Agreements: Where We Are, and Drafting for (Un)Certainty*

Todd Bell

1. INTRODUCTION

The idea for this article was borne when *Bradley*, *infra* (as are all the cases in this intro), was a released trial decision but the Court of Appeal had not yet weighed in. Before then, *Anderson*, *Voitchovsky* and a handful of other cases had suggested a shift afoot. There was a sense that holding people to personal responsibility and respecting parties' ability and right to contact were gaining strength as factors. Then, *Mills*, *Healey* and *Schrader* came along and upended things in their own way.

Two things can be said at the beginning of this article:

1. It was not entirely clear (at least to me) what the difference in outcomes was, if any, between agreements that were challenged under *Miglin* and *Hartshorne* compared to those under ss. 164 and 93; and
2. *Bradley*, *Mills*, *Healey* and *Schrader* have all changed the landscape.

After some painstaking and at times mind-numbing reading of nearly all the cases, I can proffer the following observations:

1. *Bradley*, generally speaking, is a calming decision in terms of its ultimate impact on practice;
2. Agreements are clearly being upheld more often under the provisions of the FLA than they were under straight application of *Miglin* or *Hartshorne*;
3. There are ways to draft better than we generally do. Some of our precedents we all use every single time have not changed in 20 years and perhaps it is time to rethink them with the benefit of having taken a long hard look at the case law;
4. Individual cases (especially those referred to above) that have garnered a lot of attention do not necessarily confirm trends. In most cases they are stand-alone, but appellate stand-alone nonetheless and which must be addressed;
5. There have been some recent developments in spousal support and retirement that justify a review of your precedents; and

---

* These materials were prepared by Todd Bell of Farris LLP, for the Continuing Legal Education Society of British Columbia, Biennial Conference, July 2-3, 2025. Many thanks to Megan Walwyn, also of Farris LLP, for her extremely helpful research work. I have in some places drawn on my 2019, 2024 and 2025 "Year in Review" papers originally presented for the CBABC (Okanagan). I have not made notations where I have done so, as I am plagiarizing myself and I am okay with that.

6. At this brief moment in time, having spent an incredibly boring weekend reading and tabulating 20 years of jurisprudence, I could give you pretty accurate odds on whether an agreement would stand or fall. Approximately mid-afternoon next Thursday, I'll have forgotten it all so read the paper.

Attached are charts which are things of beauty, if I do say so myself. They analyze and summarize all the cases and break down each sub-component of the tests in play at given moments in time. It's super nerdy. I apologize for nothing.

I open this article with a review of how we got here (for the young 'uns). Then I compare the cases decided under *Miglin* and *Hartshorne*, and then those under sections 93 and 164 the FLA. I offer some cautionary tales along the way to freak you out a bit. I then turn to specific subcomponents of the tests and point out things I have observed. Finally, I address some recent trends outside the context of trying to bring down Goliath the Agreement, which is the main focus, but which are apt in this moment of opportunity.

Throughout, in handy boxes, I offer some drafting tips.

Enjoy?

2. LEGAL HISTORY

(a) Miglin and s. 164 of the Family Law Act

The SCC's decision in *Miglin v. Miglin*[1] brought a modern approach to domestic contracts within the Canadian legal landscape. *Miglin* was a spousal support case and introduced principles to be applied to domestic contracts, principles later extended to property agreements. Those same principles were ultimately codified into the *Family Law Act*, S.B.C., 2011 ("FLA").

As described in *Anderson v. Anderson*:[2]

> 26 In *Miglin*, Bastarache and Arbour JJ., writing for a majority of the Court, adopted a contextual framework to discern the weight to be afforded to separation agreements dealing with spousal support under s. 15.2 of the *Divorce Act*. Section 15.2(4) directs judges to consider several factors in making a spousal support order, including any domestic agreement, and s. 15.2(6) instructs that a support order should advance certain objectives. The first stage of the *Miglin* framework examines fairness at the time the agreement was concluded. It proceeds in two parts. First, the court must evaluate the "circumstances surrounding the negotiation and execution of the agreement" to determine whether there were any vulnerabilities or circumstances of oppression that affected the bargaining process (para. 92; see also para. 81). This includes looking to whether the parties had professional assistance, such as legal counsel. Second, the court must assess the

---

1 *Miglin v. Miglin*, 2003 SCC 24.

2 *Anderson v. Anderson*, 2023 SCC 13.

> substance of the agreement to determine whether it is "in substantial compliance with the general objectives of the [legislation] at its time of creation" (para. 87).
>
> 27 The second stage of *Miglin* looks again to the substance of the agreement at the time of its enforcement to evaluate whether it still reflects the original intentions of the parties and remains consistent with the objectives of the Act. In essence, a court asks whether changes in circumstances make the agreement unfair to enforce today.

The first stage of *Miglin* was focused on procedural fairness, albeit through the lens of the unique environment in which domestic contracts are negotiated. It built upon long-settled principles of contract law, but which were modified for application in the unique family law context. As to the second stage, as explained in *Miglin*:

> 88 The parties' intentions, as reflected by the agreement, are the backdrop against which the court must consider whether the situation of the parties at the time of the application makes it no longer appropriate to accord the agreement conclusive weight. We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. Although the change need not be "radically unforeseen," and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.
>
> . . .
>
> 90 The court's focus should be on the agreement's continued correspondence to the parties' original intentions as to their relative positions and the overall objectives of the Act, not on whether a change occurred per se. That is to say, we do not consider "change" of any particular nature to be a threshold requirement which, once established, entitles the court to jettison the agreement entirely. Rather, the court should be persuaded that both the intervention and the degree of intervention are warranted. That is, at this stage, even if unbending enforcement of the agreement is inappropriate, that agreement may still indicate to a trial judge the parties' understanding of their relationship and their intentions. Even an agreement that is not determinative as a result of the parties' circumstances at the time of the application warrants compulsory consideration under s. 15.2(4).

Miglin highlighted the special vulnerability that exists in family law matters and the centrality of proper disclosure. If an agreement fell at the procedural fairness stage, that was the end of the analysis insofar as the agreement's validity was concerned. Thereafter spousal support entitlement and quantum were considered afresh, as provided for under applicable provincial or federal legislation.

For ten years, *Miglin* provided guidance to the bar and courts. The principles were applied and developed in such cases as *Reid v. Reid*[3] and *Talebpourazad v. Bandpey*.[4]

In 2013, with the coming into force of the FLA, *Miglin* was, as developed in the jurisprudence, codified:

> **Setting aside agreements respecting spousal support**
>
> **164**(1) This section applies if spouses have a written agreement respecting spousal support, with the signature of each spouse witnessed by at least one person.
>
> (2) For the purposes of subsection (1), the same person may witness each signature.
>
> (3) On application by a spouse, the court may set aside or replace with an order made under this Division all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
>
> (a) a spouse failed to disclose 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;
>
> (d) other circumstances that would under the common law cause all or part of a contract to be voidable.
>
> (4) The court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the agreement with an order that is substantially different from that set out in the agreement.
>
> (5) Despite subsection (3), the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed

---

3 *Reid v. Reid*, 2017 BCCA 73.

4 *Talebpourazad v. Bandpey*, 2022 BCCA 352.

> when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
>
> (a) the length of time that has passed since the agreement was made;
>
> (b) 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;
>
> (e) the degree to which the agreement meets the objectives set out in section 161 *[objectives of spousal support]*.
>
> (6) Despite subsection (1), the court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

Section 64 provides for a two-prong test, as follows:

1. Was the process during the negotiation and endorsement of the impugned agreement so flawed that the agreement is void?
2. If so, ignore the agreement and determine entitlement and quantum on the facts given the objectives.

If not, then determine whether it would be significantly unfair to allow the agreement to stand given changed conditions, certainty and the degree to which the parties relied on the agreement measured against the backdrop of the objectives of spousal support.

(b) Hartshorne and Section 93 of the *Family Law Act*

Hartshorne v. Hartshorne[5] was released the year after *Miglin*. It was not a verbatim replica of the *Miglin* principles, despite the significant overlap. As explained in *Anderson*:

> [29] In *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 S.C.R. 550, Bastarache J., writing for a majority of the Court, declined to import the *Miglin* framework to interpret s. 65(1) of the British Columbia *Family Relations Act*, R.S.B.C. 1996, c. 128, which allowed a court to set aside a presumptively enforceable marriage agreement where division of property would be unfair at the time of distribution (paras. 13 and 42). Bastarache J. held that to adopt "*Miglin* without qualification would distort the analytical structure" of the B.C. statute (para. 42). In *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, in considering four cases about retroactive awards for child support, the Court again did not import a *Miglin* analysis in assessing whether to vary a prior child support agreement between the parties, noting that

---

5 *Hartshorne v. Hartshorne*, 2004 SCC 22.

> two of the appeals fell under the *Divorce Act*, while the other two fell under Alberta's provincial regime (paras. 50-53). Rather, the Court had regard to the specific scheme set out in the legislation (see paras. 54 and 75-79). Finally, in *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, this Court declined to apply the *Miglin* framework to interpret s. 17 of the *Divorce Act*, holding that the different language employed by Parliament in drafting ss. 15(2) and 17 warranted a different approach (paras. 25 and 28).
>
> [30] Adding to comments from this Court, scholars have also questioned the extension of *Miglin's* second stage of analysis to the family property division context. Spousal support is primarily a prospective and ongoing obligation that looks to future value, and is in part based on means and need; "[t]he default assumption is that, spousal support is open to modification in response to changing circumstances" (C. Rogerson, "*Spousal Support Agreements and the Legacy of Miglin*" (2012), 31 C.F.L.Q. 13, at p. 34; see also *Miglin*, at para. 209, per LeBel J., dissenting, but not on this point; *Droit de la famille — 152477*, 2015 QCCA 1618, at para. 16 (CanLII); R. Leckey, "*A Common Law of the Family? Reflections on Rick v. Brandsema*" (2009), 25 Can. J. Fam. L. 257, at p. 280). The division of family property, by contrast, is a chiefly retrospective exercise: it takes stock of property brought into and acquired during the spousal relationship as past contributions giving rise to a property entitlement (Leckey (2009), at p. 280). The relevance of post-execution changes in circumstances is far less obvious to separation agreements dealing with property division, as opposed to spousal support. This subject matter distinction has similarly been recognized by this Court (see *Miglin*, at para. 76), and partly explains why we have never fully extended the *Miglin* framework to the division of family property (see *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at para. 39; Hartshorne, at para. 42).

Hartshorne preserved all the procedural considerations at the heart of the contract (with perhaps even greater emphasis on the need for proper disclosure), and put greater emphasis on personal autonomy to contract and held people to their bargains, especially where they have contemplated and accurately forecasted the future:

> 46 Where, as in the present case, the parties have anticipated with accuracy their personal and financial circumstances at the time of distribution, and where they have truly considered the impact of their choices, then, without more, a finding that their Agreement operates unfairly should not be made lightly. This does not mean that no attention should be given to the possible deficit in the assets and future income of the spouse who chose to stay at home and facilitate the professional development of the other spouse, compared to what they would realistically have been otherwise. Section 65 mandates as much. A fair distribution of assets must of course take into account sacrifices made and their impact, the situation of the parties at the time of

> distribution, their age, education and true capacity to reintegrate into the work force and achieve economic independence in particular. But this must be done in light of the personal choices made and of the overall situation considering all property rights under the marriage agreement and other entitlements. In the present case, the main feature of the Agreement was the desire that each spouse retain the assets earned before the marriage, sharing equitably assets acquired afterwards being the rule. This will be fair on dissolution of the marriage if Mrs. Hartshorne is not left without means and facing true hardship in reclaiming her professional status and income, in light also of her parental obligations. Consideration must be given to the actual situation as it unfolded. I am not inattentive to the systemic problems discussed in *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, and agree that the Court must proceed with caution in applying s. 65. But, ultimately, it is fairness between the parties that is at issue here.
>
> 47 The ultimate point then is this: in determining whether a marriage agreement operates unfairly, a court must first apply the agreement. In particular, the court must assess and award those financial entitlements provided to each spouse under the agreement, and other entitlements from all other sources, including spousal and child support. The court must then, in consideration of those factors listed in s. 65(1) of the FRA, make a determination as to whether the contract operates unfairly. At this second stage, consideration must be given to the parties' personal and financial circumstances, and in particular to the manner in which these circumstances evolved over time. Where the current circumstances were within the contemplation of the parties at the time the Agreement was formed, and where their Agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff's burden to establish unfairness is heavier. Thus, consideration of the factors listed in s. 65(1) of the FRA, taken together, would have to reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances. This approach, in my view, accords with the underlying principle of the FRA, striking an appropriate balance between deference to the parties' intentions, on the one hand, and assurance of an equitable result, on the other.

Rick v. Brandsema,[6] applying *Hartshorne*, underscored the need for procedural fairness in the negotiating process especially where vulnerability was present. That vulnerability could, but not always did, offset a power imbalance between the parties.

Hartshorne was codified under the FLA in section 93:

---

6 *Rick v. Brandsema*, 2009 SCC 10.

Setting aside agreements respecting property division

93(1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

(2) For the purposes of subsection (1), the same person may witness each signature.

(3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

(a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;

(b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;

(c) a spouse did not understand the nature or consequences of the agreement;

(d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

(4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.

(5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

(a) the length of time that has passed since the agreement was made;

(b) the intention of the spouses, in making the agreement, to achieve certainty;

(c) the degree to which the spouses relied on the terms of the agreement.

(6) Despite subsection (1), the Supreme Court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

Sections 164 and 93 are very similar at the first stage of the test. Where they differ (and which echoes the court's concern that there is "analytical distortion"

in exporting the *Miglin* approach to application to property agreements) is in the second stage of the test.

Moreover, the relationship between sections 93(3) and 93(5) needs to be understood. Procedural fairness is largely a black and white proposition. Substantive fairness, on the other hand, is contextually driven. Where fairness is looked at relative to what the parties might be entitled to but for the terms of an agreement, that analysis must be balanced against competing interests which include holding parties accountable for the choices, as well as the concepts of certainty and reliance.

As set out in *Azanchi v. Mobrhan-Shafiee*:[7]

> [51] More to the point, in my view, Mr. Azanchi has misinterpreted the terms of s. 93(5) of the *Family Law Act*. Section 93(3) sets out the typical situations in which an agreement may be set aside. Outside of those situations, s. 93(5) gives the Supreme Court discretion to set aside an agreement *where it is significantly unfair*. Significant unfairness represents a high threshold for setting aside an agreement.
>
> [52] As I read s. 93(5), paragraphs (a), (b), and (c) are simply considerations that must be taken into account before setting aside an agreement for significant unfairness. While there will be situations in which the criteria set out in those paragraphs impinge on the fairness of the agreement, they will, more often, be considerations to be taken into account in deciding whether a significantly unfair agreement should be set aside or left in place. *Thus, a court may determine that, despite significant unfairness, an agreement should not be set aside if, for example, the parties have relied heavily on its terms in making their lifestyle choices, or have deliberately risked having to live with an unfair agreement because they placed a high value on certainty*. [Emphasis added.]

In *Y.L. v. G.L.*,[8] Justice Matthews summarized thus:

> [285] With regard to the s. 93(3) considerations, on review of *Miglin*; *Rick v. Brandsema*, 2009 SCC 10; *Asselin*; *Bartch*; *De Medeiros*; *B.L.S. v. D.J.S.*, 2019 BCSC 846; and *Bradshaw v. Bradshaw*, 2011 BCSC 1103, the following principles emerge:
>
> > a) the court should consider the s. 93(3) considerations holistically, and not in isolation to each other as the combination of certain factors may lead to setting aside the agreement where each of the factors alone would not, or where the presence of a factor in favour of setting aside the agreement may be ameliorated by the absence of another factor;
> >
> > b) the fact-specific nature of the inquiry, particularly the relative vulnerabilities of the parties and/or the relative amount of

---

7 *Azanchi v. Mobrhan-Shafiee*, 2021 BCCA 55.

8 *Y.L. v. G.L.*, 2020 BCSC 808 [*YL*].

information they have about each other's financial affairs is such that the cases are not necessarily readily comparable;

c) with regard to failing to disclose significant property, debts or other relevant information:

i. failure to disclose financial information or incomplete disclosure impacts the integrity of the bargain made. The extent and nature of the failure determines whether the court will intervene;

ii. a party's assertion that he or she did not believe the other party had a claim to the assets and so did not disclose is not an answer if the party has a claim or an arguable claim. Disclosure is mandatory separate from any argument or negotiation around whether there is a legal interest in the property;

iii. failing to disclose any value for property cannot be defended on the basis that there is no misrepresentation because no value is given;

iv. where an asset's value is uncertain, the party with the duty to make disclosure should disclose the facts that will allow the other party to make a decision as to the value or as to whether further investigation is required;

v. if a party waives the right to financial disclosure in making a separation agreement but does so in the context of having been misled about the existence of assets and/or their value, the waiver may not be informed and therefore not determinative, especially if it is paired with a representation that the facts disclosed are true, accurate and complete;

vi. failure of a party to act in good faith and to act in accordance with an agreement made is not an answer to the other party's failure to disclose financial information;

vii. failing to disclose includes incomplete financial disclosure such as not providing the values of assets that both parties know to be in existence, not advising of the true income stream of a business, and providing estimates of the values of an RRSP;

viii. failing to ask for greater financial disclosure does not prevent the party who did not receive it from relying on s. 93(3)(a);

ix. where the party complaining of non-disclosure has general knowledge of the other party's assets and their value, non-disclosure of the exact value may not result in an agreement being set aside where the non-disclosure is not a deliberate attempt to avoid addressing the division of those assets or to deprive the other party of information he or she should have in making the agreement;

x. the non-disclosure must be significant and material;

d) with regard to one spouse taking advantage of the other's vulnerability, including the other's ignorance, need or distress:

i. the parties' relative abilities to understand financial matters is relevant to the assessment of whether one party took advantage of the other's vulnerabilities;

ii. vulnerability of a less powerful party should not be presumed, there must be evidence to support a finding of vulnerability;

iii. whether the party who asserts vulnerability had input into the content of the agreement is relevant to assessing this factor;

iv. legal advice may negate vulnerability but does not necessarily do so and the absence of legal advice does not lead to a presumption that a vulnerability has not been exploited;

v. the parties' respective bargaining power is relevant to vulnerability and includes whether one of the parties was at an immediate economic disadvantage because the other party controlled the cash or had better access to cash;

vi. physical and/or emotional abuse is relevant;

vii. the timing of emotional or physical abuse in relation to the time at which the agreement was made is relevant in the sense that if a party is living in active fear and makes the agreement to get away from an abuser, that is different than a situation where there was an incident of abuse a significant length of time prior to when the agreement was made, especially if the parties were living in different locations when the agreement was made;

e) with regard to whether one of the spouses did not understand the nature or consequences of the agreement:

i. whether the party received independent legal advice is relevant, but not determinative;

ii. persons who do not take advantage of the ability to receive legal advice may not be held to unfair agreements despite their own failures especially where the party seeking to enforce it withheld information or the person is vulnerable;

iii. if a party received legal advice but it was affected by incomplete financial disclosure, it may be not fair to hold the party to the agreement;

iv. similarly, failure to read an agreement when there was an opportunity to do so will be taken into account in assessing whether failure to understand the agreement is a basis on which to set it aside;

f) with regard to other circumstances that would, under the common law, cause all or part of a contract to be voidable:

> i. unconscionability can be based on information asymmetry; and
>
> ii. unconscionability does not have to result in the same type of power imbalance that would void a commercial contract but can arise out of any circumstances of oppression, pressure or other vulnerabilities

(c) The Important Distinction Between Pre- and Post-Relationship Agreements

Understanding the context of an agreement is important. Different considerations apply to determine the fairness of marriage and separation agreements. For example, the issue of certainty must be considered through a different lens 30 years after a marriage agreement compared to 5 years after a separation agreement. That is not to say that one kind of agreement gets more or less deference, automatically.

As set out in *Hartshorne*:

> 38 Marital cases must reconcile respect for the parties' intent, on the one hand, and the assurance of an equitable result, on the other. The parties here adopted opposite views as to the degree of deference to be afforded marriage agreements; the appellant submitted that more and the respondent submitted that less deference should be paid to marriage agreements than to separation agreements.
>
> 39 This Court has not established, and in my opinion should not establish, a "hard and fast" rule regarding the deference to be afforded to marriage agreements as compared to separation agreements. In some cases, marriage agreements ought to be accorded a greater degree of deference than separation agreements. Marriage agreements define the parties' expectations from the outset, usually before any rights are vested and before any entitlement arises. Often, perhaps most often, a desire to protect pre-acquired assets or an anticipated inheritance for children of a previous marriage will be the impetus for such an agreement. Separation agreements, by contrast, purport to deal with existing or vested rights and obligations, with the aggrieved party claiming he or she had given up something to which he or she was already entitled with an unfair result. In other cases, however, marriage agreements may be accorded less deference than separation agreements. The reason for this is that marriage agreements are anticipatory and may not fairly take into account the financial means, needs or other circumstances of the parties at the time of marriage breakdown. See M. Shaffer and D. S. Melamed, "Separation Agreements Post-Moge, Willick and L.G. v. G.B.: A New Trilogy?" (1999), 16 Can. J. Fam. L. 51, at pp. 67-68; Payne on Divorce (4th ed. 1996), at pp. 307-8.

(d) *Anderson v. Anderson*[9]

Anderson is helpful in at least two ways. Ignoring the analysis of the Saskatchewan statutory regime for the moment, it is helpful both as:

1. A summary of the legal principles and 30 years of jurisprudence; and
2. The qualified roles of disclosure and independent legal advice ("ILA") and parties' rights to draw and enter into their own agreements.

As the Court explained:

> [68] Here, the lack of disclosure did not result in unfairness to either party. While the parties may not have been aware of the precise value of each other's assets and liabilities at the date of separation, there has been *no suggestion that either party concealed important information* or otherwise misled the other. Nor has there been a claim that *disclosure was needed to cure an existing asymmetry of information* resulting from an imbalance of power in the relationship. In fact, the husband has not pointed to any prejudice he experienced due to the lack of disclosure. This case is entirely unlike *Rick*, for example, in which this Court set aside a domestic contract where the husband deliberately failed to disclose significant assets and psychologically exploited his wife, who was mentally unstable, resulting in an agreement that substantially departed "from the relevant legislative objectives and from the parties' undisputed intention to have an equal division of assets" (para. 53).
>
> [69] Similarly, legal advice was not required here to ensure a fair bargaining process. In finding the lack of legal advice to be "most troubling", the trial judge stressed the role of counsel to counteract imbalances of bargaining power that can otherwise "carr[y] the day" in the negotiation of domestic agreements when spouses are unaware of their legal entitlements (Trial Reasons, at paras. 108 and 99). However, there *was no evidence of any such imbalance between the parties to this case*. As this Court has instructed, *vulnerabilities are not simply to be presumed because agreements are negotiated and concluded in an emotionally stressful context*; a finding of vulnerability must be grounded in evidence (*Miglin*, at para. 82).
>
> [70] There is no doubt, as the trial judge recognized, that the involvement of counsel is an important safeguard to make sure parties understand the terms and effect of their agreement, as well as the rights they are giving up under the relevant statutory scheme. Just as with financial disclosure, the involvement of lawyers in the negotiation of a domestic contract helps to prevent prejudice arising from a vulnerability inherent in the parties' relationship or the bargaining process. For instance, independent legal advice helps to compensate for imbalances or informational deficiencies that may result in an agreement that is substantially unfair to one or both of the parties. Moreover, independent legal advice and financial disclosure are often

---

9 *Anderson v. Anderson*, 2023 SCC 13.

> functionally intertwined, in that legal advice can be instrumental in realizing the benefits of full and frank disclosure. For instance, a party may not know to request disclosure, and may not understand the legal significance of any assets that are disclosed without the advice of counsel.
>
> [71] Here, *there was nothing to suggest that the parties did not understand the terms or effect of their agreement*. Nor was there any assertion that the parties' relationship or its breakdown was characterized by vulnerability, imbalance or exploitation. And while the parties may not have been experts in the property division scheme set out by the FPA, the agreement's fairness, assessed below against the Act, is a reasonable proxy to ensure that any informational deficiency ultimately did not result in prejudice to either spouse. I note that the wife advised the husband to "think it over and talk to a lawyer" before signing the agreement, but he refused and signed immediately. I agree with the Court of Appeal that, in this case, the lack of legal advice *did not "override the parties' contractual autonomy"* or otherwise lead to unfairness in the bargaining process (para. 67).
>
> [72] In short, there is no reason not to consider the agreement in dividing the family property. The questions that remain are what weight should be given to the substance of the agreement under s. 21, and whether the property division undertaken by the courts below was tainted by reviewable error. [Emphasis added.]

Obviously, disclosure and ILA, and the relative importance of their presence and depth, are driven by the contextual *milieu* of a given case. There is no one-size-fits-all standard that can, or should, be attempted.

3. THE DATA TABLES

At the conclusion of this article are my data tables. I have endeavored to bring some order to the case law and statutory provisions, even if only so *I* can understand it. The analysis is broken into eight tables, from the following four categories thereafter split into outcomes summaries of procedural and then substantive unfairness:

1. A limited number of spousal support cases under *Miglin* and pre-FLA, simply because they no longer apply. Under the transition provisions, s. 164 of the FLA applies to agreements made both prior to and after the coming into force of the FLA;
2. The property division cases under *Hartshorne* and pre-FLA, as these cases come up where the agreement was between married parties and entered into prior to the coming into force of the FLA (*Bradley*, *infra*, for example);
3. The spousal support cases after the FLA came into force; and
4. The property division cases after the FLA came into force.

Within each of those tables, the cases are further broken down by:

1. Whether they were marriage agreements or separation agreements; and
2. The length of the marriage.

As above, the legal test is broken into the procedural and substantive fairness arms, then broken further into the subcomponents of *those* tests. As a result, the reader can determine in exactly how many cases in a specific legal class (for example, post-FLA property agreements) where a lack of disclosure was either fatal to the agreement (there were four) or whether the complaint was alleged but the burden of proof not met (there were nine).

This resource reveals trends. It allows for the cross-referencing of your fact pattern to others. It allows for a case law compare-and-contrast so one can explore those cases where vulnerabilities were made out and those where it was not, to try to get a feel for the line where independence is compromised (while always keeping in mind the specific contextual facts).

Hopefully, the reader will find them helpful.

4. THE TRANSITIONAL PROVISIONS

I pause here to note the transitional provisions of the FLA and which govern *some* agreements. Section 252 of the FLA mandates that certain agreements be assessed under the *Hartshorne* analysis that applied prior to March 2013 when the FLA came into force. However, that section applies to property division agreements only. It does not apply to spousal agreements and therefore the FLA (section 164) applies notwithstanding. Also, and per the reasoning in *Sperring*, below, it does not apply to property agreements between common law parties prior to March 2013.

The section:

> **Transition — proceeding respecting property division**
>
> 252(1) This section applies despite the repeal of the former Act and the enactment of Part 5 *[Property Division]* of this Act.
>
> (2) Unless the spouses agree otherwise,
>
> (a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or
>
> (b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed. [Emphasis added, so to better understand *Sperring*]

In *Sperring v. Shutiak*,[10] the Court held:

> [60] In my opinion Riley J. and Norell J. have it right. A proceeding to enforce, set aside or replace an agreement respecting property division made by common law partners before the coming into force of the *Family Law Act could not "be started or continued, as applicable, under the former Act as if the former Act had not been repealed"*. The former Act made no provision for the setting aside of such agreements, and the respondent could not have started a proceeding nor continued one "under the former Act".
>
> [61] In my view, the plain effect of the transitional provision was that parties with a remedy under the former Act should have their claims addressed under that Act. *Those without such a remedy could look to the Family Law Act for relief*.
>
> [62] Further, in my view, the trial judge's reading of s. 252 is more consistent with the remedial intent and purpose of the *Family Law Act* than that proposed by the appellant.
>
> [63] The trial judge did not err in concluding that when a separation agreement between common law spouses is set aside, the court should then turn to Parts 5 and 7 of the Family Law Act to fashion a remedy, if appropriate. [Emphasis added.]

Sperring also addressed the conflict between section 198 (time limitations) and section 164 (setting aside agreements relating to spousal support).

> [90] Clearly, an agreement that contains a waiver of spousal support can, in some circumstances, constitute an agreement respecting spousal support (there was no question that was so, for example in *Sime Duchesne v. Duchesne*, 2019 BCSC 284, where the separation agreement contained a mutual waiver of spousal support).
>
> [91] It is also apparent that, if the respondent had *no agreement* with the appellant respecting spousal support, she would have no right to seek an order under Part 7 of the *Family Law Act* when these proceedings were commenced on July 30, 2013, more than two years after the parties separated (as noted above, s. 198(2) provides, subject to the suspension provision, a proceeding for division of family property or spousal support by spouses who were living in a marriage-like relationship must be started no later than two years after the date the spouses separated).
>
> [92] Does the inclusion of a waiver of spousal support in the separation agreement allow the respondent to advance a claim foreclosed to common law spouses who ended their relationship before the *Family Law Act* came into force and did not expressly waive a claim to such support?

---

[10] *Sperring v. Shutiak*, 2023 BCCA 54.

> [93] To hold otherwise, we would have to look behind the separation agreement and permit parties to ask the court to weigh the consideration given for a waiver of spousal support. In my view, we should not engage in or encourage that exercise. There is no strong policy reason to do so, and the result of doing so in this case would be to disentitle a spouse—who has made out a case for compensatory and some needs-based support—from a remedy.
>
> [94] On its face, the express waiver of any claim to spousal support in a separation agreement makes the agreement one "respecting spousal support". If the respondent could not discharge the onus of establishing grounds to set aside the agreement under s. 164(3) (or at common law), the agreement would effectively bar a claim for spousal support. It must, therefore, be an agreement respecting spousal support. That is so, in my opinion, even where the waiver is given by a spouse who was not entitled to spousal support when the agreement was executed and claimed none.

5. PRELIMINARY COMMENT ON DRAFTING, GENERALLY

There are ample cases that demonstrate the mischief, headache, and, yes, nausea that can result from poor drafting. I include three recent cases as cautionary tales. Be kind to your LIF [insurance] advisor. Read them.

(a) *Campbell v. Campbell*[11]

That time that the parties had to go all the way to the Court of Appeal over what the word "cohabitation" means:

> [41] I agree with the appellant's argument. In my view, the judge erred in failing to interpret the language of the contract having regard to the contract as a whole. Instead, he plucked the words from the contract and gave them a common-law or statutory meaning: see *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37 at para. 25, 266 B.C.A.C. 98; Smith v. Lau, 2004 BCCA 443, 31 B.C.L.R. (4th) 240; *Hyman v. Hyman*, [1929] A.C. 601; *Zimmerman v. Shannon*, 2006 BCCA 499, 34 R.F.L. (6th) 32.
>
> [42] The appellant argues that applying the principles from Athwal, the word "cohabitation" in Clause 9 of the Marriage Agreement means "the parties living together in a committed relationship in one residence". I agree with the appellant that the Agreement can only be interpreted in this way, particularly when one considers the undisputed fact that the appellant refused to cohabit with or marry the respondent until she committed to sign the Agreement. I do not find any ambiguity

---

[11] *Campbell v. Campbell*, 2013 BCCA 109.

> in the agreement, so that questions of the application of contra proferentem do not arise.

(b) *Hall v. Hall*[12]

In *Hall*, the appeal was in respect of an original spousal support order that increased support from the amount set out in a separation agreement.

The case was unusual, as described here:

> 21 As I will discuss below, this case presents an application that is not directly addressed in the authoritative jurisprudence — an application for an initial order effecting an increase in spousal support on the theory that the support sought is consistent with the separation agreement because the agreement allows for a change in the agreed amount in the event of a "material change in circumstances". Both parties agree that the separation agreement met, and still meets, the applicable objectives of s. 15.2 of the *Divorce Act*, but have diametrically opposed views of the meaning of the contents of the agreement.

The central task, both at the lower level and above, was to determine what "material change" meant in the context of *this* specific case and that issue ended up bogged down all the way to the Court of Appeal. The chambers judge found there was a material change when stock options were considered; the appeals judge disagreed after looking at the agreement as a whole:

> 47 I conclude, however, that on a full review of the separation agreement, mindful of its creation to settle the interrelated issues in dispute in the mediation, the agreement does not support the judge's conclusion that the receipt by Mr. Hall of stock options was a material change in circumstances triggering an increase in spousal support under para. 4 of the agreement. Starting from the narrow and moving to the broader, I observe that the judge did not consider whether the increase in income was enduring or had a measure of continuity as suggested is important in *Powell* (see para. 28 above).

The takeaway from this case is that care must be taken to step back and holistically consider the entire agreement when looking at language, not just a single clause in a vacuum

(c) *Dhaliwal v. Dhaliwal*[13]

Dhaliwal is a case where much of what ended up in litigation could have been likely avoided if the parties had properly attributed values to assets and debts, and clearly set out the parties' present circumstances, their goals in the future, and where they expected to be.

---

12 *Hall v. Hall*, 2021 BCCA 115.

13 *Dhaliwal v. Dhaliwal*, 2021 BCCA 72.

Because that was not set out, it fell to a judge of the trial court to make findings about what was intended and how it played out. The result is not the important point in this case; rather, it stands as a cautionary tale.

6. THE CLAIMS

(a) General Observations — *Miglin* Pre- and Post-FLA

(i) Pre-FLA

Miglin, and the cases that adopted its principles, are often misquoted or misunderstood. These errors often lead counsel to take overreaching positions. Part of this is the way in which the cases are described in "sound bites". To say, for example, that *Miglin* stands for the proposition that vulnerability or power imbalance will lead to agreements being set aside is incorrect. Similarly, to assert, without qualification, that a "failure to disclose" will lead to agreements being setting aside is too simple.

The issues that arise around procedural fairness are far more nuanced, a point that seems to be often overlooked. As set out in the judgement:

> 82 We pause here to note three important points. First, we are not suggesting that courts must necessarily look for "unconscionability" as it is understood in the common law of contract. There is a danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is a unique legal context. There may be persuasive evidence brought before the court that one party took advantage of the vulnerability of the other party in separation or divorce negotiations that would fall short of evidence of the power imbalance necessary to demonstrate unconscionability in a commercial context between, say, a consumer and a large financial institution. Next, the court should not presume an imbalance of power in the relationship or a vulnerability on the part of one party, nor should it presume that the apparently stronger party took advantage of any vulnerability on the part of the other. Rather, there must be evidence to warrant the court's finding that the agreement should not stand on the basis of a fundamental flaw in the negotiation process. Recognition of the emotional stress of separation or divorce should not be taken as giving rise to a presumption that parties in such circumstances are incapable of assenting to a binding agreement. If separating or divorcing parties were generally incapable of making agreements it would be fair to enforce, it would be difficult to see why Parliament included "agreement or arrangement" in s. 15.2(4)(*c*). Finally, we stress that the mere presence of vulnerabilities will not, in and of itself, justify the court's intervention. The degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties.

> 83 Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.

The same warning applies to the concept of original intentions and the role of the objectives of spousal support. Again, there is no monolithic answer to any single fact pattern. Some are more obvious than others, clearly. Sometimes a lack of entitlement is right there, obvious for all to see (except the potential recipient perhaps). Other times, a gold standard compensatory claim is undeniable. In most cases, however, things are not so clear cut. Among other things, the objectives of spousal support are often contradictory to one another. The balancing of those competing tensions, given the age and skills of the recipient, the means of the payor, and the asset division and/or relative financial positions of both parties, must be considered. Even then, on close calls two judges could find different results.

The early *Miglin* cases did provide guidance. They caused us to change our drafting and standard clauses in agreements are the result. However, as will be seen later in this article, it is perhaps time to reconsider the sufficiency of the boilerplate clauses we use given both the trends in the law and specific decisions which require comment. We'll get to that.

(ii) Post-FLA

What seems to clear to this writer is that there is a greater reluctance to meddle in agreements post-FLA. While the test did not change but was merely codified, the effect seems to have been chilling.

It is important to note that the cases I am considering in this article are those where spousal support was waived. Cases with review provisions, including those with material change terms, are a different situation, and the law on reviews a different paper.

As a result, we see many attempts but the majority fail. Often it is simply that there was no entitlement when the agreement was signed and nothing has changed. Or there has been a change but respect for the parties' autonomy to contract overwhelms those factors.

Of the eight spousal support agreements put before the court pursuant to section 164, three fell and five were upheld. Of the three, two fell at the procedural fairness stage (*Sperring*, *Shrader*), in the other there was a sufficient change in circumstances (*C.A.L.*).

Of the five that fell, *both* procedural and significant unfairness was argued and failed in each. *S.B.F.* was a wedding duress case where the argument failed;

the Court does a helpful job of reviewing the wedding duress cases that came before.

Reiner is helpful in confirming that the question is not whether vulnerabilities existed, but whether a party actively exploited them:

> [4] The respondent claims to have suffered from depression for many years, and more recently to have been diagnosed with bipolar disorder, a major mental illness. She told me during the hearing that she has been under the active care of a psychiatrist for years. The claimant's alleged exploitation of the vulnerabilities created by this illness is the mainstay of the respondent's application to have the separation agreement set aside. The claimant denies knowledge of any such diagnosis, and no expert medical evidence was submitted to confirm it.
>
> [5] The only evidence concerning mental health that I have received, other than from the respondent herself, came in the form of a letter attached to an affidavit from a clinical counsellor, who is also a yoga instructor, confirming that she conducted 34 counselling sessions with the respondent between October 1, 2018 and October 5, 2020. In other words, the respondent has advanced her case on the basis of serious alleged psychiatric vulnerabilities, but these have not been shored up by proper medical evidence that would be readily available, it seems to me, if her specific claims had substance. The absence of such evidence raises doubts in my mind about their authenticity.
>
> [6] I am prepared to accept, however, that in 2018 and 2019 the respondent experienced significant problems in her emotional or mental health, even if the record of evidence is oddly silent concerning their precise nature. On two separate occasions in 2018, the respondent was involuntarily admitted to hospital, the second time for a period of six weeks at a facility in Calgary, AB. I have no idea why. I was given no medical evidence related to either admission. According to the respondent's clinical counsellor, however, these hospitalisations were followed by a lengthy period of emotional turmoil from various causes, including the stress of the respondent's marital breakdown, and the ensuing financial negotiations with the claimant.
>
> [7] The claimant, I find, was fully aware of these difficulties, whatever their nature or source. Notwithstanding my doubts about the quality of the respondent's evidence, I approach the case from the footing that the respondent was in a state of heightened vulnerability throughout the round of offers and counter-offers that resulted in the separation agreement. The questions that I have to deal with are, first of all, whether the claimant exploited the respondent's vulnerability; secondly, whether the claimant failed to disclose significant property or relevant financial information; and lastly, in either case, or both, whether he drove a deal that was unconscionable or significantly unfair.

> . . .
>
> [15] In assessing the substantive fairness of the agreement, I must ask myself whether the agreement is in "substantial compliance" with the underlying legislation: Miglin at para. 85. "Substantial compliance" is determined by considering whether the agreement represents a significant departure from the general objectives of the underlying legislation or the parties' statutory remedial entitlements. Along the way, I must bear in mind the important objectives of finality, certainty, and the parties' autonomy in determining their own affairs: Miglin at para. 85; Reid at para. 57; and Gibbons at para. 47.
>
> [16] Circumstances of oppression, pressure, or vulnerability are generally not sufficient on their own to warrant the setting aside of an agreement. There must be evidence that the one party exploited the other and, as a result, secured an agreement that deviated substantially from the result that would have followed upon a judicial application of the Act: Young at para. 75.
>
> . . .
>
> [40] There is no persuasive evidence in this case of oppression, pressure, or psychologically exploitative conduct on the part of the claimant, or that the claimant created financial "informational asymmetry" resulting in an unfair separation agreement, or a significant deviation from the respondent's statutory entitlement to equitable property division and adequate support.
>
> [41] Both parties were represented by capable and experienced lawyers. The playing field was level. The respondent's lawyer drafted the final version of the separation agreement, with its clear language emphasising finality. The respondent's signed certificate of legal advice speaks clearly to fully informed and voluntary consent. In all of the circumstances, I conclude that there is no legal cause to set aside these private arrangements. The separation agreement may not be perfect, but I am unable to conclude that either the negotiations leading to its creation, or its substantive terms, were significantly unfair to the respondent.

(b) General Observations — *Hartshorne* Pre- and Post-FLA

(i) Pre-FLA

I have included many more of these cases than those under *Miglin*. Mostly, this is because *Miglin* ended in 2013 (as the primary test) whereas *Hartshorne* cases are still making their way through the courts.

Hartshorne is simply *Miglin* with different factors at the second stage. Those factors are different because the subject matter is different. Spousal support is a

forward-looking remedy. Property division is the crystallization of rights and obligations at a moment in time, the sum of what came before.

Looking at the whole body of case law the following trends appear:

1. There are, and continue to be, common misunderstanding about the distinction between duress and undue influence (in most cases it did not matter, however, as behaviour is behaviour, and where one is argued the other surely is in there too;
2. There is often confusion with counsel that the test was unfairness, and not unconscionability. Counsel frequently conflates the test at the procedural fairness stage with that at the substantive stages;
3. Truly malevolent disclosure behaviour is rare; more often, the disclosure is not absent but rather, incomplete and, provided that the other party has a general understanding of the financial picture; and
4. The application of the test(s) is surprisingly inconsistent. Happily, the result is often nevertheless correct, but it is a bit jarring how frequently trial judges misapply the principles, or apply standards about, for example, disclosure, that are dramatically different from other judges.

We deal with *Bradley* separately, below.

Under *Hartshorne*, the numbers would suggest that it was easier to set aside agreements. Looking at the 15 decisions we reviewed, the numbers shake out as follows:

1. Of the 15, eight were challenged for being procedurally unfair and only five succeeded (*Rick*, *Dhaliwal*, *Talebpourazad*, *L.E.M*, *S.L.C*);
2. Of the ten that remained, only four were left alone (*Anderson*, *Press*, *McLaughlan*, *Santelli*).[14]

Thus, *Hartshorne* pre-FLA cases have a roughly 66 percent chance of being set aside, at least that is what the cohort of cases brought by counsel would suggest. Of the cases that did survive *Anderson* was a case where the SCC was arguably advocating for a greater focus on personal autonomy/responsibility and given it is more temporally in line with the FLA provides, is properly considered in the more modern approach; *Press* and *MacLaughlan* had near perfect fact patterns; and *Santelli* was brought by a litigant with few endearing attributes (he just came across as entitled and whiny, frankly).

In sum, pure *Hartshorne* cases put the wind to the backs of those attacking agreements.

(ii) Post-FLA

Similar to what I observed in section 164 cases, there is a clear tightening in the frequency of judicial intervention under section 93. The test of "significant unfairness" is obviously part of that but we suspect what is going on goes further than that. There appears — just reading the language of the cases and reading

---

[14] Minor adjustments only.

between the lines — an increased conservatism in the courts. Personal autonomy is given greater deference. The long-standing principle long known but often overlooked, namely, that the standard for disclosure is not perfection, is now applied a bit more consistently. Proving vulnerability that was in fact *exploited*, harder to establish, is the standard.

Of the 16 cases I considered:

1. Five fell at the procedural unfairness stage (two of which would have also failed at the significant unfairness stage anyway) (*Sperring*; *Asselin*; *Y.L.*; *Lawrence*; *McAdie*);
2. One fell at the significant unfairness stage (*Shrader*); and
3. Nine stood.

Of the cases that faced a challenge 60 percent stood, compared to only 33 percent under *Hartshorne*. There was greater deference to general understandings of assets rather than perfect disclosure (*Azanchi*), more nuanced looks at the alleged exploitation of vulnerabilities (*F.C.A.S.*; *Reiner*; *S.B.F.*; *Bonder*).

As described in *Azanchi*:

> [51] More to the point, in my view, Mr. Azanchi has misinterpreted the terms of s. 93(5) of the *Family Law Act*. Section 93(3) sets out the typical situations in which an agreement may be set aside. Outside of those situations, s. 93(5) gives the Supreme Court discretion to set aside an agreement where it is significantly unfair. Significant unfairness represents a high threshold for setting aside an agreement.
>
> [52] As I read s. 93(5), paragraphs (a), (b), and (c) are simply considerations that must be taken into account before setting aside an agreement for significant unfairness. While there will be situations in which the criteria set out in those paragraphs impinge on the fairness of the agreement, they will, more often, be considerations to be taken into account in deciding whether a significantly unfair agreement should be set aside or left in place. Thus, a court may determine that, despite significant unfairness, an agreement should not be set aside if, for example, the parties have relied heavily on its terms in making their lifestyle choices, or have deliberately risked having to live with an unfair agreement because they placed a high value on certainty.

And, as summarized in *A.L.A. v. C.F.W.*:[15]

> [151] Because s. 93 is essentially a codification of the common law relating to marriage agreements as set out in *Miglin*, whether an agreement is significantly unfair on a substantive basis pursuant to s. 93(5) must be determined by the degree of non-compliance with the objectives of the FLA: *Reiner v. Reiner*, 2021 BCSC 1514 at para. 15 [Reiner], citing *Miglin* at para. 85.

---

[15] *A.L.A. v. C.F.W.*, 2023 BCSC 1888.

> [152] As noted by Murray J. in *SBF* at para. 97, apart from an application of the factors in s. 93(5), *it is not open to a court to find that an agreement is substantially unfair because it deviates significantly from what a party is entitled to under the FLA*.
>
> [153] In *Asselin v. Roy*, 2013 BCSC 1681 at para. 124, Justice Harvey observed that the tenor of the FLA favours a *less interventionist approach than previous legislation*. Notably, s. 92 of the FLA specifically permits parties to structure their division of property unequally: SBF at para. 97.

For the reasons explained above, I think it fair to say that agreements are being tested with greater vigor, and the onus has gotten steeper and not only because of the significant unfairness test. It is comforting to see such a sea change in the reported decisions as would be expected with a fundamental change to a test: to me, it illustrates a system working.

(iii) Inversion

It is trite that the party seeking to set aside an agreement on the basis of procedural or significant unfairness bears the onus. However, once the exercise is underway, the section 93(5) factors operate as a shield as well as a sword. The cases are replete with examples where, for example, the length of the relationship militated in favour of *upholding* the agreement.

F.C.A.S. is a good example of this:

> **The Length of Time that has Passed Since the Marriage Agreement (M.A.) was Made**
>
> [157] The parties' marital relationship was relatively short. It lasted less than eight years. The parties separated less than four years after signing the M.A. During that time, their circumstances did not materially change. This factor weighs *in favour of a finding that the M.A. is not significantly unfair*.
>
> **The Intention of the Parties, in Making the Marriage Agreement (M.A.), to Achieve Certainty**
>
> [158] The topic of a marriage agreement was raised by the claimant in the context of Dr. S. wanting to protect the family's assets. The respondent told him that Dr. S. had nothing to worry about and that she was not interested in them.
>
> [159] The M.A. provided certainty to both parties. To the respondent, it provided certainty as to the spousal support she would receive, certainty as to her legal interests in the Art Studio and Highbury House, and certainty that she would have no responsibility for debt.

> [160] After signing the M.A., the parties continued their relationship as they had previously. The respondent did not contribute significantly or at all to the family's income or property.
>
> [161] I find, on the whole of the evidence, that it was the intention of both the claimant and the respondent in entering into the M.A. to achieve certainty. *This factor also weighs in favour of a finding that the M.A. is not significantly unfair*.
>
> **The Degree to which the Parties Relied on the Terms of the Marriage Agreement (M.A.)**
>
> [162] The parties conducted themselves after execution of the M.A. and after separation in accordance with the terms of the M.A. The M.A. anticipated that the parties would have children together—they had two children. The claimant paid and the respondent accepted the stipulated spousal support. The parties split equally the net proceeds of sale of the Sheridan Lake Property. There is no evidence that the respondent objected in any way to the Highbury Property being listed for sale prior to the parties' separation.
>
> [163] The respondent executed the M.A. with the expectation that she would be entitled to a legal interest in the Art Studio as well as a right to live rent-free in the Highbury House for five years if the claimant predeceased her. In my view, her conduct in not objecting to the Highbury House being listed for sale, along with her conduct in storing illegally obtained drugs at the Yukon Studio and, subsequently, never requesting access to it again, is inconsistent with any continuing rights in respect of those properties.
>
> [164] I am not persuaded that upholding the M.A. would be substantially unfair.

(c) Disclosure

As I suggested above, there is a significant level of confusion about what is required of disclosure. Obviously, more is better. However, the question is what is sufficient? Complicating this question are different judgments that espouse different standards. As with most things where agreements are concerned, the cases turn on their context: if the disclosure wasn't perfect, was it enough given the sophistication and understanding of the target audience: the other party.

This concept was explored by the SCC in *Anderson*:

> [67] Given that disclosure is not a legislative requirement, the lack of disclosure is only relevant if it undermined the fairness of the negotiation process. As this Court has noted several times, disclosure is critical in family law to prevent misinformation and exploitation (see *Rick*, at para. 47; *Colucci*, at para. 51). In the unconscionability

> context, this Court has recognized a general duty to make full and frank disclosure of all relevant financial information in family law cases (*Rick*, at para. 47). Even in the common law of unconscionability, however, the goal of requiring disclosure between contracting parties is to prevent one party from misleading the other or from exploiting an asymmetry of information (paras. 47-48, 58 and 63). *A lack of disclosure, on its own, will not necessarily call for judicial intervention (para. 49). A court may intervene, however, where a failure to disclose is deliberate and coupled with misinformation, or where a failure to disclose leads to an agreement that departs substantially from the objectives of the governing legislation (para. 53).* In other words, the focus is on prejudice resulting from uneven access to information.
>
> [68] Here, the lack of disclosure did not result in unfairness to either party. *While the parties may not have been aware of the precise value of each other's assets and liabilities at the date of separation, there has been no suggestion that either party concealed important information or otherwise misled the other.* Nor has there been a claim that disclosure was needed to cure an existing asymmetry of information resulting from an imbalance of power in the relationship. In fact, the husband has not pointed to any prejudice he experienced due to the lack of disclosure. This case is entirely unlike *Rick*, for example, in which this Court set aside a domestic contract where the husband deliberately failed to disclose significant assets and psychologically exploited his wife, who was mentally unstable, resulting in an agreement that substantially departed "from the relevant legislative objectives and from the parties' undisputed intention to have an equal division of assets" (para. 53). [Emphasis added.]

And, as commented in *Donnelly v. Weekley*:[16]

> [108] In a perfect world, disclosure would be immediate and complete. In the real world, for a court to set aside all or part of an agreement for failure to disclose under s. 93(3)(a) of the *FLA*, a party to an agreement must demonstrate that a *significant* asset, debt, or other information *relevant to the negotiation of the agreement* was not disclosed. I am not persuaded that occurred here. [Italics in original.]

Drafting Comment: it will always be best practice to include as much as possible in any agreement, including a complete list of assets, interests, and liabilities, values of all where possible, and every possible interest a person might have, whether vested, contingent, beneficial without the power to execute, etc. Any seed that could result in a windfall or change in financial circumstances down the road should be disclosed, and depending on the scope of the potential event, described in the recitals. Perfection is the goal in some cases but not all. However, counsel would be wise to assume the worse, and draft cautiously.

---

[16] *Donnelly v. Weekley*, 2017 BCSC 529.

If the shoe is on a different foot, and ILA is being given about the likelihood of an agreement being set aside, do not look for a schedule and do nothing more. Determine *what* disclosure was made within the *context* of the specific parties to the agreement. Ascertain whether the shortcomings were material enough to matter, particularly if general knowledge exists and there is counsel in place.

(d) Disclosure, after *Schrader v. Schrader*[17]

What happened in *Shrader* (and *Azanchi*) calls for specific attention.

Overview: Appellant challenged an order setting aside a separation agreement under section 93(5) of the FLA for being "significantly unfair", and an order for retroactive spousal support. The Court of Appeal found that the trial judge erred by not calculating retroactive spousal support based on the husband's actual income and instead using the previous year's income. The Court of Appeal did not vary the trial judge's order setting aside the separation agreement, finding that it was significantly unfair per section 93(5). The parties signed a separation agreement by which the wife received $200,000 for her interest in the family residence based on valuations of the property between $600,00-$700,000, but the husband sold the property four months after entering into the agreement for $1.18 million. The Court of Appeal also affirmed the trial judge's correction of a calculation error regarding property division that he made prior to the entry of the trial order.

In *Shrader*, the Court reasoned as follows:

> [37] The judge explained that he had discretion to set aside the property aspects of the Agreement under s. 93(5) if they were "significantly unfair" on consideration of the following three factors, being:
>
> a) The length of time that has passed since the Agreement;
>
> b) The intention of the parties to achieve certainty by making the Agreement;
>
> c) The degree to which the parties relied on the terms of the Agreement.
>
> [See Trial Reasons at para. 98.]
>
> [38] Regarding these factors, the trial judge observed that:
>
> 1) Although nearly three years had passed since the Agreement was made, Ms. Klyne did not realize the potential unfairness of the Agreement until September 2021.
>
> 2) The parties agreed to the Agreement without the benefit of a current appraisal for the Property. If the parties had the Property appraised at the time of the Agreement, they would have found the market value was significantly higher than the $750,000 they relied on in the Agreement. Any certainty achieved through the Agree-

---

[17] *Schrader v. Schrader*, 2025 BCCA 50.

ment disappeared when the foundation for the Agreement (the value of the Property) was found to be inaccurate.

3) The parties performed the property division terms of the Agreement, and the Agreement's unfairness must be balanced against any prejudice Mr. Schrader would suffer by replacing the Agreement with an order. In this case, the prejudice was that he paid for renovations after the Agreement and before the Property was sold.

[39] The judge concluded that the property aspects of the Agreement were significantly unfair and set them aside. He then turned to crafting an order to replace those provisions. The family assets at issue were the Property, the parties' vehicles, and their respective pension plans. The family debts were the mortgage against the Property and a debt incurred to renovate the Property in October 2011.

. . .

[51] *It is true that the trial judge in Azanchi reached a different conclusion on whether an increase in value to the family residence after the parties signed the separation agreement rendered it significantly unfair*. In that case, the judge found that an increase of approximately $600,000 over three years did not amount to significant unfairness, relying on Mr. Azanchi's lack of contribution to the increase in value and his superior cash flow, which mitigated any unfairness by allowing him to accumulate significant savings post-separation: 2019 BCSC 1392 at paras. 128—137. On appeal, this Court did not disturb the exercise of the trial judge's discretion on this point, bearing in mind the deferential standard of review which applies to such decisions.

[52] The question then becomes whether deference should be given to the trial judge's decision in this case.

[53] First, the judge correctly identified the legal framework when he stated that he "[has] discretion to set aside the Agreement under s. 93(5) if it is significantly unfair on consideration of [the factors in s. 93(5)]": Trial Reasons at para. 98. I would add that the "significant unfairness" standard in s. 93(5) of the *FLA* "imposes a more stringent threshold than the mere 'unfairness' test of the *FRA* [*Family Relations Act*, R.S.B.C. 1996, c. 128] to allow unequal division by a court": *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 41. It requires persuasive reasons to depart from the presumption of equal division: *Jaszczewska* at para. 41.

[54] The starting point of the judge's decision on significant unfairness was his conclusion that the market value of the Property was "significantly more than the $750,000 the parties used to establish the property division payment in the Agreement", and that, without the

benefit of a current appraisal, the parties did not know about this discrepancy at the time: Trial Reasons at para. 99. Ultimately, he set aside the Agreement on the basis that *"certainty disappears when the foundation for the Agreement turns out to be inaccurate"*: Trial Reasons at para. 102.

[55] The judge subsequently addressed the prejudice to Mr. Schrader arising from the renovations he paid for after the Agreement. The appraisal report for the Property as of March 29, 2021 applied a negative adjustment of 12% for the presence of the grow operation. To ensure Mr. Schrader received the benefit of the renovations, the judge excluded 12% of the sale proceeds of the Property, or $141,600, from the division of property: Trial Reasons at paras. 104, 127–129.

[56] I can see no error in the starting point of the judge's significant unfairness analysis being the market value of the Property at the time the Agreement was signed. Nor do I find any reviewable error in his consideration of that value in the context of the other evidence which related to the Property's value, both before and after the Agreement. This includes the historical appraisal and in particular the price the Property was sold for in August 2021. These were appropriate benchmarks in the judge's determination of whether the Agreement was significantly unfair.

[57] The judge considered the three factors in s. 93(5), concluded that the Agreement was significantly unfair and should be set aside, and addressed the prejudice to Mr. Schrader by giving him the benefit of the increase in sale price of the Property due to his renovations.

[58] It may have been of assistance for the judge to have additional evidence (for example, statistical evidence) regarding the increase in the Property's value during the four months between when the parties entered into the Agreement and when the Property was sold. This could have assisted the judge in considering whether Ms. Klyne had received a "windfall" due to market forces. However, the judge could only consider the evidence actually adduced, which I have set out above at paragraph 42—namely, that a historical appraisal estimated the value of the Property as $920,000 a few months before the parties entered into the Agreement (assuming the Property contained two marijuana grow operations), and that the sale price of $1.18 million established the actual fair market value (without any grow operation) four months after the Agreement was signed.

[59] *In addition, even if some of the increase in price between May and September of 2021 was due to a "hot" real estate market, this does not mean the judge erred in his conclusion on significant unfairness*. Increases in the price of real estate can be an appropriate factor to take into account when evaluating the fairness of a separation agreement. In

> *Dobson v. Dobson*, 2016 BCSC 1874, aff'd 2017 BCCA 390, the claimant received the entire family home pursuant to a separation agreement. The trial judge found it would be unfair to apply the terms of the separation agreement to the division of property without taking into account the large windfall received by the claimant due to the rise in property values after the agreement was entered into: *Dobson* at para. 350. This case was decided under the *Family Relations Act*, which had a lower standard for unfairness than in the current *FLA*; however, that fact goes to whether market fluctuations will meet the standard for unfairness and not to whether it is appropriate to consider such fluctuations in the unfairness analysis.
>
> [60] *Finally, it was not inconsistent for the judge to find that the Agreement was not the product of common mistake under s. 93(3)(d) of the FLA, but was nevertheless substantially unfair under s. 93(5)*. Although both s. 93(3) and s. 93(5) deal with the enforceability of property division agreements, they are directed at different considerations: s. 93(3) is concerned with procedural fairness during the formation of an agreement, whereas s. 93(5) is concerned with the substantive fairness of an agreement's effects: *S.B.F. v. D.G.F.*, 2022 BCSC 2231 at para. 24; *C.C. v. S.P.R.*, 2023 BCCA 422 at para. 40. *That both parties relied on the same information regarding the value of the Property when entering into the Agreement does not mean the Agreement cannot be significantly unfair because the Property subsequently sold for a much higher price*.
>
> [61] Ultimately, the judge's decision that the change in value of the Property rendered the Agreement significantly unfair is *entitled to deference*. Mr. Schrader has not, in my view, identified a reviewable error that would justify this Court from interfering with his decision. [Emphasis added.]

Drafting Comment: *Schrader*, *Azanchi*, and *Dobson* require, to my mind, the immediate inclusion of standard boilerplate to address the increase or decrease in value of property post-agreement, and which are based in windfall, happenstance or chance, and precluding them from being a basis. Some counsel may go so far (in specific response to *Schrader*) to include, where appraisals evidence, tax assessments, or consent to value are used, specific warrants and representations foreclosing on any future valuation information being the basis for setting aside the agreement.

(e) Duress / Pressure

As set out earlier in this article, the issue of duress and undue pressure (often conflated) has come into closer focus in recent jurisprudence. It was the centerpiece issue in *Rick*. Since then, it has been successfully argued where appropriate but also represents a card that is sometimes played far too quickly on facts that cannot support the play. Moreover, many, many counsel fail to

recognize that the presence of vulnerability is of no moment unless it is acted upon and exploited by the other party.

Obviously, exploitation can be overt or nuanced. If it exists, how is manifests, and — most importantly — *what effect it actually had*, are all matters to be carefully explored before offering an opinion on the viability of the claim.

Hartshorne, *Drummond*, *Sperring*, *Y.L.*, *Lawrence*, and *McAdie* are all good examples of where inappropriate behavior was fatal to an agreement.

The line between "improper advantage" and "duress" is hard to define, but in most cases the behavior will fall under the former: *Azanchi*:

> [39] Mr. Azanchi suggests that he signed the agreement under duress, and says, therefore, that it can be set aside under s. 93(3)(d). I have no doubt that where duress is proven, a court can set aside a family law agreement, though s. 93(3)(b) will often be a more apt statutory basis for doing so than 93(3)(d).

However, even where there are tragic or near-tragic challenges one party may face, it does not automatically follow that an agreement will fall. It all depends how people conduct themselves within that environment. As in *Reiner v. Reiner*:[18]

> [6] I am prepared to accept, however, that in 2018 and 2019 the respondent experienced significant problems in her emotional or mental health, even if the record of evidence is oddly silent concerning their precise nature. On two separate occasions in 2018, the respondent was involuntarily admitted to hospital, the second time for a period of six weeks at a facility in Calgary, AB. I have no idea why. I was given no medical evidence related to either admission. According to the respondent's clinical counsellor, however, these hospitalisations were followed by a lengthy period of emotional turmoil from various causes, including the stress of the respondent's marital breakdown, and the ensuing financial negotiations with the claimant.
>
> [7] The claimant, I find, was fully aware of these difficulties, whatever their nature or source. Notwithstanding my doubts about the quality of the respondent's evidence, I approach the case from the footing that the respondent was in a state of heightened vulnerability throughout the round of offers and counter-offers that resulted in the separation agreement. The questions that I have to deal with are, first of all, whether the claimant exploited the respondent's vulnerability; secondly, whether the claimant failed to disclose significant property or relevant financial information; and lastly, in either case, or both, whether he drove a deal that was unconscionable or significantly unfair.
>
> . . .

---

[18] *Reiner v. Reiner*, 2021 BCSC 1514.

> [9] I have also been shown electronic correspondence exchanged directly between the parties during the relevant period. The impression certainly emerges that the claimant wished to move ahead with a minimum of expense and delay, but this is neither unusual nor objectionable. The respondent's protests that the claimant's conduct amounted to pressure tactics and bullying strike me as overwrought. The claimant's correspondence, though persistent and occasionally condescending, could not be characterised as aggressive, abusive or dishonest. The respondent, for her part, was articulate and determined in stating her case, she gave as good as she got, and she held her own throughout, although I do not doubt that, in common with most family litigants, she found the process stressful, upsetting, and demoralising.

And, as set out in *Donnelly*:

> [121] In any event, whether Ms. Donnelly was vulnerable, or, if so, how vulnerable she was, is only part of the question raised by s. 93(3)(b) of the FLA. What is at issue is whether Mr. Weekley took improper advantage of her vulnerability. As the FLA makes clear, a party who benefits from the other's vulnerability will risk having an agreement set aside only if they take improper advantage of the other's vulnerability. Otherwise, vulnerability of one party would make negotiating an agreement difficult to impossible.

And, in *Bonder*, where substance abuse (very, very heavy substance abuse) was in issue, the Court reasoned:

> [71] Regarding Mr. Bonder's circumstances at the time, I accept his evidence that he was having serious difficulties with substance abuse, depression, and stress. I do not accept, however, that he was incapable of understanding the Separation Documents, or the Separation Agreement. His evidence in that regard was vague and unpersuasive, amounting to him simply saying he was totally incapacitated throughout this time by drugs and alcohol.
>
> [72] There was no expert medical evidence to support his position or any evidence from any supportive witnesses. His father described him as seeming normal while he was living in the basement from October 2010 until January 2011 when he suffered from an overdose. His medical records indicate that he was going through a difficult time, but also indicate him describing his circumstances with clarity and some insight. His own evidence was that, within a few months of signing the Separation Agreement, he obtained his Class 1 driver's licence and worked for the next two to three years in the oil patch.
>
> [73] I accept Ms. Bonder's evidence that, in their discussions about separation terms in the Separation Documents, Mr. Bonder exhibited no difficulty understanding the terms or putting forward his own desires and positions, and that he provided rational input and demonstrated a clear understanding of what they were agreeing to.

> [74] As mentioned, Mr. Bonder's own evidence was that together, for example, they chose the realtor to provide a value for their home, it was he who wanted the testamentary executor removed as a guardian, and the list of possessions included him getting the items that were important to him.
>
> [75] Even if he was vulnerable such that there was a power imbalance in the negotiations, which I find there was not, Ms. Bonder in no way tried to take advantage of him. Counsel for Ms. Bonder acknowledged in final argument that there was no evidence Ms. Bonder in any way pressured Mr. Bonder to sign. I accept that, although she knew he was partying and angry at the time, she believed that he was living with his parents and running Haul All and functioning reasonably well. I accept her evidence that he told her he had sent the Separation Agreement to a lawyer for advice, as recommended in the cover letter. If he did not actually send it to a lawyer and receive advice, that was his own choice.

Drafting Comment: if you act for the "dominant" party, or even a non-dominant party that happens to have a spouse with significant frailties, you would be well-advised to name those frailties in the agreement, and describe the steps taken to address them to achieve procedural fairness.

(f) Other Common Law Bases

Under the FLA, the usual complaint is duress, and sometimes it is terrible and as clear as day: see *Blom v. Blom*,[19] where the peach of a husband confined the wife until she signed and threatened to actively alienate the children for good measure. Not a nice guy.

The doctrine of mistake is rarely alleged at the procedural fairness stages but does come up at the certainty step in the significant unfairness analysis.

[True] Capacity claims are unusual; mostly we see exploited vulnerabilities or duress and which compromise capacity, but not capacity outright as a pre-existing frailty of a party.

McAdie (*infra*, but in any event *McAdie v. McAdie*[20]) is a fascinating outlier where fundamental breach was employed to relieve a party from an [allegedly] unfair agreement because the other party had not performed on portions of it:

> **FUNDAMENTAL BREACH OF CONTRACT**
>
> [55] Having come to the conclusion that the property division under the Separation Agreement ought to be set aside pursuant to s. 93(3)(a),(b), and (c) of the *Family Law Act*, it is not strictly necessary to consider Ms. McAdie's alternative submission that the property division ought to be set aside on that basis of fundamental breach by Mr. McAdie.

---

19 *Blom v. Blom*, 2021 BCSC 181.

20 *McAdie v. McAdie*, 2019 BCSC 578.

[56] Nevertheless, I observe that on the evidence, Mr. McAdie clearly failed to fulfill several of his significant obligations under the contract.

[57] He did not, as required, take out and maintain a $3,000,000 insurance policy on his life with Ms. McAdie named as the beneficiary.

[58] He did not, as required, direct McAdie Ventures to pay Ms. McAdie a total of $140,000. To date, only $44,500 of that amount has been paid.

[59] He did not, as required, fully pay all expenses relating to the mortgage, property taxes, fire and home insurance, and all maintenance and repairs on the Matrimonial Home. As a result, the house had to be sold and Ms. McAdie lost a fundamental benefit to which she was entitled under the contract, namely, her right to live in the Matrimonial Home with the two children until the youngest turned nineteen, married, or became self-supporting.

[60] Moreover, Mr. McAdie's failure to fulfill his obligations cannot be explained by impecuniosity. As just one illustration of the fact that he had discretionary income which he chose not to use in fulfilment of his obligations to Ms. McAdie, Mr. McAdie's credit card statements show that he spent, at Michael Anthony Jewellers in Edmonton, $44,375 on December 4, 2015; $25,000 on April 26, 2016; and $10,477 on June 16, 2016. He testified at trial that the latter two payments were for wedding rings for himself and his new wife. He testified that the payment in December 2015 was not for jewellery, but rather for an investment that went bad. Even if I were to accept that testimony as true, it would still not explain why he chose to make a risky investment of $44,375 at a time when he could have used those funds towards fulfilling his obligations under the Separation Agreement.

[61] Mr. McAdie's failure to fulfil his obligations deprived Ms. McAdie of a fundamental benefit under the Separation Agreement, namely, her right to live in the Matrimonial Home with the children. As the house has been sold, this cannot be remedied by an order for specific performance.

[62] If necessary, therefore, the property division under the Separation Agreement could also be set aside pursuant to s. 93(3)(d) of the Family Law Act, on the basis that Mr. McAdie's fundamental breach is a circumstance that would under common law render the contract voidable.

7. SPOUSAL SUPPORT AND RETIREMENT

Respectfully, the time has come for a fresh look at how we draft for retirement. A series of cases have come out in the last few years that collectively

suggest that it is getting harder to retire. Perhaps this is a function of the recent economic climate. Perhaps it is a natural result of living in one of the most expensive cities in the world. And, although maybe cheeky to say so, perhaps it is a little precocious to demand the right to retire at 63 when standing in front of a 71-year-old judge.

In any event, consider the following recent cases:

(a) *Raschpichler v. Raschpichler*[21]

Issue: Did the judge err in finding ongoing spousal support obligations when the payor retired?

Summary: Held: Appeal dismissed. The judge found that the appellant's retirement was a material change in circumstances before deciding that *no variation* in spousal support was warranted due to an ongoing entitlement to compensatory and non-compensatory support and the appellant's historic underpayment of spousal support. The judge's findings are owed significant deference and are amply supported by the record (from headnote).

Key Passages:

> [18] Of significance to the principal issues on appeal, the judge made two critical findings:
>
> > [21] I accept that [the respondent] has made out a strong case for entitlement to spousal support, both on compensatory and non-compensatory grounds, and that her case for spousal support continues to be a strong one, given the ongoing disparity between the relative means and needs of the parties today. . .. [and]
> >
> > [25] Here, I am satisfied that if the JCC order remains in effect, then there would be, at most, only limited double dipping into [the appellant's] pension earnings. I say this because the pensions from which he is benefitting today were only partially but not entirely divided. Even if there were significant double dipping, the Court held in Boston that it is not always possible to avoid double dipping, particularly where, as here, the rationale for ongoing spousal support persists. In this case, *I am satisfied that [the respondent] continues to suffer from the effects of persistent underpayment of spousal support historically*. [Emphasis added in original.]
>
> [19] The judge considered the appellant's submission that the respondent had made some improvident decisions in the litigation and otherwise, and concluded:
>
> [29] . . .but that is not really the issue. What is important is the present effect of the parties' historical dealings on the relative means and needs of each of them currently. In any event, I accept her submission that at least some of the basis for the agreements

---

[21] *Raschpichler v. Raschpichler*, 2024 BCCA 94.

> that were reached and orders that were made, or not made, flowed from incomplete or inaccurate disclosure by [the appellant] of his actual financial circumstances.

. . .

[35] This case contains certain of the features identified by this Court in *Rozen* where the parties divorced after 20 years of marriage and the husband was ordered to pay spousal support. After approximately 18 years of payments, he brought a variance application seeking termination of support on the basis of the reduction in income from retirement, an inheritance received by his ex-wife as well as her re-partnering.

[36] The chambers judge dismissed the application, holding that the support award was compensatory and entitlement was ongoing. While *Rozen* involved the respondent ex-wife, as opposed to the appellant ex-husband, having received an inheritance and re-partnering (although the respondent on this appeal will likely receive an inheritance of an unknown amount when her elderly mother passes) the framing and analysis of the question by this Court is of assistance here:

> [38] The real question, which encompasses the first three grounds of appeal, is whether the chambers judge erred in concluding that Ms. Rozen had not been adequately compensated for her loss by the receipt of spousal support for 18 years in the low sum she received. It is often difficult to determine when compensation has been achieved. The facts of this case, as found by Chamberlist J. and Bernard J., are sufficient to demonstrate that compensation had not been achieved when taking into account the statutory factors found in s. 17 of the Act:
>
> > (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
> >
> > (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> [39] Ms. Rozen suffered significant disadvantage: giving up her opportunity for further education, full-time work, employment opportunities, reduced salary and pension. Conversely, Mr. Rozen enjoyed significant advantage: the opportunity for further education, focus his efforts on his career, and obtain very high income employment. This occurred as a result of the couple's decisions (i) for Ms. Rozen to work in the early years while Mr. Rozen pursued further qualifications; (ii) to permit Mr. Rozen to pursue his career; (iii) to have three children; and (iv) that Ms. Rozen would work less to be the primary caregiver of the children.
>
> [40] *In my view, applying the high degree of deference in this case, it cannot be said that Bernard J. erred in concluding that Ms. Rozen*

> *had not been compensated to the extent that spousal support should end*. [Emphasis added in original.]
>
> [37] I would reach the same conclusion here. I would add that I do not accept the argument that the judge was effectively awarding retroactive support to the date of the parties' separation in 2007 and/or reapportioning family assets after the fact in the guise of spousal support. In my view, he did no such thing. Rather he recognized the ongoing entitlement to compensatory and non-compensatory support and the material contribution of historic underpayment of spousal support by the appellant to the respondent's circumstances, including the modest equity she has in her home and the accumulation of credit card and other debt over the years.

Comment: None. Straightforward outcome. No new law. Appeal was likely doomed before pen was put to paper.

(b) *Dextraze v. Dextraze*[22]

Issue: Forever support, to be read in conjunction with *Zandbergen*, *infra*, which also dealt with indefinite support, but the outcome of which was very different.

Overview: The parties had a 21-year marriage with children. The husband, aged 75 and retired, paid spousal support under a separation agreement for 30 years. He sought an order terminating support, opposed by the 74-year-old wife. The Court found that the husband's retirement and reduction in income was a material change in circumstances and his decision to wind up his practice was reasonable. The wife argued that the rule of 65 entitled her to indefinite support. The Court disagreed, noting that indefinite did not mean permanent support. The parties had divided assets equally, which provided them with similar incomes. The objectives of spousal support had been met, and support was terminated.

Key *Passages*:

> [113] The claimant submits that by virtue of her age (44 years) and the length of the marriage (21 years) at the time of separation, the "Rule of 65" expressed in the SSAG requires that support be indefinite in this case. I disagree.
>
> . . .
>
> [115] There are many factors that will determine whether a spousal support award should be varied or terminated. To simply say the "Rule of 65" is determinative and requires that support continue indefinitely is problematic for two central reasons. First, the SSAG provide guidance in making appropriate spousal support awards, but they do not, and cannot, replace the discretion of the court in such matters:

---

[22] *Dextraze v. Dextraze*, 2024 BCSC 1544.

> Yemchuk at para. 64. Second, there are many case-specific factors that must be considered in the exercise of that discretion, far beyond the scenario to which the "Rule of 65" is intended to respond.
>
> [116] In terms of duration of spousal support, the "Rule of 65" provides for spousal support of indefinite duration in cases where the years of marriage, plus the age of the support recipient at the time of separation, equals or exceeds 65. This "Rule" is intended to respond to the scenario of an "older" spouse who is economically dependent during a medium-length marriage and may have difficulty becoming self-sufficient, given his or her age: *Venables* at para. 153.
>
> . . .
>
> [124] The respondent has paid the claimant over $650,000 in spousal support over the last three decades. To continue to pay her will require him to utilize his share of their already equalized assets. While this fact, on its own, would not matter if I were to conclude the claimant has not overcome the disadvantage arising from their relationship or that she continues to need additional support to maintain herself, I do not conclude either of these things.
>
> [125] Rather, I conclude that the objectives underlying the claimant's very modest compensatory support claim have long been satisfied, and that the objectives underlying her stronger needs-based claim are now satisfied as well.

(c) *Zandbergen v. Craig*[23]

Issue: Termination of support after the payor had paid long after the maximum duration under the SSAGs. It was further argued that the circumstances of the recipient were independent of the marriage and disadvantaged from its breakdown. In this case, the inability of the recipient to achieve any kind of self-sufficiency ran so deep that the consequences of the breakdown were essentially without end.

Overview: The SSAGs do not determine whether the objectives of spousal support are met. The factual circumstances do.

Key Passages:

> [33] The underlying facts in *Townsend* bear some resemblance to the facts of this case. Following a trial in 2002, the appellant Mr. Townsend was ordered to pay spousal support on an indefinite basis. As described by McCreary J.A. (at para. 7), the trial judge identified a number of factors supporting the award, including Ms. Townsend's medical condition that limited her ability to work. The trial judge said this

---

[23] *Zandbergen v. Craig*, 2024 BCCA 278.

> about the indefinite duration of the spousal support order (cited at para. 8 of the CA reasons):
>
> [96] A review of the jurisprudence indicates that in situations where it is unlikely a spouse will ever achieve economic self-sufficiency and/or in situations where the marriage has created an economic dependency, a time-limited support order should not be awarded. This is the situation in this case. Accordingly, I believe an indefinite order is appropriate. If either party's circumstances change significantly it is always open to them to bring an application for variation. . .
>
> . . .
>
> [39] In my respectful view, Mr. Zandbergen's argument in this appeal is similarly flawed. His position that his support obligation must end because he has paid spousal support in excess of the duration contemplated by the SSAG ignores the fact that Ms. Craig's entitlement to spousal support was established by way of the 2009 Order and was subsequently confirmed in the Smith Order. As noted above, Smith J. found that Ms. Craig had no reasonable prospect of obtaining employment or becoming self-sufficient and, accordingly, he ordered spousal support for an indefinite period. In coming to this conclusion, Smith J. expressly rejected Mr. Zandbergen's request that he set a specific end date for the payment of support (Smith Reasons at paras. 64—69, reproduced above at para. 11).

(d) *Eldridge v. Eldridge*[24]

In *Edridge*, the arbitrator was presented with an agreement that established a right of review at age 65 (of the payor). Prior to that age, a review was brought on other grounds. However, in light of the age provision, a future award was crafted. This was one of several errors the chambers judge, and then Court of Appeal, identified.

Drafting Comments: the lay of the land of what is "reasonable retirement" has changed, and using retirement as a basis for an end date is not what it once was. Counsel should put more attention and detail into retirement terms, including connecting it directly and inexorably to the concepts of certainty and reliance.

8. SPOUSAL SUPPORT: LESSONS FROM *ROESKE* AND *COHOON*

Two recent decisions from the BCCA are excellent examples of why you simply must draft clearly and not make "everyone knows that" assumptions.

In *Roeske*, everyone "knew" super short marriages result in super short support awards. Guess again.

---

[24] *Eldridge v. Eldridge*, 2024 BCCA 21.

In *Cohoon*, everyone "knew" that long marriages, a team approach to life with sacrifices aplenty, and delayed career ambitions resulted in compensatory claims. Yeah, not so much.

Be careful with what you presume "everyone knows"

(a) *Roeske v. Roeske*[25]

Issue: In the context of a short marriage of four years that produced a child, and on the issue of spousal support, did the trial judge make the following errors:

(a) failing to base his award for retroactive support on the reasoning behind an interim order made by a (then) Master of the Court;
(b) not imputing income to a spouse and misapprehending the evidence regarding her ability to earn an income;
(c) ordering future spousal support for an indefinite duration; and
(d) including the appellant's post-separation increases of income in the calculation of spousal support.

Summary: Appeal dismissed; application for fresh evidence also dismissed. Using the same subparagraphs above for ease of reference the court found that:

(a) No basis of appeal;
(b) No basis of appeal;
(c) No basis of appeal but with interesting analysis about duration in short marriages with children; and
(d) No basis of appeal.

Key Passages:

On indefinite awards after short marriages with children:

> [70] The RUG[26] Commentary in chapter 8(n) "Short marriages, young children" may well be of assistance in situations where parents share custody or co-parent.
>
> [71] In his factum Mr. Roeske submits that the judge "fails to explain how [the cited passage] applies, given that [it relates] to recipients with primary care of the children, as opposed to this situation of shared parenting".
>
> [72] The "with child support" formula under chapter 8 of the RUG is comprised of a grouping of six formulas. One of these is the basic formula, involving a lower-income parent with primary care: Ch. 8(e). Another is the shared custody formula: Ch. 8(f).
>
> [73] After reviewing these formulas, the RUG discusses the special problem which arises regarding the duration of support in short marriages involving young children: Ch. 8(n). In my view, this section (at 44) may well be a relevant consideration to "with child support"

---

[25] *Roeske v. Roeske*, 2023 BCCA 358.

[26] SSAG *Revised User's Guide*.

> formula cases, including those involving shared custody or parenting as is seen by the excerpt from the RUG quoted at para. 65 above.
>
> [74] I would add that chapter 8(n) of the RUG specifies that the "vast majority" of support orders involving short marriages and young children "should be 'indefinite (duration not specified)'", often with a review required: at 44. In my view, this is consistent with the shared custody formula, under which all initial orders should be indefinite.

And on the caution about reviews from *Leskun*:

> [90] It is also evident from the passages of the RUG to which the judge referred that while post-*Leskun* reviews were generally considered to be the exception rather than the rule, that landscape has changed in the fifteen years that have elapsed post-*Leskun*. This is seen, for example, in the RUG commentary at chapter 8(n): "often a review will be required in these indefinite orders".

Finally, on the issue of post-separation increases in income after a short marriage:

> [96] The judge's analysis of this issue is set out at paras. 87–89 of the Reasons quoted at para. 54 above.
>
> [97] In my view the judge's conclusions and his reference to the RUG are subject to a deferential standard of review absent palpable and overriding error.

Paragraphs 87-89 stated:

> [87] The respondent argues that his post-separation increase in income should not factor into the spousal support assessment. As noted in the RUG at 82, this is an issue that usually comes up at the variation and review stages, after the initial order.
>
> [88] I have no difficulty concluding that, at this stage, in respect of the respondent's 2021 income and for ongoing spousal support purposes, the respondent's post-separation increase in income should be taken into account. Currently there remains a link or connection between his current career success and the marriage. During the marriage he continued to progress in his successful career. He was recruited to join Sauce Labs during the marriage. Later he was recruited to join Spin. As noted, the steady upward trajectory of this career was not impeded by parenting, thanks in part to the claimant.
>
> [89] Fairness is another factor. The respondent, naturally, contends that the claimant's current income should be taken into account.

Comment: Several helpful things come from this judgment:

1) The analysis of the SSAGs in a shared parenting situation;
2) The rejection, or muting, of the *Leskun* warnings about reviews; and

3) The concept, in a short marriage scenario, that some characteristics of a compensatory claim and/or causal connection link between the marriage and post-separation increases in income, that the avoidance of a suspension of trajectory will suffice.

(b) *Cohoon v. Stobo*[27]

Issue: Was the spouse entitled to compensatory support?

Basic Facts: Twenty-four-year relationship. One child; grown. Parties were both approximately 50 at the time of trial. Mr. C worked in the film industry and incorporated a small rental equipment company through which to run that work. Ms. S stayed home for the child in the early years. She then went back to school to train as a midwife and did that work through her own small company. She then changed gears, got an MBA, and at trial had just accepted a position with a financial company.

The TJ found that Mr. C's work hours were "punishing" and that Ms. S had facilitated his ability to do that work. She found that by the end of the marriage the parties were on generally equal footing, but that Mr. C would not have been able to achieve his success without Ms. S's sacrifices.

At trial Mr. C's income was $200K and Ms. S's $100K.

The TJ found a compensatory claim and ordered indefinite support subject to review.

Summary: Regarding the compensatory support issue, though aspects of the judge's findings were either inaccurate or failed to recognize other relevant evidence, they did not amount to a misapprehension of the evidence. However, the judge's conclusion that the appellant would not have achieved success in his chosen field without the respondent's contributions, expressed the legal issue before the judge too narrowly. The judge should have inquired further about the economic consequences of the parties' respective contributions during the marriage. The judge erred in failing to consider the parties' mutual conferral of benefits, and where the parties stood in economic terms at the time of their separation. In the circumstances of this case, there was no basis for the judge's compensatory support order. Accordingly, the appeal of the spousal support order is allowed, and the cross-appeal seeking to increase the amount of spousal support is dismissed (from headnote).

Key Passages:

> [49] The assistance Ms. Stobo provided to Mr. Cohoon for a period of time early in their marriage was capable, in concept, of grounding an entitlement to compensatory spousal support. That assistance, together with the length of the marriage, gave rise to a "prima facie" compensatory claim: *Zacharias* at para. 50.

---

[27] *Cohoon v. Stobo*, 2023 BCCA 479.

[50] However, the judge was required to do more before she could find that an actual entitlement to compensatory support was established. As I observed earlier, compensatory claims can be established on the basis of sacrifices made by one spouse that create some form of diminished earning capacity on the part of that spouse, or by virtue of some benefit that has been conferred on the other spouse that will, absent compensation, exclusively benefit that spouse. However, not every sacrifice by one spouse or advantage conferred on another spouse leads to a compensatory support award. The judge's core conclusion, that Ms. Stobo's compensatory claim was made out because Mr. Cohoon "would have been unable to achieve the substantial success he [had] achieved in the film industry were it not for the contributions of Ms. Stobo", was too narrow. A more searching enquiry and analysis of the economic consequences of the parties' respective contributions was required. Respectfully, in my view, the judge erred when she failed to engage in that further enquiry. In this case, the judge should have asked whether these parties, who had both built successful careers in the areas of their choosing, continued to suffer any residual economic disadvantage, or enjoy a corresponding advantage, that warranted compensation.

. . .

[59] There was no evidence that Mr. Cohoon received any additional economic benefit from being able to establish his career before Ms. Stobo established hers. Nor was their any evidence that Ms. Stobo would have been in a different economic position had she obtained her professional qualifications a few years earlier. Either of these circumstances might well have shifted Ms. Stobo's "prima facie" claim for compensatory support to an actual entitlement to such support.

. . .

[64] What, then, were the parties' likely standards of living as they left the marriage? As noted, the judge determined that Ms. Stobo's non-compensatory claim was weak. Specifically, she said:

> [84] Ms. Stobo's entitlement on non-compensatory grounds is somewhat harder to discern in this case than in other long marriages, in part because the parties lived so far beyond their means, that the marital standard, while lavish, was unsustainable for both parties. Put another way, Ms. Stobo can no longer afford the lifestyle she enjoyed with Mr. Cohoon, but neither Ms. Stobo nor Mr. Cohoon could afford that lifestyle while they were enjoying it. Both parties are now left in a state of relative financial precariousness. I do not find that Ms. Stobo is particularly economically disadvantaged by the breakdown of the marriage and

> therefore I find that her entitlement on non-compensatory grounds is weak.
>
> . . .
>
> [75] The evidence I have referred to indicates that compensation for Ms. Stobo was, in a sense, "achieved" during the marriage. This was so through the division of the parties' family property and their respective Guideline incomes. I have emphasized the "general" nature of these principles because there will be cases where some different measure of support is appropriate: *Zacharias* at para. 57.
>
> [76] In my view, this rough equivalency in the parties' ongoing ability to maintain their respective standards of living was, in the circumstances of this case, inconsistent with the compensatory spousal support order made by the judge. In my view, that spousal support order should be set aside.

Comment: respectfully, the Court ought to have left well enough alone, and paragraph 75 won't fully mitigate the problems this case may cause. The Court often refers to the principle that they ought not supplant their views with that the of the trial judge but in this case did exactly that. And to get there, the Court rides on the edges of spousal support principles without pointing at one clear pillar principle that is dispositive of an error at law. The Court says there ought to have been a "more searching enquiry"; there is an interpretation of this case that suggests that simply means a different view of the facts. Notwithstanding the Court's reference to *Swales* and the "stringent" approach to misapprehension of facts, the Court found its own interpretation of the evidence.

On the issue of "economic consequence" the Court focussed on the wife's lack of disadvantage but then brushed away the husband's on the basis of speculative reduction in income down the road and which was not, it seems, in evidence as something expected to come to pass. In any event, if that came to pass it could be dealt with by way of review.

In the end, the Court simply didn't like the outcome. And found a way to engineer another.

It is not clear how the concept of "merger over time" played here. It is hard to find if it was employed at all.

To be clear, I don't think that *either* the trial judge's or the Court of Appeal's dispositions were unavailable on the facts. Both were. The concern is the rewriting of a fact-specific finding by a judge on razor's edge facts to arrive at a preferred outcome.

Drafting Comment: You just can't assume. So, take the time to put four or five more nails down when securing your support provisions. That can be through heavier and more detailed recitals, terms for review, or taking control of the defining of the facts which is a step further in recitals.

9. UNFAIRNESS, AFTER *BRADLEY*

Issue: The release of *Bradley* was, to me, a relief. Many of us were fairly concerned that, if the trial decision held, it would mean that *no* agreement under the FRA could ever be found to be unfair due to the increase in value of the excluded property under the agreement. The case turned on contributions (the wife's role, including indirect contributions towards child rearing).

Overview: The judge erred in determining the parties' marriage agreement operated fairly. He improperly applied the factors for determining whether a marriage agreement is fair, overlooked the appellant's indirect contributions to the growth of corporate assets held by the respondent, and incorrectly concluded the enormous growth in those assets was reasonably contemplated by the parties at the time of the agreement. The agreement was not fair because it allowed the respondent to keep all the increased value in corporate assets despite the appellant's contributions to their growth over a 17-year marriage.

As set out in the reasons:

> 101 Yet, the question is not whether a well-negotiated agreement was fair at the time it was entered. The question, rather, is the extent to which the "unimpeachably negotiated agreement" contemplated the situation at the time of the triggering event: Hartshorne at para. 43, citing *Miglin* at para. 89. Having legal counsel at the time a marriage agreement is formed does not guarantee fairness when the marriage breaks down: see e.g., *H.S.S.* at paras. 7, 62; *Guivian* at paras. 44-45.
>
> 102 As discussed above, the extent to which the exponential growth in the Argus Group was unexpected is reflected in the agreement itself. Had the parties anticipated such extraordinary growth, the agreement's provisions regarding spousal and child support presumably would have reflected those considerations.
>
> 103 On the question of the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation at marriage breakdown, as noted, the parties simply could not have reasonably contemplated all that unfolded during their lengthy marriage. Less deference is therefore owed to what the parties understood to be a fair division of property at the time the agreement was made.

One of the main questions that arises in the aftermath of *Bradley* is what might have happened were the agreement a FLA agreement. I argue it would probably have stood, but on lower end odds, say 60-70 percent likelihood. The playing field is simply different under the new legal regime. For example, in *S.B.F. v. D.G.F.*,[28] people were held to the following:

---

[28] *S.B.F. v. D.G.F.*, 2022 BCSC 2231.

[97] Apart from the s. 93(5) factors, Ms. F. argues that the Court can still find the agreement to be substantially unfair, as it deviates significantly from what she is entitled to under the provisions of the *FLA*. I disagree. While this was a consideration under the *Family Relations Act*, R.S.B.C. 1996, c. 128 [*FRA*], it only becomes relevant under the *FLA* if the agreement is found to be procedurally unfair.

[98] Harvey J. explained this difference between the *FRA* and the *FLA* in *Asselin* as follows:

> The Legal Test under S. 93
>
> [124] Seemingly, *the proclamation and bringing into force of the Act heralds a new age for property division in the province of British Columbia. The tenor of the new Act appears to favour a less interventionist approach than its predecessor, the FRA*.
>
> [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. [Emphasis added.]

[99] Section 92 of the *FLA* specifically permits parties to structure their division of property in ways that are unequal:

> 92. Despite any provision of this Part but subject to section 93 [*setting aside agreements respecting property division*], spouses may

> make agreements respecting the division of property and debt, including agreements to do one or more of the following:
>
> (a) divide family property or family debt, or both, and do so equally or unequally;
>
> (b) include as family property or family debt items of property or debt that would not otherwise be included;
>
> (c) exclude as family property or family debt items of property or debt that would otherwise be included;
>
> (d) value family property or family debt differently than it would be valued under section 87 [*valuing family property and family debt*].
>
> [100] Having regard to the law and all of the evidence, I am not satisfied that Ms. F. has demonstrated that the agreement is operationally unfair as it relates to the division of property.

Applying the *Hartshorne* test, *Bradley* had to come out the way it did. Otherwise, there was no level of increase that might ever qualify as unfair. However, if they were under the FLA:

- Both parties had advice;
- There was no evidence of a power imbalance;
- It is possible that a different division might have deferred to the findings of fact of the trial judge on what the parties' could have reasonably foreseen;
- The duration was in the wife's favour; but
- Certainty and reliance were clearly in the husband's; and
- In the end she still got several million dollars of family property and significant spousal support.

So, would her losing out on the $100M + increase in value — when she knew what she was signing and would be a millionaire herself at the end — been enough to call it significantly unfair. In this new jurisdictional environment? Maybe. But I think on balance, not.

So, what could Mr. Callahan have done differently in the agreement were it being written today?

Drafting Tips on a *Bradley* Fact Pattern going forward, considering the test(s)

Stage	Issue	Drafting
Procedural Unfairness	Disclosure	• Draft clearly to include all possible interests • Directly note invitations made for further due diligence • Include disclosure of potential future upsides • Tie disclosure to ILA, and seek express agreement that the disclosure is full and complete and that no party will assert vulnerability or lack of certainty as a result.
	Imp. Adv.	• Include a recital that: o No vulnerability exists; o If it does (whether addressed or not) that the presence of accounting and legal professionals (name them) has been used to answer all concerns and ensure both parties warrant to this.
	N & C	• Include not just confirmation that each party is aware of the needs and consequences but also including foreseen possibilities of future outcomes and which would specifically contemplate a stratospheric increase to one party.
	CL	• Ensure performance, even after complaint from the other party. Don't hit the pause button.
Significant Unfairness	Length	• Assuming there is a joint property regime of some kind in place for the hiving of certain property into the family pool, include "steps" in the agreement built on milestones whether years, birth of children, etc. Sacrifice a percentage of protected property to protect the larger sums.
	Certainty	• Lay track. Refer at the outset to the importance of certainty. Explain why it is important.
	Reliance	• Key. Again, explain the context in the *individual* case at the outset. Then, lay track. Ask the client to keep copies of key business/financial transactions over the years and have them be able to explain why they did were able to do what they did. • Consider (strongly) having "reliance" addendums drafted at each uptick stage.

10. TRACING, AFTER *MILLS*

(a) *Mills v. O'Connor*[29]

Issue: *Mills* is an important case for two reasons. It is the Court of Appeal's first comment on the issue of tracing and valuing excluded property. Further, the

[29] *Mills v. O'Connor*, 2025 BCCA 34.

Court follows itself in *Healey v. Healey*,[30] in finding that excluded property could be considered under section 95(2)(i).

On tracing, the court concluded that the first in, first out, approach (followed almost universally in the practice since 2013) was wrong and could only apply in rare circumstances on the simplest of fact patterns Instead, the Court concluded that where there was comingling of property (and which seems to be almost unavoidable given that any increase in value is to be considered a contribution comingle with the excluded property) then a pro rata approach must be followed. The Court identified two ways to apply this:

1) The *pro-rata ex post facto* approach (which does not contemplate or account for fluctuations in value over time or the timing of contributions); and
2) *Pro-rata* applying the lowest intermediate balance rule (LIBR).

The Court concluded that while the second approach was more accurate, it was expensive and complicated and for those reasons, would be used only in specific circumstances. Otherwise, the *pro-rata ex post facto* approach should be the default.

There are problems, respectfully, with the reasoning in the decision:

1) It is not clear what "comingling" means, and how complicated things will need to be to justify pro-rata;
2) *Mills* considered contributions as part of the significant unfairness test, further introducing old FRA principles into a property division regime which was intended to put them to bed.

Drafting Tips: to avoid unnecessary legal fees, avoid disputes, and streamline matters, choose your own adventure. Consider having different tracing formulae apply different classes of assets if that makes sense.

11. EXCLUSIONS AND FAMILY PROPERTY, AFTER *MILLS* AND *HEALEY*

(a) *Healey v. Healey*[31]

Issue: Division of Excluded Property / Reapportionment of family property. In this judgment, the Court of Appeal, for the first time, recognized under the catch of section 95 (95(2)(i)) that the existence of excluded property in the hands of one spouse was a relevant consideration in considering reapportionment in the hands of the other. Read in conjunction with *Mills*, *supra*.

Overview: The judge erred in principle in his approach to the appellant's claim for unequal division of family property in failing to consider: (1) the parties' post-separation circumstances on a notional equal division of family property; (2) whether the objectives of spousal support had been met; and (3) the

---

[30] *Healey v. Healey*, 2024 BCCA 68.

[31] *Healey v. Healey*, 2024 BCCA 68.

respondent's significant excluded property, which was related to the economic circumstances of the spousal relationship. An unequal division of family property is ordered, with the result that the respondent is required to pay $1 million in compensation to the appellant.

(b) *Mills v. O'Connor*[32]

Overview: The parties agreed that the trial judge made an error of fact in failing to identify and apportion a substantial amount of family property available for division. The judge made reviewable errors in finding there was no family property available for division, and in her tracing analysis resulting in a substantial overvaluation of the appellant's excluded property. The proper approach to excluded property should recognize that, by operation of the FLA, the increase in value of the excluded property is family property intermingled with excluded property, and the exclusion must be traced as through an intermingling of funds on a pro rata basis. The Court of Appeal varied the valuation of the appellant's excluded property and made an award for division of family property, including reapportionment in the cross-appellant's favour. The Court did not vary the child support.

(c) The Exclusions Issue

As set out in *Healey*:

> [73] The judge did not consider these post-separation circumstances. He did not reference the fact that, on equal division of family property, the respondent would be left with over $16 million in assets, while the appellant would be left with $2.25 million. Since the judge did not undertake this analysis, he also did not consider whether it would be significantly unfair to divide family property equally, having regard to the factors listed in s. 95(2) and (3) of the FLA, when the result is to leave the parties in such vastly different financial positions following a 21-year marriage that involved an economic partnership and engaged the parties in the joint enterprise of raising children.
>
> . . .
>
> [76] The judge also failed to consider the relevance of the substantial value of the respondent's excluded property to the analysis under s. 95(2)(i) ("any other factor") and s. 95(3) of the FLA. The respondent emphasizes that, under the property regime created by the FLA, it is presumptively fair that the appellant should not share in his excluded property: *Venables v. Venables*, 2019 BCCA 281 at para. 87. He cites *Cook v. Cook*, 2021 BCCA 194 at para. 50 for the proposition that financial disparity alone, unrelated to the economic characteristics of a relationship, does not justify a departure from the usual rule of equal

---

[32] *Mills v. O'Connor*, 2025 BCCA 34.

division of family property. These principles are uncontroversial. However, they do not, in my view, operate to defeat the appellant's claim for an unequal division of family property in the circumstances of this case.

[77] The facts of *Cook* are instructive. In that case, the parties' 36-year marriage ended at a time after they had both retired from their long-term careers. The parties were similarly-situated after separation as retired persons receiving comparable pension income, having divided their family property equally. The only disparity between them consisted of the husband's receipt of an inheritance, shortly before the parties separated, that left him with $557,350 more than his former spouse. Justice Willcock, for the Court, stated that this financial advantage alone, which was unrelated to the economic characteristics of the spousal relationship, did not justify an unequal division: at para. 50. He then stated:

> [50] . . .*Unless necessary to give effect to an order for compensatory support*, neither the unequal division of family property, nor the division of excluded assets, was called for by the Act. [Emphasis added in original.]

[78] The reference to compensatory support in this paragraph related to the trial judge's finding in *Cook* that the wife was entitled to spousal support on the compensatory ground alone. On appeal, this Court noted that s. 95(3) of the FLA contemplates orders for the division of property where the objectives of spousal support are not met by a support order. However, the Court found that the trial judge had erred in his determination that the wife was entitled to compensatory support. Thus, reapportionment could not be justified under s. 95(3).

[79] The circumstances of the present case are fundamentally different. First, unlike *Cook*, the respondent's excluded property is not unrelated to the economic circumstances of the spousal relationship. The respondent routinely used income and assets from Alco throughout the marriage to cover family expenses, including the purchase of the Family Home. After he began to receive the monthly payment from KFD in May 2016, these funds were also used to cover family expenses. Therefore, the respondent's excluded assets, particularly the Alco assets, helped maintain the marital standard of living. The appellant's evidence at trial was that she had relied on the respondent to plan and save for their retirement. The respondent confirmed in his evidence that he anticipated that money to fund the parties' retirement would, at least in part, come from investments he had in Alco. With the respondent's encouragement, the appellant's primary job during the marriage was in the home, caring for the children and household. She pursued limited career opportunities during the marriage. She did not concern herself with having a pension or RRSP savings that would provide financial security in her retirement. In these circumstances, the respondent's

> excluded property does relate to the "economic characteristics of [the] spousal relationship", and thus was a relevant factor under s. 95(2)(i) of the FLA. See also *Polard* at paras. 23–30.
>
> [80] Second, and relatedly, in this case, unlike *Cook*, there is no question that the appellant is entitled to spousal support on both compensatory and non-compensatory grounds. Thus, s. 95(3) of the FLA is relevant to the appellant's claim for unequal division, but was not addressed by the judge. As the appellant emphasizes, the order the judge made for periodic support is insufficient to cover her monthly expenses, let alone address her lack of financial stability and impaired ability to achieve economic self-sufficiency, which is an objective of spousal support. Under the property division ordered by the judge, the respondent will effectively be able to maintain the marital standard of living, while the appellant's standard of living will suffer a significant decline.
>
> [81] It is worth emphasizing that economic self-sufficiency is a relative concept. It is to be assessed by reference to "the economic partnership the parties enjoyed and could sustain during cohabitation, and that they can reasonably anticipate after separation": *Fisher v. Fisher*, 2008 ONCA 11 at para. 53. Where one spouse is primarily responsible for the care of the children during the marriage, they may be left without the resources, or the ability to acquire the resources, that are necessary to their financial independence. This imbalance flows from the economic consequences of the spousal relationship. One way the imbalance can be rectified is through a reapportionment of family property under s. 95 of the FLA
>
> [82] The respondent argues that accounting for the appellant's excluded property in this way undermines the FLA's property regime, and its express recognition of the fairness of one spouse owning their excluded property. I do not agree. At the risk of repetition, as held in *Cook*, financial disparity alone, unrelated to the economic characteristics of a relationship, does not justify a departure from the usual rule of equal division of family property. However, where financial disparity is related to the economic characteristics of a relationship, it is appropriately considered under s. 95(2)(i) of the FLA as a factor relevant to a claim for unequal division of family property. Evidence of the relative condition, means and needs of the parties, which may include a spouse's ownership of significant excluded property, is also relevant to the analysis required by s. 95(3) of the FLA. It does not undermine the FLA to consider excluded property in the division of family property when the provisions of the FLA call for such consideration.

As set out in *Mills*:

> On the issue of reapportionment, the Court follows *Healey* and again introduces the concept of excluded property into the analysis under section

95(2)(i) when it was open to the legislature — twice — to choose to include such an obvious factor and elected to not do so.

In the end, following the Legislature's May 2023 tightening of the excluded property regime, this decision, and the combined effect of *Healey* and *Mills* on reapportionment, represents a new and far-reaching element of uncertainty, just when we all thought things would become clearer. It is, respectfully, profoundly frustrating that the excluded property regime — even when it is at times arbitrary on an individual basis, but which is a small cost for broad certainty — cannot be simply left alone. One state of confusion was fixed, and no sooner than it had, a new one took its place. And, at seemingly every opportunity it can, the Court of Appeal finds ways to either reintroduce contributions and ordinary use, or give them outsized roles in what was supposed to be an environment where they were to be "much constrained".

Key Passages:

> [63] Since the parties agree that $3,084,542.63 is the amount of the family property in issue, having identified that amount, the trial judge ought next to have determined whether any part of that sum represented excluded property within the meaning of s. 85 of the FLA (including by conducting an appropriate tracing analysis), before proceeding to consider whether family property should be divided unequally and whether, if necessary, there should be a division of excluded property.
>
> [64] Instead, the judge's analysis was grounded on the erroneous premise that the family property in issue was limited to the amount of the Trust Funds. This sum exceeds, by approximately $15,000, the value of Mr. Mills' exclusion relating to the Bellevue Property. The judge did not conduct a s. 95 analysis relating to the division of this $15,000, and her basis for not doing so is not readily disclosed by her reasons. It is possible that since Mr. Mills was advancing an excluded property claim in excess of the amount of the Trust Funds (relating to the Bellevue Property, inherited cash and securities, and his portion of the contents insurance proceeds), the judge determined that the question of property division would have to be considered exclusively under s. 96. However, after initially noting that Mr. Mills had inherited cash and securities as well as his portion of the contents insurance proceeds, the judge never returned to these claimed exclusions in her analysis. I observe that the amount of the inherited cash itself was said by Mr. Mills to be $137,112.23, a significant sum. Instead, she focussed entirely on Mr. Mills' exclusion relating to the Bellevue Property. Paragraph 6 of the trial order, furthermore, made it clear that the judge considered the Trust Funds to be synonymous with Mr. Mills' excluded property claim in relation to the Bellevue Property. Her basis for proceeding in this way is difficult to discern, impeding meaningful appellate review of her reasons for judgment: F.H. v. McDougall, 2008 SCC 53 at paras. 97–100.

. . .

[92] In conducting her tracing analysis, the judge does not appear to have adopted either a pro rata ex post facto approach or a pro rata approach guided by LIBR. She reasoned that because there would have been no Monck Park Property without the Bellevue Property, the portion of the Trust Funds traceable to the Bellevue Property corresponded to the undiminished value of the Bellevue Property.

[93] This approach is most similar to the rule in Clayton's Case (which has been generally rejected in Canada, though it may retain some applicability in the interests of justice on a case-by-case basis) because Mr. Mills' exclusion was treated on a "first in, first out" basis. At para. 161, the judge describes the tracing analysis in terms of following a metaphorical "bouncing ball" through to the endpoint of a series of transactions, in this case along a trajectory beginning with Mr. Mills' inheritance of the Bellevue Property. Presumably, if the judge had correctly apprehended the full extent of family property, the "bouncing ball" would have carried through, unmodified, to establish a $1,850,000 exclusion out of the more than $3,000,000 of family property available for division. This is a paradigmatic example of a "first in, first out" approach to tracing, which treats excluded property more favourably than family property. As I will explain, the principles set out in the FLA require that family and excluded property be treated in an equal way that does not prefer either category over the other.

. . .

[98] It is true that there is no 'one size fits all' approach to tracing in the family property context. However, in my view, it would be an error of law to adopt an approach to tracing that ignores the FLA's clear instructions that increases in the value of excluded property are to be considered family property and, as such, presumptively divided equally (s. 84(2)(g)); that spouses are equally entitled to family property and equally responsible for the payment of family debt (s. 81); and that a party claiming that property is excluded is responsible for demonstrating that: s. 85(2).

[99] In summary, I conclude that it is appropriate, and in keeping with the requirements of the FLA, generally to approach the exercise of tracing excluded property through a co-mingling of family and excluded property on a pro rata basis. However, I also acknowledge that different methods of tracing may be appropriate, on occasion, in order to arrive at a division of property that is fairest in the particular circumstances of a case.

. . .

> [102] It remains to be considered whether tracing should be assessed pro rata based on the ex post facto or LIBR approach. The judge's reasons offer no guidance on this point, nor does the FLA itself. In her factum, Ms. O'Connor appears to suggest that the ex post facto approach is appropriate. I agree. To conduct a LIBR-based analysis in the circumstances of this case would necessitate a detailed consideration of essentially every transaction the parties conducted, over the course of many years, involving family property bearing a traceable connection to the original value of Mr. Mills' excluded property. There is nothing in the record to suggest that this would be possible, let alone practical from a logistical and cost- based standpoint: T.D. at para. 37. More importantly, as I noted above, the FLA does not generally call for a valuation of family property that is sensitive to fluctuations in value and transactions occurring during the spousal relationship: Zellweger at para. 48. In respect of Mr. Mills' excluded property claim, the relevant dates are the date of Mr. Mills' inheritance and the date of trial, that is, when family property was to be valued: Zellweger at para. 48. This is consistent with the pro rata ex post facto approach, which considers the proportionate contributions against the total amount remaining for distribution.
>
> [103] However, to conduct a pro rata ex post facto analysis properly and completely, it is necessary to consider other contributions that might diminish the proportion of an intermixture that can be traced to a particular contribution. This is to be distinguished from the application of LIBR in that the timing, or order, of the contributions is immaterial; what matters is simply how many contributions there were, for how much, and what remains for division at the relevant time.

Drafting Tips: it is important to now begin to draft in response to *Mills* and *Healey*. Counsel need to put their minds to the concept of "ordinary use" of excluded property, coupled with express terms that excluded property will never be considered, either for division, or as a basis for reapportionment under section 95(2)(i).

12. THE JURISDICTION TRAP

It has come to our attention that in the family law context particularly, the courts appear hostile to any choice of jurisdiction clauses that are not drafted with near perfect precision. Any flaw represents a possibility that you will retain an advantage to expected to enjoy. The general principles which apply in forum selection clause analysis are:[33]

> [24] Forum selection clauses serve a valuable purpose. This Court has recognized that they "are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order

---

[33] *Douez v. Facebook, Inc.*, 2017 CSC 33, 2017 SCC 33 (S.C.C.).

and fairness, which are critical components of private international law" (*Pompey*, at para. 20). Forum selection clauses are commonly used and regularly enforced.

[25] That said, forum selection clauses divert public adjudication of matters out of the provinces, and court adjudication in each province is a public good. Courts are not merely "law-making and applying venues"; they are institutions of "public norm generation and legitimation, which guide the formation and understanding of relationships in pluralistic and democratic societies" (T. C. W. Farrow, *Civil Justice, Privatization, and Democracy* (2014), at p. 41). Everyone has a right to bring claims before the courts, and these courts have an obligation to hear and determine these matters.

[26] Thus, forum selection clauses do not just affect the parties to the contract. They implicate the court as well, and with it, the court's obligation to hear matters that are properly before it. In this way, forum selection clauses are a "unique category of contracts" (M. Pavlovi, "*Contracting out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts*" (2016), 62 McGill L.J. 389, at p. 396).

[27] Of course, parties are generally held to their bargain and are bound by the enforceable terms of their contract. However, because forum selection clauses encroach on the public sphere of adjudication, Canadian courts do not simply enforce them like any other clause. In common law provinces, a forum selection clause cannot bind a court or interfere with a court's jurisdiction. As the English Court of Appeal recognized long ago, "no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them" (*The Fehmarn*, [1958] 1 All E.R. 333, at p. 335).

[28] Instead, where no legislation overrides the clause, courts apply a two-step approach to determine whether to enforce a forum selection clause and stay an action brought contrary to it (*Pompey*, at para. 39). At the first step, the party seeking a stay based on the forum selection clause must establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court" (*Preymann v. Ayus Technology Corp.*, 2012 BCCA 30, 32 B.C.L.R. (5th) 391, at para. 43; see also *Hudye Farms*, at para. 12, and Pompey, at para. 39). At this step of the analysis, the court applies the principles of contract law to determine the validity of the forum selection clause. As with any contract claim, the plaintiff may resist the enforceability of the contract by raising defences such as, for example, unconscionability, undue influence, and fraud.

[29] Once the party seeking the stay establishes the validity of the forum selection clause, the onus shifts to the plaintiff. At this second step of

> the test, the plaintiff must show strong reasons why the court should not enforce the forum selection clause and stay the action. In *Pompey*, this Court adopted the "strong cause" test from the English court's decision in *The "Eleftheria"*, [1969] 1 Lloyd's Rep. 237 (Adm. Div.). In exercising its discretion at this step of the analysis, a court must consider "all the circumstances", including the "convenience of the parties, fairness between the parties and the interests of justice" (*Pompey*, at paras. 19 and 30-31). Public policy may also be a relevant factor at this step (*Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90, [2001] 3 S.C.R. 907, at para. 91, referred to in *Pompey*, at para. 39; *Frey*, at para. 115).
>
> [30] The strong cause factors were meant to provide some flexibility. Importantly, Pompey did not set out a closed list of factors governing the court's discretion to decline to enforce a forum selection clause. Both *Pompey* and *The "Eleftheria"* acknowledged that courts should consider "all the circumstances" of the particular case (*Pompey*, at para. 30; *The "Eleftheria"*, at p. 242). And the leading authority in England continues to recognize that the court in *The "Eleftheria"* did not intend its list of factors to be comprehensive (*Donohue v. Armco Inc.*, [2001] UKHL 64, [2002] 1 All E.R. 749, at para. 24).

The application of the two-step test dealing with forum selection clauses was summarized in *Liu v. Xu*,[34] where the Court stated:

> [69] Under the first part of the test, the party seeking the stay must establish that the forum selection clause is valid, clear and enforceable, and that it applies to the cause of action: *Pompey* at para. 39. The party opposing the stay may resist the enforceability of a forum selection clause by raising a defence such as unconscionability, undue influence, or fraud: *Douez* at para. 28. If the party seeking the stay establishes the validity of the clause, then the party opposing the stay must show "strong cause" as to why the court should not enforce the forum selection clause and stay the action: *Pompey* at para. 39. The Court must consider all the circumstances, "including the 'convenience of the parties, fairness between the parties and the interests of justice': *Douez* at para. 29, citing *Pompey* at paras. 19 and 30-31.

Moreover, an allegation of fraud does not render a contract *void ab initio* until final judgment of the court, so a choice of forum clause applies until then. A choice of forum and choice of law agreement will be upheld and applied unless there are overriding circumstances of fairness that would negate the appropriateness of the forum.[35]

What is clear is that an allegation that a contract is *void ab initio* does not make it so until a final judgment of the court.[36] Courts will stay proceedings

---

[34] *Liu v. Xu*, 2020 BCSC 92.

[35] *Morrison v. Society of Lloyd's*, 1999 CarswellNB 2.

[36] *Ash v. Corp. of Lloyd's*, 1992 CarswellOnt 449.

brought in violation of an exclusive jurisdiction clause unless the balance of convenience heavily favours disregarding it.[37] Finally, the considerations that apply in the civil versus consumer context are not the same.[38]

Do the research. There are a surprising number where the jurisdiction of another court was lost due to shoddy drafting include the use of the word "may" not must and which is generally fatal, rendering the entire term meaningless and of no effect.

13. APPENDIX

(a) Chart 1 — FRA Spousal Support — Procedural Unfairness

Legend

A	Mistake
B	Fundamental Breach
C	Capacity
D	Duress
E	Undue Influence
F	Inadequate Disclosure
G	Nature and Consequences / ILA
MA	Marriage Agreement
SA	Separation Agreement
S/F	Succeeded $\surd$ / Failed X
II	In Issue?
Yr	Years of marriage / relationship

---

[37] *National Bank of Canada v. Halifax Insurance Co.* (1996), 1996 CarswellNB 47, 26 C.L.R. (2d) 130 (N.B. Q.B.).

[38] See: *National Dispatch Services Limited v. Dumoulin*, 2021 BCSC 2138; *Preymann v. Ayus Technology Corp.*, 2012 BCCA 30; *B.C. Rail Partnership v. Standard Car Truck Co.*, 2003 BCCA 597.

FRA — Spousal Support[1] — Miglin Stage 1 Procedural Unfairness																
Case	**Ag-mt type**	**Yr**	**A**		**B**		**C**		**D**		**E**		**F**		**G**	
			II	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**
Miglin v. Miglin, 2003 SCC 24	SA	'14	N		N		N		Y	X	N		N		Y	X
Fact: The Ontario lodge couple. Parties separated in their 40s when children will still young. The SA included a full release of support. Parties divided property equally, with Ms. M continuing to work under a consulting agreement.																
Reid v. Reid, 2017 BCCA 73	SA	19											Y	X		
Fact: The telecommunications post-agreement share sale windfall case.																
Talebpourazad v. Bandpey, 2022 BCCA 352	MA	20	Y	√			Y	√		√	Y	√	Y	√	Y	√
Fact: Three days after marriage, H had W sign agreement prepared by his lawyer that was basically a mess.																

(b) Chart 2 — FRA Spousal Support — Significant Unfairness

Legend

A	Reflects Original Intentions
B	Consistent with Objectives
MA	Marriage Agreement
SA	Separation Agreement
S/F	Succeeded √// Failed X
II	In Issue?
Yr	Years of marriage / relationship

[1] I have not included many of these cases as pre-2013 are not helpful in that the transition provisions under the FLA (s. 252) only apply to Part 5 issues (property). Accordingly, any agreement in issue respecting spousal support is a "FLA" case.

FRA — Spousal Support — Miglin Stage 2 Significant Unfairness						
Case	**Ag-mt type**	**Yr**	**A**		**B**	
			II	**S/F**	**II**	**S/F**
Miglin v. Miglin, 2003 SCC 24	SA	'14	N		Y	X
Comment: • While procedural unfairness was not in issue on the facts, the court comments on their role as factors generally • Ms. Miglin's claim was not compensatory in nature, as she had developed skills during the marriage • LeBel's dissent focused on the artificiality of the two-stage test that penalized people that did not accurately predict the future						
Reid v. Reid, 2017 BCCA 73	SA	19	N		Y	X
Comment: • The stock options in issue were akin to a lottery ticket, which prior to a "draw" were of limited value • Arguments about what "might" have been done were rejected, noting *Arndt v. Smith*, [1997] 2 S.C.R. 539 • Certainty and finality were important in this case • CS was distinguished and dealt with differently						
Talebpourazad v. Bandpey, 2022 BCCA 352	MA	20	NA		Y	√
Comment: Along with *Rick*, a go-to procedural unfairness case.						

(c) Chart 3 — FRA Property Division — Procedural Unfairness

Legend

A	[1] Mistake
B	Fundamental Breach
C	Capacity
D	Duress
E	Undue Influence
F	Inadequate Disclosure
G	Nature and Consequences / ILA
MA	Marriage Agreement
SA	Separation Agreement
S/F	Succeeded √/ Failed X
II	In Issue?
Yr	Years of marriage / relationship

FRA — Property Division — Common Law Procedural Unfairness																
Case	**Ag-mt type**	**Yr**	**A**		**B**		**C**		**D**		**E**		**F**		**G**	
			II	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**
Hartshorne v. Hartshorne, 2004 SCC 22	MA	12.5							Y	X					Y	X
Facts: Lawyers. MA left H with greater assets than wife. Second marriage for H who wanted to protect property. Separate regime, with 3% to a maximum of 49% of FFR. Operation left at 37/63 split of FP, 25/75 of all property.																
Rick v. Brandsema, 2009 SCC 10	SA	29					Y	√			Y	√	Y	√	Y	√
Facts: Dairy farmers. Wife had mental health issues and husband had diverted assets without disclosing.																
Anderson v. Anderson, 2023	SA	3	Y	X									Y	X	Y	X

[1] Included difference of interpretation.

FRA — Property Division — Common Law Procedural Unfairness																
SCC 13[2]																
Facts: Parties executed each-keep-own agreement after three years of marriage with no disclosure or ILA. TJ ignored the agreement. AC found agreement binding, applying Miglin. SCC upheld agreement.																
Dhaliwal v. Dhaliwal, 2021 BCCA 72	MA	8									Y	X	Y	√	Y	X
Facts: Second marriage of independent people. He was older than her and had significant assets. MA was an each keep their own regime.																
Dobson v. Dobson, 2017 BCCA 390	MA[3]	28														
Facts: Both doctors. After bad conduct, an agreement is signed giving the wife the home. After separation, she wants to uphold the agreement and seek spousal support.																
Bradley v. Callahan, 2025 BCCA 69	MA	22														
Facts: Husband comes in with family money, parties sign each keep own, including increase in value, and income derived. Wife was largely stay-at-home mom. Value of protected property leaps from $3M to $160-$240M.																
Talebpourazad v. Bandpey, 2022 BCCA 352	MA	20	Y	√			Y	√	Y	√	Y	√	Y	√	Y	√
Facts: Three days after marriage, H had W sign agreement prepared by his lawyer that was basically a mess.																
Campbell v. Campbell, 2013 BCCA 109	MA	12														
Facts: Weird fact pattern where parties had separated midstream.																

[2] Not an FRA case but included due to its importance as a summary document and as it relates to disclosure.

[3] Guilt agreement 2/3 of way into marriage.

FRA — Property Division — Common Law Procedural Unfairness																
Press v Reid, 2021 BCSC 2224	MA	15														
Facts: Aviation school owner/wife who married a student pilot. Each keep their own regime. Wife conducted herself perfectly over the years.																
McLaughlan v Nestor, 2018 BCSC 86	MA	17														
Facts: Middle class couple with no children. Parties generally kept their finances separate. The W came in with assets and expected an inheritance. The MA included joint property regime and the parties did, in fact, acquire three properties. No one claimed unconscionability. Agreement governed property only.																
Drummond v Brilling, 2022 BCSC 1076	MA	16	Y	X								Y	X			
Facts: The Jasper staff couple. Rare "mid-relationship" agreement, roughly six years into the relationship. Parties had three children. MA was created by the H to primarily protect a personal injury settlement.																
C.A.L. v D.E.L, 2019 BCSC 1483	MA	16														
Facts: Never should have gone to trial. Parties didn't know the law and seemed to not realize they weren't that far apart.																
M. (L.E.) v. I. (D.M.), 2013 BCSC 450	MA	16							Y	√	Y	√	Y	√	Y	√
Facts: MA would have left parties with a 97/3 split. Romanian engineers with a special needs son in the care of the W. H acted terribly throughout.																
C. (S.L.) v. C. (C.J.R.), 2014 BCSC 1814	SA	16							Y	√						
Facts: Similar to L.E.M., this was a vulnerability case and the agreement was a result entirely unfair.																
Santelli v. Trinetti, 2019	MA	11														

FRA — Property Division — Common Law Procedural Unfairness															
BCCA 319															
Facts: Stonemason vs. LAA. The W had a minority interest in the family business so on her father's urging, she had a MA drawn to protect those interests. Amazingly, the H came to trial to set aside a MA when he himself was a huge non-discloser.															

(d) Chart 4 — FRA Property Division — Significant Unfairness

Legend

A	Did the Agreement Accurately Contemplate – Stage 2
B	Duration
C	Period of Separation
D	Property Dates
E	Inheritance or Gift
F	Needs
G	Other
H	UNK
MA	Marriage Agreement
SA	Separation Agreement
S/F	Succeeded $\surd$/ Failed X
II	In Issue?

Apply the Agreement Stage 1 FRA — Property Division — Hartshorne Significant Unfairness																				
Did the Agreement Accurately Contemplate — Stage 2	**Agmt type**	**Yr**	**A Stage 1**		**B Stage 2**		**C Stage 2**		**D Stage 2**		**E Stage 2**		**F Stage 2**		**G Stage 2**		**H Stage 2**	
			II	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**
Hartshorne v. Hartshorne, 2004 SCC 22	MA	12-.5	Y	X	Y	√			Y	√			Y	√	Y	√		
Comment: • Original analysis of the difference between marriage agreements and separation agreements • Adopts Miglin deference principles • In BC, the test is unfairness, not unconscionability																		
Rick v. Brandsema, 2009 SCC 10	SA	29	Y	√														
Comment: • The SCC was not impressed with the BCCA's rejection of findings of facts and credibility • Where (as here) an agreement is unconscionable no s. 65 analysis is required • Agreement fell at unconscionable stage																		
Anderson v. Anderson, 2023 SCC 13[1]	SA	3																
Comment: • Court includes analysis that warns against using the Miglin framework in property division cases • The lack of disclosure and absence of ILA was not fatal as: o Under the SASK statute, disclosure wasn't an issue o There was no suggestion that legal advice was necessary as there was no imbalance o There was no suggestion of active concealment o The relationship was very short • NA: this was pursuant to the SASK legislation and so is an outlier in this table.																		
Dhaliwal v.	MA	8	Y	X					Y	√			Y	√				

[1] Not an FRA case but included due to its importance as a summary document and as it relates to disclosure.

Apply the Agreement Stage 1 **FRA — Property Division — Hartshorne** **Significant Unfairness**																		
Dhaliwal, 2021 BCCA 72																		
Comment: • A bit strange, but the lack of disclosure, which was the only flaw in the process and/or agreement, sounded only in the amount of the compensation payment and which was increased • The parties were therefore unable to properly contemplate the sheer scope of the increase																		
Dobson v. Dobson, 2017 BCCA 390	M-A[2]	28										Y	√					
Comment: Agreement was upheld, but wife was found to be able to make a compensation payment with the assets she would get.																		
Bradley v. Callahan, 2025 BCCA 69	MA	22	Y	√	Y	X	Y	√	Y	√	Y	√	Y	√	Y	√		
Talebpourazad v. Bandpey, 2022 BCCA 352	MA	20	N-A															
Comment: Along with *Miglin*, *Rick*, and *Dhaliwal*, a go-to for procedural unfairness.																		
Campbell v. Campbell, 2013 BCCA 109	MA	12	Y	√													Y	√
Comment: Matter was sent back for reapportionment.																		
Press v. Reid, 2021 BCSC 2224	MA	15	Y	X	Y													
NA	Y	N-A	Y	X	Y													
NA	Y	X	Y	X														
Comment:																		

[2] Guilt agreement 2/3 of way into marriage.

Apply the Agreement Stage 1 **FRA — Property Division — Hartshorne** **Significant Unfairness**																		
The parties saw with near perfect clarity the future and the s. 65 factors all militated in favour of finding the agreement was not unfair.																		
McLaughlan v Nestor, 2018 BCSC 86	MA	17	Y	U-N-K	Y													
NA	Y	N-A	Y	X	Y													
NA	Y	X	Y	X														
Comment: A bit unusual as the person who drafted the agreement to protect themselves (which it did) was looking to vary the agreement to make it even more favourable to them. They struck out.																		
Drummond v Brilling, 2022 BCSC 1076	MA	16	Y	√													Y	√
Comment: This case is very helpful for the analysis about contemplation. There was very little evidence at trial about this and the Court does a detailed job of finding inferences sufficient to conclude the parties had not contemplated future circumstances. The 65 analysis is not detailed but unfairness is found on the basis that the W's contributions were not properly rewarded.																		
C.A.L. v D.E.L, 2019 BCSC 1483	MA	16	Y	√													Y	√
Comment: Only issue was that if the agreement were applied, H would get nailed with a ton of debt and that would be unfair. Court agreed.																		
M. (L.E.) v. I. (D.M.), 2013 BCSC 450	MA	16			Y													
NA	Y	N-A	Y	N-A	Y	X	Y	√	Y	√								
Comment: The wife's contributions under (e) and (f) were overwhelming.																		
C. (S.L.) v. C. (C.J.R.), 2014 BCSC 1814	SA	16															Y	√
Comment:																		

Apply the Agreement Stage 1 **FRA — Property Division — Hartshorne** **Significant Unfairness**																		
Applying the agreement would have resulted in 79/21 in favour of the H. There was little need to consider unfairness as the agreement failed at the procedural stage.																		
Santelli v. Trinetti, 2019 BCCA 319	MA	11	Y	X									Y	X	Y	X		
Comment: Husband argued he needed more property to be "self-sufficient". That was DOA. Conversely, the wife's argument that the MA shortchanged her on the FFR was a winner at trial but overturned on appeal. Basically, the MA was a knife that cut both ways.																		

(e) Chart 5 — FLA Spousal Support — Procedural Unfairness

Legend

A	S. 164(3)(a) — Disclosure
B	S. 164(3)(b) — Improper Advantage
C	S. 164(3)(c) — Nature and Consequences
D	S. 164(3)(d) — Common Law
MA	Marriage Agreement
SA	Separation Agreement
S/F	Succeeded $\surd$ / Failed X
II	In Issue?
Yr	Years of marriage / relationship

FLA — Spousal Support Procedural Unfairness										
Case	**Ag-mt type**	**Yr**	**A**		**B**		**C**		**D**	
			II	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**
Azanchi v. Mobrhan-Shafiee, 2021 BCCA 55										
Deng v. Zhang, 2022 BCCA 271										
Sperring v. Shutiak, 2023 BCCA 54	SA	20	Y	√			Y	√	Y	√
Facts: Be careful with the s. 252 analysis here, that seems to suggest that 93 is available to common law person for agreements entered into prior to 2013.										
Schrader v. Schrader, 2025 BCCA 50	SA	11							Y	√
Facts: Judge found that the agreement on SS did not constitute a "meeting of the minds".										
Reiner v. Reiner, 2021 BCSC 1514	SA	30	Y	X	Y	X			Y	X
Facts: Retired veterinarian; stay-at-home spouse. Vulnerabilities were known and there was counsel; the question was whether they were exploited.										
Donnelly v. Weekley, 2017 BCSC 529	SA	27	Y	X	Y	X			Y	X
Facts: Both parties retired. Another case of imperfect, but good enough, process.										
C.A.L. v D.E.L., 2019 BCSC 1483	MA	16								
S.B.F. v. D.G.F., 2022 BCSC 2231	MA	10	Y	X			Y	X	Y	X
Facts: Professional couple; no kids. One party brought assets in; the other had none. The MA was each keep own unless jointly named regime and a waiver of spousal support unless they had children. There was some negotiation, and ILA. Wedding										

FLA — Spousal Support Procedural Unfairness										
duress claimed.										
A.L.A. v. C.F.W., 2023 BCSC 1888	MA	4	Y	X	Y	X	Y	X		
Facts: On disclosure, again it was enough to be "generally aware" of the assets. Very good case on comparison of vulnerabilities.										
Young v. Sherk, 2019 BCSC 312	SA	6			Y	X	Y	X	Y	
Facts: Kitchen table special without ILA. No one could demonstrate entitlement.										
Bonder v. Bonder, 2022 BCSC 2448	SA	14	Y	X	Y	X	Y	X	Y	X
Facts: Case where H had terrible addiction demons and had spent time in prison. Parties had almost no assets as they carried heavy debt. Requires a cautious read as the TJ approaches the test from a Miglin perspective (in other words, incorrectly) but the result is nevertheless correct.										

(f) Chart 6 — FLA Spousal Support — Significant Unfairness

Legend

A	S. 164(5)(a) — Length of time
B	S. 164(5)(b) — Changes to CMN[1]
C	S. 164(5)(c) — Certainty
D	S. 164(5)(d) — Reliance
E	S. 164(5)(e) — Objectives
MA	Marriage Agreement
SA	Separation Agreement
S/F	Succeeded √/ Failed X
II	In Issue?
Yr	Years of marriage / relationship

[1] Conditions, means and needs.

FLA — Spousal Support Significant Unfairness												
Case	**Ag-mt type**	**Yr**	**A**		**B**		**C**		**D**		**E**	
			II	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**
Azanchi v. Mobrhan-Shafiee, 2021 BCCA 55												
Deng v. Zhang, 2022 BCCA 271												
Sperring v. Shutiak, 2023 BCCA 54	SA	20										
Facts: Be careful with the s. 252 analysis here, that seems to suggest that 93 is available to common law person for agreements entered into prior to 2013.												
Schrader v. Schrader, 2025 BCCA 50	SA	11										
Facts: Judge found that the agreement on SS did not constitute a "meeting of the minds".												
Reiner v. Reiner, 2021 BCSC 1514	SA	30									Y	X
Facts: Retired veterinarian; stay-at-home spouse. Vulnerabilities were known and there was counsel; the question was whether they were exploited.												
Donnelly v. Weekley, 2017 BCSC 529	SA	27										
Facts: Both parties retired. Another case of imperfect, but good enough, process.												
C.A.L. v D.E.L., 2019 BCSC 1483	MA	16	Y	√	Y	√	Y	X	Y	X		
S.B.F. v. D.G.F., 2022 BCSC 2231	MA	10	Y	X	Y	X	Y	X	Y	X		

FLA — Spousal Support **Significant Unfairness**												
Facts: Professional couple; no kids. One party brought assets in; the other had none. The MA was each keep own unless jointly named regime and a waiver of spousal support unless they had children. There was some negotiation, and ILA. Wedding duress claimed.												
A.L.A. v. C.F.W., 2023 BCSC 1888	MA	4			Y	X					Y	X
Facts: On disclosure, again it was enough to be "generally aware" of the assets. Very good case on comparison of vulnerabilities												
Young v Sherk, 2019 BCSC 312	SA	6									Y	X
Facts: Kitchen table special without ILA. No one could demonstrate entitlement.												
Bonder v. Bonder, 2022 BCSC 2448	SA	14									Y	X
Facts: Case where H had terrible addiction demons and had spent time in prison. Parties had almost no assets as they carried heavy debt. Requires a cautious read as the TJ approaches the test from a Miglin perspective (in other words, incorrectly) but the result is nevertheless correct												

(g) Chart 7 — FLA Property Division — Procedural Unfairness

Legend

A	S. 93(3)(a) — Disclosure
B	S. 93(3)(b) — Improper Advantage
C	S. 93(3)(c) — Nature and Consequences
D	S. 93(3)(d) — Common Law
MA	Marriage Agreement
SA	Separation Agreement
S/F	Succeeded √ / Failed X
II	In Issue?
Yr	Years of marriage / relationship

FLA — Property Division Procedural Unfairness										
Case	**Ag-mt type**	**Yr**	**A**		**B**		**C**		**D**	
			II	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**
Azanchi v. Mobrhan-Shafiee, 2021 BCCA 55	SA	7	Y	X	Y	X	Y	X		
Facts: Agreement provided that the family home would go to the wife. TJ noted that if the H knew of an asset but not the precise amount, it fell to him to pursue the issue. Court notes that (b) is where duress is argued, not (d). Also notes the significant unfairness test does not exist under 93(3).										
Sperring v. Shutiak, 2023 BCCA 54	SA	20	Y	√	Y	X	Y	√	Y	√
Facts: Be careful with the s. 252 analysis here, that seems to suggest that 93 is available to common law person for agreements entered into prior to 2013.										
Schrader v. Schrader, 2025 BCCA 50	SA	11								
Facts: Both parties were middle class. No kids. Under terms of SA, W was to receive										

FLA — Property Division **Procedural Unfairness**										
$200k for buyout of FFR. Four months after the SA, H sold property for far more than it was worth and which was higher than the valuations used in negotiations. Notably, the agreement was found to accurately reflected their intentions. The Court used the inversion of s. 93 to find unfairness. For example, that the lack of true value negated the concept of "certainty".										
F.C.A.S. v. C.E.S., 2025 BCSC 622	MA	8	Y	X	Y	X	Y	X	Y	X
Facts: Greater than the usual detail under the "improper advantage" arm of the procedural unfairness text. Also a good example of using the factors under s. 93(5) to *justify* fairness, as opposed to demonstrate it.										
Reiner v. Reiner, 2021 BCSC 1514	SA	30	Y	X	Y	X			Y	X
Facts: Retired veterinarian; stay-at-home spouse. Vulnerabilities were known and there was counsel; the question was whether they were exploited.										
Babijowski v. Wolanicki, 2022 BCSC 2126	SA	17	Y	X	Y	X	Y	X	Y	X
Facts: Both parties retired. Another case of imperfect, but good enough, process.										
S.B.F. v. D.G.F., 2022 BCSC 2231	MA	10	Y	X			Y	X	Y	X
Facts: Professional couple; no kids. One party brought assets in; the other had none. The MA was each keep own unless jointly named regime and a waiver of spousal support unless they had children. There was some negotiation, and ILA. Wedding duress claimed.										
A.L.A. v. C.F.W., 2023 BCSC 1888	MA	4	Y	X	Y	X	Y	X		
Facts: On disclosure, again it was enough to be "generally aware" of the assets. Very good case on comparison of vulnerabilities.										
Young v Sherk, 2019 BCSC 312	SA	6			Y	X	Y	X	Y	X
Facts: Kitchen table special without ILA.										

FLA — Property Division **Procedural Unfairness**										
Bonder v. Bonder, 2022 BCSC 2448	SA	14	Y	X	Y	X	Y	X	Y	X
Facts: Case where H had terrible addiction demons and had spent time in prison. Parties had almost no assets as they carried heavy debt. Requires a cautious read as the TJ approaches the test from a Miglin perspective (in other words, incorrectly) but the result is nevertheless correct.										
Asselin v. Roy, 2013 BCSC 1681	MA	24	Y	√	Y	√	Y	√		
Facts: FRA proceeding, but the parties consented to have the FLA apply (which s. 252 provides). Both parties were academics. Agreement was mostly to protect property owned by the H. The H conceded one property was unfairly divided under the agreement, but that it was otherwise fair. Not sure I can get on board with the vulnerability reasoning, but there it is.										
Y.L. v. G.L., 2020 BCSC 808	SA	5	Y	√	Y	√	Y	√	Y	√
Facts: The battle of folks with no credibility. Everyone claimed everyone was lying. There were four different agreements. One, the May 3, 2015, agreement, was the one in issue. The Court never went past the procedural unfairness stage.										
Lawrence v. Mulder, 2015 BCSC 2223	MA	8	Y	X	Y	√	Y	√		
Facts: In cursory reasons, a kitchen table agreement is set aside on the basis of vulnerability at an evidentiary threshold much lower than in other cases.										
Blom v. Blom, 2021 BCSC 181	SA	12	Y	X					Y	√
Facts: H actually kept her in a room until she signed. Whoops. Bad H. For good measure, he threatened to alienate the children. Bad, bad H. Doesn't go to the second stage.										
McAdie v. McAdie, 2019 BCSC 578	SA	12	Y	√	Y	√	Y	√	Y	√
Facts: A deliberate hiding disclosure case. The next two (vulnerability and failure to understand) flowed. One of the only cases that deal with common law other than										

FLA — Property Division **Procedural Unfairness**
duress: *fundamental breach* was successfully argued.

(h) Chart 8 — FLA Property Division — Significant Unfairness

Legend

A	S. 93(5)(a) — Length of Time
B	S. 93(5)(b) — Intention to Achieve Certainty
C	S. 93(5)(c) — Reliance
D	S. 93(5)(d) — Other[1]
MA	Marriage Agreement
SA	Separation Agreement
S/F	Succeeded √ / Failed X
II	In Issue?
Yr	Years of marriage / relationship

FLA — Property Division **Procedural Unfairness**										
Case	**Ag-mt type**	**Yr**	**A**		**B**		**C**		**D**	
			II	**S/F**	**II**	**S/F**	**II**	**S/F**	**II**	**S/F**
Azanchi v. Mobrhan-Shafiee, 2021 BCCA 55	SA	7					Y	X		
Facts: Agreement provided that the family home would go to the wife. TJ noted that if the H knew of an asset but not the precise amount, it fell to him to pursue the issue. Court notes that (b) is where duress is argued, not (d). Also notes the significant unfairness test does not exist under 93(3).										
Sperring v. Shutiak, 2023 BCCA 54	SA	20								
Facts:										

[1] I have also used the section when it is not clear which of the subsections the court has hung their hat on.

FLA — Property Division **Procedural Unfairness**										
Be careful with the s. 252 analysis here, that seems to suggest that 93 is available to common law person for agreements entered into prior to 2013.										
Schrader v. Schrader, 2025 BCCA 50	SA	11	Y	√	Y	√	Y	√		
Facts: Both parties were middle class. No kids. Under terms of SA, W was to receive $200k for buyout of FFR. Four months after the SA, H sold property for far more than it was worth and which was higher than the valuations used in negotiations. Notably, the agreement was found to accurately reflected their intentions. The Court used the inversion of s. 93 to find unfairness. For example, that the lack of true value negated the concept of "certainty".										
F.C.A.S. v. C.E.S., 2025 BCSC 622	MA	8	Y	X	Y	X	Y	X		
Facts: Greater than the usual detail under the "improper advantage" arm of the procedural unfairness text. Also a good example of using the factors under s. 93(5) to *justify* fairness, as opposed to demonstrate it.										
Reiner v. Reiner, 2021 BCSC 1514	SA	30							Y	X
Facts: Retired veterinarian; stay-at-home spouse. Vulnerabilities were known and there was counsel; the question was whether they were exploited.										
Babijowski v. Wolanicki, 2022 BCSC 2126	SA	17							Y	X
Facts: Both parties retired. Another case of imperfect, but good enough, process.										
S.B.F. v. D.G.F., 2022 BCSC 2231	MA	10							Y	X
Facts: Professional couple; no kids. One party brought assets in; the other had none. The MA was each keep own unless jointly named regime and a waiver of spousal support unless they had children. There was some negotiation, and ILA. Wedding duress claimed.										
A.L.A. v. C.F.W., 2023 BCSC 1888	MA	4	Y	X	Y	X	Y	X		

FLA — Property Division **Procedural Unfairness**										
Facts: On disclosure, again it was enough to be "generally aware" of the assets. Very good case on comparison of vulnerabilities.										
Young v. Sherk, 2019 BCSC 312	SA	6			Y	X			Y[2]	X
Facts: Kitchen table special without ILA.										
Bonder v. Bonder, 2022 BCSC 2448	SA	14					Y	X		
Facts: Case where H had terrible addiction demons and had spent time in prison. Parties had almost no assets as they carried heavy debt. Requires a cautious read as the TJ approaches the test from a Miglin perspective (in other words, incorrectly) but the result is nevertheless correct.										
Asselin v. Roy, 2013 BCSC 1681	MA	24	Y	√	Y	√	Y	√		
Facts: FRA proceeding, but the parties consented to have the FLA apply (which s. 252 provides). Both parties were academics. Agreement was mostly to protect property owned by the H. The H conceded one property was unfairly divided under the agreement, but that it was otherwise fair. Not sure I can get on board with the vulnerability reasoning, but there it is.										
Y.L. v. G.L., 2020 BCSC 808	SA	5								
Facts: The battle of folks with no credibility. Everyone claimed everyone was lying. There were four different agreements. One, the May 3, 2015, agreement, was the one in issue. The Court never went past the procedural unfairness stage.										
Lawrence v. Mulder, 2015 BCSC 2223	MA	8	Y	√			Y	√		
Facts: In cursory reasons, a kitchen table agreement is set aside on the basis of vulnerability at an evidentiary threshold much lower than in other cases.										

[2] The court considered a missed exclusion and found a small bit of unfairness and varied a term. It is not clear where the jurisdiction for that came, so I have left it under other for lack of a better place.

FLA — Property Division **Procedural Unfairness**										
Blom v. Blom, 2021 BCSC 181	SA	12								
Facts: H actually kept her in a room until she signed. Whoops. Bad H. For good measure, he threatened to alienate the children. Bad, bad H. Doesn't go to the second stage.										
McAdie v McAdie, 2019 BCSC 578	SA	12								
Facts: A deliberate hiding disclosure case. The next two (vulnerability and failure to understand) flowed. One of the only cases that deal with common law other than duress: *fundamental breach* was successfully argued.										