Legal Education
Society of Alberta

62136.00

Family Law Contracts

Edmonton, Alberta **Calgary, Alberta**

Chair

Ryan Anderson
Huckvale LLP
Lethbridge, AB

Faculty

Tamasine I. Davies QC
Soby Boyden Lenz LLP
Calgary, AB

Danielle Collins
Latitude Family Law LLP
Edmonton, AB

Nicole Dechaine
Dunphy Best Blocksom LLP
Calgary, AB

Terry S. Hunt
Rand & Company LLP
Edmonton, AB

Bud Melnyk
Warren Sinclair LLP
Red Deer, AB

Ken Proudman
Barr Picard Law
Edmonton, AB

LEGAL EDUCATION SOCIETY OF ALBERTA

These materials are produced by the Legal Education Society of Alberta (LESA) as part of its mandate in the field of continuing education. The information in the materials is provided for educational or informational purposes only. The information is not intended to provide legal advice and should not be relied upon in that respect. The material presented may be incorporated into the working knowledge of the reader but its use is predicated upon the professional judgment of the user that the material is correct and is appropriate in the circumstances of a particular use.

The information in these materials is believed to be reliable; however, LESA does not guarantee the quality, accuracy, or completeness of the information provided. These materials are provided as a reference point only and should not be relied upon as being inclusive of the law. LESA is not responsible for any direct, indirect, special, incidental or consequential damage or any other damages whatsoever and howsoever caused, arising out of or in connection with the reliance upon the information provided in these materials.

This publication may contain reproductions of the Statutes of Alberta and Alberta Regulations, which are reproduced in this publication under license from the Province of Alberta.

The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

ISBN-10: 1-55093-727-8
ISBN-13: 978-1-55093-727-5

Setting Aside Agreements: Challenging Domestic Contracts

Prepared by:

Tamasine I. Davies QC

Soby Boyden Lenz LLP

Laura Coffell

Soby Boyden Lenz LLP

Legal Education Society of Alberta

For: *Family Law Contracts*
Edmonton, AB – October 1, 2019
Calgary, AB – October 10, 2019

SETTING ASIDE AGREEMENTS

INTRODUCTION

The goal of any counsel when drafting a contract, is to create a sound, water tight document, which a client can rely upon as a final determination of the outstanding issues. Unfortunately, this goal is not always realized.

It is not entirely uncommon for a party to experience a sense of regret following the execution of a domestic contract. Sometimes this regret happens right away, and sometimes it is only after years pass and his or her circumstances change. In any event, counsel's hard work to create a solid contract can be challenged when a party wishes to revisit terms, re-open the contract, and change the outcome.

Despite the fact that negotiations have taken place, drafts have been exchanged, agreements have been made, and documents have been signed, a party may make an effort to set aside certain portions of a domestic contract which they have deemed no longer fair or equitable.

One such case, which certainly comes to mind when considering this area of law is *Miglin v Miglin*, 2003 SCC 24 [*Miglin*]. This was a determinative case in the area of setting aside spousal support provisions in a domestic contract; so much so that many lawyers now include an explicit reference to this case and its outcome in domestic contracts. *Miglin* truly changed the law in this area, and remains to this day the leading case regarding the variation of spousal support that is set out in a pre-existing agreement.[1]

The impact of *Miglin* resonated with family law counsel, creating a further desire to ensure that the terms of their contracts are thorough, transparent, and impenetrable. But how difficult of a feat is this? Is it possible to create a watertight contract or is re-opening a domestic contract a simple task?

The answer in this case, as in most, is that it depends. It depends on the term that the party is seeking to vary, and the statute under which the contract is governed. It would seem fair to say that, generally speaking, setting aside the terms of a domestic contract is not an easy thing to do. It requires more than simple "unfairness" to revisit the terms of a contract.

As a starting point there are five main grounds used in order to challenge the enforceability of a domestic contract. They are:

1. Statutory requirements not met;

[1] *Fournier v Fournier*, 2019 ABQB 97 at para 38 [*Fournier*].

2. Inadequate financial disclosure;
3. Duress;
4. Unconscionability; and
5. Lack of independent legal advice.

STATUTORY REQUIREMENTS NOT MET

In Alberta, the statutory requirements for a domestic contract to be valid are found at sections 37 and 38 of the *Matrimonial Property Act*, RSA 2000, c M-8 [*MPA*]. It should be noted that, currently, these statutory requirements apply only to married individuals. However, as of January 1, 2020, the *Family Property Act* is anticipated to come into force and will apply to both married couples and individuals that are classified as Adult Independent Partners.

Generally, if a domestic contract complies with all of the formal statutory formalities, "courts are reluctant to interfere with a domestic contract absent evidence of unconscionable conduct or evidence that one party is unable to protect his or her own interests".[2] If a contract does not meet the formalities set out at section 38 of the *MPA*, it may or may not be enforceable, as there is case law to support both positions.

In *Rarog v Rarog,* 2007 ABQB 98 [*Rarog*], the husband's lawyer had prepared a draft property agreement, the terms of which were being negotiated through counsel. The negotiations fell apart and the agreement was not executed. The wife sought to enforce the terms of the draft property agreement. The court held that the agreement was not enforceable due to its non-compliance with s. 38 of the *MPA*. The court held:

> The clear weight of authority is to the effect that non-compliance with s. 38 of the *Matrimonial Property Act* renders any agreement that was in fact made, legally unenforceable: *Miles v. Miles* (2003), 20 Alta. L.R. (4th) 26 (Alta. Q.B.) and the authorities cited therein.[3]

Similarly, the court in *Nasin v Nasin*, 2008 ABQB 219 [*Nasin*], held that:

> … [the formalities] are mandatory under the Act before a pre-nuptial agreement will be enforced by the courts. As a matter of public policy as set out in the legislation, parties entering into marriage may enter into an agreement with respect to the division of their property if their marriage fails. However, that agreement will not be enforced by the courts unless the requirements set out in the Act are met.

[2] *Siegel v Siegel*, 2011 ABQB 540 at para 11 [*Siegel*].

[3] *Rarog* at para 21.