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— **Franks & Zalev - This Week in Family Law**

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Vaccinations that Have Nothing to Do with Parenting or COVID!

Debra Louise Vanbeselaere v. Daniel Gerard Vanbeselaere (2023), 87 R.F.L. (8th) 18 (Man. K.B.) — Menzies J.

The husband and wife met in 1993. In October 1994, the wife moved into the husband's home. She had little to no money — she was 18 years old and still in high school. The husband, a farmer, was 26 years old. He paid their living expenses — including a car for the wife to get to and from school.

The parties were engaged in 1995. In the spring of 1997, just a couple months before the scheduled July wedding, the husband retained a lawyer to prepare a marriage contract. He brought a copy home with him for her to review, and he told her there would be no marriage if the agreement was not signed. At this point, the parties had been living together for 2 1/2 years.

Two days before the wedding, the wife attended the husband's lawyer's office and signed the agreement. She did not request or receive independent legal advice. And there was no evidence she received any disclosure about the husband's assets at the time the contract was signed; however, as noted, by that point they had been living together for 2 1/2 years, and she presumably would have had at least some understanding of his finances. The contract also specified that the husband owned substantial farming assets (land, buildings, farm machinery, and cattle).

The marriage contract essentially released the husband from all obligation to share property in accordance with Manitoba's then *Marital Property Act*, as well as from any claims for spousal support. It did, however, provide for automatic joint ownership of any matrimonial home.

The parties were married for 23 years. They had two children who were 20 and 16 years old at the time of separation. During the marriage, the wife worked extensively on the farm, performing manual labour, bookkeeping, maintained the home and took care of the children. She tracked the hours she devoted to the farm and was paid an hourly wage. The wife then used her earnings to pay for groceries, the children's expenses, and home expenses — sounds like income splitting to us. The parties also filed tax returns from 2012 to 2020 declaring the farm as being operated as a partnership to reduce the tax paid by the farming business. However, the wife did not actually receive any partnership income.

After the parties separated, the husband relied on the marriage contract and refused to pay the wife any spousal support or any equalization payment under the Manitoba's current *Family Property Act*, R.S.M. 1987, c. M45 (the "*Family Property Act*"). The wife brought an application to set aside the contract on the grounds of unconscionability.

Generally, courts will defer and try to recognize domestic contracts that are freely and fairly negotiated between parties: *Hartshorne v. Hartshorne* (2004), 47 R.F.L. (5th) 5 (S.C.C.) at para. 39; *Pelech v. Pelech* (1987), 7 R.F.L. (3d) 225 (S.C.C.);

Dougherty v. Dougherty (2008), 51 R.F.L. (6th) 1 (Ont. C.A.); *Hojnik v. Hojnik* (2010), 81 R.F.L. (6th) 288 (Alta. C.A.); *Cheng v. Li* (2015), 69 R.F.L. (7th) 306 (Alta. C.A.). Justice Menzies agreed with this general starting point.

His Honour then set out the test for unconscionability, recently affirmed by the Supreme Court of Canada in *Uber Technologies Inc. v. Heller*, 2020 CarswellOnt 8828 (S.C.C.):

[64] In *Norberg*, La Forest J. described proving the elements of unconscionability as a "two step process", involving "(1) proof of inequality in the positions of the parties, and (2) proof of an improvident bargain" (p. 256). The concurring judgment in *Douez v. Facebook Inc.*, [2017] 1 S.C.R. 751 (S.C.C.), followed a similar approach in a case involving a standard form consumer contract:

Two elements are required for the doctrine of unconscionability to apply: inequality of bargaining and unfairness. Prof. McCamus describes them as follows:

. . . one must establish both inequality of bargaining power in the sense that one party is incapable of adequately protecting his or her interests and undue advantage or benefit secured as a result of that inequality of the stronger party.

As for the first part of the test, demonstrating an inequality in bargaining power, the Supreme Court of Canada in *Uber* offered the following helpful comments:

[66] An inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process (see McCamus, at pp. 426-7 and 429; Crawford, at p. 143; Chen-Wishart (1989) at p. 31; *Morrison*, at p. 713; *Gustafson*, at para. 45; *Hess v. Thomas Estate*, 2019 SKCA 26, 433 D.L.R. (4th) 60 (Sask. C.A.), at para. 77; *Blomley v. Ryan* (1956), 99 C.L.R. 362 (Australia H.C.), at p. 392; *Commercial Bank of Australia*, at pp. 462-63, and 477-78; *Bartle v. GE Custodians*, [2010] NZCA 174, [2010] 3 N.Z.L.R. 601 (New Zealand C.A.), at para 166).

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[68] In many cases where inequality of bargaining power has been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both (see Stephen A. Smith, *Contract Theory* (2004), at pp. 343-44; John R. Peden, *The Law of Unjust Contracts: Including the Contracts Review Act 1980 (NSW) With Detailed Annotations Procedure and Pleadings* (1982) at p. 36; Andrew Burrows, *A Restatement of the English Law of Contract* (2016), at p. 210; *Downer*, at para. 54; McInnes, at p. 525).

[69] One common example of inequality of bargaining power comes in the "necessity" cases, where the weaker party is so dependent on the stronger that serious consequences would flow from not agreeing to a contract. This imbalance can impair the weaker party's ability to contract freely and autonomously. *When the weaker party would accept almost any terms, because the consequences of failing to agree are so dire, equity intervenes to prevent a contracting party from gaining too great an advantage from the weaker party's unfortunate situation.* As the Privy Council has said, "as a matter of common fairness, 'it [is] not right that the strong should be allowed to push the weak to the wall'" (*Boustaney v. Pigott*, [1993] UKPC 17 (England P.C.), at p. 6 (BAILII), quoting *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd.* (1984), [1985] 1 W.L.R. 173 (Eng. C.A.), at p. 183; see also *Lloyds Bank Ltd. v. Bundy* (1974), [1975] 1 Q.B. 326 (Eng. C.A.), at pp. 336-37).

[70] . . . Other situations of dependence also fit this mould, including those where a party is vulnerable due to financial desperation, or where there is "a special relationship in which trust and confidence has been reposed in the other party" (*Norberg*, at p. 250, quoting Christine Boyle and David R. Percy, *Contracts: Cases and Commentaries* (4th ed. 1989), at pp. 637-38). Unequal bargaining power can be established in these scenarios even if duress and undue influence have not been demonstrated (see *Norberg*, at pp. 247-48; see also McInnes, at p. 543).

[71] The second common example of an inequality of bargaining power is where, as a practical matter, only one party could understand and appreciate the full import of the contractual terms, creating a type of "cognitive asymmetry" (see Smith, at pp. 343-44). This may occur because of personal vulnerability or because of disadvantages specific to the contracting process, such as the presence of dense or difficult to understand terms in the parties' agreement. . . .

[72] . . . Regardless of the type of impairment involved, what matters is the presence of a bargaining context "where the law's normal assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied" (Bigwood, at p. 185; see also Benson, at pp. 189-90). In these circumstances, courts can provide relief from a bargain that is improvident for the weaker party in the contracting relationship. [emphasis added]

See also *Merklinger v. Merklinger* (1992), 43 R.F.L. (3d) 109 (Ont. Gen. Div.), aff'd, 1996 CarswellOnt 4494 (C.A.); *Downer v. Pitcher*, 2017 CarswellNfld 68 (C.A.); *Rick v. Brandsema* (2009), 62 R.F.L. (6th) 239 (S.C.C.); and *Koughan v. Dow* (2015), 59 R.F.L. (7th) 1 (P.E.I. C.A.), for similar descriptions in family law cases.

However the test is phrased, the standard of unconscionability is purposefully and extraordinarily high, because it is meant to promote certainty: *Booth v. Bilek* (2021), 52 R.F.L. (8th) 251 (Ont. C.A.); *Frick v. Frick* (2016), 91 R.F.L. (7th) 129 (Ont. C.A.); *Serra v. Serra* (2009), 61 R.F.L. (6th) 1 (Ont. C.A.); *Ward v. Ward* (2012), 26 R.F.L. (7th) 358 (Ont. C.A.); *Koughan v. Dow* (2015), 59 R.F.L. (7th) 1 (P.E.I. C.A.). It is conduct that would "shock the conscience of the court", it is beyond "inequitable", "unfair", "grossly unfair", "harsh", "unjust" or even "grossly unjust" (*Koughan v. Dow* (2015), 59 R.F.L. (7th) 1 (P.E.I. C.A.)) — and it is not meant to alleviate all situations that could be called "unfair" or "inequitable."

Given the circumstances here, Justice Menzies had "little hesitation" in finding a "marked inequality in bargaining power between the husband and the wife at the time of the execution of this agreement." His finding was based on:

- The husband was an established farmer when the contract was signed with assets of around \$500,000. He had a post-secondary education and was 8 years older than the wife.
- The wife was still in high school when the parties met and began living together. She was financially dependant on him before they were married. She quit her job before the wedding in reliance on the parties' plan that she was going to work on the farm.
- The wife was young, unsophisticated and had no legal advice before she signed the contract. She could not afford to pay for a lawyer and there was no evidence that the husband offered to pay for one. She clearly did not understand the contract or its consequences, as she believed it was meant only to protect assets he owned at marriage (when, in fact, the contract protected all of his assets). Her conduct after the marriage — she spent her entire married life working on the farm — is consistent with her understanding that the contract protected what the husband had at the date of marriage, and that she would share the fruits of their joint labour acquired after their marriage.
- The husband told the wife that if she did not sign the contract, he would not marry her. While this, in and of itself, will not justify the setting aside of a contract, from the wife's perspective at the time the agreement was signed, she had few options given her financial dependence on the husband, her age and her lack of sophistication.

To clarify this point, while "sign or no marriage" generally does not equate to duress [see *Melnyk v. Melnyk* (2010), 84 R.F.L. (6th) 137 (Man. Q.B.); *Toscano v. Toscano* (2015), 57 R.F.L. (7th) 234 (Ont. S.C.J.); *Verkaik v. Verkaik* (2009), 68 R.F.L. (6th) 293 (Ont. S.C.J.), aff'd, 2010 CarswellOnt 139 (C.A.); *Balsmeier v. Balsmeier*, 2016 CarswellOnt 1794 (S.C.J.); *M.D. v. A.C.*, 2017 CarswellOnt 16333 (S.C.J.) at paras. 82-83]; and while "sign or no marriage", without more, is not unconscionable [*Toscano v. Toscano* (2015), 57 R.F.L. (7th) 234 (Ont. S.C.J.)], "sign or no marriage" can certainly be part of the unconscionability calculus and analysis.

As for the second part of the test, Justice Menzies, again, referred to the Supreme Court of Canada's decision in *Uber*, which sets out the test for an improvident bargain:

[28] In the *Uber* decision, *supra* at para. 74, the Supreme Court explained that a bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable party. The Supreme Court stated:

[75] Improvidence must be assessed contextually (McInnes, at p. 528). In essence, the question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. . . .

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[77] Where the weaker party did not understand or appreciate the meaning and significance of important contractual terms, the focus is on whether they have been unduly disadvantaged by the terms they did not understand or appreciate. These terms are unfair when, given the context, they flout the "reasonable expectation" of the weaker party (see *Swan Adamski and Na*, at pp.993-94) or cause an "unfair surprise" (*American Law Institute and National Conference of Commissioners of Uniform State Laws, Proposed Amendments to Uniform Commercial Code Article 2-Sales: With prefatory Note and Proposed Comments* (2002), at p. 40). This is an objective standard, albeit one that has regard to the context.

[78] Because improvidence can take so many forms, this exercise cannot be reduced to an exact science. When judges apply equitable concepts, they are trusted to "mete out situationally and doctrinally appropriate justice" (*Rotman*, at 535). Fairness, the foundation premise and goal of equity, is inherently contextual, not easily framed by formulae or enhanced by adjectives, and necessarily dependent on the circumstances.

Justice Menzies analyzed the contract as a whole to determine whether it amounted to an improvident bargain *at the time the contract was signed* (in contrast to the statutory test in s. 33(4) of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3 which considers whether the contract has *resulted* in unconscionable circumstances). He concluded that the contract went far beyond the stated purpose in the preamble that the contract was meant to protect the husband's pre-marital assets. In fact, the contract "attempts to shield the husband from any financial obligations to the wife no matter what contribution she may make to the marriage or farming operation." The contract allowed the husband to retain all property that was traceable to his pre-marital property, whether or not it was comingled with property acquired after the marriage. For example, if the husband purchased a new piece of farm machinery for \$500,000 and traded-in machinery with a value of \$10,000 that was exempt by the agreement to fund the purchase, he could exclude the entire \$500,000.

Furthermore, not only did the contract go well beyond its stated purpose, but it also deprived the wife of her one and only benefit: that property held jointly would be shared equally between the parties. The wife was unable to realize on the value of property held by her and the husband jointly because the property was used as security for the husband's farming operation, in which she had no interest.

As if a further nail were necessary, the final nail was the spousal release which, on its face, prevented the wife from making a claim for spousal support to which she would have otherwise been clearly entitled — after the 23-year marriage, her years of working "side by side" with the husband on the farm, and raising their children.

Ultimately, this contract gave the wife basically nothing, and Justice Menzies found the contract to meet the "unconscionability equation": (unequal bargaining power) + (preying on the weaker party) + (improvident bargain) = unconscionability à bye bargain.

Justice Menzies set aside the marriage contract. Really, what choice did he have?

We have offered this advice before, and we do so again: when it comes to domestic contracts, you *can* have too good a deal. A contract that is "fair" to both parties is more likely to be upheld. While cohabitation agreements and marriage contracts do require some "looking into the future", if that future suggests that one party may not get anything, that is a problem. Similar problems exist with contracts that are more likely to be set aside, the longer the relationship — exactly the opposite of what

parties want. In the case of a very short marriage with no children, a contract like the one in this case may very well have been upheld. But add years and children? No chance.

It is also worth emphasizing that here, the husband might have avoided this result had he simply given the wife funds to retain a lawyer. That may not have resulted in the contract he really wanted, but it certainly would have resulted in a contract that was more likely to be upheld. Remember, in *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.) at para. 82, the Supreme Court of Canada commented that "the degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties." Perhaps this is another case of penny-wise, pound-foolish.

While independent legal advice is not an *automatic* antidote for vulnerability: *Kelly v. Kelly* (2004), 7 R.F.L. (6th) 301 (Ont. C.A.); *Rick v. Brandsema* (2009), 62 R.F.L. (6th) 239 (S.C.C.); *Richard v. Richard* (1993), 48 R.F.L. (3d) 132 (N.B. C.A.); *Campbell v. Campbell* (2011), 15 R.F.L. (7th) 309 (B.C. S.C.); *Moses Estate (Trustee of) v. Metzger* (2016), 2016 CarswellOnt 4177 (S.C.J.); in *most* cases, independent legal advice will serve as a very, very strong vaccination: *Ma v. MIV Therapeutics Inc.* (2004), 2004 CarswellBC 2175 (C.A.); *Moses Estate (Trustee of) v. Metzger* (2016), 2016 CarswellOnt 4177 (S.C.J.); *Radu v. Radu* (2016), 86 R.F.L. (7th) 1 (Sask. C.A.).

Who Wouldn't Want Some Company at Examinations?

Wu v. Di Iorio, 2023 CarswellOnt 8324 (S.C.J.) — Myers J.

Disclaimer: Epstein Cole LLP was involved in this case.

This motion argued before Justice Myers was about whether the wife had the right to have her financial expert attend the husband's cross-examination — or whether the husband could refuse to attend the cross-examination if an expert he objected to was present.

As part of the terms for an adjournment of the wife's disclosure motion in a complicated cryptocurrency matter, both parties agreed to undergo cross-examination on their motion material. The husband was scheduled to be questioned on May 18, 2023, and the wife was to be questioned on May 19, 2023. The issue arose when counsel for the wife communicated to the husband's counsel that her expert would be attending the husband's questioning for the purpose of assisting the wife's counsel with the technical issue of the use and tracing of cryptocurrencies.

The husband objected to the wife's expert attending. (In fact, he objected to the wife's expert acting as an expert.) His position was rooted in previous allegations that the wife's expert was in a conflict of interest and could not act as an impartial expert in the matter. The day before the examination, the husband stated that he would not attend the examination if the wife's expert was going to be there.

The husband then failed to show up for questioning (even though properly served with a Notice of Questioning) and counsel for the wife obtained a Certificate of Non-attendance.

The wife then brought an urgent motion seeking to compel the husband's attendance for questioning (so as to not put the cross-examination and motion date in jeopardy).

Justice Myers considered the issue of whether a party could refuse to attend questioning as a result of opposing counsel having an expert present.

First, his Honour noted that the examination was to be a cross-examination of affidavits, not an examination for discovery. While this was an important distinction, Justice Myers determined that the test for whether an expert can attend an examination to assist counsel is not different on a cross-examination or a discovery.

Justice Myers outlined that the "traditional" (read as: old) analysis on this point was set out in the case of *Al's Steak House & Tavern Inc. v. Deloitte & Touche*, 1998 CarswellOnt 5282 (Gen. Div.). In *Al's Steak House* Justice Binks held that, with limited exception, only the parties and their lawyers could attend a questioning in the nature of an examination for discovery.

An exception could be an expert witness to advise and assist examining counsel when the technical complexity of the evidence was "of such a nature that the party attempting to justify his or her presence could not proceed or could proceed only with difficulty to a satisfactory examination." Notably, Justice Binks also stated that an expert assisting examining counsel *should not* be a witness at the subsequent trial.

Justice Myers determined that the traditional analysis set out in *Al's Steak House* had to be reconsidered in light of the changed litigation landscape. In the 25 years since *Al's Steak House*, litigation has gone through significant changes. Expert witnesses have become much more common — and much more important. *Stare decisis*, while a fundamental building block of our jurisprudential system, is not a straitjacket that condemns the law to stasis. Courts may reconsider and reassess settled rulings of higher courts in two situations:

1. Where a new legal issue is raised; and
2. Where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate."

[See: *Bedford v. Canada (Attorney General)*, 2013 CarswellOnt 17681 (S.C.C.), *Duggan v. Durham Region Non-Profit Housing Corporation*, 2020 CarswellOnt 18344 (C.A.) and *R. v. Sullivan*, 2022 CarswellOnt 6589 (S.C.C.)]

Justice Myers was of the view that 25 years of litigation developments — and especially the way in which family cases are conducted — have fundamentally shifted the parameters of the debate:

[51] . . . It simply can no longer be the law that counsel needs leave every time she wishes to bring someone to help her at an examination. That would mean that in each — case, a motion that could take up to a year to be heard would be required every single time the party opposite objects to counsel bringing someone to an examination to help him or her.

In terms of the issue of the "examination" expert not being called as a witness, Justice Myers found:

[53] In a day when the need for expert witnesses was exceptional and costs and delay were perhaps less an issue for civil litigants, the notion of hiring two experts — one for discovery and one for trial — may have been seen to be appropriate doctrinal purity. Today however, the idea borders on lunacy. [Justice Myers is known for calling it as he sees it.]

In an environment of increasingly complex and complicated files, counsel on an examination might need assistance managing all of the documents, and this may not be an expert but could be a junior or another individual hired to assist them. Justice Myers determined that it ought not be the examining party that has to bring a motion to allow for this. Instead, the Court ought to take the examining counsel at their word, and if they state they need assistance then it should be respected.

Justice Myers stated that the new test required the party being examined to bring forward a motion to exclude an expert (or assistant) that the questioning party proposes to have present at the examination. To exclude such individuals, the questioned party will need to establish prejudice. This, of course, means that counsel must provide reasonable notice of such a "guest" attending at the examination.

In the case at bar, there was no prejudice to the husband by the wife's expert being present, even if he was unable to testify as an expert at later stages. He was there to assist the wife's counsel with the technical aspects of the questioning.

Justice Myers ordered that the husband re-attend for questioning, noting that neither a party, *nor counsel*, have colour of right to simply ignore a properly served Notice of Questioning. And now there is a decision that counsel will have to address if they do.