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

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## What's that Saying About Domestic Contracts and Bathwater?

***Davies v. Jane* (2025), 21 R.F.L. (9th) 1 (Ont. C.A.) — Miller, Zarnett and Madsen JJ.A**

We like *Davies v. Jane*. We like it because, every once in a while, courts and the bar alike need to be reminded that "domestic contract" is not a four-letter word. The *Family Law Act* provides for domestic contracts, including Marriage Contracts and Separation Agreements, and if they are done properly and fairly, they should be enforced. Even where a party might be able to point to some flaws in the negotiation process or on the face of the document itself, the primary position of the legislature, and the courts, is (and should be) that domestic contracts that are negotiated fairly should be enforced.

This is a thoughtful and well-reasoned decision from Justice Madsen on behalf of the Ontario Court of Appeal with important lessons and reminders about the sanctity of domestic contracts, and even some practice manage tips for the profession.

The parties separated in 2014 after a 21-year marriage and 24-year relationship. They had four children, triplets born in 1996 and a fourth child born in 1999. The Wife was a homemaker and the Husband worked for the Ontario government, earning around $80,000 a year at separation.

The parties had some financial troubles when they separated. Their home was at risk of foreclosure. The Husband, with the help of friends, arranged to purchase the home from the Wife. To secure financing, he asked the Wife to sign a Separation Agreement with no spousal support payable. The Wife agreed.

The lawyer helping the parties with the transfer of the home also assisted with the Separation Agreement. The Agreement was intended to be temporary and included no releases. The lawyer also helped the parties negotiate a second Separation Agreement. At some point, the lawyer became uncomfortable with the obvious conflict of interest, and told the parties he could not represent them both. They all agreed that he would "represent" the Wife. The Husband had no lawyer, but was told to consult with one.

The second Agreement was signed a month after the first, presumably after the transfer of the home was completed. It included a term that the Husband pay the Wife spousal support of $28,200 a *year* until the Wife: (a) remarries; (b) cohabits in a relationship resembling marriage for one or more periods totaling three years; or (c) dies. It also included a clause suspending the Wife's support if she cohabited in a relationship resembling marriage (the "Cohabitation Clause"), other variation terms, annual indexing, and life insurance of $200,000 payable to the Wife in the event of the Husband's death, reducing by $15,000 per year.

The second Separation Agreement also addressed property issues and equalized their two major assets — the home and the Husband's pension.

The Husband paid support for just over five years, until he suspended payments in December 2020 because the Wife was in a relationship with a man living in Texas. (It is not totally clear from the decision if this is why he stopped paying child support,

but it is a reasonable assumption on our part — we think.) That did not sit well with the Wife. She commenced a proceeding and brought an interim motion for spousal support. At the time of the trial in 2022, the Husband was paying monthly support of $1,950 a month.

The Trial Judge released his decision in August 2024 — inexplicably more than two years after the trial; more on that later.

The Trial Judge granted the Wife's request to set aside the second Separation Agreement in its entirety under s. 56(4) of the *Family Law Act,* RSO 1990, c F.3 (the "*FLA*"). And applying the Supreme Court of Canada's decision in *Miglin v. Miglin*, 2003 CarswellOnt 1374 (S.C.C.) (perhaps you've heard of it?), the Trial Judge found, in the alternative, that the spousal support terms did not meet the objectives of the *Divorce Act*, RSC 1985, c 3 (2nd Supp). He ordered the Husband to pay the Wife an equalization payment of close to $70,000, which was based on a "back-of-the-napkin" calculation done by the Wife's counsel in oral submissions without any evidence. He determined spousal support afresh and ordered the Husband to pay the Wife $3,616 per month commencing February 1, 2022 (a monthly increase of $1,616), and to obtain life insurance of $800,000 as security for his support obligation. (That's right — taking two years to release the decision, the trial judge awarded a retroactive increase in spousal support, setting up instant significant arrears.)

The Husband appealed. He was self-represented. He argued that the Trial Judge made procedural errors, errors of fact, and erred in setting aside the contract under s.56(4) of the *FLA* and in applying *Miglin*. He also expressed concern over the two-year delay in releasing the decision and that his arguments were not considered. By the time the appeal was heard, the parties were still waiting for the Trial Judge's decision on the amount of support owing from 2020 (when the Husband stopped paying) until February 1, 2022 when payments commenced under the Trial Judge's Order.

At the hearing of the appeal, the Wife fairly conceded that the order for an equalization payment should be set aside.

The Court of Appeal was not amused with the two-year delay in releasing the decision or by the Trial Judge having copied and adopted the Wife's arguments from her written closing submissions with little analysis or reference to the Husband's:

> [23] Adequate reasons for decision are not merely a precondition for deference but are also a basic entitlement of every litigant. Reasons should demonstrate that the judge has considered each litigant's argument and taken the time to explain why the losing party lost: *Penate v. Martoglio*, 2024 ONCA 166, 496 D.L.R. (4th) 50, at para. 21; *Lawson v. Lawson* (2006), 2006 CanLII 26573 (ON CA), 81 O.R. (3d) 321 (C.A.), at paras. 13, 44. Reasons should also be released on a timely basis: *Crump v. Fiture*, 2018 ONCA 439, at para. 29.
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> [24] As noted above, the delay in this case between the conclusion of the trial and the release of the decision was inordinate. Further, the trial decision reflected extensive reliance on the wife's written submissions with little, if any, reference to the husband's submissions. Indeed, the husband prepared a "concordance" demonstrating, in effect, wholesale adoption of the wife's written submissions. In this context, reasons cannot be said to be "adequate." Deference cannot be afforded.
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> [25] While delay, without more, is not a ground of appeal, any delay of this magnitude creates the very risk exhibited here: that a decision-maker will, in the absence of independent recollection of the details of the trial, over-rely on the submissions of one party, including where those submissions contain obvious mistakes. Here, this was evident in the decision on equalization, which was essentially duplicative of the wife's submissions, clearly incorrect, and made without evidence. While I recognize that there can be many causes for delay — personal or professional — this does not diminish litigants' entitlement to timely and responsive reasons.

That is a pretty rough smack-down from the Court of Appeal.

The court further held that the delay, in and of itself, did not justify setting aside the entire trial decision. It partly varied the Trial Judge's decision, and set aside the equalization order, the spousal support order, and life insurance terms, finding that, "As varied herein, the decision accords with the facts in the record and the law" (para. 26).

 

Turning to the substantive grounds of appeal, the Court of Appeal found that the Trial Judge erred in setting aside the second Separation Agreement under s.56(4) of the *FLA*. Under this section, a court may set aside a domestic contract:

> (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the 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.

These are the only bases upon which a court can set aside a domestic contract.

While such decisions are discretionary and entitled to deference, the Court of Appeal decided to undertake a fresh analysis given its concerns with the adequacy of the Trial Judge's reasons, and the delay in releasing the decision. It then, correctly, cited the following principles applicable to the issue of setting aside a domestic contract under s.56(4):

> 1. The burden is on the party seeking to set aside the agreement to show that one or more of the conditions in s.56(4) have been met.
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> 2. Courts must encourage domestic contracts. Not every apparent flaw will result in setting aside an agreement. As stated in *Anderson v. Anderson*, 2023 CarswellSask 224 (S.C.C.), at para. 33: "As a starting point, domestic contracts should generally be encouraged and supported by courts, within the bounds permitted by the legislature, absent a compelling reason to discount the agreement".
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> [To this, we would add there is no presumption that courts should be hesitant to enforce domestic contracts: *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.); *Ramdial v. Davis* (2015), 68 R.F.L. (7th) 287 (Ont. C.A.); *Cheng v. Li* (2015), 69 R.F.L. (7th) 306 (Alta. C.A.)
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> 3. Even where a party has met one of the criteria in s.56(4), the agreement is not automatically set aside; a court retains discretion and must do what is appropriate in the circumstances of the case (*Faiello v. Faiello* (2019), 30 R.F.L. (8th) 1 (Ont. C.A.), at para 20; *LeVan v. LeVan* (2008), 51 R.F.L. (6th) 237 (Ont. C.A.), at para 33).
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> 4. Not having a lawyer or independent legal advice does not automatically invalidate an agreement (*Dougherty v. Dougherty* (2008), 51 R.F.L. (6th) 1 (Ont. C.A.), at para 11).
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> 5. Lack of formal financial disclosure does not automatically invalidate an agreement (*Dougherty v. Dougherty* (2008), 51 R.F.L. (6th) 1 (Ont. C.A.), at para 11).
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> 6. Evidence of prejudice arising from flaws in the negotiation process is an important consideration (*Anderson*, at paras. 10, 67 and 70).

The Court of Appeal acknowledged that there were flaws in the negotiation of both agreements, but these flaws did not "nullify the apparent consent between the parties and invalidate the agreement" (para. 32). It disagreed with the Trial Judge's findings of "incomplete financial disclosure", that the wife did not understand the agreement, or that there was an imbalance in bargaining power between the parties.

On the issue of financial disclosure, the Husband had delivered a financial statement to the Wife setting out his income and assets shortly before the agreements were signed. There were only two major assets at issue, the Husband's pension (which was properly valued), and the matrimonial home. These were shared equally under the agreements. As noted by Justice Madsen:

> [33] The record reflects that the disclosure exchanged was adequate for both parties to understand the financial landscape upon which their agreement was based. While the trial judge's reasons refer to "incomplete financial disclosure," the reasons do not identify any apparent missing disclosure or specific prejudice arising to either party therefrom.

 

The court also concluded that the Wife understood the nature and consequences of the agreements. Despite her lawyer's obvious conflict of interest, the Wife knew what she was signing. She participated in drafting the terms, she admitted she understood specific terms put to her, and she told the lawyer that she agreed to certain terms. While the Husband was more directive of the process, the court was not convinced that she was taken advantage of to the point where she did not understand what she was signing.

While the Wife was clearly vulnerable, there was no evidence that she was under duress when she signed the agreements. There was no evidence that she was coerced by the Husband or that he dominated her (see *Ludmer v. Ludmer* (2013), 33 R.F.L. (7th) 331 (Ont. S.C.J.) at para 53, var'd on other grounds, (2014), 52 R.F.L. (7th) 17 (Ont. C.A.)). The legal advice she received was obviously problematic and did not fully shield her vulnerabilities, *but the Husband did not benefit from her vulnerabilities in a way that would justify setting aside the agreement for duress*.

For these reasons, the Court of Appeal set aside the judgment invalidating the agreement, and the order requiring the Husband to pay the Wife an equalization payment of close to $70,000 (which, again, the Wife conceded in oral argument could not stand).

On the issue of spousal support, the Court of Appeal agreed with the trial judge's alternative conclusion that these terms should be varied and "overridden" under the *Divorce Act* using the *Miglin* analysis.

The Court of Appeal correctly pointed out that:

> [40] Section 15.2 of the *Divorce Act* confers authority on a court to order spousal support corollary to a divorce application. That section, as interpreted by the Supreme Court of Canada in *Miglin* and noted by this court in *Faiello* at para. 16, does not grant authority to "set aside" a separation agreement but establishes that the existence of a valid separation agreement is one factor for the court to consider when determining whether to award spousal support. Support terms under an otherwise valid agreement may in some circumstances be "overridden": *Faiello*, at para. 17.
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> [41] The decision of the Supreme Court of Canada in *Miglin* establishes a two-stage inquiry where, as here, a support application is made in the face of a valid agreement between the parties.
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> [42] At the first stage, the court considers "the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it": *Miglin*, at para. 80. Circumstances of negotiation that do not amount to unconscionability may be relevant, but the court is not to presume an imbalance of power: *Miglin*, at para. 82. Where the court is satisfied that the conditions under which the agreement was negotiated are satisfactory, the court then considers whether the substance of the agreement substantially complies with the objectives of the *Divorce Act,* reflecting an equitable sharing of the economic consequences of the marriage. The court considers the agreement in its totality, bearing in mind that all aspects of the agreement are linked and that parties have broad discretion to set goals and priorities for themselves: *Miglin*, at para. 84; *Faiello*, at para. 46.
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> [43] If the agreement "passes" the first stage of the *Miglin* analysis, the inquiry proceeds to consider the circumstances at the time of the application for spousal support. As stated in *Miglin*, "[i]t is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may give the agreement little weight": at para. 91.

The Trial Judge concluded, and the Court of appeal agreed, that the spousal support terms in the second Separation Agreement did not pass the first stage of the *Miglin* analysis. There was no evidence that the wife had the strength of her support claim explained to her, or that she was given advice about the re-partnering terms, including the risk that she would lose her support even if she re-partnered with someone who could not meet her needs. There were serious flaws in the negotiation and execution of the agreements, specifically the fact that her lawyer was acting for both parties until essentially the agreement was signed. These flaws allowed the court to engage in a more in-depth review of the agreement (see *Miglin* at para 85).

 

Specifically, the court found that the Cohabitation Clause could not stand, because it did not meet the objectives of spousal support under the *Divorce Act.* Recall these objectives are to:

> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
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> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
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> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
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> (d) so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

The Cohabitation Clause, which suspended support upon cohabitation, did not comply with these objectives. This was a long-term traditional marriage where the Wife was a homemaker, and the Husband was always the breadwinner. The Wife had not worked outside of the home for over 20 years. They had four children whom the Wife raised. The Wife suffered from multiple chronic illnesses during the marriage and after separation. "The compensatory basis for indefinite entitlement to spousal support was overwhelming". She clearly had ongoing need for spousal support.

While the court took issue with the Cohabitation Clause, it did not agree with the Trial Judge that all of the support terms should be overridden. In *Miglin* the Supreme Court of Canada stated (para 86):

> Provided that demonstrated vulnerability and exploitation did not vitiate negotiation, even a negotiated agreement that it would be wrong to enforce in its totality may nevertheless indicate the parties' understanding of their marriage and, at least in a general sense, their intentions for the future. Consideration of such an agreement would continue to be mandatory under s. 15.2(4). For example, if it appeared inappropriate to enforce a time-limit in a support agreement, the quantum of support agreed upon might still be appropriate, and the agreement might then simply be extended, indefinitely or for a different fixed term. [Emphasis added.] (para 51).

The court adjusted the parties' "original bargain" only to the extent necessary to bring it into substantial compliance with the objectives of the *Divorce Act.* That meant removing the Cohabitation Clause and the termination of spousal support upon re-marriage or three years of cohabitation. The Trial Judge's Support Order was set aside, and the Husband was required to continue paying the Wife $28,800 annually, indexed in accordance with the second agreement, until she dies. This meant that the Husband owed the Wife retroactive spousal support to the date he stopped paying, with a credit for payments he made to date.

Finally, the Court of Appeal set aside the Trial Judge's Order for life insurance of $800,000, finding that it was excessive. Instead, the court adjusted the parties' "original bargain" only to the extent necessary to bring it into compliance with the objectives in the *Divorce Act.* The court removed the term reducing life insurance by $15,000 per year (which would effectively mean that the Husband could reduce his life insurance obligation by almost $150,000 by the time the appeal was heard), and simply required him to maintain life insurance of $200,000, as originally agreed.

Again, this decision is an important reminder that *contracts mean something* and should not be too easily discounted or set aside because of flaws in the negotiating process. These flaws need to be examined in context, and only when these flaws deprive a party from making an informed choice about signing a contract to such an extent that the party's consent is "nullified" — should the contract be set aside. Flaws, in and of themselves, do not render a contract unenforceable. Contracts, and the parties' choice to sign a contract, must be respected. Otherwise, it would make it extremely challenging for parties to settle disputes amicably and out of court, and move on with their lives. As noted by the same Court of Appeal in *Ramdial v. Davis* (2015), 68 R.F.L. (7th) 287 (Ont. C.A.) at para. 51, "The court should treat the parties' reasonable best efforts, as reflected in their negotiated agreement, as presumptively dispositive." Amen.

Even if there are flaws that justify revisiting support under *Miglin* we do not simply ignore the parties' agreement and determine support afresh. Again, the contract means something, and the parties' bargain is not to be totally re-written unless there are

 

significant issues that justify discounting it entirely or if the remainder of the contract cannot reasonably survive without the part that does not survive.

This decision includes important lessons for lawyers acting for family clients. The lawyer in this case was obviously in a conflict of interest by assisting both the Wife and the Husband with the two agreements. That is a breach of the lawyer's obligation under Rule 3.4 of the *Rules of Professional Conduct.*

On top of that, the lawyer was also, arguably, helping the Husband be "cute" with his lender by drafting an agreement to make it appear that there was no spousal support owing, when the Husband clearly owed the Wife spousal support, and would be paying it. These flaws made it possible for the Wife to argue that the contract should be set aside, and gave the court a reason to adjust the parties' original spousal support bargain in the Wife's favour. Family lawyers should never be acting for two spouses in a separation, regardless of how amicable things may appear. It doesn't help either party in the long run, and the lawyer risks a negligence claim or complaint to the Law Society. Don't. Do. It.

We were left with a couple of questions after reading this decision:

1. Why did it take the Trial Judge two years to release his decision? Judges are required to deliver their decision within six months of a trial — s.123(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. They may apply for an extension to the Regional Senior Judge, and there is no limit under the *Courts of Justice Act* as to the number of extensions the Regional Senior Judge may grant.

We are aware of other cases where judges have requested and been granted significant extensions to release their trial decisions. This is a concern for the reasons indicated by the Court of Appeal; memories fade, judges forget the details of the case, and the more time passes, the harder it becomes, and the longer it takes, to actually write the decision. Delay begets delay. It causes additional cost and inconvenience to the parties — in this case — to the Husband, who was immediately saddled with arrears for two years given the delay, and both parties will now have to re-file their tax returns to deal with the adjusted spousal support.

In parenting cases, delays mean children live in limbo. If a parenting case goes to trial, it is usually because there are serious issues, i.e. significant conflict between the parents, difficult personalities, or serious mental health issues. The longer these concerns remain unaddressed by a judgment, the worse things become for the family and the children involved. These delays also create evidentiary issues, the evidence becomes stale-dated, and leads to unnecessary costs for the parties if a mistrial must later be declared or updated evidence provided to the court.

We are extremely sympathetic to the struggles judges face in meeting the demands on them. Our justice system has, for far too long, gone underfunded and under-resourced by provincial and federal governments alike, and these are the effects of years of bad policy choices. There are not enough judges to hear cases, and for the cases that are heard, they are becoming increasingly complex and document-heavy. We have more self-represented parties who take up a disproportionate amount of court time because they, understandably, do not understand our increasingly complex and Rule-heavy system, or the law.

2. Finally, while the court, in adjusting the spousal support terms, commented that the Wife's re-partnering or re-marriage could be a "material change in circumstances", we query whether that is strictly accurate. Only support orders, not agreements, are subject to variation on a material change in circumstances (unless the agreement specifically states that it is subject to a material change). There is no jurisdiction to vary an Agreement. There is, however, jurisdiction to vary an Agreement that has been registered under s. 35 of the *FLA* "as if it were an order of the court." It is a subtle but important difference. Courts cannot just run around changing people's agreements.

Also, curiously, if spousal support is payable for the Wife's life (as it is), and it was reasonably foreseeable at the time they signed the agreement that she might re-marry or re-partner, then, arguably, such re-partnering would not be a material change. Interesting.

To sum it all up, we thought a poem might be in order:

 

Roses are red;

Violets are blue;

Domestic Contracts should generally be enforced and even somewhat significant flaws in the bargaining process can be overlooked if those flaws are not operating in causing unfairness.

You thought we meant a *good* poem? You should know better by now.

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