2013 ONSC 2940
Ontario Superior Court of Justice

Demaine v. Racine

2013 CarswellOnt 6252, 2013 ONSC 2940, [2013] W.D.F.L. 3240, [2013] W.D.F.L. 3241, [2013] O.J. No. 2269, 228 A.C.W.S. (3d) 761, 32 R.F.L. (7th) 216

Jason Demaine, Applicant and Suzanne Michelle Racine, Respondent

A. Trousdale J.

Heard: May 16, 2013
Judgment: May 17, 2013
Docket: FC 12-2603

Counsel: Deanne Fowler, for Applicant
Jack Pantalone, for Respondent

Subject: Family; Contracts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Family law

V Domestic contracts and settlements
V.2 Validity
V.2.a Essential validity and capacity
V.2.a.i General principles

Family law

V Domestic contracts and settlements
V.2 Validity
V.2.b Formal validity
V.2.b.i General principles

Headnote

Family law --- Domestic contracts and settlements — Validity — Formal validity — General principles

Parties started cohabiting in November 2004 — Respondent woman alleged that parties signed cohabitation agreement in October 2005, but applicant man denied that he signed agreement — Parties married in June 2006 and separated in August 2011 — Man brought motion for order that cohabitation agreement was invalid and unenforceable, or alternatively, for order setting aside agreement — Motion dismissed — On balance of probabilities, parties signed cohabitation agreement in October 2005; and agreement complied with formal requirements of s. 55(1) of Family Law Act in that it was in writing, signed by both parties, and witnessed — Man's evidence was that parties signed handwritten agreement at start of their cohabitation to deal with each retaining their personal possessions in event that they separated — Woman's evidence was that she wanted to protect cottage property she had purchased prior to cohabitation, as well as her RRSPs and any retirement pensions at date of cohabitation or acquired in future; and that man wanted to protect his military pension — Woman's evidence was that friend C witnessed each party's signature to agreement — On balance of probabilities, C witnessed each of

parties signing agreement as alleged by woman — Cohabitation agreement was valid domestic contract.

Family law --- Domestic contracts and settlements — Validity — Essential validity and capacity — General principles

Parties started cohabiting in November 2004 — Respondent woman alleged that parties signed cohabitation agreement in October 2005, but applicant man denied that he signed agreement — Parties married in June 2006 and separated in August 2011 — Man brought motion for order that cohabitation agreement was invalid and unenforceable, or alternatively, for order setting aside agreement — Motion dismissed — On balance of probabilities, parties signed cohabitation agreement in October 2005; and agreement complied with formal requirements of s. 55(1) of Family Law Act in that it was in writing, signed by both parties, and witnessed — Although disclosure may not have been perfect, it was adequate, and reasonably set out nature and value of assets and debts of parties — There were no grounds to set aside agreement on basis of nondisclosure of asset and liabilities — On balance of probabilities, man understood nature and consequences of agreement even though he did not have legal advice — Man could have obtained independent legal advice had he wanted to do so — There was no evidence of undue influence or duress on man to sign agreement; nor was there material misrepresentation or breach of any fiduciary duty by woman — Agreement was not unconscionable, but provided benefits for both parties — Cohabitation agreement was valid domestic contract and should not be set aside under s. 56(4) of Act.

Table of Authorities

Cases considered by *A. Trousdale J.*:

Demchuk v. Demchuk (1986), 1 R.F.L. (3d) 176, 1986 CarswellOnt 251 (Ont. H.C.) — referred to

Dougherty v. Dougherty (2008), 2008 ONCA 302, 2008 CarswellOnt 2203, 51 R.F.L. (6th) 1, 292 D.L.R. (4th) 103, 235 O.A.C. 85, 89 O.R. (3d) 760 (Ont. C.A.) — referred to

LeVan v. LeVan (2008), 51 R.F.L. (6th) 237, 90 O.R. (3d) 1, 2008 CarswellOnt 2738, 2008 ONCA 388, 239 O.A.C. 1 (Ont. C.A.) — referred to

Montreuil v. Montreuil (1999), 1999 CarswellOnt 3853 (Ont. S.C.J.) — considered

Statutes considered:

Family Law Act, R.S.O. 1990, c. F.3

s. 51 “domestic contract” — considered

s. 53 — pursuant to

s. 53(1) — considered

s. 53(2) — considered

s. 55(1) — considered

s. 56(4) — considered

s. 56(4)(c) — considered

MOTION by man for order that cohabitation agreement was invalid and unenforceable, or alternatively, for order setting aside agreement.

***A. Trousdale J.*:**

1 The Applicant brought a motion for an order that the Cohabitation Agreement dated October 18, 2005 is invalid and unenforceable, or in the alternative for an order to set aside the aforesaid Cohabitation Agreement, and for costs.

2 The Respondent brought a motion for an order that the Cohabitation Agreement dated October 18, 2005 is a valid and subsisting domestic contract pursuant to section 53 of the *Family Law Act*, and for costs.

3 These motions were brought by the parties by order of Justice Ray on consent of the parties at a Case Conference between the parties on March 11, 2013 which provided that a summary trial take place on May 16, 2013 for the trial of the issue of the enforceability of the Cohabitation Agreement. Each party was ordered to provide the opposite party with affidavits of their witnesses by May 1, 2013. The affidavits were to be filed as the evidence of the party, with cross-examination of each affiant to be completed in 30 minutes or such time period as the trial judge may allow.

4 Both motions were heard by me on May 16, 2013 in the manner prescribed by Justice Ray in his order of March 11, 2013.

Background

5 The parties started cohabiting in November, 2004.

6 The Respondent alleges the parties signed a Cohabitation Agreement dated October 18, 2005 on October 19, 2005. The Applicant denies that he signed this Cohabitation Agreement.

7 The parties married on June 23, 2006 and separated on or about August 15, 2011.

8 The parties have one child born of their marriage, a son who is now 6 years old. The parties entered into Partial Minutes of Settlement dated March 28, 2013 with respect to their son which provided for joint custody with a week on/week off residential schedule with each party.

Issues

9 The issues before are as follows:

(1) Did the Applicant and the Respondent sign on October 19, 2005 a Cohabitation Agreement between the parties dated October 18, 2005?

(2) If so, should the Cohabitation Agreement be found to be a valid domestic contract or should it be set aside?

Position of the Applicant

10 The Applicant denies that he participated in discussions with the Respondent regarding the alleged Cohabitation Agreement, and he denies that he signed the alleged Cohabitation Agreement. He alleges that if he had been asked to sign such an Agreement he would have obtained legal advice, and would not have signed such a contract. In the alternative, if the Applicant is found to have signed the Cohabitation Agreement, the Applicant seeks that the Cohabitation Agreement be set aside as he did not have independent legal advice, and he alleges that the Agreement is not fair and reasonable in the circumstances.

Position of the Respondent

11 The Respondent alleges that the parties jointly prepared the Cohabitation Agreement from the internet and that neither

party wished to consult a lawyer as they had each just spent substantial funds in extricating themselves from their respective prior relationship / marriage situation. The Respondent states that the parties each signed the Cohabitation Agreement in front of a friend of the Respondent, Dana Campbell who witnessed each party's signature to the Agreement. The Respondent seeks that the Cohabitation Agreement be declared valid and enforceable.

Law and Analysis

Was the Cohabitation Agreement signed by both parties?

12 Section 53(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, as am. ("the Act") provides that parties who are cohabiting or intend to cohabit who are not married to each other may enter into an agreement dealing with *inter alia* ownership in or division of property and support obligations.

13 Section 53(2) of the Act provides that if the parties to a cohabitation agreement marry each other, the agreement shall be deemed to be a marriage contract.

14 Section 55(1) of the Act sets out that a domestic contract, which by definition in Section 51 of the Act includes a cohabitation agreement and a marriage contract, is unenforceable unless made in writing, signed by the parties and witnessed.

15 I find on the evidence before me that on the balance of probabilities, the Applicant and the Respondent did sign on October 19, 2005, the original Cohabitation Agreement filed by the Respondent as Exhibit Number 1 at the trial of this issue. I also find that the Cohabitation Agreement complied with the formal requirements of s. 55(1) of the Act in that it was in writing, signed by both parties and witnessed.

16 The evidence of the Applicant was that he and the Respondent, at the instance of the Respondent, had signed a handwritten agreement at the beginning of their cohabitation to deal with each retaining their personal possessions in the event that they subsequently separated. The Applicant testified that the Respondent is sometimes meticulous about things like that. I find that this is supportive of the Respondent's testimony that the parties subsequently prepared and executed the Cohabitation Agreement dated October 18, 2005. The Respondent owned a cottage property and she wanted to protect it in the event of separation of the parties. The Respondent would have been even more likely to insist on an agreement regarding her cottage than an agreement regarding her furniture.

17 The Applicant testified that he may not have even been at home in Ottawa on the date the Cohabitation Agreement was allegedly signed as he had been away a lot in Petawawa, in Toronto and in other locations at that time on pre-deployment training. He stated that he could have requested proof of his travel expenses submitted to the military for that time period but that it would have taken considerable time to get them just as it apparently took 13 months to get his pension information. However, the Applicant testified that he did not request the travel expense information until 3 months ago even though the Applicant has been aware of this issue for over 18 months. The Applicant stated that he could have called people who were on course with him to testify regarding the dates but he didn't want to put them in a difficult position as they also know the Respondent. In summary, the Applicant produced no proof that he was away from Ottawa at that time and I am unable to find that he was away from Ottawa at that time.

18 The Applicant denied that the signature on the document was his. When questioned about the considerable change in his signature from a sample document signed by him on January 1, 2008 and some of the documents signed by him during the course of this proceeding, the Applicant explained that he has a short signature that he uses at work for quickly signing out equipment which is more in the nature of initials, and a more formal signature which is both his names in clearly legible writing. The signature on the alleged Cohabitation Agreement appears to be initials and it is similar to the initials on the sample document signed by the Applicant on January 1, 2008, which document the Applicant acknowledged he signed.

19 The evidence of the Respondent is that each party received a copy of the executed Cohabitation Agreement and that from the time the document was executed until the Respondent put forward the document shortly after the separation of the parties, the Cohabitation Agreement was never discussed by them again. It is possible that the Applicant may have legitimately forgotten that he signed a Cohabitation Agreement at that time as he was in the midst of predeployment training at the time, and the Cohabitation Agreement was never referred to again during the cohabitation and marriage until after the separation.

20 The Respondent filed the Affidavit of Dana Campbell, sworn April 19, 2012. Ms. Campbell also gave evidence at the hearing on May 16, 2013. The alleged execution of this document took place seven and a half years ago and Ms. Campbell could not explicitly say that the document was the exact document that she witnessed the parties executing, but she acknowledged that she did witness each of them signing a document at that time. Ms. Campbell was unable to definitely say

whether the pages after the signature page were attached to the Agreement at the time she witnessed the parties sign the Agreement. The Applicant argues that Ms. Campbell is a friend of the Respondent and that her evidence is therefore not to be trusted. However, I found Ms. Campbell's evidence to be credible. I am satisfied on the evidence before me on the balance of probabilities that Ms. Campbell did witness each of the parties signing the Cohabitation Agreement on October 19, 2005.

Should the Cohabitation Agreement be set aside?

21 Now that I have made a finding that the Applicant did sign the Cohabitation Agreement on October 19, 2005, the issue is whether the Cohabitation Agreement should be set aside pursuant to Section 56(4) of the Act. The burden of proof is on the party asking for the contract to be set aside to convince the court that the court's discretion should be exercised in that party's favour: *LeVan v. LeVan*, 2008 CarswellOnt 2738, 2008 ONCA 388 (Ont. C.A.). Accordingly, the Applicant bears the burden of proof to convince the court that this Cohabitation Agreement should be set aside.

22 The evidence of the Respondent is that she wanted to protect the cottage property which she had purchased prior to the cohabitation of the parties, as well as her RRSPs and any retirement pensions at the date of cohabitation or acquired in the future. Her evidence was that the Applicant wanted to protect any pension he might have in the future from division with the Respondent, as he was considering returning full time to the Canadian Military at the time.

23 Section 56(4) of the Act sets out the reasons why a court may set aside a domestic contract or a provision in it. The analysis is comprised of a two-part process: *Demchuk v. Demchuk* (1986), 1 R.F.L. (3d) 176 (Ont. H.C.), and in *Levan.*

24 According to the aforesaid cases, the court must first consider whether the party seeking to have the Agreement set aside can prove that that party can fit within one of the provisions of s. 56(4). Those provisions are:

> (a) if a party failed to disclose significant assets, or significant debts or other liabilities, existing when the contract was made;
>
> (b) if a party did not understand the nature or consequences of the domestic contract; or
>
> (c) otherwise in accordance with the law of contract.

25 If the party can fit within one of the provisions of s. 56(4), the court must then consider whether it is appropriate to exercise discretion in favour of setting aside the agreement.

26 On the basis of Schedule "A" and Schedule "B" attached to the Cohabitation Agreement, which detailed the assets and debts of the parties at or around the time when the Agreement was made, I find that although the disclosure may not have been perfect, it was adequate, and reasonably set out the nature and value of the assets and debts of the parties. Accordingly, I find that there are no grounds to set aside the Cohabitation Agreement on the basis of nondisclosure of asset and liabilities.

27 The Applicant maintains that he did not understand the nature or consequences of the domestic contract as he did not have independent legal advice. As he took the position he did not sign the Cohabitation Agreement, he would not give his interpretation of the Cohabitation Agreement in cross-examination nor comment on the provisions. On the evidence before me, I find that the Applicant could have obtained independent legal advice if he had wanted to do so. It was incumbent on the Applicant to read the Cohabitation Agreement carefully before signing it and to obtain independent legal advice if he did not understand it. However, I find that the Applicant chose not to obtain legal advice. On the balance of probabilities, I find that the Applicant understood the nature and consequences of the Agreement even though he did not have legal advice, and that he chose not to obtain independent legal advice.

28 Justice Aitken in the case of *Montreuil v. Montreuil*, 1999 CarswellOnt 3853, [2000] W.D.F.L. 578, 93 A.C.W.S. (3d) 503, [1999] O.J. No. 4450 (Ont. S.C.J.) reviewed a number of common law grounds in s. 56(4)(c) for setting aside a domestic contract (a separation agreement in that case) including:

> (a) not receiving adequate, complete and competent independent legal advice before signing the Agreement;
>
> (b) one party exerting undue influence on the other;

(c) the Agreement was an unconscionable transaction resulting from one party, being the stronger party, taking unfair advantage of the other, being the weaker party;

(d) there was a material representation by one party;

(e) the Agreement was procured by duress; and

(f) one party owed a fiduciary duty to the other which that party breached in the manner in which that party conducted himself or herself during the negotiations leading up to the signing of the Agreement.

29 On reviewing the aforesaid common law grounds for setting aside an Agreement, I find that there was no evidence of undue influence by the Respondent on the Applicant to sign the Agreement, or of the Respondent taking advantage of the Applicant, or of duress, or material misrepresentation by the Respondent, nor that the Respondent breached any fiduciary duty to the Applicant in the negotiations.

30 The Applicant complains of the fact that he had no independent legal advice. That in itself does not necessarily result in the Agreement being set aside. That is a factor for the court to consider along with all the other circumstances. (See *Dougherty v. Dougherty*, 2008 CarswellOnt 2203, 2008 ONCA 302 (Ont. C.A.)) As I have previously found, the Applicant could have obtained independent legal advice if he wished to do so, but he chose not to do so.

31 The Applicant also argues that the Agreement should be set aside as it is not fair and reasonable in the circumstances. The Applicant states that the parties worked together to build up assets, in particular with respect to labour and joint monies put into the cottage property owned by the Applicant, as well as labour and expertise provided by his father to the cottage property, and that the Applicant would never have signed an Agreement which would prohibit him from having an equal share of the property for those efforts and contributions.

32 I am unable, on the evidence before me, to find that the Cohabitation Agreement in this particular case is "unconscionable", which I find is the test rather than "it was not fair and reasonable in the circumstances" as argued by the Applicant. I find that the Agreement provided benefits for both parties. In addition, the Respondent confirmed in her evidence that the Cohabitation Agreement in para. 10.3 (c) provided that each party has the ability to claim compensation for "both financial and non-financial contributions made to non-family assets." The Respondent confirmed in her testimony her understanding that "non-family assets" are assets that are "excluded property" under the Cohabitation Agreement, which includes the cottage property owned by her. Her Counsel agreed in submissions on behalf of the Respondent that it is open to the Applicant to make claims for financial compensation for financial and nonfinancial contributions made by the Applicant to the Respondent's excluded property, including the cottage property, and the Respondent's Counsel agreed that this specific provision supersedes the more general boiler-plate provision regarding trust claims set out in para. 8 of the Cohabitation Agreement. I have relied on the aforesaid acknowledgements by the Respondent and her Counsel in coming to my decision. Accordingly, as the Cohabitation Agreement provides for claims for compensation against excluded property and the Respondent acknowledged this in her evidence and it was confirmed by her Counsel, I find that the Cohabitation Agreement is not unconscionable. The Applicant may need to amend his pleadings as a result of this decision.

33 As I find that the Applicant has not satisfied me that he fits within one of the provisions of s. 56(4) of the Act, I do not find it necessary to exercise my discretion in favour of setting aside the Cohabitation Agreement.

34 In conclusion, I find that the Cohabitation Agreement signed by the parties on October 19, 2005 is a valid domestic contract and I am not satisfied on the evidence before me that the aforesaid Cohabitation Agreement should be set aside.

35 The Agreement provides that the parties should attend at mediation prior to bringing any dispute to Court. The parties expressed to the Case Conference Justice that they intended to do so once this issue of the Cohabitation Agreement was determined and I would recommend that they now proceed to attend at mediation to attempt to resolve this matter.

36 For clarity, I have not made any decision with respect to whether the cottage is a matrimonial home as alleged by the Applicant. I have also not made any decision as to whether the Applicant or the Respondent are entitled to compensation for contributions made to excluded assets of the other pursuant to the Cohabitation Agreement. Those issues, along with issues of interpretation of the Cohabitation Agreement, will need to be determined by the Trial Judge hearing this matter.

Costs

37 Each party has made a claim for costs. Although the Respondent was successful on her motion, in my view there

should be no order for costs. On the one hand, I found that the Applicant did sign the Cohabitation Agreement contrary to the Applicant's position that he did not sign the Cohabitation Agreement. On the other hand, the Applicant's position was that he should be entitled to a share of the value of the cottage property because of the monies and labour that he claims he and his father had invested in the property during cohabitation and during the marriage, and that the Agreement was unfair if he were to receive nothing for these contributions. I note that in para. 29 of the Respondent's affidavit sworn April 30, 2012 she took the position that the parties wanted to ensure by the Cohabitation Agreement that neither party would be able to advance a constructive trust claim against property in the other's name, including her cottage. However, when I brought para. 10.3(c) of the Cohabitation Agreement to the attention of the Respondent and asked her what her understanding of that clause was, she acknowledged without any hesitation that the Applicant could make a claim against her "excluded property" including the cottage, for financial and non-financial contributions. This possible claim had not been acknowledged by the Respondent prior to that time. In these circumstances, I find that there should be no order for costs.

Order

38 Order to go as follows:

(1) The Cohabitation Agreement signed by the parties on October 19, 2005 is found to be a valid domestic contract.

(2) The Applicant's request that the aforesaid Cohabitation Agreement be set side is hereby dismissed.

(3) No order for costs.

Motion dismissed.