

CANADA / JUDGMENT

Young v. Sherk

2019 BCSC 312

COURT

Supreme Court of British Columbia

DECIDED

8 March 2019

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2019 BCSC 312 Young v. Sherk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Young v. Sherk,

2019 BCSC 312

Date: 20190308

Docket: E22024

Registry: Dawson Creek

Between:

Cassandra Lynn Young

Claimant

And

Jason Allen Sherk

Respondent

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment

The Claimant, acting on her own behalf:

C.L. Young

The Respondent, acting on his own behalf:

J.A. Sherk

Place and Dates of Trial:

Dawson Creek, B.C.

August 28-31, 2018

Place and Date of Judgment:

Vancouver, B.C.

March 8, 2019

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I. Introduction

[1] This family law matter involves two parties who were in a common law relationship. They executed a separation agreement on February 15, 2016, in which they divided property, agreed to keep all debts in their names, and agreed to waive any claim to spousal support (the "Agreement"). The Agreement was to be the entire agreement, dealing with all family property and all family debt, and any claims arising from the relationship.

[2] Ms. Young (the Claimant) is seeking to set aside most of the Agreement on the ground of duress. Mr. Sherk (the Respondent) also says that he was under significant stress when they signed the Agreement. He seeks to set aside two terms of the Agreement.

II. Facts

A. Background

[3] At the date of the Agreement, Ms. Young was 31 years old and Mr. Sherk was 40 years old. They lived in Dawson Creek, B.C.

[4] Mr. Sherk has three children from a previous relationship. They were then 15, 13 and 11. He remarried in 2017 and has a stepdaughter who is 4 years old. Ms. Young does not have children.

- [5] The parties began to live together in September 2009 at 1108 - 120 Avenue, Dawson Creek, B.C. ("120 Avenue"). In his pleadings, Mr. Sherk initially took the position that they began living in a marriage-like relationship in July 2009, however he later amended his counterclaim, agreeing that the start date was in September 2009. The Agreement states October 15, 2015 as the date of separation. The parties do not agree on this date.
- [6] After the separation Ms. Young moved from 120 Avenue to 9804 - 17 Street, Dawson Creek, B.C. ("17 Street"). Mr. Sherk had owned 17 Street and sold it to Ms. Young at the time of his purchase of 120 Avenue in the summer of 2009.
- [7] Ms. Young moved from Dawson Creek on November 5, 2016 to Grande Prairie, Alberta, where she now resides.
- [8] Mr. Sherk continues to reside at 120 Avenue.
- [9] Ms. Young has had the following jobs and sources of income from 2015:
- 2015 CCI Controls Ltd, Fort Saint John, B.C.;
 - 2015 and 2016 received Employment Insurance;
 - 2016 Waitress, Chubby Joe Food DC Ltd., Dawson Creek, B.C.;
 - 2016 Waitress, Shark Clubs of Canada Inc., Grande Prairie, AB;
 - 2016 Sales, Jim Hansen Ford, Grande Prairie, AB; and
 - 2017/ 2018 Waitress, The Great Northern Casino, Grande Prairie.
- [10] Ms. Young's income in 2015, the year of the separation, in Dawson Creek was \$28,350. In 2016, the year of the move to Grande Prairie, she earned \$16,558. Her income from the casino for 2017 is estimated to be \$30,000, and to July 28, 2018 she had earned gross wages of \$9,303 at the casino in Grande Prairie. She estimates her 2018 income from employment at the casino to be \$17,082. Mr. Sherk takes issue with this estimation saying that her expenditures indicate a greater income. An updated Financial Statement was not filed.
- [11] The income earned by Ms. Young in previous years is as follows:
- 2007 - \$27,299
 - 2008 - \$30,331
 - 2009 - \$40,928
 - 2010 - \$25,292
 - 2011 - \$26,808
 - 2012 - \$22,028
 - 2013 - \$18,628

- 2014 - \$40,276

- [12] Other sources of income for Ms. Young include her sole proprietor business, Dog Gone Bad Habits, which was registered in 2012. She is a licensed dog groomer and a licensed marriage licence issuer.
- [13] Mr. Sherk has been employed with Louisiana-Pacific Ltd. since 2001, having been promoted in 2013 and 2016. He is currently absent from work on long-term medical leave commencing November 8, 2017. His anticipated 2018 income is approximately \$61,215. His income in 2015 was \$84,563, and was \$95,104 in 2016.
- [14] On November 8, 2017, Mr. Sherk went on short-term medical leave for stress as directed by his doctor. Long-term medical leave commenced on May 8, 2018. He submits that he has lost employment income and a desired position within the company as a result of being on long term medical leave. It is unknown at this time when his health will recover so that he can return to work.
- [15] Mr. Sherk filed the Agreement with the court on July 12, 2018.

B. Property

- [16] Ms. Young inherited \$60,520 in January 2013 when her biological mother passed away. Mr. Sherk inherited \$80,000 in 2012 and 2013 from the estate of his biological grandmother. No issue arises from these inheritances.
- [17] During the relationship, the following gifts were received by the parties:
1. 2 garage doors with tracks (motor and chains already installed), given in 2009 by the claimant's father, Brian Young.
 2. Outdoor pool, given in 2009 by claimant's father.
 3. 4 Wheeler Honda, given in 2010 by the claimant's father.
 4. John Deere Lawn mower with trailer, given by claimant's father.
 5. Stainless steel fridge, given/purchased in 2013 by respondent's mother Ann Sherk.
 6. 1 Queen sized mattress and box-spring, given in 2013 by respondent's mother.
 7. 50" TV, given in 2015 by the claimant's father.
- [18] Mr. Sherk filed a Scott Schedule listing the parties' property, assets and debts. He includes Ms. Young's sole proprietorship, which was registered in 2012, but does not indicate a value for that asset.

- [19] With respect to personal property, he lists 34 items, some of which he notes are excluded, either because the item was a gift or acquired before the start of the relationship. He provides a description of each item, along with the year it was acquired, and where available the month or exact date, the purchase price, who purchased it, and who had possession of the item following the separation.
- [20] The Scott Schedule does not include any accounts with financial institutions or details about Mr. Sherk's pension. There is no evidence that the parties had joint bank accounts or investments. Documents filed by Mr. Sherk indicate that his Louisiana-Pacific Defined Contribution Pension Plan increased in value from \$25,583 in June 2009 to \$82,185 in January 2016.
- [21] As the gifts were received by both parties and used in the family residence, all items acquired during the relationship are included in the following calculations of values. The total of the items that Mr. Sherk sets out as his assets post-separation, excluding vehicles, is valued at approximately \$9,974. Since there is no evidence as to the value of these assets as of the date of separation, this figure is based on the sum of either the initial purchase price of the item or, if the information was available, its value when sold. On the Scott Schedule, the items retained by Ms. Young are valued at approximately \$9,852. However this does not include the value of the X-Box console, the John Deere, the Honda 4-Wheeler, and the 2000 BMW, model unspecified, all of which were acquired in the course of the relationship and were agreed to be her property after the separation. Most of the assets Ms. Young retained were specified in the Agreement, whereas the Agreement was silent on the specific personal family property Mr. Sherk would retain stating that he would "be allowed to reside in the home, with the majority of its contents".
- [22] With respect to the family debt, Mr. Sherk lists several items of debt incurred in his name. The collective value of the family debt on or about October 2015 is \$29,745. Legal fees incurred by Mr. Sherk in June 2015 are not included as family debt. The debt associated with the Dodge vehicle that Mr. Sherk received in the division of assets as family debt is also not included in the calculation of family debt. Mr. Sherk has paid the other items constituting family debt that were outstanding at separation.

C. The Agreement - February 15, 2016

- [23] The Agreement reads as follows:

Background:

1. Jason Allen Sherk and Cassandra Lynn Young (collectively the "Parties" and individually a "Party") entered into a common law relationship on September 1, 2009, in Dawson Creek. Due to certain differences that have developed between the Parties, they agree to live separate and apart from each other, subject to the terms and conditions in this Agreement.

2. The Parties have complete, fair, and accurate disclosure to each other on all financial matters reflected on this Agreement.
3. The Parties have each voluntarily entered into this Agreement and have not been forced by anyone to sign this Agreement, and both Parties confirm that they are in sound mental health.

IN CONSIDERATION OF the mutual promises and covenants contained in the Agreement, and as well as the condition, means, needs and other circumstances of each spouse has been taken into consideration and other valuable consideration, the receipt and sufficiency of which consideration is acknowledged, the Parties agree as follows:

1. The Parties have lived separate and apart since October 15, 2015.
2. Neither Party claims entitlement to spousal support at this time, or in the future. Both Parties waive any claim to spousal support during the separation, regardless of the length of the period of separation.
3. The common-law home is located at: 1108 120 Avenue, Dawson Creek, BC V1G3K1 (the "Home") and is owned by Jason Allen Sherk.
4. Jason Allen Sherk will be allowed to reside in the Home, with the majority of its contents.
5. If at any point Jason Allen Sherk decides to sell the Home, Cassandra Lynn Young will be given 50% of the profits with the mortgage set at \$213 000.000, Plus \$12 000.00 for the down payment that was given to Jason Allen Sherk for the purchase of the Home.
6. The expenses relating to the Home, including but not limited to the mortgage payments, utility bills, property taxes, and repair costs, will be paid by Jason Allen Sherk.
7. Cassandra Lynn Young will be allowed to take the 70" TV with its stand, the 250 GB X-Box with Kinect, 2 Quads, the PA system, all of her belongings, the flatbed trailer, John Deer lawnmower, and anything belonging to her mother she received at the time of her inheritance.
8. Cassandra Lynn Young will be given until May 30, 2016 to have all of her belongings removed from the common law home.
9. The Parties agree that any indebtedness secured against, or attributable to, any item of property that either Party is receiving under this Agreement will be the sole responsibility of the Party receiving the particular property.
10. Neither Party will incur any further debt or liability on the other Party's credit. Any debt accumulated as of the date of this Agreement is the debt of the individual Party, regardless if the debt was incurred as a result of joint credit.
11. This Agreement contains the entire agreement between the Parties about their relationship with each other.

12. The Agreement may only be terminated or amended by the Parties in writing signed by both of them.

III. Positions of the Parties

A. Pleadings

- [24] Ms. Young filed a notice of family claim on June 19, 2017. In it she sets out that the parties began living together in a marriage-like relationship on September 1, 2009 and were separated on October 15, 2015. She confirms that they entered into a written agreement dated February 15, 2016 (the "Separation Agreement"). She makes claims for orders relating to spousal support, family property and family debt, and costs.
- [25] Specifically, she asks that spousal support be ordered according to the Spousal Support Advisory Guidelines ("SSAG"), stating her gross annual income as \$16,558 and Mr. Sherk's annual income as \$84,000. She also asks for unequal division of 120 Avenue in her favour on the grounds that she was the "one who made the down payment of over \$12 000.00" and the one who purchased "most of the house hold electronics and furniture". She also applied for a Certificate of Pending Litigation ("CPL") to be registered against 120 Avenue.
- [26] Mr. Sherk filed his response and a counterclaim on July 19, 2017. In his response he notes that the written agreement Ms. Young referred to was "invalid due to no legal counsel for [himself] at the time of signing". He also disputes her recounting of the relevant dates for their spousal relationship, stating they began to live together in a marriage-like relationship on July 1, 2009, which was when they signed the mortgage on 120 Avenue. He notes that they separated May 30, 2015, with the claimant having vacated the home in June 2015. He reports his income as being \$84,563.19 for 2015 and disputes Ms. Young's reported income.
- [27] In his counterclaim, Mr. Sherk requests orders relating to spousal support, family property and family debt, and costs, however he does not file a corresponding schedule for his spousal support claim. He agrees that 120 Avenue is family property. He claims unequal division of family property and family debt on the grounds that:

At the time of separation claimant left respondent with the following de[b]t; Property mortgage \$270,072.34, de[b]t for 2 credit card's total \$9709.73, property land taxes \$4,340.54, home insurance \$1516.00, Citi financial loan \$13,323.33, vehicle loan \$35,712.00. These were amounts dated Oct 2015, receipts available. All were expenses accumulated during common-law relationship where claimant did not financially contribute to.

- [28] In addition to the family property, Mr. Sherk claims an interest in a second property, 17 Street, and an order for compensation instead of an interest in 17 Street on the grounds that "[d]uring the time of relationship [he] paid mortgage payments and utilities for this household". He also applied for a CPL against 17 Street.

[29] Ms. Young filed her response to Mr. Sherk's counterclaim on August 9, 2017. She disputes Mr. Sherk's recounting of the relevant dates, restating her view that the parties began living together on September 1, 2009 and separated on October 15, 2015, and explaining this is confirmed in the Separation Agreement they signed. She also notes that they had resumed their relationship from February 2016 to the end of July 2016.

[30] On December 4, 2017, Ms. Young filed an amended version of her June 19, 2017 Notice of Family Claim, in which she revises the grounds for her division of family property claim and sets out claims for further orders. With respect to her claim for unequal division of the family property and family debt, she explains:

My father and I purchased 9804 17 St, Dawson Creek, BC, V1G4B5 from Mr. Sherk for the purpose of having money for the down payment for the larger house, and so Mr. Sherk could pay off the remainder of his debt at the time, until Mr. Sherk brought this up in court i forgot that this is in fact how down payment was acquired. This gave Mr. Sherk Close to \$40000 i do believe. I am still currently paying this off as the house at 9804 17 still has \$ over \$10000 in negative equity. Furthermore most of the house hold electronics and furniture were purchased by myself. I am asking for monies back from that purchase, 50% of the profits, and the items i purchased during the relationship to be returned.

[31] She also makes claims for the following further orders, in addition to reimbursement for her legal costs:

- i. Reimbursement for time lost during court proceeding.
- ii. Half of Mr. Sherk pension accumulated during our time together. September 2009 to July 2016. Mr. Sherk and I continued our relationship from February 2016 - end of July beginning of August 2016.
- iii. Reimbursement for damaged furniture/electronics Mr Sherk dumped in my yard on November 14, 2017.
- iv. Reimbursement for the removal of the stuff that was not mine, Mr. Sherk left in my yard on November 14, 2017.
- v. For the property at 1108 120 Avenue to have a proper appraisal by a Realtor of my choosing.
- vi. If the Realtor decides work should be done to the home before going on the market that Mr. Sherk have to pay 50% of those costs.
- vii. Once the Realtor has done the appraisal, and repairs are done, the house to go back on the market for the appropriate price.
- viii. If there is interest in the home Mr Sherk and I must agree on the selling price if it goes into negotiations.
- ix. The items we agreed I would get when we separated.

- x. The return of my mothers belonging. If Mr. Sherk has lost or damaged these belonging I ask that he have to reimburse me for them.

[32] Mr. Sherk filed his response on December 19, 2017. He expands on his position that there is no written agreement relating to either party's present claims, stating:

No signed copy has been entered in Provincial or Supreme court, not valid due to respondent signing under duress and without advice from legal coun[sel] and is grossly unfair and one sided.

[33] He argues that the claimant is not entitled to spousal support or pension, and explains that her income is unknown "as filed financial statement has been falsified where claimant has not provided income tax statements to prove income". He disagrees with all of the other claims Ms. Young advanced.

[34] On February 27, 2018, Ms. Young filed an application for document disclosure and requesting Mr. Sherk attend an Examination for Discovery. Specifically, she sought:

- i. Documentation showing the pension he accumulated during the duration of September 2009-July 2016 from his place of employment;
- ii. Documentation showing the total profit made from me purchasing 9804 17 Street from him;
- iii. Documentation showing the current amount owing on 1108 120 Avenue;
- iv. Documentation showing his bank account number.

[35] On March 9, 2018, Mr. Sherk consented to all of the requests for document disclosure, explaining he had needed additional time to comply with the disclosure requests. He also consented to the request for an Examination for Discovery, however noted discovery was still ongoing.

[36] On March 22, 2018, Mr. Sherk filed an amended response to Ms. Young's amended claim and an amended counterclaim. In his response, he repeats his challenge to the alleged Separation Agreement, explaining it was not valid as he signed "under duress, without counsel, and [it] is grossly unfair and one sided." He goes on to dispute Ms. Young's claim for spousal support stating that she is not entitled to spousal support and that she drafted the Separation Agreement which waived spousal support; it states, "[n]either party claims spousal support at this time, or in the future. Both parties waive any claim to spousal support during the separation, regardless of the length of the period of separation". He again challenges her income, stating that her 2015 T4 stated her income as \$28,350.32.

[37] In his counterclaim, Mr. Sherk removed his claim for spousal support, but included a claim for child support with respect to his three children, to whom he claims Ms. Young was a stepparent. The children were born in February 2000, October 2001 and April 2003, respectively. He seeks this order retroactive as of October 2015.

- [38] Mr. Sherk also modified his property claim, making a claim for equal division of family property and family debt. Significantly, Mr. Sherk takes the position that 120 Avenue be deemed excluded property as he purchased it before the start of the parties' marriage-like relationship, which he now claims commenced on September 25, 2009. This is later than the date he originally claimed, July 1, 2009, and the date Ms. Young claims, which is September 1, 2009.
- [39] He makes the following claims with respect to his claim for family property and family debt, which concerns solely debt Mr. Sherk says Ms. Young left him with at the time of separation:
- Property mortgage \$225,113.44;
 - Capital One credit card \$6,199.74;
 - Master Card Canadian tire credit card \$3509.99;
 - Dawson Creek property land taxes \$4,675.78;
 - Dawson Creek utility bill \$1,377.29;
 - Western Financial Group Home Insurance \$1,442.00;
 - Citi financial loan (Now named Fairstone) \$13,323.33;
 - Vehicle loan lien payout on trade in \$35,712.00; and
 - Nathan Bauder Lawyer bill \$3,000.00.
- [40] He maintains that the date of separation was May 30, 2015, however Mr. Sherk notes that the amounts for these debts were as of "October 2015/or the closest month to" and explains "[a]ll were expenses accumulated during the common-law relationship where claimant did not contribute financially to pre or post-relationship".
- [41] He also modifies his claims for other, non-family property, claiming an interest in Ms. Young's sole proprietorship, Dog Gone Bad Habits, and equal division of any money Ms. Young maintained in an undisclosed bank account at the time of their separation.
- [42] With respect to 17 Street, Mr. Sherk modifies his claim, acknowledging this is excluded property, claiming instead compensation for half of the increase of the value of the property from the beginning of parties' marriage-like relationship.
- [43] On April 30, 2018, Ms. Young filed a notice of application seeking orders to, inter alia, prevent Mr. Sherk from selling 120 Avenue, to have certain documents filed by Mr. Sherk and his wife removed from the court file, and to keep the matter moving so a trial could be scheduled. She states, among other things that it "was my money that allowed for the purchase of the family home, which in turn has allowed it to accumulate value, it is only fair I have a say in the price it be sold for", and that there "are no other avenues [other than a trial] that would be beneficial" for her and Mr. Sherk to settle their issues.

[44] On May 3, 2018, Mr. Sherk filed an application response contesting all of the orders Ms. Young sought. With respect to 120 Avenue, he states, in part:

The applicant did not buy, and does not share title with my property 1108-120 Avenue, Dawson Creek, BC. My home is legally defined as excluded property.

I solely purchased my home in July 2009, before the common-law relationship began in September 2009.

[45] In his application response, Mr. Sherk also takes issue with the exhibits Ms. Young entered with her application, stating in part:

The applicant is attempting to admit evidence of harassment. The facebook messages and entries made on "the dirty.com" are all anonymous postings on the internet with no way of proving who posted them, when or how they were received.

Neither my wife or me have posted, commented, been involved in these on-line events about the applicant. We do not part take on social media sites. I wouldn't be surprised if the applicant wrote and posted them herself in attempt to falsely prove and falsely try to create a time line that we are harassing her.

[46] On May 7, 2018, Ms. Young filed a notice of application to enforce an order for document disclosure against Mr. Sherk, and seeking an order of contempt.

[47] On May 17, 2018, Mr. Sherk filed an application response contesting both orders on the grounds that he had complied with the order, serving the documents on May 7, 2018, which was within the time limit.

[48] On May 22, 2018, Mr. Sherk filed a notice of application seeking, inter alia, orders to strike her December 4, 2017 amended notice of family claim and preventing her from filing a second amended version. He also sought orders that would declare Ms. Young was not entitled to spousal support, that would deem 120 Avenue and 17 Street as excluded property, and that would require Ms. Young to remove the CPL against 120 Avenue.

[49] On May 24, 2018, Ms. Young filed an application response contesting all the orders. Among other things, she argues that 120 Avenue was the parties' common law home that they shared for over seven years and that it was not excluded property.

[50] On June 12, 2018, Mr. Sherk filed a notice of application seeking to enforce all the terms of the Separation Agreement, save for the terms that related to 120 Avenue and 17 Street, which he argues are void on the grounds that both properties are excluded property.

[51] He takes the position that Ms. Young is not entitled to spousal support as they both agreed not to claim entitlement in the Separation Agreement. He also sets out details of her financial situation, explaining she has not been "financially strained" as she has:

- been able to support herself in the last 3 years by employment;

- since 2015 she has held 5 different employment position's and received employment insurance benefits;
- chosen to leave a employment position that paid \$1600 bi-weekly to further her education;
- has current employment as a waitress at The Great Northern Casino in Grande Prairie, AB;
- moved two times (from Dawson Creek, BC to Grand Prairie, AB);
- owns a residential property;
- purchased a new vehicle; and
- went on numerous travel vacations.

[52] He goes on to state that Ms. Young "failed to provide full disclosure of her current financial status and assets in attempt to make her status seem worse than what it is. To date she has failed to file her 2017 taxes and revise her F8 financial statement."

[53] Ms. Young filed a response on June 18, 2018, contesting the orders sought by Mr. Sherk, stating these were matters for trial.

[54] On June 26, 2018, Ms. Young filed a notice of application seeking, inter alia, orders for document disclosure and an order that the Separation Agreement be deemed void by the court. In relation to the former she notes that "Mr. Sherk is refusing to give his full pension information". In relation to the latter, she states that "[a]t the time the agreement was made I was under tremendous stress and was not thinking clearly when agreeing to it. I did no[t] receive legal advice, if i had I would have been more aware of my rights and would not have gone through with the agreement." She also alleges that Mr. Sherk is falsely claiming that these court proceedings caused him to go on medical leave. She states that he "has been on medical leave more than once since late 2015 to early 2016".

[55] Mr. Sherk filed a response on July 3, 2018, contesting the orders sought by Ms. Young. With respect to the Separation Agreement, he states:

Separation Agreement was entered with registry on June 12, 2018 by Jason Allen Sherk making it enforceable.

The agreement was drafted and written by Cassandra Lynn Young in 2016. The agreement is grossly one sided to her favor, and does not list division of her property that she owned at the time of the end of the relationship, it only lists my assets.

For the past year the claimant has been referring to the agreement to settle assets, but after I filed in in registry to enforce the agreement is when she started to demand it be void.

I have provided every household asset the claimant requests in the agreement, which is more than 50% of the household assets. These have been divided unfairly but I choose to giver her everything in attempt to resolve these matters before trial.

- [56] On July 27, 2018, Ms. Young filed a notice of application seeking to have certain witnesses removed from Mr. Sherk's witness list and to again charge him with contempt. These were both contested by Mr. Sherk in his August 1, 2018 response.
- [57] There are also ongoing Provincial Court applications between the parties with four hearing dates set for 2019, including regarding the children.

B. Submissions of the Parties at Trial

- [58] During the trial both parties, at my request, provided summaries of their positions in the format of a list of the provisions of the Agreement, whether seeking them to be upheld or struck, and a list of what they each sought the court to order. From those written submissions, I understood the issues at the trial to be as follows.
- [59] Ms. Young asked the court to set aside the Agreement with the exceptions of clause 6, regarding Mr. Sherk paying the 120 Avenue expenses, and clause 10, regarding the parties' responsibility for their own debts. She also sought an order that 120 Avenue be sold with her having conduct of sale and that the equity be divided 50/50, with her to receive an additional \$16,000 for her contribution to the purchase.
- [60] Ms. Young seeks compensatory spousal support, one-half of Mr. Sherk's pension from September 2009 to July 2016, and reimbursement for the damaged property items set out in clause 7 of the Agreement. In her testimony, however, she stated that she is no longer seeking to be reimbursed for the 70" television. She opposes paying child support; any claim by Mr. Sherk to her father's home on 17 Street; and payment of half of the debts claimed by Mr. Sherk.
- [61] In his summary, Mr. Sherk set out that he agrees with the terms of the Agreement except for clause 5, regarding Ms. Young receiving 50% of the equity of 120 Avenue in addition to \$12,000 for her contribution to the purchase. He instead seeks that both properties be divided equally between the parties, but that the \$15,000 he contributed to the down payment be deemed excluded property. He also takes the position that clause 11, the "entire agreement" clause, should be interpreted to include all family property that is not listed, including 17 Street. He seeks that clause 9 should provide that both parties are equally responsible for family debt.
- [62] Mr. Sherk also sought child support although during the trial he abandoned that claim. There was also an issue with regard to the claim having been made more than two years after separation. I advised him that his requests for a protection order, a consolidation with the Provincial Court matters, and a sealing order for all documentary evidence would not be dealt within this trial but could be subject of further applications. I dismissed his application to strike out Ms. Young's pleadings due to no or insufficient evidence. I advised Mr. Sherk that his claim for compensation for lost wages due to his inability to work due to the stress of these proceedings was without a cause of action.

IV. The Law

- [63] The Family Law Act, 2011 S.B.C., c. 25 [FLA] recognizes the rights of parties to enter agreements upon the breakup of their relationship that govern the division, inclusion or exclusion, and valuation of their property and debt; the division, including non-division or compensation in lieu of division, of a pension; and liability to pay spousal support: FLA, ss. 92, 127, and 163. Such an agreement is binding whether or not it was made with the involvement of a family dispute resolution professional or filed with a court: FLA, s. 6.
- [64] In considering any application related to a family agreement, the court must be satisfied, having regard to the basic principles of contract formation, that the agreement is a valid and enforceable contract. The test is whether an objective reasonable bystander would find that the parties intended to contract and that there was consensus on all of the essential terms of the agreement: *Berthin v. Berthin*, 2016 BCCA 104 at paras. 46-47.
- [65] If there is an agreement concerning property or spousal support, the FLA provides that it can be set aside or varied if it was unfairly constituted or the result of the agreement is significantly unfair having regard to the enumerated factors within ss. 93 and 164: *Asselin v. Roy*, 2013 BCSC 1681 at para. 109.
- [66] The law regarding the setting aside of separation agreements respecting property division under the FLA was set out in *Asselin*:
- [125] Section 93 contemplates 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.
- [126] Even if the court determines the agreement was unfairly reached, there is still discretion to decline to set aside or vary the agreement if the result would not be substantially different from that which is contained in the agreement. s. 93(4)
- [127] If an agreement was fairly reached, having regard the enumerated factors in s. 93 (3), the court must go on to consider whether the agreement is significantly unfair having regard to the enumerated criteria in s. 93(5).
- [128] Judicial discretion has been modified, particularly as it relates to the assessment and enforceability of agreements. Under the previous legislation, a finding of unfairness based on one of an enumerated factors in s. 65(1) was sufficient to allow the court to, in effect, rewrite the parties' Agreement to achieve the fairness found lacking in the original version.
- [129] Critics of the legislation argued the threshold for judicial intervention was low, resulting in uncertainty which, in turn, encouraged litigation.
- [130] Certainty is no doubt a desirable objective and parties should be encouraged, where mutually desired, to establish regimes of property entitlement which deviate from the statutory scheme.

- [131] However, certainty should not trump either procedural or operational fairness as defined in s. 93.
- [67] The principles set out in Asselin similarly apply to s. 164, which concerns agreements respecting spousal support. Section 127, pertaining to agreements concerning pension division, is subject to s. 93; as such, the tests for setting aside an agreement extend to an agreement that concerns pension division.
- [68] In sum, to set aside an agreement concerning property, including debt and pensions, or spousal support, a party must provide evidence demonstrating:
- i. some defect in the process of making the agreement, as indicated by the existence of any of the factors enumerated in ss. 93(3) and 164(3) ("procedural unfairness"); or
 - ii. significant unfairness in the agreement, based on the enumerated factors set out in ss. 93(5) and 164(5) of the relevant provision ("operational unfairness").
- [69] An application to set aside or replace all or part of an agreement respecting property or spousal support must be brought no later than two years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

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.
1. Division of Family Property and Family Debt
- [92] Part 5 of the FLA governs the division of property and debt. Section 81 provides that, subject to an agreement or order providing otherwise, on separation each spouse has a right to an undivided half interest in all family property and is equally responsible for family debt.
- [93] Family property is all real and personal property that at least one spouse owned or had a beneficial interest in as of the date of separation. It also includes property or a beneficial interest acquired by a spouse that was derived from family property after the date of separation: FLA, s. 84(1). Family property does not include excluded property, which includes property that was acquired by a spouse before the marriage-like relationship began, inheritances to a spouse, and gifts to a spouse from a third party: FLA, s. 85(1). Excluded property also includes property derived from the disposition of other excluded property: FLA, s. 85(1)(g).

- [94] Family property does include the amount by which the value of excluded property increases since the start of the relationship or date of acquisition of the excluded property, as the case may be: FLA, s. 84(2)(g). As such, it is important to have evidence setting out the existence and value of property at the beginning of the relationship, the value at separation, and evidence relating to the tracing of excluded property: Asselin at para. 106.
- [95] The onus rests with the spouse claiming that property is excluded property to demonstrate that the property is excluded property: FLA, s. 85(2). The lack of an evidentiary basis to trace or follow excluded property into currently held property may result in a loss of a claim for an exclusion: Asselin at paras. 208-214.
- [96] Where the excluded property co-mingles with other property in an asset that appreciates in value, generally the value of the excluded property at the commencement of cohabitation or when it was received can be deducted from the full value of the currently held property. The spouse's interest in the excluded property will be limited to its value at cohabitation or the date it was received: C.P. v. K.W.A., 2018 BCSC 332 at paras. 99-100.
- [97] Family debt is defined to include financial obligations incurred during the marriage-like relationship and after the date of separation, if incurred for the purpose of maintaining family property: FLA, s. 86. The party alleging the existence of a debt bears the onus of establishing it was incurred during the relationship or to preserve or maintain family property: Chatha v. Uppal, 2018 BCSC 6 at para. 309.
- [98] Generally, the reduction of family debt by one spouse following separation but before the hearing does not relieve the other spouse from the obligation to share in the debt that existed at the time of separation: K.M.J. v. J.H.D.N., 2014 BCSC 1895 at para. 155. However it may be appropriate to divide the value of the debt as at the date of trial if the debt-paying spouse had exclusive use or enjoyment of the asset with which the debt is associated: R.L.H. v. A.A.H., 2018 BCSC 939 at para. 100.
- [99] Section 95 of the FLA enables the court to order unequal division of family property or family debt if it would be "significantly unfair" to divide it equally, based on a consideration of the following factors:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;

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

[100] In assessing whether equal division of the family property or family debt would be significantly unfair, the court "must notionally divide the family property, taking into account the exclusions, in accordance with the provisions of the FLA": *Remmem v. Remmem*, 2014 BCSC 1552 at para. 47. In doing so, the court may consider a global pooling of the value of the family property, however in certain circumstances "it may be necessary to examine each piece of family property individually and then factor that analysis into an appropriate order dividing the family property": *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 49.

[101] It should be emphasized that the presumption is that family property is to be equally divided. Part 5 of the FLA was intended "to limit the circumstances in which a departure from equal division of family property could be justified because of unequal contributions to its acquisition, preservation, maintenance or improvement" and constrain the exercise of judicial discretion: *Jaszczewska* at paras. 38 and 41. The circumstances set out in s. 95(2) are not intended to "allow for the wide ranging examination of each spouse's contribution to the accumulation of family assets and their respective capacities": *Nearing v. Sauer*, 2015 BCSC 58 at para. 141.

[102] Section 96 of the FLA enables the court to order the division of excluded property where it would be "significantly unfair" not to divide it based on a consideration of the duration of the relationship and "a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property". The significant unfairness warranting the division of excluded property, however, must be compelling or meaningful; such division "will be justified where the court finds that the consequences of not dividing excluded property would be so weighty as to produce an unjust or unreasonable result": *Andermatt v. Tahmasebpour*, 2015 BCSC 1743 at para. 59.

2. Pension Division

- [103] Part 6 of the FLA provides a comprehensive breakdown of how to divide pensions; it applies to all pensions that are deemed family property, in which the other spouse is entitled to an interest in the benefits, unless an agreement or order provides otherwise: FLA, s. 111(1).
- [104] The other spouse will have an interest in the portion of a pension that is acquired during the marriage-like relationship. Any portion of the pension acquired by the pension-holding spouse prior to the commencement of the marriage-like relationship or after separation is not family property and is excluded from division by Part 6 of the FLA: Asselin at para. 175.
- [105] Where an agreement is silent on entitlement to pension benefits and represents a final settlement and separation of the financial affairs of the spouses, the benefits are deemed to be allocated to the pension-holding spouse: FLA, s. 111(2). Where a separation agreement expressly states that it constitutes a full, complete and final settlement of all rights, claims and demands respecting property, if the agreement omits terms respecting the division of a pension, the court is unlikely to intervene to make an order for pension division unless there are other circumstances warranting the setting aside of the agreement: Webster v. Webster, 2014 BCSC 730 at paras. 23-30.
- [106] If making an order concerning pension division, the pension will be divided equally unless equal division would be significantly unfair based on the considerations enumerated in s. 95(2) of the FLA, as already discussed above.

3. Spousal Support

- [107] In determining whether to make an order for spousal support, the court must first assess whether a spouse is entitled to support. The starting point for determining entitlement are the objectives set out in s. 161 of the FLA. Having regard to these objectives, the court must consider on which of the following three bases a spouse is entitled to spousal support, if at all: compensatory, non-compensatory and contractual.
- [108] Ms. Young's claim for spousal support was advanced on compensatory support principles. The Court of Appeal in Chutter v. Chutter, 2008 BCCA 507 explained the compensatory basis for support as follows:
- [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise ([Bracklow v. Bracklow, [1999] 1 S.C.R. 420], at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success ([Moge v. Moge, [1992] 3 S.C.R. 813], at 861-863; Bracklow, at para. 39).

[109] If the court finds a spouse is entitled to spousal support, the amount and duration of spousal support are determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the length of time the spouses lived together and the functions performed by each spouse during the period they lived together: FLA, s. 162. The court will also use the SSAG as a guide in determining the amount and duration of the spousal support: *Redpath v. Redpath*, 2006 BCCA 338 at paras. 38 and 42.

C. Setting Aside an Agreement for Operational Unfairness

[110] If the court, having considered the factors enumerated in ss. 94(3) and 164(4), finds the Agreement was fairly reached, the court must go on to consider whether the agreement concerning property division is significantly unfair having regard to the factors in s. 93(5):

- (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.

[111] The court must also consider whether the agreement concerning spousal support is significantly unfair having regard to two additional factors set out in s. 163(5):

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

[112] In *Asselin* at paras. 151-157, the court found the parties' agreement was significantly unfair due to the significant passage of time since the agreement was signed, about twenty years, and the fact that one spouse had contributed her excluded property, from an inheritance, to the other spouse's property, indicating that the agreement did not continue to reflect their intentions through their relationship.

[113] In *N.P.T. v. L.M.E.D.*, 2016 BCSC 900 at para. 184, the court found that an agreement was not significantly unfair given that only a couple of years had passed since the agreement was made and, more significantly, there had been no material changes that would render it unfair. The court gave weight to fact that parties wanted to achieve certainty by making the agreement and had relied on it.

[114] In *Ashton v. Ashton*, 2015 BCSC 790, the court found the agreement concerning spousal support was significantly unfair because it contradicted the objectives of spousal support.

D. Considerations if Setting Aside an Agreement in Part

[115] If the court finds the Agreement to be either procedurally or operationally unfair, ss. 93 and 164 contemplate that the court may set aside or replace all or part of the Agreement.

- [116] If setting aside an agreement in part, the court should be cautious of varying a single or a few terms of the agreement in isolation. The court must consider the terms as a whole to ensure that any order modifying the agreement would result in a scheme that is fair and that would, in the words of Rick at para. 49, substantially comply with the objectives of the FLA.
- [117] There are several examples of the court only varying part of an agreement, having found that it was either procedurally or operationally unfair. In each of these cases, it is clear that the court considered all the terms related to the property division or spousal support, as applicable, before arriving at the conclusion that the setting aside of only a particular provision or provisions would remedy the unfairness in the agreement but continue to give effect to the parties' intentions for certainty in entering the agreement.
- [118] In *De Medeiros v. Hodgson*, 2018 BCSC 408, the court found the claimant did not make out his case that the terms of the agreement with respect to property should be set aside under any of the factors set out in s. 93(3), but that the portion related to spousal support was severable from the rest of the agreement, and should be set aside due to ss. 164(3)(a) and (c) as the respondent failed to disclose all of her income and the claimant did not understand that he was agreeing to pay the respondent spousal support indefinitely. As such, the court, at para. 141, set aside the portion of the agreement pertaining to spousal support and replaced it with an order that was "substantially different" than what was agreed to in the negotiated agreement.
- [119] In *To v. Owston*, 2015 BCSC 1403, which was decided under the FRA, the respondent was unable to demonstrate the entire agreement should be set aside as it was "unfair". It should be noted that the standard this court is bound by under the FLA is "significantly unfair", which is a higher threshold.
- [120] The agreement provided for a full range of issues, including the children. Among other things, the agreement provided that the claimant would receive all the proceeds from the sale of the family home following the payment of joint debts to the claimant's family and the claimant's legal fees incurred in preparing the agreement. The respondent was not represented during the negotiation of the agreement. The respondent was left with all the Canada Revenue Agency debt he accumulated and was required to make monthly spousal support payments, despite the fact that under the SSAG based on their incomes, there would have been very little or no spousal support payable.
- [121] The court isolated two particular factors, the full re-apportionment of the family home to the claimant and the spousal support order, and remedied only those terms. In varying the division of the proceeds of the sale of the family home so that one-third of the balance would go to the respondent, the court did not change any of the other property or debt allocations.

V. Issues

[122] As the parties are self-represented in this high-conflict family litigation, I granted considerable latitude in permitting them to pursue issues not set out in the pleadings as long as the other party was not taken by surprise and was able to respond at the trial.

[123] To determine whether to set aside the Agreement under ss. 93 and 164 of the FLA, I must consider the following issues:

A. Was the Agreement between the parties fairly reached based on the circumstances set out in ss. 93(3) and 164(3)?

B. If not, with regard to ss. 93(4) and 164(4), would it be replaced with an order that is substantially different from the terms of the Agreement?

C. If so, is the Agreement significantly unfair on the considerations set out in ss. 93(5) or 164(5)?

VI. Discussion

[124] Prior to commencing with the primary issue which is whether the Agreement should be set aside entirely or in part as being procedurally or operationally unfair, I will address the preliminary issues of the parties' separation date and length of their marriage-like relationship.

[125] One of the facts in dispute is the date of the end of the relationship. The Agreement states that date as October 15, 2015. Mr. Sherk submits that it had ended for him by May 2015 and that Ms. Young had substantially moved out of 120 Avenue in the summer of 2015. However, he accepts October 15, 2015 as the date of their separation. Ms. Young states that although they separated in October 2015, they reconciled after the Agreement was signed in February 2016 and separated in July 2016. Mr. Sherk responds that there was only a brief sexual relationship from February to March 2016 and some limited contact in the months following.

[126] I find that the date of separation should be fixed at the date specified in the Agreement. Ms. Young drafted the Agreement. In her Notice of Family Claim filed in June 2017 Ms. Young cites that date, October 15, 2015, as the date of separation. With the evidence of Mr. Sherk, and of a former girlfriend of Mr. Sherk that he dated in May and June 2016, I do not find that the common-law relationship resumed after February 2016.

[127] In respect of the evidence regarding the date of separation I prefer the evidence of Mr. Sherk. He testified in a calm and conciliatory manner, thoughtful when recalling the facts as he testified and was cross-examined, and was able to support his memory of the events regarding the separation with concurrent events such as a minor surgery. Although Ms. Young was firmly of the view that her evidence was entirely correct, the dates she testified to are not consistent with the evidence as a whole. Further, where the evidence of the parties differs on any issue, I prefer the evidence of Mr. Sherk.

[128] As such, the duration of the relationship, which parties agreed commenced in September 2009, was six years.

A. Was the Agreement between the Parties Fairly Reached?

[129] Generally throughout the trial an assumption that there had been duress was held by both parties. They sought to litigate the aftermath of the end of their relationship including, for example, whether Ms. Young's property was safely delivered to her home. The evidence at the trial was focussed primarily on the parties' assets as well as their debts. Although both parties sought variations of the Agreement, they disagreed on the changes to be made. Neither party proceeded on the basis that the Agreement was dispositive of all issues unless the conditions set out in ss. 93 and 164 of the FLA were established.

[130] With regard to the procedural aspect of the Agreement pursuant to ss. 93(3) and 164(3) of the FLA, the parties agree that the Agreement was primarily drafted and typed by Ms. Young. The parties had discussions about the division of property, and exchanged text messages regarding the provisions of the Agreement. These text messages were submitted as evidence about the negotiations.

[131] In particular, the text message exchange on January 23, 2016, approximately three weeks before the Agreement was signed, shows that Ms. Young sent an attachment with "how she had been dividing things since the beginning." When Mr. Sherk says that he is giving her everything she wants, she responds: "No your not your sitting here telling me I'm fucking you over, after you just tried to take half of my house. Which you don't want now cause you realize it comes with over \$10,000 debt." Mr. Sherk asks what they agreed on and the response from Ms. Young is: "If the house was sold I was getting half plus the down payment. " Mr. Sherk again says that he will sign what she wants, and he then texts: "And if you want alimony technically I should be getting child support. Common law goes both ways". Ms. Young also texts: " The second you made me aware of the fact I shouldn't get the money you put into the mortgage I changed the agreement no problem. But no the fact my \$12,000 should accumulate some interest ." Mr. Sherk states towards the end of the series of texts: "I told you I would give you everything you wanted then we agreed on something. I just wanted the agreement to say what we agreed on".

[132] The texts on the date the Agreement was signed confirm Ms. Young's concern that Mr. Sherk would not talk to her, and Mr. Sherk stating that he told her he "would print of the agreement and get it signed".

[133] At the time the Agreement was signed Mr. Sherk testified that he was under stress as a result of an approaching family court trial with his former spouse. Ms. Young had been involved in assisting Mr. Sherk with that litigation.

[134] Ms. Young testified that it was important to her that the Agreement be signed that day because Mr. Sherk was not responding to her communications and she was concerned that something had changed. There is no evidence that Ms. Young was under any duress or

pressure from Mr. Sherk such that the Agreement or any part of it should be set aside. When she drafted and typed the Agreement she was clear on the division of assets and debts and included detail such as the return of her alleged down payment on 120 Avenue of \$12,000 and legal phrases, such as the "entire agreement" provision in clause 11.

- [135] Mr. Sherk testified that he signed the Agreement because he wanted the separation with Ms. Young to be final and that he gave her what she wanted. He stated in cross-examination that he was under stress at the time of signing the Agreement from fighting with his ex-wife. When asked if he felt like he had the capacity to fully understand the Agreement, he answered no. However, he also said that he had no medical problems other than probably some medication for stress or an anti-depressant and that it did not affect his ability to think clearly. Notwithstanding his statements at the time and his evidence that he gave Ms. Young everything she sought, Mr. Sherk was able to and did negotiate with Ms. Young. It appears that, at least partly as a result of those negotiations, there was an agreement to forego spousal support.
- [136] The evidence establishes that the parties negotiated the terms of the Agreement regarding personal property, the real property at 120 Avenue and 17 Street, and spousal and child support.
- [137] I do not find that Ms. Young took advantage of Mr. Sherk's vulnerabilities from his stress with the court case with his ex-wife. These were parties who were under the stress of the end of their relationship at the time of another stress with the family litigation from Mr. Sherk's previous relationship. As set out in the discussion of the legal principles, stress and other such vulnerabilities alone are generally not sufficient to warrant the setting aside of an agreement. There must be evidence of exploitation which enabled the other party to secure an agreement that deviated substantially from what the FLA prescribes: H.J.S. at para. 46.
- [138] Further, I do not find that either Ms. Young or Mr. Sherk has established duress. Neither party has described the level of improper advantage or "oppressive contractual conduct directed by one party towards the other to compel them to act to their disadvantage" necessary to make out duress: G.C.G. at para. 104.
- [139] Although Mr. Sherk raised the issue of not having legal advice at the time of negotiating and signing the Agreement, I do not find it warrants the setting aside of the Agreement: Gurney at para. 30 and Bradshaw at para. 49. There is no evidentiary basis for me to conclude that either Mr. Sherk or Ms. Young did not have an adequate understanding of the nature and consequences of the Agreement. Their negotiations disclose an awareness of their respective rights and obligations stemming from their spousal relationship and a strong desire to achieve certainty of these rights and obligations through a final agreement. In the result, I do not find that there are any of the conditions set out in ss. 93(3) or 164(3) such that the Agreement should be set aside for procedural unfairness.

B. Would the Agreement be Replaced with an Order that is Substantially Different?

[140] Having found that none of the circumstances set out in ss. 93(3) or 164(3) were present when the Agreement was signed such that it should be set aside, I do not need to consider whether it would be replaced with an order substantially different from that set out in the Agreement in accordance with ss. 93(4) and 164(4).

C. Is the Agreement Significantly Unfair?

[141] Having found there were no defects in the making of the Agreement, the next issue to consider is whether the Agreement is significantly unfair with regard to the factors set out in ss. 93(5) and 164(5). This analysis requires a consideration of the division of property and debts of the parties, and if there is entitlement to spousal support, an estimate of the quantum of spousal support.

[142] At the outset, subject to a variation of clause 5 as set out below, the parties in their negotiated agreement achieved a relatively equal division of property and debts. The equity in the family home, 120 Avenue, was to be divided while Ms. Young kept the down payment and the 17 Street in her name, which had no equity at the time; personal property was divided with each party receiving items valued at approximately \$10,000; Mr. Sherk took on payment of all family debts in the approximate amount of \$30,000; Ms. Young agreed that there would be no spousal support; Mr. Sherk did not pursue child support; and the Agreement was silent on Mr. Sherk's pension, such that he retained an undivided interest.

[143] At issue is Ms. Young's interest in and contribution to 120 Avenue of \$12,000; Mr. Sherk's contribution to 120 Avenue of \$15,000; the division of the 17 Street Property; the \$30,000 in family debt borne by Mr. Sherk; spousal support; and Mr. Sherk's pension.

[144] The primary guiding principles in this analysis are the presumption in the FLA that family property and debt are to be equally divided, and that an agreement that is in substantial compliance with the provisions of the FLA will not be considered significantly unfair. Given that the presumption for equal division only applies to family property and debt, an issue I must consider is whether any property or debt is deemed excluded property under the FLA.

[145] As will be discussed below, in applying those principles to this Agreement, I conclude that the Agreement should be given weight as accurately reflecting the intentions of the parties at the time it was signed, and in particular, their intention to achieve certainty. There has not been a change of circumstances since that date such that the Agreement should be revisited. With regard to its compliance with the objectives of the FLA, it is only in the area of the division of the 120 Avenue real property that the Agreement is significantly unfair. As such, clause 5 will be varied.

1. Real Property

[146] Both Mr. Sherk and Ms. Young sought a variation of clause 5 regarding 120 Avenue, and Mr. Sherk sought an additional provision regarding the division of 17 Street. At various dates, the evidence of the respective values and equity in the two properties was as follows:

17 Street

Date

Value

Mortgage

August 2009

\$120,215 (Purchase)

\$117,591

2013

\$80,800 (Assessed)

2014

\$94,400 (Assessed)

\$110,627

August 2015

\$107,674

2016

\$92,800 (Assessed)

2017

\$112,000 (Assessed)

August 2018

\$99,695

120 Avenue

Date

Value

Mortgage

July 2009

\$234,000 (Purchase)

\$222,990

2013

\$260,200 (Assessed)

2014

\$299,000 (Assessed)

2015

\$316,000 (Assessed)

2016

\$310,000 (Assessed)

\$200,951

2017

\$292,000 (Assessed)

\$195,719

[147] There is no issue that 120 Avenue is family property; Mr. Sherk abandoned the position that 120 Avenue is excluded property at the outset of the trial. It was purchased by Mr. Sherk with the intention that it would be their home.

[148] Clause 5 of the Agreement states that when 120 Avenue is sold, Ms. Young will receive "50% of the profits with the mortgage set at \$213,000, Plus \$12,000 for the down payment given to Jason Sherk for the purchase of the home." In clause 8, with which no issue is taken by either party, provision is made for Mr. Sherk to pay all ongoing expenses for 120 Avenue including the mortgage.

[149] It is inconsistent that Mr. Sherk would be solely responsible to make continuing mortgage payments, but that the increasing equity would be divided equally for the benefit of Ms. Young. There will therefore be a variation to the Agreement to fix the equity Ms. Young is entitled to at the date of the Agreement, just as the amount of the mortgage was fixed.

[150] With regard to the down payment made to the mortgage broker on June 30, 2009, the date of the mortgage commitment, Ms. Young claims that the \$11,500 (referred to in the Agreement as \$12,000) contributed to the down payment for 120 Avenue is excluded property as it was a gift from her father. Section 85(1)(b.1) of the FLA provides that gifts to a spouse from third parties are excluded property; to be excluded, however, the funds must have been a gift solely to Ms. Young; *Cabezas v. Maxim*, 2014 BCSC 767 at para. 48, *aff'd* 2016 BCCA 82.

- [151] Ms. Young testified that her father gave a cheque for \$11,500 to her and Mr. Sherk so that she and Mr. Sherk could purchase the family home. Mr. Brian Young testified that he provided the down payment and he and Ms. Young had to buy 17 Street so that "you guys" (Mr. Sherk and Ms. Young) could buy 120 Avenue. As such, I find that at the time the gift was made Mr. Young intended that the \$11,500 for the down payment would benefit both parties. Therefore it does not fall within the definition of excluded property.
- [152] Ms. Young also referred to the payment of \$8889 for legal fees on closing of the real estate transactions for 17 Street and 120 Avenue. That amount was an expense related to the purchases and does not form part of the consideration of an interest in 120 Avenue.
- [153] Mr. Sherk claims that the \$15,000 he contributed to the down payment of 120 Avenue was derived from the sale of 17 Street, property which he acquired before the beginning of their relationship and therefore was excluded.
- [154] On the sale of 17 Street to Ms. Young, Mr. Sherk realised equity of approximately \$34,000. The Amended Order to Pay directed that \$15,791.36 of the equity be transferred to the purchase of 120 Avenue. The amount of \$16,797.15 was paid to Mr. Sherk and deposited in his bank account on August 4, 2009. The Buyer Statement of Adjustments on purchase of 120 Avenue on July 31, 2009 credits Mr. Sherk with the \$15,791.36 transferred directly from the sale of 17 Street.
- [155] I find that Mr. Sherk has provided sufficient evidence to demonstrate that the \$15,791 he contributed to the purchase of 120 Avenue was derived from the sale of 17 Street, which was property held by Mr. Sherk prior to the beginning of their relationship. As such, I find that equity in 120 Avenue derived from 17 Street in the amount of \$15,791 is excluded property: *Shih v. Shih*, 2017 BCCA 37 at para. 59.
- [156] Clause 5 therefore will be varied so that it provides that 50% of the net equity at the date of the Agreement accrues to Ms. Young on sale based on the mortgage at the agreed amount of \$213,000 and the value of 120 Avenue as at the date of the Agreement, which is determined to be \$313,000, or the midpoint of the assessed values for 2015 and 2016. Her share is subject to Mr. Sherk being entitled to retain the contribution derived from the sale of his excluded property, being \$15,791. The amount of profits to which Ms. Young is entitled is therefore fixed at \$42,105 ($\$313,000 - \$213,000 - \$15,791$ (the net equity) $\div 2$).
- [157] To be clear, there is no requirement as to when, or indeed if, 120 Avenue is to be sold. In accordance with clauses 4 and 5 of the Agreement, the decisions regarding the sale and timing of any sale are solely for Mr. Sherk to make. If and when 120 Avenue is sold, the conduct of sale is solely in the hands of Mr. Sherk. Ms. Young's share of proceeds as set out above are due to her only when a sale is completed. At the date of sale, Ms. Young is also entitled to interest at the rate of court ordered interest to compensate her for the use of her funds from the date of the Agreement.

- [158] In determining whether the Agreement is significantly unfair, I have noted also the omissions of property from the Agreement. The property owned by Ms. Young, 17 Street, is not dealt with. The Agreement is silent with regard to Mr. Sherk's pension.
- [159] There is a dispute regarding whether 17 Street should be divided between the parties. It was purchased and is presently registered solely in the name of Ms. Young. Notwithstanding her references to it being her father's home, although he lives there, he is not an owner.
- [160] It is Mr. Sherk's position that the Agreement ought to be varied to include a division of 17 Street. However, the text messages clearly indicate that the parties discussed 17 Street and its financial realities. As shown in the table above, there was no equity in 17 Street in the timeframe including January and February 2016. There was a deficit as Ms. Young stated in her text; approximately \$10,000 more was owing on the mortgage than the property was worth at the time.
- [161] I therefore conclude that the issue of the exclusion of 17 Street from division in the Agreement was negotiated by the parties. The result reflects the reality that there was no equity in that property to be divided. The agreement reached by the parties is respected and is not one with which the court will interfere. The Agreement will not be varied to include any reference to 17 Street which remains the sole property of Ms. Young.
- [162] I would add that, although it is not necessary to determine if 17 Street is excluded property, it is my view that it is not excluded property since it was purchased by Ms. Young in contemplation of, and in order to facilitate, her moving in to 120 Avenue with Mr. Sherk. The parties both made mortgage and other payments for the property during the relationship.

2. Personal Property

- [163] With regard to the personal belongings, Ms. Young was entitled to the items listed in clause 7 of the Agreement. Mr. Sherk retained all other belongings in the home he continued to reside in. As set out above, relying on the Scott Schedule filed by Mr. Sherk and the supporting documentation, the parties' agreement regarding property resulted in an equal division of value.
- [164] Mr. Sherk includes Ms. Young's sole proprietorship, which was registered in 2012, but does not indicate a value for that asset. Although Mr. Sherk indicated he wanted an interest in the sole proprietorship, he did not pursue this claim in trial. As such, no issue arises from the sole proprietorship.
- [165] Ms. Young is not pursuing a claim for reimbursement for the 70" television. I do not accede to Ms. Young's submission that her other property was damaged when Mr. Sherk delivered it to 17 Street. Mr. Sherk's emails dated November 14, 2017 and June 23, 2018 confirm his delivery of property to her residence. Mr. Young testified that the items were delivered and covered with a tarp as stated in the 2017 email. He put them into the shed so that they would not be covered with snow as although they had been covered with a tarp, they were

wet. Mr. Young testified that the items dropped off in 2018 were not damaged and he put them away right away. With regard to Ms. Young's mother's possessions, the timeline in the Agreement for Ms. Young to collect her belongings, May 30, 2016 had passed without her attendance at the home for that purpose and unfortunately those items appear to have gone missing.

[166] There will not therefore be any adjustment to the Agreement regarding the agreed upon division of personal property.

3. Debt

[167] As discussed above, given that Mr. Sherk has had exclusive use and enjoyment of 120 Avenue since the signing of the Agreement, I find it is appropriate for him to be responsible for the associated mortgage as at the date of the Agreement. Similarly, the debt owing for Mr. Sherk's Dodge Journey vehicle is his sole responsibility.

[168] Mr. Sherk has paid the other items constituting family debt that were outstanding at separation. However that does not necessarily relieve Ms. Young of her obligation to share in that debt which existed at the time of separation: K.M.J. at para. 155. With the exclusion of the legal fees and debts associated with the vehicle and 120 Avenue, I find that the collective value of the family debt on or about October 2015 is \$29,745. In making this finding, I am mindful that the operative date is the date of the Agreement. However, since the Scott Schedule and related evidence relied on the date of separation, I assume that the amounts at the date are sufficiently reliable for the purposes of these findings.

[169] Giving weight to the intentions of the parties at the time of signing the Agreement as well as the circumstances of its negotiation and finalisation, and Mr. Sherk's ability to pay these debts, there will not be any adjustment to clauses 9 and 10 of the Agreement concerning the parties' debts.

4. Pension

[170] The Agreement was silent on Mr. Sherk's pension. There is no evidence that Ms. Young was unaware of the existence or nature of the pension. As spouses for six years, I draw the inference that Ms. Young knew that Mr. Sherk's employer provided pension benefits. Ms. Young was the party primarily responsible for the drafting of the Agreement. She did not raise the pension at the time. She included an "entire agreement" clause, reflecting their intention to achieve certainty and a final determination of their property rights.

[171] I conclude that the silence regarding the pension reflected the parties' intention at the time to not divide the pension. Such an agreement is in accordance with the provisions of the FLA, particularly s. 111(2), and is consistent with the relatively equal division of the parties' assets and debts taken as a whole. In the circumstances there will not be a division of Mr. Sherk's pension.

5. Spousal Support

- [172] With regard to spousal support, this too was a negotiated term. Mr. Sherk texted that if Ms. Young sought spousal support, he thought it would be fair to include child support. The Agreement then provided that no party would seek spousal support at the time the Agreement was signed or in the future. I give this provision of the Agreement significant weight. Ms. Young was aware of the issue and made a considered decision in reaching a bargain that did not include spousal support at the time.
- [173] Further, although Ms. Young appears to have had some remorse after signing the Agreement, and particularly after Mr. Sherk's marriage in 2017, there is not a change of circumstances such that this term of the Agreement ought to be revisited. Ms. Young's income has remained consistent over the years before, during and after the relationship. Her ability to be employed in similar positions has not changed. The evidence does not support her submission that she gave up everything to move to Dawson Creek to live with Mr. Sherk; there is no evidence that her economic self-sufficiency was affected during the relationship or after their separation.
- [174] Having considered the factors set out in s. 164(5), and in particular, the objectives of spousal support set out in s. 161 of the FLA and the condition, means, needs and other circumstances of Ms. Young and Mr. Sherk, I do not find that the parties' decision to waive entitlement to spousal support is significantly unfair.

VII. Conclusion

- [175] In the result, and considering the terms as a whole, the Agreement is given substantial weight as having reflected the intention of the parties, being relied upon, and, with the variations to clause 5 regarding the division of real property, being fair and in substantial compliance with the provisions of the FLA.
- [176] Pursuant to s. 93(5) of the FLA, only clause 5 of the Agreement is varied. It will provide that on the sale of 120 Avenue, if and when Mr. Sherk decides to sell, Ms. Young will receive \$42,105 plus interest at the rate of court ordered interest from the date of the Agreement. In addition to his 50% of the net equity, Mr. Sherk retains an additional \$15,791 of the equity as a result of his contribution of proceeds from the sale of excluded property. The gift of \$11,500 from Mr. Young forms part of the joint equity as a deemed gift to both parties and Ms. Young does not receive repayment of that amount.
- [177] Mr. Sherk is not entitled to an interest in 17 Street. It remains the sole property of Ms. Young. Ms. Young is not entitled to an interest in Mr. Sherk's pension. Mr. Sherk remains entirely responsible for the repayment of family debts as agreed. Ms. Young is not required to contribute \$15,000, or any amount, to equalise the debt repayments. Neither party will be entitled to spousal support arising from their relationship.
- [178] With regard to costs, as success was divided, each party will bear their own costs.

"The Honourable Madam Justice Watchuk"

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