

CANADA / JUDGMENT

Spanell v. Spanell

2024 BCSC 733

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 733 Spanell v. Spanell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Spanell v. Spanell,

2024 BCSC 733

Date: 20240501

Docket: E131809

Registry: Kelowna

Between:

Amy Ann Spanell

Claimant

And

Randall Norman Spanell

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Claimant:

G. LeClair

Counsel for the Respondent:

C.G. Johnson

Place and Dates of Trial/Hearing:

Kelowna, B.C.

August 28-31, September 1, 2023

Place and Date of Judgment:

Kelowna, B.C.

May 1, 2024

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- [1] This is primarily a claim to set aside a separation agreement between the parties, Amy Ann Spanell (the "claimant") and Randall Norman Spanell (the "respondent") dated January 23, 2021 (the "Separation Agreement") under s. 93 of the Family Law Act, S.B.C. 2011 c. 25 [FLA]. If successful, the claimant seeks to divide the family property in accordance with the provisions of the FLA generally.
- [2] There is a companion claim for child and spousal support pursuant the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) which is independent of, but directly related to, the claims made under the FLA.
- [3] As it pertains to the claim to set aside the Separation Agreement under s. 93 of the FLA, I accept the claimant's submission that the analysis can be broken down into the following three issues:
- a) Did one party take "improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress";
 - b) Was the Separation Agreement in "substantial compliance" with applicable legislation at the time the parties entered into it and is it in "substantial compliance" at present; and
 - c) Is the Separation Agreement ultimately "significantly unfair",
- (see *Miglin v. Miglin*, 2003 SCC 24; *Rick v. Brandsema*, 2009 SCC 10; *H.J.S. v. K.C.S.*, 2013 BCSC 998.
- [4] Regardless of whether the Separation Agreement is set aside, the corollary issues requiring determination are:
- a) the parties' respective incomes under the Federal Child Support Guidelines (the "Guidelines");
 - b) the quantum of prospective and retroactive child support under the Divorce Act; and
 - c) The entitlement and quantum of prospective and retroactive spousal support, if any, under the Divorce Act.

Overview of the FLA and Separation Agreements

- [5] Division 1 of Part 2 of the FLA mandates that a resolution out of court in family law matters is preferred and that disclosure, financial or otherwise, required to achieve such out-of-court resolution must be provided. Specifically, ss. 4-7 of the FLA provide as follows:

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;
- (c) to encourage parents and guardians to
 - (i) resolve conflict other than through court intervention, and
 - (ii) create parenting arrangements and arrangements respecting contact with a child that is in the best interests of the child.

Duty to disclose

5 (1) A party to a family law dispute must provide to the other party full and true information for the purposes of resolving a family law dispute.

- (2) A person must not use information obtained under this section except as necessary to resolve a family law dispute.

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) A child who is a parent or spouse may enter into and be bound by an agreement, including an agreement respecting the division of property or debt.

Replacing agreements

7 If an agreement changes a previous agreement,

- (a) each part of the previous agreement that is changed is deemed to have been revoked, and
 - (b) the remainder of the previous agreement, if any, remains effective.
- [6] Whilst out-of-court agreements are legislatively encouraged and prima facie binding, as set forth above, they still must accord with the objectives of the FLA which, in this case, include the presumption of equal division of family property on the basis of fairness as balanced against the discretion retained by the court to intervene in situations of significant unfairness.
- [7] As part of that statutory regime, s. 93 of the FLA does give the court the ability to intervene even where the parties have signed a written agreement.
- [8] Relative to this case and as articulated above in the description of the issues, the FLA provides for setting aside agreements respecting property division where, most importantly here, "a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress" (s. 93(3)(b)), and/or "that the agreement is significantly unfair" (s. 93(5)).
- [9] More comprehensively stated, pursuant to ss. 93 and 164 of the FLA, the court may set aside or replace an agreement respecting property and spousal support if it is satisfied that the agreement is either procedurally unfair or operationally unfair.
- [10] Procedural unfairness may occur when:
- (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 existed that would, under the common law, cause all or part of a contract to be voidable

FLA ss. 93(1), (2), (3) and 164.

- [11] Section 93(3) of the FLA provides that the court may set aside or replace an agreement, or part of it, in relation to property division, only if it is satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
- (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement; or

- (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- [12] 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.
- [13] Similarly, s. 164(3) of the FLA provides that the court may set aside or replace an agreement, or part of it, in relation to spousal support, if it is satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
- (a) a spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other party's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement; or
 - (d) other circumstances that would under the common law cause all or part of a contract to be voidable.
- [14] Even if none of these circumstances existed when the parties entered into an agreement relating to spousal support, the court may nonetheless set aside or replace an agreement or part of it, if the agreement is significantly unfair in consideration of 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"].

- [15] As can be seen from the foregoing, ss. 93 and 164 contemplate a two-pronged inquiry as to the enforceability of an agreement. The first inquiry is directed at the formation of the agreement; the second stage, its effect. If an agreement was fairly reached, having regard to the FLA ss. 93(3) and 164(3) factors, the court must go on to consider whether the agreement is significantly unfair having regard to the FLA ss. 93(5) and 164(5) factors.
- [16] A finding of oppression, pressure, or other vulnerabilities with respect to a property division or spousal support agreement alone is not generally sufficient to set aside the agreement. There must also be evidence that the other party exploited the vulnerable party and, as a result, secured an agreement that deviated substantially from the result that would follow upon an application of the applicable legislation: ss. 93(4) and 164(4).
- [17] A court can 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., at paras. 39 and 44-46.
- [18] In this case, paragraph 53 of the Separation Agreement acknowledged an unequal division of family property in favour of the respondent. In spite of paragraph 53, the respondent's evidence was that the negotiations were premised on the concept of "equal division" between the parties after purportedly taking into account the respondent's excluded property claims.
- [19] Recital Q(I) of the Separation Agreement further states:
- The Parties are aware that the law provides for judicial intervention if this Agreement is considered significantly unfair in future circumstances in which it is intended to operate.
- [20] Regarding the issue of setting aside the Separation Agreement under s. 93 of the FLA, I acknowledge that this Court must examine the parties' domestic roles, relative sophistication, means, needs, dominance and vulnerability at the time of entering into the Separation Agreement in order to fully address the competing principles of promoting out-of-court resolution and fairness.
- [21] The Supreme Court of Canada decision in *Miglin* (see specifically paras. 81-83), stands for the proposition that where there are any circumstances of oppression, pressure, or other vulnerabilities and one party's exploitation of such vulnerabilities during the negotiation process resulted in a separation agreement that deviated substantially from the legislation, the subject agreement need not be enforced.
- [22] This principle was carried forward later by the Supreme Court of Canada in *Rick*.
- [23] Specifically, at paras. 4, 44, 47 and 48 of *Rick*, Justice Abella said as follows:
- [4] This appeal, therefore, attracts a spotlight to the duties owed by separating spouses during the process of negotiating and executing a separation agreement for the division of matrimonial assets. In *Miglin*, based on the inherent vulnerability of spouses during negotiations, this Court stated that in order to safeguard a separation agreement from

judicial intervention, a spouse must refrain from using exploitative tactics. It held that the failure to do so, particularly if the agreement fails to materially comply with the objectives of the governing legislation, could well result in the agreement being set aside.

...

- [44] Where, therefore, "there were any circumstances of oppression, pressure, or other vulnerabilities", and if one party's exploitation of such vulnerabilities during the negotiation process resulted in a separation agreement that deviated substantially from the legislation, the Court in Miglin concluded that the agreement need not be enforced (paras. 81-83).

...

- [47] In my view, it flows from the observations and principles set out in Miglin that a duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances. The deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation.
- [48] Such a duty in matrimonial negotiations anchors the ability of separating spouses to genuinely decide for themselves what constitutes an acceptable bargain. It also helps protect the possibility of finality in agreements. An agreement based on full and honest disclosure is an agreement that, prima facie, is based on the informed consent of both parties. It is, as a result, an agreement that courts are more likely to respect. Where, on the other hand, an agreement is based on misinformation, it cannot be said to be a true bargain which is entitled to judicial deference.
- [24] I was also referred by claimant's counsel to H.J.S. This proceeding dealt with an action commenced prior to the introduction of the FLA. However, at para. 45, Justice Barrow reviewed s. 93 of the FLA and concluded as follows:
- [45] There are, therefore, two issues. The first is whether the evidence establishes "circumstances of oppression, pressure, or other vulnerabilities". If not, and if there is no other basis for setting aside the agreement, then generally the agreement will stand. I say generally, because at least under the Family Law Act, and specifically s. 93(5), the court may set aside an agreement, even if there are no legally vitiating circumstances surrounding its formation. It may do that if, in its operation, it is found to be "significantly" unfair.
- [25] In my view, despite there being more recent authorities of which the court is aware, Justice Barrow's conclusions are particularly on point when considered in the circumstances of this case and not inconsistent with more recent caselaw.

Background

- [26] The parties began living together in a marriage-like relationship on July 1, 2007, when the claimant moved into the respondent's home located on Buckingham Drive, Abbotsford, BC (the "Family Home") The respondent had purchased and built the Family Home in or around 2004. This was prior to the parties having even met.
- [27] The parties were married on July 1, 2009, and had a son, K, approximately 26 months later on September 16, 2011. By way of agreement between the parties, which is not in dispute in these proceedings, the claimant is currently the primary caregiver to K. K is 12 and, as I will return to, resides and attends school in the North Okanagan region of British Columbia.
- [28] Unfortunately, there was no expert evidence at trial as to the fair market value of the Family Home in 2007. The only evidence tendered is the 2007 BC Assessment report which set the assessed value for property taxation purposes at \$476,000. This is far from ideal. However, absent other evidence this Court can, especially in circumstances such as this, accept the BC Assessment report as the best evidence of value: see *T.C. v. L.A.*, 2020 BCSC 1313 at para. 106; and *Dosanjh v. Liang*, 2015 BCCA 18.
- [29] Specifically, in *Dosanjh*, Mr. Justice Groberman said as follows at paras. 60-61:
- [60] While trial courts have, with some frequency, admitted property assessments as evidence of property value in family law cases, they have generally done so either with the agreement of the parties, or, alternatively, where no other evidence of value has been tendered (e.g. *Chung v. La*, 2011 BCSC 1547). Where proper expert evidence of value has been tendered, the courts have been reluctant to consider property assessments as evidence (see, for example, *Hall v. Mougan*, 2009 BCSC 645).
- [61] In family law cases, a court is often faced with having to assess the value of real property in a situation where neither side is clearly subject to any burden of proof. Rather, the court is simply required to estimate the value of property for the purpose of dividing a family asset. It is not surprising, in such situations, that a court may "grasp at straws" in an attempt to reach a just result. It is simply a matter of doing the best job possible with limited evidence.
- [30] The Family Home was encumbered as of July 1, 2007. The amount of the encumbrance was \$350,000. As the Family Home was in the respondent's sole name, this did presumptively entitle the respondent to advance an excluded property claim for, at minimum, \$126,000 under s. 85 of the FLA. The claimant further does not challenge this presumptive exclusion - which I presume is because the claimant recognizes that the use of the assessed value is likely advantageous to her and the amount of the encumbrance is clearly proven with requisite documentary support.
- [31] Throughout the entirety of the parties' relationship, the respondent was the owner and operator of Huebert Heating Ltd, ("HHL"), a company which serviced and installed residential HVAC systems primarily in the Fraser Valley region of British Columbia. HHL did do other work, at times, within the province of British Columbia. However, I accept that

HHL was a small closely-held corporation which primarily did work on a subcontract basis and that those subcontracts were predominately in the Fraser Valley region of the Lower Mainland. I will return to this point in due course during my analysis of the issues.

- [32] The claimant did come into the relationship with a remunerable skill set in the insurance industry. When in the workforce, she built on that skill set and held (or now holds) various positions in the insurance industry including as a broker, underwriter and branch manager. I will return to the relationship dynamics between the parties in due course, but the claimant presented at trial as an intelligent individual and her work history is not inconsistent with that conclusion.
- [33] The parties separated on or about November 13, 2020. It was thus a marriage-like relationship of some 13 years and a marriage of some 11 years.
- [34] The claimant was not working at the time of separation, as she was focusing her efforts on caring for K. The total time she was absent from the workforce due to maternity leave and subsequent child care duties that she considered inconsistent with a functional work/life/family balance was some approximately six years. The respondent, to his credit, does not dispute this and has recognized the role that the claimant played in the relationship in taking the primary role in raising K and looking after the domestic responsibilities at home while absent from the workforce.
- [35] In December 2020, approximately one month after separating, the parties retained the services of Christina Vinters. Ms. Vinters is a member in good standing of the Law Society of British Columbia and an accredited family law mediator.
- [36] The respondent did initially resist the suggestion of mediation and thought the parties could avoid the expense of retaining Ms. Vinters by negotiating directly between themselves. The respondent, I accept, did quite quickly accede to the request to proceed to mediation. I place no weight on the initial reluctance to participate in mediation as the breakdown of a family unit can be difficult and stressful to initially navigate and the respondent's resistance to mediation was brief. A different inference could be drawn from a protracted refusal to participate in alternative dispute resolution in a situation where the reluctant party is the one who, it is submitted, was holding the balance of power.
- [37] The mediation process moved forward very quickly and by January 23, 2021, the parties entered into the Separation Agreement. For context, this is approximately one month after commencing the mediation process and approximately two months after separating.
- [38] During this time, I note that the claimant and respondent, along with K and the family pets, continued to reside in the Family Home. It was an understandably a particularly stressful period of uncertainty.

- [39] Given the tight timeline between November 2020 and January 2021, no expert reports were sought or obtained. The result being that the Separation Agreement was negotiated without the benefit of any appraisal evidence (either current or, as noted, historical given the excluded property claim), any business valuation of HHL or an effective Guideline income report given the respondent was self-employed.
- [40] There was some financial disclosure provided in accordance with the mediation agreement protocols required by Ms. Vinters. It was not as comprehensive as would have been required under an action commenced pursuant to the Supreme Court Family Rules [Rules], but I recognize there was some disclosure and this is not a situation where the claimant was unaware of the family's general financial situation.
- [41] Specifically, I conclude that the evidence does not suggest that the respondent was obstructing any requests to obtain expert evidence or provide additional financial disclosure. Rather, both parties were independently motivated to resolve matters in a timely way and with limited costs. Unfortunately, as evidenced by this five-day trial, that did not turn out to be the case. However, I cannot find on the evidence at trial that this is a situation where there was intentional non-disclosure of financial information by the respondent or an intentional refusal to cooperate with requests for joint expert reports. Rather, I accept that the parties moved with imprudent haste but with mutual bona fides to a quick resolution.
- [42] The very quick resolution of the financial issues allowed the claimant to purchase a residence in the North Okanagan area, where the housing prices were more affordable than in the Fraser Valley region in the vicinity of the Family Home in Abbotsford. The respondent, as a presumptive guardian of K, voluntarily consented to this "relocation", in writing. I accept the respondent did so with knowledge that it would limit his parenting time with K somewhat due to logistical practicalities, but otherwise considered the relocation of the claimant and K to be in K's best interests.
- [43] Consistent with this plan, the claimant and K did move to the North Okanagan and remain residing in the property that the claimant purchased following the settlement. K attends school in this community and appears to generally be well adjusted notwithstanding the separation.
- [44] The claimant had reservations about the fairness of the settlement soon after the Separation Agreement was signed and in May 2021, some approximately four months later, the claimant began searching for legal counsel to address her concerns.
- [45] On August 6, 2021, the claimant filed a notice of family claim seeking, amongst other relief, an order setting aside the Separation Agreement. This was some nine months after separation and seven months after the signing of the Separation Agreement.

- [46] I have highlighted these dates as, in my view, it is important to put into context that this is not an attempt to set aside a separation agreement years later where parties have fundamentally restructured their financial affairs, started new families or otherwise demonstrably relied upon the finality of a written agreement.
- [47] To the contrary, the discord between the parties about the fairness of the Separation Agreement has been clearly live between them since August 6, 2021, at which point they were still not even able to legally be divorced since they had not been separated without prospect of reconciliation for one year as required by the Divorce Act.

Negotiations resulting in the Separation Agreement

- [48] The claimant submits that the evidence at trial establishes that there was (and always has been) a "power imbalance" between the parties. Specifically, the claimant submits that the respondent is 13 years older than she is, that the respondent was the dominant personality in the marriage and that the claimant was the submissive personality. The claimant would thus, it was submitted, avoid conflict and make compromises to keep peace in the home.
- [49] The claimant further submits that there was "exerted sustained pressure and intimidation" by the respondent upon her when she was vulnerable during the negotiation process and that this vulnerability was exploited by the respondent.
- [50] As noted, after the date of the separation on November 13, 2020, the parties continued to live together in the Family Home until after the signing of the Separation Agreement. As also acknowledged, I accept their continuing cohabitation was stressful and there was tension as between them which was negatively impacting K in certain respects. It was not, however, an intolerable situation which would have, in my retrospective view, merited an interim order for exclusive occupancy. They were functionally able to live separate and apart in the Family Home, even if not ideal.
- [51] However, the claimant was, in the circumstances, highly motivated to extricate herself and K from the situation. She was further concerned about the rising real estate market at the relevant time and wanted to secure, as soon as possible, an appropriate residence for herself, K and the family pets which was financially feasible for her.
- [52] I will dovetail back when I address the obvious issue of credibility in this trial. However, I will make clear that I find that the evidence does not support there being sustained pressure towards the claimant or intimidation of the claimant.
- [53] As a starting point in this regard, there is no evidence of family violence, as that term is defined under s. 1 of the FLA, either during the relationship/marriage or the brief post-separation cohabitation.

- [54] This lack of family violence does not preclude a finding that there was a power imbalance which may be material to considering the negotiations and the ultimate fairness of the Separation Agreement. However, I consider it important to note that there was no evidence that the respondent intimidated or forced the claimant to sign the Separation Agreement.
- [55] In this case, the mediation sessions which led to the Separation Agreement were, as noted, initiated at first instance by the claimant. They were conducted with the assistance of an accredited family law mediator. The respondent, after his initial brief resistance, participated. The respondent, using his skills acquired through the course of his business acumen, was, I accept, the more sophisticated negotiator spouse. The claimant, in contrast, is conflict adverse. The respondent ultimately made a short-fuse offer. The claimant wanted to secure her own residence for herself and K. The claimant thus accepted that offer which became the basis of the Separation Agreement. I specifically find that there was a power imbalance engaged in this regard. However, this is different, I find, then intentional intimidation.
- [56] Further in this regard, I cannot conclude that the text messages in which the respondent said he "was kinda thinking about calling my [his] lawyer" and "calling his lawyer" amounts to exploitation of the claimant's vulnerability or compromised the claimant's negotiating position. The claimant did have access at that time to some financial resources, even though she was not in the workforce. It was thus within the claimant's ability to also consult a lawyer to obtain legal advice regarding issues arising from the separation. I again make these findings, in the very specific factual matrix of this case wherein there was not, I conclude, family violence of any kind. Rather, I have found there is a power imbalance that arose due to a combination of the roles each party played in the marriage, their individual personalities, their vulnerabilities and their level of negotiating sophistication.
- [57] That conclusion having been made, where I do distinguish from these general and not entirely unanticipated difficulties regarding navigating certain issues following separation is the respondent's decision to make unilateral decisions to assume full financial control of the family finances very shortly following separation.
- [58] Specifically, I accept that the respondent removed the HHL company "gas fob" from the claimant's keychain, took the HHL company cheques and secreted them from her and took back the credit card which she had historically been permitted to use. Thereafter, while the claimant did receive monies from the respondent, she was required to make specific requests of him for basic expenses such as groceries and Christmas gifts for K. While I acknowledge the respondent did provide money on request, it was not until the claimant accepted the respondent's "short-fuse" final offer that he transferred \$1,500 to the claimant to spend at her discretion. I accept that this limited access to funds at the respondent's whim was stressful to the claimant and left her in a position of increased vulnerability.

- [59] The final point of significance I draw from the evidence is that the initial mediation session with Ms. Vinters took place via Zoom with both parties attending from the same room in the Family Home. While online mediation through Zoom, Microsoft Teams or other such platforms can be a valuable and cost-effective tool to parties and counsel dealing with family law disputes to access the resources of family law dispute resolution professionals outside of their community or at times that accord with their work or parenting schedules, this particular instance does give rise to some concern.
- [60] Specifically, the respondent took an assertive negotiation approach and sought to advance various "excluded property" claims under the FLA. This is far from unexpected at the outset of a family law dispute and I heard evidence, albeit hearsay but not objected to, that Ms. Vinters advised the respondent as to the frailties of certain aspects of these claims shortly after the outset of the mediation.
- [61] The concern I thus recognize above is simply that the claimant was having these discussions not only without the benefit of counsel but whilst seated at the same table as the respondent in the Family Home which they continued to share with K. This is a problematic situation, particularly where there is, as noted, an identifiable power imbalance.
- [62] It was on the next day after this mediation session, namely January 12, 2021, that the respondent made his short-fuse "final offer" of \$450,000 in total satisfaction of child and spousal support via text to the claimant. It purported to have a 24-hour window of acceptance.
- [63] Prior to the expiry of the 24-hour window, the respondent followed up with the claimant to simply "remind" her of the 24-hour deadline he had unilaterally imposed on his offer.
- [64] Although it was a global offer, I accept it was premised upon the general premise that the respondent had a \$600,000 exclusion claim for the fair market value of the Family Home at the time of cohabitation. The respondent further factored in notional real estate commission of some \$16,000 based upon the future sale of the Family Home despite his intention to retain the residence (which he still owned as at the date of trial).
- [65] I acknowledge that the law is clear that real estate commissions are generally only deductible if a sale is imminent (see for example *Remmem v. Remmem*, 2014 BCSC 1552 at para. 54), but parties are entitled to and indeed encouraged by the FLA to make reasonable compromises to reach negotiated resolutions. The claimant was also informed of the fact that deduction of real estate commissions was not typical in these circumstance by Ms. Vinters but still acquiesced. In this specific scenario and particularly having regard to the relatively modest adjustment in issue, I do not consider the agreement to include a notional real estate commission to be material to my overall analysis of the fairness of the Separation Agreement.

- [66] A much more significant issue is that the respondent also sought to reduce the claimant's entitlement to the family property based upon a \$157,770 debt owing to his mother, Hildegard Spanell.
- [67] Having regard to the respondent's mother's personal medical circumstances at the time of trial, it is not appropriate nor was it submitted that her failure to testify should attract an adverse inference, in accordance with the law as summarized in *Singh v. Reddy*, 2019 BCCA 79 at paras. 8 and 9:

The Adverse Inference Principle

- [8] The principle is described by authors S.N. Lederman, A.W. Bryant and M.K. Fuerst in *The Law of Evidence in Canada* (2018, 5th ed.) as follows:

§6.471 In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it. [Emphasis in original.]

In *Thomasson v. Moeller* 2016 BCCA 14, this court summarized the principle in similar terms:

An adverse inference may be drawn against a party, if without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a prima facie case is established: *Cranewood Financial v. Norisawa*, 2001 BCSC 1126 at para. 127; *Lambert v. Quinn* (1994) 110 D.L.R. (4th) 284 (Ont. C.A.) at 287. [At para. 35; emphasis in original.]

(See also *Rohl v. British Columbia (Superintendent of Motor Vehicles)* 2018 BCCA 316 at paras. 1-5.)

- [9] As noted in *Rohl*, it is now generally accepted that the court is not required as a matter of law to draw an adverse inference where a party fails to call a witness. Thus in *Witnesses* (looseleaf), A.W. Mewett and P.J. Sankoff write:

A considerable number of cases now reinforce the view that there is no such thing as a "mandatory adverse inference" to be drawn where a party fails to call a witness. Rather, the question of whether to make such an inference seems to depend upon the specific circumstances, in particular whether:

- There is a legitimate explanation for the failure to call the witness;
- The witness is within the "exclusive control" of the party, and is not "equally available to both parties"; and
- The witness has material evidence to provide; and
- The witness is the only person or the best person who can provide the evidence.

Essentially, the decision to draw an adverse inference is discretionary and premised on the likelihood that the witness would have given harmful testimony to the party who failed to call him or her. In a case before a jury, where there are circumstances that support the drawing of such an inference, the trial judge should charge the jury that it is "appropriate for a jury to infer, although [jurors] are not obliged to do so, that the failure to call material evidence which was particularly and uniquely available to [a party] was an indication that such evidence would not have been favourable to [that party]. [At 2-23 to 2-24; emphasis added by Court of Appeal

- [68] However, the documentary evidence submitted in support of this claim by the respondent in respect of this loan alleged to be owing to Hildegard Spanell is extremely lacking. That description is perhaps generous and it could also be described as woefully lacking.
- [69] That in and of itself is not determinative as *Shih v. Shih*, 2017 BCCA 37, stands for the proposition that viva voce evidence in and of itself can be sufficient in these circumstances to prove an exclusion.
- [70] However, when considered as against my assessment of the credibility of the respondent, I cannot accept that the respondent would have been able to prove, on the balance of probabilities, that this was a "family debt" as defined in the FLA had this matter gone to trial at first instance.
- [71] Returning to the chronology, the claimant did in fact accept the respondent's "short fuse" settlement proposal which, in addition to the above property issues, further included a complete and final waiver of spousal support. The claimant did so despite being aware of her possible entitlement to spousal support on a compensatory basis and this issue having been canvassed in discussions with Ms. Vinters during the mediation process.
- [72] Of significance in this regard is the fact that the claimant returned to the workforce in January 2021. She had thus only been in her position a very short period of time while the negotiations were being finalized. However, I conclude the claimant's return to paid employment gave her some assurance of economic stability which she had understandably felt was lacking in the weeks between the separation and her securing this employment.
- [73] It was some approximately 10 days later that the parties signed the Separation Agreement, as noted, on January 23, 2021.

- [74] As of January 23, 2021, based upon the historical appraisal entered as expert evidence at trial, which was subject to cross-examination, the fair market value of the Family Home was \$1,035,000. The secured debt on the Family Home remained at \$350,000, the same as in 2000. This is also not disputed. The net equity was thus \$559,000 subject to the respondent's exclusion claim under s. 85 of the FLA and his family debt claim which I have concluded, as addressed above, could not have met the necessary standard of proof and the adjustment for notional real estate commission upon future sale.
- [75] Excluded from the negotiations was any compensation whatsoever to the claimant for her share of the fair market value of the shares in HHL. The evidence of the parties in this regard is quite consistent. The claimant testified that the respondent told her that the company was "off the table" for negotiating purposes and she did not pursue the issue further as she did not want to jeopardize the company's viability. The respondent testified the claimant expressed to him she wanted him to keep operating the business to generate income to provide support to K and did not pursue any efforts to attribute value to it in negotiations.
- [76] While I accept each party's recollection of the negotiations regarding HHL are subjectively credible and not inconsistent, the end result is that the fair market value of the shares in HHL were not considered in the global settlement comprised in the Separation Agreement.
- [77] After some procedural machinations in the course of this litigation, the parties did ultimately agree to have Derek Sanders of Spence Valuation Group provide a joint business valuation. Mr. Sanders is a chartered business valuator and his credentials are set out in the curriculum vitae attached to his reports dated June 29, 2023. No issue was taken with Mr. Sanders' qualifications as an expert and it is noted he has been accepted as an expert by this Court on previous occasions.
- [78] Additionally, although Mr. Sanders was called as witness at trial, there was nothing arising from his very brief cross-examination which elicited no more than a short explanation of his expert reports and the methodology utilized therein.
- [79] According to Mr. Sanders, whose expert opinion I reiterate was not substantively challenged, the fair market value of the shares in HHL as at January 23, 2021 (the date of the Separation Agreement), was between \$490,000 and \$540,000 with a mid-point or average value of \$515,000. The claimant is content with the mid-point valuation.
- [80] The respondent's "short fuse" offer to settle also did not, on its face, appear to attribute value to the family vehicles or "toys" as they were referred to in the course of evidence, which were retained by the respondent.

[81] There are two important factual findings I make in this regard; Firstly, the claimant was generally aware of these "toys" at the time of the negotiation and had at least basic knowledge of their approximate value. Secondly, as I will return to, I do not have any expert evidence as to fair market value as at the date of the Separation Agreement. It does, however, appear that the value was not trifling and there is suspicion from the claimant that some were disposed of for less than fair market value.

Credibility - The Law

[82] Earlier this year I summarized my review of the law regarding credibility in family law matters in *L.C. v. Y.S.*, 2023 BCSC 422. Specifically, at paras. 51-57 I stated as follows:

[51] Before detailing certain key conflicts in the evidence, I will note that credibility plays a key part in the assessment of the evidence in this trial.

[52] The assessment of credibility by the trial judge is a nuanced analysis. It is also, ultimately, fact specific. However, various justices of this Court have outlined certain factors to be considered when addressing this issue which are very helpful. Having regard to the significance of this issue to the trial, I am going to refer to four decisions of the court which I consider relevant and applicable.

[53] The first is the seminal decision in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296. In *Bradshaw*, Justice Dillon wrote the following oft-quoted passage on credibility:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) ; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).

[54] There are three recent decisions which follow *Bradshaw* that are also instructive.

[55] In *M.L. v. R.H.*, 2022 BCSC 1580 at para. 25, Justice Wilkinson helpfully summarized *Bradshaw* as the following list of factors:

1. Is the witness able to resist the influence of interest in modifying their recollection?

2. Does the witness' evidence harmonize with independent evidence that has been accepted?
3. Does the witness change their evidence during examination for discovery, direct examination and cross-examination, or is it otherwise inconsistent in their recollections?
4. Does the witness' evidence seem generally unreasonable, impossible, or unlikely?
5. What demeanour did the witness exhibit when testifying?

[56] In *S.B.F. v. D.G.F.*, 2022 BCSC 2231, Justice Murray cited Bradshaw and adopted a helpful statement on the distinction between credibility and reliability from the Ontario Court of Appeal:

[29] The distinction between reliable evidence and credible evidence was discussed by Doherty J.A. in *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (C.A.) at p. 526:

Testimonial evidence can raise veracity and accuracy concerns. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[57] Finally, in *L.M. v. K.M.*, 2022 BCSC 689 at paras. 275-82, Justice Fleming sets out a comprehensive review of the credibility issue with reference to Bradshaw. Recognizing that the overall review is instructive, albeit done in a factually distinguishable case, I will note in particular the following paragraphs:

[275] Credibility or truthfulness and reliability or accuracy are related but distinct concepts. A truthful witness, for example, may be mistaken about what they recall.

[276] Credibility and reliability are not all or nothing concepts. The trier of fact may believe some, all, or none of a witness's evidence and attach different weights to different part of their evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8 at para. 93.

[277] The proper approach to assessing the truthfulness of any interested witness was articulated many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (C.A.) at 357, with these words:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the

preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[83] This summary of the law is equally applicable in this case.

Credibility - Analysis

[84] Applying the foregoing analysis to the facts of this case, I will start by noting there was no challenge to the credibility or qualifications of the expert witnesses, Mr. Derek Sanders and Mr. Chris Roworth. Nor did anything arise under examination or cross-examination which would undermine underlying assumptions or ultimate conclusions in their reports. Both were straightforward in questioning and well aware of the contents of their reports.

[85] Stofell de Beer is the long-time accountant for the respondent and HHL. He testified as a fact witness and not an expert witness. Despite his long association with the respondent, Mr. de Beer presented as an impartial witness who attempted to answer the questions posed to the best of his recollection. The fact that he testified via video from a foreign jurisdiction and did not have immediate access to his file materials to answer questions he may not have anticipated was somewhat unfortunate. However, that did not impact my overall assessment of the reliability of his evidence. Rather, it just functionally limited his utility as a witness on certain issues. Further, there was no real challenge to his credibility by the claimant and his evidence was generally consistent with the documents which were tendered.

[86] The claimant presented as a soft spoken and somewhat timid witness who had to be notably led by her counsel on certain points (beyond those which were unconvertible and wherein leading was appropriate). Although these questions were generally not specifically objected to by counsel for the respondent, the Court is cognizant of same and has to take this into consideration in weighing those portions of the evidence.

[87] The claimant's presentation was generally unchanged as between direct examination and cross-examination. She was not argumentative on cross-examination and made various concessions where appropriate.

[88] The claimant's evidence was not contradicted by documentary evidence on any material points.

[89] Subject to my findings below, I thus generally accept her evidence as both credible and reliable.

[90] The one aspect of the claimant's evidence which has to be put into context is her perception of having been intimidated and pressured into accepting the respondent's "short-fuse" offer which ultimately formed the basis of the Separation Agreement.

- [91] I do not accept that claimant's evidence in this regard. Although timid and, I accept, conflict adverse, the claimant is an intelligent individual. She initiated the mediation process very shortly after separation. Through same she acknowledges she acquired some key knowledge of her legal entitlements under the relevant legislation arising from the breakdown of the marriage and had the ability to seek further, more comprehensive, independent legal advice given her pending return to the workforce.
- [92] Rather, I conclude, consistent with my above findings, that the claimant was highly motivated to resolve the financial issues between the parties as quickly as possible. To do so, the claimant accepted the respondent's settlement proposal and signed the Separation Agreement. She was under certain pressures and stressors but she was not forced or coerced.
- [93] The assessment of the respondent's credibility is far more challenging.
- [94] Consistent with my above conclusions, I accept that the respondent is more sophisticated in negotiating than the claimant due to the nature of his employment history. The respondent did not, however, present in any way during his testimony as an aggressive or overly confrontational individual.
- [95] His description of the negotiation process leading up to the execution of the Separation Agreement was further substantially consistent with the claimant's evidence save for his version of a phone call between them that occurred in December 2020, shortly after separation (the "December 2020 Phone Call").
- [96] The respondent specifically denies "tearing a strip off the claimant" during the December 2020 Phone Call. I ultimately conclude that the parties, recently separated at this time and while navigating the challenges arising thereof, had a lengthy telephone conversation where emotions were high. They both subjectively have their own views of how that conversation proceeded but, in my conclusion, both versions are reliable when viewed through that lens. Further, the claimant, I conclude, could have terminated the call at any time without consequences beyond it adding to what both parties acknowledge was a stressful living situation due to the shared occupancy of the Family Home.
- [97] Although it occurred later, when considering their varying evidence on this point, I also come back to the respondent's voluntary agreement shortly thereafter to allow the claimant and K to relocate, at her request, to a community which was more affordable. This conduct is, in the overall factual matrix, I conclude inconsistent with the submission that the respondent was intentionally bullying or intimidating the claimant at the material times. If the respondent wished to be difficult or obstructive, it would have been extremely simple for him to deny consent for the relocation and force the claimant to either remain in the Fraser Valley region or litigate the issue.
- [98] Returning to my general assessment of credibility, much like the claimant, the respondent's presentation was similar while under direct examination as under cross-examination.

- [99] This is particularly notable because, as I will detail, the cross-examination of the respondent by counsel for the claimant was extremely effective in obtaining a plethora of admissions from the respondent which were adverse to his interests. Even whilst obtaining these admissions, the respondent never raised his voice, was overly argumentative or disrespectful to the claimant's counsel or the Court.
- [100] Ultimately though, said effective cross-examination confirmed that the respondent has generally considered compliance with court orders in this proceeding to be optional and his financial obligations to the claimant and K to be at his whim.
- [101] The most obvious example of same is the respondent's email to his accountant, Mr. de Beer, on October 21, 2021. This email clearly expressly sets out the respondent's intent to shut down HHL and cease doing business through this entity given the claimant's pursuit of a business valuation of the company, the respondent apparently being under the misapprehension that he could divert business opportunities otherwise available to HHL to a new entity (very arguably in breach of his fiduciary duty as a director and officer of HHL) to avoid or frustrate the claimant's claims as against the shares in HHL.
- [102] The respondent also admitted to flagrantly disregarding the property restraining order which was made March 21, 2022, by Associate Judge (at that time Master) Schwartz. The transcript speaks for itself in this regard and I will not detail the particulars in these reasons for judgment as all of these admissions relate to conduct after the commencement of the proceeding as opposed to conduct during the material time leading up to the negotiation and execution of the Separation Agreement. However, these admissions support my conclusion as to the respondent's limited regard for the importance of court orders.
- [103] Ultimately, the results of the cross-examination of the claimant necessitate that, except where I have specifically noted, I prefer the evidence of the claimant on matters where the parties differ. This is in accordance, I find, with the law as outlined herein.

Setting aside the Separation Agreement: "Substantial Compliance" with applicable Legislation

- [104] I have already recited the law set forth by the Supreme Court of Canada decisions in Miglin and Rick.
- [105] I also rely upon the helpful decision of Justice Watchuk in *Young v. Sherk*, 2019 BCSC 312. Specifically, I refer to paras. 70-91:

A. Setting Aside an Agreement for Procedural Unfairness

- [70] As noted, ss. 93(3) and 164(3) enable the court to set aside or replace the Agreement with an order due to procedural unfairness, which arises if one or more of the following circumstances existed when the parties entered 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.

[71] The FLA codifies these circumstances as an acknowledgment that, due to the unique challenges associated with "negotiations following the disintegration of a spousal relationship special care must be taken to ensure that, to the extent possible, the assets of the former relationship are distributed through negotiations that are free from informational and psychological exploitation": *Rick v. Brandsema*, 2009 SCC 10 at para. 1.

[72] Although the parties have specifically used the language of stress and duress, given that their descriptions of the grounds for setting aside or varying the Agreement were vague and their evidence discloses other potential markers of unfairness, I will set out and consider the law pertaining to each of the circumstances that might have rendered the process of making the Agreement unfair.

1. Improper Advantage

[73] The Supreme Court of Canada in *Rick* at para. 61 emphasizes that "[g]iven that vulnerabilities are almost always present in [family] negotiations, the parties' genuine wish to finalize their arrangements should, absent psychological exploitation or misinformation, be respected".

[74] The question of whether a spouse has taken improper advantage of the other's vulnerability will vary by case. Courts should focus on the circumstances of ignorance, need or distress and whether there were "misleading informational deficits" or "psychologically exploitative conduct" that renders the agreement unconscionable or otherwise unenforceable: *Rick* at para. 63.

[75] If one or another of the circumstances of oppression, pressure, or other vulnerabilities is established, that alone is generally not sufficient to warrant the setting aside of an agreement. There must be evidence that the other party exploited the vulnerable party and, as a result, secured an agreement that deviated substantially from the result that would have followed upon an application of the FLA: *H.J.S. v. K.C.S.*, 2013 BCSC 998 at para. 46.

[76] Improper advantage will be made out where a party exploits the other's belief that entering into an agreement is the only way to safely separate or ensure the emotional safety of her children is to enter into an unfair agreement: *S.L.C. v. C.J.R.C.*, 2014 BCSC 1814 at paras. 426-427.

[77] In *Lawrence v. Mulder*, 2015 BCSC 2223 at paras. 53-54, the court found a party was vulnerable, given that she reasonably believed her relationship and the support she derived from it, would come to an end if she did not sign a partnership agreement. She was taken advantage of as she had no realistic alternatives. Paired with both parties' inadequate understanding of the effects of the agreement, the court found it should be set aside.

2. Inadequate Understanding of Nature and Consequences

[78] Receiving independent legal advice at the time of negotiation is an important means of ensuring an informed decision to enter an agreement: *Hartshorne v. Hartshorne*, 2004 SCC 22 at para. 60. As such, in considering whether a party understood the nature and consequences of an agreement, the court must consider whether independent legal advice was obtained and if so, the quality of that advice.

[79] The court in *Gurney v. Gurney*, 2000 BCSC 6 set out the standard for independent legal advice in the family context, stating:

[29] In the family law context, providing independent legal advice must mean more than being satisfied that a party understands the nature and contents of the agreement and consents to its terms. The solicitor should make inquiries of the party so as to be fully apprised of the circumstances surrounding the agreement. The party should be advised of his or her legal rights and obligations in relation to the subject matter of the agreement and advised of the consequences associated with a refusal to sign. The solicitor should offer his or her opinion on the question of whether it is appropriate for the party to sign the agreement in all of the circumstances. It is only with that kind of advice that the party can make an informed decision about the advisability of entering into the agreement as opposed to pursuing some other course.

[80] The absence of such legal advice will not invalidate an agreement or require it to be set aside, however it is a factor to consider: *Gurney* at para. 30 and *Bradshaw v. Bradshaw*, 2011 BCSC 1103 at para. 49.

[81] In *Giebelhaus v. Giebelhaus*, 2012 BCSC 1100 at para. 46, which was decided under the predecessor legislation to the FLA, the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], the court reapportioned property divided under an agreement after finding that a party received inadequate legal advice, wrongly thought he would be liable for substantial spousal support payments, and was unaware of the value of his spouse's pensions, therefore not fully aware of his rights and obligations.

3. Common Law Circumstances Rendering an Agreement Voidable

[82] Sections 93(3)(d) and 164(3)(d) of the FLA incorporates other circumstances that would, under the common law, cause all or part of a contract to be voidable. Several such circumstances, such as mistake and capacity, do not arise from the pleadings or submissions at trial. Given parties have specifically used the language of duress, I must consider whether this claim is made out.

- [83] In considering the question of duress in the family context, the court has defined duress as "a form of oppressive contractual conduct directed by one party towards another to compel them to act to their disadvantage" and the underlying question to be "whether the oppressor's action vitiated the consent of the oppressed party": *G.C.G. v. M.J.T.*, 2016 BCSC 1277 at para. 104.
- [84] The onus is on the party alleging duress to prove they entered the separation agreement because of duress on the part of the other spouse: *Roberts v. Roberts*, 2000 BCSC 611 at para. 32.
- [85] Mere emotional difficulty or strain is generally insufficient to establish duress to set aside a family agreement: *A.B. v. T.R.*, 2013 BCSC 1798 at para. 19.
- [86] Although economic duress may warrant the setting aside of a family agreement, the claim requires urgent and compelling economic pressures to vitiate consent. Merely caving to the other spouse's insistence of entitlement and wanting to have the spouse out of one's home is not sufficient: *Stein v. Schommer*, 2006 BCSC 1551 at paras. 15-21.
- [87] In *G.C.G.* at para. 110, which was decided under the FRA, the court found that there was duress such that the separation agreement should be set aside. The court found the wife was willing to do anything "to escape what she perceived to be the real possibility of [the husband] carrying out his suicidal or homicidal threats, testifying 'she would have signed anything'".

B. Discretion to Decline to Set Aside an Unfairly Reached Agreement

- [88] Even if either Ms. Young or Mr. Sherk is able to establish there was a defect in the process of making the Agreement, ss. 93(4) and 164(4) provide that the court may decline to act if, on consideration of all the evidence, the court "would not replace the agreement with an order that is substantially different from the terms set out in the agreement."
- [89] The question of whether a court will interfere with a pre-existing agreement will be determined by the extent to which that agreement varies from the objectives of the FLA and what would have accrued under the FLA: *Rick* at para. 49 and *Asselin* at para. 148.
- [90] As such, if the court finds there has been some procedural unfairness, the court must consider the provisions of the FLA applicable to the matters dealt with in the agreement to assess whether the terms of the agreement are in substantial compliance.
- [91] In the present case, as the Agreement deals with the division of property, debt and spousal support, and by omission, deals with the division of Mr. Sherk's pension, I must consider Parts 5, 6, and 7 of the FLA to assess whether I would replace the Agreement, or part of it, with an order that is substantially different from the terms of the Agreement.

- [106] Under s. 85(2) of the FLA, the respondent has the onus of proving his alleged excluded property claim for the shares of HHL. That proof should have ideally been through documentation and/or retrospective expert opinion. As stated in *Asselin v. Roy*, 2013 BCSC 1681 at para. 106:
- [106] . . . Where exclusion of property is sought, on whatever basis, documents showing the value of property as at the time cohabitation commenced and at the date of separation will be critical in the assessment which the court is to perform.
- [107] *Asselin* expressly does not stand for the proposition that going back to determine the value of exclusions under s. 85 can never be done without the benefit of documents and/or expert evidence. It is, however, very difficult in a situation such as this. Clearly HHL was operating as a going concern as of July 1, 2007, when the parties started cohabitating. It had generated sufficient income to the respondent to allow him to construct the Family Home (with the corresponding secured liability) prior to that date and to pay his day-to-day living expenses without any apparent difficulty. However, it was a small company with, I conclude, little in the way of hard assets. It likely had some limited good will, but determining what that might have been without the benefit of financial documentation and expert analysis of same is simply not possible.
- [108] The Scott Schedule tendered by the claimant suggests that, after factoring in the family property and family debt that the parties would each take and be responsible for, in specie, the respondent should have paid the claimant a global compensation payment of \$1,079,053 to \$1,157,938 (depending on the Court's findings regarding the alleged debt to Hildegard Spanell) and should have rolled over RRSPs to the claimant in the amount of \$5,182. Neither calculation factors in any claim for spousal support.
- [109] In comparison, the Separation Agreement provides for a global payment of \$450,000 from the respondent to the claimant, which included all compensation for RRSPs and spousal support.
- [110] The claimant submits that this payout was, at least, \$629,053 to \$707,938 too low (again depending on what the Court found regarding the alleged debt to Hildegard Spanell) and that this significant shortfall clearly highlights a "substantial deviation" from what would have been provided upon a fulsome application of the governing legislation. This "substantial deviation" amounts, it is submitted, to "significant unfairness" and warrants setting aside the Separation Agreement.

Conclusion on the setting aside the Separation Agreement

- [111] Having regard to my findings of fact and legal analysis as articulated above, I have concluded as follows regarding the claimant's claim to set aside the Separation Agreement:

- a) Neither party took "improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress". The parties had different negotiating styles but that was mitigated by the involvement of an accredited family law mediator and the imminent return of the claimant to the workforce which would have allowed her the opportunity to obtain independent legal advice. The claimant was motivated to accept the "short fuse" offer made by the respondent but not compelled to do so;
- b) The Separation Agreement was not "substantial compliance" with applicable legislation at the time the parties entered into it and continues to not be in "substantial compliance" at present. As detailed, the primary non-compliance pertains to the consideration of the alleged debt owing to Hildegard Spanell, the complete failure to account for any value of the shares in HHL and the effective waiver of spousal support; and
- c) The Separation Agreement is ultimately "significantly unfair" to the claimant. I will reiterate my findings set forth at paragraph (b) and acknowledge that the court's role is not to review a separation agreement with a fine-toothed comb. Parties are able and indeed encouraged by the legislation to resolve matters outside of court. The Rules further encourage resolution in a timely, proportional and cost-effective manner. If the court were to simply insert its own views and override parties' right to knowingly make compromises in the course of negotiations which might not be in strict accordance with the application of the legislation, it would fundamentally undermine these objectives. However, where a separation agreement is significantly unfair, the court must exercise its jurisdiction accordingly. This is the purpose of s. 93 of the FLA.

[112] Accordingly, the Separation Agreement between the claimant and the respondent dated January 23, 2021, is set aside pursuant to s. 93 of the FLA.

[113] I shall return at the conclusion of these reasons to the mathematical calculations which flow from this determination as there are other issues that must be determined which factor into the analysis.

Division of Family Property, Unequal Division and Valuation Date

[114] Given my conclusion that the Separation Agreement shall be set aside, the family property and family debt must be divided according to the governing provisions of the FLA.

[115] As a starting point, the definition of "family property" is comprehensively set out at s. 84 of the FLA.

[116] Simply stated, subject to s. 85 of the FLA, "family property" constitutes all real property and personal property that, at the date of separation, otherwise known as the triggering event, is owned legally or beneficially by at least one spouse (s. 84(1)(a)).

- [117] As set out above, the definition of family property under s. 84 of the FLA is subject to the determination of excluded property under s. 85 of the FLA. Again, simply stated, the purpose of s. 85 is to remove certain defined classes of property from the proverbial "family pot" presumptively created under s. 84.
- [118] The onus on proving an exclusion under s. 85 lies with the spouse seeking to rely on this provision (s. 85(2)).
- [119] The interplay between ss. 84 and 85 of the FLA can thus be summarized as follows: 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 gets set aside in a separate pot and is dealt with differently.
- [120] 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.

- [121] Blair v. Johnson, 2015 BCSC 761 at paras. 68-69 stands for the proposition that any change in the valuation date first requires a finding that the trial date valuation would be "significantly unfair". The analysis is akin to the s. 95 FLA analysis. This case considers and distinguishes Justice Betton's conclusions in K.M.J. v. J.H.D.N., 2014 BCSC 1895 at paras. 155-156 which was the initial authority on this issue.
- [122] The claimant seeks to vary the presumptive valuation date for HHL from the date of trial to January 23, 2021, the date of the Separation Agreement. The claimant submits that doing so is appropriate on the basis that the respondent has intentionally decreased the value of HHL during the period following the Separation Agreement. In this regard, the claimant relied on Chang v. Xia, 2015 BCSC 1994 (paras. 13, 43, 48-50 and 54) and Suidy v. Corbeil, 2021 BCSC 1717 (paras. 92-96).
- [123] Based upon the evidence tendered, I am satisfied that the claimant has met the threshold of proving that the valuation date should be the date of the Separation Agreement. In reaching this conclusion, I refer back to the evidence of the respondent wherein it was established that the respondent, who was upset over the claimant's pursuing a claim against the shares

in HHL, tried to intentionally divert corporate opportunities to defeat this claim. It thus is simply not believable that the decrease in the value of the shares in HHL was simply due to overall economic conditions and market factors. There may have been some impact in that regard but it is not possible to ascertain having regard to the evidence which confirms an actual intention to diminish or defeat the claimant's pursuit of a claim against HHL in the course of seeking to set aside the Separation Agreement.

[124] Accordingly, I accept that, pursuant to the expert evidence of Mr. Sanders that the value of the shares in HHL at the date of the Separation Agreement is \$515,000. This is the mid-point of the valuation and I see no reason, based upon the cross-examination of Mr. Sanders, to depart from it.

[125] I am further satisfied, as will be apparent from my prior findings, that the alleged debt owing to Hildegard Spanell does not constitute a family debt pursuant to s. 86 of the FLA.

[126] The respondent has proven an exclusion in the amount of \$126,000 as it relates to the equity in the Family Home as pre-relationship property under s. 85(1)(a) under the FLA.

[127] As it relates to the "toys" that the respondent received, the claimant's difficulty is that she has not tendered any satisfactory evidence as to the value of these items even though she was clearly aware of their existence at the time of separation. However, they are family property and must be dealt with accordingly under the FLA. Some of those "toys" have been allegedly disposed of already which complicates matters. The list of "toys", either presently held or disposed of post separation are:

- a) Crownline boat;
- b) Jeep Renegade;
- c) Jet ski and trailer;
- d) Can-am UTV; and
- e) Harley Davidson Motorcycle.

[128] The most practical way to address this lacuna in the evidence is that the respondent make a proposal to pay the claimant for the "toys", as identified in the F8 financial statements. If this amount can be negotiated by consent, it will save the parties significant further legal fees. However, if the parties cannot agree on a compensation payment for some or all items, then the matter will necessarily have to be referred to the registrar for a hearing pursuant to Rule 18-1 of the Rules.

- [129] For the purposes of said reference, I am not satisfied that the claimant has proven, on a balance of probabilities, that any of these assets were sold for below fair market value. I understand the claimant's concerns but even having regard to my credibility conclusions, I am not satisfied the claimant has met the requisite burden of proof. It is merely an accounting exercise at this point to determine what remains, what was sold and how much was received upon sale for the "toys".
- [130] The issue of the RRSP equalization as between the parties is rather insignificant and did not factor into my conclusion regarding the ultimate fairness of the Separation Agreement. That is a concession that the claimant might likely have made in any event. However, as I am now determining the division of family property in accordance with ss. 84 and 85 of the FLA and there is no basis for unequal division under s. 95 of the FLA, the RRSPs must be divided equally between the parties in accordance with the relevant provisions of the Income Tax Act.

Guideline Income--Introduction

- [131] Regarding the support issues presented in this family law case, upon determining entitlement and when considering possible child support and spousal support, the court must determine the parties' Guideline income.
- [132] In determining the parties' Guideline income, the court must attempt to establish a fair determination of the amount available to a proposed payor to pay support.
- [133] I accept the claimant's submission that the jurisprudence is clear that, in making that determination, ss. 16 through 19 of the Guidelines are not mutually exclusive and can be applied together as appropriate.
- [134] I consider the key starting point in this case to be *Kowalewich v. Kowalewich*, 2001 BCCA 450. At paras. 40-42 of *Kowalewich*, Madam Justice Huddart stated:
- [40] I disagree with Justice Pitfield's approach to sections 17 and 18. A court need not look for signs of bad faith or undeclared personal benefits to support a conclusion of intentional avoidance of a child support obligation before reaching the opinion required to trigger an adjustment under ss. 17 or 18. Nor should it look only to the value of a payor's services to a company that parent owns or controls.
- [41] I note the use of pre-tax corporate income as a basis for the determination of child support does not strip a spouse of his available money. It is to use available money as a measuring rod for the purpose of fixing annual income and thus the amount of child support.
- [42] I suggest that at the root of these provisions is a concept not unlike that of income earning capacity well known to the law of support obligations in the pre-Guidelines era, as this Court noted in *Van Gool v. Van Gool* (1998), 59 B.C.L.R. (3d) 395. Courts have long imputed to underemployed parents the amount they could earn if working to capacity. The Guidelines affirm that approach in s. 19(1)(a) and (e). The purpose of the Guidelines is to permit an

impartial assessment of "money" available to a spouse to pay child support. They are not just about actual income as a parent directly or indirectly determines it to be. [Emphasis added.]

- [135] Kowalewich illustrates that the definition of "Guidelines income" is much broader than "income" defined under the Income Tax Act.
- [136] Similarly, the decision in *Vincent v. Vincent*, 2012 BCCA 186 at para. 35 again confirms that the definition of "Guidelines income" is much broader than "income" defined under the Income Tax Act. *Vincent* is consistent with the conclusion at para. 35 where Madam Justice Huddart states as follows:
- [35] All determinations of child support begin with finding the spouse's Line 150 income, a relatively straight-forward step one. The second step is to make whatever adjustments to that amount are required by Schedule III. Once these two steps are completed, the court must look to sections 17 to 20, to determine whether any of the exceptions set down in those provisions applies, and, if so, what effect they should be given on the facts of the case.

Guideline Income--Section 17

- [137] Under s. 17 of the Guidelines, the court may average past income over three to five years in its attempt to find the "fairest determination" of the "amount available" to the respondent for support: see *Harras v. Lhotka*, 2016 BCCA 246 paras. 24, 35-37. This patterning of income is particularly appropriate where there are fluctuations of income which are outside the immediate control of the payor such as, for example, real estate agents or lawyers who do contingency work. These are but two examples where incomes may very legitimately fluctuate annually and so s. 17 of the Guidelines provides for a method to address these ebbs and flows.
- [138] The Guideline income report prepared by Mr. Derek Sanders dated August 24, 2022, opined that the respondent had an effective Guideline income for the relevant years as follows:

2019

\$250,000

2020

\$219,000

2021

\$124,000

Average:

\$197,666

- [139] The respondent's 2018 and 2022 T1 General income tax returns reported total income of \$128,553 and \$52,137, respectively. These years were not factored into Mr. Sanders' report as that was not included as part of his retainer. Had those years been factored into a five-year patterning approach under the Guidelines, by my calculations, the respondent's average income would have been \$154,734. I raise this point for comparative purposes because, as noted, there was not expert evidence specifically provided on these two additional years.
- [140] As noted, the respondent did not challenge Mr. Sanders' qualifications, which are clearly established in his curriculum vitae and, more significantly, did not substantively challenge the analysis underlying Mr. Sanders' Guideline income report. I shall thus take into my overall consideration of the issues Mr. Sanders' conclusions as to the respondent's Guideline income.
- [141] I do not accept, however, the submission of the claimant regarding an email which was obtained through the disclosure of Mr. de Beer's accounting file in the course of these proceedings. That August 30, 2022 email does, I accept, consist of an imprudent "cutting and pasting" of advice received by the respondent from his counsel to Mr. de Beer. The respondent's evidence on this is credible when the email is read globally. Specifically, there is a notable disconnect in the language used between the introductory/conclusory comments versus the substantive component of the email.
- [142] Had the respondent substantively taken issue with Mr. Sanders' expert report, a considered analysis of waiver of solicitor-client privilege would have been required. In this circumstance, however, I accept the respondent's evidence that he simply forwarded on the portion of an email from his counsel to his trusted accountant for Mr. de Beers' input. The August 30, 2022 email does not amount to a specific endorsement of Mr. Sanders' Guideline income report by the respondent.

Guideline Income--Section 19

- [143] In the alternative to the patterning of income approach, the claimant relies on ss. 19(1)(a) (d) and (e) of the Guidelines which provide for the imputation of income. Specifically, section 19(1) provides as follows:

Imputing income

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;

...

[144] In this regard, *T.K. v. R.J.H.A.*, 2015 BCCA 8, at para. 81 stands for the proposition that the overarching principle for imputing income under s. 19(1)(a) is that of reasonableness, having regard to the needs of the child and the earning capacity of the payor.

[145] In this regard, the claimant asserts that the respondent is voluntarily under-employed. Somewhat consistent with this theory, the respondent's own evidence was that the changes in operation of "the business" were "pending" the settlement/resolution of this proceeding. There are other references in the evidence consistent with this theory but this admission, combined with the email to Mr. de Beers regarding shutting down HHL because the claimant was pursuing an interest in it, as referred to above, gives genuine plausibility to this submission in this factual matrix.

[146] Further, I refer to para. 19(b) of Mr. Sanders' report which states as follows:

Set out below are the Company's results of operations for the 2020 through 2023 fiscal years. During this time the Company's revenues decreased from approximately \$875,000 in fiscal 2020 to approximately \$270,000 in fiscal 2023. For the four months ended April 30, 2023, the Business generated cash revenues of approximately \$17,000 (footnote: As summarized from the Business' bank statements for the four month period ended April 30, 2023). Mr. Spanell could not pinpoint a specific cause of the revenue decline other than to note that the Company generally took on a number of smaller projects during this period as there was significant competition for the larger projects and that the Business was not of a sufficient size to obtain larger projects at the valuation date . . .

[147] To put the above in context, at the end of the calendar year 2022, in spite of the then-positive economic outlook, the respondent voluntarily shut down his company and began to conduct effectively the same business through a sole proprietorship known as "Huebert Heating".

[148] The respondent primarily justified, as noted, the substantial drop in his business income to, "significant competition for the larger projects". The frailty in this evidence is that HHL was always a small operation which worked primarily on smaller projects, quite successfully while the parties were together as noted above. Rather, I conclude that the decline of the respondent's business income was primarily related to the claimant's claim in this proceeding and not industry conditions.

Guidelines Section 19(1)(d)--Diverted Income

[149] The claimant further submits that the respondent is supplementing his current lifestyle while unemployed or under-employed. He has supplemented his income by doing unreported "cash work" and living off the money of his mother, Hildegard Spanell.

[150] The claimant relies on *Motyka v. Motyka*, 2001 BCCA 18 at para. 16 which provides as follows:

[16] In imputing to Mr. Motyka an income of \$60,000 per year, the learned chambers judge relied on "his present lifestyle, his monthly living expenses...and the range of income that he was earning during their marriage". According to his Property and Financial Statement his household expenses prior to 1999 totalled about \$73,000 per year. The judge reasoned that he must have had more income than he disclosed in order to meet those expenses

[151] The Court of Appeal in *Motyka* concluded, at para. 19, that there was an adequate basis for the chambers judge to impute income accordingly.

[152] I note that there are various other cases which stand for the same proposition. I conclude, however, that I need not make these already lengthy reasons longer by citing cases which are generally consistent with the above proposition. It is the application of the law to the facts which is the more important exercise.

[153] Regarding the allegation that the respondent is diverting income through unreported "cash work", the claimant submits as that:

- a) During his discovery on August 3, 2023, the respondent testified that he "possibly" did work for cash in the past;
- b) In her trial direct examination on August 28, 2023, the claimant testified that she consistently saw envelopes of cash around the house during the marriage, sometimes in amounts between \$10,000 and \$20,000. The claimant further testified that the respondent admitted to her that the cash was from "jobs under the table" and admitted that he would not be paying tax on the earnings;
- c) In his trial direct examination on August 30, 2023, the respondent finally admitted that there were "large amounts of cash around the house" during the marriage;

- d) Also in his trial direct examination on August 30, 2023, the respondent admitted that he hid cash in various spots, including his office desk and more significantly in the home freezer, wrapped in paper marked as "tenderloin". The latter, in my view, was the most significant admission as there is a distinct difference between keeping cash in a secure location in one's office desk and putting it in the freezer with a fake label. That exhibits a clear intention to conceal;
- e) The respondent typically used "old-school" handwritten invoices and then, quite shortly prior to the date of the separation, began using computer-generated invoicing. The respondent then used both types of invoicing, even though the two systems used different invoice numbering, which did result in some confusion/inconsistencies;
- f) The respondent's most recent Form F8 financial statement sets out his current Guideline income at only \$52,137. However, the respondent's current personal annual expenses disclosed in his most recent Form F8 financial statement are similar to what they were in 2021 when he swore his first F8 financial statement in this proceeding. This does not necessarily even fully account for his primarily residing in the Okanagan and travelling with his new partner.

Guidelines Section 19(1)(e)--Property Not Reasonably Utilized

- [154] Finally, the claimant alleges the respondent is under-utilizing property to generate income.
- [155] Hildegard Spanell is in her eighties and is in an assisted-living facility. Due to her medical circumstances, the respondent has power of attorney over her affairs and controls her finances. The evidence is that in 2022, the respondent took \$365,000 from his mother's savings account and put that money into his personal CIBC Account.
- [156] The respondent then completely paid off his mortgage on the Family Home. Just a few months later, the respondent withdrew \$340,000 from that same mortgage account to gift or loan the \$340,000 to his then-girlfriend, Tiffanie Millius. I use the language gift or loan as I am not satisfied that the evidence tendered allows that conclusion to be made and this might be an issue for judicial determination in the future if the relationship between the respondent and Ms. Millius ends. I am entirely satisfied, however, that the respondent used Hildegard Spanell's funds to pay off the mortgage on the Family Home and then quite promptly advanced monies to his current romantic partner as described above.
- [157] It is not within the Court's purview in this proceeding to determine whether the respondent acted contrary to his duties as a power of attorney in using Hildegard Spanell's funds. That is not an issue raised by the pleadings. Rather, the claimant's argument is that if the use of the funds was appropriate at first instance, it was imprudent to simply loan or gift the funds to Ms. Millius as the respondent receives no financial benefit from the transaction.
- [158] The claimant relies on *M.E.S. v. L.A.P.*, 2019 BCSC 1526 at para. 16 in this regard.

- [159] In addition to this, the evidence from the respondent's discovery evidence is that he has allowed a third-party and her friend to live rent-free for the past several months in the Family Home. There was no definitive response as to when this arrangement might end or be converted into a paid rental arrangement
- [160] The June 1, 2023 expert report of Steve Miller tendered by the claimant sets out that the fair market rent for the Family Home would be between \$3,800 to \$4,000 per month. Mr. Miller was not cross-examined and so I accept that the respondent is likely, at minimum, failing to generate \$3,800 per month from the rental of the Family Home.
- [161] Had there been evidence that the respondent agreed to accept something less than full fair market rent on the basis he selected trusted tenants and that this is his personal residence, I would have entertained that evidence as having a genuine air of reality. Better to have a reliable tenant who will maintain your residence with proper care and attention than get the highest rent and return to it damaged. However, no such evidence was provided. I further accept that the net rental income would be less as the respondent must still pay property taxes and insurance, at minimum. The key point though is that the respondent has an income generating asset in the Family Home which he is completely failing to utilize.

Guideline Income Conclusions

- [162] Based upon my review of the law and evidence before the Court, I simply do not accept that the respondent's Guideline income is only \$52,137.
- [163] I do, however, expressly find that 2019 and 2020 were somewhat anomalous years which must be relied upon, with caution, in my obligation to find the fairest determination of the respondent's Guideline income.
- [164] Using a comprehensive analysis of the Guidelines, I have ultimately concluded that the respondent's Guideline income shall be set at \$140,000 per annum pending further court order or written agreement between the parties. I reach this conclusion on the following basis:
- a) The respondent's historical pattern of income;
 - b) The respondent's current disclosed income;
 - c) The historical receipt of undisclosed cash income;
 - d) The respondent's desired intent to minimize his financial obligations to the claimant; and
 - e) The respondent's failure to manage his financial affairs in a way that optimizes his income earning potential.
- [165] I acknowledge that the Guideline income determination of \$140,000 may be perceived as having some degree of arbitrariness. This is an exercise of my judicial discretion. I further find it is inevitable in this factual matrix where there is a pattern of fluctuating income,

undisclosed income and underutilization of assets. There is no exact mathematical conclusion which can be reached. However, on the basis of all the evidence and an application of same to the law, I am satisfied that \$140,000 per annum is the fairest determination of the respondent's Guideline income.

[166] As indicated above, the claimant re-entered the workforce in the insurance industry very shortly after separation.

[167] The claimant is a T4 employee who is presently employed on a full-time basis to her maximum skill set. She has no opportunities to receive unreported cash income and has no assets which she is not using to generate income. The claimant's Guideline income is thus very simple to calculate:

[168] Specifically, the claimant's Guideline income for the calendar years 2021, 2022 and 2023 is as follows:

2020

\$65,893

2021

\$57,742

2022

\$61,096

2023

\$81,000

[169] As is apparent, the claimant's Guideline income has fluctuated somewhat.

[170] However, I do not consider it an appropriate situation on the evidence to use a pattern of income approach under the Guidelines. The claimant has secure employment in a managerial position and her income will likely remain at a similar level to what it was in 2023 with some increased adjustment to account for the cost of living in due course but is unlikely to decrease unless there is a material change in circumstances. In that case, the claimant, as does the respondent, retains the right to obtain a further court order or negotiate a written agreement which reflects such material change.

[171] The claimant's Guideline income for the purposes of s. 7 special and extraordinary expenses and spousal support be determined to be \$81,000 per annum.

Child Support Calculation

- [172] In July 2022, the respondent unilaterally reduced the child support for K from \$1,000 per month to \$943 per month. On June 1, 2023, he then unilaterally reduced child support to \$489 per month. His rationale was his alleged reduced Guideline income.
- [173] Using DivorceMate to calculate basic support payable under the Guidelines, table child support for one child is \$1,278 per month.
- [174] This support should have commenced April 1, 2021, which is the first full month after the claimant and K had relocated to the North Okanagan and were no longer existing in a "living separate and apart regime" wherein there were benefits provided for the overall family unit.
- [175] Accordingly, the prospective child support is that effective May 1, 2021, the child support for K shall be \$1,278 per month payable on the 1st of each month until further court order or written agreement.
- [176] Having regard to the more complicated financial issues involved in this matter, the decision has been under reserve for several months. As a result, I am unable to calculate with precision the specific amount of retroactive support owing as I do not know what payments have been made during the intervening period. To do so might bring me into error.
- [177] I anticipate the parties shall be able to calculate this sum using updated FMEP records. For clarity, this amount can be calculated simply comparing my order, namely \$1,278 per month commencing April 1, 2021, adjusted for the payments made by the respondent to date of these reasons for judgment as against the total retroactive support owing by the respondent for the support of K.
- [178] Based upon by own rudimentary calculations and assessment of the respondent's needs and the child's circumstances, am satisfied that the amount of retroactive support as agreed or as determined by the registrar shall be paid in the amount of \$400 per month commencing June 1, 2024, and continuing on the 1st of the month thereafter until satisfied in full.
- [179] In making this order, I recognize that the finalization of the retroactive support component of my order may not be finally resolved by June 1, 2024. However, the respondent clearly owes the claimant retroactive child support and his payments towards the retroactive component of my award can simply be offset. This is not a situation where I have a concern that there might be a windfall based upon even the most rudimentary of calculations.

Spousal Support

- [180] On the issue of spousal support, *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 confirmed that there are three forms of entitlement to spousal support: contractual, compensatory and/or non-compensatory (or "needs-based" entitlement) (see *Chutter v. Chutter*, 2008 BCCA 507 at paras. 57-61).
- [181] In this case, the claimant submits she is entitled to both "non-compensatory" (or "needs-based" approach), based on her clear financial need, and "compensatory" spousal support for her role in the marriage and her loss from the breakdown of the marriage.
- [182] On April 24, 2023, the claimant began working for her new employer, Wawanesa Insurance. It is full-time employment and allows her to work remotely from home.
- [183] The claimant's Guideline income, as noted, has been determined to be \$81,000. This is effectively the high-water mark of her income since the relationship commenced.
- [184] She is, particularly with the benefit of the adjusted child support order, capable of being economically self-sufficient.
- [185] However, balanced against that is the fact that the claimant did absent herself from the workforce for an extended period of time during the marriage to assume the role of primary caregiver for K. Had she not done so and continued to move up the ranks in the insurance industry, it is very possible that her high-water mark would be higher. That simply cannot be known.
- [186] What can be known is that the respondent benefited from the claimant's efforts in caring for K. He concedes she was and remains a good mother. And during the time that she was out of the workforce, the respondent was a good financial provider who was able to grow the business of HHL. The respondent would not have had that same opportunity had he been required to take on a primary caregiving role for K while the claimant prioritized her career.
- [187] Accordingly, I conclude that the claimant is entitled to spousal support on a compensatory basis. Having regard to her successful and prompt return to the workforce in the industry to which her skillset is suited, I have concluded, however, that her entitlement is on the low end of the Spousal Support Advisory Guidelines ("SSAG") range and that the duration should be based upon support being transitional in nature.
- [188] I have been provided with various DivorceMate support calculations in this matter. I have run a plethora of calculations of my own using various scenarios. The benefit of the ranges provided by the SSAG is that they provide the necessary discretion to the court to craft an order that is appropriate in the circumstances. The challenges of the ranges is that they can, based upon the data inputted, vary wildly.

- [189] For example, the claimant seeks support of \$3,311 per month on an indefinite basis. Whereas, if the Guideline incomes of \$140,000 and \$81,000 are utilized, the support on the low end of the range is \$0. Even using the mid-range, the support would be \$307 per month with a minimum duration of 6.5 years.
- [190] Before reaching my conclusion on reviewing these various scenarios, I must state that I acknowledge that an award that is substantially above or below the range provided for in the SSAG, in the absence of exceptional circumstances to explain the anomaly, may attract appellate intervention (see *Redpath v. Redpath*, 2006 BCCA 338 at para. 42; *Lightle v. Kotar*, 2014 BCCA 69 at paras. 62-63).
- [191] In my view, the exceptional circumstances are the difficulties arising from determining the respondent's Guideline income and the fact that spousal support is being awarded following what amounted to a waiver of spousal support by the claimant in the Separation Agreement in February of 2021, and a trial that commenced approximately two-and-a-half years later in August of 2023.
- [192] In all the circumstances, and again taking into consideration all of the circumstances and the relevant calculations under the SSAG, I have concluded that the respondent shall pay to the claimant the sum of \$900 per month in spousal support commencing June 1, 2024 and continuing on the 1st of each month for a period of 60 months (five years).
- [193] I expressly recognize that this duration is slightly lower than provided for under the SSAG. An explanation is thus required pursuant to *Redpath* and *Lightle*. Specifically, I conclude that given the claimant's successful return to the workforce and K's age and anticipated corresponding reduced reliance upon the claimant as his primary caregiver, I consider this appropriate in the circumstances even though it is a slight deviation from the strict application of the SSAG.

Special and Extraordinary Expenses

- [194] The issue of special and extraordinary expenses for K pursuant to s. 7 of the Guidelines was not a primary focus at the trial.
- [195] However, having set aside the Separation Agreement and made determinations as to Guideline income and quantum of support, it is incumbent upon me as the presider to address the issue.
- [196] Based upon the DivorceMate calculations of a Guideline income to the respondent of \$140,000, a Guideline income of \$81,000 to the claimant, child support of \$1,278 per month and spousal support of \$900 per month, the respondent shall be responsible for 58% of K's special and extraordinary expenses and the claimant shall be responsible for 42% of K's special and extraordinary expenses.

- [197] All special and extraordinary expenses for K shall be mutually agreed by the parties, in writing, before the expense is incurred. If consent is unreasonably withheld, the party seeking contribution to the expense may, on proper notice, seek a court order for a contribution to the expense.
- [198] Neither party shall be permitted to seek contribution for an expense unilaterally incurred without first seeking the consent of the other party.

The Calculation and Summary of Corollary Orders

- [199] The division of family property, family debt and excluded property in accordance with these reasons needs to be calculated in accordance with the terms of this order.
- [200] As I have not accepted either parties' position in its entirety, I endeavoured with considerable effort to recalculate the Scott Schedules provided at trial in accordance with my reasons for judgment.
- [201] However, upon reflection, I am not satisfied this is the appropriate approach in this particular factual matrix. Rather, although I acknowledge it will delay final resolution somewhat, I have concluded that the appropriate route is to have counsel, who are both experienced and very familiar with the file, exchange updated Scott Schedules for their respective review based upon factual findings and legal conclusions. If counsel can agree on the calculations, then the matter can come on before me, as arranged through Supreme Court Scheduling, simply to confirm the calculations by agreement and the schedule can then be appended as schedule "A" to the order.
- [202] If there is disagreement, then the matter can be rescheduled before me through Supreme Court Scheduling for a two-hour hearing at a date mutually convenient to counsel with all materials from the claimant filed and served within ten days of the hearing date, all response materials filed and served within five days of the hearing date and all reply materials filed and served within two days of the hearing date.
- [203] The corollary relief orders are summarized as follows:
- a) Pursuant to the Divorce Act, the respondent shall, commencing May 1, 2021, pay child support for K in the amount \$1,278 per month. Such amount to be payable on the 1st of each month until further court order or written agreement;
 - b) Pursuant to the Divorce Act, the amount of retroactive support as agreed or as determined by the registrar shall be paid in the amount of \$400 per month commencing June 1, 2024, and continuing on the 1st of the month thereafter until satisfied in full;
 - c) Pursuant to the Divorce Act, the respondent shall pay to the claimant the sum of \$900 per month in spousal support commencing June 1, 2024 and continuing on the 1st of each month for a period of 60 months (five years);

- d) The respondent shall be responsible for 58% of K's special and extraordinary expenses and the claimant shall be responsible for 42% of K's special and extraordinary expenses on the following terms:
- i. All special and extraordinary expenses for K shall be mutually agreed by the parties, in writing, before the expense is incurred. If consent is unreasonably withheld, the party seeking contribution to the expense may, on proper notice, seek a court order for a contribution to the expense; and
- ii. Neither party shall be permitted to seek contribution for an expense unilaterally incurred without first seeking the consent of the other.

Costs

[204] Costs are awardable in the discretion of the trial judge.

[205] Rule 16-1(7) of the Rules states the general principle that costs are awarded to the successful party:

Costs to follow event

(7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.

[206] The standard of "success" required for the award of the costs of an action under Rule 16-1(7) is "substantial success". The Court of Appeal in *Harras*, 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.

[207] The claimant was the substantially successful party at trial and she is presumptively entitled to her costs of the application. There is no reason of which I am aware for me to exercise my discretion to deny her those costs.

- [208] The claimant is thus presumptively entitled to her costs of the trial in accordance with the Rules as ordinary costs subject to any formal offers to settle which may have been exchanged.
- [209] In the event that there have been formal offers which require the Court's consideration, the party seeking to rely upon the formal offer shall file written submissions within 14 days of these reasons for judgment and the responding party shall respond within seven days thereafter. Upon receipt of any written submissions, the Court reserves its right to require the parties to attend at a mutually agreeable date for one hour of oral submissions. Failing receipt of written submissions within this timeframe, the presumptive order that the claimant is entitled to her costs shall govern.

"Hardwick J."

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