Law Society of Saskatchewan

Family Property Agreements Without Lawyers

Anderson v Anderson

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The Family Property Act, SS 1997, c F-6.3

- 2(1) …
- **“value”** means:

1. the fair market value at the time an application is made pursuant to this Act, or at the time of adjudication, whichever the court thinks fit; or
2. if a fair market value cannot be determined, any value at the time an application is made pursuant to this Act, or at the time of adjudication, that the court considers reasonable.

- 38(1) The terms of an interspousal contract mentioned in subsection (4) are, subject to section 24, binding between spouses, whether or not there is valuable consideration for the contract, where the spouses have entered into an interspousal contract:

1. that deals with the possession, status, ownership, disposition or distribution of family property, including future family property;
2. that is in writing and signed by each spouse in the presence of a witness; and
3. in which each spouse has acknowledged, in writing, apart from the other spouse, that he or she:

(i) is aware of the nature and the effect of the contract;

(ii) is aware of the possible future claims to property he or she may have pursuant to this Act; and

(iii) intends to give up those claims to the extent necessary to give effect to the contract.

- 38 (2) A spouse shall make the acknowledgment mentioned in subsection (1) before a lawyer other than the lawyer:

  (a) acting in the matter for the other spouse; or

  (b) before whom the acknowledgment is made by the other spouse.

- 40 **The court may**, in any proceeding pursuant to this Act, take into consideration any agreement, verbal or otherwise, between spouses that is not an interspousal contract and **may give that agreement whatever weight it considers reasonable.**

- 24(2) If at the time the interspousal contract was entered into it was, in the opinion of the court, unconscionable or grossly unfair, the court shall distribute the property or its value in accordance with this Act as though there were no interspousal contract, but the court **may take the interspousal contract into consideration and give it whatever weight it considers reasonable.**

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- The parties attended a “reconciliation meeting” with friends from church on July 19, 2015
- They did not reconcile, and the wife presented the husband a very short agreement to sign to deal with property
- The agreement essentially said that they would each keep all of their own property, with the family home to be dealt with at a later date, and a couple other small exceptions
- There were no lawyers involved, but the wife offered the husband that he could take the agreement to a lawyer. He did not and it was signed that day
- The wife asked to formalize the agreement in an Interspousal Contract, but the husband declined

- The wife then brought a Petition on December 10, 2015
- She did not, however claim anything under *The Family Property Act* in her Petition
- While there were Property statements exchanged in December 2015/January 2016, there was no claim made under *The Family Property Act* until the husband's Counter Petition on May 4, 2017
- The matter went to trial in 2018, with the wife arguing that the agreement should be upheld, or alternatively, for a valuation date as of the date of her initial Petition
- The trial judge found that the agreement was not an Interspousal Contract, and that *The Family Property Act* did not permit him to use the date of the initial Petition as a valuation date

- The trial judge concluded that he could still give some weight to the parties' agreement pursuant to Section 40
- He reduced the equalization payment from the wife to the husband by $8,000
- The trial judge weighed very heavily the fact that the parties had not exchanged disclosure and did not have independent legal advice in determining that he would not give the agreement much weight
- Ultimately, he valued a number of assets as of the date of the Counter Petition, but valued some of the most valuable assets as of the date of adjudication, considering that the husband continued to pay half the mortgage on the family home up until trial and that market forces were the primary reason other assets changed in value
- The result of the trial decision was that the wife owed the husband $62,646.98 plus an RRSP rollover of $37,089.69 (not including costs)

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- The wife appealed the trial decision
- The Court of Appeal overturned the trial decision, ultimately ordering that the husband pay the wife $4,914.95 (not including costs)
- The Court of Appeal confirmed that the agreement was not an Interspousal Contract
- Rather than enforcing the terms of the agreement, they instead chose to value all family property as of the date of the wife's initial Petition (December 10, 2015) relying on the discretion provided by Section 40.
- The agreement being applied would have meant the wife paying the husband $40,882.63 as an equalization

Independent Legal Advice

- The Court of Appeal determined that the trial judge erred in the emphasis that he put on Independent Legal Advice when looking at an agreement through the lens of Section 40
- At paragraph 70, the Court of Appeal wrote:
- Finally, **an interpretation of s. 40 that effectively mandates independent legal advice for it to be assigned significant or any weight would essentially render that section meaningless.** To hold that a lack of independent legal advice, which is fatal under s. 38, is also fatal for purposes of s. 40 or leads to significantly less weight being assigned to it, would mean that no agreement entered into by spouses without the benefit of independent legal advice is of value and that it does not achieve its intended purpose. This is not what the Legislature intended or what the case law, including *Miglin*, provides.

Section 40 Analysis Framework

- **Step one** – a court must ask itself whether there is an agreement in the contractual sense of *consensus ad idem*. If the existence of an agreement is itself in question, the party seeking to enforce its terms must prima facie establish its existence. Where the existence of the agreement is challenged, a court should be particularly attentive to the lines of inquiry outlined in *Tether* (at para 62):

  (i) Was there a meeting of the minds that would be "manifest to the reasonable observer"?

  (ii) Did the parties achieve consensus on the "essential terms of the agreement"?

  (iii) Was the agreement intended to be "conditional upon, and subject to", some other condition being met?

- **Step two** – if an agreement is prima facie established, the onus shifts to the party asserting it to be invalid, unenforceable or that it should be given little weight. If challenged, a court must look to the circumstances surrounding negotiation and execution to determine whether there is any reason to discount the agreement. While the list of factors used to assess these matters is not closed or exhaustive, a court should pay particular attention to the following:

  (i) evidence of the conditions of the parties, i.e., whether there is any indication of "oppression, pressure or other vulnerabilities" in the circumstances at hand that would warrant a finding that the negotiation process was fundamentally flawed (*Miglin* at para 81); and

  (ii) evidence as to the "conditions under which the negotiations were held", e.g., the duration of the negotiations, whether professional assistance was provided, etc.

- **Step three -** if no issues arise with respect to the negotiation or execution of the agreement, a court must go on to examine the substance of the agreement to determine if its terms are fair and reasonable in the sense that they are in substantial compliance with the general objectives of the *FPA*. In keeping with the dicta in *Miglin*, "Only a significant departure from the general objectives of the *Act* will warrant the court's intervention on the basis that there is not significant compliance with the *Act*" (at para 84).

- **Step four -** where the agreement is found to be in substantial compliance with the general objectives of the *FPA* at the time it was prepared, great weight should be given to it, unless a new or a changed circumstance has arisen such that its terms "no longer reflect the parties' intentions at the time of execution" or are no longer in substantial compliance with the general objectives of the *FPA* (at para 88). In this respect, the test is not strict foreseeability; rather, a court will examine "the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application" (at para 89). If the change in circumstance can be said to have been within the contemplation of the parties at the time of execution, then the agreement may be given great weight.

Appeal to the Supreme Court of Canada

- Leave to Appeal to the Supreme Court of Canada was granted on April 7, 2022
- Three grounds of Appeal

1. Should an analysis under *Miglin* be applied when considering a non-binding agreement?
2. If the *Miglin* Analysis is applied to a non-binding agreement, is it open to the Court to find the agreement is enforceable but depart from the terms of the agreement?
3. Must an Appellate Court apply the correct Standard of Review? i. Questions of Fact/Mixed Fact and Law; and ii. Discretionary Questions.

What now?

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of Saskatchewan