**SUPREME COURT OF NOVA SCOTIA**
**(FAMILY DIVISION)**
**Citation:** Stailing v. Stailing, 2011 NSSC 501

**Date:** 20110704
**Docket:** 1201-064876
**Registry:** Halifax

**Between:**

Valeria Darlene Stailing

Applicant

v.

Robert Bruce Stailing

Respondent

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| **Judge:** | The Honourable Justice Deborah Gass |
| **Heard:** | June 9 & 13, 2011, in Halifax, Nova Scotia |
| **Written Decision:** | February 1, 2012 |
| **Counsel:** | Angela Walker, for the applicant<br>Julia Cornish, for the respondent |

**By the Court:**

[1] This decision is with respect to a motion to set aside a Cohabitation Agreement entered into by the parties.

[2] Robert Bruce Stailing and Valeria Banks began living together in or around June of 2003. In September of 2003 they entered into a Cohabitation Agreement. They married in November of 2004 and separated in March of 2010.

[3] The petitioner, Bruce Stailing, is seeking a divorce and relying on the terms of the Cohabitation Agreement entered into by the parties. The respondent, Valeria Banks, is seeking to have the Cohabitation Agreement deemed invalid and unenforceable.

[4] The status of the Cohabitation Agreement is a preliminary issue to be determined on Ms. Stailing's interim application for spousal support and because the Cohabitation Agreement also deals with property, it has implications for the parties in this divorce proceeding.

[5] The relevant provisions of the Cohabitation Agreement are found in the following paragraphs:

> 4. **REGIME OF SEPARATE PROPERTY**
>
> (a) **All property now held in the name of** either Bruce or Valeria will **forever be free of any claim by the other regardless of whether they later marry each other**, save to the extent which they may agree in writing. [emphasis added]
>
> . . .
>
> 6. **HOME**
>
> (a) Bruce and Valeria acknowledge that Bruce is the sole owner of the "home" in which the parties are intending to reside and that Valeria has made no contribution to its acquisition, repair or maintenance and Valeria's contribution toward the mortgage payments and any other shared operating cost related to the home shall be irrevocably construed as "board" and not in any way creating in Valeria a legal beneficial or property right in Bruce's home.

(b) No contribution or rule of law or statutory provision or any other matter, including any by way of resulting, constructive or allied trust, will give rise to any right or interest in Valeria with respect to Bruce's home.

(c) Bruce will be responsible on a monthly basis for the household expenses of heating, telephone and all utilities and any other such expenses as the parties may agree, provided however, the parties may agree from time to time as to how the household operating expenses will be shared, **but no such agreement shall give rise to a right in Valeria to claim an interest in Bruce's home, save to the extent that the parties agree otherwise <u>in writing</u>**. Valeria will be responsible for all expenses incurred by her prior to commencement of cohabitation (June 1, 2003) and will attend to payment of her own cellular telephone account and any special foods which she may require. [emphasis added]

. . .

. . .

8. **SUPPORT**

In the event that the parties separate after the execution of this agreement, Bruce will pay to Valeria the sum of Fifteen Hundred Dollars **($1,500.00) per month for a period of one year** from the date of separation, and this will be in full and final settlement of any right to claim support, whether pursuant to the *Maintenance and Custody Act* of Nova Scotia or any successor law thereto, or whether pursuant to any other statute or common law. . . . [emphasis added]

9. **RELEASE OF RIGHTS TO EACH OTHER'S ESTATE EXCEPT AS PROVIDED FOR IN THIS AGREEMENT AND SUBJECT TO ANY RIGHT GIVEN BY THE OTHER IN HIS OR HER WILL**

(a) In the event that Bruce should die during the currency of this Agreement (while the parties are cohabiting), then Bruce's estate shall make the home at 11 Sellars Lane, Glen Haven, Nova Scotia, available for Valeria to live in for a period not exceeding ten (10) years from the date of Bruce's death, and Bruce's estate shall maintain the home expenses in the manner and custom to which the home has been maintained during Bruce's lifetime. The home must be used and occupied only by Valeria, and in the event that she remarries or forms a relationship with another

person and cohabits with that person for any period of time, then the agreement to provide Valeria with the right to live in the home shall immediately cease.

(b) Subject to paragraph 9 (a) hereof, Bruce and Valeria each release and discharge all rights that he or she may have under the laws of any jurisdiction in the estate of the other.

10. **RELEASE OF RIGHTS**

Subject to the terms of this Agreement, Bruce and Valeria each release all right to any interest in support from the other or property of the other, which right or interest he or she may have now or in the future , and more particularly each releases:

(a) Right to support or maintenance whether permanent or interim;

(b) Right and interest respecting ownership, division or possession of property;

(c) Right and interest arising out of any part of the *Maintenance and Custody Act* or any similar statute in any relevant jurisdiction as they may be amended or succeeded;

. . .

(f) Any other right or interest resulting from the relationship as cohabiting or common law or legal spouses as these are defined in law.

**11. In the event that the parties shall subsequently become married, the parties agree to execute a marriage contract on terms not inconsistent with the within agreement.** [emphasis added]

12. **INTENTION OF THE PARTIES**

It is the intention of Bruce and Valeria that this Agreement be:

(a) liberally interpreted for all purposes;

(b) governed by the laws of Nova Scotia;

> (c) **severable so that the invalidity of any part of it will not affect the remainder**. [emphasis added]

[6] The first question is whether the marriage vitiates the Cohabitation Agreement. Is the Cohabitation Agreement valid after the parties marry?

[7] It is clear in the Agreement that they expressed an intention to execute a marriage contract when they married on terms not inconsistent with the within agreement, which suggests that there was some contemplation that the Cohabitation Agreement could not survive the marriage. The never did enter into the marriage contract.

[8] The Province of Nova Scotia does not recognize or define in statute a cohabitation agreement per se. The parties can enter into a marriage contract or separation agreement and the courts can rely on an agreement under the *Maintenance and Custody Act* and the *Divorce Act* in making determinations with respect to support issues. A marriage contract is actually defined in the *Matrimonial Property Act*, and it provides for parties to enter into agreements before marriage or during the marriage which set out their rights and obligations resulting from the marriage. This is clearly a cohabitation agreement and it was clearly contemplated to be such, in that the parties indicated within the body of their agreement that it was their intention to enter into a marriage contract, should they marry. This was never done.

[9] While the parties were very careful, it appears, to create a contract to cover their circumstances when they cohabited, and were also careful to indicate that they would have a regime of separate property which would survive a marriage should there be one, they did not at any point in the agreement indicate that should they marry, this would serve as a marriage contract. In fact, the tone of the contract is just the opposite. The only reference to the possibility of marriage is that they would maintain a regime of separate property and this regime of separate property would survive a marriage. Thus, in looking at the whole of the agreement and the specific wording, it would appear to me that it is a cohabitation agreement that becomes void once they married.

[10] While this could be the end of the decision, the court is left with the dilemma of determining whether the entire agreement dies upon marriage, or whether portions of the agreement remain valid. The court is mindful of the provision in

the agreement that says that the unenforceability or the invalidity of one portion of the agreement does not render other portions of the agreement invalid.

[11] It is of some significance that there is reference in the *Maintenance and Custody Act* which gives the court the authority to consider, among other things, the terms of a marriage contract or a separation agreement in looking at the question of spousal support. It raises the question of how one can prospectively determine spousal support, and in this case with a termination date, when there is no indication as to the duration of the relationship or the circumstances of the parties during the course of that relationship. It seems to me that one can only contract with any degree of certainty and thereby validity, the terms of spousal support upon separation. Only then can one take into consideration all of the factors that give rise to a support order, including the length of the marriage, the nature of the relationship and their contractual obligations; in other words the compensatory and non-compensatory principles set out by the Supreme Court of Canada in *Bracklow v. Bracklow* [1999] S.C.J. No. 14.

[12] The duration and quantum of spousal support cannot be ascertained prospectively because the factors giving rise to entitlement are those which arise in looking back at the history of the relationship.

[13] Secondly, spousal support is variable and it can change if there is a change in circumstances. There is no way that a static fixed amount of spousal support for one year could be considered to be enforceable because spousal support by its very nature can be subject to variation. Again, the only time a fixed duration of spousal support can realistically be imposed is by looking back to the duration of the marriage as well as other circumstances of the marriage and the parties. Therefore, to actually fix and determine by contract a prospective amount of spousal support at the commencement of the relationship is unenforceable. That conclusion is enhanced by the acknowledgement in this agreement that the parties would enter into a marriage contract if they were to marry.

[14] The second part of the agreement, that is with respect to the property, is more difficult because the agreement does specifically say that the property regime will survive a marriage. Therefore, even if it is not a marriage contract, but an agreement that dies at the conclusion of the cohabitation when they move into marriage, is that portion of their agreement valid because it is made, although not

in contemplation of marriage, with a provision that should they marry the terms of this agreement would survive that marriage?

[15] It seems to me on reflection that those provisions could be taken into consideration in the determination of an issue of matrimonial property as a factor to be considered, but that the agreement itself comes to an end upon marriage and is not enforceable.

[16] Having decided that this agreement is void and therefore unenforceable it is not necessary for the court to then take the next step to determine whether it is unenforceable because it was so grossly unfair as to be unconscionable. However, if I am wrong in determining that the cohabitation agreement comes to an end upon the marriage of the parties, then I must consider the argument that the agreement is unconscionable.

[17] The applicant, who is seeking to set aside the agreement, has indicated that she does not remember having signed the agreement. That is not the same as signing it and at the time being in a position to understand what was happening at the time of the agreement. There was considerable evidence led with respect to the degree and extent of legal advice that was provided to the applicant and the circumstances under which the agreement was reached. In looking at the circumstances under which the agreement was reached, there is no question that the applicant had several meetings with legal counsel, Ms. Smith-Camp. There is no question as well that full financial disclosure was not provided. Ms. Stailing was in the process of separating from her husband and finalizing her divorce from him simultaneously with entering into this cohabitation agreement with Mr. Stailing.

[18] The degree of advice that was given with respect to whether this was a good deal or not was not clear, particularly as it relates to the issue of spousal support. Ms. Smith-Camp's significant recollection was that the applicant did not want to be seen to be a "gold-digger". She indicated that she explained the document to her but she did not say if the agreement was fair or unfair. She did say there were changes made to the agreement and that the respondent herself specifically chose the amount of $1,500.00 per month as well as the retention of a motor vehicle. Ms. Smith-Camp did indicate that she advised her of her rights under the *Matrimonial Property Act* and that was confirmed in a letter to the late Tom Burchell, Mr. Stailing's counsel. Ms. Smith-Camp confirmed that there was no disclosure. She confirmed as well that in the respondent's divorce from her husband Mr. Debison,

she waived any claim to his pension, and Ms. Banks (Stailing) instructed counsel that she wanted nothing from Mr. Debison. That was a matter of concern to Ms. Smith-Camp. She also waived spousal support. Ms. Smith-Camp was particularly mindful of her client's competence and she would not have let her sign the agreement if she had doubts about that.

[19] On the issue of conscionability of the spousal support agreement, I would have to conclude that that portion of the agreement would not be enforceable in that it would appear to be unconscionable. At that time it would be impossible to know how long the parties were going to be living together, and a limit of one year spousal support would contemplate very short duration of cohabitation. While I am not satisfied that Ms. Stailing at the time was suffering from physical and mental health issues which would cause her to not be fully competent to enter into this agreement, that part of the agreement in and of itself is inherently problematic because it really only contemplates, in my view, a short period of cohabitation.

[20] The second stage of looking at whether an agreement is unconscionable or not is to consider the present circumstances. The circumstances at the time would suggest that she was in a hurry to get out of her marriage and establish the contractual relationship with Mr. Stailing. It does seem odd that she would give up her husband's pension and any claim for spousal support from Mr. Debison and seek only $1,500.00 a month for one year if her and Mr. Stailing's relationship did not survive. In my view, these facts are only consistent with her (and their) thinking that this was a "test run" and during their cohabitation this would be the arrangement. They subsequently married, and whether or not there was a marriage, they were ultimately together for a full seven years. That in and of itself would cause the court to consider that an agreement for $1,500.00 a month for only one year is unconscionable. Entitlement would be established by virtue of the fact that she suffered from some illnesses and she was completely dependent upon him during the course of the relationship, and those factors would probably substantiate a longer period of spousal support. So the circumstances of marriage and length of cohabitation would, in retrospect, make the spousal support provision of $1,500.00 a month for one year to be unconscionable.

[21] Turning then to the property issue, where they agreed that the regime of separate property survives the marriage, then the court has to consider whether that portion of the agreement is unfair or unconscionable. In looking at the circumstances of the parties at the time, I have already determined that Ms. Stailing

was not of such an unsound mind that she did not know what she was doing. I am also satisfied that she had ample advice with respect to the property issue. Relinquishing all her rights to any property at the commencement of their cohabitation would not appear to be an unconscionable act considering all of these circumstances. However, looking back, they did in fact marry and live together for a period of six years. The fact of that marriage and the length of that marriage would indicate that the principles of the *Matrimonial Property Act* should apply in this instance and the complete relinquishment of all right, title and interest to any of the respondent's property could be considered to be unconscionable. Having said that, I can indicate that there would be a significant claim under s. 13 of the *Matrimonial Property Act* for unequal division in favour of Mr. Stailing given all of the circumstances, and the presumption of equal division would be countered in an application for an unequal division, given the date, manner and circumstances of the acquisition of the various assets.

[22] Therefore, on the whole of the evidence, I am setting aside the agreement, primarily on the basis of the agreement itself and the fact that the parties did subsequently marry and the cohabitation agreement died with that event. Secondarily, in applying the *Miglin* test and more particularly looking at the retrospective effect of this agreement in that the parties did actually live together for seven years, it appears that the agreement was unfair and unconscionable, although I find the conscionability of the property aspect of the agreement less persuasive than the spousal support aspect. However this issue was not necessary to the ultimate determination to set aside the agreement.

J.