permitted to raise this error on appeal because he did not make any arguments about calculating retroactive spousal support at trial, instead only opposing a retroactive spousal support award altogether.
- [28] Ms. Klyne also argues that the retroactive amount ordered by the judge should not be varied in any event because the award was based on several factors as outlined in *D.B.S. v. S.R.G.*, 2006 SCC 37, a fact recognized by the judge: Trial Reasons at para. 158. Specifically, she points to the fact that the trial judge only ordered retroactive support dating back to February 2019, when Mr. Schrader had acknowledged his spousal support obligation in 2017 when he started paying spousal support.
- [29] I do not agree. While the judge was not referred to *Tedham*, the law still had to be applied correctly and Mr. Schrader's actual income for 2022 should have been used in his analysis.
- [30] In the alternative, Ms. Klyne's counsel prepared a chart recalculating the judge's award using Mr. Schrader's actual income for 2022, which revises the judge's net retroactive award from \$85,018 to \$66,436. Mr. Schrader's counsel accepts those calculations, with one exception: his client's income for 2023, which is the subject of the fresh evidence application.
- [31] For the reasons below, I would decline to grant Mr. Schrader's fresh evidence application. Accordingly, I would vary paragraph 6 of the trial order to provide that:

The Respondent will pay the Claimant the sum of \$66,436 in retroactive spousal support from February 1, 2019 to December 31, 2023.

The Fresh Evidence Application

- [32] Mr. Schrader seeks to have his 2023 tax information, as well as documents relating to significant health difficulties he now experiences, admitted as fresh evidence on appeal. On the basis of this evidence, which was not available at the time the Trial Reasons were rendered in December 2023, Mr. Schrader seeks to have the retroactive spousal support for 2023 reduced from \$7,896 to \$6,624.
- [33] In my view, it is not necessary to set out the criteria in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8, which relate to applications for fresh evidence. This is because it is clear the evidence Mr. Schrader seeks to adduce was not available at the time of the trial. As such, it is more accurately "new evidence" rather than fresh evidence. While new evidence may properly be subject to an application on appeal and to the *Palmer* criteria, in this case it should be subject to a variation application: *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 80. If, as the evidence seeks to portray, there has been a material change in Mr. Schrader's circumstances since the trial order was pronounced, then he should bring a variation application in the Supreme Court. As this Court noted in *P.R.C. v. C.K.C.*, 2024 BCCA 363 at para. 80, allowing litigants to use evidence of post-trial circumstances to vary an order on

appeal undermines the principle of finality. I would therefore dismiss the application.

Ms. Klyne's Temporary Total Disability Benefits

[34] The second ground of appeal relates to Ms. Klyne's TTDs. Mr. Schrader submits the judge made a palpable and overriding error in not taking into account the TTDs when calculating retroactive spousal support, since it was not in dispute that Ms. Klyne received \$39,337 in TTDs in June 2018. He argues it is "substantially unfair" that this amount was not included when calculating the average of Ms. Klyne's 2018 and 2020 incomes to generate her 2019 income, since if the TTDs were included it would have reduced the retroactive amount Mr. Schrader was ordered to pay.

[35] I do not agree with this submission. As Ms. Klyne says in her factum, the judge did not order spousal support retroactive to 2018, but instead to February 2019. As a result, the \$39,337--which was for Ms. Klyne's temporary total disability from 2014 to 2018--played no part in determining Ms. Klyne's income in 2019. The retroactive support order was consistent with the judge's finding that Ms. Klyne had not worked since 2014 and at the time of trial was receiving Canada Pension Plan disability payments: Trial Reasons at para. 159.

[36] I would not accede to this ground of appeal.

Issue 2: Significant Unfairness

The Trial Reasons

[37] The judge explained that he had discretion to set aside the property aspects of the Agreement under s. 93(5) if they were "significantly unfair" on consideration of the following three factors, being:

- a) The length of time that has passed since the Agreement;
- b) The intention of the parties to achieve certainty by making the Agreement;
- c) The degree to which the parties relied on the terms of the Agreement.

[See Trial Reasons at para. 98.]

[38] Regarding these factors, the trial judge observed that:

- 1) Although nearly three years had passed since the Agreement was made, Ms. Klyne did not realize the potential unfairness of the Agreement until September 2021.
- 2) The parties agreed to the Agreement without the benefit of a current appraisal for the Property. If the parties had the Property appraised at the time of the Agreement, they would have found the market value was significantly higher than the \$750,000 they relied on in the Agreement. Any certainty achieved through the Agreement disappeared when the foundation for the Agreement (the value of the Property) was found to be inaccurate.

- 3) The parties performed the property division terms of the Agreement, and the Agreement's unfairness must be balanced against any prejudice Mr. Schrader would suffer by replacing the Agreement with an order. In this case, the prejudice was that he paid for renovations after the Agreement and before the Property was sold.
- [39] The judge concluded that the property aspects of the Agreement were significantly unfair and set them aside. He then turned to crafting an order to replace those provisions. The family assets at issue were the Property, the parties' vehicles, and their respective pension plans. The family debts were the mortgage against the Property and a debt incurred to renovate the Property in October 2011.
- [40] Most of the parties' disagreements about the terms of the order revolved around the Property. Mr. Schrader claimed that a portion of the Property was excluded property, as it was purchased using the sale proceeds from a previous residence. He alleged that Ms. Klyne did not contribute to the purchase price of the previous residence, although it was purchased during the parties' relationship. The trial judge rejected Mr. Schrader's claim on the basis that Ms. Klyne also contributed to the equity in the previous residence during the time the parties lived there.
- [41] Mr. Schrader also made a claim for an unequal division of the Property 70/30 in his favour, on the basis that he alone spent time and money removing a marijuana grow operation from the Property in 2021, which enhanced its value. The judge declined to order such a division, but did provide Mr. Schrader the benefit of the increase in the Property's value due to the removal of the grow operation. He calculated this increase to be \$141,600, after taking into account that "the value of the [Property] may have increased due to general market forces as well as due to the removal of the grow operation": Trial Reasons at para. 126.

Parties' Positions

- [42] Since the parties' arguments on this ground of appeal are based primarily on the judge's treatment of the value of the Property, I will briefly summarize the uncontroverted evidence regarding the Property's value:
- a) In November 2019, the parties obtained a joint appraisal of the Property that listed its current market value as \$600,000.
 - b) Prior to entering into the Agreement, the parties were also aware that the B.C. Assessment Authority and Mr. Schrader's bank placed the value of the Property at around \$700,000.
 - c) Mr. Schrader's financial statement--sworn on May 6, 2019 and filed on May 8, 2019--indicated that he valued the Property at \$730,000.
 - d) The Agreement, which is dated May 10, 2021, provides that Mr. Schrader will pay Ms. Klyne \$200,000 for her interest in the Property.

- e) On May 22, 2021, Mr. Schrader signed an agreement to list the Property for sale with a listing price of \$1,249,000.
 - f) On September 28, 2021, Mr. Schrader sold the Property for \$1,180,000.
 - g) For the purposes of the trial, Mr. Schrader obtained a historical appraisal which valued the Property at \$920,000 as of March 29, 2021. This appraisal assumed the Property contained two marijuana grow operations.
- [43] Mr. Schrader's position is that the judge erred in setting aside the Agreement because he did not base his decision on the factors set out in s. 93(5) of the FLA, but rather on the fact the Property sold for significantly more than what the parties considered it to be worth when they entered into the Agreement. He says that the judge did not take into account the fact that the parties started negotiating the Agreement in February 2021, and exchanged a draft separation agreement dated March 29, 2021--approximately six months before the Property was sold. Mr. Schrader points out that Ms. Klyne made handwritten notes on the draft agreement, but that those notes did not include a request that Mr. Schrader increase the property division payout from the amount offered of \$200,000. He says that Ms. Klyne signed the agreement she bargained for, and that he should not be penalized for the fact Ms. Klyne decided not to obtain an appraisal.
- [44] Mr. Schrader also submits that the judge's focus on the sale price of \$1,180,000 ignored the "red-hot" real estate market in Maple Ridge in 2021, which resulted in a "windfall" for Ms. Klyne. He says it was unfair to him for the judge to rely on post-Agreement events when he had proceeded in good faith to organize his affairs in reliance on the Agreement, including by removing the effects of the grow operation from the Property. In addition, Mr. Schrader argues that the judge ought not to have focussed on the historical appraisal which valued the property at \$920,000 as of March 29, 2021, since it was not available to the parties at the relevant timeframe.
- [45] During oral argument, Mr. Schrader made two additional submissions. First, he referred to the trial judge's s. 93(3) analysis. Specifically, he relied on the judge's finding that the parties' reliance on a lower value for the Property, based on the information they had before them at the time of the Agreement, was not a common mistake such that the Agreement should be set aside. Mr. Schrader argues that it is inconsistent for the judge to find that the parties were entitled to rely on a lower value for the Property under s. 93(3) of the FLA, and then conclude that the higher value of the Property made the Agreement significantly unfair under s. 93(5). Second, Mr. Schrader says that because the factors set out in s. 93(5) militated in his favour, the judge essentially had no option but to find the Agreement could not satisfy the significant unfairness threshold.
- [46] Ms. Klyne's position is that the judge's approach and conclusion on the issue of significant unfairness were clearly available to him on the evidentiary record. She notes that the change in value of the Property was known 12 days after the Agreement when the Property was listed for sale at over \$1.2 million. She also says that she should not be faulted for not

obtaining an appraisal at the time the Agreement was being negotiated and entered into because both parties were under the misapprehension that the Property was valued at \$750,000.

- [47] In addition, Ms. Klyne argues that Mr. Schrader should not be permitted to challenge the trial judge's reliance on the historical appraisal on appeal, when it was Mr. Schrader that obtained the appraisal for the purpose of trial.

Discussion

- [48] I do not agree with Mr. Schrader's argument that because the factors in s. 93(5) of the FLA weighed in his favour, the Agreement could not be significantly unfair. This Court's decision in *Azanchi v. Mobrhan-Shafiee*, 2021 BCCA 55 is of assistance on this point.
- [49] The primary issue in *Azanchi* was whether the trial judge erred in his decision not to set aside a separation agreement under s. 93(3) or s. 93(5) of the FLA. This Court upheld the trial judge's decision. Justice Groberman, writing for the Court, rejected Mr. Azanchi's argument that the judge failed to give sufficient weight to one of the factors under s. 93(5) of the FLA, stating:
- [51] More to the point, in my view, Mr. Azanchi has misinterpreted the terms of s. 93(5) of the Family Law Act. Section 93(3) sets out the typical situations in which an agreement may be set aside. Outside of those situations, s. 93(5) gives the Supreme Court discretion to set aside an agreement where it is significantly unfair. Significant unfairness represents a high threshold for setting aside an agreement.
- [52] As I read s. 93(5), paragraphs (a), (b), and (c) are simply considerations that must be taken into account before setting aside an agreement for significant unfairness. While there will be situations in which the criteria set out in those paragraphs impinge on the fairness of the agreement, they will, more often, be considerations to be taken into account in deciding whether a significantly unfair agreement should be set aside or left in place. Thus, a court may determine that, despite significant unfairness, an agreement should not be set aside if, for example, the parties have relied heavily on its terms in making their lifestyle choices, or have deliberately risked having to live with an unfair agreement because they placed a high value on certainty.
- [Underline emphasis added, italic emphasis in original.]
- [50] It is therefore not correct to say, as Mr. Schrader argues, that the factors in s. 93(5) conclusively determine whether an agreement will be significantly unfair. Under s. 93(5), a judge considers both whether an agreement is significantly unfair and, if it is, whether it should be set aside. The s. 93(5) factors are considerations at each stage of the analysis. Their significance will vary depending on the facts of the case.

- [51] It is true that the trial judge in Azanchi reached a different conclusion on whether an increase in value to the family residence after the parties signed the separation agreement rendered it significantly unfair. In that case, the judge found that an increase of approximately \$600,000 over three years did not amount to significant unfairness, relying on Mr. Azanchi's lack of contribution to the increase in value and his superior cash flow, which mitigated any unfairness by allowing him to accumulate significant savings post-separation: 2019 BCSC 1392 at paras. 128-137. On appeal, this Court did not disturb the exercise of the trial judge's discretion on this point, bearing in mind the deferential standard of review which applies to such decisions.
- [52] The question then becomes whether deference should be given to the trial judge's decision in this case.
- [53] First, the judge correctly identified the legal framework when he stated that he "[has] discretion to set aside the Agreement under s. 93(5) if it is significantly unfair on consideration of [the factors in s. 93(5)]": Trial Reasons at para. 98. I would add that the "significant unfairness" standard in s. 93(5) of the FLA "imposes a more stringent threshold than the mere 'unfairness' test of the FRA [Family Relations Act, R.S.B.C. 1996, c. 128] to allow unequal division by a court": *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 41. It requires persuasive reasons to depart from the presumption of equal division: *Jaszczewska* at para. 41.
- [54] The starting point of the judge's decision on significant unfairness was his conclusion that the market value of the Property was "significantly more than the \$750,000 the parties used to establish the property division payment in the Agreement", and that, without the benefit of a current appraisal, the parties did not know about this discrepancy at the time: Trial Reasons at para. 99. Ultimately, he set aside the Agreement on the basis that "certainty disappears when the foundation for the Agreement turns out to be inaccurate": Trial Reasons at para. 102.
- [55] The judge subsequently addressed the prejudice to Mr. Schrader arising from the renovations he paid for after the Agreement. The appraisal report for the Property as of March 29, 2021 applied a negative adjustment of 12% for the presence of the grow operation. To ensure Mr. Schrader received the benefit of the renovations, the judge excluded 12% of the sale proceeds of the Property, or \$141,600, from the division of property: Trial Reasons at paras. 104, 127-129.
- [56] I can see no error in the starting point of the judge's significant unfairness analysis being the market value of the Property at the time the Agreement was signed. Nor do I find any reviewable error in his consideration of that value in the context of the other evidence which related to the Property's value, both before and after the Agreement. This includes the historical appraisal and in particular the price the Property was sold for in August 2021. These were appropriate benchmarks in the judge's determination of whether the Agreement was significantly unfair.

- [57] The judge considered the three factors in s. 93(5), concluded that the Agreement was significantly unfair and should be set aside, and addressed the prejudice to Mr. Schrader by giving him the benefit of the increase in sale price of the Property due to his renovations.
- [58] It may have been of assistance for the judge to have additional evidence (for example, statistical evidence) regarding the increase in the Property's value during the four months between when the parties entered into the Agreement and when the Property was sold. This could have assisted the judge in considering whether Ms. Klyne had received a "windfall" due to market forces. However, the judge could only consider the evidence actually adduced, which I have set out above at paragraph 42--namely, that a historical appraisal estimated the value of the Property as \$920,000 a few months before the parties entered into the Agreement (assuming the Property contained two marijuana grow operations), and that the sale price of \$1.18 million established the actual fair market value (without any grow operation) four months after the Agreement was signed.
- [59] In addition, even if some of the increase in price between May and September of 2021 was due to a "hot" real estate market, this does not mean the judge erred in his conclusion on significant unfairness. Increases in the price of real estate can be an appropriate factor to take into account when evaluating the fairness of a separation agreement. In *Dobson v. Dobson*, 2016 BCSC 1874, aff'd 2017 BCCA 390, the claimant received the entire family home pursuant to a separation agreement. The trial judge found it would be unfair to apply the terms of the separation agreement to the division of property without taking into account the large windfall received by the claimant due to the rise in property values after the agreement was entered into: *Dobson* at para. 350. This case was decided under the Family Relations Act, which had a lower standard for unfairness than in the current FLA; however, that fact goes to whether market fluctuations will meet the standard for unfairness and not to whether it is appropriate to consider such fluctuations in the unfairness analysis.
- [60] Finally, it was not inconsistent for the judge to find that the Agreement was not the product of common mistake under s. 93(3)(d) of the FLA, but was nevertheless substantially unfair under s. 93(5). Although both s. 93(3) and s. 93(5) deal with the enforceability of property division agreements, they are directed at different considerations: s. 93(3) is concerned with procedural fairness during the formation of an agreement, whereas s. 93(5) is concerned with the substantive fairness of an agreement's effects: *S.B.F. v. D.G.F.*, 2022 BCSC 2231 at para. 24; *C.C. v. S.P.R.*, 2023 BCCA 422 at para. 40. That both parties relied on the same information regarding the value of the Property when entering into the Agreement does not mean the Agreement cannot be significantly unfair because the Property subsequently sold for a much higher price.
- [61] Ultimately, the judge's decision that the change in value of the Property rendered the Agreement significantly unfair is entitled to deference. Mr. Schrader has not, in my view, identified a reviewable error that would justify this Court from interfering with his decision.
- [62] I would not accede to this ground of appeal.

Issue 3: The Apportionment of the Vehicles

- [63] Mr. Schrader argues that, if this Court finds the judge did not err in setting aside the property aspects of the Agreement, he erred in apportioning the parties' vehicles in his property division order. The judge apportioned the vehicles by ordering Mr. Schrader to pay Ms. Klyne half of the increase in value, if any, of his two vehicles; and ordering Ms. Klyne to pay Mr. Schrader \$4,785.84, which was half of the insurance proceeds she received for a jointly-owned vehicle in 2014.
- [64] Mr. Schrader relies on Ms. Klyne's testimony during the trial that "in the beginning" she was not interested in Mr. Schrader's vehicles. Mr. Schrader says she should not be permitted to resile from that position.
- [65] Ms. Klyne says that since the judge set aside the Agreement, he was entitled to make what he considered to be a fair apportionment of the family property, including the vehicles.
- [66] I am not prepared to find that the judge erred in his decision to apportion the parties' vehicles. As the trial judge, he had the benefit of hearing all the evidence. After he set aside the Agreement, the judge then made the discretionary decision to apportion the family property--including the motor vehicles--in a way he considered fair to both parties. The fact that Ms. Klyne expressed at some point in the past that she was under the impression both parties would keep their respective vehicles does not mean the judge's apportionment decision was so clearly wrong as to amount to an injustice.

Issue 4: The Calculation Error

The Calculation Reasons

- [67] On March 6, 2024, following a request from Ms. Klyne, the judge heard oral submissions from the parties regarding the allocation of funds as set out in paragraph 139 of the Trial Reasons. In oral reasons delivered the same day, he altered paragraph 139 to reflect what he considered to be a "calculation error" that had the unintended effect of decreasing the compensation payment from \$166,852.67 to \$96,052.68: *Schrader v. Schrader*, 2024 BCSC 460 [Calculation Reasons]. The judge stated:
- [2] On December 21, 2023, I issued reasons for judgment on this family law case. As part of my reasons, I ordered that the funds generated from the sale of the Acadia Street residence be divided equally, subject to an adjustment to account for [Mr. Schrader's] costs to remove a grow operation from that property. When I summarized the amount payable to [Ms. Klyne] for her share of the Acadia Street residence, I deducted the grow operation adjustment from [Ms. Klyne's] share after dividing the net sale proceeds between the parties. This resulted in [Mr. Schrader] receiving a credit for 50% more than the \$141,600 that I had intended to allow. The \$141,600 credit should have been deducted from the net sale proceeds before the funds were divided between the parties. The reason for this discrepancy is because the \$141,600 credit to [Mr. Schrader] is based on the \$141,600 increase in the value of the Acadia

Street residence due to the removal of the grow operation.

- [3] By deducting the \$141,600 credit from [Ms. Klyne] after dividing the net sale proceeds, [Mr. Schrader] received the benefit of 50% of that deduction in the division of the net sale proceeds, and then received an additional \$141,600 when it was deducted from [Mr. Schrader's] share of the net sale proceeds.
- [4] The result of this calculation error is that the amount payable by [Mr. Schrader] to [Ms. Klyne] is \$166,852.68, rather than the \$96,052.68 indicated in the reasons for judgment. The difference is half of the adjustment attributed to the grow operation.
- [5] In my view, I have the jurisdiction to revise my reasons for judgment to correct a mathematical error. My intention was to give [Mr. Schrader] credit for \$141,600 attributed to his efforts to remove the grow operation. The previous figures were not consistent with that intention because the credit received by [Ms. Klyne] was, in fact, 50% more than what I had intended. This was entirely due to a calculation error.

[Emphasis added.]

[68] Prior to the correction, paragraph 139 of the Trial Reasons read as follows:

[139] The net amount payable to the claimant for her share of the Acadia Street Residence is \$96,052.68, summarized as follows:

Net amount available for division

\$889,525.53

Claimant's half on equal division

\$444,762.77

Less: increase due to removal of grow operation

(\$141,600.00)

Less: half of the renovation loan payments

(\$7,110.09)

Claimant's net share of the Acadia Street Residence

\$296,052.68

Less: payment received

(\$200,000.00)

Amount payable by the respondent

\$96,052.68

[69] After the Calculation Reasons, paragraph 139 of the Trial Reasons was corrected to provide:

[139] The net amount payable to the claimant for her share of the Acadia Street Residence is \$166,852.67, summarized as follows:

Net amount available for division

\$889,525.53

Less increase due to removal of grow operation:

(\$141,600.00)

Claimant's half on equal division

\$373,962.76

Less half of the renovation loan payments

(\$7,110.09)

Claimant's net share of Acadia Street residence

\$366,852.67

Less: payment received

(\$200,000.00)

Amount payable by the respondent

\$166,852.67

Parties' Positions

[70] Mr. Schrader acknowledges that since the trial order had not been entered when the parties made submissions to the judge on the calculation issue, the judge was not functus officio and had the discretion to make the change. However, he submits that the judge did not judicially exercise this discretion by reopening the judgment, because the error referred to by the judge in the Calculation Reasons was not a discreet error in math, but instead substantially changed the decision itself. Mr. Schrader says that the change contradicts paragraph 129 of the Trial Reasons, which provided him with the benefit of the increase in value of the Property due to the removal of the grow operation "to the exclusion of [Ms. Klyne]". He argues that the revised table provides him with the benefit of only half the increase in the value of the Property due to the removal of the grow operation.

[71] Ms. Klyne's position is that the judge properly exercised his discretion to correct the calculation error. She says that without the correction, Mr. Schrader would have received more than the \$141,600 benefit the judge intended.

Discussion

- [72] Since Mr. Schrader accepts that the judge was not functus officio, the only issue is whether he exercised his discretion judicially when changing the calculation in paragraph 139 of the Trial Reasons.
- [73] In my view, the judge properly recognized that the original calculation did not reflect what he intended to be the amount of Ms. Klyne's compensation payment. In the Trial Reasons, the judge found that 12% or \$141,600 of the sale price of the Property was due to the removal of the grow operation. He also found that, since Mr. Schrader had incurred the removal costs, he should have the benefit of this increase, rather than having to share it with Ms. Klyne.
- [74] However, as the judge noted in the Calculation Reasons, his initial method of calculation gave Mr. Schrader credit for 50% more than the \$141,600 benefit the judge intended. This was because the \$141,600 was included in the net sale price, which was divided equally between the parties, in effect giving Mr. Schrader credit for \$70,800. However, the \$141,600 was then deducted from Ms. Klyne's half share, which gave Mr. Schrader an additional \$141,600 benefit for a total of \$212,400.
- [75] The corrected calculation deducts the \$141,600 from the total sale proceeds before dividing the remainder in half, giving Mr. Schrader the benefit of \$141,600. This is consistent with the judge's statement in the Trial Reasons that Mr. Schrader should receive the benefit of the \$141,600 "to the exclusion of [Ms. Klyne]": at para. 129.
- [76] In my view, the trial judge committed no reviewable error in rectifying the arithmetic originally set out in the Trial Reasons to ensure his calculation of the property division was consistent with his reasons. I would not accede to this ground of appeal.

Disposition

- [77] I would allow the appeal to the limited extent of varying the trial order as set out at paragraph 31, above, and would otherwise dismiss the appeal.
- [78] Ms. Klyne has achieved substantial success in this Court and I would award her costs of the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Chief Justice Marchand"

*Voith J.A. did not participate in the final disposition of the judgment due to medical incapacity. The judgment is pronounced pursuant to section 40(2)(c) of the Court of Appeal Act.

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