

A review of *Anderson v Anderson*

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The logo of the Law Society of Saskatchewan, featuring a stylized tree with a white trunk and branches, and a gold and white leaf-like shape at the base.

Law Society
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Introduction

2023 SCC 13, 2023 CSC 13
Supreme Court of Canada
Anderson v. Anderson

2023 CarswellSask 224, 2023 CarswellSask 225, 2023 SCC 13, 2023 CSC 13, [2023] 6 W.W.R. 187, 2023 A.C.W.S. 229, 481 D.L.R. (4th) 1, 86 R.F.L. (8th) 1

James Allan Anderson (Appellant) and Diana Anderson (Respondent)
Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin JJ.

Heard: December 5, 2022

Judgment: May 12, 2023

Docket: 39884



Summary

- Short marriage
- Second marriage for both
- Both brought in property
- Agreement drafted by wife and signed at the end of a “reconciliation meeting”
- No disclosure
- No negotiations
- No Independent Legal Advice



Trial decision

- 2019 SKQB 35
- Trial judge determined the agreement was not an Interspousal Contract
- Determined that the agreement could be given weight, having regard to Section 40, Section 21(2)(C) and Section 21(3)(q)
- Reduced the equalization payment from the wife to the husband by \$8,000 because of the agreement
- Ordered the wife to pay the husband \$62,646.98 and rollover \$37,089.69 from RRSPs



Family Property Act

21(2) Subject to section 22, where, having regard to the matters mentioned in subsection (3), the court is satisfied that it would be unfair and inequitable to make an equal distribution of family property or its value, the court may:

...

(c) make any other order that it considers fair and equitable.

(3) For the purposes of subsection (2), the court shall have regard to the following:

...

(q) any other relevant fact or circumstance.



Family Property Act

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.



Court of Appeal Decision

- 2021 SKCA 117
- Overturned trial decision
- Created a framework based on *Miglin*
- Determined that the agreement should be given “great weight”
- Exercised discretion to apply values as of the date of petition and divide property accordingly
- Required the husband to pay the wife \$4,914.95 to equalize property



Supreme Court of Canada Decision

- 2023 SCC 13
- Reversed the Court of Appeal Decision
- 7 I agree with the Court of Appeal that the trial judge erred. But **I would not transpose the *Miglin* framework, which arose within a different statutory context, into provincial family property legislation.** While useful general principles emerge from *Miglin* to guide courts in approaching domestic contracts, *Miglin* is not, and was never intended to be, a framework of general applicability for courts in dealing with all types of domestic contracts. Rather, the judge's interpretive exercise is statute-specific, and differences between property division and spousal support, division of powers concerns, and the distinctive features of the Saskatchewan statute mandate a tailored analytical approach.
- 39 Here, the Court of Appeal was not wrong to refer to principles from *Miglin* to structure judges' exercise of discretion under s. 40 of the FPA. It failed, however, to appropriately tailor the analysis to the governing statutory scheme.



New Framework

4 steps

1. Interspousal Contract?
2. Validity (general contract law principles)
3. Procedural Integrity
4. Weight



SCC Outcome

- The agreement was applied, effectively exempting most of the family property
- The equity in the family home and the household goods were divided as of the date of trial
 - Agreement did not specify how they would be divided
 - Stronger presumption for equal distribution of family home
- Wife owed husband \$43,382.63



Recent Cases

Martin v Martin, 2023 SKKB 145

54 An informal agreement executed without legal advice or a valuation of the assets was generally not of great significance prior to the Supreme Court decision in *Anderson*. The weight assigned to such an agreement was purely discretionary via s. 40 of the FPA. However, that regime has now been supplanted in favour of a priority system wherein informal domestic agreements regarding family property are to be encouraged and supported by the court. Absent a compelling reason to discount such an agreement, they are to be controlling in a family property division analysis. *Anderson* recognizes self-sufficiency, autonomy and finality as being important objectives within the family property context.



Recent Cases

Martin v Martin, 2023 SKKB 145 (continued)

- Oral contract
- Not and Interspousal Contract
- Valid agreement
- Some property not dealt with under agreement, or acquired after – was divided
- Determined distribution was fair, so agreement given full weight



Recent Cases

Jansen v Doerksen, 2023 SKKB 106

- Agreement reached at Pre-Trial
- Terms confirmed in an email between counsel
- Referred the matter back to the Pre-Trial judge, giving the Pre-Trial judge the ability to determine the issue summarily or direct the matter to trial
- Relied on *Ruskin v. Chutskoff Estate*, 2004 SKCA 107, and *Anderson v Forsyth*, 2022 SKQB 21



Shift from *Rick v Brandsema*, 2009 SCC 10

- 5 The circumstances of this case move us to consider the implications flowing from *Miglin* for the deliberate failure of a spouse to provide all the relevant financial information in negotiations for the division of assets. In my view, it is a corollary to the realities addressed by this Court in *Miglin* that **there be a duty to make full and honest disclosure of such information when negotiating separation agreements.**

...

- 45 Notably, the Court also stressed the importance of respecting "the parties' right to decide for themselves what constitutes for them, in the circumstances of their marriage, mutually acceptable equitable sharing" (para. 73). Parties should generally be free to decide for themselves what bargain they are prepared to make. And it is true that most separating spouses appear to determine their agreements without judicial participation.
- 46 This contractual autonomy, however, depends on the integrity of the bargaining process. **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.**



Contracts before or during a relationship?

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.



Mediation

Association de médiation familiale du Québec v. Bouvier

2021 SCC 54

- Agreement reached in mediation but not signed
- After legal advice, one party decided not to proceed
- “Summary of mediated agreements” relied on as evidence, but not a contract
- Parties gave evidence about discussions in mediation
- Settlement exception (*Union Carbide*) applies to family mediation
- Parties can contract out of this exception – but must clearly express this intention in their mediation contract
- Emphasized contractual autonomy
- Parties “alluded to terms of an agreement” in emails, and their child support cheques were provided and cashed
- Under the *Quebec* civil system, but likely still has relevance here



Key Takeaways

- Similar but distinct framework from *Miglin*
- Consider any agreement, verbal or otherwise
- Advise clients to avoid any agreements, even verbal
- Likely does not apply to the family home if home is divided unequally
- May apply to contracts before or during a marriage/cohabitation
- Caution should be exercised in mediation (insist on *Union Carbide* exception) and with partial performance

