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— Franks & Zalev - This Week in Family Law

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In Ontario, s. 55(1) of the *Family Law Act*, R.S.O. 1990 c. F.3 (the "*Family Law Act*") makes it clear that "[a] domestic contract and an agreement to amend or rescind a domestic contract are unenforceable unless made in writing, signed by the parties and witnessed." Yet despite these clear and well-known statutory requirements, we continue to see cases where courts are being asked to enforce an agreement that fails to meet the basic requirements of s. 55(1), including both of this week's cases.

***Widdifield v. Hunter* (2023), 97 R.F.L. (8th) 194 (Ont. S.C.J.) — Wilkinson J.**

The parties in *Widdifield* lived together for 30 years and had two children together. They never married, and their primary asset was a farm property in Caledon, Ontario, title to which was registered in Mr. Hunter's sole name.

After they separated, Mr. Hunter and Ms. Widdifield both retained lawyers, and eventually agreed to mediate their dispute with a senior family law mediator in Toronto. Litigation between the parties had not started.

The Mediation Agreement confirmed that an agreement signed by both parties was a condition precedent to a binding agreement, which in most cases will suffice to ensure that the parties understand that a signed agreement is a true condition precedent. However, the Mediation Agreement in this case also stated that if signing the settlement instrument was "not feasible because of timing and because of the mediation taking place by Zoom, an e-mail communication from the mediator that confirms the terms of settlement, the contents of which are acknowledged by both counsel to be correct," would suffice. We suspect this provision is meant to try to ensure that one party, with the benefit of counsel, cannot bind themselves to a reasonable agreement, and then try to resile.

At a Zoom mediation session on August 25, 2021, Mr. Hunter proposed that the farm would be sold, and that Ms. Widdifield would receive 33% of the net proceeds of sale. Ms. Widdifield responded with a counter-offer that led to further negotiations that ultimately led to an agreement in principle.

At 3:30 p.m. the mediator emailed the parties' lawyers a summary of the terms he understood they had agreed to in principle, including the following:

1. The farm would be sold, and Ms. Widdifield would receive 37% of the net proceeds of sale;

2. Prior to the sale of the farm, Mr. Hunter would advance Ms. Widdifield $220,000 within 30 days, which would be credited against her share of the net proceeds of sale;

3. Ms. Widdifield would receive a specific list of items from the farm once the sale had closed;

4. The parties would sign a certain form of release;

5. Ms. Widdifield's lawyer would draft a Separation Agreement; and

6. The mediator would summarily arbitrate any disputes about the wording of the Separation Agreement.

After some further discussions, at 3:52 p.m. the mediator emailed the parties' lawyers to confirm that his email from 3:30 p.m. would "constitute an enforceable agreement and Domestic Contract." After some further emails between counsel and the mediator, the parties agreed that any communications about the terms of sale of the farm would be done through counsel, and this agreement was confirmed by an email from the mediator at 4:36 p.m.

After the mediation, Mr. Hunter paid Ms. Widdifield the $220,000 advance that he had agreed to pay, and the parties started consulting with real estate agents about the terms of sale for the farm, and when would be the best time to list it for sale. Their lawyers also exchanged emails about the sale of the farm. However, they never actually signed the Separation Agreement contemplated by the mediator's emails.

In March 2022, Mr. Hunter changed lawyers, and took the position that the parties had not reached a binding agreement or, alternatively, that the agreement should not be enforced for various reasons (including that he had not understood the agreement, that he had agreed to it under duress, that the alleged agreement was unconscionable, etc.). Ms. Widdifield responded to Mr. Hunter's attempt to resile from the settlement by commencing an Application, and bringing a motion for summary judgment on the terms set out in the mediator's emails.

Justice Wilkinson agreed with Ms. Widdifield that summary judgment would be a proportionate, more expeditious, and less expensive means to achieve a just result. She then considered the following questions:

(a) Did the parties reach a binding settlement?

(b) If the parties reached a binding settlement, should it be enforced?

(a) Did the parties reach a binding agreement?

To determine whether the parties reached a binding agreement, Justice Wilkinson started by summarizing some of the general principles that apply in these types of cases, including:

• "The test is whether a reasonable bystander observing the parties would conclude that both parties, in making a settlement offer and in accepting it, intended to enter into legal relations." [*Apotex v. Allergan Inc.*, 2016 CarswellNat 1682 (F.C.A.) at para. 22]

• When parties "agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract." [*Bogue v. Bogue* (1999), 1 R.F.L. (5th) 213 (C.A.), at para. 12]

To these we would add that, as Justice Perell explained in his recent decision in *Sumarah v. International Property Group (Toronto) Limited*, 2024 CarswellOnt 556 (S.C.J.) at paras. 58-59:

• "A settlement agreement is subject to the ordinary rules of contract."

• "For there to be a binding settlement agreement, there must be a mutual intention to create a legally binding agreement and the essential terms of the agreement must have been agreed upon."

• "The conduct of the parties, including the language they used, is viewed objectively in order to determine whether a contract has been made."

• " . . . it is not necessary to have reached agreement on incidental matters, such as the method of payment or the exchange of releases."

• "An enforceable settlement agreement may be made orally, in writing, by correspondence, or by an exchange of emails."

• "The policy of the court is to encourage settlements and in matters of interpretation, courts are not inclined to find that the settlement agreement does not have the requisite certainty in its essential terms."

• "If the settlement agreement is silent, there is an implied term that the parties will execute a release consistent with the terms of the settlement."

Based on the evidence before her, Justice Wilkinson had no difficulty finding that the parties had, in fact, reached a binding agreement, particularly given that:

(a) The mediator's email of 3:52 p.m. on August 25, 2021, *expressly* stated that the parties had reached a settlement on certain terms, the mediation agreement specifically permitted the mediator to confirm a settlement in that manner, and neither party's lawyer had objected to the mediator's email.

(b) After the mediation, the parties conducted themselves as though they had reached an agreement.

(c) There was no evidence to substantiate Mr. Hunter's bald assertions that he didn't understand that the parties had reached an agreement on certain terms or his claims of duress, unconscionability, etc. In fact, the Agreement was a very simple one and Mr. Hunter had acted on it.

(d) Prior to the motion, Ms. Widdifield had obtained an email from the mediator confirming he had understood that the parties had reached an agreement. [See also *Arbuckle v. Arbuckle* (2023), 83 R.F.L. (8th) 1 (Ont. C.A.).] Furthermore, as Mr. Hunter had waived privilege by taking the position that he hadn't understood the agreement, duress, etc., Ms. Widdifield had also obtained various emails from Mr. Hunter's former lawyer's file that clearly contradicted Mr. Hunter's version of events.

(b) If the parties reached a binding agreement, should it be enforced?

As we have previously discussed in *TWFL*, although s. 55(1) of the *Family Law Act* provides that a domestic contract will only be enforceable if it is in writing, signed by the parties, and witnessed, the court nevertheless has authority to enforce family law settlements in appropriate circumstances based on a line of cases emanating from the Ontario Court of Appeal's 1982 decision in *Geropoulos v. Geropoulos* (1982), 26 R.F.L. (2d) 225 (Ont. C.A.), where the court created what we have previously referred to as the "*Geropoulos* exception", which allows a family law settlement reached with legal advice and *during the course of litigation* to be enforced even it does not meet the formal requirements of s. 55(1) of the *Family Law Act*.

To help decide whether the parties' agreement should be enforced even though it did not meet the requirements of s. 55(1) of the *Family Law Act*, Justice Wilkinson turned to the non-exhaustive list of factors that Justice LaForme (as he then was) indicated should be considered when dealing with the *Geropoulos* exception in *Harris v. Harris*, 1996 CarswellOnt 2794 (Gen. Div.):

1. Were either of the parties represented by legal counsel or the beneficiary of legal advice?

2. Was either party otherwise disadvantaged at any time during the course of the negotiations?

3. Can the written material the parties prepared, or the oral representations that are being relied upon, support a *prima facie* conclusion that either constitutes a settlement agreement?

4. Does the evidence demonstrate that the parties intended that the written or oral representations or negotiations are to be binding on them?

> 5. Was there an intention that some final act or determination be made before the settlement was to be final and binding?
>
> 6. Does the enforcement or non-enforcement of the negotiated resolution result in an injustice to either of the parties?
>
> 7. Does enforcement encourage negotiated settlement and discourage litigation and does it support the overall purpose and intent of the principles of the *Family Law Act*?

To this we would add that, as the Court of Appeal stated in *Gallacher v. Friesen* (2014), 43 R.F.L. (7th) 1 (Ont. C.A.):

> [27] . . . the strict requirements of section 55(1) may be relaxed where the court is satisfied that the contract was in fact executed by the parties, where the terms are reasonable and where there was no oppression or unfairness in the circumstances surrounding the negotiation and execution of the contract.

After considering these principles, Justice Wilkinson was satisfied that the parties' agreement should be enforced:

> [110] Considering the totality of the evidence before me, including the email communications on the day of the mediation, and various texts, emails and other communications following the mediation as set out above, I find that following the mediation, Mr. Hunter was aware that a deal had been made that required him to sell his farm, and that a binding settlement agreement was reached between the parties on the day of the mediation. It would appear that upon reflection, Mr. Hunter was no longer agreeable to this deal, and incorrectly believed (or let on that he believed) that the lack of a settlement agreement signed by the parties created a reason to unravel the deal.

As a result, Justice Wilkinson granted Ms. Widdifield's motion for summary judgment on the terms set out in the mediator's August 25, 2021 emails.

Based on the facts of this case, we understand why Justice Wilkinson came to the conclusion she did. The decision is undoubtedly "right" in the sense that the parties clearly reached an agreement at the mediation that they both intended to be bound by, but for reasons known only to him, Mr. Hunter subsequently changed his mind and tried to resile from it.

But is the decision "right" in law?

In the November 21, 2022 (2022-44) edition of *TWFL*, we discussed *Greve v. Shaw* (2022), 71 R.F.L. (8th) 293 (Ont. S.C.J.), where Justice Breithaupt Smith dismissed Ms. Shaw's request to enforce an agreement that she alleged was evidenced by an exchange of letters between the parties' lawyers because she did not think that the legislation or caselaw permitted her to "deem an exchange of correspondence between counsel, pre-litigation, to be a valid and enforceable domestic contract." In reaching this conclusion, her Honour determined that the *Geropoulos* exception only allows a family law settlement reached with legal advice and ***during the course of litigation*** to be enforced even if it does not comply with s. 55(1) of the *Family Law Act* (i.e. in writing, signed by the parties, and witnessed), but it does ***not*** extend to pre-litigation settlements. In reaching this conclusion, Justice Breithaupt Smith also declined to follow Justice Perrell's decision in *Pastoor v. Pastoor* (2007), 48 R.F.L. (6th) 94 (Ont. S.C.J.), where his Honour applied the *Geropoulos* exception to a pre-litigation settlement, as the facts of *Pastoor* were quite different than the facts of *Greve*.

In *Widdifield v. Hunter*, the mediation took place ***prior to*** the start of the litigation. Although it does not appear that this argument was raised before Justice Wilkinson, if it is correct that the *Geropoulos* exception does ***not*** extend to pre-litigation settlements, there would have been no basis in law for Justice Wilkinson to have granted judgment on the particular facts of this case. Or, at the very least, it would have been necessary for the court to explain why it had decided to enforce the parties' settlement notwithstanding the court's prior decision in *Greve v. Shaw*.

***El Rassi-Wight v. Arnold* (2024), 97 R.F.L. (8th) 25 (Ont. C.A.) — Roberts, Sossin, and Dawe JJ.A.**

In *El-Rassi-Wight v. Arnold*, the Ontario Court of Appeal dealt with whether a written and signed — although *unwitnessed* — agreement between two common law spouses was enforceable.

The parties were in a long-term common law relationship. They bought a home together in March of 2019, taking title as joint tenants. One year later, in the summer of 2020, the parties decided to end their relationship (home ownership is not for everyone). The parties disagreed as to how much the house had grown in value, being between $29,000 and $102,000.

On August 2, 2020, the parties signed a document that stated that the Husband would transfer his interest in the house to the Wife in exchange for $10,000 and a motorcycle that belonged to the Wife's father. The document specified that the Husband had agreed to forfeit "the house and all the assets, equity and so on" and that he would "give up all rights" in exchange for $10,000 and the motorcycle.

Both parties *signed* the document, but neither the Husband's nor the Wife's signatures were *witnessed* by a third party. The Wife, perhaps alive to the issue, actually video-recorded the Husband acknowledging that he had signed the document.

After the document was signed, the Husband refused to transfer his interest in the home to the Wife. The Wife then brought an application seeking a declaration that the document was a valid and binding domestic contract, and for an order that the Husband's share of the home be transferred to her. In response, the Husband brought a counterclaim for an order that the home be sold pursuant to the *Partition Act*, R.S.O. 1990, c. P.4.

The main issue at trial was whether or not the document was a binding domestic contract under the *Family Law Act*.

As noted in our discussion of *Widdifield v. Hunter* above, in *Gallacher v. Friesen* (2014), 43 R.F.L. (7th) 1 (Ont. C.A.), the Ontario Court of Appeal confirmed that the strict requirements of s. 55(1) can be relaxed if the court is satisfied that "the contract was in fact executed by the parties, where the terms are reasonable and where there was no oppression or unfairness in the circumstances surrounding the negotiation and execution of the contract."

Notwithstanding *Gallacher*, the trial judge in *El Rassi-Wight* found that the "agreement" did not comply with the requirements of s. 55(1) of the *Family Law Act* because it had not been witnessed — despite the fact that the Husband *did not dispute* that he had signed it and the video record of him signing it — because the trial judge did not agree that this was an appropriate case to relax the formal requirements of s. 55(1). Of particular significance was the fact that the "agreement" had not been witnessed and that the Husband had not received any legal advice before signing. The trial judge also determined that the document was vague and imprecise:

> The terms of any domestic contract should be clear enough to give effect to the reasonable expectations of the parties. In my view the August 2 Document, drafted by the parties without legal assistance, is overly broad and vague.

Specifically, the trial judge focused on the clauses wherein the Husband agreed to forfeit "the house and all the assets, equity *and so on*" [emphasis added] and where he would "give up all rights." The trial judge was of the view that the words "and so on" and "all rights" were so broad that they were incapable of properly narrow interpretation. The trial judge found that when the Husband signed the document, he neither understood what those terms meant, nor did he understand what was meant by the word "equity."

In the alternative, the trial judge determined that even *if* she had found the document to be a valid domestic contract, she would have set it aside under s. 56(4) of the *Family Law Act* on the basis that the Husband did not understand what he had signed.

The Wife appealed. She argued that the "agreement" was an enforceable domestic contract; in the alternative, that the trial judge had erred in refusing to relax the formalities of s. 55(1) of the *Family Law Act*; and finally that the trial judge erred in her determination that the document had been signed under duress.

Was the trial judge correct in finding that the document was not an enforceable domestic contract? Yes she was; the Court of Appeal upheld the trial judge's decision.

The Court of Appeal adopted a functional approach to the consideration of s. 55(1) of the *Act*. While the Wife had a video recording of the Husband acknowledging that he had signed the document, the requirement that a domestic contract be witnessed goes beyond just providing proof that the document was, in fact, signed by both parties. Rather, it is meant to ensure that there is a "measure of formality in the execution of a domestic contract" and to "avoid kitchen table agreements."

As set out by the Court of Appeal in *Virc v. Blair* (2014), 42 R.F.L. (7th) 304 (Ont. C.A.):

> [78] The purpose of this provision is in part to provide some assurance that the parties were deliberate in reaching their agreement and understood the obligations being imposed [citations omitted]

Here, given the purpose of s. 55(1), there was no error in the trial judge's finding that the document was not a domestic contract despite the Husband having acknowledged signing the document and the video record. These were not adequate safeguards and were no substitute for the document having been properly witnessed, and the Court of Appeal endorsed the following policy statement by the trial judge:

> In order to forgo compliance with section 55(1) of the *FLA*, both parties must understand the agreement they have reached and the obligations it imposes. Given the circumstances surrounding the preparation of the August 2nd agreement and the wording used, I am not satisfied that this condition has been met in this case.

Here, again, the trial judge was particularly concerned that the Husband did not understand what he was signing. However, query how the signature of a witness would have had any effect. The purpose of a witness is just that — to witness that a party signed a document.

As described by the Court of Appeal, the trial judge also had some concerns with respect to the video recording:

> [15] In the circumstances here, we are not persuaded that the trial judge made any error in concluding that the video recording did not serve as a complete substitute for the document having been properly witnessed. Among other things, the video recording is only around 20 seconds long, and it does not capture the full extent of the discussions that led up to the document being drafted and signed. Some portion of these discussions was also audio-recorded by the appellant, and the trial judge found that this latter recording caused her "to have concerns about the circumstances surrounding the negotiation and execution of the contract".

Although not discussed in the Court of Appeal's reasons, it also appears that the agreement in this case was also made ***before*** litigation started. If that is correct, as we discussed in our comment on *Widdifield* above, this raises the question of whether the court would have had authority to dispense with the requirements of s. 55(1) even if the trial judge had found that such a result was appropriate in the circumstances.

The Wife also tried to rely on the recent Supreme Court of Canada decision in *Anderson v. Anderson* (2023), 86 R.F.L. (8th) 1 (S.C.C.) (which was released ten months after the trial judge's decision). But the Court of Appeal found that *Anderson* was distinguishable from this case on its facts: the agreement in *Anderson* ***was*** witnessed and there had been a specific finding that both parties understood the nature and effect of the terms of the agreement. In *El Rassi-Wight*, the trial judge specifically found that the Husband did not understand key aspects of the "agreement" and that it was overly broad and vague.

Although not mentioned by the Court of Appeal, there is another even more significant differentiating feature in *Anderson*. While in *Anderson*, there was no dispute that the parties' agreement did not comply with s. 38 of Saskatchewan's *Family Property Act*, S.S. 1997, c. F-6.3 (the "*FPA*") (similar to s. 55(1) of the *Family Law Act*) — under s. 40 of the *FPA*, a court could give "whatever weight" to "any agreement, verbal or otherwise, between spouses that is not an interspousal contract." That is, in the Saskatchewan *FPA* (unlike other provinces), there is a specific a provision for dealing with agreements between parties that are *not* property signed and witnessed.

As a result, the appeal was dismissed.

Some Final Thoughts

Given the strong emphasis being placed on reducing the number of family law cases in the court system and the emphasis the *Divorce Act* now places on encouraging parties to use out of court family dispute resolution processes, it would make enormous sense to modify the *Geropoulis* exception so that it places less emphasis on when an alleged agreement was reached (i.e. before or after the start of litigation), and more emphasis on whether the settlement was reached in circumstances where, to use the words of the Court of Appeal in *Gallacher*, the evidence shows that "there was no oppression or unfairness in the circumstances surrounding the negotiation and execution of the contract[.]"

However, unless and until s. 55(1) of the *Family Law Act* is amended or an appellate court says otherwise, if you want to ensure that the parties in a family law case have reached a binding agreement, make sure they strictly comply with the formal requirements of the applicable statute in your particular jurisdiction.

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