



When Written Contracts Just Aren't Enough - Grounds for Setting Aside Domestic Contracts

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Many spouses are now choosing to enter into domestic contracts, either at the outset, during, or after their marriage or cohabitation has ended. The negotiation and drafting of these domestic contracts are taking place under various situations and fact patterns. As a result, much litigation has revolved around a party or parties seeking to set aside a domestic contract under the various legal grounds discussed in this article below.

Setting Aside Domestic Contracts “in accordance with the law of contract”

Subsection 56(4)(c) of the *Family Law Act* provides that domestic contracts may be set aside in accordance with the law of contract. Some of these common law grounds include duress, undue influence, misrepresentation, mistake, and non est factum.

The onus is on the person alleging that a contract is invalid to prove his or her case.

Duress

Duress means coercion of the will or giving no realistic alternative but to submit to the pressure being exerted. To

prove duress, the applicant must show that he or she was compelled to enter into the final agreement out of fear of actual or threatened personal injury or confinement. There is no evidence to support a claim of duress where there is no attempt by one spouse to dominate the will of the other at the time of execution of the contract. The reality of the negotiations should be considered to determine if there is evidence to support a finding of duress.

Undue Influence

A person seeking to set aside a contract because of undue influence must prove that, as a result of a pre-existing relationship, the other party to the contract had control/power over him or her and took advantage of his/her position to extract an unfair bargain. The court must inquire into whether (a) the agreement was an improvident bargain; and (b) if so, was there inequality of bargaining power.

The test of unconscionability was formulated by the Court of Appeal for Ontario in *Rosen v. Rosen*. In order for a contract to be set aside on the basis of unconscionability, there must be “an inequality between the parties and a preying of one upon the other which when combined with improvidence, cast the onus upon the other party of acting with scrupulous care for the welfare and interests of the



other.” To prove unconscionability, a person must prove that he or she was in a vulnerable position at the time of contracting and that the other party was aware of this and took advantage of the situation to extract a bargain that is grossly unfair. The objecting party must meet a high burden of proof.

In *Simpkins v. Simpkins*, the Court of Appeal for Ontario found that, “in many family law settings, a more lenient test may pertain and the circumstances of vulnerability of oppression do not have to meet the higher threshold of unconscionability as the term is understood in the common law of contract.”

Misrepresentation

In *Dougherty v. Dougherty*, the court noted that “in contract law, a misrepresentation must be material in the sense that a reasonable person would consider it relevant to the decision to enter the agreement in question. In addition, the material misrepresentation must have constituted an inducement to enter the agreement upon which the party relied.”

Mistake

Where the existence of mistake has been alleged, the courts must balance the conflicting principles of preserving the sanctity of contracts, and of recognizing circumstances where holding a party to a bargain resulting from a fundamental mistake would be unjust.

The court must initially determine whether or not there was in fact an operative mistake. Before the court can turn to the rules as to mistake, whether at common law or in equity, it must determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake.

Non Est Factum

Non est factum, one of the grounds in accordance with the law of contract, is restated in section 56 of the *Family Law Act* as a party’s failure to “understand the nature or consequences” of the contract.

Financial Disclosure

Of fundamental importance is the requirement for financial disclosure. There is a positive obligation on each of the parties to a domestic contract to make full and complete financial disclosure during the negotiations, which disclosure is to be made before signing a domestic contract. If a party fails “to disclose significant assets, or significant debts or other liabilities, existing when the domestic contract was made,” the contract or a provision in it may be set aside. A failure to make disclosure is not justified by pointing out that no one asked for it. The onus is on the party himself or herself to come forward with the information without being asked.

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