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TAB 5

Family Law Refresher 2020

What you need to know about Negotiating and Drafting Agreements

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February 21, 2020

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WHAT YOU NEED TO KNOW ABOUT NEGOTIATING AND DRAFTING AGREEMENTS[1]

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Introduction

In this paper, I set out the statutory framework for domestic contracts and the seminal authorities, and I review ten domestic contract cases from 2019 and 2020. I consider what this law means for how we negotiate and draft agreements. I conclude with a short list of what I consider to be best practices.

The Statutory Framework for Domestic Contracts

Subsection 2(10) of the *Family Law Act* confirms that a domestic contract dealing with a matter that is also dealt with in the *Act* prevails unless the *Act* provides otherwise. (emphasis added)

A "domestic contract" means a marriage contract, separation agreement, cohabitation agreement, paternity agreement or family arbitration agreement.[2]

A domestic contract and an agreement to amend or rescind a domestic contract are unenforceable unless made in writing, signed by the parties and witnessed.[3]

Section 33(4) of the *Family Law Act* provides as follows:

The court may set aside a provision for support or a waiver of the right to support in a domestic contract and may determine and order support in an application under subsection (1) 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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[1] Presented at the Family Law Refresher, Law Society of Ontario, February 21, 2020.
[2] Section 51 of the *Family Law Act*.
[3] Section 55(1) of the *Family Law Act*. See, also, *Gallacher v. Freisen, 2014 ONCA 399 and Virc v. Blair, [2014] O.J. No. 2301 (C.A.).*

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

Section 56 (1.1) of the *Family Law Act* provides the following:

(1.1) In the determination of a matter respecting the support of a child, the court may disregard any provision of a domestic contract 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.

Section 56(4) of the *Family Law Act* addresses the circumstances in which a domestic contract or a provision in it may be set aside, as follows:

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.

Subsection 56(7) of the *Family Law Act* expressly states that (4) cannot be waived.

The Seminal Authorities

The Legislature Encourages Domestic Contracts

When one looks at the provisions of Part IV of the *Family Law Act*, it is apparent that, far from having a bias against domestic contracts, the legislature was prepared to encourage parties to a marriage or similar relationship to make their own arrangements as to the treatment of property and their responsibilities to each other and to any children of the union.[4]

Negotiation is carried on in "the shadow of the law"

"...parties must be free to settle their family law disputes, and should be encouraged to do so outside the litigation context where possible. Negotiation is carried on in 'the shadow of the law', and will often lead to results that are different from those a court would decide. This is one of the strengths of a negotiated resolution: the parties may take account of issues important to them which are legally irrelevant. One need only consider the extraordinary expense and emotion spent by

[4] *Bosch v. Bosch (1991), 6 O.R. (3d) 168 (C.A.), at p. 174.*

some litigants on 'custody' and 'access' issues respecting pets, which the law regards as simple chattels, like couches and cutlery."[5]

The Courts Should Respect the Private Arrangements Parties Make

In *Hartshorne v. Hartshorne*[6], the Supreme Court of Canada recognized that the courts should respect the private arrangements made for the division of property on relationship breakdown, particularly where the parties have independent legal advice. The courts should be reluctant to second-guess the arrangements on which private parties reasonably expected to rely.

In *Butty v. Butty*[7], the Court of Appeal noted at paragraph 50 that "courts should respect private arrangements that spouses make for the division of their property on the breakdown of their relationship, particularly where the agreement in question was negotiated with independent legal advice."

More recently, the Court of Appeal wrote at paragraph 52 of *Ramdial v. Davis*[8] that "the Supreme Court reiterated the need for courts to respect private arrangements made for the division of property on marriage breakdown, particularly where the agreement was negotiated with independent legal advice, in *Hartshorne v. Hartshorne*, at para. 9. While such agreements are not immune to scrutiny, they are to be set aside only where there is evidence establishing that the circumstances in which the agreement was negotiated were not satisfactory or that the agreement was not in substantial compliance with the objectives of the *Divorce Act*." (emphasis added)

A Greater Duty of Dealing in Good Faith is Owed in Marriage Contracts

There is a distinction between marriage contracts and other kinds of domestic contracts. As Justice Mesbur commented at paragraph 54 of *Patrick v. Patrick*[9] "Unlike separation agreements, marriage contracts are contracts *uberrimae fidei*, contracts requiring the utmost fidelity and good faith between the parties. A greater duty of dealing in good faith is owed in marriage contracts. Because of the special relationship between the parties as intended spouses, they are not entirely at arm's length and thus owe one another duties of good faith and fair dealing."

The Formalities of Execution

In *Gallacher v. Friesen*[10], the appellant submitted that paragraph 55(1) of the *Family Law Act* supports a strict reading, with the effect that all domestic contracts are unenforceable, with an exception for domestic contracts that comply with the necessary formalities of execution. The Court of Appeal noted that the appellant's approach to s. 55(1) of the *Family Law Act* was "inconsistent with that court's observation in *Bosch v. Bosch* that the legislature intended to

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[5] *Mantella v. Mantella (2006), 80 O.R. (3d) 270 (Corbett, J.), para. 38.*
[6] *Hartshorne v. Hartshorne, 2004 S.C.C. 22 (SCC) at paras. 9, 36, 65 and 67.*
[7] *2009 ONCA 852.*
[8] *[2015] O.J. 5630 (C.A.).*
[9] *[2002] O.J. 639 (S.C.J.).*
[10] *2014 ONCA 399.*

encourage rather than discourage domestic contracts". Additionally, the Court of Appeal said, a strict reading with would be inconsistent with that court's recent judgment in *Virc v. Blair*. Paragraph 27 is as follows:

> Justice Pepall's decision in *Virc v. Blair, [2014] O.J. No. 2301* is consistent with a substantial body of case law in Ontario, and in other provinces with similar legislation, holding that the strict requirements of s. 55(1) may be relaxed where the court is satisfied that the contract was in fact executed by the parties, where the terms are reasonable and where there was no oppression or unfairness in the circumstances surrounding the negotiation and execution of the contract..." (emphasis added)

The Burden for Setting Aside a Domestic Contract

In *Dougherty v. Dougherty*[11], the Court of Appeal confirmed that the burden is on the party seeking to escape the effect of the agreement to show that there are grounds for setting it aside.

Financial Disclosure is a Bedrock Principle

The Supreme Court of Canada has confirmed that honest, complete financial disclosure is a bedrock principle in family law disputes. In *Rick v. Brandsema*[12], the Court holds at paras. 47 to 49 that:

> A duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances. The deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation... whether a court will actually intervene will depend on the circumstances of each case, including the extent of the defective disclosure and the degree to which it is found to have been deliberately generated. (emphasis added)

A misrepresentation must be material, in the sense that a reasonable person would consider it relevant to the decision to enter the agreement in question. In addition, the material misrepresentation must have constituted an inducement to enter the agreement upon which the party relied.[13]

Butty v. Butty[14] confirms that a party cannot enter into an agreement knowing of its shortcomings in disclosure and then rely on those shortcomings to have the agreement set aside. In that case, the wife had actual knowledge and understood that the marriage contract ended her interest in the farm property, was aware of the uncertainty as to the value of her husband's interest in the farm

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[11] *Dougherty v Dougherty, [2008] O.J. No. 1502 (ONCA) at para 11.*
[12] *2009 SCC 10*
[13] *Dougherty, supra. at para. 11.*
[14] *See note 7.*

because of a third party's interest in the property, and had been given documents disclosing this and other valuation uncertainties.

In *Quinn v. Epstein Cole LLP*, the Court of Appeal held at para. 4 that a spouse could not resile from the consequences of failing to pursue further disclosure "unless she demonstrated that [the husband's] financial disclosure was inaccurate, misleading or false."[15] In *Quinn*, the appellant had no evidence of non-disclosure but maintained that more such evidence might be forthcoming as a result of examinations for discovery.

In *Virc. v. Blair*[16], the wife, a lawyer, realized after signing a separation agreement that her husband had significantly overvalued his shares in a business corporation at the time of the marriage in his Net Family Property Statement. She brought an application to set aside the agreement and recalculate the equalization payment. The motions judge who heard the husband's application for summary judgment dismissing her claim granted the motion on the basis that the wife could not rely on the undervaluation, having failed to undertake her own investigation when she had the opportunity to do so as a shareholder and officer of the business corporation with full access to its records and books. Nor did she ask the husband for further information or consult with anyone regarding the value of the shares.

The Ontario Court of Appeal held at para. 58 that "in the face of a deliberate material misrepresentation, the onus is not appropriately placed on the recipient spouse. Rather, the burden is on the party disclosing to establish actual knowledge of the falsehood by the recipient". It went on to note at para. 68 that "It is one thing to disclose assets and liabilities and their values believing the disclosure to be true. It is quite another to deliberately misrepresent the values of assets and liabilities knowing them to be untrue. The law does not entitle a liar to succeed just because the recipient of the falsehoods has not ferreted them out. " The Court of Appeal concluded that the motion judge erred in granting summary judgment when relevant factors that required a determination were left unresolved. Specifically, the motion judge did not make rulings on key factors required by *Rick v. Brandsema*, including the extent of the defective disclosure and the degree to which it was deliberate. The Court of Appeal ordered a trial.

At trial, Justice Jarvis found that the wife did not have actual knowledge of the husband's misrepresentations. Moreover, the husband's misrepresentation materially impacted the calculation of his net family property and the wife's decision to sign the separation agreement. The husband asserted on appeal that he had fulfilled his disclosure obligations because the wife could have sought to independently verify his valuations. The Court of Appeal[17] held that the fact that the wife had the ability to independently verify the husband's valuations did not mean that the husband had fulfilled his disclosure obligations. The duty to disclose is the duty of the titled spouse to fairly value the asset. Given the husband's valuation expertise and the wife's deference to it, it was incumbent on him to do more than stand by silently and leave it to the wife to verify the accuracy of his representation.

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[15] *Quinn v. Keiper, [2007], O.J. No. 4169 (Ont. S.C.J.) at para 56 affirmed (without mentioning this point), [2008] O.J. No. 3788, (Ont. C.A.).*
[16] *2014 ONCA 392.*
[17] *2017 ONCA 394*

The Right to an Income Stream is an "Asset", Within the Meaning of s. 56(4)(a)

The right to an income stream is an "asset", within the meaning of s. 56(4)(a) of the *Family Law Act* and ought to be disclosed.[18]

Failure to Understand the Nature or the Consequences

These cases often go hand in glove with the engagement of one of the other provisions of s. 56(4). For example, full financial disclosure is essential to a party's ability to enter into a domestic contract on an informed basis.

Independent legal advice is a factor to be considered in the analysis, but it is not determinative.[19]

In *LeVan*[20], Justice Backhouse found at trial that the husband misrepresented to the wife that the marriage contract had a very narrow purpose of ensuring that she would not get shares in the LeVan family companies. In fact, the marriage contract excluded all of the husband's business interests from net family property and severely restricted the wife's right to support. The husband did not want to pay spousal support to the wife in the event of a separation and knew that the agreement went much further than he represented to the wife.

The wife's lawyer had no idea as to the nature and extent of the husband's assets or income and was not in a position to appreciate the consequences of the agreement and impart them to the wife in the absence of knowing what the wife was giving up. Without financial disclosure, the wife's lawyers were deprived of the opportunity to advise her in a meaningful way of her rights. There was no evidence that the wife's lawyer had advised the wife that in order to understand what she was giving up, she needed to know the value of the husband's assets and income. A lawyer cannot give proper independent legal advice when he or she does not understand the client's situation. Justice Backhouse concluded that the wife did not understand the nature and consequences of the marriage contract on her rights and that she did not receive independent legal advice, in large part because of the husband's interference with her relationship with her first lawyer.

At paragraph 45 of *Martin v. Sansome*,[21] the Ontario Court of Appeal holds that the fact that a party appreciates that a domestic contract is not good for him or her does not mean that he or she understood the nature or consequences of the domestic contract.

Otherwise In Accordance with the Law of Contract

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[18] *Tadayon v. Mohtashami, 2015 ONCA 777, at para. 23, citing Horner v. Horner (2004), 72 O.R. (3d) 561 (C.A.), at para. 77.*
[19] *Dougherty v. Dougherty, supra., at par. 11.*
[20] *LeVan v. LeVan, [2008] O.J. No. 1905, 2008 ONCA 388 (Ont. C.A.), leave to appeal refused [2008] S.C.C.A. No. 331 (S.C.C.) at para 33.*
[21] *[2014] O.J. No. 27 (C.A.), at para. 45.*

In *Ward v Ward*[22] the Ontario Court of Appeal confirms that the grounds for setting aside a domestic contract pursuant to s. 56(4)(c) include unconscionability, duress, uncertainty, undue influence, mistake and misrepresentation.

Unconscionability

In *Rosen v. Rosen,*[23] the Ontario Court of Appeal states that the question to be answered in determining unconscionability is whether there was inequality between the parties, or a preying of one upon the other, that placed an onus on the stronger party to act with scrupulous care for the welfare and interests of the vulnerable. At paragraph 13 the court notes 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".

At paragraph 31 of *Rick v. Brandsema*, the Supreme Court of Canada noted that the trial judge had found that:

> "the wife's 'perception of reality' was 'very significantly' affected by an 'unhealthy condition of the mind' and that she was a 'deeply troubled person'. He found that her mental instability was not only manifest at the time of separation, but also persisted throughout the negotiation, execution and implementation of the separation agreement. This led him to conclude that the husband, by accepting a settlement offer he knew was based on misleading financial information, knowingly exploited his wife's mental instability at the time the agreement was negotiated and executed."

The court was satisfied that the trial judge's findings of fact were fully supported by the record, and relied on them. The wife's vulnerabilities were not compensated for by the presence of a solicitor, as her emotional and mental condition left her unable to make use of the professional assistance available to her. Therefore, the combination of misleading informational deficits and psychologically exploitative conduct led the trial judge to conclude that the resulting, significant deviation from the wife's statutory entitlement rendered the agreement unconscionable and unenforceable. The Supreme Court of Canada confirmed that the trial judge's conclusion was amply supported by the evidence, and restored the trial judge's order.

In general, the doctrine of unconscionability with respect to domestic contracts focuses on whether or not there were unconscionable circumstances surrounding the formation of the contract. It is the circumstances at the time of the drafting and signing of the contract which must be examined, not the results, under this criterion.[24]

In *Balsmeier v Balsmeier*, the wife's position was that she had "no choice" but to sign the contract as she had invited 200 people to her wedding and "given up everything" to move to Canada to marry her husband. Despite those facts, the court found that she had received independent legal advice and the circumstances surrounding the signing of the marriage contract were not

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[22] *Ward v Ward, 2011 ONCA 178 at para 21.*

[23] *Rosen v. Rosen,[1994] O.J. No. 1160 (C.A.).*

[24] *Toscano v. Toscano [2015] O.J. No. 315. (S.C.J.)*

unconscionable.[25]

Duress

Ludmer v. Ludmer, 2013 ONSC 784 (S.C.J.) is a frequently cited authority on the issue of duress. Paragraph 53 says the following:

> "Duress involves a coercion of the will or a situation in which one party has no realistic alternative but to submit to pressure. There can be no duress without evidence of an attempt by one party to dominate the will of the other at the time of the execution of the contract. To prove duress, the applicant must show that she was compelled to enter into the marriage contract out of fear of actual or threatened harm of some kind. There must be something more than stress associated with a potential breakdown in familial relations. There must be credible evidence demonstrating that the complaining party was subject to intimidation or illegitimate pressure to sign the agreement."

In *Toscano v. Toscano*[26], the wife argued she had signed a marriage contract under duress, in haste, eleven days before the wedding. The court noted that the marriage contract was signed after weeks of negotiations and several drafts. There was no credible evidence to support the argument that Ms. Toscano was subjected to intimidation or illegitimate pressure. She testified she entered the contract freely and voluntarily and was never threatened. While she did feel pressure to sign the contract given the impending wedding, she also testified she was never prevented from reading any of the drafts or negotiating the terms of the contract. Paragraph 72 describes duress as follows:

> "Duress involves a coercion of the will of one party or directing pressure to one party so they have no realistic alternative but to submit to the party (see *Berdette v. Berdette (1991), 81 D.L.R. (4th) 194* at para. 22 (Ont. C.A.)). Equity recognizes a wider concept of duress including coercion, intimidation or the application of illegitimate pressure."

When the party alleging duress received independent legal advice and had a meaningful opportunity to review the domestic contract, courts are less likely to make a finding of duress.[27]

Discretion to Set Aside

The violation of a provision of s. 56(4) of the *Family Law Act* does not automatically render a domestic contract void. Rather, the decision maker must consider whether it is appropriate, in all the circumstances, to set aside the contract.[28]

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[25] *Balsmeier v Balsmeier, 2016 ONSC 950 at paras 111-116.*

[26] *Toscano v. Toscano [2015] O.J. No. 315. (S.C.J.)*

[27] *Balsmeier v. Balsmeier, 2016 ONSC 950 at paras 121-122, 153; Ludmer at paras. 55-58*

[28] *LeVan v. LeVan, [2008] O.J. No. 1905, 2008 ONCA 388 (Ont. C.A.), leave to appeal refused [2008] S.C.C.A. No. 331 (S.C.C.) at para 33.*

In exercising this discretion whether to set aside a domestic contract, the decision maker should consider the factors listed in *Dochuk v. Dochuk*, as set out below[29]:

a) whether there has been concealment of the asset or material misrepresentation;

b) whether there has been duress, or unconscionable circumstances;

c) whether the petitioning party neglected to pursue full legal disclosures;

d) whether he/she moved expeditiously to have the agreement set aside;

e) whether he/she received substantial benefits under the agreement; and

f) whether the other party had fulfilled his/her obligations under the agreement.

Turk v. Turk, [2018] O.J. No. 6433 (C.A.) added to the above-noted criteria one more, namely, whether the non-disclosure was a material inducement to the aggrieved party entering into the agreement (in other words, how important the non-disclosed information would have been to the negotiations).

***Miglin v. Miglin*[30]**

A *Miglin* analysis to determine whether to override the spousal support provisions in a domestic contract entails a two-stage process, in which the decision maker must first consider the time of formation of the agreement, and second, the parties' current circumstances, as set out below:

Stage one: Time of Formation of the Agreement

a. whether the circumstances of the contract's execution included oppression, undue pressure or other vulnerabilities;

b. whether the agreement is in "substantial compliance" with the objectives of the *Divorce Act*, in other words, whether it was substantively fair at the time of execution; and

Stage two: Current Circumstances

a. the court assesses, at the time of the application, whether the agreement still reflects the parties' original intentions and the extent to which it still substantially complies with the objectives of the *Divorce Act*.

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[29] *Toscano v. Toscano [2015] O.J. No. 315 (S.C.J), at para. 88, citing Dochuk v. Dochuk* (1999), 44 R.F.L. (4th) 97 (Ont. S.C.) citing the factors as listed by in Clarke L.J.S.C. in *Demchuk v. Demchuk* (1986), 1 R.F.L. (3d) 176 (Ont. H.C.) at para 17.

[30] *2003 SCC 24*

Unconscionability Under s. 33(4) of the Family Law Act

In comparison to Section 56(4)(c) of the *Family Law Act*, which examines unconscionability in the context of circumstances at the time of the drafting and signing of the contract, Section 33(4) of the *Family Law Act* examines unconscionability in the context of the results of the contract. Specifically, pursuant to section 33(4) of the *Family Law Act*, the court may set aside a provision for support or a waiver of the right to support in a domestic contract and may determine and order support in an application under section 33(1), if the provision for support or the waiver of the right to support results in unconscionable circumstances. Therefore, section 33(4) operates to remedy unconscionable circumstances arising from the waiver of support under a valid domestic contract.[31]

[31] *Shair v. Shair, [2015] O.J. No. 4883 (S.C.J.), para. 68; affirmed on appeal, [2016] O.J. 6662 (C.A.)*

2019 and 2020 Domestic Contract Cases in Review

1. Ord v. Ord, [2019] O.J. No. 1254 (S.C.J.)

This is a marriage contract set aside case, in which the wife brought a motion for interim disbursements. Justice McDermot commences his decision on the motion as follows, at paragraph 1:

> "Marriage contracts result in a world of second thoughts. Often signed with marriage pending, they speak to business at a time when those types of thoughts are foreign to the parties. Because of this, the negotiation of an agreement is often hasty and ill thought out. Notwithstanding this, marriage contracts are often of long-lasting effect, both during the marriage and after. The terms, which might have seemed fair at the time, may also result in seemingly inequitable situations resultant from waivers of spousal support or property claims after a long-term relationship, leaving one party in apparent poverty and without recourse to remedies that he or she might otherwise have on marriage breakdown."

His Honour went on to observe that this was such a case. In October 2008, the parties moved in together. They married in June 2011. The day before the marriage, they signed a marriage contract. Both parties had legal advice and there was financial disclosure attached. That contract barred spousal support and reserved certain assets as being matrimonial assets, leaving others alone.

Nothing took place as originally contemplated by the marriage contract. The parties did not buy a matrimonial home, but moved into the excluded cottage property. They demolished the cottage and built a large house on the same property. It was never transferred into both names. The furniture business sold, but there was no sharing of the net proceeds; the husband said that he paid debts with most of that money, purportedly because the wife had mismanaged funds when operating the business.

The wife alleged that the marriage began to break down in 2017 and the husband became increasingly abusive. She said the husband's sons moved into the home and they were concerned about losing their inheritance in the cottage property. In March, 2017, the wife was presented with an agreement which purported to amend the marriage contract. The amending agreement deleted certain paragraphs and stated that the wife had "made no financial contribution to the building of the matrimonial home or payment of the mortgage." Under the amending agreement, the wife released the husband "from all claims that she may have on the effective date of this amending agreement or may later acquire to any interest in the matrimonial home". The amending agreement further contained full spousal support and property equalization releases.

The wife signed the amending agreement. Her evidence was that the amending agreement was forced on her in order to deprive her of her rights in the matrimonial home which she might otherwise have had under the marriage contract. She claimed she was subject to a course of badgering by the husband and his sons which resulted in her signing the amending agreement. There was no legal advice or financial disclosure. She denied the agreement was a domestic

contract, as she said that the witness to the amending agreement, the husband's son, was not present when she signed it and did not see her sign it.

The wife also claimed the amending agreement to be unconscionable and pointed to the fact that she received nothing from the marriage whatsoever; in fact her assets decreased. She alleged that she was ill and that her annual income was $6,700 from CPP. She noted that the husband had assets on the valuation date of over $4,000,000 including the matrimonial home, and that his income exceeded $72,000 per annum.

The husband asserted that his wife was entirely responsible for her circumstances. According to him, she drank to excess during the marriage, and squandered funds. He said that the amending agreement reflected the state of affairs at the time that it was signed insofar as she put nothing into the matrimonial home and deserved nothing from it.

The parties agreed that the issues in the case would be bifurcated, and that the first issue to be dealt with would be the validity of the amending agreement signed weeks prior to separation.

The husband disputed the wife's request for interim disbursements.

Justice McDermot distinguished the outcome in *Balsmeier*, stating at paragraph 21 that it is really a case confined to its particular facts and addresses only the question of whether the claimant's case was, at that point, meritorious. In that case, there was only a three-year cohabitation, an agreement signed with independent legal advice, and negotiations that took place between counsel with at least one redraft of the agreement. There was consideration for the agreement, and full financial disclosure. Even if the marriage contract were upheld in that case, there would have been only a time limited award of spousal support. There was a good argument that the agreement was properly negotiated and constituted a fair bargain considering the length of cohabitation.

Those circumstances, His Honour said at paragraph 22, were completely at odds with the present case. Here the only agreement in issue was the amending agreement, which left the wife with literally nothing after more than nine years of cohabitation. There was little or no consideration for the execution of the amending agreement, and it was apparent from its face that the wife would receive no property or support at the close of the day. There were allegations of duress and bullying leading up to the execution of the amending agreement and it appeared that the end result was patently unfair. The wife's property decreased from the date of marriage values as set out in the original marriage contract, and the husband's property remained roughly the same as it was on that date. The wife ended the marriage with just over $200,000 in assets, while the husband's assets exceeded $4,000,000. As well, the husband had more than ten times the wife's income, while the wife was being expected to subsist on disability income. His Honour expressed the view that is a result that might be easily seen as unconscionable.

At paragraph 23, His Honour addressed the wife's contention that her signature was not even witnessed, an issue not addressed in the husband's materials by way of an affidavit of execution signed by his son. His Honour stated that if the wife's signature was not witnessed, the amending agreement was not a valid domestic contract under s. 55(1) of the *Family Law Act* and could not be relied upon the replace the marriage contract that the wife sought to uphold.

At paragraph 24, His Honour found as follows:

> "Where the result of the agreement signed by the parties appears to be unconscionable, and the court is left to ask why any reasonable person would sign this particular amending agreement, the Applicant's case for setting aside the agreement is, on its face, meritorious. Added to this are the unanswered concerns respecting the issue of adherence to the formal requirements of the *FLA* for enforcement of domestic contracts."

Notwithstanding the agreement to bifurcate, Justice McDermont found the wife's claim to set aside the amending agreement sufficiently meritorious so as to warrant an advance of fees and disbursements in the her favour.

2. C.V. v. S.G., [2019] O.J. No. 1553 (O.C.J.)

In this case, the mother of the parties' 10 year old child sought relief including an order setting aside the parties' 2009 agreement and re-adjusting child support based on the father's actual income for the years 2008 through to 2016, for a retroactive amount of child support owing in the amount of $2,469,904.00 (without calculating section 7 expenses). The parties had met while the father played professional basketball for the Toronto Raptors and the mother was working in Toronto and training to be a make-up artist. They began dating in 2005. Their relationship ended in 2008 after the child's birth. The child lived with the mother in Ontario. The father lived in the United States.

The mother asserted that the parties' agreement should be set aside and that child and spousal support should be retroactively calculated to 2010 for the following reasons:

1. The father failed to provide complete financial disclosure at the time the agreement was signed and he deliberately misrepresented his income;

2. The Agreement was unfair and unconscionable. It did not benefit the child because it did not reflect the father's actual income, it could not be varied for six years, even if the father's income had increased, and it did not require the father to pay section 7 expenses or spousal support;

3. The mother was pressured and unduly influenced into signing the Agreement at a time when she was emotionally vulnerable and exhausted as a result of what she describes as a very abusive relationship with the father.

Justice O'Connell found that the self-represented mother did not lead sufficient evidence to prove that the father had failed to provide full financial disclosure at the time the parties entered into the domestic agreement in 2009, or that any of the circumstances under section 56(4) or 33(4) applied to the circumstances of the case. Instead, the evidence overwhelmingly demonstrated that the parties entered into the agreement after lengthy negotiations while being represented by very experienced family law counsel. The correspondence and emails filed on consent of the parties demonstrated that the negotiations through counsel continued over a period of eight months. The agreement included terms including the following:

- that the contract was prepared jointly by both parties and their lawyers,

- that both parties acknowledged that they had independent legal advice, the agreement was fair and reasonable, that they were not under any undue influence or duress when signing the agreement and that they both signed the Agreement voluntarily;

- that the parties had exchanged and provided all of the financial disclosure requested prior to signing the Agreement. The mother did not call any evidence to the contrary.

The mother did not call her previous counsel as a witness, or call any witnesses to corroborate her belief that the father had failed to disclose significant assets or financial disclosure during the negotiations or otherwise. Most importantly, Her Honour found, the mother was aware that the

father's income would significantly increase during his career as a professional basketball player. The agreement contemplated that fact, in a term that stated: "The parties acknowledge that given that the [father's] income has increased for 2008 and will likely continue to increase each year, the amount of child support being paid is below the *Guideline* amount, but having regard to the age of the child and his current needs, the amount set out in this agreement fully satisfies all of the child's financial needs."

Justice O'Connell found that the mother's evidence was not reliable. The email correspondence that the mother produced during the course of the parties' negotiations did not reflect that she was coerced, threatened or under duress. In fact, Her Honour found that the email correspondence reflected quite the opposite.

Notwithstanding that the child support agreed to by the parties was below the Table amount for one child based on the father's income, the parties acknowledged in the agreement that although $18,000.00 per month was below the *Guideline* amount, it fully satisfied the child's needs at that time. The parties further negotiated a clause in the agreement that the father would annually pay $25,000.00 into an investment account for each additional $1,000,000.00 (U.S.) of income that the father earns in the previous year above $2,500,000.00 (U.S.), in trust for the child. It was not disputed that there was at trial approximately $741,575.00 in Canadian funds for the child's sole benefit. The father also agreed to provide the mother with a lump sum payment of $125,000.00 to assist her in purchasing a home for the child and herself.

Her Honour was satisfied that the agreement was fair and reasonable and in accordance with the *Child Support Guidelines*. The mother did not meet the burden of proof necessary to set aside the agreement on any of the grounds raised.

3. Tozer v. Tassone, [2019] O.J. No. 1829 (C.A)

I wrote about this case last year, which has since been affirmed by the Court of Appeal in a brief decision. This is a motion for summary judgment, brought during a proceeding in which the common law husband sought to set aside a 2012 signed separation agreement that had come about in the course of a mediation process. That mediation had followed a Court proceeding in which each party asserted trust claims to the other's business interests. The parties, had been in a long-term intimate relationship from 1991 to September 2007. They had two children, ages 23 and 21.

The husband complained that he discovered in 2015 that the wife had not disclosed all her business interests and that various land development projects had not been disclosed to him at the time of the mediation. He alleged that the wife failed to disclose an interest in her company, GMNR. During questioning of the wife in 2018, the husband determined that the wife had not revealed the financial statements for GMNR for 2011 and 2012 and he argued that disclosure of these statements would have materially affected how the case would have been resolved had the parties' proceeded to trial.

The wife submitted that the husband had not provided any evidence of material non-disclosure and that there was insufficient corporate disclosure of the business interests of both parties when they signed the agreement. The wife maintained that the business earnings were not material to the settlement, which dealt primarily with issues relating to child and spousal support, and the wife's trust claim in the husband's properties.

The Court noted that the husband had failed to provide valuations of his own various business interests at the time of the mediation, claiming that he was under no legal obligation to do so. His Form 13 financial statement, prepared for the mediation, indicated, regarding the value of his various business interests, "TBD" which meant "to be determined". Furthermore, while both parties received requests for more financial information, neither party complied with those requests. It was, therefore, disingenuous for the husband to seek to justify setting aside the agreement because of the wife's non-disclosure of her assets when he similarly failed to disclose the full value of his own assets prior to mediation. The Court was satisfied that the husband was very much a part of the projects in issue and the income which GNMR derived from them, such that he had a general awareness of the wife's assets.

The husband also asserted that he did not understand the nature and the consequences of the agreement, as he had unknowingly entered into it without actual knowledge of the wife's assets. The Court noted that the husband had independent legal advice from two lawyers before entering into the agreement, which was set out in the agreement. As well, the agreement confirmed at the outset that "The parties agree to be bound by this Agreement which settles all issues between them". The agreement contained the usual paragraphs of understanding the nature and the implications of the agreement and that it had been jointly prepared. The Court found that the husband had provided no evidentiary basis to support a finding that he did not understand the nature or consequences of the agreement.

The motion judge had concluded that there was no compelling reason to set aside the agreement. The husband's decision to enter into the agreement was neither coerced nor precipitous. He had

the benefit of legal advice from two lawyers. He signed the agreement voluntarily. Prior to the agreement, the parties participated in mediation. The agreement specifically stated that it was "in full and final satisfaction" of all outstanding claims between the parties. The wife did not withhold or fail to disclose any material information that would justify a setting aside of the agreement.

The Court of Appeal held that it was disingenuous for the husband to seek to justify setting aside the agreement because of the wife's non-disclosure of her assets when he similarly failed to disclose the full value of his own assets prior to mediation in 2012.

The Court of Appeal noted that the court is reluctant to interfere in a situation where the parties have purported to conclusively settle their financial issues: see *Quinn v. Epstein Cole LLP*, 2008 ONCA 662, 92 O.R. (3d) 1 at paras. 3-4. In this case, the parties' agreement specifically stated that it is "in full and final satisfaction" of all outstanding claims between the parties, and acknowledges that the parties "have sufficiently disclosed their income, assets and other liabilities existing at separation and the date of this Agreement". In these circumstances, even if there was non-disclosure it was not material.

Finally, the Court of Appeal stated that the motion judge had found that there was no evidentiary basis to support a finding that the husband did not understand the nature or consequences of the agreement. There was no allegation of duress or other misconduct. This was a situation in which two sophisticated parties with complex financial and business interests signed an agreement after having received independent legal advice. In all of the circumstances, the motion judge found no basis to exercise his discretion to set aside the Agreement.

In summary, the motion judge applied the proper test and made findings that were open to him. There was no basis for interfering with the decision.

4. Smith v. Arsenault-Smith, [2019] O.J. No. 3205 (S.C.J.)

This is an appeal of an arbitral decision, involving the immediate ongoing obligation to make full and honest disclosure in a family dispute.

The parties separated in August 2012. They attended at mediation/arbitration and resolved many issues. Two substantive issues were not resolved, one of which was the determination of the husband's income and spousal support. On the first day of the parties' arbitration in February 2016, the parties signed Minutes of Settlement. Paragraph 1 of the Minutes of Settlement resolved the issue of retroactive support up to December 31, 2015. It required the husband to pay the wife a lump sum net amount of $72,500.

In the midst of the arbitration, the wife brought a motion to set aside paragraph 1 of the Minutes of Settlement. She argued that the husband had misrepresented his income for the purpose of the Minutes of Settlement because he did not disclose that he had earned $1,120,844.98 in stock option income in 2015. The husband argued that the Minutes of Settlement should not be set aside because he had disclosed his 2015 stock option income to the wife and she and her counsel had failed to appreciate the significance of this disclosure.

The husband had represented that his 2015 income would be similar to his 2014 income of $975,000. He indicated he had realized on a stock option but did not include the value, and his financial statements did not include the stock option income. He had provided two pay stubs that included the income.

The Arbitrator set aside paragraph 1 of the Minutes of Settlement. Specifically, the Arbitrator found that the husband did not fulfill his legal obligation to make full disclosure before the Minutes of Settlement were signed. Instead, his disclosure created "information asymmetry", which the Arbitrator explained as follows:

> "Information asymmetry is precisely what happened in this case. There was a disconnect between Mr. Smith's paystub and the totality of his other evidence concerning his income. He did not correct that asymmetry. He did not specifically advise counsel for Ms. Arsenault-Smith of this asymmetry and in doing so, allowed the mistaken belief regarding his 2015 [income] to continue."

On appeal, the husband argued that in an adversarial system, the recipient of the disclosure has a duty to cross reference the information that is disclosed. He also argued that one cannot have a system where a domestic contract is negotiated and set aside because one party did not appreciate the significance of what was disclosed.

The husband asserted that the effect of the Arbitrator's decision was to impose an obligation on him to "connect the dots" for the wife. He argued that this is contrary to the nature of an adversarial system and contrary to *Quinn v. Keiper*. He argued that he had made his disclosure and the burden shifted to the wife to conduct whatever due diligence she deemed was necessary, again, relying on *Quinn v. Keiper*.

Justice Horkins found that attaching the pay stub did not amount to "actual disclosure". The evidence viewed as a whole provided the factual support for the Arbitrator's finding that there was information asymmetry.

Justice Horkins said that *Quinn v. Keiper* is not the guiding authority on disclosure and that the Arbitrator correctly relied upon *Rick v. Brandsema* and the duty to make "full and honest disclosure". Whether the wife's counsel should have asked questions about the disclosure did not relieve the husband of his duty to make full and honest disclosure. The onus on the husband could not shift to the wife until he had discharged his obligation to provide the disclosure. The wife did not discharge his disclosure obligation. Instead, his disclosure created information asymmetry, about which Her Honour wrote at paragraph 50 as follows:

> "As the Supreme Court of Canada explained in *Rick v. Brandsema* at para. 46, Informational asymmetry compromises a spouse's ability to reach an acceptable bargain:
>
> > Decisions about what constitutes an acceptable bargain can only authoritatively be made if both parties come to the negotiating table with the information needed to consider what concessions to accept or offer. Informational asymmetry compromises a spouse's ability to do so (*Leskun v. Leskun*, *2006 SCC 25*, *[2006] 1 S.C.R. 920* (S.C.C.), at para. 34". [Emphasis added.]

5. Aberback v. Bellin, [2019] O.J. No. 3314 (S.C.J.)

In this case, the husband brought a motion for summary judgment in respect of a legal issue, requesting a final order in accordance with an agreement allegedly reached at a settlement meeting, at which the wife was self-represented. The wife responded that there was no settlement agreement, that all discussions were settlement related discussions only. She provided evidence that it was her impression that as long as she did not sign anything, she was meeting with the husband only to hear what he had to say and to try and settle the matter. Following the meeting, she had asked for a draft agreement, which was not provided, that she said she wanted to take to counsel.

The Court dismissed the motion for the following reasons, set out at paragraph 23:

1. There was no consensus on the essential terms. How could there be consensus when the terms of the agreement are so vague? In order to reach a consensus, the terms of an agreement must be clear enough to give effect to the reasonable expectations of the parties. Further, there was not an agreement on all essential terms when one of the terms includes "the parties will negotiate the exchange of personal property..." There can be no agreement on "equalization and spousal support" when there is an outstanding disagreement on the property issues.

2. What does $106,000 in the agreement consist of? What is the equalization? What is the spousal support? How can the court be satisfied that the agreement was reasonable? The terms in the agreement are insufficient to permit the inquiry.

3. Finally, the wife was not afforded an opportunity to obtain independent legal advice. She provided evidence that she expected to have any agreement reviewed by counsel first. Where one party is self-represented, she must be afforded an opportunity to obtain independent legal advice. ILA would ensure that the litigant has informed consent. Informed consent would include the nature of general release conditions and the necessity for *Miglin* releases in the context of spousal support resolutions. I do not believe, in the absence of ILA, that the wife had informed consent.

6. Faiello v. Faiello, [2019] O.J. No. 4534 (C.A.)

This is an appeal by the husband from a judgment refusing to set aside a separation agreement and a cross-appeal by the wife from a spousal support award. The parties had separated in 2008 following an 18 year marriage and a 26 year relationship. Less than a month later, they executed a separation agreement. The agreement gave the husband a greater share of household debt in exchange for relieving him of child support obligations. Each party retained their own investments. The wife retained the matrimonial home and had a net worth exceeding $1 million. The husband agreed to vacate the matrimonial home within 30 days. The husband's net worth was negative by $500,000 given his assumption of debts. Although historically, the parties had been self-supporting and the husband had earned a significant income, his Investment Dealers Association of Canada registration was suspended and he was unemployed at the time the parties executed the agreement. The parties released all rights to spousal support. A lawyer of the husband's choosing was involved in drafting the agreement, but the husband did not receive independent legal advice.

After one year, the husband stopped paying the debts he had assumed. The wife assumed the debts, in addition to paying the mortgage debt on the matrimonial home. The father never became gainfully re-employed. He ultimately settled his debt to the Bank of Montreal ("BMO"), indicated in the agreement as being in the amount of $600,000, for $20,000.

In 2012, the husband challenged the validity of the separation agreement and sought an equalization payment, plus lump-sum spousal support. The trial judge found no basis to set aside the agreement, but ordered the wife to pay the husband lump-sum spousal support of $143,933.

The Court of Appeal dismissed both the appeal and the cross-appeal, holding that the trial judge did not err in finding the husband failed to satisfy the criteria for setting aside the separation agreement. In any event, the trial judge's conclusion that had the criteria been satisfied, he would not have exercised his discretion to set the agreement aside, was reasonable. The trial judge's finding that the spousal support release did not comply with the *Divorce Act's* objectives was supported by the evidence of the husband's hardship resulting from the marriage breakdown. The wife made a substantial income and retained assets with the awareness the husband lacked sufficient means to pay the debts he assumed.

On appeal, the husband did not take issue with the trial judge's findings about the circumstances of the negotiation and execution of the agreement, including that the use of the lawyer to prepare the agreement was the husband's idea; the husband could have obtained independent legal advice had he so wished; and the wife did not prey upon the husband or take advantage of him.

The first argument the husband made on appeal was that the trial judge had erred in not finding that the wife had failed to disclose significant assets or debts to the husband when the agreement was made, even though she did not include the value of her business (between $77,000 and $154,000) and her jewelry ($6,380) on her unsworn financial statement. The trial judge had accepted the wife's evidence that the parties sat down at the kitchen table and discussed how to complete their financial statements. The husband was a trained accountant and investment advisor who did very well financially. The wife was a chartered accountant.

The trial judge found that the husband was aware of the wife's business, which was a "flow through company that did not have significant assets or retained earnings" and was used for income and tax advantages, and he knew the mother had jewelry. The trial judge additionally found that the husband was aware of the financial information of the wife and of her assets and debts, and he did not seek further information on the values because he made the decision that he did not require the values due to his knowledge. The trial judge further found that the values of the wife's business and of her jewelry were not sufficiently significant to warrant setting aside the agreement.

The unconscionability discussion is interesting. The Court of Appeal observed that the trial judge considered the substantive effect of the agreement on the parties' rights to equalization. He noted that, at first blush, the agreement seemed improvident because the assets of the marriage stayed mainly with the wife while the husband agreed to pay the parties' joint debts (other than the mortgage) and his debt to BMO in the amount of $600,000. Although the husband did not receive spousal support, he received a significant benefit under the agreement in the form of the release from any requirement to pay child support. The trial judge then engaged in a contextual assessment of the circumstances. He considered that at the time the agreement was executed, the husband was being investigated by the Ontario Securities Commission, there was a possibility of claims against him from his clients, and he owed BMO $600,000. Further, the husband testified that he wanted to protect the welfare, financial and otherwise, of his children.

The Court of Appeal states at paragraphs 41 to 43 of its decision that:

> "These considerations all pointed to an entirely rational decision to place assets in the mother's hands, where the parties' children, rather than the father's creditors, could benefit from them. The trial judge found, and the record supports that, in this way, the decision to give the parties' most valuable assets to the mother ensured that both parties got "exactly what they both wanted": 2016 decision, at paras. 72-74.
>
> The trial judge concluded that, in all these circumstances, the agreement did not rise to the level of unconscionability.
>
> That finding was supported by the record and I see no reason to interfere."

The Court of Appeal also found that the trial judge engaged in the appropriate two-stage inquiry under *Miglin*. It was open to him to conclude that the spousal support waiver did not meet the objectives of ss. 15.2(6)(a) and (c) of the *Divorce Act* at the time it was made. It was also open to him to conclude that the circumstances at the time of the application departed significantly enough from the parties' original intention to warrant a modest lump sum spousal support award.

The Court of Appeal went on to say at paragraph 61 that at the time of the agreement, the husband's Investment Dealers Association of Canada registration was suspended, and he was unemployed. The agreement required him to vacate the matrimonial home within 30 days. As a result of the breakdown of the marriage, he lost a place to live, which had been provided to him at the wife's expense. The trial judge's finding that the husband suffered economic hardship as a result of the breakdown of the marriage was supported by the record.

At paragraph 62, the Court of Appeal commented that at the time of the application, the husband was still unemployed and did not yet have his own living space. He testified at trial that, since signing the agreement, he spent time sleeping on the floor of a stock room, followed by living with his sister and then with his parents. The husband's actual income in the year prior to the commencement of his application was slightly less than $52,000, roughly $39,000 of which was income from RRSPs according to his 2011 Income Tax Return. While he had reduced his debt to BMO from some $600,000 to only $20,000, that was significantly more than his income from sources other than RRSPs that year.

At paragraph 63, the Court of Appeal stated that while it was open to the trial judge to attribute all these circumstances exclusively to the husband's own poor decisions and intentional under-employment, after hearing evidence from both parties, that was not his conclusion. Instead, the trial judge attributed some of this misfortune to the breakdown of the marriage and also viewed the husband's circumstances at the time of the application as a sufficient departure from what the parties had originally intended to warrant the award of some support.

7. M.O. v. F.S., [2019] O.J. No. 4544 (S.C.J.)

This a decision by Justice Horkins resulting from the trial of the preliminary issue of the validity of a Marriage Contract, which was bifurcated from the other issues.

The parties met while studying electrical engineering in Iran in May 2005. They were married in Iran in May 2006 and moved to Canada in December 2006 to pursue doctoral studies in engineering. Their only child was born in 2013. The parties separated in 2015. A court proceeding was commenced, in which the wife sought child support and spousal support. In March 2016, the wife decided she wanted to reconcile.

The husband agreed to reconcile if the wife signed a Marriage Contract that his lawyer had prepared. The husband did not give the Marriage Contract to his wife until October 20, 2016. He had already signed the contract. The husband insisted that the wife sign the Marriage Contract if she wanted to reconcile. It was important to the wife that the parties reconcile so that she could protect her child. As a result, she testified that she "let it go", went to see a lawyer and agreed to sign the Marriage Contract. The wife signed the Marriage Contract on October 28, 2016. The wife obtained independent legal advice. She signed the Marriage Contract, even though she was "strongly" advised not to do so.

The Marriage Contract provided for a waiver of equalization of property, that neither party would ever seek spousal support from the other and that the parties would use their capital if they needed support. After the Marriage Contract was signed, the parties resumed cohabitation in December 2016 and the parties dismissed the family application. This meant that the wife's pending motion for child and spousal support did not proceed. The parties separated again in July 2017.

The wife suffered from psychosis and schizoaffective disorder. She had been hospitalized on several occasions, was under the care of a psychiatrist and took medication. Her mental health problems started before she came to Canada. She was unemployed, and her only source of income was ODSP. The child lived with the father and the mother had supervised access.

The wife sought custody, access, spousal support, equalization and an order setting the Marriage Contract aside. She argued that the Marriage Contract was signed without disclosure, she did not understand the nature and consequences of the contract, she was under duress and the Marriage Contract was unconscionable. In other words, the wife relied on all of s. 56(4) (a), (b), and (c) of the *Family Law Act*. The husband countered that when his wife signed the Marriage Contract, she was mentally stable and understood the terms of the contract. He argued that the Marriage Contract was valid, such that the wife had no right to seek spousal support or equalization.

Justice Horkins found that the wife satisfied all of s. 56 (4)(a), (b) and (c) of the *Family Law Act*, and that it was appropriate to exercise her discretion and set aside the Marriage Contract.

Regarding the absence of full financial disclosure, the wife argued that the husband had not disclosed his pension. Justice Horkins disagreed. While there was no evidence that the husband told his wife about the pension while they were talking about reconciliation, and he did not give her any pension documents, the wife knew her husband had a pension, and that pension was in his

name and in the future could be very large. Her Honour found that given this knowledge, the wife could have asked for more information about the pension but did not do so. The wife also argued that her husband did not provide disclosure of his actual income for 2016. Justice Horkins accepted that income disclosure would have been provided in the family litigation that was outstanding at the time of the marriage contract and, for that reason, rejected the wife's position that there was non-disclosure of his actual 2016 income.

On the other hand, Her Honour found as a fact that the husband did not disclose his purchase of a property before the Marriage Contract was signed. That property was a significant asset because parties did not own any property in Canada when they moved to Ontario. They had modest savings and lived in a rented apartment. Purchasing a property was a significant step. The equity in the property and the fact that it generated rental income added to the significance of the asset. Linked to the non-disclosure of the property were two important facts that the husband did not disclose to his wife. She did not know that he had represented to the real estate lawyer that he was "not a spouse". She also did not know that he had removed $43,164 from their joint account two days before he purchased the property. Half of that money belonged to the wife and represented most of her savings. He created a debt that he did not disclose. In summary, the husband deliberatively decided not to disclose the property to his wife. That non-disclosure was significant and impacted the integrity of the process that led to the signing of the Marriage Contract.

The wife asserted that because of the husband's non-disclosure, she could not understand the nature and consequences of the Marriage Contract. She did not rely on the status of her mental health to support her lack of understanding. Justice Horkins observed at paragraph 175 that parties have an obligation to make full and honest disclosure when negotiating agreements such as a Marriage Contract or Separation Agreement. The husband here had failed to honour this fundamental obligation. He was not honest with his wife. Instead, he deliberately decided not to reveal the property to his wife and his use of their joint funds. Her Honour noted that at paragraph 176 that the Marriage Contract was a complete opt out of all rights to equalization of property and support. She confirmed that a party needs to know what she is giving up, to understand the consequences of the agreement: *LeVan* at para. 54; *Dubin v. Dubin*, *[2003] O.J. No. 547*. At para 32 in *Dubin* the court stated:

> "... Fundamental to a choice to opt out of the legislative scheme is a clear understanding of what one's rights and obligations might be if there were no contract. It is in this context that financial disclosure is critical, in that knowing assets and liabilities at the date of the agreement is fundamental to an eventual calculation of net family property. A party needs to know what asset base might potentially grow, in order to determine what he or she is being asked to give up in the agreement. Coupled with financial disclosure is the notion of understanding legal rights and obligations under the legislative scheme. This second notion carries with it the concept of independent legal advice. Thus, a party must know what assets and liabilities exist at the date of the contract, and must understand the general legislative scheme in order to know what he or she is giving up in the proposed agreement."

At paragraph 177, Her Honour concluded that the wife did not understand the nature and consequences of what she was giving up because there was absolutely no disclosure about the

purchase of the property. As a result, she had no understanding of how the purchase price was funded, that the property might grow in value or the rental income earned.

The analysis under s. 56(4)(c) of the *Family Law Act* warrants a close review. Justice Horkins indicated that subsection 56(4)(c) codifies the common law position that ordinary contract law principles apply to domestic contracts. Under the law of contract, contracts may be set aside if:

- * there was undue influence at the time of signing;
  * there was duress at the time of signing;
  * there was unconscionability at the time of signing;
  * there was a mistake as to an essential element of the contract;
  * there was fraud or material misrepresentation; or
  * there was a repudiation of a term in the contract.

The wife argued that the Marriage Contract was unconscionable, and she was under duress when she signed it. Her Honour agreed on both counts.

Unconscionability

Justice Horkins began the unconscionability analysis by stating at paragraphs 180 to 181 that the legal context to assess and answer the question was set out by the Supreme Court in *Miglin v. Miglin*, *2003 SCC 24* and again in *Rick v. Brandsema*, at para. 43. These decisions direct that unconscionability in the matrimonial context be considered by focusing on the circumstances of negotiation and execution of the agreement and not the result of the agreement.

At paragraphs 182 to 183, Her Honour noted that unconscionability in the matrimonial context is not equivalent to unconscionability in a commercial context. As stated in *Miglin* at para. 82:

> "... 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."

The question to be asked is whether there were "'any circumstances of oppression, pressure, or other vulnerabilities', and if one party's exploitation of such vulnerabilities during the negotiation process resulted in a separation agreement that deviated substantially from the legislation" (*Brandsema* at para. 44).

At paragraph 184, Her Honour set out some examples of inequality in bargaining, which may include one party being intellectually weaker by reason of a disease of the mind, economically weaker or situationally weaker. However, 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" (*Miglin* at para. 82). As stated

in *Brandsema*, at para. 61, it is a question of fact in each case:

> "... Given that vulnerabilities are almost always present in these negotiations, the parties' genuine wish to finalize their arrangements should, absent psychological exploitation or misinformation, be respected. One way to help attenuate the possibility of such negotiating abuses is undoubtedly through professional assistance. But exploitation is not rendered anodyne merely because a spouse has access to professional advice. It is a question of fact in each case."

In this case, Her Honour found that during the negotiations and execution of the Marriage Contract, the wife was vulnerable, and her husband exploited her vulnerability. Her vulnerability was rooted in her long-standing mental illness that has seriously impaired her ability to function and become financially independent.

The medical evidence was important. The last medical note on record before the Marriage Contract was dated March 18, 2016. On this date, the wife's medication was increased because of stress, anxiety and problems sleeping. She had been hospitalized because of delusions and was found to be incapable of making decisions. She lost the right to care for her child and had no home or job to support herself. She begged her husband to reconcile because she feared for her child's safety. This fear, Justice Horkins found, was likely another delusion.

At paragraphs 190 to 191, Her Honour rejected the husband's position that the wife was not vulnerable during their period of negotiations and when she signed the Marriage Contract. His position was unreasonable and narrowly focused on a period of fragile stability that allowed the wife to defend her PhD thesis. His position assumed that her many years of mental illness and the uncontested evidence could be ignored that her illness drastically impacted her ability to function and become financially independent. This was her state of vulnerability at the time of negotiations and when she signed the Marriage Contract. The wife's period of fragile stability did not eliminate her vulnerability. She remained alone, unable to support herself and afraid for her child's safety. Her decisions were fueled by her imagined fear that led her to give up every right afforded to a spouse under the *Divorce Act*. She was desperate to reconcile and was dependent on her husband in every way.

The husband's evidence revealed his awareness of the wife's ongoing vulnerability. He exploited his wife's vulnerable state. He was facing a motion for support and an equalization claim. The Marriage Contract was his tool to extinguish her rights. His negotiation tactics were deliberative and manipulative and he was not honest.

At paragraph 194, Her Honour found that the one hour of independent legal advice that the wife obtained did not neutralize the husband's negotiation conduct. The lawyer providing ILA had no knowledge of the wife's mental illness and her vulnerable condition. If he had known, Her Honour said, it would have been recorded in the Acknowledgment signed by the wife. Furthermore, a prudent lawyer would not have signed the Certificate of Solicitor that day without further evidence of her stability.

Duress

Justice Horkins referred to the applicable authorities in her analysis and noted at paragraph 198 that to prove duress, the wife must show that she was compelled to enter into the Marriage Contract out of fear of actual or threatened harm of some kind. Her Honour found that the wife had signed the Marriage Contract under duress. She acted on her imagined belief that her child was unsafe living alone with her husband. The fear for her child's safety gave her no option but to sign the Marriage Contract.

Exercise of Discretion

Her Honour exercised her discretion and set aside the Marriage Contract. There was nothing "fair" about the Marriage Contract. It was a complete waiver of the wife's right to equalization and spousal support. It was an agreement premised on false assumptions: that the wife was "financially independent", that it was negotiated in an "unimpeachable fashion" and that it "substantially complies" with the objectives of the *Divorce Act* and the *Family Law Act*.

During a period of fragile stability, the husband took advantage of his wife's desperation and got rid of her equalization and spousal support claims against him in the matrimonial litigation. The Marriage Contract was fatally infected by the husband's deliberative and dishonest conduct.

8. Ezzati v. Bae, [2019] O.J. No. 5035 (S.C.J.)

In this case, the parties had been married for approximately 20 years. They entered into a separation agreement in or about two years after separation. Its terms provided that the wife would keep several business properties and that the husband would assume ownership of the matrimonial home. The wife had proposed revisions during the negotiation of the separation agreement and the final version essentially incorporated all of them.

Contrary to the separation agreement, the wife refused to transfer title to the matrimonial home to the husband and registered a $300,000 mortgage against title. The husband brought an application for the sale of the matrimonial home and damages arising from the wife's registration of a mortgage against title to it. The wife argued that the agreement should be set aside, on the basis that the husband did not disclose the existence of Iranian properties and that she had signed it under duress.

The husband succeeded in his claim. The wife did not.

Justice Diamond held that the husband did not fail to disclose the existence of the Iranian properties. Even if there was non-disclosure, it was not a material inducement to the wife entering into the separation agreement. The Iranian properties were disposed of two years before separation and four years before the agreement. The wife understood the nature and consequences of the agreement. There was no duress. The pressure that the wife felt was internal pressure from her debt load. While the debt load might have been impacted by the husband's actions, the wife's will was not coerced by him.

9. Graham v. Graham, [2020] O.J. No. 21 (S.C.J.)

This is a case involving the issue of whether a withdrawal from the Family Responsibility Office could properly be construed by the husband as a termination and release of spousal support.

The parties separated after 21 years of marriage in 1999. The wife was then 43 years of age and her highest level of education was grade 12. The husband was 41 years of age and self employed as a certified electrician. The wife was not employed outside of the home during the marriage other than providing some basic bookkeeping services for the husband's business. She was primarily responsible for childcare of the parties' two children and household management, while the husband worked full time to provide for the family financially. At separation, the wife was not employed outside of the home and she was fully financially dependent on the husband. The wife gave evidence of having been a victim of domestic violence at the hands of the husband.

Following separation, the husband continued to operate his electrical business. The wife secured part time employment earning minimum wage, and after two years, she moved to full-time hours, still earning minimum wage. The wife resided with her mother in order to make ends meet.

In December of 2001 the husband issued a Petition for Divorce in which he claimed only a divorce. The wife counterclaimed for spousal support and equalization. In June of 2002 the husband was ordered to pay the wife $400 per month in spousal support, under an interim interim order. The corollary relief issues were severed from the divorce by order of the same date and subsequently a divorce only was granted on June 29, 2004. No further steps were taken by either party with respect to the litigation. The corollary relief issues remained unresolved.

The parties entered into an agreement in 2008, which they prepared themselves, in respect of which neither obtained legal assistance or advice and neither made financial disclosure. They could not agree on what the agreement meant, whether it was a final termination of the husband's spousal support obligations, as the husband said, or simply a withdrawal of the interim interim order from FRO enforcement, in order that the wife could get some badly needed support paid (which was often in arrears) as the wife asserted. The FRO ceased enforcement effective May 2008. The motion to terminate the interim order was never filed.

The husband made no further support payments after July 29, 2008 until September 2017 when the wife filed the 2002 order with FRO. On her evidence, the wife did not request support from the husband in the intervening period. After the events of 2008, the wife continued to work in various minimum wage jobs. She was unable to keep up with the payments on her mother's former home and sold it. After paying off the mortgage and other debt, her evidence was that she was left with $50,000 which she deposited to a TFSA. She then moved to a small apartment. In August of 2015 the wife was seriously injured in a workplace accident. The wife received a lump sum settlement of just under $15,000 from WCB. She then applied for and secured a position as a bookkeeper. However, she was not kept on following her probationary period.

In these circumstances, the wife returned the case to court. The husband argued that whether or not the wife was entitled to support, she released her claim to it on a final basis in 2008. It was his

position that the documentation prepared in 2008 constituted a domestic contract and the wife's agreement to terminate her spousal support entitlement on a full and final basis.

The court noted at paragraph 49 that there was no written agreement or contract, only a document which contained the signatures of both parties, namely the Notice of Withdrawal for FRO. The Notice of Withdrawal was entirely consistent with the wife's evidence that she did not agree to a final release of support. There was only one letter that could even remotely be construed as contemplating a final arrangement and that was signed by the husband alone.

The husband creatively argued that the requirements of s.55 should be considered flexible. He relied upon *Gallacher v. Friesen*, *2014 ONCA 399* citing *Virc v. Blair*, *2014 ONCA 392* in support.

The court found at paragraphs 51 and 52 that the facts of the case differed markedly from those in *Gallacher*. This was a traditional marriage of over 21 years following which the wife had strong claims to both compensatory and non-compensatory support. The 2002 order (which was substantially in arrears) had been in place for only six years. The wife's evidence was that she was in dire financial circumstances at the relevant time and badly needed the back support that was owed to her. She made a bargain to get those arrears by helping the husband to keep his driver's licence. There was nothing reasonable about a final termination of support in those circumstances. The wife's need for money put her in a vulnerable position. There was unfairness in the circumstances surrounding the negotiation. Neither party received legal advice or made financial disclosure. These facts did not call for a flexible interpretation of s. 55.

The court found that there was no evidence that wife entered into an agreement to release her entitlement to spousal support on a final basis. Everything signed by her referred very specifically to the interim interim order. Nowhere in the documentation signed by her was there any reference to a final release or termination of anything other than that order.

Even if the court had found the various letters to constitute such an agreement, it would have been given little to no weight. The wife was vulnerable at the time the negotiations took place. She needed the arrears that were owed to her. Refusing to cooperate with the husband's request would have made it even less likely that she would get the money that was owed to her. The husband knowingly took advantage of that vulnerability when he advised her that without a licence he could not work and without work, he could not pay her. She did not have legal advice. She did not receive financial disclosure. As such, the court found that the wife did not release her claim to spousal support on a final basis in 2008.

10. Dessisa v. Demisie, [2020] O.J. No. 376 (S.C.J.)

This is a capacity and estate case involving Minutes of Settlement impugned by the surviving former common law wife.

The deceased passed away in July 2018. The deceased had been in a common-law relationship for more than 25 years. In 2003, the deceased and his former common law spouse purchased a home in Toronto. Title was taken by the couple as joint tenants. In October 2016, the deceased was diagnosed with cancer and admitted to hospital. The deceased made a will on November 7, 2016 in which he appointed the former common law spouse as his Executor. The will left the residue of his estate equally to the former common law spouse and the deceased's sister. The parties separated on January 22, 2017. On that date, the police were called to the hospital after an allegation that the former common law wife had threatened to kill the deceased. The former common law wife was not charged, but was asked not to return to the hospital. Thereafter, the deceased took steps to formalize a separation.

In February 2018, the deceased commenced an Application. All issues related to the breakdown of the deceased's relationship with the former common law wife were resolved by comprehensive Minutes of Settlement. The Minutes dealt with spousal support, property, the home, and the deceased's pensions and life insurance policy. Pursuant to the Minutes, the former common law wife released her right to receive spousal support, released her right to make any trust claims against the deceased, agreed to buy out his interest in the home for $253,000 and released her right to receive any proceeds from the deceased's estate, amongst other things. The releases were mutual. Both parties were represented by counsel throughout the negotiation of the Minutes. The parties to the Minutes initialed each page. The terms of the settlement proposed by the deceased's lawyer were accepted by the former common law wife's lawyer on June 8, 2018, in writing.

After the parties separated, the deceased made a new will, which left his entire estate to a nephew. The deceased also severed the joint tenancy on the home.

When the nephew attempted to obtain an application for a Certificate of Estate Trustee, the former common law wife filed a Notice of Objection. It did not specifically mention the Minutes. Among other things, the former common law spouse sought a constructive and resulting trust in the estate. While she agreed that she signed the Minutes, she alleged that her lawyer did not explain the document to her and she never received a signed copy.

Justice Gilmore held that the Minutes could not be ignored. While the former common law wife claimed she did not understand what she was signing, that her lawyer did not explain the document to her and that her lawyer was in a rush, no negligence action had been commenced against the lawyer. The former common law spouse simply made bald allegations in relation to a document which was comprehensive and negotiated with legal advice.

Her Honour found that the Minutes were very detailed. They contained a complete *Miglin* style release of spousal support. The parties agreed that each would be responsible for their own medical and dental expenses. The Minutes recited that the beneficiary of the life insurance policy would be changed to the nephew. After obtaining an appraisal of the house, the parties to the Minutes

agreed that the former common law spouse would buy out the deceased for $253,000 less $7,000 (being a notional cost of disposition). The payment was to be made within 10 days. The former common law wife never made the payment. She claimed that the deceased did not live long enough for her to do so. She was to continue paying the mortgage on the home and use her best efforts to discharge it. The former common law wife was to receive a portion of the deceased's two employment pensions, as well as 60% of his CPP pension income. The Minutes also contained comprehensive releases including a release of any claim for a constructive or resulting trust and an agreement to renounce any entitlement either may have had in the other's will or for a share in the other's estate. The parties to the Minutes agreed to be bound by them, had independent legal advice, understood their rights and obligations and were signing the Minutes voluntarily.

The former common law wife alleged that the Minutes were not actually signed by the deceased before his death but were signed by the nephew using his Power of Attorney after the date of death. Her Honour rejected this argument in its entirety. Regardless, and most importantly, the terms of settlement offered by the deceased's lawyer were accepted by the former common law spouse's counsel in writing on June 8, 2018. Even if the allegations about the signature were correct, the parties were bound by their lawyers' offer and acceptance of the settlement terms.

At paragraph 50, Justice Gilmore referred to *Olivieri v. Sherman*, *2007 ONCA 491* (CanLII), in which the court set out the requirements for enforcing a concluded settlement agreement. Her Honour noted that such an analysis does not require an inquiry into the actual state of mind of one of the parties or a party's subjective intention, but must be measured by the objective reading of the language chosen by the parties to reflect their agreement (para 44).

Her Honour found at paragraph 51, as per *Olivieri*, (para 41), that the parties had a mutual intention to create a legally binding contract, and reached an agreement on its essential terms. As a result, the Minutes were valid, enforceable and binding on both the deceased and the former common law wife.

Conclusion

I set out below a list of what I consider to be key takeaways from the above-noted cases and my own experience, that should guide our approach to how we negotiate and draft agreements:

1. Negotiating an agreement while the separation is fresh and emotions are raw is dangerous;

2. A rushed negotiation is risky. Allow at least six months to negotiate a marriage contract. Beware the circumstances of a client who has precipitously purchased a new home in the wake of a separation, only to learn she needs a separation agreement to secure financing. This situational weakness may lead to poor reasoning and decision-making;

3. The time taken to negotiate an agreement should be proportionate to the duration of the relationship or marriage, the complexity of the circumstances, the level of conflict and the sophistication of the parties;

4. In my view, the standard of financial disclosure on a cohabitation agreement or a marriage contract should be the same as that for a separation agreement, particularly, if the prenuptial agreement contains a term that "upon a breakdown of the relationship, this Agreement will take effect and be construed for all purposes as a separation agreement within the meaning of the *Family Law Act*... ";

5. There must be sufficient disclosure of financial information to permit informed decision-making. A client must know what he/she is giving up. On the other hand, a party may have only herself to blame if she enters into an agreement knowing that the financial disclosure is deficient, knowing that she is entitled to ask for more, choosing not to do so and signing anyway—especially, if she does so with the benefit of independent legal advice;

6. Always obtain corroborating documents. And then review them carefully, to ensure there is no disclosure of material information in those documents that does not appear on the sworn financial statement(s). Always test information and ask probing questions. Always do title searches—and then update them before an agreement is signed. Always obtain proof of income on an ongoing basis;

7. Require the client to obtain advice in respect of areas of expertise that you do not have that may be relevant to the agreement, such as issues of bankruptcy, corporate or real estate law or trusts and income tax considerations. You should develop a working relationship with these other professionals, to ensure a common understanding of the purpose and intended effect of the agreement and the efficacy of its terms;

8. Both parties and their lawyers should have meaningful input into the terms of any domestic contract, before it is drafted. ;

9. Terms of the domestic contract should be negotiated, not presented as a fait accompli, especially, when one of the parties doesn't even know the domestic contract is coming;

10. Favourable concessions in respect of important terms should be granted where possible, not rejected out of hand;

11. Parties having vulnerabilities, such as an addiction or serious mental health issues, learning challenges, capacity deficits or a lack of bargaining power, cannot be taken advantage of. To the contrary, accommodations in the process should be put in place, to ensure the playing field is level. That may include ensuring that the disadvantaged party can financially afford legal representation of her choice. A Continuing Power of Attorney for Property may have to be relied upon, and/or a litigation guardian appointed. In addition, the disadvantaged party should not be pestered, intimidated, pressured, threatened or subjected to manipulations, ultimatums or arbitrary deadlines;

12. Be mindful of the context in which the domestic contract is negotiated—is there a history of domestic violence or other abusive / bad faith behaviour? Has the parenting and/or the financial status quo remained in place post-separation? If not, are appropriate interim arrangements in place? Are there criminal convictions / charges or protection concerns? Is the case high conflict?

13. Make sure there is consideration for the agreement and that it is not improvident;

14. Do not bargain so hard that an agreement is likely to have disastrous financial consequences for one of the parties or that it is a foregone conclusion that obligations cannot be performed or objectives achieved;

15. Include extensive background in the domestic contract, to assist in any future interpretation that may be required. Include mention of any essential facts, such as an agreed upon mediation process, any global financial settlement, the existence or expectation of financial independence or the like. These provisions will become your objective evidence of the facts in the future, if the need arises;

16. Draft clearly and without ambiguity:

    a. Who is doing what, when, why and how? Specify what the payments, transfers or assignments are for, so that the reasonableness of the terms of the agreement can be tested. If there is a buy-out, lay out how the value has been arrived at, including by reference to any appraisal;

    b. Be clear about the incomes of the parties (and whether they are estimates or imputed), the names of the children for whom one party is paying the other party child support, the formula being used, the current s. 7 expenses and their amount both individually and in totality, when and how they will be updated, whether the spousal support is compensatory, non-compensatory or both and explain how it has been calculated. Specify whether, when and how an obligation ends;

c. Attach as schedules to the agreement the net family property statement giving rise to the equalization payment and the support calculation on which the child support and spousal support is based;

d. Use examples for formulae;

e. Specify the start date of an obligation, so there can be no doubt about whether it is the date of separation, the date of the agreement, or something else;

f. Don't use "forthwith" language. Instead, use a time constraint or a date;

g. Don't deal with issues by way of an agreement to agree;

h. Include a time sensitive and workable mechanism for resolving any impasses;

i. Think carefully about the severability term of the agreement—is it appropriate, or is the settlement global in nature?

j. Make sure your financial disclosure and independent legal advice sections are accurate and detailed.

17. Document your negotiations and record your advice and instructions, even if by e-mail;

18. Before your client signs a domestic contract, test her understanding of its nature and consequences. Ask her to tell you what the agreement accomplishes;

19. Ensure that the formalities for signing a domestic contract are met. If a party signs with someone other than his/her lawyer, obtain an Affidavit of Execution and make sure the signing party knows the witness must be present at the time of signing; and

20. Absent exceptional circumstances, obtain a simple divorce as soon as the separation agreement is done. Leaving the divorce straggling and asking for it down the road is an invitation for an unexpected Answer.