Apocalypse Now Redux: Safeguarding Enforceability of Domestic Contracts and Exercising Professional Risk Management

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APOCALYPSE NOW REDUX:
SAFEGUARDING ENFORCEABILITY OF DOMESTIC CONTRACTS AND EXERCISING PROFESSIONAL RISK MANAGEMENT

Whether generated by the genuine good faith efforts of the parties or a subtle exploitation of leverage and ultimate capitulation, if nothing else, the Domestic Contract is the physical representation of the joint intention of the parties. Ideally, *they* have decided how they want to live their lives, in leaving their marriage, or in the unfortunate event of the breakdown of their marriage.

Considering the naturally collaborative aspect of these contracts, it is somewhat remarkable that they now inspire unease, anxiety and trepidation amongst the Family Bar. With ever-evolving expectations of not just the contracts themselves, but all participants involved, most lawyers have moved their involvement in these contracts from something analogous to out-patient treatment to something closer to open heart surgery. This is as much in the interest of serving the client, as it is in the self-serving interest of the lawyer. In ensuring that the integrity of the contract is not compromised, the lawyers are at the same time protecting themselves. All efforts to safeguard the contract from future scrutiny can be considered best practices protocol that should naturally lead to avoiding a claim in professional negligence.

However, when even these best practices become prone to being viewed dubiously, or the means used to facilitate them become cost-prohibitive for clients, we see the potential for a crisis. The fact that some of the Family Bar have elected to not involve themselves in these contracts at all should arouse concern.

Exploration of these issues was the topic of my paper "Challenging the Validity of Cohabitation and Pre-Nuptial Agreements in Alberta" (May 2012). Exploration of any changes in the landscape since then is important, given recent case law. At one time, perhaps no more than a reflection on a series of cautionary tales, Alberta lawyers can now view the risks to their clients and themselves in an increasingly tangible fashion.

Lawyers encounter these contracts in various ways. Contracts entered prior to marriage (i.e., cohabitation agreements, marriage contracts and pre-nuptial agreements) are distinguishable from separation agreements in terms of their origin, purpose and application. What is largely consistent amongst them however is the judicial analysis of the circumstances surrounding these agreements, namely the factors considered in deliberations about their enforceability.

1. ANALYZING ENFORCEABILITY WITHIN THE CONTEXT OF FURTHER LEGAL REMEDY

A party seeking to set aside one of these agreements is obviously seeking relief that the agreement otherwise contractually precludes. Where an agreement exists, you can reasonably expect this to be the first point of attack for a party seeking to advance a claim for property division, unjust enrichment or support.

A. Common-Law Relationships and Cohabitation Agreements

For common-law relationships, the existence of a contract is evaluated within the context of the "unjust enrichment test" revisited most recently in *Kerr v Baranow.*[1]

As per *Kerr*, recovery for unjust enrichment is permitted if the Plaintiff can establish:

(a) an enrichment or benefit to the Defendant;

(b) a corresponding deprivation; and

(c) an absence of juristic reason for the enrichment.[2]

In dealing with juristic reason, the Court in *Kerr* provides examples of possible juristic reasons that would deny recovery, such as the intention to make a gift (donative intent), a contract, or a disposition of law, such as where a valid statute would deny recovery.[3]

The existence of a valid contract could conceivably be fatal to an unjust enrichment claim. Conversely, success in having the contract set aside is critical in advancing such a claim.

The existence of a valid contract could also be instrumental in limiting an unjust enrichment Defendant's exposure at the remedy stage. The "joint family venture" appears to be one of three vehicles by which to advance a claim. The others being *quantum meruit* and a claim for a share of specific property.

[1] *Kerr v Baranow*, 2011 SCC 10, [2011] 1 SCR 269 [*Kerr*].
[2] *Ibid* at 32.
[3] *Ibid* at 41.