TAB 2

Attacking and Upholding Marriage Contracts

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Marriage Contracts:
Drafting and Advising Post-*Hartshorne*

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Continuing Legal Education

ATTACKING AND UPHOLDING MARRIAGE CONTRACTS

Introduction

This topic represents two sides of the same coin. The question really is whether a marriage contract will be respected by the court and if not, why not. Many papers have been written about this as the law evolves (or rather weaves its way through society) including an early paper I wrote (Law Society Special Lectures 1991) but much more helpfully, that of Professor Rollie Thompson, in 19 CFLQ 399. I am indebted to his review of the cases and thoughtful comments, as always.

It is impossible to state categorically how any particular contract will be treated: there is much judicial discretion in the form of subjective assessment of credibility of the parties as well as interpretation of the particular agreement and, in relation to support especially, the size of the chancellor's foot. It can be said, however, that at this time we can expect more deference to be given by the average judge (if there is such a creature) in Ontario in particular, to a properly prepared and executed marriage contract, than ever before. It is not just *Hartshorne v. Hartshorne*[1] but a myriad of other cases upon which lead up to it. While *Hartshorne* itself was a pleasant surprise for those of us who prepare marriage contracts, a review of the case law indicates that it should not have been entirely unexpected, particularly since the contract which was upheld dealt only with property and support was left at large to remedy any inequities.

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[1] (2004), 47 R.F.L. (5th) 5 (S.C.C.)

Overview

The following are the elements which must be examined and met to assess the likelihood of a contract being upheld or set aside or ignored.

1. **Formalities**: In Ontario Part IV of the *Family Law Act* requires the agreement in writing, signed and witnessed. It is surprising how often clients bring in agreements which were prepared at the kitchen table and signed by both parties, but without a witness, often undated. While this may have some limited applicability to a determination under Part I of the *Act* (s.5(6): Other Agreements) it usually isn't worth the paper it's written on, quite literally. In addition, certain subject matter must be avoided, the most obvious being custody. In Ontario Part II rights must be preserved, although a precatory provision (for instance, "on separation it is the parties' intention that the husband vacate the matrimonial home within thirty days, although the parties recognize the restrictions under Part III of the *Family Law Act*"). Hopefully these are all easily met.

2. **Disclosure**: While the same degree of disclosure is not necessary in a marriage contract (with one exception) for a separation agreement, there must be disclosure in order to allow the party to clearly understand the consequences of the agreement, which usually involves the release or limiting of certain rights. The party must know what those rights are (see no. 3 below). It surely makes a difference if one is releasing rights to the growth of a property worth $100,000 as opposed to $1,000,000. I advise my clients to think of the reasonable range of value of assets which are not readily apparent (such as businesses or trusts) and either state the range as such or estimate at the high end of the range (but not beyond), and specify that it is before tax and other costs of disposition. It is not sufficient to simply list the nature of the asset without any value being ascribed to it (see

Patrick v. Patrick[2]

The exception to the degree of disclosure is a marriage contract negotiated in the middle of a marriage, particularly if there have been marital problems. In such a case it is important to be precise because there are *existing* rights which are being eliminated or limited and to understand the consequences, one must in effect do an equalization calculation. While formal valuations may not be required, much more precision is.

3. **Independent Legal Advice**: This is, as we all know, not a requirement, but it might as well be. Without it, a party can readily say, with varying degrees of credibility, that they did not understand the consequences (the nature is usually pretty obvious) of the agreement, as no one told them that they were entitled to share the growth of assets, even those which were owned by the other party at marriage.

4. **Negotiations**: It always helps if there have been real negotiations, a true give and take, even if the essential matter and provisions of the agreement are unchanged. It is where a contract is presented by one to the other and a statement is made that no changes can be countenanced or the marriage is off, where one loses the sympathy of the court. While the contact may still be upheld (see, for instance, *Lay v. Lay*[3], 2000, 47 OR 3rd 779 (CA) , where a marriage contract was entered into the day before the marriage and its ousting of Part I of the *Family Law Act* was upheld even though it was entered into before that Act came into force, thus adopting the minority reasons in *Bosch v. Bosch*[4] (1991), 6 OR 3rd

[2] 2002 CarswellOnt 593 (S.C.J.)
[3] (2000), 47 O.R. (3d) 779 (C.A.)
[4] (1991), 6 O.R. (3d) 168 (C.A.)

(CA) by Finlayson J. This really was the turning of the tide in Ontario. Nevertheless, the more negotiating, the stronger the contract.

5. **Precise Drafting**: It is here that many marriage contracts run into trouble. Because they frequently represent an attempt to impose a regime on people where circumstances may change dramatically and unexpectedly in a wide variety of ways between the execution of the agreement and the triggering event, the task is enormously complicated. It is far more difficult than negotiating and drafting a separation agreement, where one must deal with existing rights, obligations, assets and liabilities. Common mistakes include failing to refer to successor properties (replacing a matrimonial home for instance) or failing to exclude income earned on income, where property and income derived from it are to be excluded (over the years the income generated will generate its own income and gains and become almost impossible to untangle and trace). Proper protection is not provided for excluded assets which may momentarily flow through a joint asset, such as the bank account or joint property, before being segregated again, and thus may be irredeemably tainted. One often sees inconsistent or even contradictory provisions, particularly in releases.

6. For instance, if it is intended to create a specific exclusion but allow the rest of the assets and liabilities to fall under the scheme of Part I of the *Family Law Act*, but a release of all claims under Part I is included in the agreement as part of a boilerplate clause at the end, there is a conflict which might invalidate the exclusion altogether. Too often, provisions and terms from model separation agreements are adapted or worse still, used unchanged, and marriage contracts, in which they have no place.

Generally, one can assume that the courts will examine the wording of a marriage contract extremely carefully and if there is interpretation which can be reasonably asserted against the interests of the person who sought the protection of the contract, the court will go down that path.

7. **Extraneous Factors: Fraud, Duress and Undue Influence**: Fraud is really an extreme failure of disclosure and so covered above. Clearly it would invalidate the contract, as I am equating it with material misrepresentation.

Duress and undue influence are really the "praying upon" of one party by the other in a superior position: *Rosen v. Rosen*[5] 3 RFL 4th Ed., p. 267 (CA). Duress itself is rarely found. One of the exceptions is *Bradley v. Bradley*[6] 7 RFL 5th, 270 (Ont. S.J.) where the wife, who was "financially destitute" as well as emotionally upset, and had no money at all, signed a separation agreement limiting her spousal support. This was considered economic duress. Generally the law requires physical duress, thus threatening not to go through the marriage ceremony if the contract is not signed does *not* constitute duress. However, if the other side is pregnant, has quit her job in anticipation of the marriage based upon promises of support, etc., as well as having invited 300 guests and a Barry Manilow impersonator to the wedding, this may be the sort of taking advantage of a weakened position which could result in the agreement being set aside.

8. **Some Examples**:

[5] (1994), 3 R.F.L. (4th) 267 (Ont. C.A.)
[6] (2000), 7 R.F.L. (5th) 270 (Ont. S.C.J.)

(1) ***M (N.M.) v. M. (N.S.)***[7] A Muslim marriage contract , *Maher*, signed just before the marriage was upheld, even though the husband claimed he had not read it and was led to believe it only had symbolic value. This was a matter of credibility.

(2) ***Van Den Oetelaar v. Van Den Oetelaar***[8] The parties signed their marriage contract three days before the wedding, releasing all rights to property, including equalization. The parties were both retired. On the wife's death the husband tried to set aside the agreement, alleging that he did not understand it, and didn't even know it was a legal document. He was not believed by Justice Morissette. He had independent legal advice and past business experience and it was upheld. Though the wife did not speak English and was not provided with financial disclosure until after the contract was signed, Himel J. upheld it. She found that the wife was not a believable witness and had had independent legal advice in her own language and financial disclosure provided subsequently would not have changed her mind about entering into the contract. However, the wife was awarded spousal support due to her change in financial circumstances. Segal v. Qu

(3) ***Camilleri v. Camilleri***[9] An exotic dancer from Romania married only after the husband insisted upon a marriage contract whereby all support was released, unless they had a child. Even though the judge found that the husband had taken advantage of a "colossal inequality of bargaining power" to get his wife to sign, the agreement was upheld. Once again, however, support was awarded because

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[7] (2004), 26 B.C.L.R. (4th) 80 (S.C.)
[8] [2004] O.J. No. 1424 (S.C.J.)
[9] (2001), 19 R.F.L. (5th) 15 (Ont. Div. Ct.)

the husband had forced the wife to stop dancing and the court did not feel it appropriate to force her to return, so she had suffered a change in circumstances.

(4) ***Griffore v. Adsett***[10] Fifteen years after they married, the parties signed a marriage contract releasing all property and support claims. The husband tried to set it aside, stating that although he knew it was unfair at the time, he still signed freely with independent legal advice. While the agreement was upheld, Justice Mackinnon found that there were unconscionable circumstances and ordered spousal support.

(5) ***Frazer v. Van Roostelaar***[11] The parties signed a marriage contract upon their engagement. It was a second marriage for both and they had independent legal advice. They waived all rights to each other's property, unless held jointly. Even though the wife was in poor health, the trial judge found that since she was in a superior asset position and had been supported by him for four years, the contract would be upheld without support.

(6) ***M.C. v. C.C.***[12] After reconciling, the parties entered into an agreement. The wife suffered from bipolar disorder and consulted with her doctors about the agreement. Cunningham J. found that it was not unconscionable as it entitled the wife to half her husband's salary for five years, half the matrimonial home, and support for a daughter from the previous marriage. The wife was able to work as long as she took medication. The financial disparity between the two parties at

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[10] (2001), 18 R.F.L. (5th) 63 (Ont. S.C.J.)
[11] [2004] B.C.J. No. 1103 (S.C.)
[12] [2002] O.J. No. 1515 (S.C.J.)

trial is the result of the wife spending all her time and money litigating. The contract was upheld.

(7) ***Kopelow v. Warkentin***[13] This case would quite possibly have been decided differently, after *Hartshorne*. The parties entered into a marriage contract shortly before their marriage at the insistence of the husband's mother, who had gifted him significant assets. Both were represented. The husband's mother threatened to disinherit him if a marriage contract protecting these assets was not signed. The wife was four months pregnant and ill the day she signed the agreement. While the contract was found not to be unconscionable (no mention of duress, coercion or undue influence) the trial judge found the agreement to be unfair pursuant to s.65(1) of the BC Family Relations Act, as it did not adequately account for the twelve year marriage during which the parties' relation evolved, the wife removing herself from the workforce and also working without pay in the husband's business. It did not provide the means for the wife to become economically independent and self-sufficient. Property division was granted along with support.

(8) ***Colafranceschi v. Colafranceschi***[14] This is a textbook case of what to do to ensure a marriage contract will be set aside. Six weeks after their marriage, the husband presented the wife with a contract releasing all entitlement to support. There was no financial disclosure and no ILA and the wife was pregnant. The wife initially refused to sign the contract and so the husband pulled her by her

[13] [2002] B.C.J. No. 2534 (S.C.)
[14] (2001), 15 R.F.L. (5th) 294 (Ont. S.C.J.)

ponytail and insisted that she sign. Given the circumstances and the one-sidedness of the contract, it was set aside.

Summary:

The courts will generally respect a properly negotiated and drafted agreement especially regarding property rights. They will look carefully at the circumstances surrounding the agreement, to try to discern what the parties thought would happen during their marriage, and see if that approximates what did in fact happen. The court will, however, closely examine the drafting, as well, to ensure that only the property and rights which are protected or limited receive that treatment. Philosophically this is in keeping with *Miglin v. Miglin*. The circumstances of the negotiation should be unimpeachable, but that must be taken in the context which actually presents itself. Where the parties are not yet married and there are no rights or obligations relating to each other in many instances, it will take less to satisfy this part of the test. Where a contract is negotiated in the middle of a marriage, particularly where there have been marital difficulties, the court will take a closer look and it will become much more akin to the standard applied to a separation agreement.

When Will the Court Award Interim Support in the Face of a Marriage Contract Which Releases Same:

Today the *Miglin* test applies at the interim stage as well, although far more difficult to apply. In *Christakos v. Papamanolopoulos*[15] (unreported decision of Senior Regional Justice Benotto, April 22, 2003) the judge did not find the level of urgency necessary to require an interim order in the face of a release (although this decision was rendered on the day *Miglin* was released).

[15] [2003] O.J. No. 1378 (Ont. S.C.J.)

In *Chaitis v. Christopoulos* (unreported decision of Justice Sachs, January 19, 2004) the court undertook the *Miglin* analysis based upon affidavits and cross-examinations. The wife had never met with the solicitor before signing the contract, which was drafted thirteen days before the wedding. While no criticism was made of the disclosure itself, Her Honour found that there was a serious issue to be tried on the question of whether there were circumstances surrounding the negotiation and execution of the contract establishing a reason to discount the agreement. Her Honour went on to apply the balance of the *Miglin* test (whether it meets the objectives of the *Divorce Act*) and found that it did not. However, while the marriage contract was found not to be a bar to the application, it was clear from the reasons that it was left open to the trial judge to make a different finding, which logically would result in the support being repaid.

The converse of this was dealt with by the Court of Appeal recently in *Kelly v. Kelly*[16]. Here the Court of Appeal reversed a decision by a Motions Court Judge granting summary judgment dismissing the wife's support claim on a permanent basis. The court found that there were issues of credibility to be left to trial for determination. Therefore it was premature to grant summary judgment. The same logic should apply to interim support applications in the face of a release. If there are issues of credibility, they ought to be dealt with by way of an expedited trial, rather than an attempt to apply the *Miglin* test, based upon a fraction of the evidence available to the trial judge, no opportunity to see the parties or test credibility, and resulting in an order that may have to be repaid.

Tips on Protecting Yourself and Your Client in Marriage Contracts

(1) If at all possible, don't deal with support issues. Focus on property. Then you can virtually guarantee your client that the contract will be upheld. Thus far the

[16] 2004 CarswellOnt 3074 (C.A.)

courts have not awarded large lump sums of support in cases where there are no property rights.

(2) Avoid complex formulas with respect to support or the sharing of property. If you must use one, use examples which clearly state the results intended.

(3) Seriously consider making all dollar amounts in constant dollars so that if the ravages of inflation return, it will not be an excuse to ignore the agreement.

(4) Warn your client to segregate excluded assets and to keep all documents necessary for tracing as they go along the marriage.

(5) Identify excluded or otherwise affected assets clearly by precise definitions.

(6) In the preamble, consider describing the various possibilities which the marriage may evolve into: for instance, one or both may have a career sacrifice, be in poor health, suffer financial reversals, etc. etc. The language in the standard spousal support release may help here. Ensure that whatever list you use is not exhaustive but does cover the major points.