

**SUCCESS AND FAILURE:  
THE ADVOCATE'S ROAD MAP TO DOMESTIC CONTRACTS  
IN SLRA APPLICATIONS**

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## **SUCCESS AND FAILURE: THE ADVOCATE’S ROAD MAP TO DOMESTIC CONTRACTS IN SLRA APPLICATIONS**

**Authored by Caroline Abela<sup>1</sup>**

- Accident counts for much in companionship as in marriage.

- *The Education of Henry Adams* [1907] ch. 4

### **INTRODUCTION**

When couples enter into or terminate a relationship, they can enter into contracts in which they agree on their respective rights and obligations within their relationship and on the termination of their relationship. This means that they can contract out of support provisions and property claims, including those under the *Family Law Act* (“*FLA*”)<sup>2</sup> and the *Succession Law Reform Act* (“*SLRA*”).<sup>3</sup> However, an attempt to contract out of statutory provisions and obligations does not necessarily result in success. A court may not enforce such provisions in a domestic contract. This paper focusses on the enforceability of domestic contracts in the context of *SLRA* applications. It examines the legal and practical principles that a court reviews when determining whether a person is entitled to support after the death of a contracting party to a domestic agreement.<sup>4</sup> In particular, the various grounds available to challenge a domestic contract in *SLRA* applications include: 1) the contract does not abide by common contractual principles; 2) the contextual *Miglin*<sup>5</sup> requirements were or are absent; 3) the contract does not comply with section 56(4) of the *FLA*; and 4) adequate support was not made. While I have separated these grounds into four headings, they overlap extensively. Before delving into the substantive topic, below I have set out the legal framework for the discussion.

### **(A)**

### **THE LEGAL FRAMEWORK**

### **(I)**

### **WHAT IS A DOMESTIC CONTRACT?**

Domestic contracts are governed by the Ontario *Family Law Act*. Domestic contracts include marriage contracts, cohabitation agreements, and separation agreements. Part IV of the

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<sup>2</sup> *Family Law Act*, RSO 1990, c F3 [“*FLA*”].

<sup>3</sup> *Succession Law Reform Act*, RSO 1990 c S26 [“*SLRA*”].

<sup>4</sup> This paper does not canvas domestic contracts in the context of family law claims.

<sup>5</sup> *Miglin v Miglin*, 2003 SCC 24 [“*Miglin*”].

*FLA* also regulates paternity agreements and arbitration agreements but for the purposes of this paper it is not necessary to detail these types of agreements.

***i. Marriage Contract***

A marriage contract is an agreement between two persons who are married to each other or intend to marry each other in which they set out their respective rights and obligations during the marriage, on separation or on death. The marriage contract may include provisions with respect to the property of the parties, acquired prior to the marriage and during the marriage, support obligations, the right to direct the education and moral training of their children and any other matters in the settlement of their affairs.<sup>6</sup>

***ii. Cohabitation Agreement***

A cohabitation agreement is an agreement between two persons who are either cohabiting or intend to cohabit and governs their respective rights and obligations during the cohabitation or when the cohabitation finishes, either by way of separation or death. Parties who enter into a cohabitation agreement are not married. As in marriage contracts, a cohabitation agreement may include provisions with respect to the property of the parties, support obligations, the right to direct the education and moral training of their children and any other matters in the settlement of their affairs. If the parties subsequently marry, the cohabitation agreement is deemed to be a marriage contract.<sup>7</sup>

***iii. Separation Agreement***

Two persons who cohabited and are living separate and apart may enter into a separation agreement in which they agree on their rights and obligations to one another now that they are no longer cohabiting. These can be two persons who are married or not. A separation agreement may provide for the present, the future and on death of a party to the agreement. Separation agreements may include provisions with respect to the property, spousal support obligations, child support obligations and access, the right to direct the education and moral training of their children and any other matters in the settlement of their affair.<sup>8</sup>

**(II)**

**WHAT IS AN *SLRA* APPLICATION?**

When referring to domestic contracts and an *SLRA* application, two distinct circumstances are applicable: a) where a spouse dies intestate, which falls under Part II of the *SLRA*; and b) where an application for dependant's support is made, which falls under Part V of the *SLRA*.

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<sup>6</sup> *FLA*, *supra* note 1, s 52.

<sup>7</sup> *FLA*, *supra* note 1, s 53.

<sup>8</sup> *FLA*, *supra* note 1, s 54.

## INTESTATE SUCCESSION

Part II of the *SLRA* governs where a spouse dies intestate. Under this part, a ‘spouse’ is defined as two persons who were married to one another on the death of their spouse, or entered into a marriage that is voidable or void.<sup>9</sup> As such only spouses who were married at the time of death are entitled to relief under this part.

Where a spouse dies intestate, and they have no surviving issue, the surviving spouse is entitled to the estate absolutely. Where they have issue, the surviving spouse is entitled to a preferential share of the estate.<sup>10</sup> Pursuant to section 6(2) of the *FLA*, where a spouse dies intestate, they may elect to receive an equalization payment or their entitlement under Part II of the *SLRA*.<sup>11</sup>

### *i. Equalization*

If a surviving spouse elects to receive an equalization payment, the surviving spouse and the deceased estate’s “net family property” are calculated and the spouse who’s net family property is the lesser of the two, is entitled to one-half the difference between them.<sup>12</sup> The net family property is the value of all property, except property that is specifically excluded under the *Act*, after deducting the spouse’s debts and other liabilities and the value of property the spouse owned on the date of marriage (after deducting the spouse’s other debts and liabilities on the date of marriage).<sup>13</sup> A surviving spouse who wishes to receive an equalization payment must file an election and bring an application for an equalization of net family property.<sup>14</sup>

Parties may contract out of the right to equalize in its entirety, may execute a contract where different assets are included or excluded from their net family property, or may provide for property to be distributed in a different manner than the equalization of net family properties.

### *ii. Preferential share*

Where a spouse dies intestate and leaves behind a surviving spouse and issue, the surviving spouse is entitled to the entirety of the estate if the value of the estate is less than the preferential share. The preferential share is set by the Lieutenant Governor and is currently set at \$200,000.<sup>15</sup> If the value of the estate is greater than the preferential share, the spouse is entitled to the preferential share and the remaining value of the assets are divided between the spouse and issue. Where a spouse dies intestate and leaves a surviving spouse and one child, the remaining assets are split equally between the surviving spouse and child. Where the deceased leaves more than one child, the surviving spouse is entitled to one third of the remaining assets and two thirds is split equally between the children.<sup>16</sup> There are also rules where a person dies intestate and

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<sup>9</sup> *SLRA*, *supra* note 2, s 1; *FLA*, *supra* note 1, s 1.

<sup>10</sup> *SLRA*, *supra* note 2, ss 44 and 45.

<sup>11</sup> *Ibid*, s 6(2).

<sup>12</sup> *FLA*, *supra* note 1, s 5.

<sup>13</sup> *FLA*, *supra* note 1, s 4. Section 4(2) sets out legislatively excluded property.

<sup>14</sup> *FLA*, *supra* note 1, s 7(1).

<sup>15</sup> *Ibid*, s 45(6); *SLRA*. O Reg 54/95, s 1.

<sup>16</sup> *SLRA*, *supra* note 2, ss 45 and 46.

leaves no spouse but parents or siblings, however for the purposes of this discussion these rules are not relevant.

Parties are free to contract out of these provisions in their entirety or enter into a domestic contract that provides for the division of assets in a manner that is in line with their interests.

### **DEPENDANT'S RELIEF CLAIM AND THE SURVIVING SPOUSE**

Where a deceased has not made adequate provision for a surviving, dependant spouse, the surviving spouse may have a right to dependant support under Part V of the *SLRA*.<sup>17</sup> The definition of spouse under this part is broad. It includes married spouses, formerly married spouses (i.e. divorced), common law spouses and those in a relationship of some permanence who have a natural or adoptive child together<sup>18</sup> – these individuals may be entitled to support *if* they were dependants of the deceased on the deceased's death. The court is given broad discretion under this Part to (a) order support, even where the parties have executed a valid and enforceable contract barring the surviving spouse from support,<sup>19</sup> and (b) determine the appropriate quantum and duration of support in consideration of a number of factors set out in the *SLRA*.<sup>20</sup> As discussed in more detail below, on an application for dependant's support, the court may choose to order support in spite of a valid and enforceable contract, where the deceased has not otherwise adequately provided for a dependant spouse.

#### **(B)**

### **THE ENFORCEABILITY OF A DOMESTIC CONTRACT**

There are a number of grounds to argue in favour or against the enforcement of a domestic contract in the context of *SLRA* applications. These grounds, which overlap, include that: 1) the contract does not abide by common law contractual principles; 2) the contextual requirements were absent or are absent; 3) the contract does not comply with section 56(4) of the *FLA*; and 4) adequate support has to have been made.

#### **(I)**

### **COMPLIANCE WITH COMMON LAW CONTRACTUAL PRINCIPLES**

For a contract to be valid and enforceable it must comply with common law contractual principles. The common law grounds to set aside a contract include fraud, material misrepresentation, uncertainty as to terms, duress, unconscionability, and undue influence.<sup>21</sup> If during the formation of the contract, one of these contractual principles was not respected, the contract (or provision related to the support claim post-death) will unlikely be enforceable.

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<sup>17</sup> *Ibid*, s 58(1). This discussion on dependant's support does not include children or adult children.

<sup>18</sup> *FLA*, *supra* note 1, s. 29.

<sup>19</sup> *Ibid*, s 63(4).

<sup>20</sup> *Ibid*, s 62(1)(m). A surviving spouse can also be entitled to interim support. See section 64 of the *SLRA*.

<sup>21</sup> *Phillips-Renwick v. Renwick Estate*, [2003] OJ No 3156 at para 48 (Ont. SCJ) [*"Phillips-Renwick"*].

## EQUITY

A good example of the violation of the laws of equity is found in *Scalabrini v. Scalabrini Estate*.<sup>22</sup> When Mr. and Mrs. Scalabrini separated, Mrs. Scalabrini was in dire financial straits. The couple signed a separation agreement. In total Mr. Scalabrini provided Mrs. Scalabrini with \$7,000 as per the terms of the agreement. Mrs. Scalabrini accepted the offer because she had a child to care for and she had no access to money. Mrs. Scalabrini brought a motion for child support. The defendant estate trustees argued that the separation agreement precluded any support claims; however, the Court chose not to enforce the separation agreement because it was unconscionable. Justice Karam stated:

*In these circumstances, it is apparent that although he did not intimidate her or even persuade her to enter into an unfavourable agreement, her husband obviously attempted to seize the opportunity to take advantage of her financial situation, by locking her into an agreement that she did not understand and was completely unfavourable to her. The agreement, as it relates to her claim for a division of matrimonial property, must therefore be set aside.*<sup>23</sup>

In contrast, in *Phillips-Renwick*<sup>24</sup>, the Court upheld a cohabitation agreement where none of the markers violating contractual principles existed, among other things. The parties eventually were married and Mr. Renwick died in 2001. Interestingly, it was Ms. Phillips-Renwick's idea to enter into a cohabitation agreement. At the time, there was an investigation against her into various financial transactions during her previous employment that could implicate her and could result in her facing criminal charges and a civil suit. She did not want Mr. Renwick to be dragged into the problems nor did she want to expose any of his assets to liability. In fact, Ms. Phillips-Renwick was eventually charged with criminal offences and a civil suit was brought against her. As a finding of fact, Justice MacKinnon found that Ms. Phillips-Renwick was not under any duress or undue influence when she signed the agreement. There was no imbalance between her and Mr. Renwick and he took no advantage of her.<sup>25</sup> Justice MacKinnon also found that Ms. Phillips-Renwick understood the meaning and effect of the contract and did sign it voluntarily (such that no undue influence existed).<sup>26</sup> Applying common law contract principles, among other principles, Justice MacKinnon held that the contract was valid and enforceable.<sup>27</sup> Notably, while not specifically discussed in the decision, the deceased's intentions were corroborated through the lawyers who drafted and provided independent legal advice on the agreement.

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<sup>22</sup>[2003] OJ No 2911 (Sup Ct J). This proceeding commenced when both Mr. and Mrs. Scalabrini were alive, however, during the course of the proceeding, Mr. Scalabrini died in an industrial accident, and the executors of his estate became the defendants.

<sup>23</sup>*Ibid*, at para 12.

<sup>24</sup>*Phillips-Renwick*, *supra* note 21.

<sup>25</sup>*Ibid*, para. 8.

<sup>26</sup>*Ibid*, para. 18.

<sup>27</sup>*Ibid* at para 73.

### UNCERTAINTY OF A CONTRACT OR PROVISION

A provision in a contract may be uncertain if it is unintelligible, meaningless, unable to be selected between a variety of meanings or the court is unable to discern the concept which the parties had in mind.<sup>28</sup> Domestic contracts are no different than other contracts in this regard. Therefore, direct and cogent words are required in order to find that a claim under the *SLRA* has been surrendered.

In *Prelorentzos v. Havaris*, the Court held that direct and cogent words were required for a separated spouse to give up her *SLRA* rights in a contract.<sup>29</sup> In that case, a husband and wife separated. Upon separation, a contract was executed where by the wife agreed to “release all possessory rights” in a subject property. The property was then transferred to the husband. Nine years later, he died intestate. A common law spouse also made a competing claim for support. The Court held that the language in the contract fell short of the separated spouse giving up her *SLRA* rights. The contract referred to possessory rights not rights of ownership.<sup>30</sup> Therefore the separated spouse (but not divorced) was entitled to a preferential share in the estate pursuant to section 45(1) of the *SLRA*. The separated spouse therefore received her preferential share from the subject property that she had earlier given up her possessory rights.

Similarly, in *Caron v. Rowe*,<sup>31</sup> the surviving spouse brought an application for her preferential share pursuant to the *SLRA*. The spouses entered into a domestic contract prior to their marriage which became a marriage contract upon marriage. The marriage contract provided that certain property shall *forever remain in the husband's estate*, including but not limited to, all interest, rents, profits and proceeds of disposition which may accrue from the property; 2) the husband shall have, at all times, the full right and authority, in all respects the same as he would have if not married, to use, enjoy, manage, gift, sell, assign and otherwise convey the property without interference, approval or other consent from the wife and the property shall remain forever free of claim by the wife.<sup>32</sup> Despite this language, the surviving spouse argued that the marriage contract provided for what would happen on separation and dissolution of the marriage which had not occurred when the deceased passed. The Court cited both the decisions of *Saylor*<sup>33</sup> and *Cairns*<sup>34</sup> referencing the principle established in *Winter, Re*<sup>35</sup> that “anything so serious as her surrender of her rights on her husband's intestacy should have required much clearer and more direct and cogent words than a mere acknowledgment under seal that she had no further claims against the husband nor against his estate...”.<sup>36</sup>

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<sup>28</sup> Kim Lewison, *The Interpretation of Contracts*, Fifth Edition (London: Sweet & Maxwell 2011) at 8.10.

<sup>29</sup> 2015 ONSC 2844.

<sup>30</sup> *Ibid*, at paras 17 and 18.

<sup>31</sup> 2013 ONSC 863 (Sup Ct J).

<sup>32</sup> *Ibid*, at para 18. The wife could live in the property for six months upon separation but the wording was such she would have no other claim.

<sup>33</sup> *Saylor, Re*, [1983] OJ No 3252 (Ont Sup Ct).

<sup>34</sup> *Cairns v Cairns*, [1990] OJ No 377 (Ont HC).

<sup>35</sup> *Winter, Re*, [1954] OJ No 219, at para 9 (Ont HC) [“*Re Winter*”]. In *Re Winter*, the separation agreement stated the wife released the husband from all financial support claims and “acknowledges that she has no further claims against the husband nor against the estate of the husband of the first part.”

<sup>36</sup> *Ibid*, at para 9.

The Court held that there were no direct and cogent words in the agreement to the effect that the surviving spouse relinquished her rights under the *SLRA*. The parties had independent legal advice but the agreement did not address support on death, but for child support for the surviving spouse's children. On this basis, the Court ordered that the surviving spouse was the sole beneficiary of the estate.

In *Cairns v. Cairns*, the Court held that while the surviving spouse had released her right to equalization under the *FLA*, the words of the separation agreement were not sufficiently direct and cogent to bar her from her preferential share under Part II of the *SLRA*.<sup>37</sup> The release was held to release her claim for a further division of property or payment for net equalization pursuant to the *FLA*.

## (II)

### EMPHASIS ON CONTEXTUAL REQUIREMENTS

While common contractual principles apply to the creation of, and words in, a domestic contract, domestic contracts are specially treated. In particular, the Supreme Court has emphasized the need to treat domestic contracts differently due to the relationship between the parties, the nature of the negotiations and the emotionally charged issues.

In *Miglin v. Miglin*, the Supreme Court outlined a test to be applied when determining the enforceability of domestic contracts in the context of family law cases. First, the court must consider the time of execution of the agreement, including the substance of the agreement itself and the circumstances surrounding the parties at the time of the agreement. For example, was there oppression, pressure or other vulnerabilities. Second, the court considers whether the substance of the agreement departs from the overall objectives of the *Divorce Act*.<sup>38</sup> Third, the court must consider whether the agreement reflects the original intentions of the parties.<sup>39</sup> There may be occasions where the court needs to assess the parties' circumstances at the time of the application. A change in the parties' circumstances from what could have been reasonably anticipated at the time of the negotiations will also be considered.

The *Miglin* test was developed in the *FLA* context but has been applied in *SLRA* applications. In the estate case of *Phillips-Renwick* discussed above, Justice Mackinnon held that under the *Miglin* test, the contract was valid and enforceable. Under the first stage of the *Miglin* test, where the court must consider the circumstances of negotiation and execution, the Court found that there was no undue influence or duress at the time of the agreement. It was Ms. Phillips-Renwick's idea to enter into the agreement. The agreement was proposed to protect Mr. Renwick and his assets from any involvement or liability in her affairs. She understood the nature and effect of the agreement even though she did not have independent legal advice. The Court held that there was no power imbalance between the parties and Ms. Phillips-Renwick did not suffer any vulnerability that Mr. Renwick took advantage of. The fact that Ms. Phillips-

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<sup>37</sup> *Cairns*, *supra* note 34 at para 13.

<sup>38</sup> *Divorce Act*, RSC 1985 c3 (2nd Supp).

<sup>39</sup> *Miglin*, *supra* note 5, at paras 82-90.



Renwick was facing criminal prosecutions was not “vulnerable” as contemplated in *Miglin*.<sup>40</sup> Next the court must turn its attention to the substance of the agreement. The Court held that the cohabitation agreement did not amount to a significant departure from the applicable general objectives of matrimonial or succession spousal support legislation. It was the parties’ reasonable and sensible attempt to order their affairs:

*Each continued to work. Each had his or her own children and no new children were contemplated. A cohabitation agreement that exchanged full and final release of property and support rights during life and upon death, cannot be said to represent a substantial departure from the objectives of matrimonial or succession support legislation in these circumstances.*<sup>41</sup>

Justice Mackinnon held that the agreement reflected and continued to reflect the parties’ original intentions. The question was not whether the parties’ intentions had changed, but whether in light of new circumstances, the outcome of enforcing the agreement would still reflect the parties’ original intentions. The domestic agreement clearly contemplated the death of either party and clearly provided that the surviving spouse would have no claim against the deceased spouse’s estate.<sup>42</sup>

In the author’s view, *Miglin* is not applicable in the SLRA context.<sup>43</sup> *Miglin* seeks to emphasize common contractual principles such as ensuring that no undue influence or duress is present during the formation of a domestic contract. It also provides another exit strategy to judges who do not believe that a party has been adequately provided for such that there is a change in circumstances that was not originally foreseeable. It is not necessary to apply *Miglin* to cases seeking support or a spousal share of property in SLRA applications when a domestic contract exists. There are enough tools for advocates and particularly equitable arguments available without resorting to a test that was necessarily created in the FLA context in order to arrive at a fair result.<sup>44</sup>

### (III)

#### SECTION 56(4) OF THE FLA

Section 56(4) gives the court the discretion to set aside a domestic contract or a provision of a domestic contract if (a) one party failed to disclose to the other significant assets, or significant debts or liabilities, existing when the domestic contract was entered into; (b) a party did not understand the nature or consequences of the contract; or (c) otherwise in accordance with the law of contract.<sup>45</sup>

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<sup>40</sup> *Ibid*, at para 76.

<sup>41</sup> *Ibid*, at para 79.

<sup>42</sup> *Ibid*, at para 81.

<sup>43</sup> Notably, *Miglin* is rarely referenced in estate cases.

<sup>44</sup> Again, advocates already have the normal common law contractual principles available, equity and adequate support arguments.

<sup>45</sup> FLA, *supra* note 1, s 56(4).

In *Moses Estate v. Metzger*<sup>46</sup>, the Ontario Court of Appeal cited the leading decision from that court of *Le Van v. Le Van*<sup>47</sup> for the two part approach to setting aside a domestic contract under section 56(4) of the *FLA*:

*First, the party seeking to set aside must demonstrate that one of the listed circumstances within s. 56(4) of the FLA has been engaged. This is a necessary but insufficient condition for invoking the power to set aside. The court must then consider whether it is appropriate to exercise discretion in favour of setting aside the agreement or a provision within it.*<sup>48</sup>

A contract is not automatically void and unenforceable on a finding that a party has violated a provision of s. 56(4) of the *FLA*. It is at the discretion of the trial judge to determine whether it is appropriate in the circumstances to set aside the contract.<sup>49</sup> Once a judge determines that one of the statutory preconditions under s. 56(4) exists, the judge should consider the “fairness” of the contract.<sup>50</sup>

***i. Failure to Disclose Assets and Liabilities - Financial Disclosure***

Under the first statutory precondition, a party may attempt to challenge the enforceability of a domestic contract on the basis that proper financial disclosure was not exchanged between the parties; this can be done by demonstrating that they were not provided with full disclosure of their partner’s assets, debts or liabilities before entering into the contract, or that proper valuations were not obtained.

In *Rick v. Brandsema*<sup>51</sup>, the Supreme Court of Canada overturned an appeal court that found a spouse “knew what she was doing” when she signed a domestic contract where the spouse deliberately misrepresented his finances to his spouse. The spouse failed to disclose assets and overstated his debt and liabilities. The Supreme Court commented that while parties are free to decide for themselves what bargain they are prepared to make, decisions about what constitutes an acceptable settlement can only authoritatively be made if both parties come to the negotiating table with the information they need to consider what concessions to accept or offer. Justice Abella stated that: “The deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention...”.<sup>52</sup>

In addition, in conjunction with allegations of misrepresentation or lack of disclosure of assets, a surviving spouse can challenge the provision of support or lack thereof provided in a domestic contract through commonly argued equitable principles of constructive trust, *quantum meruit* and unjust enrichment.

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<sup>46</sup> 2017 ONCA 767.

<sup>47</sup> 2008 ONCA 388, leave to appeal to the SCC refused, [2008] 3 SCR viii (note).

<sup>48</sup> *Moses Estate v Metzger*, 2017 ONCA 767, at para 9.

<sup>49</sup> *LeVan v LeVan*, 2008 ONCA 388, at para 33.

<sup>50</sup> *Ibid*, at para 60.

<sup>51</sup> (2009), 303 DLR (4<sup>th</sup>) 193 (SCC).

<sup>52</sup> *Ibid* at para. 47.

*ii. Understanding the Nature and Consequences of the Contract*

If the court was of the opinion that the party seeking to set aside the contract did not understand the contract or the consequences of it, they may set it aside. Independent legal advice, while not a requirement of a valid contract, is given significant weight by the courts when considering whether a party understood the nature and consequences of the contract.<sup>53</sup>

*iii. Otherwise in accordance with the law of Contract*

The *FLA* specifically provides that a domestic contract may be set aside if it does not comply with the law of contract. This topic was discussed in the previous section.

**(IV)**

**ADEQUATE PROVISION REQUIRED**

If a deceased does not provide adequate support for his spouse or partner, a domestic contract provision can be set aside. Under Part V of the *SLRA*, the court has the discretion to order dependant support on a deceased's estate even though the court finds that there was a domestic agreement between the dependant and the estate that was valid and enforceable. Section 58 of the *SLRA* provides that a court may order dependant support from an estate where a deceased has not made adequate provision for the proper support of his dependants. Under section 63(4) of the *SLRA*, this order can be made despite any agreement or waiver to the contrary. This means that a party cannot contract out of their support obligations.

An often cited case for the principle that adequate provision must be made despite a separation agreement providing to the contrary is *Butts v. Butts Estate*.<sup>54</sup> In this case, the parties entered into a separation agreement where the deceased was to pay the surviving spouse \$500 per month. Both parties had independent legal advice and adhered to the agreement until the deceased's death. The deceased left an estate having a net worth of \$700,000 and the surviving spouse was living under the poverty line. The Court set aside the domestic contract on the basis that the circumstances warranted the court intervening - Ms. Butts had been living below the poverty line and there was no reason why she should be denied support under the *SLRA*.<sup>55</sup> The Court applied the judicial discretion given to it under section 63(4) of the *SLRA* to set aside the agreement and order support:

*...Section 63(4) gives the court a broad judicial discretion to award support to a dependant, as defined in s. 57, notwithstanding the existence of any prior agreement or waiver. The language of s. 63(4) could not be broader or clearer in its purpose and is obviously aimed at achieving justice and equity at the date of the hearing, notwithstanding what the parties might have agreed to earlier on.*<sup>56</sup>

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<sup>53</sup> *Phillips-Renwick*, *supra* note 21, at para 48.

<sup>54</sup> *Butts v Butts Estate*, [1999] OJ No 1672 ["*Butts Estate*"] .

<sup>55</sup> *Ibid*, at paras 4,6, 7 and 43.

<sup>56</sup> *Ibid*, at para 45.

The Court held that the support paid under the separation agreement was “patently inadequate and must be corrected on any objective approach to the facts of [the] case”.<sup>57</sup> Clearly, public policy reasons favour interfering in a domestic contract that does not provide adequate support.

In fact, in an earlier case, *Boyko v. Boyko Estate*,<sup>58</sup> where an interim application for increased support by the spouse from the deceased’s estate was made, the Court ignored a domestic contract. In this case, the surviving spouse made an interim support application so that she could spend time with her siblings in North Carolina. The spouses had entered into a marriage contract prior to their marriage which provided that should the deceased predecease the surviving spouse, she was entitled to \$1,500 from the estate until she should die, cohabit or remarry and all of her medical and dental expenses would be covered by the estate.<sup>59</sup> The surviving spouse made an application pursuant to s. 58 of the *SLRA* for support. The Court held that the issue before the Court was whether the deceased had made adequate provision for the surviving spouse and citing *Swire v. Swire*,<sup>60</sup> domestic contracts do not deprive the court of ordering support pursuant to the *SLRA*.<sup>61</sup>

The Court completely ignored the provisions in the domestic contract and held that it was not in the public interest to force the surviving spouse to live a lonely life in Toronto because the current level of support would not be sufficient for life in North Carolina. Proper support would allow the surviving spouse to live gracefully with some happiness and is more than “maintenance”. The Court ordered the estate pay \$3,000 a month to the surviving spouse.

Adequate provision does not mean support proportional to the size of the estate. In *Middel v. Vanden Top Estate*,<sup>62</sup> the Court held that a former spouse was provided with adequate support despite the large estate and relatively small support. In this case, the deceased husband had become a highly successful businessman whose success was achieved many years after his separation and divorce. The parties married in 1958 and separated in 1973. No support order was made and the spouse did not bring a claim for support. Thirty years after her separation and 23 years after her divorce, the spouse approached the then living husband.

The Court noted that the surviving dependant was cagey in her transparency to the Court about what her assets were.<sup>63</sup> In 2003, the husband who was battling cancer received a card from

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<sup>57</sup> *Butts Estate* was cited in *Phillips-Renwick* where arguments were made that Ms. Phillips-Renwick who entered in a cohabitation agreement said she was not provided with adequate support. In *Phillips-Renwick* the Court held that there was no reason to set aside the domestic contract as the deceased had sufficiently provided for the surviving spouse. As a result of his death she received \$100,000 from Canada Pension, RRSP employee benefits and a life interest in the home. The Court found that the balance of the estate was at most \$79,800.00. The Court held that wife had been adequately provided for and therefore the support was not warranted under s. 63(4). [See *Phillips-Renwick*, *supra* note 21 at para. 60].

<sup>58</sup> 1998 CarswellOnt 1447.

<sup>59</sup> *Ibid*, at para 1.

<sup>60</sup> 1986 OJ No 2023 (Ont Surr Ct).

<sup>61</sup> *Ibid*, at para 9.

<sup>62</sup> 2010 ONSC 2951 [“*Middel*”].

<sup>63</sup> As it turned out, one of the adult children of the marriage filed an affidavit that contradicted his mother’s evidence and explained that the property received by the mother upon separation was a three unit house in which the father

his ex-spouse. The card spoke about regrets and sadness about his cancer diagnoses. It also expressed that she was having financial difficulties. Over the next 5 years, the deceased provided her with \$37,000 in cash (or \$7,400 per year) and he purchased an annuity of \$761 per month for his ex-spouse for the rest of her life. At the time the payment was made, the deceased had no obligation to provide her with any support. The Court found that despite the fact that the deceased had no legal obligation to the applicant, he did make provision for her. After 30 years of estrangement, he assisted the applicant and was generous to her. The provision he made for her was to provide her with shelter in the home of her choice for the rest of her life, provide her with an annual income of \$9,120 for the rest of her life. The income provided comes close to balancing her budget. More importantly, the deceased told his lawyer that he already made provision for the applicant. In all the circumstances, the Court held that adequate support was made for the ex-spouse.

Judges are not limited to needs-based economics. Adequate provision is not an exact science and it is largely a matter of judicial discretion.<sup>64</sup> While the above cases deal with domestic contracts and separation agreements, another approach is to argue that the adequacy of the support is tied to a moral duty to provide support. While a court may not state that a domestic contract should not be enforceable because it offends the moral obligations of a party, in essence, a number of grounds listed above would adequately fall into that category.<sup>65</sup>

## CONCLUSION

While parties are free to enter into domestic contracts and courts have said that they are hesitant to interfere in such contracts, a domestic contract is certainly not a full proof shield to fight an *SLRA* application. Creative lawyers and the judiciary can rely on a multitude of arguments to get a fair result for the surviving spouse despite a domestic contract that seemingly disallows a dependant's support or a share of an estate. While our laws in Ontario are quite developed in this area, advocates await the next case against an estate trustee with its own unique facts and circumstances to continue the commentary.

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intended to provide income to the applicant to rent out. The applicant also had lake lots that she sold. [*Ibid*, *Middel* at para 21].

<sup>64</sup> *Juffs v Investors Group Financial*, [2005] O.J. No 3872, additional reasons at 2005 CarswellOnt 4959 (Ont. SCJ), leave to appeal to Div. Ct. refused 2005 CarswellOnt 7474 (Div Ct).

<sup>65</sup> Note that *Cummings v. Cummings*, [2004] OJ No. 90 (CA) was a case for support between two adult children. While the surviving spouse of the deceased did not make a support claim, the Court of Appeal upheld a lower court decision which gave consideration to the effect of a dependant's support order on all dependants. An argument of moral obligation should not be made in Ontario in the context of the enforcement of a domestic contract. Rather, it should be made under the guise of adequate support or unconscionability, for example. This is particularly the case when there is Ontario case law that departs from Western Canada, which permits a moral inquiry.