TAB 4

Judicial Control of Collaborative Family Law Separation Agreements: Good Faith, Non-Disclosure, *Miglin*, the Guidelines & Best Interests

Professor Nicholas C. Bala
Faculty of Law
Queen's University

Joanna Harris
Queen's LL.B. Candidate 2005

Collaborative Family Law Practice

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Nicholas Bala
Professor
Faculty of Law, Queen's University

& Joanna Harris
Queen's LL.B. Candidate 2005

Contact:

Professor Nicholas Bala
Faculty of Law
Queen's University
Kingston, Ontario
K7L 3N6

Email bala@post.queensu.ca

Te. 613-533-6000 ext 74275
Fax 613-533-6509

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Heightened Judicial Scrutiny for CFL Agreements

Collaborative Family Law (CFL) is an innovative, promising new approach to the resolution of many family law disputes. The CFL process involves separated spouses and their counsel signing a Participation Agreement before beginning negotiations, undertaking to negotiate in "good faith" and use all reasonable efforts to reach an agreement without resorting to litigation or the threat of litigation.[1] The parties and their lawyers work together to negotiate and draft Separation Agreements based on common needs and interests, allowing for creative solutions. The Participation Agreements stipulate that in the event that an agreement is not entered into and litigation is undertaken, each party must retain other counsel for the litigation, giving both the parties and their counsel an incentive to reach an agreement. While it is clear that an "agreement to agree" is not enforceable, to the extent that there is an undertaking to retain other counsel for any litigation, Participation Agreements are enforceable.

All Separation Agreements are subject to judicial control in a range of circumstances, especially in regard child related issues. The 2003 Supreme Court of Canada decision in *Miglin,* however, emphasized the importance of upholding agreements that are negotiated in "unimpeachable circumstances," especially in regard to issues of spousal support and property issues.[2] A central argument of this paper is that by entering into a Participation Agreement, the parties are inviting a heightened level of later judicial scrutiny of any Separation Agreement that is made if there has been a failure to act in good faith in the negotiation, in particular if there has a breach of the duty to disclose. This is not to suggest that many individuals will later seek judicial variation of CFL Separation Agreements, or that courts will lightly set aside these agreements if relief is sought, but only to argue that there is likely to be heightened judicial scrutiny of these agreements in comparison to separation agreements that are a result of the traditional adversarial negotiations. Such heightened judicial scrutiny should be welcomed by supporters of CFL, as it provides a method for ensuring that those who enter into the CFL process are truly acting in good faith and will honour their undertakings of disclosure.

This paper reviews the statutory provisions and caselaw that create the judicial authority to control and review separation agreements. While there are as yet no reported cases that deal with judicial consideration agreements that are the product of CFL, we will offer some thoughts about how such agreements are likely to be viewed by the courts. The paper concludes with some advice for practitioners involved in negotiation of CFL separation agreements.

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[1] See Brahm Siegel, *Family Law: Bar Admission Course,* Chapter 25, "Alternative Dispute Resolution (Toronto: Law Society of Upper Canada, 2004).

[2] *Miglin v. Miglin,* 2003 SCC 24.

Participation Agreements

Collaborative Family Law is a new approach to the resolution of disputes between separated spouses that is based on a Participation Agreement, typically signed by both spouses and their counsel, which sets out the expectations for the process of negotiation. Key terms of a typical Participation Agreement include undertakings: [3]

1. To settle the outstanding issues in a non-adversarial manner using interest-based negotiation, without resorting to litigation; and to refrain from the threat of litigation in the settlement process;
2. To use the "good faith" (or the "highest good faith") in problem solving and in attempting to achieve a settlement;
3. To make "full" and voluntary disclosure;
4. To retain new counsel in the event that settlement is not reached and the case proceeds to trial.

It is clear that to the extent that a CFL Participation Agreement creates an "agreement to agree," it is not enforceable.[4] There is no direct legal sanction for breaching an agreement to negotiate an agreement, even if a court concludes that it was the lack of "good faith" of one party that results in the break-down of negotiations.[5]

It also seems certain that if a Separation Agreement is not entered into as a result of the CFL process, the courts would allow the parties to have access to the courts,[6] though undoubtedly prohibiting either party for using the same counsel as they used in the CFL process.[7]

If a CFL Separation Agreement is entered into and it is subsequently established that there was a lack of good faith in the bargaining process or a failure to make full disclosure, the breach of contractual provisions of the Participation Agreement may give a court a broader scope for review than the usual, generally narrow, grounds for seeking judicial review of provisions of a Separation Agreement

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[3] Richard W. Shields, Judith P. Ryan, Victoria L. Smith, *Collaborative Family Law: Another Way to Resolve Family Disputes* (Scarborough: Carswell, 2003) at 61.

Most Participation Agreements will also contain more specific provisions detailing unacceptable abuse of the CFL process. Abuse of the CFL process can include taking unfair advantage of the process; abusing the children involved; threatening to flee the jurisdiction with the children; disposing of property; withholding or misrepresenting information; and failing to disclose the existence or the true nature of assets or debts. In any of these instances of abuse, Participation Agreement typically specify that both lawyers must withdrawn from the process.

[4] See e.g. *Courtney and Fairburn v Tolani Brothers*, [1975] 1 W.L.R. 297 (C.A.)

[5] *L.C.D.H. Audio Visual v I.S.T.S.*(1988), 40 B.L.R. 128 (Ont. H.C.)

[6] The only situation in which access to the courts might be restricted would be if there is a binding agreement to arbitrate in the Participation Agreement.

[7] In theory the parties might both agree that they would waive the terms of the Participation Agreement and both continue with the same counsel in litigation, but counsel might well be unwilling to do so, if for no other reason than a concern that this would undermine involvement in later CFL cases.

Unconscionability, the Duty to Disclose & Good Faith: *F.L.A.* s. 56(4)

In Ontario, Part IV *Family Law Act* governs domestic contracts. While the Act allows parties to establish their own post-separation legal regime, it provides some procedural safeguards, giving a court a limited yet significant discretion to set aside domestic contracts:

> 56(4) A court *may*, on application, set aside a domestic contract or a provision in it,
>
> (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
>
> (b) if a party did not understand the nature or consequences of the domestic contract; or
>
> (c) otherwise in accordance with the law of contract.

Although this subsection can be invoked to challenge any provision of a Separation Agreement,[8] it is most likely to be used to challenge the property provisions, as there are other, broader statutory bases for variation or overriding of provisions related to support or the care of children (see discussion below.)

Section 56(4) gives a court a discretion to set aside a provision in a domestic contract where:

- a party failed to disclose significant assets, debt or liabilities, which existed at the time the contract was made;
- if the party did not understand the nature or consequence of the domestic contract; or
- otherwise "in accordance with the law of contracts." The contractual grounds that have been used to challenge Separation Agreements include fraud, duress, undue influence, public policy and material misrepresentation, though there is a tendency to focus on the broader ground of unconscionability.

Section 56(7) makes clear that parties cannot contract out of the judicial oversight offered by s. 56(4). There is no time limit within which a party may seek to invoke s. 56(4), though generally the longer the time that has elapsed since the Agreement was signed, the more serious the breach that is required for a court to upset the arrangements that the parties have made and lived with.

There are no reported cases in which CFL Separation Agreements have been challenged, which is not surprising given the nature and the relative novelty of this

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[8] A court may invoke s. 56(4) of the *F.L.A.* to set aside a spousal support provision of a Separation Agreement that deals with support under the *Divorce Act,* as this is valid provincial law governing the formation of domestic contracts. Even if a challenge fails under s. 56(4) of the *F.L.A.,* a court may invoke the *Divorce Act* to override a spousal support provision; see *Murray v Murray*, [2003] O.J. 3350 (Ont. Sup. Ct.) at para. 12.

method of resolving family law cases. It is, however, instructive to review some of the leading cases decided under s. 56(4).

While unconscionability is an important ground for challenging domestic contracts, especially if one party does not have independent legal advice, it is unlikely to be invoked in many cases where a Separation Agreement was negotiated under CFL. The courts will only find an agreement unconscionable if there has been both an "improvidence in the terms of the agreement" and an inequality of bargaining power. [9] It seems unlikely that a CFL Separation Agreement would be both "improvident on its face," and the result of substantial inequality of bargaining power that was not redressed by the provision of independent legal advise.

Inadequate disclosure or non-disclosure is more likely to be an issue than unconscionability in CFL situations.

In *Demchuk v. Demchuk*[10]Clarke L.J.S.C. emphasized that s. 56(4)(a) is a discretionary provision and declined to invoke this provision despite the non-disclosure by the husband of some of his assets. The court noted that the wife had independent legal advice and was not under duress at the time the separation agreement was made. Perhaps most significantly, the wife was aware of the existence of the assets in question, the husband's pension and profit sharing plan, but her counsel did not pursue efforts to obtain disclosure of their value when the agreement was being negotiated. Further, the value of the assets in question was not a very large portion of the total value of the family property, and the husband had honoured all of his commitments in the agreement in the six years since separation

Despite decisions like *Demchuk*,[11] it is important to appreciate that s. 56(4)(a) creates a positive duty on parties to the domestic contract to divulge information without legal steps compelling them to do so.[12] The recent decision in *Reinhardt v. Reinhardt*[13]

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[9]The leading authority in Ontario as to whether a domestic contract is unconscionable under sec. 56(4)(c), is *Rosen v. Rosen* (1994), 18 O.R. (3d) 641 (C.A.), where Grange J. states the test for unconscionability as follows:

> The question therefore becomes, was there an inequality between the parties, a preying of one upon the other which, combined with improvidence, cast the onus upon the husband of acting with scrupulous care for the welfare and interests of the wife. We must always remember it is not the ability of one party to make a better bargain that counts. Seldom are contracting parties equal. It is the taking advantage of that ability to prey upon the other party that produces the unconscionability.

[10] (1986), 1. R.F.L. (3d) 176 (Ont. S.C.).

[11] See also *Dochuk v Dochuk* (1999), 44 R.F.L. (4th) 97 (Ont. Gen. Div.)

[12] *Montreuil v. Montreuil*, [1999] O.J. No. 4450 (Ont. S.C.), at para 100, Aiken J. [emphasis added]:

> There are cases decided under the Family Law Act where trial judges have held s. 56(4)(a) cannot be invoked to set aside a separation agreement for non-disclosure of financial information if no request is made for disclosure or if ordinary discovery mechanisms are not used. To the extent that any such decision stands squarely for the proposition that someone seeking to invoke s. 56(4)(a) of the Family Law Act must show that he or she pursued all avenues of obtaining financial disclosure (including discovery) prior to signing a domestic contract, I am not in agreement with it. *I interpret s 56(4) of the Family Law Act as placing a positive duty on a party to a domestic contract to divulge information without the other party having to take legal steps in order to compel disclosure*. To hold that one party has to go as far as to the discovery stage in order to

presents an example of a situation where a husband was held to be under a legal duty not only to disclose the existence of assets, but also to provide expert opinion to his wife of their value prior to the drafting of the Separation Agreement. Although the wife was aware of the existence of the husband's pension, she was not aware of its value. Justice Hambly found that the husband preyed on his former spouse's vulnerability and that the separation agreement was "not a true negotiation," even though the wife was represented by counsel. The judge ordered a revised equalizing payment to take account of the proper valuation of the assets which had not been appropriately valued at the time of the agreement being signed,

Section 56(4) provides a court with discretion to set aside the entire Separation Agreement, or any offending provisions of the Agreement. The failure to properly disclose assets and income, despite the lack of unconscionable circumstances, may result in an award for retroactive and ongoing child and spousal support, as it did in the 2003 Ontario case of *Trick v. Trick*[14]. Justice Seppi stated:[15]

> The [husband]... who has misled the court throughout...these proceedings regarding his financial position, and has failed to inform his former wife of his improved financial circumstances which he knew were materially different from what existed at the time of the agreement, is now not believed in his contention that he is completely without any financial resources and unable to make up the proper financial support which he should have paid to help make his former wife's and children's lives reasonably comfortable.

Related to the obligation to fairly disclose the value of assets and income is the obligation set out in typical Participation Agreements to act in "good faith" when negotiating a CFL Separation Agreement.

In 2000 in *Leopold v Leopold*[16] Madam Justice Janet Wilson of the Ontario Superior Court expressed the view that in assessing the validity of Separation Agreements, courts have duty to ensure that these agreements are negotiated in "good faith", exercising a broader jurisdiction than merely ensuring that these agreements are not unconscionable.

> A useful theoretical framework in the commercial context defining the graduated obligations between contracting parties is found in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) at p. 3. [where

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compel disclosure before that party can later rely on s. 56(4)(a) ignores that portion of the preamble to the legislation which states one of its objectives is `...to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership...'. It also ignores the policy, to which the courts frequently give lip service, of encouraging parties to settle their affairs outside of the litigation process.

[13] [2004] O.J. No. 3318.

[14] [2003] O.J. No. 1263

[15] [2003] O.J. No. 1263, at para. 61.

[16] (2000), 51 O.R. (3d) 275, at para. 105.

]P.D. Finn describes a three-tiered hierarchy of standards of conduct governing consensual relationships. The demarcation where one standard of behaviour ends and another begins is not always clear, as reflected in tensions and developments in the law....:Finn confirms ... that each of the three standards places different demands on a contracting party with respect to the extent that he or she is required to acknowledge or protect the interests of the other:

> Common to all three standards mentioned is a concern with the extent to which one party to a relationship is obliged to acknowledge and to respect the interests of the other. But each, in setting its own limits, proceeds from a different premise. "Unconscionability" accepts that one party is entitled as of course to act self-interestedly in his actions towards the other. Yet in deference to that other's interests, it then proscribes excessively self-interested or exploitative conduct. "Good faith" while permitting a party to act self-interestedly, nonetheless qualifies this by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other. The "fiduciary" standard for its part enjoins one party to act in the interests of the other -- to act selflessly and with undivided loyalty. There is, in other words, a progression from the first to the third: from selfish behaviour to selfless behaviour. Much of the most contentious of the trio is the second, "good faith" It often goes unacknowledged. It does embody characteristics to be found in the other two.

Justice Wilson concluded that the judicial standard of review for separation agreements should be a requirement of "good faith," and explained the significance of this standard in terms of ensuring that the agreement meets standards of "objective fairness" and that there has been adequate disclosure:[17]

> The reasonable expectations of the parties defining the expected or prohibited conduct of good faith depend upon the circumstances. In the family law context, the requirements include making full and complete documentary and factual financial disclosure, and not to take advantage of known weaknesses of the other. I submit that the duty of good faith imposes a further obligation: to be governed by principles of objective fairness in reaching an agreement. The standard of fairness demanded is not the selfless standard of a fiduciary, who is obliged to look after the interests of the other, but rather standards of objective fairness given the facts and circumstances of each case. ...The vows of marriage when made are serious ones, with vast social implications. I conclude that the duty of good faith allows a court to impute that the reasonable expectations of the parties are that the contractual terms ending their marital responsibilities must be within the range of objective fairness. Objective fairness must be judged at the time the agreement is reached. ...

[17] (2000), 51 O.R. (3d) 275, at para. 133-140.

....The unique and important aspects of a matrimonial relationship may be recognized by imposing the standard of good faith upon separating couples negotiating their financial arrangements to ensure that there is an appropriate judicial supervisory role for domestic contracts. Even when there is a full and final release of support, spouses must not be able either intentionally or unintentionally to exact an improvident, clearly unfair bargain at the termination of the relationship.

While in light of Supreme Court of Canada decision in *Miglin,* there is real doubt as to whether the higher "good faith" standard of scrutiny is to be applied to all Separation Agreements,[18] the express undertakings in a CFL Participation Agreement would clearly invite this higher level of judicial scrutiny. Since the parties themselves have undertaken to disclose assets and negotiate "in good faith," it would certainly be appropriate for courts to hold them to this aspect of their bargain. This does not mean that courts will lightly intervene to vary CFL agreements, but it does suggest that, if one party later seeks to challenge a CFL agreement in the courts, judges will be more likely to carefully scrutinize the conduct of the parties during the negotiating process. The undertakings in the Participation Agreement create a degree of vulnerability that merits protection in the courts.

Spousal Support Provisions: *Miglin* & F.L.A. s. 33(4)

In 2003 the Supreme Court of Canada in *Miglin v Miglin*[19] redefined the test for granting spousal support under the *Divorce Act* in cases in which one party is asking a judge to override a provision for support, or a waiver of support, in a prior Separation Agreement. Although the majority of the Court rejected the very narrow "radical and unforeseen" change in circumstances test established in the 1987 Supreme Court spousal support Trilogy,[20] the Supreme Court continues to emphasize the importance of finality and of generally holding parties to their agreements.

The majority in *Miglin* stressed the objectives of certainty, finality and autonomy following the break down of marriage. The Supreme Court articulated a two-stage test to determine if the spousal support provisions of a Separation Agreement should be judicially varied: stage one requires consideration of the circumstances and terms at the time of the formation of the Agreement, while stage two considers the extent to which the Agreement remains in compliance with the *Act* at the time of application to override the Agreement.

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[18] Both the majority and the dissent of the Supreme Court in *Miglin* briefly discussed the "good faith" approach of Wilson J in *Leopold* (at paras. 61 and 99). Though recognizing a broader statutory when dealing with spousal support under the *Divorce* Act, the majority in *Miglin* indicated that when dealing with common law based challenges to the validity of Separation Agreement, the standard of judicial review of is "unconscionability." The decision in *Miglin* does not, however, preclude a broader review power for CFL Agreements, where there has been an express undertaking to act in "good faith."

[19] *Miglin v. Miglin,* 2003 SCC 24.

[20] *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Caron v. Caron*, [1987] 1 S.C.R.

The first stage considers the circumstances and terms when the Agreement was negotiated and executed, including concern about oppression, pressure or the existences of either parties' vulnerability. If the Agreement is found to be unconscionable, a court may override any provision of the Agreement, including the spousal support provisions, but it is clear that the applicant for support does not have to establish unconscionablity for a court to invoke its *Divorce Act* jurisdiction to award support.

At this first stage "the court should first look to the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it.".[21] An important consideration is whether the parties had independent legal advice, as "any systemic imbalances between the parties" will in most cases be overcome by appropriate professional assistance. The Court concluded:[22]

> 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 first stage also requires consideration of the substantive terms of the Separation Agreement:[23]

> The court must determine the extent to which the agreement takes into account the factors and objectives listed in the Act, thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown. Only a significant departure from the general objectives of the Act will warrant the court's intervention on the basis that there is not substantial compliance with the Act. The court must not view spousal support arrangements in a vacuum, however; it must look at the agreement or arrangement in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves.
>
> When examining the substance of the agreement, the court should ask itself whether the agreement is in substantial compliance with the *Divorce Act*. As just noted, this "substantial compliance" should be determined by considering whether the agreement represents a significant departure from the general objectives of the Act, which necessarily include, as well as the spousal support considerations in s. 15.2, finality, certainty, and the invitation in the Act for parties to determine their own affairs. The greater the vulnerabilities present at the time of formation, the more searching the court's review at this stage.

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[21] At para. 80
[22] At para. 83
[23] At paras. 84 & 85.

If an agreement is rendered in "unimpeachable circumstances" and "substantial compliance" with the objectives of the *Divorce Act,* the court should proceed to the second stage, which requires consideration of the parties' circumstances at the time of the application, as:[24]

> the vicissitudes of life mean that, in some circumstances, parties may find themselves down the road of their post-divorce life in circumstances not contemplated. Accordingly, on the bringing of an application under [the *Divorce Act*] s. 15.2, the court should assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act.

If the Agreement meets the tests of the first stage, at this second stage, a court is required to give "great weight" to the agreement. [25] A court should uphold a Separation Agreement unless the situation was not "contemplated" by the parties at the time of negotiation:[26]

> a certain degree of change is foreseeable most of the time. The prospective nature of these agreements cannot be lost on the parties and they must be presumed to be aware that the future is, to a greater or lesser extent, uncertain..... The test here is not strict foreseeability; a thorough review of case law leaves virtually no change entirely unforeseeable. The question, rather, is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application.

As examples, the Supreme Court suggested that changes in the job market, more onerous parenting responsibilities, or a challenging transition to the workforce will generally not be considered circumstances where an agreement or any of its provision will be set aside. While the Court recognized the "unique nature of separation agreements and their differences from commercial contracts," the Court observed that "they are contracts nonetheless".[27] The decision in *Miglin* is clear that trial judges should not use their discretion to arbitrarily substitute their views of what is fair for what was agreed to by both parties.[28]

As a result of the *Miglin* decision in the Supreme Court, lawyers may be more confident in advising their clients that the likelihood Separation Agreements will be likely to be upheld by the courts.[29] It is, however, clear that notwithstanding *Miglin* the Ontario

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[24] At para. 87
[25] At para. 87
[26] At para. 89
[27] At para. 91
[28] At para. 91
[29] Reinforcing the *Miglin* approach is subsequent decision by Supreme Court's in *Hartshorne v. Hartshorne*, [2004] S.C.J. No. 20.. This case applied the *Miglin* non-interventionist stance to marriage contracts, but not without qualification.[29] Justice Bastarache recognized that marriage contracts are written before rights are vested and before any entitlement arises, while separation agreements concern existing rights. The court is conscious not only of the circumstances in which different types of marriage

courts are, in appropriate circumstances, prepared to invoke the *Divorce Act* to vary spousal support provisions of Separation Agreements, even if they are negotiated in "unimpeachable circumstances". In her 2003 decision in *Murray v. Murray*, [30] Justice Croll found that a Separation Agreement which had been negotiated in "unimpeachable circumstances," but concluded that in light of the husband's "huge" post-separation increase in income and wealth, the wife's waiver of spousal support was not binding and the court awarded spousal support. [31]

In cases in which spousal support is dealt with under the *Family Law Act*,[32] the statute appears to give courts a somewhat different jurisdiction than under the *Divorce Act*.

> 33(4) The court may set aside a provision for support or a waiver of a right to support in a domestic contract ...although the contract contains an express provision excluding the application of this section
>
> (a) if the provision for support or the waiver of the right to support results in unconscionable circumstances;
>
> (b) if the provision for support is in favour of or the waiver is by or on behalf of a dependant who qualifies for an allowance for support out of public money; or

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contracts are drafted, but also takes into account in the first step of the *Miglin* test, the significance of the circumstances of how negotiations are reached. For further discussion of *Miglin* and *Hartshorne*, see: Elizabeth Jollimore, *"Hartshorne, Miglin*, the Variability of Domestic Agreements and the Supreme Court of Canada" (June 2004) 288 *Canadian Family Law Matters* 1. See also, Carol Rogerson, "They Are Agreements Nonetheless" (2003), 20 Can. J. Fam. L. 197; also M. Bailey, "Marriage à la Carte: A Comment on *Hartshorne v Hartshorne* " (2004), 20 Can. Fam.L.Q. 249; and also M. Shaffer, "Domestic Contracts , Part II : The Supreme Court's Decision in *Hartshorne v Hartshorne"* (2004), 20 Can. Fam.L.Q. 261.

[30] [2003] O.J. No. 3350 (Ont. Sup.C.). In *Murray* the spouses had a 16 year traditional marriage during which the husband started a business. At the time of separation the business was not doing well, but after separation market conditions dramatically improved and the husband's wealth and income increased very substantially.

For cases where the courts did not override waivers of spousal support, see *Pearce v Murphy*, [2004] O.J. 367 (Ont. Sup. Ct.) and *Wagner v. Wagner,* [2003] O..J. No. 3771 (Ont. Sup. Ct.). In *Wagner* there was some violence during the marriage, and the woman signed the agreement without having obtained full financial disclosure and contrary to the advice of a lawyer whom she consulted for one hour, but the court applied the two-stage test from *Miglin* and upheld the wife's waiver of the right to claim spousal support.

[31] See also *Marinangeli v. Marinangeli* [2003] O.J. No. 2819 (Ont. C.A.), where the Ontario Court of Appeal, distinguishing *Miglin*, implied a term in the Minutes of Settlement that the husband had a duty to disclose material changes in his financial circumstances when the wife did not have access to this information. The Court characterized the husband's non-disclosure as a breach of an implicit obligation to disclose, because the parties had agreed that spousal and child support could be varied in the event of a "material change in circumstances" and the husband had exercised stock options worth over $1 million within 14 months of signing the agreement.

[32] Due to the doctrine of paramountcy, if a divorce is being obtained, either party can require the issue of spousal support to be dealt with under the *Divorce Act* . The *F.L.A.* is only likely to be invoked in cases involving Separation Agreements if the parties were living common law and hence cannot get a divorce.

(c) if there is default in the payment of support under the contract or agreement at the time the application is made.

The Ontario Court of Appeal held in 2001 in *Scheel v. Henkelman* that s. 33(4)(a) is "directed not to unconscionable agreements, but to unconscionable results of such agreements." [33] Factors that the court should consider include: [34]

the circumstances surrounding the execution of the agreement, including
(a) the fact that each party was represented by competent counsel, the absence of any undue influence, the good faith and the expectations of the parties;

(b) the results of the support provisions of the agreement, including any hardship visited upon a party, and

(c) the parties' circumstances at the time of the hearing, including their health, employability and ability to maintain their lifestyle.

Although in theory the *F.L.A.* s. 33(4) articulates a somewhat different standard from *Miglin*, there are no-post-*Miglin* decisions that have invoked this provision, and it seems unlikely that the courts will take a much different approach in the relatively infrequent post-Separation Agreement *F.L.A.* cases than they might under *Miglin* and the *Divorce Act*.

A properly negotiated CFL Separation Agreement that deals fairly with spousal support should not be subject to later judicial variation. However, like other Separation Agreements, the spousal support provisions of a Separation Agreement drafted in the CFL process may in some circumstances be subject to later judicial variation, no matter how carefully worded any purported waiver of the right to seek support or later judicial review. In particular, if it is established that there was not full and fair disclosure of information about income, assets and reasonably foreseeable prospects, a court is likely to find that there has been a breach of the "good faith" and "disclosure" clauses of the Participation Agreement, and conclude that the circumstances in which the Separation Agreement was negotiated *are* "impeachable." The fact that a Separation Agreement was negotiated under the CFL process, with its undertaking of "good faith" is likely to increase the level of judicial scrutiny, especially at the first stage of the *Miglin* inquiry. On the other hand, the effect of *Miglin* may result in courts giving significant deference to a CFL Separation Agreement at the second stage, when considering future developments.

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[33] (2001) 52 O.R. (3d) 1 (Ont. C.A.), at para. 15. See also *Desmaraux v Desmaraux* (2002), 28 R.F.L. (5th) 25 (Ont. C.A.).
[34] (2001) 52 O.R. (3d) 1 (Ont. C.A.), at para. 205.

Child Support: The *Guidelines*, *Divorce Act* s.15.1(8) & *F.L.A.* s. 56(1.1)

The courts have long accepted that a parent "cannot barter away his or her child's rights to support in a settlement agreement," though "the agreement operates as strong evidence that at the time [it was made], each accepted the agreement as adequately providing for the needs of the children."[35] It is now, however, clear that with the introduction of the *Child Support Guidelines,* there is an onus on the person paying child support that is less than the *Guidelines* amount at the time of making the Agreement to establish that this is because some other "special provision" has been made for the support of the child, for example by a property transfer that benefits the child.[36]

Both the federal *Divorce Act*[37] and the Ontario *F.L.A.*[38] require a court to be satisfied that "reasonable arrangements" have been made for the support of any children. The *Divorce Act* goes on to provide:

> 15.1(8) [I]n determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.

The *Divorce Act* also offers the courts guidance about when it is appropriate to give effect to child support provisions of a Separation Agreement that provide for less than the *Guidelines* amount:

> 15.1 (5) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied
>
> (a)that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
>
> (b) that the application of the applicable guidelines would result in an amount of child support that *is inequitable given those special provisions*.

This provision places an onus on the payor parent to establish it would be "inequitable" to order an amount that is lower than the *Guideline* amount, though the court should regard to the Agreement as a whole when assessing the adequacy of the arrangements for child support.

In *Martin v. Martin*[39], the court considered a separation agreement that provided that the mother would transfer her joint interest in the matrimonial home to the father,

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[35] *Willick v Willick* (1994), 6 R.F.L. (4th) 161, at para 16 &17, per Sopinka J.
[36] *F.L.A.* s. 37(2.1) to (2.6); *Deiter v. Sampson,* [2004] O.J. 904 (C.A.); and *Wright v. Zaver* [2002] O.J. 1098 (Ont. C.A.).
[37] *Divorce Act*, s. 11(b)
[38] *F.L.A.* s. 37(2.5)(a)

and additionally assume responsibility for certain family debts, in return for which the custodial father agreed that he would not seek periodic child support from her. The court confirmed that a Separation Agreement cannot oust the jurisdiction of a court under the *Divorce Act* s. 15.1 to ensure that children are properly supported. [40] Although Métiever J. observed that she would be "loathe to unravel only one term of a comprehensive separation agreement" negotiated with competent counsel, before deciding not to vary the Agreement she determined that the amount of the indirect and direct benefits to the children and the custodial parent from Agreement exceeded the amount that would have been paid under the *Guidelines* at the time of the court application for child support.

If the issue of child support is being dealt with under the Ontario *Family Law Act*, there are similar provisions giving a court the discretion to override the child support provision of a Separation Agreement, though arguably giving the Agreement somewhat more weight than situations dealt with under the Divorce Act. The *F.L.A.* provides:

> 56 (1.1) In the determination of a matter respecting the support of a child, the court may disregard any provision of a domestic contract or paternity agreement pertaining to the matter where the provision is unreasonable having regard to the child support guidelines, as well as to any other provision relating to support of the child in the contract or agreement.

It has been held that this provision requires a court to consider all of the terms of the Agreement, not just those dealing with child support, but also those provisions that deal with a transfer of property or other financial benefit for the child or custodial parent. It was held by Lack J. in *Spencer v Irvine,*[41] that the applicant "bears the onus" of establishing that a provision is "unreasonable."

If the terms of the Agreement call for a fixed amount of child support to paid and do not provide for an adjustment if there is an increase in the income of the payor parent, a court is likely to find that the Agreement is "unreasonable." [42]

The Best Interests of the Child: *F.L.A.* s. 56(1)

It is clear that courts have the authority to override provisions of domestic contracts relating to custody, access or care of children, which do not accord with the best interests of a child. [43] In Ontario, this authority is codified in the *Family Law Act* which provides:

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[39] (1999) 44 RFL (4th) 125.

[40] However, the court decided that the benefits provided by the mother deemed sufficiently substantial to stand in the place of periodic child support for a lengthy period. There was reluctance by the court to interfere with only one aspect of a comprehensive settlement where no evidence of an unanticipated material change since the execution on the agreement.

[41] (1999), 45 R.F.L. (4th) 434 (Ont. S.C.J.)

[42] See *Marinangeli v. Marinangeli*,[2003] O.J. 2819 (C.A.) (implied duty in Separation Agreement to disclose increase in income to allow adjustment of child support)

[43] *Joyce v. Joyce* (1983), 35 R.F.L. (2d) 92 (Ont. H.C.), at para. 13 – "Agreements cannot oust the court's jurisdiction to ensure that the children's needs are met". See also *Grant-Hose v. Grant-Hose*[1991] O.J. No. 314 (Ont. U.F.C.).

> 56(1) In the determination of a matter respecting the education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining to the matter where, in the opinion of the court, to do so is in the best interests of the child.

The federal *Divorce Act*[44] also requires the courts to consider only the best interest of the child when making an order for the custody, access or care of the child:

> 16(8) In making an order [for custody or access] the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

Despite this broad judicial power, Separation Agreements are given significant weight if there is a later challenge in regard to child care arrangements. The fact that parents have agreed to a particular arrangement creates a presumption that it was in best interests when made,[45] though quite appropriately courts will consider developments since the Agreement was made and their effect on the children. The courts will only override the child care provisions of a Separation Agreement if it is established that those provisions are, at the time they are presented to the court, contrary to the best interests of the child.[46]

CFL is intended to result in Separation Agreements in which well-informed, well-counseled parents make the best possible arrangements for their children. Arrangements for the care of children should include a process for variation to meet the changing needs and interests of the children as they grow older. An *appropriate* variation process involving a couple for whom CFL is appropriate should preclude the necessity of returning to court to deal with situations in which the original arrangements that have been made no longer meet the children's needs. The courts will be most likely to be asked to intervene to protect the best interests of a child only in cases that resulted in CFL Agreement but were not suitable for CFL, or where there has been a subsequent change in circumstances that the parties have not been able to deal with.

Conclusion: Practice Advice

If the CFL process is functioning properly, it should result in Separation Agreements which the parties will want to honour. The Agreements should be fair when made, and deal appropriately with the inevitable changes that the future will produce for the parties.

The Supreme Court of Canada in *Miglin* has signaled that the courts should give significant deference to Separation Agreements negotiated in "unimpeachable circumstances." Counsel and the parties should, however, be aware that the fact that a

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[44] Divorce Act, R.S. 1985, c.3 (2nd Supp.)
[45] *Liang v Liang* (1978), 5 R.F.L. (2d) 103 (Ont. H.C.); and *Sabbagh v Sabbagh* (1994), 2 R.F.L. (4th) 44 (Man C.A.)
[46] *Harthauer v. Harthauer* (1990), 26 R.F.L. (3d) 256 (Ont. U.F.C.).

CFL Separation Agreement has been signed does not preclude the possibility that one party may seek later judicial review. Indeed, the greater degree of trust and vulnerability that is inherent in the CFL process may result in greater judicial scrutiny if there has been a breach of the duties to disclose and act in good faith.

We offer the following suggestions for counsel involved in the CFL process:

- Include in the Participation and Separation Agreements a clause which stipulates that if there has been a breach of the duties of disclosure or good faith, there may be later resort to the courts to have the agreement set aside in whole or in part to provide relief. The courts are very likely to imply such a term, but warning the parties of this may provide a degree of reassurance as well as encourage the honouring of these duties.

- Emphasize to clients starting the CFL process their duty to fully disclose and to act in good faith, and explain the consequences of failing to do so.

- Do not advise a client that a Separation Agreement which appears to be unfair to her can be signed and nevertheless might later be set aside unenforceable by a court. As established by the Supreme Court of Canada in *Hartshorne,* this type of advice may actually make it more difficult for the client to later challenge an agreement that is unfair, and exposes the lawyer to potential liability for negligence. [47] If an Agreement appears unfair, the appropriate advice is to urge the client not to sign it. If the client is unable to resist the financial or emotional pressure to sign, counsel should refuse to sign a certificate of independent legal advice which does not include a qualifying statement to that the Agreement appears unfair and the client feels under pressure to sign.

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[47] In *Hartshorne v Hartshorne*, [2004] S.C.R. 20 the lawyer for a woman who entered into a marriage contract sent her an opinion letter stating the Agreement proposed by the husband was "grossly unfair" and advised her that "a Court would easily find such provision to be unfair and would intervene to redistribute the property on a more equitable basis," as well strongly recommending that she not execute the Agreement "in its present form. " Justice Bastarache observed [at para. 61, emphasis added]:

> It is clear from ... in this opinion letter that the [woman]... was forewarned of the Agreement's "shortcomings"..... Despite this advice, or because of it, as expressed by counsel for the respondent during the hearing before our Court, the respondent signed the Agreement. [She]... cannot now rely on her lawyer's opinion to support her allegation that because she thought the Agreement was unfair from its inception, for all intents and purposes, she never intended to live up to her end of the bargain. *It is trite that a party could never be allowed to avoid his or her contractual obligations on the basis that he or she believed, from the moment of its formation, that the contract was void or unenforceable.*

See comments of Prof. Jay McLeod and Philip Epstein in "Prenuptial Agreements must usually be honoured: SCC," *The Lawyers Weekly*, 9 April 2004. See also M. Bailey, "Marriage à la Carte: A Comment on *Hartshorne v Hartshorne"* (2004), 20 Can. Fam.L.Q. 249 at 251.

- Advise clients in their final reporting letter that the provisions of the Separation Agreement which deal with such future oriented matters as child care arrangements and child and spousal support might be the subject of future court orders if the parties are unable to resolve future disagreements about these matters.

- Advise clients in their final reporting letter that if they subsequently learn that the other spouse has failed to disclose assets or otherwise acted in bad faith during the negotiating process, there may be some basis for setting aside the agreement.

If both counsel are acting appropriately and are not being deceived by their clients, CFL should result in Separation Agreements that endure and are not later challenged in the courts.[48] Practitioners of CFL should welcome the fact that there is the possibility of later judicial review of CFL Separation Agreements for those rare cases in which there may have been a breach of the undertakings to fully disclose and act in good faith, or where the agreement fails to make appropriate provision for children in a manner that accords with the continuing best interests of children. If the lawyers can inform their clients that there may be significant legal consequences for a breach of a CFL Participation Agreement, their clients may be more inclined to enter into these agreements and to honour them.

[48] Pauline Tesler, "Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It" (1999) 13 *American Journal of Family Law* 215 at 220. For an interesting discussion on the collaborative divorce process, see also: A. Rodney Nurse and Peggy Thompson "Collaborative Divorce: A New, Interdisciplinary Approach" (1999) 13 *American Journal of Family Law* 226.