



SUPREME COURT OF CANADA

CITATION: Anderson v.
Anderson, 2023 SCC 13

APPEAL HEARD: December 5,
2022

JUDGMENT RENDERED: May 12,
2023

DOCKET: 39884

BETWEEN:

James Allan Anderson
Appellant

and

Diana Anderson
Respondent

CORAM: Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal and O’Bonsawin JJ.

REASONS FOR Karakatsanis J. (Côté, Rowe, Martin, Kasirer, Jamal and
JUDGMENT: O’Bonsawin JJ. concurring)
(paras. 1 to 85)

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James Allan Anderson

Appellant

v.

Diana Anderson

Respondent

Indexed as: Anderson v. Anderson

2023 SCC 13

File No.: 39884.

2022: December 5; 2023: May 12.

Present: Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal and O’Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Family law — Family assets — Domestic contracts — Parties entering into agreement regarding division of family property without receiving independent legal advice — Agreement failing to meet statutory requirements entitling it to presumptive enforceability under provincial family property legislation — Husband claiming that enforcing agreement would be unfair and seeking division of family property pursuant to applicable legislation — Framework governing evaluation of agreements that are not presumptively binding under provincial family property legislation — Whether

Miglin framework applies to all domestic contracts — The Family Property Act, S.S. 1997, c. F-6.3, ss. 38, 40.

At the end of a three-year marriage, the wife and the husband executed a separation agreement which essentially provided that each party would keep the property held in their name and give up all rights to the other's property, except for the family home and the household goods. The agreement, prepared by the wife, was executed at the end of a meeting with two friends of the parties, who witnessed its execution. There was no financial disclosure between the parties and neither party had the benefit of independent legal advice before signing. Nearly 17 months after the wife petitioned for divorce, the husband counter-petitioned and sought family property division, arguing that the agreement was signed without legal advice and under duress. The trial judge found that the agreement was not binding and declined to give it any weight. He instead equalized the family property under Saskatchewan's family property legislation, *The Family Property Act* ("FPA"), and ordered the wife to pay the husband a net equalization payment of about \$90,000. The Court of Appeal set aside the trial judge's division of family property and found that the agreement was binding. It applied the framework developed by the Court in *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, to conclude that the agreement should be afforded great weight. Based on family property values at the date closest in time to the agreement, the Court of Appeal ordered the husband to pay the wife about \$5,000.

Held: The appeal should be allowed.

Domestic contracts should generally be encouraged and supported by courts, within the bounds permitted by the legislature, absent a compelling reason to discount the agreement. This deference flows from the recognition that self-sufficiency, autonomy and finality are important objectives in the family law context. In the instant case, the agreement between the wife and the husband was binding. It was fair and equitable, given the criteria and objectives of the *FPA*. The family home and household goods should be divided as of the date of the trial, resulting in a payment of \$43,382.63, owed by the wife to the husband.

Domestic contracts present unique advantages and concerns. On the one hand, parties are generally better positioned than courts to understand the distinctive needs and circumstances of their private relationship. On the other, parties to domestic contracts are particularly vulnerable to unfairness and exploitation, given the unique environment in which domestic contracts are negotiated and concluded. The Court's jurisprudence on domestic contracts, including *Miglin*, signals to courts to approach domestic contracts with caution and to have regard to important procedural protections that help ensure the deal struck is fair. Moreover, while the Court has long supported the freedom of parties to settle their domestic affairs privately, respect for private ordering cannot be permitted to thwart the public policy objectives enshrined in family law legislation. Courts must approach family law settlements with a view to balancing the values of contractual autonomy and certainty with concerns of fairness. In essence, courts must review domestic contracts with particular sensitivity to the vulnerabilities that can arise in the family law context, without presuming that spouses lack the agency

to contract simply because the agreement was negotiated in an emotionally stressful context.

While useful general principles emerge from *Miglin* to guide courts in approaching domestic contracts, *Miglin* is not, and was never intended to be, a framework of general applicability for courts dealing with all types of domestic contracts. The *Miglin* framework, which arose within a different statutory context, should not be transposed into provincial family property legislation. Rather, the court's interpretive exercise is statute-specific, and differences between property division and spousal support, division of powers concerns, and the distinctive features of particular statutes mandate a tailored analytical approach.

Like other provincial family property legislation, the *FPA* begins from a presumption of equal distribution, but permits spouses to contract out of the scheme in certain circumstances. In particular, the *FPA* recognizes two types of domestic contracts dealing with family property. Interspousal contracts, under s. 38 of the *FPA*, are presumptively enforceable if they conform to the statutory formalities set out in that provision, including that the parties formally acknowledge that they understand the nature and effect of the terms of the agreement in the presence of independent counsel. Domestic contracts that do not meet the statutory requirements set out in s. 38 may still be considered by a court, and, under s. 40, assigned whatever weight the court considers reasonable. Therefore, while the *FPA* begins from a presumption of equal distribution,

a written agreement between parties is an important factor in determining whether departure from equal division is fair and equitable in the circumstances.

In determining whether to consider an agreement that does not qualify as an interspousal contract under the *FPA*, the court should be alive to any concerns that the agreement is not valid according to ordinary contract law principles. Assuming there is a valid agreement, the court's attention shifts to whether the agreement merits consideration in the equalization analysis. The court must assess the agreement for its procedural integrity, where such concerns are raised. By examining the integrity of the bargaining process for undue pressure, or exploitation of a power imbalance or other vulnerability, the judge can determine whether the parties concluded the agreement freely and understanding its meaning and consequences. While safeguards like financial disclosure and independent legal advice provide critical protection in the family law context, they are not required by the legislation and their absence, without more, does not necessarily impugn the fairness of an agreement. Given the respect for spousal autonomy reflected in both the legislation and the jurisprudence, unless the court is satisfied that the agreement arose from an unfair bargaining process, an agreement is entitled to serious consideration.

Once the court is satisfied that an agreement is entitled to consideration, it may assess the substantive fairness of the agreement, in order to determine how much weight to afford the agreement in fashioning an order for property division. Ultimately, the weight given to the agreement in an order for the distribution of property depends

on how its substance accords with what is fair and equitable in the circumstances, considering the objectives and factors of the legislative scheme. The purposes and criteria of the governing statute provide an objective yardstick against which to assess the parties' subjective understanding of what is fair, and limit the risk that parties will depart significantly from public policy goals expressed by the legislature.

In the instant case, the agreement was binding and there were no substantiated concerns with its fairness. The agreement is short and uncomplicated and reflects the intention of the parties to effect a clean break from their partnership. A lack of independent legal advice and formal disclosure can undermine informed choice, but was not troubling here because the husband could not point to any resulting prejudice: there was no suggestion that the absence of these safeguards undermined either the integrity of the bargaining process or the fairness of the agreement. The agreement was therefore entitled to serious consideration given that it reflects the parties' understanding of what division of property was fair in the context of their relationship at the time of separation. The trial judge erred in finding the agreement not binding on the parties and failing to consider its substance in his property distribution, and while the Court of Appeal concluded the agreement should be given great weight, it equalized the family property in a way that defeated the intent of the parties and resulted in unfairness. Besides the family home and household goods, equal division of the family property under the *FPA* results in unfairness. The parties were best positioned to organize the limited family property resulting from their short marriage and, given all

the circumstances, the most fair and equitable solution is for their simple agreement to be given effect.

Cases Cited

Considered: *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303; *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 S.C.R. 550; *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231; *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775; *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295; **referred to:** *Droit de la famille — 152477*, 2015 QCCA 1618; *Association de médiation familiale du Québec v. Bouvier*, 2021 SCC 54; *Colucci v. Colucci*, 2021 SCC 24; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; *New Brunswick (Minister of Health and Community Services) v. C. (G.C.)*, [1988] 1 S.C.R. 1073; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014; *Boston v. Boston*, 2001 SCC 43, [2001] 2 S.C.R. 413; *Tysseland v. Tysseland*, 2022 SKCA 39; *Ackerman v. Ackerman*, 2014 SKCA 137, 451 Sask. R. 132; *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55, [2007] 3 S.C.R. 679; *Tether v. Tether*, 2008 SKCA 126, 314 Sask. R. 121.

Statutes and Regulations Cited

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Matrimonial Property Act, R.S.N.S. 1989, c. 275, ss. 12(1), 29.

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Shaffer, Martha, and Carol Rogerson. “Contracting Spousal Support: Thinking Through *Miglin*” (2003), 21 *C.F.L.Q.* 49.

Thompson, D. A. Rollie. “When is a Family Law Contract *Not* Invalid, Unenforceable, Overridden or Varied?” (2001), 19 *C.F.L.Q.* 399.

APPEAL from a judgment of the Saskatchewan Court of Appeal (Ottenbreit, Caldwell and Schwann JJ.A.), 2021 SKCA 117, 463 D.L.R. (4th) 217, 61 R.F.L. (8th) 265, [2021] 11 W.W.R. 563, [2021] S.J. No. 381 (QL), 2021 CarswellSask 513 (WL), setting aside a decision of Brown J., 2019 SKQB 35, [2019] S.J. No. 56 (QL), 2019 CarswellSask 72 (WL). Appeal allowed.

David A. Couture and Monica R. Couture, for the appellant.

Christopher N. H. Butz and M. Danish Shah, for the respondent.

The judgment of the Court was delivered by

KARAKATSANIS J. —

I. Overview

[1] In the family law context, private agreements present unique advantages and concerns. On the one hand, individual autonomy to settle domestic affairs should be encouraged, as parties are generally better positioned than courts to understand the distinctive needs and circumstances of their private relationships. On the other, parties

to domestic contracts are particularly vulnerable to unfairness and exploitation, given the unique environment in which domestic contracts are negotiated and concluded. As a result, family law legislation typically authorizes judges to review a domestic contract. The degree of deference afforded to a domestic contract under the governing statute often depends on whether it meets statutory formalities, such as whether the parties received independent legal advice.

[2] This appeal raises the issue of how courts should approach and weigh a domestic contract that purports to opt out of a provincial property scheme, but fails to meet the statutory requirements that would entitle it to presumptive enforceability. In particular, this appeal asks whether the analytical framework this Court developed in *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303 — which dealt with spousal support under the federal *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) — is appropriately applied to such a domestic contract.

[3] This Court’s jurisprudence on domestic contracts, including *Miglin*, recognizes that the breakdown of a spousal relationship is often wrought with emotional turmoil and can give rise to vulnerabilities that undermine the fairness of domestic contracts. The devastating impact of a separation means that parties to a separation agreement may be “ill-equipped to form decisions of a permanent and legally binding nature” (J. D. Payne and M. A. Payne, *Dealing with Family Law: A Canadian Guide* (1993), at p. 78, quoted in *Miglin*, at para. 74). *Miglin* and the cases that follow it therefore signal to courts to approach domestic agreements with caution

and to have regard to important procedural protections that help ensure the deal struck is fair. Moreover, while this Court has long supported the freedom of parties to settle their domestic affairs privately, respect for private ordering cannot be permitted to thwart the public policy objectives enshrined in family law legislation. Therefore, in deciding how much weight to give the agreement, a reviewing judge generally examines both the fairness of the bargaining process and the substance of the agreement, in accordance with the legislative scheme.

[4] Like other provincial family property statutes, *The Family Property Act*, S.S. 1997, c. F-6.3 (*FPA* or Act), of Saskatchewan begins from a presumption of equal distribution, but permits spouses to contract out of the scheme in certain circumstances (relevant provisions of the *FPA* are reproduced in the appendix to these reasons). In particular, the *FPA* recognizes two types of domestic contracts dealing with family property. “Interspousal contracts” under s. 38 of the Act are presumptively enforceable if they conform to the statutory formalities set out in that provision, including that the parties formally acknowledge that they understand the nature and effect of the terms of the agreement in the presence of independent counsel. Domestic contracts that do not meet the statutory requirements set out in s. 38 may still be considered by a court, and, under s. 40, assigned “whatever weight [the court] considers reasonable”. While the Act begins from a presumption of equal distribution, a written agreement between the parties is an important factor in determining whether departure from equal division is fair and equitable in the circumstances (see s. 21(1) and (3)(a)).

[5] The agreement at issue was executed by separating spouses at the end of a three-year marriage. The agreement is simple: it provides essentially that each party will keep the property held in their name and give up all rights to the other's property, except for the family home and the household goods. Because no lawyers were involved, the agreement is not presumptively enforceable, but can be considered by the court in determining whether to depart from equal distribution under s. 21.

[6] The trial judge found the domestic contract was not binding on the parties and declined to give it any weight. He ordered the wife to pay the husband more than \$90,000 (2019 SKQB 35). The Saskatchewan Court of Appeal found the trial judge erred in this respect, and applied the *Miglin* framework to conclude that the agreement should be afforded great weight (2021 SKCA 117, 463 D.L.R. (4th) 217). The Court of Appeal divided the family property using the trial judge's property valuation at the date closest in time to the agreement, and ordered the husband to pay the wife about \$5,000.

[7] I agree with the Court of Appeal that the trial judge erred. But I would not transpose the *Miglin* framework, which arose within a different statutory context, into provincial family property legislation. While useful general principles emerge from *Miglin* to guide courts in approaching domestic contracts, *Miglin* is not, and was never intended to be, a framework of general applicability for courts in dealing with all types of domestic contracts. Rather, the judge's interpretive exercise is statute-specific, and differences between property division and spousal support, division of powers

concerns, and the distinctive features of the Saskatchewan statute mandate a tailored analytical approach.

[8] In determining whether to consider an agreement that does not qualify as an interspousal contract under the *FPA*, the court must first assess the agreement for its procedural integrity, where such concerns are raised. By examining the integrity of the bargaining process for undue pressure, or exploitation of a power imbalance or other vulnerability, the judge can determine whether the parties executed the agreement freely and understanding its meaning and consequences. While safeguards like financial disclosure and independent legal advice provide critical protection in the family law context, they are not required by the legislation and their absence, without more, does not necessarily impugn the fairness of an agreement. Given the respect for spousal autonomy reflected in both the legislation and the jurisprudence, unless the court is satisfied that the agreement arose from an unfair bargaining process, an agreement is entitled to serious consideration under s. 21 of the *FPA*.

[9] Once the court is satisfied that an agreement is entitled to consideration, it may assess the substantive fairness of the agreement, in order to determine how much weight to afford the agreement in fashioning an order for property division. The weight to ascribe to the substance of the agreement will ultimately be determined by what is fair and equitable according to the scheme set out by the *FPA*.

[10] I agree with the Court of Appeal's conclusion that the agreement was binding and there were no substantiated concerns with its fairness. A lack of

independent legal advice and formal disclosure can undermine informed choice, but was not troubling here because the husband could not point to any resulting prejudice: there was no suggestion that the absence of these safeguards undermined either the integrity of the bargaining process or the fairness of the agreement. As a result, the agreement was entitled to serious consideration. But the trial judge erred in finding the agreement was not binding on the parties and in failing to consider its substance in his property distribution. And while the Court of Appeal concluded the agreement should be given great weight, it equalized the family property in a way that defeated the intent of the parties and resulted in unfairness.

[11] Given the circumstances, including the brief marriage and the assets each party brought into the marriage, the simple agreement to keep individual assets and divide the family home equally was fair and equitable, given the criteria and objectives of the *FPA*. I would allow the appeal, set aside the decision of the Court of Appeal with respect to the division of family property, and divide the family home and household goods as of the date of trial. I would order that the wife pay the husband \$43,382.63.

II. Background

[12] Diana Anderson and James Allan Anderson were married for three years and separated on May 11, 2015. This was not the first marriage for either party and both came into the marriage with considerable assets, including houses, vehicles, personal property, RRSPs and pensions. They had no children. On July 19, 2015, the parties met with two friends, who brought the couple together to discuss the possibility

of reconciliation. It soon became clear that reconciliation was not a possibility. At the end of the meeting, the parties executed an agreement, prepared by the wife, dividing the family property. It was witnessed by their two friends. There was no financial disclosure between the parties and neither party had the benefit of independent legal advice before signing. While the wife recommended that the husband “think it over and talk to a lawyer”, he declined and signed immediately (Trial Reasons, at para. 79 (CanLII)).

[13] The agreement divides all of the family property except for the family home. It largely provides that the parties’ respective assets and liabilities are to remain separate, besides the family home and a truck that the wife agreed to reconvey to the husband.

[14] Both parties contributed equally to the down payment on the family home and the couple split home ownership costs equally, including mortgage, tax and utilities. At the time of separation, there was no equity in the home and the parties would have suffered a loss had they sold it. The agreement thus provides that the home would be dealt with later. The parties agreed to have a valuation done on the home and, if they could not agree on its division, to seek mediation. After the separation, the wife continued to live in the home and the husband continued to pay half of the property taxes until June 2017, and half of the mortgage until the trial in June 2018.

[15] The agreement also provides that the wife would give up any right to the husband’s business interests. During the marriage, the husband invested in Globe-Elite

Electrical Contractors Ltd., the company at which he worked. The wife considered this to be an improvident investment and refused to contribute to the share purchase. To invest, the husband borrowed a substantial sum of money from his sister and refinanced the home he had brought into the marriage. The company performed poorly in the years leading to the separation, but performed “very” well in 2015, at the time of separation, returning a net corporate profit (Trial Reasons, at para. 27). After 2015, “there were no good years with losses in each subsequent year” (para. 72).

[16] Following the reconciliation meeting, the parties began to perform the terms of the agreement. The husband retrieved his furniture from the family home, cashed in some of his RRSPs, and the wife reconveyed the truck to the husband. However, the husband was not responsive to the wife’s attempts to deal with the family home. The wife’s lawyer subsequently contacted the husband to ask him to formalize the agreement according to the requirements of s. 38 of the *FPA*, which would have made the agreement presumptively enforceable. The wife’s lawyer sent another letter to the husband seeking to value the husband’s business interests. The husband did not respond to these overtures. Nor did he challenge or repudiate the agreement.

[17] On December 10, 2015, the wife petitioned seeking a divorce and costs, but not spousal support or property division. On May 5, 2017, nearly 17 months after the wife filed her petition and nearly 2 years after the agreement was signed, the husband issued an answer and counter-petition in which he formally claimed for family

property division and argued the agreement was signed without legal advice and under duress.

[18] The trial judge held that the agreement was unenforceable, finding the lack of independent legal advice to be “most troubling” (para. 108). He found the agreement was “more akin to an agreement to agree than a contract”, as it deferred the issue of the family home to be dealt with at a later date (para. 114; see also para. 109). The trial judge did not consider the substance of the agreement in dividing the family property, and instead equalized the family property under the *FPA*. For equalization purposes, the trial judge valued many of the parties’ assets and debts as of May 2017, the date of the husband’s counter-petition, but valued the parties’ pensions, investments and the family home as of the date of adjudication in June 2018. Rather than give the substance of the agreement any weight, the trial judge exercised his equitable discretion under the *FPA* to reduce the equalization payment owed by the wife by \$8,000, given the husband’s refusal to communicate about the family home and his delay in filing for property division, which resulted in “additional expense and consternation” for the wife (para. 278). The wife was ordered to pay the husband a net equalization payment of \$62,646.98, and either an RRSP rollover valued at \$37,089.69 or a further cash payment of \$27,817.27, for a total of about \$90,000 (para. 280).

[19] The Saskatchewan Court of Appeal set aside the trial judge’s order with respect to division of family property and costs, finding he erred in his interpretation of the agreement in several respects. Among the errors identified, the Court of Appeal

held that the trial judge placed too much weight on the lack of independent legal advice, which is not a requirement under s. 40 of the *FPA*. The Court of Appeal found that the agreement was a binding contract, not an agreement to agree, and, having regard to the *Miglin* framework, concluded that it was entitled to great weight. The Court of Appeal reasoned that the family property should be valued at the date closest in time to the agreement. The Court of Appeal divided the family property using values found by the trial judge as of December 2015, the date of the wife's divorce petition, and ordered the husband to pay the wife \$4,914.95.

III. Analysis

[20] This appeal asks how a judge should evaluate an agreement that does not meet the formal requirements of a presumptively enforceable agreement under provincial family property legislation. The specific question is whether the *Miglin* framework ought to apply to agreements that are not presumptively binding under the *FPA*.

[21] Noting the inconsistent treatment by trial judges of agreements that do not meet the definition of an interspousal contract, the Court of Appeal set out a framework for courts to apply in assessing the weight to afford an agreement under s. 40 of the *FPA*. The Court of Appeal's framework asks first whether the agreement is a valid agreement according to contract law principles. If it is, the burden shifts to the party seeking to discredit the agreement to show that (1) there were inequities in the bargaining process; (2) the substance of the agreement is unfair in that it departs

substantially from the objectives of the *FPA*; or (3) something has changed since the agreement was concluded such that it no longer reflects the parties' intentions when the agreement was entered into or no longer complies with statutory objectives. If the challenging party cannot discharge their burden as to these steps, the agreement is to be given great weight by the court. This analysis mirrors the framework set out by this Court in *Miglin*.

[22] The husband contends that the application of the *Miglin* framework is inappropriate, given the authority granted by s. 40 to give an agreement between spouses "whatever weight" the court considers reasonable. He submits that the framework creates a presumption of great weight unless the challenging party can discredit the agreement, and undermines the broad discretion conferred by s. 40.

[23] I agree that it is inappropriate to import the *Miglin* framework without modification in light of the structure of the *FPA* and the nature of family property division. Still, principles from *Miglin* and other cases dealing with domestic contracts help inform judges' exercise of discretion under s. 40 of the *FPA*. I first canvass those cases before turning to interpret the Saskatchewan legislation.

[24] Finally, I turn to the application of the legislation to the agreement. I examine first whether the trial judge erred in finding the agreement was not binding and failing to give it any weight. I conclude he did and agree with the Court of Appeal that the substance of the agreement should be seriously considered in making a property

division order under the Act. I then examine the property division undertaken by the courts below and the proper remedy.

A. *Domestic Contracts: Miglin and Later Cases*

[25] A domestic contract is an agreement between spouses designed to organize some aspect of the couple's affairs, be it child support, custody, spousal support or family property division. The agreement may be concluded at the outset of a spousal relationship, during a spousal relationship, or at the time of separation. Over the past two decades, this Court has interpreted provisions dealing with domestic contracts in a variety of federal and provincial statutes, beginning with *Miglin*, the decision at the heart of the Court of Appeal's analysis below. While certain principles of general application emerge from this jurisprudence, the case law also reveals that a statute-specific approach must be taken when considering such contracts.

[26] In *Miglin*, Bastarache and Arbour JJ., writing for a majority of the Court, adopted a contextual framework to discern the weight to be afforded to separation agreements dealing with spousal support under s. 15.2 of the *Divorce Act*. Section 15.2(4) directs judges to consider several factors in making a spousal support order, including any domestic agreement, and s. 15.2(6) instructs that a support order should advance certain objectives. The first stage of the *Miglin* framework examines fairness at the time the agreement was concluded. It proceeds in two parts. First, the court must evaluate the "circumstances surrounding the negotiation and execution of the agreement" to determine whether there were any vulnerabilities or circumstances

of oppression that affected the bargaining process (para. 92; see also para. 81). This includes looking to whether the parties had professional assistance, such as legal counsel. Second, the court must assess the substance of the agreement to determine whether it is “in substantial compliance with the general objectives of the [legislation] at its time of creation” (para. 87).

[27] The second stage of *Miglin* looks again to the substance of the agreement at the time of its enforcement to evaluate whether it still reflects the original intentions of the parties and remains consistent with the objectives of the Act. In essence, a court asks whether changes in circumstances make the agreement unfair to enforce today.

[28] The analysis in *Miglin* was borne out of the spousal support context and the relevant provisions, objectives and structure of the *Divorce Act*. As our jurisprudence has since recognized, these origins limit the applicability of the *Miglin* framework in other legislative contexts.

[29] In *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 S.C.R. 550, Bastarache J., writing for a majority of the Court, declined to import the *Miglin* framework to interpret s. 65(1) of the British Columbia *Family Relations Act*, R.S.B.C. 1996, c. 128, which allowed a court to set aside a presumptively enforceable marriage agreement where division of property would be unfair at the time of distribution (paras. 13 and 42). Bastarache J. held that to adopt “*Miglin* without qualification would distort the analytical structure” of the B.C. statute (para. 42). In *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, in considering four cases about retroactive awards for

child support, the Court again did not import a *Miglin* analysis in assessing whether to vary a prior child support agreement between the parties, noting that two of the appeals fell under the *Divorce Act*, while the other two fell under Alberta's provincial regime (paras. 50-53). Rather, the Court had regard to the specific scheme set out in the legislation (see paras. 54 and 75-79). Finally, in *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, this Court declined to apply the *Miglin* framework to interpret s. 17 of the *Divorce Act*, holding that the different language employed by Parliament in drafting ss. 15(2) and 17 warranted a different approach (paras. 25 and 28).

[30] Adding to comments from this Court, scholars have also questioned the extension of *Miglin*'s second stage of analysis to the family property division context. Spousal support is primarily a prospective and ongoing obligation that looks to future value, and is in part based on means and need; "[t]he default assumption is that, spousal support is open to modification in response to changing circumstances" (C. Rogerson, "Spousal Support Agreements and the Legacy of Miglin" (2012), 31 *C.F.L.Q.* 13, at p. 34; see also *Miglin*, at para. 209, per LeBel J., dissenting, but not on this point; *Droit de la famille — 152477*, 2015 QCCA 1618, at para. 16 (CanLII); R. Leckey, "A Common Law of the Family? Reflections on *Rick v. Brandsema*" (2009), 25 *Can. J. Fam. L.* 257, at p. 280). The division of family property, by contrast, is a chiefly retrospective exercise: it takes stock of property brought into and acquired during the spousal relationship as past contributions giving rise to a property entitlement (Leckey (2009), at p. 280). The relevance of post-execution changes in circumstances is far less obvious to separation agreements dealing with property division, as opposed to spousal

support. This subject matter distinction has similarly been recognized by this Court (see *Miglin*, at para. 76), and partly explains why we have never fully extended the *Miglin* framework to the division of family property (see *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at para. 39; *Hartshorne*, at para. 42).

[31] It is clear from this review that the *Miglin* framework is not a panacea for all domestic contracts. Rather, the analysis to be undertaken in determining whether to give weight to a domestic contract must be determined by reference to the distinctive nature of the underlying statutory scheme. This is especially so given our country's constitutional makeup: spousal support in the context of a divorce is dealt with under the federal *Divorce Act*, whereas, family property division, for instance, falls within the province's jurisdiction over property and civil rights. To automatically import a structured analysis grounded in federal legislation to interpret a discretionary provision in a provincial statute risks undermining the province's legislative authority (*D.B.S.*, at para. 55; see also M. Bailey, "Limits on Autonomy", in B. Atkin, ed., *The International Survey of Family Law* (2010), 95, at p. 97; Leckey (2009), at p. 287).

[32] Still, this Court has more broadly relied on principles from *Miglin* that address concerns common to domestic contracts. Although Bastarache J. declined to directly apply the *Miglin* framework in *Hartshorne* and *D.B.S.*, he relied on principles from *Miglin* in both cases, such as the judicial deference to be afforded to domestic contracts, to inform the inquiry to be taken under the relevant statutory scheme (see *D.B.S.*, at para. 76; *Hartshorne*, at paras. 40 and 43-45). And in *Rick*, this Court relied

on ideas from *Miglin* in reshaping the common law doctrine of unconscionability “to reflect the uniqueness of matrimonial bargains” (para. 43), recognizing a “duty to make full and honest disclosure of all relevant financial information” in the bargaining process (para. 47).

[33] So while the proper interpretive framework for assessing a domestic contract is statute-specific, useful principles emerge from *Miglin* and this Court’s subsequent jurisprudence that aid in this judicial assessment. As a starting point, domestic contracts should generally be encouraged and supported by courts, within the bounds permitted by the legislature, absent a compelling reason to discount the agreement (*Miglin*, at para. 46; *D.B.S.*, at para. 76; *Rick*, at para. 45). This deference flows from the recognition that self-sufficiency, autonomy and finality are important objectives in the family law context (*Miglin*, at para. 28). Not only are parties better placed than courts to understand what is fair within the context of their relationship, but the private resolution of family affairs outside the adversarial process avoids the cost and tumult of protracted litigation (paras. 45-46; see also *Association de médiation familiale du Québec v. Bouvier*, 2021 SCC 54, at paras. 44 and 134).

[34] At the same time, negotiations over domestic contracts take place in a singularly challenging environment, often at a time of acute emotional stress, “in which one or both of the parties may be particularly vulnerable” (*Miglin*, at para. 74; see also *Rick*, at para. 47; C. Rogerson, “*Miglin v. Miglin*, 2003 SCC 24: ‘They are Agreements Nonetheless’” (2003), 20 *Can. J. Fam. L.* 197, at p. 225). In this context, the simple

application of ordinary principles of contractual validity may be inadequate to quiet concerns of imbalance and exploitation (*Miglin*, at para. 77; M. Shaffer, “Domestic Contracts, Part II: The Supreme Court’s Decision in *Hartshorne v. Hartshorne*” (2004), 20 *Can. J. Fam. L.* 261, at p. 286). Rather, judges must approach family law settlements with a view to balancing the values of contractual autonomy and certainty with concerns of fairness. In essence, judges are to review domestic contracts with particular sensitivity to the vulnerabilities that can arise in the family law context, without presuming that spouses lack the agency to contract simply because the agreement was negotiated in an emotionally stressful context (*Miglin*, at para. 82; see also R. Leckey, “Contracting Claims and Family Law Feuds” (2007), 57 *U.T.L.J.* 1, at p. 14; Bailey, at p. 102 (citing the gendered unfairness that may arise from presuming incapacity to contract where a bargain is struck in an emotional context)).

[35] Concern about vulnerabilities may be countered by the presence of procedural safeguards. For example, full and frank disclosure of all relevant financial information between the parties can go far to assuage concerns of informational asymmetry (*Rick*, at para. 47; *Colucci v. Colucci*, 2021 SCC 24, at para. 51). Similarly, professional assistance, such as independent legal advice, can serve as a hallmark of a fair bargaining process (*Miglin*, at para. 82; *Rick*, at paras. 60-61), although the curative impact of legal advice in the negotiation of domestic contracts should not be taken as given. As La Forest J. recognized, dissenting in *Richardson v. Richardson*, [1987] 1 S.C.R. 857, divorce is one of the most stressful periods in an individual’s life and many people do “very unwise things, things that are anything but mature and sensible, even

when they consult legal counsel” (p. 883). Courts must have careful regard to the financial and emotional pressures that characterized the relationship, and not simply presume that legal advice immunizes a contract from unfairness.

[36] The rigour of a court’s review of a domestic contract depends on the authorizing statute. Some statutes provide that a domestic contract may only be set aside where it is unconscionable, for example (see *Family Law Act*, R.S.O. 1990, c. F.3, s. 33(4)), while others use the measures of “inequitable” or “undue influence” (see *Marital Property Act*, R.S.N.B. 2012, c. 107, s. 43; *Family Property and Support Act*, R.S.Y. 2002, c. 83, s. 2(4)). In any case, however, fairness review of a domestic contract typically looks both to the circumstances surrounding the contract’s execution and to the substance of the agreement, where such a review is authorized by governing legislation. As Abella J. stated in *Rick*, at para. 50: “. . . the best way to protect the finality of any negotiated agreement in family law is to ensure both its procedural and substantive integrity in accordance with the relevant legislative scheme”.

[37] An assessment of the substance of the agreement is generally determined by reference to the governing legislative regime. The purposes and criteria of the statute provide an objective yardstick against which to assess the parties’ subjective understanding of what is fair, and limit the risk that parties will depart significantly from public policy goals expressed by the legislature. Measuring the substance of the agreement against the legislation also helps to promote greater certainty for parties, who may rely on their statutory entitlements as a reference point in organizing their

personal affairs (M. Shaffer and C. Rogerson, “Contracting Spousal Support: Thinking Through *Miglin*” (2003), 21 *C.F.L.Q.* 49, at p. 61).

[38] In sum, our jurisprudence on domestic contracts, beginning with *Miglin*, values the principles of autonomy and certainty by encouraging parties to arrange their intimate affairs outside the court system. But the emotional complexities of family dynamics make contracting over domestic affairs unlike regular arm’s length transactions. The unique context out of which these agreements arise requires courts to approach them with keen awareness of their potential frailties to ensure fairness, having regard for the integrity of the bargaining process and the substance of the agreement.

B. *The Saskatchewan Family Property Act*

[39] Here, the Court of Appeal was not wrong to refer to principles from *Miglin* to structure judges’ exercise of discretion under s. 40 of the *FPA*. It failed, however, to appropriately tailor the analysis to the governing statutory scheme.

[40] Family property law has evolved in response to the modern understanding of marriage as a joint economic endeavour. In 1973, Laskin J. (as he then was) recognized in dissent that a wife’s contribution of labour to property in her husband’s name should entitle her to a share in that property in equity (*Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, at pp. 450-57). This opinion laid the groundwork for future cases like *Pettkus v. Becker*, [1980] 2 S.C.R. 834, and *Peter v. Beblow*, [1993] 1 S.C.R. 980, in which this Court extended the common law doctrine of the constructive trust to the

family law context in recognition of the non-economic contributions that can entitle a spouse to share in the property accumulated during a marriage.

[41] Similarly, years of advocacy by feminists culminated in reforms to family property legislation in the 1970s and 1980s to recognize “that women’s unpaid work in the home and in child care [give] rise to an entitlement to share property accumulated during the marriage” (M. Shaffer, “Developments in Family Law: The 2003-2004 Term” (2004), 26 *S.C.L.R.* (2d) 407, at p. 435). Thanks to these “hard fought gains”, provincial property division schemes across the country now uniformly presume that family property ought to be divided equally upon marital breakdown, subject to exceptions and judicial discretion (Shaffer, at p. 435; see *FPA*, s. 21(1); *Family Property Act*, R.S.A. 2000, c. F-4.7, s. 7(4); *Family Law Act*, S.B.C. 2011, c. 25, s. 81; *The Family Property Act*, C.C.S.M., c. F25, s. 13; *Marital Property Act* (N.B.), s. 2; *Family Law Act*, R.S.N.L. 1990, c. F-2, s. 19; *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, s. 12(1); *Family Law Act*, S.N.W.T. 1997, c. 18, s. 36(1); *Family Law Act* (Ont.), s. 5(1); *Family Law Act*, S.P.E.I. 1995, c. 12, s. 6(1); *Family Property and Support Act* (Yukon), s. 6(1)). While statutes across the provinces differ in structure — for example, on the statutory threshold for departing from equalization (see, e.g., *Family Law Act* (Ont.), s. 5(6) (using a threshold of “unconscionable”); *Family Property Act* (Alta.), s. 7(4) (using a threshold of “not . . . just and equitable”)) — all are grounded in a presumption of equal division.

[42] At the same time, nearly all provincial family property regimes let spouses contract out of the scheme by private agreement, so long as their agreements meet certain formal requirements, with the exception of Quebec (see *Civil Code of Québec*, art. 391; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at paras. 83-84). As a minimum, most regimes require that an agreement be in writing, signed by both parties, and witnessed to exempt family property from distribution under the statute. Some also include additional requirements, such as disclosure between the parties (see *Family Law Act* (B.C.), s. 93(3)(a); *Family Law Act* (N.W.T.), s. 8(4)(a); *Family Law Act* (Ont.), s. 56(4)(a); *Family Law Act* (P.E.I.), s. 55(4)(a)) or independent legal advice (see *Family Property Act* (Alta.), s. 38(2)). These statutory formalities serve to impress upon spouses the significance of their agreement and to encourage and preserve the validity of binding family property settlements (D. A. R. Thompson, “When is a Family Law Contract *Not* Invalid, Unenforceable, Overridden or Varied?” (2001), 19 *C.F.L.Q.* 399). If an agreement meets the legislative requirements, it can generally only be set aside upon a finding of significant unfairness or unconscionability (see, e.g., *Matrimonial Property Act* (N.S.), s. 29; *Family Law Act* (B.C.), s. 93(5)).

[43] The purpose of the Saskatchewan *FPA* is to recognize that childcare, household management and financial provision are the mutual responsibilities of spouses, and that joint contributions are inherent to the spousal relationship (see s. 20). The Act applies both to married spouses and unmarried spouses who have cohabited continuously for a period of two years or more (see s. 2(1) “spouse” (c)). Like other

provincial legislation, the *FPA* presumptively divides family property equally once an application is made by a spouse under the Act (see s. 21(1)).

[44] Even so, where distribution according to the Act would be unfair and inequitable, the *FPA* empowers courts to depart from equal distribution (see ss. 21 and 22). Section 21(3) sets out several factors to guide courts in making that assessment, including: any written agreement between the spouses (s. 21(3)(a)); the period of cohabitation (s. 21(3)(b)); the duration of the period the spouses have lived separate and apart (s. 21(3)(c)); the date when family property was acquired (s. 21(3)(d)); the contribution of a third party on behalf of a spouse to the family property (s. 21(3)(e)); the contribution of one spouse to the career or career potential of another (s. 21(3)(f)); the extent to which the means and earning capacity of each spouse has been affected by the relationship (s. 21(3)(g)); any debts or liabilities of a spouse (s. 21(3)(o)); and any other relevant fact or circumstance (s. 21(3)(q)). Once satisfied that departure from equal division is warranted under the legislation, the court is empowered to make any distribution order that it considers fair and equitable (ss. 21(2)(c) and 22(2)(c)). The overarching goal of the legislative inquiry is thus the determination of a fair and equitable property distribution in the particular circumstances of a relationship.

[45] Like other provincial family property legislation, the *FPA* permits spouses to contract out of the regime and resolve property matters by agreement. The Act distinguishes between a formalized agreement, referred to in the Act as an “interspousal

contract”, which is presumptively enforceable (s. 38), and other agreements that do not meet the requisite statutory formalities, but may still be considered and given weight by a court in making a fair and equitable property distribution (s. 40).

[46] To constitute an interspousal contract under s. 38, the agreement must be in writing, signed by each spouse, witnessed, and an acknowledgment must be made in the presence of a lawyer that the signing spouse understands the nature and effect of the contract, and is aware of and intends to give up any statutory entitlements under the *FPA*. Once formalized, an interspousal contract presumptively exempts the contemplated assets from division under the statutory scheme (s. 24(1)). The legislature has determined that these formalities serve as sufficient indicators of a valid agreement and a fair bargaining process, such that the agreement will be enforced by a court, unless a challenging party can show unconscionability or gross unfairness (s. 24(2)).

[47] Section 40 makes it clear that courts may still consider and give “whatever weight [the court] considers reasonable” to agreements that fail to meet one or more of the formalities required under s. 38. And while property dealt with by a s. 40 agreement is not presumptively exempted from distribution, s. 21(3)(a) of the Act directs courts to consider any written agreement in determining whether equal division would be unfair and inequitable. Accordingly, the Act places considerable value on spousal autonomy to contract over matters of property division.

[48] How, then, should a court approach, under s. 40, an agreement that is not an interspousal contract? As a starting point, the court should be alive to any concerns

that the agreement is not valid according to ordinary contract law principles, given that it lacks one or more of the formal assurances of an interspousal contract. If such concerns arise, the court will need to satisfy itself of the agreement's validity.

[49] Assuming there is a valid agreement, the court's attention shifts to whether that agreement merits consideration in the equalization analysis. Drawing on the general principles I have described from *Miglin* and subsequent cases, the relevant question under the *FPA* is whether any substantiated concerns about the agreement's formation were raised, such that it would be unfair to consider it. To show the agreement should not be considered, a party need not meet the stringent test of a common law defence to a contract's enforceability. Nonetheless, the challenging party must point to evidence that suggests that the agreement was tainted by undue pressure, circumstances of oppression, or exploitation of a power imbalance or other vulnerability, or that a defect in the bargaining process prevented the parties from understanding some essential part of the bargain. If the judge is satisfied that no such concerns are established, the agreement may be taken to represent the autonomous choice of the parties. While measures like independent legal advice and financial disclosure help ensure a fair bargaining process, they are not a statutory requirement under s. 40 of the *FPA*, and their absence alone is not determinative of the inquiry.

[50] If a court is satisfied of the agreement's validity and procedural integrity, it then may consider the agreement in determining the appropriate order for the distribution of property. Given the considerable value placed on spousal autonomy to

contract in the legislation and the jurisprudence, the substance of an agreement that represents the parties' subjective understanding of what property division was appropriate in the context of their relationship at the time of separation merits serious consideration.

[51] Ultimately, however, the weight given to the agreement in an order for the distribution of property depends on how its substance accords with what is fair and equitable in the circumstances, considering the objectives and factors of the legislative scheme. The court should assess the substance of the agreement in the context of the *FPA*, including the Act's starting presumption of equal division and the equitable considerations set out in s. 21(3) that judges must consider in order to determine whether departures from equal distribution are justified by the circumstances. Other provisions may also be of use. Section 22, for instance, holds that departures from equal division of the family home are only justified in extraordinary circumstances or where equal division would be unfair to a custodial parent. Section 23 exempts certain property from distribution entirely. The standard is not strict compliance with statutory entitlements, however, as such a review risks gutting the *FPA*'s enablement of private ordering (Leckey (2007), at p. 13). The question is whether the parties' autonomous choice at the time of separation falls within a range of fair and equitable possibilities contemplated by the *FPA*, by reference to the broad contextual factors set out in s. 21(3) and, where helpful, other provisions.

[52] How a court takes the agreement into account is ultimately at the court's discretion in fashioning an order under s. 21(2). That the agreement is not an interspousal contract under s. 38 does not preclude it from being fully adopted by a court in making an order for the division of property, if the court is satisfied that doing so is what is fair and equitable in the circumstances. But even where an agreement departs from the *FPA* in some way, the court may still respect those parts of the agreement it considers fair and equitable, while disregarding the rest.

[53] Having set out these principles, I turn to the application of this framework to the facts of the case.

IV. Application

[54] The agreement is short and uncomplicated. It reflects the intention of the parties to effect a clean break from their partnership, contemplating only division of the family home and household goods, and the reconveyance of a truck from the wife to the husband. This reconveyance has already taken place.

[55] The husband contends that the agreement was executed quickly and without legal advice or disclosure. He argues the Court of Appeal was insufficiently deferential to the trial judge's discretionary determinations and factual findings on disclosure and legal advice, as well as on the issue of whether the parties executed a valid agreement.

[56] Trial judges' decisions on matters of family law generally attract deference from appellate courts absent an error of law; a material misapprehension of the evidence; a failure to consider all relevant factors or a consideration of an irrelevant factor; or where the decision is so clearly wrong as to amount to an injustice (*New Brunswick (Minister of Health and Community Services) v. C. (G.C.)*, [1988] 1 S.C.R. 1073, at p. 1077; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at paras. 11-14; *Boston v. Boston*, 2001 SCC 43, [2001] 2 S.C.R. 413, at para. 73; *Tysseland v. Tysseland*, 2022 SKCA 39, at para. 12 (CanLII), citing *Ackerman v. Ackerman*, 2014 SKCA 137, 451 Sask. R. 132, at para. 23).

[57] I agree with the Court of Appeal that the trial judge erred in failing to consider the terms of the agreement in dividing the family property. There was nothing to suggest the agreement was not binding, that one party took advantage of the other or did not understand the bargain. As a result, the agreement was a relevant factor meriting serious consideration and the trial judge should have determined whether the substance of the agreement was fair and equitable by reference to the legislative scheme.

A. *Validity of the Agreement*

[58] In this case, the relevant issue of validity is whether there has been a “meeting of the minds”, or *consensus ad idem*, on all essential terms of the agreement (see *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55, [2007] 3 S.C.R. 679, at para. 16; J. D. McCamus, *The Law of Contracts* (3rd ed. 2020), at pp. 31 and 97; see also *Tether v. Tether*, 2008 SKCA 126, 314 Sask. R. 121, at para. 62).

[59] The trial judge found the agreement was more like an “agreement to agree” because it deferred final resolution of the family home until a later date and because the wife’s lawyer later contacted the husband to formalize the agreement under s. 38 and to value his business interests. The trial judge held these latter communication attempts undermined the wife’s contention that the agreement was binding. He also noted that the lack of legal advice “alone [was] sufficient to make [it] unenforceable”, although, as the Court of Appeal reasoned, it is unclear whether his comments on this issue went to his analysis of the agreement under s. 38 or s. 40 (Trial Reasons, at para. 108; C.A. reasons, at para. 66). The Court of Appeal concluded the trial judge erred on all points and that the agreement was binding (para. 100).

[60] I agree with the Court of Appeal that the trial judge erred in principle in finding this was not a binding agreement. Consensus on all essential terms does not mean that the parties cannot defer the final resolution of an issue where the parties, as here, have included in the agreement a detailed and objective method by which to resolve it later. The agreement stated that the home would be dealt with through buyout or sale; that the parties would obtain an independent valuation of the home; that the household goods would remain with the home or be itemized and divided; and that the parties would resolve any disputes through mediation.

[61] Nor is it necessary that the agreement resolve all issues of property division between the parties. There is a difference between a partial agreement and an incomplete agreement, and the Act does not require that an agreement deal with all

issues of family property before it can be given weight. Spouses may agree to exempt certain property from equal distribution, for example, while leaving the rest to be divided under the *FPA* (see, e.g., s. 24(3)).

[62] Finally, it is worth clarifying that, whatever the trial judge intended by his remark about the absence of legal advice, the involvement of counsel is not a prerequisite to enforceability under s. 40, as it is under s. 38. And I agree with the Court of Appeal that the trial judge erred in holding the wife's subsequent attempts to contact the husband suggested the agreement was an "agreement to agree". Nothing suggested the agreement was made conditional on the execution of a formal agreement, or that it did not represent a final resolution of the parties' family property division as between them.

[63] In my view, the Court of Appeal correctly concluded that the agreement was binding on the parties.

B. *Integrity of the Bargaining Process*

[64] The husband claims that enforcing the agreement would be unfair because the parties did not engage in formal financial disclosure or consult legal counsel before signing the agreement. Although the trial judge did not refer to disclosure in his reasons, he found that the parties "clearly had little understanding of the value of the assets and debts the other had" or their entitlements under the *FPA* (para. 111). The husband suggests that the first part of this statement reflects the substantial weight

placed by the trial judge on the lack of disclosure, and that the Court of Appeal ought to have deferred to this determination. But the Court of Appeal noted in its reasons that the husband did not “allude to inadequate disclosure or uneven knowledge of the parties’ respective assets and liabilities” in the proceeding (para. 103). On the issue of the parties’ understanding, the Court of Appeal highlighted evidence that revealed the parties learned of one another’s finances at the outset of the marriage (para. 114).

[65] As to the lack of legal advice, the Court of Appeal noted that the involvement of counsel is not a requirement under s. 40 and that the absence of counsel here did not work to create any unfairness, given the relatively short duration of the parties’ marriage and the comparable simplicity of the agreement (para. 104).

[66] I agree with the Court of Appeal that neither the lack of disclosure nor the lack of legal advice was a reason to discount the agreement. To begin, disclosure is not a statutory precondition to the enforceability of an agreement under the *FPA*, even for an interspousal contract. Rather, s. 27(1) provides that a court *may* order disclosure between spouses upon the commencement of an application under the *FPA*. This case is unlike *Colucci*, then, in which the entire child support scheme was predicated on disclosure between the parties (see paras. 48-50).

[67] Given that disclosure is not a legislative requirement, the lack of disclosure is only relevant if it undermined the fairness of the negotiation process. As this Court has noted several times, disclosure is critical in family law to prevent misinformation and exploitation (see *Rick*, at para. 47; *Colucci*, at para. 51). In the unconscionability

context, this Court has recognized a general duty to make full and frank disclosure of all relevant financial information in family law cases (*Rick*, at para. 47). Even in the common law of unconscionability, however, the goal of requiring disclosure between contracting parties is to prevent one party from misleading the other or from exploiting an asymmetry of information (paras. 47-48, 58 and 63). A lack of disclosure, on its own, will not necessarily call for judicial intervention (para. 49). A court may intervene, however, where a failure to disclose is deliberate and coupled with misinformation, or where a failure to disclose leads to an agreement that departs substantially from the objectives of the governing legislation (para. 53). In other words, the focus is on prejudice resulting from uneven access to information.

[68] Here, the lack of disclosure did not result in unfairness to either party. While the parties may not have been aware of the precise value of each other's assets and liabilities at the date of separation, there has been no suggestion that either party concealed important information or otherwise misled the other. Nor has there been a claim that disclosure was needed to cure an existing asymmetry of information resulting from an imbalance of power in the relationship. In fact, the husband has not pointed to any prejudice he experienced due to the lack of disclosure. This case is entirely unlike *Rick*, for example, in which this Court set aside a domestic contract where the husband deliberately failed to disclose significant assets and psychologically exploited his wife, who was mentally unstable, resulting in an agreement that substantially departed "from the relevant legislative objectives and from the parties' undisputed intention to have an equal division of assets" (para. 53).

[69] Similarly, legal advice was not required here to ensure a fair bargaining process. In finding the lack of legal advice to be “most troubling”, the trial judge stressed the role of counsel to counteract imbalances of bargaining power that can otherwise “carr[y] the day” in the negotiation of domestic agreements when spouses are unaware of their legal entitlements (Trial Reasons, at paras. 108 and 99). However, there was no evidence of any such imbalance between the parties to this case. As this Court has instructed, vulnerabilities are not simply to be presumed because agreements are negotiated and concluded in an emotionally stressful context; a finding of vulnerability must be grounded in evidence (*Miglin*, at para. 82).

[70] There is no doubt, as the trial judge recognized, that the involvement of counsel is an important safeguard to make sure parties understand the terms and effect of their agreement, as well as the rights they are giving up under the relevant statutory scheme. Just as with financial disclosure, the involvement of lawyers in the negotiation of a domestic contract helps to prevent prejudice arising from a vulnerability inherent in the parties’ relationship or the bargaining process. For instance, independent legal advice helps to compensate for imbalances or informational deficiencies that may result in an agreement that is substantially unfair to one or both of the parties. Moreover, independent legal advice and financial disclosure are often functionally intertwined, in that legal advice can be instrumental in realizing the benefits of full and frank disclosure. For instance, a party may not know to request disclosure, and may not understand the legal significance of any assets that *are* disclosed without the advice of counsel.

[71] Here, there was nothing to suggest that the parties did not understand the terms or effect of their agreement. Nor was there any assertion that the parties' relationship or its breakdown was characterized by vulnerability, imbalance or exploitation. And while the parties may not have been experts in the property division scheme set out by the *FPA*, the agreement's fairness, assessed below against the Act, is a reasonable proxy to ensure that any informational deficiency ultimately did not result in prejudice to either spouse. I note that the wife advised the husband to "think it over and talk to a lawyer" before signing the agreement, but he refused and signed immediately. I agree with the Court of Appeal that, in this case, the lack of legal advice did not "override the parties' contractual autonomy" or otherwise lead to unfairness in the bargaining process (para. 67).

[72] In short, there is no reason not to consider the agreement in dividing the family property. The questions that remain are what weight should be given to the substance of the agreement under s. 21, and whether the property division undertaken by the courts below was tainted by reviewable error.

C. *Distribution of Family Property*

[73] The trial judge ignored the substance of the agreement and equalized the family property according to the Act. In doing so, he failed to consider a relevant factor in the exercise of his discretion, and his order is therefore not entitled to deference. However, his findings of fact have not been challenged. In equalizing the family property, the trial judge made findings as to the value of the assets for three possible

dates: the date of the wife's petition for divorce (December 2015); the date of the husband's counter-petition for property division under the *FPA* (May 2017); and the date of trial (June 2018). He equalized most of the family property using the May 2017 values, but selected June 2018 as the proper date at which to value the family home, the parties' pensions and investments, and the husband's business interests, because those assets had changed in value post-separation due to market forces (Trial Reasons, at paras. 253, 261-62 and 264-65). As noted, the trial judge ultimately reduced the amount owing by the wife to the husband by \$8,000 to account for the husband's silence in the two years following the execution of the agreement.

[74] Having determined that the agreement was entitled to great weight, the Court of Appeal sought to give effect to it by dividing all of the family property as of the date of the wife's divorce petition in December 2015. The husband argues that the choice of this valuation date contravenes the statute, which provides that family property is to be valued as of the date of an application under the Act or the date of adjudication (see s. 2(1) "value"). Given that the wife did not apply for family property division in her divorce petition, so the argument goes, December 2015 is an inappropriate valuation date as there had been no application made under the *FPA* at that time.

[75] In my view, the approaches to dividing the family property taken by both courts are flawed and neither is fair and equitable in light of the terms of the agreement, the scheme set out by the *FPA*, and the passage of time in this case. While the trial

judge failed to consider the substance of the agreement in dividing the family property, the Court of Appeal's division actively undermined the agreement and resulted in unfairness. The inequity can be most clearly seen by looking to two key assets that were valued differently by the trial judge and the Court of Appeal, with significant consequences for the final order: the family home and the husband's business interests. Each court below equalized one of these assets in a way that led to a result that was unfair to the parties and defeated the intent of the agreement.

[76] Looking first to the family home, it is clear that the Court of Appeal's choice as to the valuation date resulted in an order that was not fair and equitable, regardless of whether it was at odds with s. 2(1) of the Act. The trial judge valued the family home as of the date of trial to give the husband an equal share of the equity to which he had been contributing throughout: the husband continued to pay half of the mortgage until the June 2018 date of trial. Moreover, the intention of the parties, as reflected in the agreement, was to defer the resolution of the issue of the home until a later date. To use the December 2015 value of the family home in dividing the family property would unfairly deprive the husband of his share in the growth of the home's equity, undermine the strong statutory presumption of equal division for the family home, and materially contradict the agreement (see ss. 21(3)(a) and (q) and 22(1)). In this respect, I agree with the trial judge that the husband should receive half the equity in the home as of the date of adjudication.

[77] Yet, while the trial judge's valuation of the family home was appropriate, division of the husband's business interests at either date chosen by the courts below was highly problematic. The Court of Appeal's approach grants the wife a windfall by equalizing those interests at a time when the business was performing uncharacteristically well, when the parties had agreed that the wife would have no interest in the business at all. According to the record, 2015 was the only year of the husband's investment in Globe-Elite in which the company generated a net positive return. Under the terms of the agreement, the wife surrendered *all* rights to the husband's business interests at the time of separation in July 2015, when the company's value was at its highest. The business lost money in every subsequent year, and the value of the husband's interest declined by \$160,000 between December 2015 and May 2017 (Trial Reasons, at para. 266). The trial judge found it was not "fair, reasonable or appropriate" to use the high December 2015 valuation of Globe-Elite, given the subsequent fiscal downturn the company experienced (paras. 181-82). I agree. To grant the wife an inflated share of the husband's interest in the company would be unfair to the husband and directly contradicts the clear intentions of the parties at the time of forming their agreement.

[78] But while a December 2015 valuation date would grant the wife a windfall, the trial judge's June 2018 valuation date would work to her significant disadvantage by forcing her to share in the burden of the business's poor performance. Throughout the marriage, the wife disagreed with the husband's decision to invest in the business and refused to contribute to the share purchase. The husband incurred substantial debt

in his name to finance the investment because the wife wanted no part in it (see s. 21(3)(o)). Because the value of the investment only decreased over time, a later valuation date works to the financial advantage of the husband in any division of those interests. Given that the husband waited nearly two years to challenge the agreement and apply for property division, the selection of a valuation date that not only undermines the terms of the agreement, but rewards the husband's delay would produce an order that is "unfair and inequitable" in the circumstances (see s. 21(2)). Just as the wife should not share in the business's profits, so she should not be held responsible for its post-separation losses.

[79] As the Court of Appeal's application of the *FPA* was clearly wrong, the question of the proper remedy remains. In my view, nothing would be served by sending this case back to be retried after all this time. Accordingly, I turn to the issue of the application of the legislative property regime in this case. The first question is whether it would be unfair and inequitable to make an equal distribution, having regard to the agreement, under s. 21(3)(a). The agreement is entitled to serious consideration given that it reflects the parties' understanding of what division of property was fair in the context of their relationship at the time of separation. I am of the view, as was the Court of Appeal, that the parties' solution was also fair and equitable by reference to the legislative scheme (para. 120).

[80] The agreement reflects an intention to split the family home and household goods equally, in line with the special rules for the treatment of the family home in the

FPA (see s. 22(1)) and essentially keeps separate the rest of the family property (including the investments, businesses, pensions, and debts of each of the parties). As the trial judge found, both parties entered the marriage already owning homes, vehicles, savings and personal property, the balance of which was “not equal but also not so imbalanced that it was an unreasonable economic alliance” (paras. 9 and 268) (see s. 21(3)(d)). Their marriage was short, and there is no suggestion either party disproportionately contributed to the responsibilities of the shared partnership, or suffered because of its breakdown (see s. 21(3)(b) and (e) to (g)). In this context, allowing each party to keep their own property and abandon claims to the other’s property is fair and equitable.

[81] Besides the family home and household goods, equal division of the family property under the *FPA* results in unfairness. As I have explained, the valuation dates chosen by each of the two courts for an important asset disadvantaged one party in a way that is unfair, particularly given the agreement. The courts’ equalization also divides other significant assets that the parties intended to keep separate, such as the parties’ pensions and RRSPs — personal assets each party brought into the marriage that naturally only continued to increase in value over time. I see no reason for the parties to be forced to share that increase in value two years post-separation, which would be the presumptive result under the Act. Apart from the family home, the husband’s business interests, and the parties’ pensions and investments, the remaining family property consists mainly of tools, jewelry and bank accounts that are not of significant value relative to other assets.

[82] It would also be unfair to equalize the family property, in this case, given the delay of the husband in challenging the agreement. As of the trial date in June 2018, the parties had lived separate and apart nearly as long as they had been married (see s. 21(3)(c)). By that point, the record suggests the parties had considered their affairs to be resolved through agreement for close to two years, as shown by their actions between the date of the agreement and the husband's counter-petition (see s. 21(3)(a)). The husband retrieved his furniture from the family home and cashed in some of his RRSPs, and the wife reconveyed the truck to the husband and sold a trailer she used with the husband during the marriage (C.A. reasons, at paras. 78 and 122). The husband's conduct led the wife to believe that the matter of property division had been resolved, so that she did not apply for property division in her divorce petition. Any delay in valuing the assets thus only works to the advantage of the husband, given post-separation changes in the values of important assets. I find that it would be unfair for the husband to benefit from the delay he caused.

[83] I would enforce the agreement according to its terms, as the wife requested before the Court of Appeal (although before this Court she sought to uphold the Court of Appeal's property division). As the Court of Appeal acknowledged, there is "a certain logic and attraction" to this remedy (para. 132). The parties were best positioned to organize the limited family property resulting from their short marriage and, given all the circumstances, the most fair and equitable solution is for their simple agreement to be given effect.

[84] The only property the agreement contemplated dividing was the family home and the household goods. I would limit the equalization calculation to these assets alone. As noted, valuing the family home as of the date of trial was fair, given the husband's continued contribution to the mortgage and the terms of the separation agreement. No circumstances warrant departing from the strong presumption of equal distribution of a family home in the *FPA* (see s. 22(1)). Dividing these assets as of the date of adjudication results in a payment of \$43,382.63, owed by the wife to the husband.

V. Conclusion

[85] I would allow the appeal, set aside the decision of the Court of Appeal with respect to the division of family property and make an order that the wife pay the husband \$43,382.63. As success is divided in this Court, each party will bear their own costs in this Court.

APPENDIX

Distribution of family property

21(1) On application by a spouse for the distribution of family property, the court shall, subject to any exceptions, exemptions and equitable considerations mentioned in this Act, order that the family property or its value be distributed equally between the spouses.

(2) Subject to section 22, where, having regard to the matters mentioned in subsection (3), the court is satisfied that it would be unfair and inequitable to make an equal distribution of family property or its value, the court may:

- (a) refuse to order any distribution;
- (b) order that all the family property or its value be vested in one spouse; or
- (c) make any other order that it considers fair and equitable.

(3) For the purposes of subsection (2), the court shall have regard to the following:

- (a) any written agreement between the spouses or between one or both spouses and a third party;
- (b) the length of time that the spouses have cohabited;
- (c) the duration of the period during which the spouses have lived separate and apart;
- (d) the date when the family property was acquired;
- (e) the contribution, whether financial or in some other form, made directly or indirectly by a third party on behalf of a spouse to the acquisition, disposition, operation, management or use of the family property;
- (f) any direct or indirect contribution made by one spouse to the career or career potential of the other spouse;
- (g) the extent to which the financial means and earning capacity of each spouse have been affected by the responsibilities and other circumstances of the spousal relationship;
- (h) the fact that a spouse has made:
 - (i) a substantial gift of property to a third party; or
 - (ii) a transfer of property to a third party other than a bona fide purchaser for value;
- (i) a previous distribution of family property between the spouses by gift or agreement or pursuant to an order of any court of competent jurisdiction made before or after the coming into force of this Act . . . ;
- (j) a tax liability that may be incurred by a spouse as a result of the transfer or sale of family property or any order made by the court;
- (k) the fact that a spouse has dissipated family property;
- (l) subject to subsection 30(3), any benefit received or receivable by the surviving spouse as a result of the death of his or her spouse;
- (m) any maintenance payments payable for the support of a child;
- (n) interests of third parties in the family property;

- (o) any debts or liabilities of a spouse, including debts paid during the course of the spousal relationship;
- (p) the value of family property situated outside Saskatchewan;
- (q) any other relevant fact or circumstance.

Distribution of family home

22(1) Where a family home is the subject of an application for an order pursuant to subsection 21(1), the court, having regard to any tax liability, encumbrance or other debt or liability pertaining to the family home, shall distribute the family home or its value equally between the spouses, except where the court is satisfied that it would be:

- (a) unfair and inequitable to do so, having regard only to any extraordinary circumstance; or
- (b) unfair and inequitable to the spouse who has custody of the children.

...

Property exempt from distribution

23(1) Subject to subsection (4), the fair market value, at the commencement of the spousal relationship, of family property, other than a family home or household goods, is exempt from distribution pursuant to this Part where that property is:

- (a) acquired before the commencement of the spousal relationship by a spouse by gift from a third party, unless it can be shown that the gift was conferred with the intention of benefitting both spouses;
- (b) acquired before the commencement of the spousal relationship by a spouse by inheritance, unless it can be shown that the inheritance was conferred with the intention of benefitting both spouses; or
- (c) owned by a spouse before the commencement of the spousal relationship.

(2) Subject to subsection (4), property acquired as a result of an exchange of property mentioned in subsection (1) is exempt from distribution pursuant to this Part to the extent of the fair market value of the original property mentioned in subsection (1) at the commencement of the spousal relationship.

(3) Subject to subsection (4), family property, other than a family home or household goods, is exempt from distribution pursuant to this Part where that property is:

- (a) an award or settlement of damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both spouses;
- (b) money paid or payable pursuant to an insurance policy that is not paid or payable with respect to property, unless the proceeds are compensation for a loss to both spouses;

- (c) property acquired after a decree *nisi* of divorce, a declaration of nullity of marriage or a judgment of judicial separation is made with respect to the spouses or, where the spouses are spouses within the meaning of clause (c) of the definition of “**spouse**” in subsection 2(1), property acquired more than 24 months after cohabitation ceased;
- (d) property acquired as a result of an exchange of property mentioned in this subsection; or
- (e) appreciation on or income received from and property acquired by a spouse with the appreciation on or income received from property mentioned in this subsection.

(4) Where the court is satisfied that to exempt property from distribution would be unfair and inequitable, the court may make any order that it considers fair and equitable with respect to the family property mentioned in this section.

(5) In making an order pursuant to this section, the court shall have regard to the following:

- (a) any of the matters mentioned in clauses 21(3)(a) to (p);
- (b) contributions in any form made by the spouses to their relationship, children or property prior to the commencement of their spousal relationship;
- (c) a contribution, whether financial or in any other form, made by a spouse directly or indirectly to the acquisition, disposition, preservation, maintenance, improvement, operation, management or use of property mentioned in this section;
- (d) the amount of other property available for distribution;
- (e) any other relevant fact or circumstance.

(6) All family property is presumed to be shareable unless it is established to the satisfaction of the court that it is property mentioned in this section.

Property dealt with in interspousal contract exempt

24(1) Subject to subsection (2), but notwithstanding any other provision of this Act, family property, including a family home and household goods, that is distributed or disposed of by an interspousal contract, or with respect to which an interspousal contract provides for its possession, status or ownership, is exempt from distribution pursuant to this Part.

(2) If at the time the interspousal contract was entered into it was, in the opinion of the court, unconscionable or grossly unfair, the court shall distribute the property or its value in accordance with this Act as though there were no interspousal contract, but the court may take the interspousal contract into consideration and give it whatever weight it considers reasonable.

Interspousal contracts

38(1) The terms of an interspousal contract mentioned in subsection (4) are, subject to section 24, binding between spouses, whether or not there is valuable consideration for the contract, where the spouses have entered into an interspousal contract:

- (a) that deals with the possession, status, ownership, disposition or distribution of family property, including future family property;
- (b) that is in writing and signed by each spouse in the presence of a witness; and
- (c) in which each spouse has acknowledged, in writing, apart from the other spouse, that he or she:
 - (i) is aware of the nature and the effect of the contract;
 - (ii) is aware of the possible future claims to property he or she may have pursuant to this Act; and
 - (iii) intends to give up those claims to the extent necessary to give effect to the contract.

(2) A spouse shall make the acknowledgment mentioned in subsection (1) before a lawyer other than the lawyer:

- (a) acting in the matter for the other spouse; or
- (b) before whom the acknowledgment is made by the other spouse.

(3) Any provision of an interspousal contract that is void or voidable is severable from the other provisions of the contract.

(4) An interspousal contract may:

- (a) provide for the possession, ownership, management or distribution of family property between the spouses at any time, including, but not limited to, the time of:
 - (i) separation of the spouses;
 - (ii) dissolution of the marriage; or
 - (iii) a declaration of nullity of marriage;
- (b) apply to family property owned by both spouses and by each of them at or after the time the contract is made; and
- (c) be entered into by two persons in contemplation of their commencing to cohabit in a spousal relationship, but is unenforceable until after they commence cohabitation.

(5) Without limiting the generality of subsection (4), an interspousal contract entered into on or after June 4, 1986 may provide that, notwithstanding the *Canada Pension Plan*, there may be no division between the parties of unadjusted pensionable earnings pursuant to that Act.

(6) Where an interspousal contract has been entered into pursuant to this section, the spouses may enter into another contract amending, varying or cancelling the earlier contract, and the subsequent contract, if made in accordance with this section, takes precedence over the earlier contract.

...

Agreements between spouses

40 The court may, in any proceeding pursuant to this Act, take into consideration any agreement, verbal or otherwise, between spouses that is not an interspousal contract and may give that agreement whatever weight it considers reasonable.

Appeal allowed.

Solicitors for the appellant: Legal Aid Saskatchewan, Regina Rural Area

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Solicitors for the respondent: Butz & Company, Regina.