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THE FAMILY LAW ACT: EVERYTHING YOU ALWAYS WANTED TO KNOW

PAPER 4.1

Marriage and Cohabitation Agreements: Drafting and Setting Aside Agreements under the FLA

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MARRIAGE AND COHABITATION AGREEMENTS: DRAFTING AND SETTING ASIDE AGREEMENTS UNDER THE FLA

I. Introduction

The purpose of this paper is to assist you in drafting agreements that will be subject to the *Family Law Act*, S.B.C. 2011, c.25 (the "*FLA*"), and in advising parties who will be entering into those agreements or who wish to set aside an agreement. Our goal is to bring to your attention issues that should be considered and suggest ways to address those issues. When discussing the provisions for setting aside agreements, we have looked to the experience in Ontario for insight, as some of the provisions in the *FLA* are substantially the same as the provisions in Ontario's *Family Law Act*. However, much of our commentary is speculative because the courts in this jurisdiction will not have the opportunity to comment on the meaning and effect of various provisions of the *FLA* until it has come into force. Our comments are also incomplete because we are not able to canvass all of the potential issues that should be considered. In addition, there are likely to be some issues that will only come to light after the *FLA* has come into force. With those *caveats* in mind, we hope to provide those of you who—like us—forgot to order your crystal ball with an admittedly hazy view of the future for marriage and cohabitation agreements.

II. Practical Drafting Tips

One of the challenges in drafting Agreements that will be subject to the *FLA* is to determine how much of the existing precedents are still useful and how much of them must be revised. The subtitle for this section might be, "Do we need to throw the baby out with the bathwater?" The response to this query would be "No." While the *FLA* includes a new regime for division of family property in

the absence of an agreement and a new standard for setting aside an agreement, many of the features of well-drafted agreements made under the *Family Relations Act* (the "*FRA*") should also be part of agreements made under the *FLA*. For example, agreements should continue to set out:

(1) the parties' circumstances and economic prospects,

(2) the assets and liabilities of each party and the value or balance of those assets and liabilities,

(3) the parties' intentions to achieve certainty and what consideration they have given to changes in their circumstances, and

(4) the parties' intentions with respect to property brought into the relationship and property acquired during the relationship.

Agreements made under the *FLA* may differ from agreements made under the *FRA* in the following ways:

(1) the distinction between marriage and cohabitation agreements will likely disappear,

(2) the level of disclosure provided will increase, as will the documentation of what disclosure has been provided, and

(3) establishing the date on which assets and debts are valued will become much more significant, and

(4) parties will need to give specific consideration to both the current value of assets and the potential increase in value.

Depending on the purpose of an agreement, an agreement made under the *FLA* may look similar to an *FRA* agreement (for example, an agreement between common-law spouses that provides for property to remain separate, whether acquired before or during the relationship) or very different (for example, an agreement intended primarily to document each party's excluded property as defined by the *FLA*).

A. Who Should be Entering into Agreements?

With respect to who should be entering into an agreement, it may be easier to list those who should *not* be entering into agreements than those who should be entering into them. Spouses who enter their relationship without significant assets or debts and are content to share assets and debts acquired during their relationship as provided by the *FLA* do not need to enter into an agreement. Everyone else should at least give consideration to doing so.

Prior to the *FLA*, married and common-law couples contemplating an agreement faced different considerations. For married couples, the primary issue was whether they wished for their property to be divided as provided by the *FRA*. For common-law couples, the issue was more complicated because they faced either the uncertainty of an unjust enrichment claim in the absence of an agreement or the possibility of a variation pursuant to s. 120.1 of the *FRA* if they made an agreement. Since the *FLA*'s provisions regarding property division and setting aside agreements will apply to both married and common-law couples, the primary issue for all couples will be whether they wish for their property to be divided as provided by the *FLA*.

One remaining distinction between married and common-law couples is that married couples becomes "spouses" under the *FLA* immediately, while common-law couples must live together for two years before they are considered to be spouses for Parts 5 and 6 of the *FLA*. For this reason, some common-law couples may wish to enter into an agreement which provides that, in the event of a separation, their property will be divided as set out in Parts 5 and 6 of the *FLA* even if they are not yet "spouses" as defined in the Act.

Couples may enter into an agreement to divide family property or family debt differently than provided under the *FLA*. For example, spouses may wish to enter into an agreement for one of the following reasons:

(1) To exclude the increase in value of certain property (such as property acquired prior to the relationship or an inheritance) from division.

(2) To exclude some or all assets acquired during the relationship from division. In particular, some spouses may wish to specifically address business assets acquired during the relationship given that business assets (shares or an interest in a corporation or interests in a partnership, association, organization, business or venture) acquired during the relationship automatically form part of family property (s. 84(2)).

(3) To provide that a specific asset (likely one that forms part of a spouse's excluded property) will be retained by a spouse, even if the amount of increased value of the asset is family property. This may be the case where the spouse owns shares in a company and cannot or would not wish to transfer or dispose of the shares themselves.

(4) To limit which debts will be considered to be family debts. The *FLA* provides that family debt, which includes all financial obligations incurred by a spouse during the relationship (s. 86), will be divided equally unless the court finds that it would be significantly unfair to do so (s. 95). There is the potential for one spouse to be responsible for half of a debt that he or she was not aware of or did not benefit from. For this reason, some parties may wish to agree that only debts incurred with both spouses' consent or for a family purpose will be family debts.

(5) To provide for the sharing of some part of what would otherwise be considered to be excluded property.

(6) To provide that each spouse's property, whether acquired before or during the relationship, remains separate and is not subject to division in the event that the relationship ends. This type of agreement may be used by couples in a marriage-like relationship who have chosen not to marry in part because they did not wish to be subject to a statutory scheme for property division.

Even couples who are content for their property to be divided pursuant to Parts 5 and 6 of the *FLA* may wish to consider entering into an agreement in order to establish the nature and value of their assets and debts prior to the relationship so that, in the event that their relationship ends, it is easier to determine what are family property and family debts. For couples where one or both parties have either significant or complicated assets or debts, setting out in a written agreement the assets and debts that were acquired prior to the relationship may be more effective than relying on the documentation necessary to establish that information. However, in a case like this, the parties should give consideration to what documentation they need to provide prior to entering into the agreement in order to ensure adequate disclosure, and to how they would they would record the disclosure that had been provided.

Couples who made agreements prior to the *FLA* coming into force may wish to enter into a new agreement that is subject to the *FLA*, either to take advantage of the narrower grounds set out under the *FLA* for setting aside an agreement or to avoid any potential uncertainty about which statue would apply on a variation. The issue regarding which statute will apply on a variation arises from s. 252(2) of the *FLA*, and explained in Section V below.

B. New Issues to be Considered under the FLA

Agreements made under the *FLA* will be negotiated and drafted in a different context than those drafted under the *FRA*. However, the extent to which an "*FLA* agreement" will differ from a "*FRA* agreement" will depend, in part, on the purpose of the agreement. The operative clauses of an

agreement between spouses who wish to keep their property entirely separate may not look much different from a *FRA* agreement, but there may be more specific provisions confirming the circumstances in which the agreement was made in order to address the factors set out in s. 93(3) and (5) of the *FLA*.[1] In contrast, an agreement primarily intended to document excluded property may include different operative clauses intended to follow the structure of the *FLA* more closely.

One obvious new issue to consider is the new definition of an agreement set out in the *FLA*. In order to qualify as a "marriage agreement" under the *FRA*, an agreement had to be in writing, signed by both spouses, and witnessed by one or more other persons.[2] It also had to take effect on the date of marriage, or the date on which the agreement was executed, whichever was later.[3]

The *FLA* does not use the term "marriage agreement." An order for property division under the *FLA* is subject to a "written agreement"[4] respecting division of property and debt, where the signature of each spouse is witnessed by at least one person (s. 93(1)). The same person may witness each spouse's signature (s. 93(2)). The Supreme Court may not order division of property or debts that are the subject of a written agreement unless all or part of the agreement has been set aside.

Since the *FLA* does not limit when an agreement may take effect, married spouses may enter into an agreement before or during marriage. Cohabiting couples who have not lived together for two years may not be able to make an agreement that is subject to s. 93 because they do not yet qualify as spouses. However, they may wish to enter into an agreement at the beginning of their relationship in order to address what would happen if they separated prior to becoming spouses under the *FLA* or to deal with claims in unjust enrichment and trust. In this case, the parties may be able to make an agreement as set out in s. 6 of the Act, which provides that two or more persons may make an agreement respecting a matter that may be the subject of a "family law dispute"[5] in the future. Section 6(3) provides that this type of agreement will be binding on the parties, subject to the Act. In a case where the parties are entering into the Agreement before they are "spouses" for the purposes of Parts 5 and 6 of the Act, the agreement could include clauses as follows:

> Recitals:
>
> A. (1) This is a cohabitation agreement.
>
> (2) If the parties are "spouses" for the purposes of Parts 5 and 6 of the *Family Law Act*, then this is a written agreement within the meaning of s. 93(1) the *Family Law Act*.
>
> Operative clauses:
>
> 1. This Agreement is binding on the parties during their relationship and after their relationship ends, whether or not they are "spouses" as defined by the *Family Law Act*.

Drafters of agreements made under the *FLA* should place a greater emphasis on valuation than was the case for previous agreements. See Section III below for a discussion of how much disclosure will be sufficient under the *FLA*. Agreements should include values for all assets, and whenever possible,

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1 See Section III below.

2 *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 61(3).

3 *Family Relations Act*, s. 61(2).

4 "Written agreement" is defined in s. 1 of the *FLA* as "an agreement that is in writing and signed by all parties."

5 "Family law dispute" is defined in s. 1 of the *FLA* as "a dispute respecting a matter to which this Act relates."

those values should be as at the date the relationship between the parties began as this information will likely be considered if the court is asked to determine whether an agreement is "significantly unfair." Agreements should not include clauses such as,

> The parties have a general knowledge of the assets and liabilities of the other, and are continue to enter into this Agreement without detailed financial particulars for each party, or any further investigation of such matters.

This type of clause is unlikely to protect an agreement from being set aside under s. 93(3).

For assets that are difficult or expensive to value, like an interest in a company or trust, one option would be leave the value as undetermined but attach as schedules the documents that would be needed to prepare a valuation (for example, financial statements for the company). This approach would both confirm the disclosure that has been provided and provide the basis for establishing the increase in value of the asset in the future.

Since the *FLA* will provide for family debt, an agreement should also specify and provide balances for all debts held by the spouses as of the date that the relationship between the parties began. Again, this information will likely be considered if the court is asked to determine whether an agreement is "significantly unfair."

The date of separation has new significance under the *FLA* because family property is defined as property owned by at least one spouse on the date of separation or derived from property owned on the date of separation. The Act specifically provides that:

(a) spouses may be separated despite living in the same residence (s. 3(4)(a));

(b) the Court may consider as evidence of separation, communication of an intention to separate permanent or an action that demonstrates an intention to separate permanently (s. 3(4)(b)); and

(c) spouses are not considered to have separated if, within one year after separation, they begin to live together for the primary purpose of reconciling and continue to live together for one or more periods that total at least 90 days (s. 83(1)).

Given the significance of the separation date and the uncertainty with respect to its determination, it may be prudent for parties to define what constitutes a separation as a term of their agreement. However, it may only be possible for the parties to refine the statutory provisions regarding separation and not to contract out of them.

Drafters should also give careful consideration to providing for review of an agreement, since the length of time that has passed since the agreement was made is one of the factors to be considered in determining whether an agreement is significantly unfair (s. 93(5)(a)). As was the case under the *FRA*, it is likely that review provisions will only be effective if the parties conduct reviews as contemplated by the agreement.

III. Setting Aside Agreements

The Act, in s. 93, sets out the grounds upon which an agreement may be set aside. It contemplates that an agreement may be set aside if:

(a) there is some defect in the process of making the agreement (s. 93(3));

(b) there is significant unfairness in the agreement, having regard to the factors set out at s. 93(5).

A. Section 93(3)—Defect in the Process

Section 93(3) provides:

> (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
>
> (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
>
> (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
>
> (c) a spouse did not understand the nature or consequences of the agreement;
>
> (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

These are principles that are already known to us and applied in such cases as *Hartshorne v. Hartshorne*, 2004 SCC 22 and *Rick v. Brandsema*, 2009 SCC 10.

Section 93 also contains, at subsection (4), a saving provision:

> (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.

Sections 93(3)(a), (c), and (d) are substantially the same as s. 56(4) of Ontario's *Family Law Act*, which provides for the setting aside of "domestic contracts" as follows:

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

Accordingly, it is instructive to examine how the courts in Ontario have dealt with s. 56(4).

The leading case in Ontario on s. 56(4) is *LeVan v. LeVan*, 2008 ONCA 388, leave to appeal to the Supreme Court of Canada ref'd, 2008 CanLII 54724, which states (at para. 51):

> [51] The analysis undertaken under s. 56(4) is essentially comprised of a two-part process: *Demchuk v. Demchuk* reflex, (1986), 1 R.F.L. (3d) 176 (Ont. H.C.J.). First, the court must consider whether the party seeking to set aside the agreement can demonstrate that one or more of the circumstances set out within the provision have been engaged. Once that hurdle has been overcome, the court must then consider whether it is appropriate to exercise discretion in favour of setting aside the agreement …

1. Section 93(3)(a)—Disclosure

Section 93(3)(a) codifies the principles expressed in *Rick*, wherein the Court described the importance of disclosure in the context of separated spouses (at para. 47-48):

> [47] … 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.

> [48] Such a duty in matrimonial negotiations anchors the ability of separating spouses to genuinely decide for themselves what constitutes an acceptable bargain. It also helps protect the possibility of finality in agreements. An agreement based on full and honest disclosure is an agreement that, prima facie, is based on the informed consent of both parties. It is, as a result, an agreement that courts are more likely to respect. Where, on the other hand, an agreement is based on misinformation, it cannot be said to be a true bargain which is entitled to judicial deference.

While *Rick* deals with disclosure in the separation context, there is no doubt that disclosure will be equally important in the marriage/cohabitation context. The point of a marriage/cohabitation is generally to have one party in the relationship give up rights that he or she would otherwise have under the law. Without full disclosure, the party is unable to "genuinely decide for [himself/herself] what constitutes an acceptable bargain." Moreover, disclosure at the outset of the relationship establishes a baseline against which an increase in value of excluded property can be measured for the purposes of s. 84(2)(g).

Where tension will arise is in those cases where there are assets at play that do not lend themselves to easy valuation. It is one thing to hire a real estate appraiser to put a value on a house. It is quite another to attempt to value the growth shares in the family business that have been issued to a party as part of an estate freeze or a party's interest as one of many beneficiaries of the family trust that holds shares in a family holding company. In agreements made under the *FRA*, it was not unusual to see a party disclosing the existence of an asset but not valuing it. For example, Party A might disclose that he had 100 common shares in ABC Co. and list its value as "unknown." Or there might be a very general statement along the lines of "Party A is a discretionary beneficiary of the XYZ trust, which holds trust property with a value in excess of $1,000,000." Moreover, there was always the possibility that such an asset might never be used for a family purpose during the marriage and, therefore, never be an issue.

Is this type of disclosure sufficient under the *FLA*? What if there is no concern about establishing a baseline value because the purpose of the agreement is to shield any increase in value of excluded property from division? How much has to be disclosed by Party A in order for Party B to know that the bargain he is being asked to make requires him to give up a lot? If Party B is told that Party A's potential inheritance could run into the millions of dollars and it is expected that Party B will not share in it, does it really matter that Party A's potential inheritance is in the $10 million dollar range rather than the $5 million dollar range?

According to the Ontario Court of Appeal in *LeVan*, it does really matter. In *LeVan*, the spouses' pre-marital domestic contract was set aside based on a number of the s. 56(4) factors, including the husband's non-disclosure. His parents had established a complex corporate structure which saw the husband and his three siblings each holding an equal ¼ interest in three different companies. The husband, together with his siblings, was also a beneficiary of a family trust. Going into the marriage, the wife was well aware from family discussions that the husband's father required all of his children to enter into marriage agreements to protect the family business from spousal claims.

The domestic contract provided that the family companies would be excluded property but it went well beyond that in protecting the husband's interest in those companies. The extent of the husband's disclosure was that his net worth was "$80,000 and LeVan Family Companies interest" and that he held 100 common shares in a particular company. No values were provided for his interest in the companies or in the family trust. The evidence from the wife's valuator at trial was that the mid-point value of husband's business assets was in excess of $14 million when the domestic contract was made. This was but one of the deficiencies in the husband's financial disclosure. When the wife's lawyer asked for values for the husband's business interests, his lawyer took this as a request for full valuations and refused to provide them on the basis of time (the wedding date was imminent) and cost. She also suggested that the husband's contingent interest in the family trust had a very minimal value when, in fact, the trust property had a value of $30 million, the four siblings had always been treated equally under the trust and it was the parents' intention to continue treating them equally. The trial judge found that his interest in the trust was actually worth $3.4 million at the date of the marriage.

The trial judge found that the husband had deliberately concealed the extent and value of his assets from the wife. He argued that the misrepresentations did not matter because the wife wanted to marry him and would have signed the contract no matter what. The wife's evidence on cross-examination seemed to support this but the trial judge still found the non-disclosure to be inexcusable. Coupled with the wife's failure to understand the nature and consequences of the contract, the judge determined it was appropriate to set aside the contract.

A live issue in *LeVan* was whether the disclosure obligation at s. 56(4)(a) encompassed an obligation to not only disclose assets but their value. The husband's position was that the obligation to disclose could be met by simply providing a list of significant assets without values being attributed to them. It is implicit in the Court's statements that he argued that the absence of the word "value" from s. 56(4)(a) supported his position. The trial judge did not accept this argument. The Court of Appeal declined to engage in a detailed analysis of the significance of the absence of the term "value" from s. 56(4)(a) because the trial judge had not done so and there was enough other evidence to support the conclusion that the husband had breached his disclosure obligation quite apart from the failure to disclose value. However, the Court did comment that there was no case law to support the husband's position and emphasized the importance of full disclosure not only of assets but of their value. The Court cited with approval the following statement from *Patrick v. Patrick* (2002), 112 A.C.W.S. (3d) 302 (S.C.J.) (at para. 52):

> [52] Marriage contracts are a device by which parties can opt out of most or part of the Family Law Act, its property provisions, its support provisions, or both. 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 marriage contract. It is in this context that financial disclosure is critical.

The Court also approved (at para. 53) the statement in *Dubin v. Dubin*, 2003 CanLII 2103 (ON SC), (2003), 34 R.F.L. (5th) 227 at para. 32 that:

> [32] ... 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.

LeVan was clearly a case of dishonest non-disclosure. But what if there is an absence of malice? In *Rick*, Madam Justice Abella discussed the circumstances in which a court would intervene, saying (at para. 49):

> [49] Whether a court will, in fact, intervene will clearly 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. It will also depend on the extent to which the resulting negotiated terms are at variance from the goals of the relevant legislation.

Rick suggests that it is deliberate non-disclosure that puts an agreement at risk. However, the wording of s. 93(3)(a) does not include any such qualifier. Contrast this with s. 93(3)(b)'s requirement that the advantage taken of a vulnerable spouse be "improper," which denotes some element of fault. Arguably, the wording of s. 93(3)(a) allows a court to intervene when non-disclosure is not necessarily deliberate. After all, if the point of disclosure is to give Party B the ability to make a full and informed decision about the bargain that he has been asked to make, why does it matter if the non-disclosure is deliberate? What does Party A do if she knows she is the beneficiary of a trust but has little or no idea about the structure of the trust, its value, or even the nature of her interest in that trust. Can she be faulted for making defective disclosure if, for example, those people in charge of the trust and its underlying assets are unwilling to provide her with complete information?

2. Section 93(3)(b)—Improper Advantage

Section 93(b) is a further codification of *Rick* and, in its reference to "ignorance, need, or distress," of the common law principles regarding unconscionability, as set out in *Morrison v. Coast Finance Ltd.,* (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (C.A.).

Section 93(3)(b) is likely to be of greater significance in the case of separated spouses where emotional and financial pressures will more readily result in a spouse being in a position of need or distress. But there are circumstances in which it may apply to spouses entering into a property agreement.

In *Jasinski v. Jasinksi*, 2006 BCSC 878, the parties had made a domestic contract while living in Ontario. At the time of making the domestic contract, the wife was a recent immigrant to Canada who did not speak English. She signed a marriage contract approximately seven months after the marriage, having been told by her husband that if she did not sign, he would divorce her. She was not working, and did not have landed immigrant status. As the agreement stipulated that the applicable law would be the law of Ontario, Justice Josephson reviewed and applied the law in relation to s. 56(4). Ontario's *Family Law Act* does not have an equivalent to s. 93(3)(b). Instead, Justice Josephson found that it was in relation to s. 56(4)(c) ("otherwise in accordance with the law of contract") that the Ontario courts had recourse to the doctrines of unconscionability, duress/compulsion, and undue influence. It would appear both from *Jasinski* and one of the cases referred to therein, *Deguire v. Deguire* (1997), 34 R.F.L. 4th 164 (Ont. Ct. J. Gen. Div.) that a threat to divorce a spouse if she does not sign a marriage agreement could be grounds to set aside the agreement if the Court can conclude she was "compelled by fear" to sign.

In *Verkaik v. Verkaik*, 2009 CanLII 6843 (ON SC), the wife attacked a domestic contract on the basis on inadequate financial disclosure, inadequate legal advice, and duress. She claimed she was taken to see a lawyer just two days before the wedding to sign an agreement she had been given only two weeks earlier and forced to sit between the husband and the lawyer. The Court acknowledged that if the wife had been forced to go to the lawyer two days before the wedding to sign an agreement that she first saw just two weeks before and had been required to sit between the husband and lawyer while signing the agreement, that would merit a serious consideration of the issues of duress and coercion. However, based on the evidence from the lawyer, the Court did not believe the wife.

The wife alleged that she felt compelled to sign the Agreement because the husband told her he would not marry her if she did not sign, she was pregnant, and her relatives were coming to the wedding. Contrary to approach taken in *Jasinski* and *Deguire*, the Court said:

> [77] The fact that the respondent would not marry the applicant unless they had a contract was known to her when she accepted his proposal in marriage, and even before. It was entirely her choice to marry or not to marry. The fact of her pregnancy and perceived embarrassment of a child out of wedlock is not a valid basis to find duress or coercion in this case. She had cohabited in a spousal relationship without marriage for two and a half years and the pregnancy was not an unnatural consequence of that relationship. Both were educated and experienced in commercial realities. They began their negotiations in the context of a draft contract about two months before the wedding. The parties were both mature adults, each having had the experience of a prior unsuccessful marriage. There is no credible evidence to support the applicant's contention she was under duress or coerced to sign the marriage contract.

This may simply be a reflection of the Court's less than charitable view of the wife's overall credibility.

3. Section 93(3)(c)—Understanding the Nature and Consequences of the Agreement

In *Jasinski*, Justice Josephson referred to a number of cases in which s. 56(4) of Ontario's *Family Law Act* had been applied to set aside a domestic contracts, the recurring theme of which appeared to be a spouse without proper advice:

- the plaintiff was a recent immigrant who did not speak English and received legal advice through a translator (*Patrick v. Patrick*, [2002] O.T.C. 131 (Sup. Ct. J.))
- the plaintiff's rights under the applicable property division legislation were not explained to her (*Best v. Best* (1990), 30 R.F.L. (3d) 279 (Ont. Ct. J. Gen. Div.))
- the plaintiff signed an agreement without legal advice at the behest of the husband to avoid creating upset in her marriage and received no consideration in the agreement for giving up her statutory rights (*Atkinson v. Atkinson* [no cite given in *Jaskinski* decision]).

If there are language issues, it is incumbent upon you, as counsel for the party who seeks the protection of an agreement, to ensure that appropriate translation is available. Consider whether it is appropriate to have the agreement translated into the other spouse's native tongue and provide both the English version and the translation to the lawyer providing independent legal advice. If you do so, ask that the other party sign both versions of the agreement.

If you act for the party who seeks the protection of an agreement, does s. 93(3)(c) require you, as prudent counsel, to inquire into the quality of the independent legal advice that the other party has received? I would suggest the answer is 'yes.'

The law in BC at present is that bad independent legal advice does not necessarily vitiate an agreement and good legal advice does not necessarily save a bad agreement. The principles concerning independent legal advice in the family law context are articulated as follows in *Bradshaw v. Bradshaw*, 2011 BCSC 1103 (CanLII):

> [49] Independent legal advice, in the family law context, is important because it ensures that the spouses are fully aware of their statutory and common law rights and obligations. It safeguards against one spouse taking unfair advantage of another and redresses or at least minimizes disparity of bargaining power between them: see, for example, *Gurney v. Gurney*, 2000 BCSC 6 (CanLII), 2000 BCSC 6 at para. 29, [2000] B.C.J. No. 13. In *Gurney*, supra, Pitfield J. found that "the lack of independent legal advice in this case is not fatal and the agreement should not be set aside because of its absence" (at para. 30). Indeed, the absence of independent legal advice will not, by itself, invalidate an agreement: *Chepil*, *supra*, at para. 45, citing *Rosen v. Rosen* 1994 CanLII 2769 (ON CA), (1994), 3 R.F.L. (4th) 267, 72 O.A.C. 342, leave to appeal ref'd [1994] S.C.C.A. No. 392. Nor will the receipt of independent legal advice automatically cure or neutralize one or both spouses' vulnerabilities; in other words, it will not protect an otherwise invalid or unfair contract: see, for example, *Stark*, supra; *Davidson v. Davidson* 1986 CanLII 1320 (BC CA), (1986), 2 R.F.L. (3d) 442, [1986] B.C.J. No. 505 (C.A.); *Gold v. Gold* 1993 CanLII 286 (BC CA), (1993), 49 R.F.L. (3d) 41, 82 B.C.L.R. (2d) 165 (C.A.), leave to appeal ref'd [1993] S.C.C.A. No. 441.

As to what constitutes independent legal advice, Justice Pitfield expressed it thusly in *Gurney*:

> [29] In the family law context, providing independent legal advice must mean more than being satisfied that a party understands the nature and contents of the agreement and consents to its terms. The solicitor should make inquiries of the party so as to be fully apprised of the circumstances surrounding the agreement. The party should be advised of his or her legal rights and obligations in relation to the subject matter of the agreement and advised of the consequences associated with a refusal to sign. The solicitor should offer his or her opinion on the question of

> whether it is appropriate for the party to sign the agreement in all of the circumstances. It is only with that kind of advice that the party can make an informed decision about the advisability of entering into the agreement as opposed to pursuing some other course.

Having said that, Justice Pitfield was not prepared to set aside the separation agreement based on what he found to be the inadequate legal advice to the wife. The case might be decided differently under the *FLA*, which explicitly contemplates that an agreement can be set aside based on failure to understand the nature of the agreement or its consequences. Certainly, the Ontario experience seems to suggest that proper legal advice is extremely important if an agreement is to be upheld. In *LeVan*, the fact that the wife did not receive effective independent legal advice and that some advice provided was wrong was a factor supporting the trial judge's decision to set aside the agreement. By contrast, the agreement was upheld in *Verkaik*, where the Court found that the concept of net family property equalization was fully explained to the wife by the lawyer before she signed the contract and that she understood she was giving up her rights to property equalization.

In *Giebelhaus v. Giebelhaus*, 2012 BCSC 1100, the Court found an agreement was unfair in circumstances where the lawyer for the husband was inexperienced at the time, was unable to provide the husband with a proper understanding of the value of the wife's pension and significantly overestimated the husband's potential liability for spousal support. In the result, the husband was not "fully aware" of his rights and obligations and the Court stepped in to vary the division of property set out in the agreement.

How you go about satisfying yourself as to the quality of the legal advice the other party has received has the potential to be quite a delicate undertaking. If you know counsel providing the ILA, you may be quite satisfied that the advice will be appropriate. But perhaps, as a matter of course, you should require Certificate of ILA from the other lawyer that is more detailed than the ones we tend to use now and that includes statements like:

> I reviewed with [party] his/her entitlement to division of property under the *Family Law Act* and specifically advised [party] about family property, family debt, and excluded property.
>
> I reviewed with [party] what [he/she] would be entitled to by way of division of property under the *Family Law Act* in the absence of an agreement and I compared that with what the [party] would be entitled to by way of division of property under the Agreement.
>
> I confirmed with [party his/her] understanding that by signing the Agreement, [he/she] was giving up rights to which he/she is entitled under the *Family Law Act*.

4. Section 93(3)(d)—Other Common Law Factors Rendering a Contract Voidable

The common law factors are such things as mistake, fundamental breach, and capacity. These are discussed in the *Family Law Sourcebook* at §7.7.

5. Residual Discretion/ Section 96(4)—The Saving Provision

As noted above, *LeVan* sets out a two-step analysis. The second stage of the analysis requires the court to decide whether, notwithstanding a breach of s. 56(4), the domestic contract should be set aside. This is not explicitly articulated in s. 56(4) but is the natural consequence of the permissive "may" in relation to the court's power to set aside. A similar argument could be made on the wording of s. 93(3). It may be that s. 96(4) is simply a clear articulation of the residual discretion[6] and comes into play where the court finds that there was a procedural defect in the making of the agreement but the court is nonetheless satisfied that the agreement is objectively fair.

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6 There is no explanatory commentary about s. 96(4) in the Ministry of Justice's backgrounder on the *FLA*.

In discussing the second stage of analysis, the trial judge in *LeVan (LeVan v. LeVan*, 2006 CanLII 31020 (ON SC)) acknowledged (at para. 198-99) that not every breach of disclosure would result in setting aside the contract and that courts should not lightly interfere with domestic contracts. The trial judge suggested that the following factors should be considered in deciding whether to set aside the contract:

> [200] Several cases have suggested that when exercising their discretion, trial judges should consider the following factors originally set out in *Demchuk v. Demchuk*, *supra* and reiterated by Lack, J. in *Dochuk v. Dochuk*, *supra* and *Freake v. Freake*, *supra*:
>
> (a) whether there had been concealment of the asset or material misrepresentation;
>
> (b) whether there had been duress, or unconscionable circumstances;[7]
>
> (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;
>
> (f) whether the other party had fulfilled his/her obligations under the agreement;
>
> (g) whether the non-disclosure was a material inducement to the aggrieved party entering into the agreement.

B. Significant Unfairness

Even if an agreement cannot be attacked on the basis of defect in its making, the *FLA* nonetheless allows a spouse a final kick at the proverbial can through s. 93(5), which provides:

> (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
>
> (a) the length of time that has passed since the agreement was made;
>
> (b) the intention of the spouses, in making the agreement, to achieve certainty;
>
> (c) the degree to which the spouses relied on the terms of the agreement.

Presumably, the significance of the length of time that has passed is that the greater the time that has elapsed, the greater the possibility that life has unfolded for the spouses in a way not contemplated by the agreement, à la *Hartshorne*.

On the other hand, it may be very clear from the circumstances that the spouses wanted to achieve certainty no matter what. Perhaps, for example, one party has already been through a nasty divorce and is only interested in a relationship with the other party if the protection of a binding agreement is put in place first. Perhaps both spouses have assets that they wish to protect and to pass down to children from prior relationships. In those circumstances, it may be quite easy to find that the spouses wanted to achieve certainty.

As to reliance, I assume that what is meant by this is that the court may find it easier to set aside an agreement on the basis of significant unfairness if the spouses have not conducted themselves in a way that indicates reliance on the agreement. For example, if the parties contract that any property they acquire will be held by them as tenants in common but they acquire a succession of properties as joint

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7 Recall that this factor, dealt with at s. 93(3)(b) of the *FLA*, is absent from s. 56(4) of Ontario's *FLA*.

tenants, the court may be more willing to find it significantly unfair that one of the spouses belatedly wants to adhere strictly to the terms of the agreement.

This, of course, is a very different—and narrower—set of factors for unfairness than we are used to under s. 65 of the *FRA*. Moreover, the threshold for variation has been increased to "significant" unfairness as opposed to unfairness *simpliciter*.

For an interesting discussion of the meaning of the term "significantly unfair" as it is used in the context of strata law, see JP Boyd's post at the Courthouse Libraries BC Blog "The Stream": http://www.courthouselibrary.ca/training/stream/jpboyd/12-02-02/JP_Boyd_More_than_merely_less_than_grossly_significant_unfairness_and_the_Family_Law_Act.aspx

Certainly the intention of the government, as set out in the White Paper and at the Ministry of Justice website, is to make it more difficult for the court to interfere with a freely negotiated, procedurally fair agreement. At the Ministry's website explaining the new Act (http://www.ag.gov.bc.ca/legislation/family-law/acts-explained.htm), the following language is used in relation to agreements:

> This Division [Part 4] provides that spouses may make agreements to divide their property and debt as they wish and *limits the court's ability to interfere* with those agreements.
>
> The section [section 92] clearly states that, subject to the *court's limited ability to set aside a property agreement* under section 94, spouses have autonomy to depart from the *Family Law Act* with respect to property division.
>
> [in relation to section 93] Section 65 of the *Family Relations Act* provided *much broader discretion for judges to interfere* with an agreement. The test was whether the agreement was "unfair" having regard to a number of factors.
>
> [in relation to section 94] The *Family Relations Act* property division provisions were criticized for setting the threshold for review too low and *providing courts' with too much discretion to change agreements* dividing property. It created uncertainty for spouses as to whether their agreements would be upheld. (emphasis added)

The $64,000 question is whether the courts will heed the very clear direction from the government and take a more hands-off approach to agreements. Or will our courts, used to intervening to redress perceived unfairness, simply strive more mightily to find procedural defect in the making of an agreement in order to right a perceived (albeit freely negotiated) wrong? Will, for example, the spouse who fails to disclose because she cannot extract information about the family trust from the trustees be found in breach of s. 93(3)(a) as a way of circumventing the constraints of s. 93(5).

IV. Transitional Provisions: Which Statute to Apply?

The transition provisions with respect to property division are set out at s. 252 of the *FLA*, which provides that:

> 252(1) This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.
>
> (2) Unless the spouses agree otherwise,
>
> (a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or
>
> (b) a proceeding respecting property division started under the former Act
>
> must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

Subsection (2) set out above appears to mean that *an agreement respecting property division made before the coming into force of the FLA* will continue to be subject to the *FRA*, even if the proceeding to enforce, set aside or replace the agreement is commenced after the coming into force of the *FLA*. However, it is possible that subsection (2) could be interpreted to mean that *a proceeding commenced before the coming into force of the FLA to enforce, set aside or replace an agreement* must be continued under the *FRA*. Either interpretation would be subject to the words, "unless the spouses otherwise agree."

The former interpretation is supported by the use, later in the subsection, of the term "started" because proceedings to enforce, set aside or replace agreements seem to be the only types of proceedings that would be started under the *FRA* after the coming into force of the *FLA*. This interpretation is also supported by the explanatory notes provided by the Ministry of Justice to support the transition to the *FLA* (http://www.ag.gov.bc.ca/legislation/family-law/acts-explained.htm), which state that:

> Section 252 provides that the *Family Relations Act* continues to apply to agreements or orders made before the *Family Law Act* comes into force. This ensures that property division disputes that have been resolved may not be re-opened by virtue that new property division rules have been introduced.

The explanatory notes do not distinguish between agreements regarding property made at the end of the parties' relationship and agreements made prior to or during the relationship, and presumably apply to both types of agreements.

Although it appears that the *FLA* was not intended to apply to agreements made before it comes into force, the effect of s. 252 may become an issue in proceedings to set aside an agreement because one party wishes to take advantage of the narrower grounds set out in the *FLA* for doing so. The effect of s. 252 could also become an issue in the future in cases where a marriage or cohabitation agreement was made shortly before the coming into force of the *FLA*, but the proceeding to enforce, set aside or replace the agreement is not commenced until the *FLA* has been in force for a number of years.

There is an additional issue for cohabitation agreements arising from the fact that s. 120.1 of the *FRA* was repealed prior to the *FRA* being repealed. If the transitional provisions are applied to a cohabitation agreement made prior to the coming into force of the *FLA*, a proceeding to set aside or replace that agreement cannot be made under the *FRA* because Part 5 of the *FRA* does not apply to unmarried spouses. What would happen in this case? In JP Boyd's post at the Courthouse Libraries BC Blog "The Stream," (http://www.courthouselibrary.ca/training/stream/jpboyd/12-08-22/JP_Boyd_Unmarried_Couples_and_Property_Transition_Provisions_of_the_FLA-2589858436.aspx), he suggests that unless one party brought a claim under s. 120.1 prior to its repeal, they will not be "trapped" in the *FRA* by s. 252:

> You therefore will not have "started or continued" a "proceeding to enforce, set aside or replace an agreement respecting property division" under the *FRA*, and may file under the *FLA* as you wish when it comes into effect.

This interpretation is a reasonable one. However, it is likely that at a some point a party seeking to enforce an agreement will argue that a cohabitation agreement made prior to the coming into force of the *FLA* would subject to the *FRA* pursuant to s. 252 but, since the *FRA* does not apply to a cohabitation agreement, is subject only to contract law.

For parties entering into agreements in the short period remaining before the coming into force of the *FLA*, any transitional issues can be resolved by including an agreement that once the *FLA* comes into force, it will apply to the agreement. Sample wording for a recital regarding transition is as follows:

A. (1) Until the *Family Law Act* comes into force, [this is a cohabitation agreement / this is a marriage agreement within the meaning of the *Family Relations Act* of British Columbia].

(2) On the coming into force of the *Family Law Act*, this is a written agreement within the meaning of section 93(1) of the *Family Law Act*.

Depending on the parties' circumstances, another option may be to defer executing the agreement until after the *FLA* comes into force.

Many parties who entered into agreements prior to the *FLA* coming into force, or even prior to the *FLA* being contemplated, may wish for their agreement to remain subject to the *FRA* particularly if the agreement was made in specific reference to the *FRA*. Other parties may wish to take advantage of the narrower grounds for setting aside an agreement under the *FLA*, or simply to avoid the possibility of a future dispute about which statute applies to the agreement. Where spouses have an existing agreement that they wish to remain in effect but make subject to the *FLA*, they could enter into an amending agreement that provides for their existing agreement to be subject to the *FLA*, notwithstanding s. 252(2) of the *FLA*. However, before taking this step the parties should consider whether any adjustments to their agreement are necessary in order to address the factors to be considered on an application to set aside or replace an agreement, as set out in s. 93 of the *FLA*.

V. Conclusion

No doubt the drafters of the *FLA* intended to make things simpler and more straightforward when it comes to marriage and cohabitation agreements. However, given the creativity of the family bar, it may well be that we have simply been given different things to fight about. Only time and litigation will tell.