

SETTLEMENT IN FAMILY LAW
JENNIFER SAMARA SHUBER LL.B. M.S.W.

An oft-quoted statistic claims that 95% of family law cases settle. If that is true, it is lawyers and clients who are resolving matters between themselves and not resorting to judicial determinations. What implications does this have for the practice and, more specifically, the settlement of family law cases? In this paper, I will address what I believe are the top three differences between family law settlements and other civil settlements, in order to make counsel aware of the typical pitfalls that exist when trying to settle a family law case.

Difference #1: Family Law is About Family

It is clear from its name that “family” law deals with individuals in a particular relationship. Whatever your definition of family, and who you consider a family to include, it is evident that family law does not deal with legal relationships between strangers, business associates or even major corporations. Rather, family law deals with making and breaking connections between intimates. Whether you are negotiating a marriage contract for a young bride or acting for a senior bank executive divorcing his third wife, the parties to a family law action have a personal relationship. A great deal flows from that personal relationship in the context of settlement.

Consider marriage contracts and cohabitation agreements. These contracts are negotiated in a different context than separation agreements. A person who is waiving rights at the time of entering into a relationship is typically in love and less likely to be prepared to consider all the downsides and risks. Someone about to marry likely finds it difficult to imagine scenarios such as death and separation and is often not truly expecting that they will ever have to rely on the contract.

Disclosure is very important for any type of domestic contract, but it may have a special significance for a marriage contract or cohabitation agreement in which a spouse is releasing future claims and entitlements. Hence, some consider marriage contracts to be contracts *uberrimae fidei*, requiring the utmost fidelity and good faith between the parties¹. There is some support for the position that a greater duty of dealing in good faith is owed in marriage contracts than in separation agreements because of the special relationship between the parties as intended spouses. A Separation Agreement, which is negotiated when the parties are more clearly adverse in interest, therefore resembles a traditional contract, so it requires no more fair dealing than a standard business contract. In *Hartshorne*², the Supreme Court of Canada stated that there was no “hard and

¹ *Dubin v Dubin* (2003) 34 R.F.L. (5TH) 227

² *Hartshorne v Hartshorne* (2004) 47 R.F.L. (5th) 5

fast" rule that more deference should be given to marriage contracts than separation agreements, or vice versa, but that the degree of deference will depend on the particular circumstances of the case.

In the recent Ontario Court of Appeal decision in *LeVan*³, the court held that if the conduct of the spouse seeking the contract is sufficiently shocking, the agreement may be set aside even if the other party has consulted a lawyer before signing. The case illustrates some of the dangers faced by family lawyers and their clients when negotiating a marriage contract. It also provides important direction for those who want to ensure that the contracts they draft withstand judicial scrutiny.

The facts in *LeVan* are as follows: The Husband had delayed putting together a Marriage Contract that he wanted until two months before the wedding. The Wife's lawyer asked for financial disclosure but received very little, so had no idea of the husband's income or the extent of his assets and could not discern the value of the husband's widely varied corporate interests or determine the husband's interest in a family trust. The Wife's lawyer insisted on more disclosure and different terms than the contract proposed by the Husband and Husband put pressure on Wife to get rid of her lawyer. The Wife fired her lawyer and Husband arranged for his own lawyer to find the Wife new counsel. The Wife's new lawyer had acted for the husband's lawyer in her own divorce proceeding. All of this took place a few days before the wedding. The parties later separated and the lack of financial disclosure, the undue haste, the misrepresentation of the Husband's financial position, the lack of information about the Husband's income and the close relationship between counsel resulted in the court setting aside the marriage contract

An essential lesson from *LeVan* is that financial disclosure is a pre-requisite for a valid marriage contract under the Ontario *Family Law Act*. Section 56(4) of the *Family Law Act* makes it clear that the lack of financial disclosure can be a basis for setting aside a contract and section 56(7) of the *Family Law Act* indicates that this section cannot be waived. To put it simply, you cannot settle your case or give up future entitlements unless you know what it is you are giving up. You can only know what you are giving up if the other side makes full and complete financial disclosure. It is not necessary to get formal valuations of assets at the time of the contract, but it is necessary to put realistic values on the assets. In *LeVan*, the Husband did not make the requisite and reasonable financial disclosure one would have expected in a timely fashion. He waited too long to have the contract prepared, he interfered with the wife's lawyer and steered her to a new lawyer who had no time to assess the situation. The Husband pressured the wife, he wrote a letter on the Wife's behalf dismissing her first lawyer and he represented to the Wife that the contract was much more limited than the contract actually was. For all those reasons, the Court of Appeal overturned the contract.

³ *LeVan v LeVan* (2008) 51 R.F.L. (6th) 261 (OCA)

Since the parties will normally have an ongoing relationship, whether by choice or by operation of law, it is very rare to have a one-off deal in family law. As Dr. Howard Irving has expressed it, you should not look at it as getting divorced **from** someone, but rather you get divorced **to** each other. There will be support being paid by one spouse to another or children to parent. The parties' relationship will not end once a settlement is reached. The end of the spousal relationship does not end the parental relationship. It is not only the substantive settlement to the dispute that is important but the precedent that is set for future relations. As long as the child is a minor, and probably well beyond that time, some ongoing interactions between the parents are necessary. Since a family law settlement is rarely a one-time arrangement, the deal that is made should allow parties to save face and move forward in a healthy working relationship with each other. A scorched earth approach does not work when the parties have to sit beside each other a week later at their son's school holiday pageant.

There is significant mutuality of interest among the parties in family law. At the very least, parents have one very large shared interest: the children. While they may occasionally lose sight of this fact, or have very different interpretations of what constitutes the children's best interests, usually parents do share concern for their children's well being. This "common concern" is a trump card, which can be played over and over in managing settlement negotiations. The parties have leverage over each other and need each other's cooperation. At a minimum, each can make the life of the other miserable and can cause emotional and financial problems by not cooperating.

There is a long and tragic history of lose-lose solutions to divorce conflicts. On the positive side, parents can provide a considerable amount of assistance and back-up to each other. They can reinforce each other's parenting role and practices, provide back-up child care, share in the practical logistics of child rearing which, without co-operation and dialogue can be a nightmare, particularly for the child: things like moving a child's athletic equipment between homes ("where are my tennis shoes? my hockey stick? my bathing cap?"), ensuring homework is completed, doctors' appointments scheduled and attended, and providing consultation with each other about problems that may arise. Settlement in family law cases must assist the parties in providing this ongoing support and preserve or even improve their relationship rather than destroy or harm it. If a settlement is "fair", the chances are that the acrimony and hostility that could go on between parties after divorce is reduced. The last thing a family lawyer ever wants to do is to increase acrimony or further alienate a client from his or her spouse.

In *Mantella*⁴ the Ontario Superior Court made it clear that a lawyer in a family law case has no obligation to the other side apart from not engaging in fraud. A family lawyer's primary obligation remains to negotiate the best possible deal for his or her client. The Court did, however, add that it is possible for a deal to be "too

⁴ *Mantella v Mantella* (2006) 80 OR (3d) 270

good”, especially if the other side appears vulnerable, has less resources and/or is unrepresented. The better the settlement terms are for your client, the greater your concern should be in establishing that there was demonstrably fair process. If fair process is lacking, and the deal looks too good for one side, the Court will do what it has to in order to correct the perceived injustice.

Family law counsel must also be aware of the risk of a “victory” for one spouse producing an accommodation by the other spouse that is unworkable in the long run. A spouse may release support only to later determine that this was not a financially sound decision, since self-sufficiency is absolutely impossible.⁵ Since many provisions in family law settlements, including support payment and co-parenting, require cooperation over an extended interval, there are significant adverse consequences of too zealous advocacy and too great a victory. Furthermore, a substantive victory may turn quickly into a defeat due to the ability of each parent to sabotage any court-imposed settlement.

Since many parties are also parents, in family law one has to be concerned not only for one’s client, but also for the children of the marriage. When acting as an advocate, Rule 4.01 of the *Rules of Professional Conduct* states, that “a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.” The commentary to Rule 4.01, however, articulates the dichotomy facing a family lawyer: “In adversary proceedings that will likely affect the health, welfare, or security of a child, a lawyer should advise the client to take into account the best interests of the child, where this can be done without prejudicing the legitimate interests of the client. (Emphasis added).”⁶

As a result, family law, and hence family law settlement, is bit of a balancing act that requires juggling all of the diverse interests at play. Howe and McIsaac frame these varied interests as follows:

This problem of competing interests is complicated by the need for attorneys to represent the adverse interests of their client in resolving distributive issues, such as property and allocation of income, which are settled by law and principles of equity and fairness, while simultaneously helping their client reach decisions about the integrative issues involved in parenting and intersecting with the needs of the children.⁷

The pure advocacy rule is, therefore, largely unsuited to family law cases. The adversarial model fuels and encourages conflict and it is universally accepted that conflict is bad for children. Perhaps a better perspective is to consider the

⁵ Note that in these post-*Miglin* days, this may be a negligence problem rather than a problem for the spouse who has obtained the release.

⁶ Law Society of Upper Canada, *Rules of Professional Conduct*, effective November 1, 2000.

⁷ Howe and McIsaac. “*Finding the Balance: Ethical Challenges and Best Practices for Lawyers Representing Parents When the Interests of Children Are at Stake*” in *Family Court Review*, Vol 46 No. 1 January 2008 78-90.

children as “phantom clients’ whose interests are directly affected by the custody settlement. As Judith Wallerstein writes: “The child is the hidden client in the divorce proceedings.”⁸

The American Association of Matrimonial Lawyers (“AAML”), for example, has drafted advisory guidelines for lawyers representing parents where the interests of children are affected by the litigation. There is a recognition that family lawyers must represent the interests of their clients, but not at the expense of the children. Consider the following excerpt from the AAML “Bounds of Advocacy: Goals for Family Lawyers”:

6.1 An attorney representing a parent should consider the welfare of, and seek to minimize the adverse impact of the divorce on, the minor children.

Although the substantive law in most jurisdictions concerning custody, abuse and termination of parental rights is premised upon the “best interests of the child,” the ethical codes provide little (or contradictory) guidance for an attorney whose client’s expressed wishes, interests or conduct are in direct conflict with the well-being of children. This Goal emphasizes that the welfare of each family member is interrelated.

Matrimonial lawyers should counsel parties to examine their wishes in light of the needs and interests of the children and the relationship to other family members. In so doing, the matrimonial lawyer is not only advising the client to adhere to applicable substantive law, but is also reminding the client that the family relationship continues.

Parents owe a continuing fiduciary duty toward each other, as well as toward their children, to serve their children’s best interests. In many instances, parents should subordinate their own interests to those of their children. Matrimonial lawyers and parents alike should collaboratively seek parenting arrangements that eliminate fractious contact between parents, minimize transition or transportation difficulties and preserve stability for the children.

Children do not benefit from involvement in their parents’ divorce. The attorney should warn the client against leaving papers from the attorney out where children can read them and to avoid talking about the case when children can overhear....

Looked at another way, if a parent must act in a child’s best interests, and lawyers act for parents, so too must the lawyer consider the interests of the children.

⁸ Judith Wallerstein, “*Child of Divorce: An Overview*” Behavioural Sciences and the Law 1986: 105-109.

Difference #2: There Are No Hard and Fast Rules

Most litigation and adjudication is concerned with the determination of clear legal principles, based upon past events. The wording of the statutes means something and precedent is king. A court determines a litigant's rights and entitlements and grants the appropriate legal remedies. For most civil cases, the legal principles are mandatory and non-discretionary, although there is a certain amount of discretion in the determination of an appropriate remedy. Conversely, family law adjudication is almost entirely based on discretion. In deciding custody, support and property division, judges make decisions about future behaviour and evaluate the present and future needs of the parties and their children. Inherent in any such decision-making is a great deal of subjective evaluation, including the making of value judgements and predictions for the future.

Family law is almost never cut and dry. Hence, it is virtually impossible to make an accurate, clear and consistent prediction as to the outcome of a judicial procedure. This uncertainty is a powerful motivator for divorcing families to settle. At the same time, however, the discretionary nature of family law makes settlement more difficult, as it makes advising a client virtually impossible. The parameters of settlement are very broad and there is a wide range of settlement possibilities on almost every issue. Most decisions are fact specific and not law based. The issues that need to be settled go beyond questions that can be resolved by reference to legal standards. There are no good criteria for deciding how to arrange for a car-pool to nursery school or the appropriate age for a child to date, etc... "Bargaining in the shadow of the law" takes on new meaning for family lawyers, since the range of outcomes is pretty much wide open. Moreover, most people do not have difficulties that fit within the neat categories defined by legislature. Hence, there is great unpredictability of result and this makes settlement all the more difficult.

The law is applied inconsistently in custody and access matters. This is largely due to the fact that the merits of a custody application are determined on the basis of the best interests of the child.⁹ What "best interests" means, however, is a matter of interpretation. "Best interests of the child" can be used to justify any result on any given fact situation. There are significant cultural and jurisdictional variations on what defines best interests. The tender years doctrine gave way to a more gender-neutral primary caregiver concept, which arguably may now have been replaced by a presumption of joint custody. The notion that social science and psychological literature on attachment, developmental and psychological needs could lead to some definitive parameters and guidelines for example on what is age or developmentally appropriate has been revealed as a myth. Clinicians are often unable to agree on the appropriate parameters to consider in many cases. As a test, then, best interest remains subject to debate and

⁹ *Children's Law Reform Act* R.S.O. 1990, c. C12 as amended, section 24.

interpretation in each and every custody case, based on the particular needs and abilities of the parents and children in question.

When considering the unpredictability of family law, one can also look at the vast ranges of outcomes in the area of spousal support. Child support orders have been regularized given the coming into force, in 2006, of the Child Support Guidelines¹⁰, which make the table amounts mandatory in most circumstances. The Spousal Support Advisory Guidelines¹¹ (“SSAGs”), however, remain advisory in nature. The SSAGs are, at present, merely a recommendation, a reflection of the case law and a summary of precedent resulting in a range of awards. The SSAGs are not law and are not binding, although in *Fisher*¹², Lang J.A. of the Ontario Court of Appeal suggested that they should be considered and even treated as case law. Hence, courts will consider the SSAG support ranges before making an order. The SSAGs do not replace a case-by-case assessment or an individual analysis of the facts. They are just a supplement, another tool for counsel and the courts to use, if only to provide a ceiling and floor for support orders in many cases.

When settling family law cases, then, the lawyer spends a great deal of time discussing the “range of outcomes” or the “wide variety of solutions.” Many letters are written to the client, outlining the unpredictable nature of the law, the risks inherent in taking a case to trial and the impossibility of knowing the “RIGHT” result for the purposes of settlement. Lawyers practising in this area have to be comfortable in the grey. Never ever is a family law case black or white.

3. “It Ain’t Over Till It’s Over” or “If At First You Don’t Succeed, Just Move to Vary”:

In family law, there is no such thing as a final settlement. Whether it is in the area of spousal support, child support or custody, nothing is truly final. Given the concepts of material change and best interest, family law statutes and case law have ensured that a party who does not feel s/he got it right the first time will always have a second (and even a third or a fourth) chance.

The *Divorce Act* and most provincial statutes include provisions allowing a court to vary a support order (or agreement) if there is a material change in the parties’ circumstances after the order or agreement is made. Prior to 1994, a material change was considered to be a significant, grave or weighty change that was not anticipated at the time of the original order. However, in its decision in *Willick*¹³, the Supreme Court of Canada held that in order to be a material change, the event also could not be foreseeable at the time of the order.

¹⁰ S.O.R./97-175 as amended.

¹¹ Rogerson and Thompson: *Spousal Support Advisory Guidelines*: Department of Justice: July 2008.

¹² *Fisher v Fisher* (2008) 47 R.F.L. (6th) 235

¹³ *Willick v Willick* [1994] S.C.R.670

To view the *Willick* test in practice, consider an anecdote conceived by Malcolm Kronby, where an ex-husband who suffered a heart attack and lost all his income applies for a variation to reduce or eliminate his spousal support obligation. On cross-examination, the husband is asked the following questions:

At the time of the agreement, were you considerably overweight?

At the time of the agreement, were you drinking alcohol to excess?

At the time of the agreement, did you consider yourself to be a workaholic?

At the time of the agreement, did your doctor advise you to go on a strenuous diet?

At the time of the agreement, did your doctor advise you to abstain from alcohol?

At the time of the agreement, did your doctor advise you to significantly change your work habits and take more holidays?

At the time of the agreement, did your doctor advise you that if you did not follow his advice you would have a heart attack?

If the answers given by husband were “yes”, then the only possible conclusion is that his heart attack was inevitable and certainly foreseeable, hence it could not be used as a basis for a variation based on material change test. Careful drafting is, therefore, essential. The wording of the material change clause in an agreement is an area of heated discussion and negotiation. Whether or not a material change includes, for example, events that are “foreseeable or unforeseeable, foreseen, anticipated or otherwise” can be the difference between paying spousal support for life, regardless of changes in financial circumstances, or not.

A court is never bound by a custody and access agreement, as it is always free to vary custody provisions in the child’s best interests. Pursuant to section 56(1) of the *Family Law Act*, for example, a court may disregard any provision in a domestic contract pertaining to custody where, “in the opinion of the court, it is in the child’s best interests to do so.” This is to say nothing of the more general *parens patriae* jurisdiction preserved by the court and a judge may change custody, child support or other rulings affecting the child’s well-being, no matter what the parents may have agreed or the court previously decided. Thus, even parenting plans made entirely on consent could be interfered with.

Child support is the right of the child. Hence, even if the parents make a deal, it risks being overturned in subsequent court proceedings as a court will not allow parents to “barter away” a child’s right to support.¹⁴ Section 56(1.1) of the *Family Law Act*, for example, also makes it clear that domestic contracts are subject to the *Child Support Guidelines*.

In addition to the grounds particular to family law, the common law grounds to set aside a domestic contract or a provision in it are preserved by Section 56(4)(c) of the *Family Law Act*, thereby expanding the possible circumstances in which a final order or agreement can be set aside. This would include a variety of

¹⁴ *Willick*, supra.

grounds: duress, undue influence, unconscionability, mistake (including *non est factum*), fraud, and misrepresentation. As in other civil cases, the party seeking to set aside the contract bears the burden of proof. Again, as set out above, due to the nature of the relationship between the parties, the test for unconscionability seems more lenient than in general civil context or in law of contract. In addition, there is the notion of an obligation extending beyond good faith and perhaps even further to some objective standard of fairness in reaching a family law agreement.¹⁵

Conclusion or How to make Family Law Settlements Stick?

Given all of the above, how can counsel make family law settlements last? One is always learning better and smarter ways to practice. Here are a few pointers on how to craft lasting settlements:

- **Negotiate, don't dictate:** Discuss the proposed terms of a contract with the lawyer on the other side, rather than delivering and executed contract to the other party the day before the nuptials.
- **Make complete financial disclosure, no ifs, ands or buts:** Parties must make complete financial disclosure if they want their settlements to hold up down the road.
- **Consider the children and, yes, even the other party:** When negotiating, never exploit the other side's vulnerabilities or threaten them. Always act in the child's best interests.
- **Do not over-reach:** Don't push for too good a deal. What looks great now sours in the cold light of appeal or variation.
- **Independent legal advice is essential:** Both sides must have counsel and these individuals should not be married to each other, father and son, dating or even second cousins.
- **Live by the "K.I.S.S." principle:** Keep it simple, solicitors! The parties need to be able to understand the deal they are making. They should, for example, be able to settle their affairs around the kitchen table upon marriage breakdown if you have properly and clearly drafted the marriage contract.

¹⁵ *Leopold v Leopold* (2000) 51 OR (3d) 275