Family Property Agreements Without Lawyers:

Anderson v Anderson

by David A. Couture

Introduction

On its surface, the *Anderson* case seems fairly straightforward as family law cases go. There were no children of the marriage, and therefore no parenting or child support issues. There was no claim for spousal support, and while there was a claim for occupational rent, it is really a family property case. Family property issues are, of course, provincially regulated, and in Saskatchewan it is *The Family Property Act*, SS 1997, c F-6.3 that governs.

Few family property cases make it to trial in Saskatchewan each year. There is an automatic right of appeal from a final family property judgment to the Saskatchewan Court of Appeal, so it is uncommon for a party who loses at trial to bring an appeal. It is, however, not as common that a trial decision is completely overturned on appeal, with the Court of Appeal entering their own reasons as to how family property should be divided, and with 39 pages of written reasons, as happened in the *Anderson* case.

There is no automatic right of appeal from the Saskatchewan Court of Appeal to the Supreme Court of Canada in any family law matters, and with *The Family Property Act* being provincial legislation, it is almost unprecedented for a case like this to receive leave to appeal to Canada's top court.

So, what is unique about this case that has led to our provinces two superior courts taking very different approaches? Why has it garnered the attention of the Supreme Court of Canada? As already stated, the Court of Appeal decision was somewhat lengthy, coming in at 39 pages and 139 paragraphs, with an appendix. The trial decision was 94 pages and 282 paragraphs.

In this paper, the writer does not intend or purport to address all of the issues from trial, or all of the minutia of the family property distribution. Instead, the hope is to do as follow:

- Provide a brief overview of the trial decision;
- Discuss Sections 38 and 40 of *The Family Property Act*;
- Look at the Saskatchewan Court of Appeal decision, and specifically, the test from that case on how to apply Section 40;

- Touch on the grounds of appeal from the Application for Leave to Appeal to the Supreme Court of Canada; and
- Discuss the grey area that we are left with pending the Appeal to the Supreme Court of Canada, and what that means for us as family law practitioners in Saskatchewan.

Trial Decision

The trial decision can be found at 2019 SKQB 35.

While some aspects of this case were a straightforward, family property matter, there were some irregularities that the parties faced coming into trial, which have had varying levels of impact on the appeals.

Valuation Date

It is perhaps par for the course in family property trials to argue about the date of valuation for family property.

Section 2 of *The Family Property Act* allows a court to choose to value property as of either "the time an application is made pursuant to this Act, or at the time of adjudication".

Many family law practitioners refer to this as valuing property as of the "date of Petition" or "date of Trial". However, that language is technically incorrect, and *Anderson* is one of the unique cases in which the nuances mattered. The wife in *Anderson* did not make any claim under *The Family Property Act* in her Petition. Consequentially, the time an application was made pursuant to *The Family Property Act* was when the husband claimed property distribution in his Counter-petition, about a year and a half later.

At trial, the wife argued that property should have been valued as of the date of her Petition. The Trial judge, however, addressed this question in depth beginning at paragraph 144, and ultimately concluded at paragraph 148 that "[i]t would be a significant extension of the law as set out in the *FPA* to conclude that, notwithstanding no family property issues were raised in a petition, that date ought to be the valuation date in any event." He went on at paragraph 149 to speak generally of the discretion trial judges are afforded in the "equitable and

fairness-based provisions found throughout the *FPA*" that would allow him to still consider this irregularity in some way.

While speaking about valuation dates, it should be noted that the Trial Judge valued many of the assets and liabilities (and certainly the most valuable assets), including the corporation, the family home (and mortgage), and pensions, as of the date of adjudication. His conclusion regarding this, and summary of his seasoning, is at paragraphs 261 through 267.

What seemed an important factor to the Trial Judge was that the change in values between the date of application and date of adjudication were primarily due to market forces. As it pertained to the home and mortgage, the husband had consistently and continually paid half the mortgage up until the date of trial and had paid part of the property taxes after separation, despite the wife living in the home since separation.

With regard to the house, part of the Trial Judge's reasoning for dismissing the husband's claim for occupational rent was that the husband was ultimately benefitting from the increase in equity during the period in which he continued to pay the mortgage (paragraphs 124-126).

2015 Separation Agreement

The situation in *Anderson* that has become a central theme in the appeals involves a separation agreement that the wife prepared and presented to the husband ("the Agreement") at the end of a "reconciliation meeting" when it became clear that they would not reconcile.

The Trial Judge began looking at the Agreement at paragraph 76 of his decision. At paragraph 77 he reproduced the entire wording of the Agreement. There was no dispute over whether or not the husband had signed the Agreement, and it was witnessed by friends of the parties. The wife offered that the husband could have a lawyer review it, but he signed it immediately instead.

The wife later asked the husband, through counsel, to execute a formal Interspousal Contract. The husband did not do so. The wife and her counsel then began seeking information about the husband's company to have it valued.

Of important note is that the Agreement did not concretely state how all of the property was to be divided. It essentially said that each party would retain their own assets and be

responsible for their own debts (with minor exceptions) and that the family home and some household goods within the family home would be divided at a later date.

It was clear at both levels of Court that the Agreement was not an Interspousal Contract. The Trial Judge chose at paragraphs 277-278 to give the Agreement some, albeit minimal, weight. The Trial Judge considered many factors in making this determination, but it seems the primary factor he considered was that that parties did not have legal counsel when they executed the Agreement. He commented on this at paragraph 99, as follows:

> "**The requirement for counsel to be involved is an extremely important aspect of attempting to prevent an imbalance of power from carrying the day.** Counsel will provide critical information to the parties; what their rights are and whether the agreement reflects those rights."

At paragraph 108 he continued in the same vein:

> "The agreement at issue here is not within the category of agreements recognized in *Tether* or *Iverson*. The absence of legal representation of either party before, or at the time, it was executed is most troubling. It is important to ensure that requirement is not easily overlooked. **The involvement of counsel is what provides most people with the best chance to ascertain what their rights truly are regarding family property.** Agreeing to a significant disposition when emotions are still raw absent a clear understanding of what the law provides raises the requirement for additional vigilance. **This glaring absence alone is sufficient to make the agreement unenforceable.**
> [emphasis added]

Further significant factors that the Trial Judge took into account in choosing to find the agreement was not enforceable, and giving it minimal weight, were:

- The Agreement did not completely deal with the parties' family property. In particular, it left the distribution of the family home to be negotiated at a later date. (para. 109)

- The wife, who was later trying to rely on the Agreement, sought to formalize it and make it legally binding with an Interspousal Contract, which demonstrated that "[s]he was aware of the fact at an early time that the July 2015 agreement was unlikely to be found to be a final and binding contract" (para. 110)
- There was no disclosure exchanged and the parties "clearly had little understanding of the value of the assets and debts the other had, how exemptions for assets brought into the marriage might operate, or what their entitlement on a fully analysed legally compliant family property division might be." (para. 111)
- The wife's lawyer wrote letters which confirmed that the Agreement was not a completed agreement, partially because they made requests to value the business and the house. (para. 112)

Conclusion at Trial

The Trial Judge ultimately found that the date of the Counter-petition was the "date of application" and valued some assets at that date and others as of the date of adjudication. He determined that the Agreement was not enforceable but that he could and would give it some weight. He reduced the equalization payment from the wife to the husband by $8,000.00 as a result.

Sections 38 and 40 of *The Family Property Act*

It is important to address the sections of the legislation that are at the heart of this case.

For an agreement on family property to be an "Interspousal Contract" it must meet all of the formalities of Section 38 of *The Family Property Act,* which reads:

> 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:
>
> (a) that deals with the possession, status, ownership, disposition or distribution of family property, including future family property;
>
> (b) **that is in writing and signed by each spouse in the presence of a witness; and**
>
> **(c) 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.

(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.

(3) Any provision of an interspousal contract that is void or voidable is severable from the other provisions of the contract.

(4) An interspousal contract may:

(a) provide for the possession, ownership, management or distribution of family property between the spouses at any time, including, but not limited to, the time of:

(i) separation of the spouses;

(ii) dissolution of the marriage; or

(iii) a declaration of nullity of marriage;

(b) apply to family property owned by both spouses and by each of them at or after the time the contract is made; and

(c) be entered into by two persons in contemplation of their commencing to cohabit in a spousal relationship, but is unenforceable until after they commence cohabitation.

(5) Without limiting the generality of subsection (4), an interspousal contract entered into on or after June 4, 1986 may provide that, notwithstanding the Canada Pension Plan, there may be no division between the parties of unadjusted pensionable earnings pursuant to that Act.

(6) Where an interspousal contract has been entered into pursuant to this section, the spouses may enter into another contract amending, varying or cancelling the earlier contract, and the subsequent contract, if made in accordance with this section, takes precedence over the earlier contract.

[Emphasis added]

Section 38 itself does not mention fairness or unconscionability, but it is subject to Section 24, which reads:

24(1) Subject to subsection (2), but notwithstanding any other provision of this Act, family property, including a family home and household goods, that is distributed or disposed of by

an interspousal contract, or with respect to which an interspousal contract provides for its possession, status or ownership, is exempt from distribution pursuant to this Part.

(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.**

(3) Where the spouses have entered into an interspousal contract and where an application is made pursuant to this Act respecting family property that is not distributed or disposed of by the interspousal contract, that property shall be distributed in accordance with this Act as though there were no interspousal contract.

[emphasis added]

Section 40 then goes on to read:

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.

And herein lies the crux of the issue we are addressing. Section 38 has very specific formalities, including the involvement of two separate lawyers. But then Section 40 goes on to allow discretion to the court. The wording of Section 40 is wide open. The court "**may** … take into consideration any agreement" and "**may** give that agreement whatever weight it considers reasonable."

It is clear that the Agreement in *Anderson* fails to meet the requirements of Section 38. The wife, however, argued that it should still be enforced. The husband argued that it should have no weight given to it.

Previously, there were few cases from the Court of Queen's Bench where Section 40 was analysed in a very substantive way, and no decision from the Court of Appeal which dealt with Section 40 except in passing. However, two recent Court of Queen's Bench decisions (*C.M. v S.K,* 2017 SKQB 289 and *Banilevic v Cairney,* 2020 SKQB 25) did look at Section 40.

That framework was at least part of the foundation from which the Court of Appeal ultimately built their decision in *Anderson*.

Saskatchewan Court of Appeal Decision

The Court of Appeal decision can be found at 2021 SKCA 117.

The Court of Appeal noted that there was no case authority from that Court previously which addressed Section 40, "apart from a passing reference in *Propp v Propp,* 2014 SKCA 5" (para 34 CA). Much of the decision outlines their approach to how Section 40 should be applied. The Court looked in depth at the body of case law from the Court of Queen's Bench that deal with Section 40 at paragraphs 35 through 54.

The Court of Appeal determined that the same analysis that the Supreme Court of Canada used in *Miglin v Miglin,* 2003 SCC 24 ("*Miglin*") should be applied to a property agreement that is not an Interspousal Contract under Section 38, and therefore is being considered under Section 40.

What we sometimes refer to as the "*Miglin* Analysis" or "*Miglin* Test" is summarised as follows by the Court of Appeal in *Anderson* at paragraph 52:

> At the first stage of *Miglin*, a court must examine the specific "circumstances surrounding the negotiation and execution of the agreement …" (at para 92). The second stage calls for an assessment of the substance of the agreement to see if it is "in substantial compliance with the general objectives of the Act at its time of creation …" (at para 87).

The Court of Appeal outlined at paragraph 55 the "analysis framework on a go-forward basis" for Courts to use when looking at agreements under Section 40. At paragraph 58, the Court of Appeal provided a four step test, as follows:

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

(b) 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
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> (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.

(c) 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).

(d) 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.

The Trial Judge had not made any reference to *Miglin* in his decision. However, in looking at the Court of Appeal's four step test, much of his analysis was similar, but with different conclusions along the way.

The Trial Judge's analysis on *consensus ad idem* would have happened at the first step. The Trial Judge, while determining that the Agreement was essentially an "agreement to agree", still determined that there was the existence of some type of an agreement sufficient to be considered under Section 40.

Then, on the analysis under the second step, namely looking at the circumstances surrounding the negotiation and execution of the Agreement, the Trial Judge's conclusions regarding the lack of disclosure and lack of independent legal advice seemed, for him, sufficient to find it should be given little weight. The Court of Appeal, however, drew different factual conclusions looking at the negotiation and execution of the Agreement on both of these steps.

Interestingly, at step two from the Court of Appeal's framework, if a prima facie agreement is established, the onus shifts to the party asserting it should be given little weight or unenforceable to show evidence, such as that there was oppression, pressure or other vulnerabilities "in the circumstances at hand that would warrant a finding that the negotiation process was fundamentally flawed" (para. 58(b)(i)).

Then, with regard to the second stage of the *Miglin* analysis (or the third step from the Court of Appeal decision), the Trial Judge at para 90 somewhat looked at the question, though from the perspective of if the agreement was fair and reasonable at the time it was executed, and not specifically from the perspective of if it was in substantial compliance with the objectives of *The Family Property Act.*

Perhaps most distinct in the Court of Appeal's decision in *Anderson* is the dramatically different weight they gave to the lack of independent legal advice than the Trial Judge gave to that factor. While the Court of Appeal's decision recognizes the parties having independent counsel as a factor when looking at an agreement being considered under Section 40, the Court of Appeal at paragraphs 66 through 71 found that the Trial Judge erred in principle by the weight he put on the lack of independent legal advice. The Court of Appeal stated at paragraph 70:

> 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.
>
> [Emphasis added]

The Court of Appeal then at paragraph 99 stated that the lack of legal advice "was of marginal legal significance".

The Court of Appeal disagreed with the Trial Judge's conclusion that there was no "meeting of the minds" (*consensus ad idem*) between the parties. The Trial Judge's finding that the Agreement was more than an agreement to agree was rejected. The Court of Appeal determined that, even though the house was not divided by the Agreement, the Agreement "contained *an objectively verifiable method* that allowed the parties to address the equity (if any) in the family home" (para. 91 CA).

The Court of Appeal gave little or no consideration to:

- the lack of any negotiations leading up to the drafting of the Agreement (though they mentioned the "conditions under which the negotiations were held" and specifically "duration of the negotiations" as a factor at paragraph 59(b)(ii).);
- the husband being confronted with an agreement at the end of a "reconciliation meeting";
- the husband paying half the mortgage until the date of trial;
- the Trial Judge dismissing the claim for occupation rent, in part due to how he had valued the family home and mortgage as of the date of adjudication;
- the wife asking to formalize the agreement afterwards (finding this was reasonable in the circumstances at paragraph 97); or
- the wife seeking disclosure regarding the corporation (accepting at para. 98 her explanation that this was done to prompt a response about dealing with the family home).

The Court of Appeal found that the Agreement "passed" steps one through three, and therefore "great weight should be given to it" as they did not find any relevant new or changed circumstances.

Much emphasis was put on respecting the "mutual intention of the parties" (para. 92 CA). At para. 108 the Court quoted para. 87 of *Miglin* where the Supreme Court of Canada stated: "the court should defer to the wishes of the parties and afford the agreement great weight."

The Court of Appeal at paragraph 120 concluded, "I see no basis for the 2015 Agreement not to govern the division of the parties' family property".

At paragraph 132-133 the Court of Appeal did not allow the Agreement to govern. They considered the wife's request to "uphold the 2015 Agreement and have the family property, including the family home, divided in accordance with the terms of that agreement" but instead chose to do something entirely different, which was value and divide all family property as of the date of the initial Petition.

For comparison's sake, had the Court of Appeal fully upheld the Agreement, and divided the equity in family home equally, the wife would have been required to pay the husband half of the equity in the family home. As of the date of adjudication the total equity, according to the Trial Judge at paragraph 249, was $81,765.26. Therefore, the wife would have owed the husband a payment of $40,882.63 had the Court of Appeal fully enforced the Agreement. The Court of Appeal's ultimate decision, instead, still had the wife keep the home solely but had the husband pay her $4,914.95. The Trial Judge's decision was that the wife would pay the husband $62,646.98 plus an RRSP rollover of $37,089.69.

The Court of Appeal used the discretion provided by Section 40 to insert a different property regime in place of the Agreement which the Court of Appeal had at paragraph 120 determined should "govern the division of the parties' family property". Paragraph 101 of the Court of Appeal decision stated:

> Having found the trial judge erred by concluding that the 2015 Agreement was not an agreement between the spouses that he could take into account within the meaning of s. 40 of the *FPA*, it falls to this Court to determine the weight to be assigned to that agreement.

The Trial Judge had, however, determined that the Agreement was an agreement that he could consider under Section 40, and he did apply weight to it, though markedly different weight (see paras. 116 and 278 of the Trial Judgment).

Looking at the Court of Appeal's framework, there seems to remain a question of if, and when, an agreement being considered under Section 40 would be given less than "great weight". Section 40 provides that the Court may give an agreement "whatever weight it considers reasonable". The four-step test could be read as a litmus test of sorts, choosing to either reject the agreement or give it "great weight".

Appeal to the Supreme Court of Canada

The Respondent brought an Application for Leave to the Supreme Court of Canada on October 28, 2021. Leave was granted on April 7, 2022.

The Appeal was made on 3 grounds, which succinctly can be put as:

1. Was the Court of Appeal correct to apply the "test" from *Miglin v Miglin,* 2003 SCC 24, when looking an at agreement through the lens of Section 40 (or similar sections in other jurisdictions in Canada)
2. Assuming the answer to the first question is "yes", was it open to the Court of Appeal to determine that the Agreement should govern, but then do something different?
3. Did the Court of Appeal apply the wrong Standard of Review at any point?

While we know that leave to appeal to the Supreme Court of Canada was granted, we do not know which ground or grounds of appeal drew the attention of the Court.

The written arguments for the leave application are available online on the Supreme Court of Canada's website for those interested. The writer would like to specifically thank Monica Couture and Mustafa Ghori for their assistance in drafting those materials.

What now?

Lawyers and alternative dispute resolution practitioners, such as mediators, have been intrigued about what the Court of Appeal decision means since it was released. Standard advice has historically been that a binding family property agreement in Saskatchewan must involve two lawyers and all of the other formalities that Section 38 requires, to have any reasonable

certainty that it will be upheld. Any agreement signed lacking those formalities was challenged or quickly "made more legal", as was attempted but not fulfilled by the wife in *Anderson* once she had retained counsel. The Court of Appeal's in-depth decision promises, if upheld, some real change in that regard, particularly by finding that independent legal advice was only marginally important.

With the uncertainty of not knowing where the Supreme Court of Canada will fall in this analysis, family law practitioners should take a cautious approach at this time.

Regardless of the ultimate outcome, an Agreement with all of the formalities required by Section 38 will still be the best protection we can offer to our clients. Neither the Trial Judge nor the Court of Appeal in *Anderson* ultimately enforced the exact terms of the parties' agreement. While the Court of Appeal's decision leans heavily in favour of giving more weight to such agreements, that Court still relied on the discretion which Section 40 provides, resulting in an outcome which would not have been possible had the same agreement strictly met the requirements of Section 38, unless section 24 were triggered.

That being said, clients will continue to sign agreements before meeting lawyers or contrary to their lawyers' advice, and we will be faced with the questions of how to deal with those agreements. Performing the four-step analysis as outlined by the Court of Appeal would be a good initial approach in questioning whether or not the agreement should be challenged. If there is a good argument that an agreement fails a *"Miglin*" type analysis, then family lawyers should not hesitate to challenge its enforceability regardless of the current uncertainty.

There is a very real possibility that, if the Court of Appeal decision is upheld, mediators will be in the position (particularly if they are also lawyers) to help their clients negotiate a binding family property agreement, and then step into the role of also drafting the agreement and executing it with both of their clients. The mediator would not be providing legal advice to either, but especially if both had the option to obtain legal advice throughout the process, such an agreement would very likely be enforceable under Section 40. At this time, however, it is probably best practice for mediators to at least strongly recommend that their clients each retain a lawyer to formalize any agreement.

For lawyers, it is important to caution our clients against signing anything with their spouse, or future spouse since we do not know how it may later be treated.