

## ONTARIO JUSTICE EDUCATION NETWORK

### SUMMER LAW INSTITUTE FOR SECONDARY SCHOOL TEACHERS 2003

#### **FAMILY LAW** - A Pot Pourri of Topics

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1. Which Court, for what purpose
  2. Is a Domestic Contract really a Contract
  3. Common misconceptions about who and what is covered by the *Family Law Act*, R.S.O. 1990, c.F.3
  4. Recent decisions
  5. Websites
1. **Which Court, for what purpose:**

Jurisdiction over Family Law matters (essentially divorce; custody and access; child support; spousal support; equalization of net family property) has historically been split between two levels of Court in Ontario. Currently the Courts are known as:

- a. Superior Court of Justice  
(Judges are appointed federally under s.96 of the *Constitution Act*);
- b. Ontario Court of Justice  
(Judges are appointed provincially under the *Courts of Justice Act*, R.S.O. 1990, c. C.43).

Federally appointed Judges (S.C.J.) handle divorces; equalization of net family property; custody and access; child support; spousal support.

Provincially appointed Judges (O.C.J.) have jurisdiction over custody and access; child support; spousal support. In addition, O.C.J. has jurisdiction over adoptions; child protection; matters under the *Youth Criminal Justice Act*, S.C. 2002, c.1.

In 1977, a federal-provincial project was launched in Hamilton where all Family Law matters (including adoption; child protection; the then *Juvenile Delinquents Act*) were consolidated into one Court - the Unified Family Court of Hamilton-Wentworth. The Judges appointed to the Unified Family Court had both s.96 appointments and provincially appointed powers.

This “hybrid” Court has extended now to several other areas in Ontario (Counties of Frontenac; Lennox and Addington; Middlesex; Simcoe). It is called the Family Court (of the Superior Court of Justice).

In addition, and as a further effort to stream-line the process for family law matters, the Family Law Rules (O. Reg. 114/99) were established in 1999 to effect a case management system for actions involving divorces; custody and access; child support; spousal support; equalization of net family property; adoption; child protection.

The Family Law Rules are in effect in:

- Regional Municipality of Durham
- County of Frontenac
- County of Haliburton
- City of Hamilton
- County of Lanark
- United Counties of Leeds and Grenville
- County of Lennox and Addington
- County of Middlesex
- Territorial District of Muskoka
- The part of The Regional Municipality of Niagara that was the County of Lincoln as it existed on December 31, 1969
- County of Northumberland
- City of Ottawa
- County of Peterborough
- United Counties of Prescott and Russell
- County of Simcoe
- United Counties of Stormont, Dundas and Glengarry
- City of Kawartha Lakes
- Regional Municipality of York O. Reg. 441/99, s. 1; O. Reg. 202/01, s.1

Choice of court (where there is one) may be dictated by such things as where the parties reside, where their lawyers practice law, what issues are involved. Generally speaking,

you need to check both statutes (such as the *Family Law Act*, supra; *Divorce Act*, R.S.C. 1985, c.3 (2<sup>nd</sup> Supp); *Children’s Law Reform Act*, R.S.O. 1990, c.C.12); and applicable Court Rules (such as the Family Law Rules, supra, and the Rules of Civil Procedure, R.R.O. 1990, Reg. 194).

## 2. Is a Domestic Contract really a Contract:

The *Family Law Act*, *supra.*, as did its predecessor, *The Family Law Reform Act*, R.S.O. 1980 c.152 includes a specific part (Part IV) for “Domestic Contracts”. Domestic Contracts mean marriage contracts, separation agreements, and cohabitation agreements. The definitions of each are set out below.

The *Family Law Act*, *supra.*, also allows a Court to set aside a Domestic Contract, or a provision in it, as described in s. 56 as set out below.

With the advent of *The Family Law Reform Act* in 1978, Courts seemed to become more pro-active in setting aside Domestic Contracts, or provisions in them, and in a variety of creative ways. Every time a decision came down with a new way to set aside a Contract, or a provision in it, lawyers would extend the “finality” clause in a Domestic Contract to cover the latest decision.

Examples of changes include:

a. A simple paragraph:

“The parties accept the terms of this contract as being final and binding upon them. They release one another from any other claims for support or property now or in the future.”

b. Grew to:

“The parties accept the terms of this contract as being final and binding upon them. They release one another from any other claims for support or property now or in the future. The parties agree that there shall be no variation of this agreement even if there is a material change in circumstances in either of the parties circumstances, no matter how catastrophic or unforeseen or unforeseeable, and no matter whether related to health, employment, financial or any other circumstances.”

c. And further grew to:

“The parties acknowledge and agree that each of them is self-supporting or is capable of being self-supporting and is not in need of support from the other. Both parties accept the terms of this Agreement in full satisfaction of all claims and causes of action which he or she now has or may, in the future, acquire against the other for support, whether under the *Family Law Act*, the *Divorce Act*, the

*Succession Law Reform Act* or any other statute or law of Ontario or any other jurisdiction.

Each of the parties:

- (a) Is financially independent or is capable of financial independence;
- (b) Does not require financial assistance from the other;
- (c) Releases the other from all obligations to provide support or interim support pursuant to the *Family Law Act*, the *Divorce Act*, the *Succession Law Reform Act* or any other statute or law of Ontario or any other jurisdiction; and
- (d) Releases all rights to claim or obtain support or interim support, pursuant to the *Family Law Act*, the *Divorce Act*, the *Succession Law Reform Act* or any other statute or law of Ontario or any other jurisdiction, from the other.

The parties realize that there may be future changes in their financial circumstances by reason of their health, the cost of living, their employment, financial mismanagement, financial reversals, inheritance or otherwise. No change whatsoever will give either party the right to claim support from the other pursuant to the *Family Law Act*, the *Divorce Act*, the *Succession Law Reform Act* or any other statute or law of Ontario or any other jurisdiction, even if the change is a catastrophic, drastic, material, profound or radical one, whether or not the change was foreseeable, foreseen, unforeseeable or unforeseen, whether or not the change is causally connected to the marriage, and whether or not such change arises from a pattern of economic dependence related to the marriage. The parties specifically agree that:

- (i) The Husband and Wife have been fully compensated for his or her contributions to the marriage and, therefore, they have suffered no economic hardship or disadvantage as a result of the marriage or its breakdown;
- (ii) There have not been any economic advantages or disadvantages to either of them that have not been fully compensated for in the arrangements set out in this Agreement; and
- (iii) Each party acknowledges the obligation and his or her ability to be self-sufficient and that he or she is solely responsible for his or her own support.

The parties acknowledge and agree that they have considered the economic consequences of the marriage and its breakdown in agreeing to the final release of

spousal support above. The parties have specifically considered the provisions and factors set out in sections 15 and 17 of the *Divorce Act* and sections 30 through 33 of the *Family Law Act* in agreeing to the provisions of this paragraph.

Each of the parties acknowledges that his or her solicitor has advised him or her of recent rulings of the Ontario Courts in which the Court has awarded spousal support, notwithstanding that full releases in respect to spousal support had been contained in a separation agreement previously entered into between the parties. Notwithstanding these rulings, the parties to this Agreement agree and intend that no change in circumstances whatsoever, including but not limited to those set out in sub-paragraph above, will entitle either party to apply to a court for spousal support. This Agreement and this paragraph, in particular, may be pleaded as a complete defence to any claim brought by either party for spousal support in contravention of the terms of this paragraph.”

The setting aside of Domestic Contracts came to a head with the *Miglin v. Miglin* decision released by the Supreme Court of Canada in April 2003 (one citation is (2003), 224 D.L.R. (4<sup>th</sup>) 193). In the Court below (the Ontario Court of Appeal) the Justices had determined that because a material change in circumstances had occurred between the date the separation agreement was signed, and the date the wife challenged her release of support in that agreement, the Court “had a wide discretion” to impose upon the parties what the Court felt was appropriate. The Court set aside the release of support and ordered the husband to pay support to the wife on an indefinite basis.

The Supreme Court of Canada reversed the Ontario Court of Appeal decision and effectively re-instated the parties’ separation agreement. One significant quote from this decision is set out below:

“Although we recognize the unique nature of separation agreements and their differences from commercial contracts, they are contracts nonetheless. Parties just take responsibility for the contract they execute as well as for their own lives. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the [*Divorce*] Act, that the Court may be persuaded to give the agreement little weight.”

### 3. **Common misconceptions about the *Family Law Act* (“the Act”):**

#### a. **Matrimonial homes**

Part II of the Act is entitled Matrimonial Home. Matrimonial Home is specifically defined in section 18:

*“Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.”*

It is important to note that “spouse” is defined in section 1 of the Act as “*either a man and woman who are married to each other or have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right*”.

The Act does not extend ownership rights to a non-titled spouse. The Act only extends possessory rights to a non-titled spouse in section 19.

- “(1) *Both spouses have an equal right to possession of a matrimonial home.*
- (2) *When only one of the spouses has an interest in a matrimonial home, the other spouse’s right of possession:*
  - (a) *Is personal as against the first spouse; and*
  - (b) *Ends when they cease to be spouses, unless a separation agreement or Court Order provides otherwise.”*

**b. Rights and obligations with respect to support and to property.**

Part I of the Act is entitled “Family Property”. It provides for the equalizing of net family property (these are all defined terms) as between spouses when the parties separate, or one of the parties dies. Simply put, the parties calculate their individual net worth as it has grown (or not grown) over the course of the marriage and compare the figures. One may owe the other an equalization payment to “equalize” the net growth.

Part I of the Act does not re-distribute property, or affect legal ownership of property.

The definition of spouse is the one described above, found in section 1 of the Act.

Therefore, Part I only applies to persons who have been married.

While parties who have lived together as common law spouses or as same-sex partners do not have rights with respect to property under the Act, they often pursue claims against one another when the relationship ends under equitable or trust principles.

Part III of the Act is entitled “Support Obligations”. There is a definition section in Part III to include:

- (a) Spouses as defined in section 1;

- (b) Spouses being a man and a woman who are not married to one another and have cohabited for three years (or are in a relationship of some permanence if they are parents of a child); and
- (c) Same-sex partners, being two persons of the same sex who have cohabited for three years (or are in a relationship of some permanence if they are parents of a child).

Part III of the Act applies to persons who have been married, common law spouses, and same-sex partners.

#### 4. Recent Decisions:

- a. ***The Attorney General of Nova Scotia v. Susan Walsh and Wayne Bona et al*, [2002] S.C.R. 83**

The Supreme Court of Canada released the above decision on December 19, 2002. The background of the case is as follows:

Ms. Walsh and Mr. Bona lived together as a common law couple for ten years. They had two children and resided in Nova Scotia. Upon separation, Ms. Walsh challenged the constitutional validity of the Nova Scotia *Matrimonial Property Act*. That Statute, similar to Part I of Ontario's *Family Law Act*, excluded unmarried persons.

The Nova Scotia Court of Appeal found the Statute to be unconstitutional as being discriminatory against unmarried persons. The Supreme Court of Canada disagreed and upheld the validity of the Statute. There was one dissent.

Justice Bastarache wrote for the majority. He stated:

*“Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount. The decision to marry, or not, is intensely personal and engages a complex interplay of social, political, religious and financial considerations by the individual. While it remains true that unmarried spouses have suffered from historical disadvantage and stereotyping, it simultaneously cannot be ignored that many persons in circumstances similar to those of the parties, that is, opposite sex individuals in conjugal relationships of some permanence, have chosen to avoid the institution of marriage and the legal consequences that flow from it...to ignore these differences among cohabiting couples presumes a commonality of intention and understanding that simply does not exist. This effectively nullifies the individual's freedom to choose alternative family forms and to have that choice respected and legitimated by the state.”*

- b. *Halpern, et al v. The Attorney General of Canada, et al* (2003), 36 R.F.L. (5<sup>th</sup>) 127

The Ontario Court of Appeal released the above decision on June 10, 2003:

*The common law definition of marriage has been re-defined by the Court as “the voluntary union for life of two persons to the exclusion of all others”.*

The prior definition from an 1866 English decision had been “...*marriage as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others*”.

The Court stated in its reasons:

*“In our view, this case does not engage religious rights and freedoms. Marriage is a legal institution, as well as a religious and a social institution. This case is solely about the legal institution of marriage. It is not about the religious validity or invalidity of various forms of marriage. We do not view this case as, in any way, dealing or interfering with the religious institution of marriage.”*

It is also stated that:

*“Nor is this a case of balancing the rights of same-sex couples against the rights of religious groups who oppose same-sex marriage. Freedom of religion under s.2 (a) of the Charter ensures that religious groups have the option of refusing to solemnize same-sex marriages. The equality guarantee, however, ensures that the beliefs and practices of various religious groups are not imposed on persons who do not share those views.”*

## 5. Websites:

- a. The Canadian Legal Information Institute:

This is Canada’s main source of free access to primary legal material. It was created for the Federation of Law Societies of Canada.

[www.canlii.org](http://www.canlii.org)

- b. For information about Youth Criminal Justice Act:

[www.canada.justice.gc.ca/youth](http://www.canada.justice.gc.ca/youth)

<http://canada.justice.gc.ca/en/dept/pub/ycja/youth/html>.