



Marriage Agreements:

Should You Sign the Agreement before You Say “I Do”?

A Short Analysis of *Hartshorne v. Hartshorne*

The Supreme Court of Canada released its decision in *Hartshorne v. Hartshorne* on March 26, 2004. For consideration was a marriage agreement or domestic contract entered into by the parties prior to their marriage.

Domestic contracts are explicitly permitted by the matrimonial property regime in British Columbia. They allow spouses to substitute a consensual regime for the statutory regime that would otherwise be imposed on them. Domestic contracts are, however, like the statutory regime itself, subject to judicial intervention when provisions for the division of property that they contain are found to be unfair at the time of distribution, after considering the various factors enumerated in section 65 of the *Family Relations Act*, R.S.B.C. 1996, c. 128.¹

The provisions of section 65 of the *Family Relations Act* allow for judicial reapportionment on the basis of fairness. Section 65(1) reads as follows.

If the provisions for division of property between spouses under section 56, Part 6 (pensions), or their marriage agreement, as the case may be, would be unfair having regard to:

(a) the duration of the marriage;

- (b) the duration of the period during which the spouses have lived separate and apart;
- (c) the date when property was acquired or disposed of;
- (d) the extent to which property was acquired by one spouse through inheritance or gift;
- (e) the needs of each spouse to become or remain economically independent and self-sufficient; or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement, or use of the property or the capacity or liabilities of a spouse, the Supreme Court, on application, may order that the property covered by section 56, Part 6, or the marriage agreement, as the case may be, be divided into shares fixed by the court.

The foregoing is the statutory scheme underpinning the decision of the Supreme Court of Canada in *Hartshorne v. Hartshorne*.²

The parties, both lawyers, began to cohabit in 1985; their first child was born in 1987. They married in 1989; a second child was born later that year. This was a second marriage for both. They separated nine years later.

From the time of the birth of the first child, the respondent wife withdrew from the practice of law to remain at home to raise the children. One of the children was a special needs child. The husband had made it clear to the respondent prior to the marriage that he would never again allow a division of his property as had occurred after

his first marriage dissolved. The husband brought assets valued at almost \$1.6 million into the marriage, including his law practice, while the wife entered the relationship with no assets and considerable debt.

The parties entered into negotiations regarding a marriage agreement but had not executed it until the day of the marriage when the husband insisted that the wife sign a marriage agreement that rendered the parties separate as to property, but with a provision that the wife would be entitled to a 3 percent interest in the matrimonial home for each year the parties were married, up to a maximum of 49 percent. The parties both had independent legal advice; the wife had been advised, however, that the agreement was grossly unfair. Nevertheless, she signed the agreement with a few amendments, including a clause confirming her right to spousal support.

By virtue of the agreement and the formula set out therein, the wife was entitled to property valued at \$280,000 on separation and the appellant husband was entitled to property worth \$1.2 million. At trial, the judge found the agreement to be unfair and awarded a 60:40 split of assets in favour of the husband. The Court of Appeal upheld the finding of the trial judge. The issue for determination by the Supreme Court of Canada was:

whether a marriage agreement respecting the division of property, entered into after receiving independent legal advice, without duress, coercion, or undue influence, can later be found to be unfair and set

aside on the basis that it failed “to provide anything for the respondent’s sacrifice in giving up her law practice and postponing her career development,” notwithstanding that the parties’ agreement preserved the right to spousal support.³

In determining whether the agreement was fair and, as part of the analysis of the Court, Bastarache, J., for the majority discussed whether or not the Court should establish a “hard and fast” rule regarding the deference to be afforded to marriage agreements as compared to separation agreements. Since marriage agreements define the parties’ expectations from the outset, usually before any rights are vested and before any entitlement arises, the court felt that marriage agreements should be accorded a greater degree of deference than separation agreements.

By contrast, separation agreements deal with existing or vested rights and obligations; in some cases, however, it was felt marriage agreements should be given less deference because they are anticipatory and may not account for the actual financial circumstances of the parties when the marriage ends.

The Court turned to the case of *Miglin v. Miglin*, [2003] 1 S.C.R. 303, 2003 SCC 24, for its general legal proposition that some weight should be given to marriage agreements. Although *Miglin* was specifically directed at determining what weight to give separation agreements when one party sought to modify the agreement, the court felt the general propositions set out in *Miglin* that “a court should be loathe to interfere with a pre-existing agreement unless it is convinced that the agreement does not comply substantially with the overall objectives” of the Act in question, and “the court must not view spousal support arrangements in a vacuum...it must look at the agreement or arrangement in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves” were helpful to its analysis.⁴

Thus, “the determination that a marriage agreement operates fairly or unfairly at the time of distribution cannot be made without regard to the parties’ perspectives”⁵ since the agreement should reflect what the parties thought was fair at

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the time. The Court also felt that central to any analysis under section 65(1) of the *Family Relations Act* would be a consideration of how accurately the parties predicted their actual circumstances to be at the time of distribution.

The Court pondered its own suggestion that the parties should review their marriage agreements during the marriage with a view to updating them as circumstances changed throughout the marriage, so that they could anticipate possible future distribution, but the reality is that most couples having negotiated the agreement just before marriage would rather put the document away and never look to it again, unless there were a breakdown of the marriage.

In determining whether or not the agreement was unfair, Bastarache, J. commented that the trial judge should have considered the impact of the financial awards to which the wife was entitled under the Agreement or otherwise, including spousal and child support, before making a determination that the Agreement operated unfairly.

The decision of the majority in *Hartshorne* determined that at the time of trial, the anticipated domestic and financial arrangements of the parties had unfolded as planned and that the parties had lived out the intent of the marriage agreement, which was to keep their property separate during the relationship. The majority set out the following guideline for determining whether a marriage agreement operates unfairly:

...first, [the court must] apply the agreement. In particular, the court must assess and award those financial entitlements provided to each spouse under the agreement and other entitlements from all other sources, including spousal and child support. The court must then, in consideration of those factors listed in section 65(1) of the *FRA*, make a determination as to whether the contract operates unfairly.

At this second stage, consideration must be given to the parties’ personal and financial circumstances and, in particular, to the manner in which these circumstances evolved over time. Where the current circumstances were with the contemplation of the parties at the time the Agreement was formed and where their Agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff’s burden to establish unfairness is heavier. Thus, consideration of the factors listed in section 65(1) of the *FRA*, taken together, would have to reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances.⁶

According to the majority, this approach accords with the underlying principle of the *Family Relations Act* in that it strikes an appropriate balance between deference to the parties’ intention on one hand and assurance of an equitable result on the other.

The majority found the agreement was fair at the time of the triggering event and determined that the Agreement should be left intact, contrary to the finding of the trial judge. In making this determination, the Court relied on the fact that the respondent wife had signed the agreement after altering it to protect her right for spousal maintenance, which the Court thought significant as any economic disadvantage she might have suffered by operation of the Agreement was compensated through spousal support and with regard to section 65(1)(e) of the *FRA*, which deals with the need to become or remain economically independent.

Summary

Just as in any contract, whether domestic or otherwise, the parties are expected to fulfill their contractual obligations. The difference with domestic contracts is that the *Family Relations Act* permits the court to make a determination as to whether or not the agreement is unfair and to re-apportion assets in the event of a finding of unfairness. Notwithstanding the court’s ability to assess the fairness of the agreement upon application by one of the parties, the court should be loathe to interfere, especially where independent legal advice was obtained prior to the execution of the agreement. In determining fairness, the court must first take into account what was

within the realistic contemplation of the parties, what attention they gave to changes in circumstances or unrealized implications, then what are their true circumstances, and whether the discrepancy is such that a different apportionment should be made given the factors in section 65(1).

Of interest to professionals entering into a second marriage or a first marriage later in life and wanting a marriage agreement is the finding of the Court that the appellant's law practice was not a family asset. In that regard, Bastarache, J. for the majority said:

Under section 59 of the *FRA*, in absence of a marriage agreement, a law corporation could potentially be classified as a family asset... . Under section 59(1), property is not a family asset if it "is owned by one spouse to the exclusion of the other and is used primarily for business purposes and if the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business"...under these circumstances, the law practice must not be considered a family asset.⁷

While the law is not completely clear or settled in regard to marriage agreements, the *Hartshorne* decision provides family law lawyers with some guidance in drafting marriage agreements and providing legal advice to their clients, especially when the client is wrestling with whether or not to execute an agreement prior to the big day. ▲

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- 1 Hartshorne v. Hartshorne, [2004] S.C.J. No. 20; 2004 SCC 22. (S.C.C.) paragraph 1
- 2 *ibid*
- 3 Hartshorne, paragraph 2
- 4 Hartshorne, paragraph 42
- 5 Hartshorne, paragraph 44
- 6 Hartshorne, paragraph 47
- 7 Hartshorne, paragraph 66