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Drafting Post-Separation Property Agreements

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INTRODUCTION

There are broadly speaking pre-nuptial/cohabitation agreements, which are made with the intention of addressing how couples will address the financial aspects of their relationship, and there are post-separation agreements that are made following the breakdown of the relationship or marriage. The focus in this paper is on the actual drafting of post-separation agreements with an emphasis on more “complex” drafting issues, including:

- Disclosure
- Tax considerations
- Corporate reorganizations
- Pension plans

The discussion has assumed that a “deal” has been struck and the focus will be on approaches to drafting and possible methods and terms that might be relevant.

DISCLOSURE AND AGREEMENT VALIDITY

Disclosure is of course a key element and aspect of family law practice and often consumes a great deal of lawyer time. It is therefore important to consider disclosure requirements from a drafting perspective.

Validity of Agreements

The courts have indicated that if the Matrimonial Property Act section 38 certificates are completed, that the courts will enforce the agreement. Our Court of Appeal has cautioned against dissecting property agreements that are otherwise in compliance with the Act. The Alberta Court of Appeal in *Lemoine v. Griffith*¹ stated that the proper role of the courts is to enforce matrimonial property agreements and not to impose on spouses what is perceived to be a just property arrangement. Despite this approach by the courts it is still advised that agreements be detailed and specific regarding property distribution and values.

While this paper is not intended as a procedure for challenging the validity of agreements, it is helpful from a drafting perspective to be aware of issues that have been raised before the courts

¹ 2014 ABCA 46

regarding validity. The starting point in this discussion is *Miglin v. Miglin*² which set out a process to be followed in reviewing the validity of separation agreements:

1. First the court must look at the circumstances in which the agreement was negotiated and signed; and
2. Then assess whether the agreement reflects the original intentions of the parties and the extent to which it is still in substantial compliance with the objectives of the *Matrimonial Property Act*.

The next case of importance is of course *Rick v. Bransema*³ which dealt with a wife seeking to set aside an agreement based on the argument that the agreement was unconscionable and the wife should be compensated by an amount representing the difference between the negotiated “equalization payment” and her entitlement under the Ontario *Family Relations Act*. The Court at paragraphs 46 to 48 stated:

[46] This contractual autonomy, however, depends on the integrity of the bargaining process. Decisions about what constitutes an acceptable bargain can only authoritatively be made if both parties come to the negotiating table with the information needed to consider what concessions to accept or offer. Informational asymmetry compromises a spouse’s ability to do so (*Leskun v. Leskun*, 2006 SCC 25 (CanLII), [2006] 1 S.C.R. 920, at para. 34; Marcia Neave, “Resolving the Dilemma of Difference: A Critique of ‘The Role of Private Ordering in Family Law’” (1994), 44 U.T.L.J. 97, at p. 117; Penelope E. Bryan, “Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion” (1999), 47 Buff. L. Rev. 1153, at p. 1177).

[47] In my view, it flows from the observations and principles set out in *Miglin* that 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

² 2003 S.C.C. 24

³ [2009] 1 S.C.R. 295