IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Coady v. Osberg - 2004 NSSC127

Date: 20040628
Docket: S.H. No. 123335
Registry: Halifax

Between:

Frances Cheyenne Coady

Petitioner

-and-

Lars Spencer Osberg

Respondent

Judge: The Honourable Justice Robert W. Wright

Heard: April 13-16, 21 and May 13 and 17, 2004 at Halifax, Nova Scotia

Written Decision: June 28, 2004

Counsel: Counsel for the Petitioner - Terrence Sheppard

Counsel for the Respondent - Ronald Pizzo

By the Court:

INTRODUCTION

[1] This is a divorce proceeding between Frances Coady as petitioner and Dr. Lars Osberg as respondent following the breakdown of their marriage in 1994.

[2] The parties were married on December 18, 1976 and eventually became a family of five. They were two sons born of the marriage (Spencer in 1977 and Brandon in 1981) and a daughter Natasha (born in 1971) who was Ms. Coady's daughter from a previous relationship.

[3] The parties lived most of their married life in Halifax. Their's was a traditional marriage for the most part in the sense that Dr. Osberg was the main provider as a university professor and Ms. Coady, although involved in many extracurricular activities in the community, was primarily responsible as the homemaker. During the marriage, however, she did obtain her Bachelor of Social Work degree from Dalhousie University in 1992 in furthering her education, having earlier obtained degrees in Economics and Philosophy from the University of Western Ontario in or about 1980. Ms. Coady also worked outside the home from time to time during the marriage although never on a sustained basis. She held employment at various times with the NDP party, in retail, as a Reiki therapist, and as a social worker doing contract work with the Briggs Greenberg firm (the latter between 1993-95). Ms. Coady has since graduated with a Masters of Social Work degree in 2001 and is currently employed by Statistics Canada.

[4] The parties separated on July 1, 1994 at which time Natasha was living independently at age 23 with the two sons, then ages 16 and 12 respectively, living at home. The two sons were given a choice as to where they wished to live and they chose to stay in the matrimonial home where Dr. Osberg continued to reside after Ms. Coady moved into an apartment.

[5] After much negotiation, which will be detailed later in this decision, the parties signed a separation agreement on June 6, 1996. As early as 1997, Ms. Coady began to challenge the validity of the agreement which delayed the divorce proceedings. Ultimately, a divorce judgment was granted on January 17, 2002 but the outstanding issues relating to corollary relief remained to be set down for hearing.

[6] Because of a number of applications filed, Justice Goodfellow was eventually appointed as case management judge. He concluded that the validity of the 1996 separation agreement should first be determined as a preliminary issue and accordingly issued an Order on October 21, 2003 directing that the trial proceed at this stage to address that sole issue. The matter has now come before me to make that determination.

DELINEATION OF ISSUES

[7] Ms. Coady asserts that the 1996 separation agreement is substantially unfair to her in two primary respects, namely, because it created an unequal division of matrimonial assets in favour of her husband and inadequate spousal support provisions. She therefore attacks the validity of the agreement on two bases.

[8] First, it is argued that the separation agreement is unconscionable and unduly harsh and should therefore be set aside by the court under s.29 of the *Matrimonial Property Act*. Secondly, where that section cannot be used to vary a spousal support provision in a separation agreement, because of its restrictive application to property issues (see, for example, *Durocher v. Durocher* (1991) 106 N.S.R. (2d) 215), Ms. Coady also applies for judicial intervention in respect of the spousal support provisions of the separation agreement on common law principles as recently enunciated by the Supreme Court of Canada in *Miglin v. Miglin* [2003] 1 S.C.R. 303 (hereinafter referred to as the "*Miglin* test").

[9] As will be detailed later in this decision, the unusual feature of the separation agreement in this case is that the division of the chief matrimonial asset, namely, the matrimonial home and the spousal support arrangements were intertwined. Both the s.29 test and the *Miglin* test must therefore form part of a two pronged legal analysis.

SUMMARY OF LEGAL PRINCIPLES

[10] The first branch of the analysis is governed by s.29 of the *Matrimonial Property Act* which reads as follows:

> Upon an application by a party to a marriage contract or separation agreement, the court may, where it is satisfied that any term of the contract or agreement is unconscionable, unduly harsh on one party or fraudulent, make an order varying the terms of the contract or agreement as the court sees fit.

[11] The principles to be applied in determining the unconscionability of contracts were reviewed by the Nova Scotia Court of Appeal in *Stevens v. Stevens* (1983) 57 N.S.R. (2d) 141. Essentially, it is the combination of inequality in the bargaining position of the parties and improvidence in the terms of the agreement which alone may invoke this jurisdiction. As Justice Hallett put it in the later decision of *Crouse v. Crouse* (1988) 88 N.S.R. (2d) 199 (at para. 16):

> To succeed on the ground that the bargain was unconscionable, the petitioner must show that there was inequality in the position of the parties arising out of ignorance, need or distress which left her in the power of her husband and, secondly, that the bargain she reached was substantially unfair to her.

[12] The second branch of the analysis, the *Miglin* test, is captured in the following extract from the Supreme Court headnote of the case:

> An initial application for spousal support inconsistent with a pre-existing agreement requires a two-stage investigation into all the circumstances surrounding that agreement, first at the time of its formation, and second, at the time of the application. Unimpeachably negotiated agreements that represent the intentions and expectations of the parties and that substantially comply with the objectives of the Divorce Act as a whole should receive considerable weight. Holding that any agreement that deviates from the objectives listed in s.15.2(6) would inevitably be given little or no weight would seriously undermine the significant policy goal of negotiated settlement and would undermine the parties' autonomy and freedom to structure their post-divorce lives in a manner that reflects their own objectives and concerns. It would also render the direction to consider prior agreements in s.15.2(4)(c) meaningless. In searching for a proper balance between consensus and finality on the one hand, and sensitivity to the unique concerns that arise in the post-divorce context on the other, a court should be guided by the objectives of spousal support listed in the Act, but should also treat the parties' reasonable best efforts to meet those objectives as presumptively dispositive of the spousal support issue. The court should set aside the wishes of the parties as expressed in a pre-existing agreement only where that agreement fails to be in substantial compliance with the overall objectives of the Act, including certainty, finality and autonomy.

At the first stage, the court should look at the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it, including any circumstances of oppression, pressure or other vulnerabilities. Circumstances less than "unconscionability" in the commercial law context may be relevant, but a court should not presume an imbalance of power. Further, the degree of professional assistance received by the parties may be sufficient to overcome any systemic imbalances between the parties. Next, the court must consider the substance of the agreement to determine whether it is in substantial compliance with the Act. Assessment of an agreement's substantial compliance with the entire Act will necessarily permit a broader gamut of arrangements than would be the case if testing agreements narrowly against the support order objectives in s.15.2(6)...

> At the second stage, the court must assess whether the agreement still reflects the original intentions of the parties and the extent to which it is still in substantial compliance with the objectives of the Act. Accordingly, the party seeking to set aside the agreement will need to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned. Some degree of change in the circumstances of the parties is always foreseeable, as agreements are prospective in nature. Parties are presumed to be aware that health, job markets, parental responsibilities, housing markets, and values of assets are all subject to change. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight.

[13] As can be readily observed, the s.29 analysis under the *Matrimonial Property Act* and the analysis under the first stage of the *Miglin* test invoke similar considerations. The court must first assess the circumstances or conditions under which the agreement was negotiated and executed in determining whether or not there was a power imbalance owing to oppression, pressure or some other vulnerability which one party took advantage of, and which was not negated by the professional legal assistance received by the other. The court must then look at the overall fairness of the agreement and, more specifically as part of the *Miglin* test, examine the extent to which the agreement takes into account the factors and

objectives set out in the *Divorce Act*, thereby reflecting an equitable sharing of the economic consequences of the marriage and its breakdown. It is with these principles in mind that I now turn to a review of the relevant facts of this case.

BACKGROUND CHRONOLOGY OF LEGAL PROCESS

[14] I begin with a chronology of the legal process which led to the signing of the separation agreement on June 6, 1996 as recited in the evidence of Ms. Coady's successive legal counsel, Valerie MacKenzie and Lynn Reierson.

[15] Ms. Coady first consulted Valerie MacKenzie of the Reierson Sealy law firm on May 30, 1995 after earlier attempts to negotiate a separation agreement with the assistance of two predecessor lawyers were unsuccessful. After a lengthy office conference on May 30th, Ms. MacKenzie sent a preliminary opinion letter to Ms. Coady outlining her legal rights and objectives, options to consider to achieve those objectives, and a "game plan" of time lines and costs. She then met again with her client later in June following which she prepared a draft Petition for Divorce and related documentation for the exchange of financial information. She also prepared a draft interim agreement focusing on custody, visitation and child care arrangements which were then at the forefront of Ms. Coady's concerns. This draft agreement was transmitted to her husband's counsel, Mr. Pizzo, on July 5th.

[16] Unfortunately, no interim agreement was reached and the parties eventually agreed to a private mediation in the fall of 1995 at which Ms. Coady participated on her own. In the meantime, there were ongoing discussions between counsel on the issue of interim spousal support which Ms. MacKenzie tried to resolve by

sending Mr. Pizzo in October a draft Interim Maintenance and Tax Agreement. The draft agreement proposed an interim spousal support payment of $1500 per month which Ms. MacKenzie considered to be in the upper end of the range in the circumstances.

[17] The private mediation met with some success but no global agreement was reached and in particular, the spousal support issue remained unresolved. Dr. Osberg insisted that any spousal support award have a termination date and both the amount and duration of spousal support remained a subject of disagreement.

[18] On November 27, 1995 Ms. MacKenzie wrote another opinion letter to Ms. Coady which, among other things, set out the pros and cons of the spousal support arrangement which was then under discussion, viz. $1600 per month with a termination date of five years along with a deferred claim on the matrimonial home accordingly. Ms. MacKenzie considered spousal support at that level to be on the high side, where the husband had the primary care and sole financial responsibility for the two sons. At the same time, however, she pointed out the disadvantages of the proposal, in anticipation that a court would not likely impose a five year termination date in her opinion but was likely to require a deferral of the realization of her interest in the matrimonial home. Ms. MacKenzie recorded in her letter their shared optimism that achieving self-sufficiency in the next five years was a realistic expectation and a probable development.

[19] On the next day, Ms. MacKenzie sent to Mr. Pizzo a working draft of a third

version of the separation agreement she had prepared in an attempt to reach a final global settlement. The essentials of the proposal were that:

a) spousal support be paid by the husband at $1600 per month for five years with a review to be conducted at the end of that period; and

b) the parties have joint custody of the two sons with primary residence to be with the husband and liberal access to the wife, to be arranged directly with the sons (as well as other parenting plan provisions); and

c) equal division of matrimonial assets and debts.

[20] In reply, Mr. Pizzo sent a counter-proposal on December 13th expressing general agreement with the proposed custody and access arrangement but advancing other terms which were unacceptable to Ms. Coady. In the result, Ms. MacKenzie prepared the necessary documents for an interim application to the court returnable December 21st. Negotiations then intensified and in the result, an interim agreement was reached the day before the hearing on terms whereby the husband agreed to pay to the wife interim spousal support of $1300 per month (which was embodied in a consent order dated December 21, 1995). Also on December 20, 1995, the parties signed an Interim Maintenance and Tax Agreement in which they confirmed the amounts of retroactive support paid during the years of 1994-95 and the tax treatment thereof.

[21] With no global agreement in place, counsel then proceeded to arrange discovery examinations and made reciprocal requests for disclosure of financial information. After the discovery examination of her client began on February 15, 1996, and prior to its completion on February 23rd , Ms. MacKenzie prepared a

lengthy opinion letter dated February 20th which appears to have been given to her client at a meeting on February 25th. In that letter, Ms. MacKenzie reviewed the evidence given by Ms. Coady at discovery and pointed out certain weaknesses in her testimony in making a case for joint custody as sought. Ms. Coady was by then dissatisfied with Ms. MacKenzie and her handling of the file.

[22] That dissatisfaction led to a three-way meeting on March 25, 1996, between Ms. MacKenzie, her senior partner Lynn Reierson, and Ms. Coady. This meeting marked the end of Ms. MacKenzie's involvement and the transfer of the file to Ms. Reierson. Between them, both counsel made extensive notes of what transpired during the three hour meeting. The upshot was that Ms. Reierson was instructed to prepare a counter proposal to send to Mr. Pizzo. She acknowledged, however, that she advised Ms. Coady that it was open to her to try to save legal fees by negotiating an agreement directly with her husband, although she ought not sign anything without legal advice. She said that is in keeping with her usual practice where the relationship between spouses makes it feasible to do so. Ms. Reierson had no misgivings about that in the present case, given her assessment of her client as an astute, assertive person and considering that she had communicated directly with her husband on a number of issues over the previous two years.

[23] In keeping with her instructions, Ms. Reierson prepared a draft settlement proposal which she sent to her client for review and comment before providing it to Mr. Pizzo. The draft proposal included the following highlights:

a) spousal support of $1300 per month for five years, subject to review at the end

of that period (a figure which Ms. Reierson considered to be in the range of a likely outcome from the court based on Dr. Osberg's historical income in the $80,000-$90,000 range and considering that he also had primary care of the children of the marriage);

b) Blue Cross coverage under her husband's plan for the same period;

c) Dr. Osberg's payment of the cost of tuition and books to enable Ms. Coady to obtain her Masters of Social Work degree from Dalhousie, to which she aspired;

d) the terms of division of various matrimonial assets and debts, including a formula for a deferred entitlement to her share of the value of the matrimonial home;

e) Dr. Osberg's provision to Ms. Coady of a guarantee of a mortgage (limited to $100,000) to enable her to purchase a property should she wish to do so;

f) Dr. Osberg to have sole custody of Brandon (then age 14) provided that Ms. Coady have flexible liberal access and input into major decisions affecting their son.

[24] Ms. Reierson's billing records show that she then held two telephone conferences with Ms. Coady on April 10th. That appears to be the same date on which Ms. Coady and Dr. Osberg met directly themselves to discuss a final agreement, after Ms. Coady had met privately with an accountant. Indeed, they were able to achieve a breakthrough on the key issue of spousal support by agreeing on a monthly amount of $2000 to be paid for 7½ years, ending December 1, 2003. Coupled with that was an agreement by Ms. Coady to immediately convey her interest in the matrimonial home to Dr. Osberg. These and other terms discussed between the parties, were then embodied in a draft separation agreement

prepared by Mr. Pizzo which was sent to Ms. Reierson on April 16th. She in turn sent it to Ms. Coady for review and comment.

[25] On April 19th, Ms. Coady hand wrote a letter to Ms. Reierson setting out a couple of concerns she had with the wording of the draft agreement which she felt were needed to better secure the spousal support and Blue Cross coverage provisions. On the same date, Ms. Reierson wrote a detailed letter to Ms. Coady suggesting several changes in wording. Without going into unnecessary detail, the main thrust of the suggested revisions was that the wording be tightened up to provide better security for the spousal support obligations to be paid over a guaranteed period of 7½ years, as well as the preservation of the Blue Cross coverage.

[26] Ms. Reierson's billing records and file notes also document an office conference having been held with Ms. Coady on May 9th. Those notes record a discussion of Dr. Osberg's buying out Ms. Coady's interest in the matrimonial home by means of an extra $700 being paid per month over and above the earlier spousal support figure of $1300. Ms. Reierson then recorded a formula of half the value of the house (appraised at $172,500) less a $700 credit for each month paid, if for any reason Dr. Osberg stopped paying support (intended as a way to secure her client's position).

[27] On the following day, May 10th, Ms. Coady wrote a letter to Ms. Reierson

making two points, namely, (a) that the contingent reduction of $700 per month should only apply to spousal support payments made after June 1, 1996 and (b) she did not want a "live in" requirement in any property she might purchase with the support of her husband's mortgage guarantee. Ms. Coady concluded her letter with a comment that "the rest looks good to me".

[28] After taking these further instructions from her client, Ms. Reierson sent a detailed letter to Mr. Pizzo dated May 13th going through the draft agreement step by step, asking that consideration be given to wording amendments to several paragraphs. Amongst these was a request that there be a provision securing spousal support whereby if, for any reason Dr. Osberg stopped his spousal support payments before the termination date, Ms. Coady was to get a lump sum payment of $86,250 (representing half the current value of the matrimonial home) less a credit of $700 per month for the number of months spousal support was paid after June 1, 1996.

[29] On May 16th, Mr. Pizzo replied with the transmission of a revised separation agreement incorporating all the changes requested by Ms. Reierson with a few minor exceptions. On that same date Ms. Reierson reviewed these further suggested changes with Ms. Coady by telephone, clause by clause. Shortly thereafter, she prepared another letter, sent to Mr. Pizzo on May 21st , confirming those amendments which were acceptable and setting out a number of further minor changes which were required by Ms. Coady to be made. All of these further changes were then incorporated in the final draft of the separation agreement (a fact acknowledged by Mr. Sheppard at trial) which was signed by Dr. Osberg and

sent by his counsel to Ms. Reierson on June 6, 1996. On the following day, June 7th, Ms. Reierson held an office conference with Ms. Coady to review and execute the final draft of the separation agreement, to which was added Ms. Reierson's signed Certificate of Independent Legal Advice in the usual form.

TERMS OF FINAL AGREEMENT

[30] In its final version as executed by the parties, the separation agreement essentially provided as follows:

(1) Dr. Osberg was to have sole custody of the children of the marriage, their primary residence was to be with him, and he was to be responsible for their day to day care and control. Ms. Coady was entitled to liberal access at times agreed to between herself and her sons (then ages 18 and 14 respectively). Ms. Coady was expressly to have no responsibility for paying child support or making any other financial contribution to any of the children's expenses;

(2) Dr. Osberg was required to pay spousal support of $2,000 per month for the next 7½ years, ending December 1, 2003. The clause further provided that spousal support was neither to be extended or varied for any reason;

(3) Dr. Osberg agreed to pay his wife's tuition for a one year Masters of Social Work program at Dalhousie for which she had been accepted. He also agreed to contribute $400 toward the cost of books;

(4) Dr. Osberg was required to keep his wife on his Blue Cross group medical plan until December 31, 2003 or until she obtained coverage under her own group medical plan.

(5) If for any reason Dr. Osberg became unable or unwilling to continue payment of spousal support as provided, Ms. Coady would be become entitled to receive, as

a lump sum, $86,250 less a credit of $700 per month for the number of months spousal support was actual paid after June 1, 1996;
(6) Ms. Coady agreed to convey her interest in the matrimonial home to her husband, who was to remain solely responsible to pay the mortgage which by that time had been reduced to a relatively small amount;
(7) Both acknowledged that furniture and household effects had been divided to their mutual satisfaction;
(8) The 1993 Plymouth automobile which had served as the family car was to go to Ms. Coady;
(9) Dr. Osberg's RRSP in the principal amount of $22,000 was to be rolled over to Ms. Coady who was to assume any resulting tax consequences;
(10) Dr. Osberg's pension benefits accumulated during the period of cohabitation were to be equally divided;
(11) Dr. Osberg agreed to provide a mortgage guarantee to Ms. Coady in the event she wished to purchase real property, which guarantee was to be limited to the amount of $100,000 and in duration to December 1, 2003;
(12) Dr. Osberg agreed to be solely liable for certain debts, including the total owing on a line of credit from which Ms. Coady had unilaterally withdrawn $15,000 post separation.

[31] The separation agreement also contained a number of acknowledgment and release clauses including an acknowledgment that the agreement was made in full and final satisfaction of the respective rights and obligations under the *Matrimonial Property Act* and the *Divorce Act*, an acknowledgment that the agreement was entered into without undue influence, fraud or coercion and was

being signed voluntarily, and a release clause in respect of all rights and claims either might have against the other for payment of any form of spousal support, except as provided in the agreement.

EVIDENCE OF THE PARTIES AND THEIR EXPERTS

[32] When the parties first separated on July 1, 1994, it was supposedly to be on a trial basis. The two sons (then ages 16 and 12 respectively) were given a choice as to where they wished to live and they chose to stay in the matrimonial home where Dr. Osberg continued to reside after Ms. Coady moved into an apartment. Both continued to actively participate in their sons' lives. However, as the months went by, it soon became apparent that the separation would become permanent. Although by this time both parties had independent legal counsel (Mr. Pizzo and Ms. Corrine Corbett respectively), they continued to communicate with each other directly from time to time.

[33] In her evidence at trial, Ms. Coady portrayed her husband as having been verbally and emotionally abusive both during and after the marriage. She described him as a controlling person who used intimidation tactics in order to gain leverage in their matrimonial negotiations. More specifically, she alleged that her husband used threats that he would curtail her access to the two sons or otherwise interfere with her relationship with them in order to get the agreement he wanted. She also testified that at the time she was a "basket case" from the emotional stress of the situation, magnified by her medical history of mental health problems (details of which will be reviewed later in this decision). Ms. Coady asserts that it was this combination of circumstances that created an inequality of

bargaining power in the settlement negotiations and left her vulnerable to a bad agreement. She was also highly critical of the quality of legal representation she received, especially from Ms. MacKenzie and Ms. Reierson, which might otherwise have negated any power imbalance.

[34] Indeed, Ms. Coady made a number of astounding allegations against her legal counsel, citing a number of instances where drafts of separation agreements were allegedly sent to her husband's counsel without her instructions, without her input into its contents and indeed contrary to what she wanted. She was particularly critical of Ms. MacKenzie in several examples cited. To name only a few, she alleged that she did not receive Ms. MacKenzie's original opinion letter of June 2, 1995 until some time in early 1996 and that the referenced draft interim agreement was simply bogus (i.e., fabricated by Ms. MacKenzie). She further alleged that Ms. MacKenzie advised her to go to court asking for less than her legal entitlement in order to "look good" before the court. She alleged that Ms. MacKenzie stipulated that she had to sign an interim tax agreement as a condition to making an interim application for corollary relief. She accused Ms. MacKenzie of talking directly with her husband in respect of a RRSP rollover. She also alleged that Ms. MacKenzie quit her retainer and abandoned her in February of 1996 before Ms. Reierson agreed to take over the file. Notwithstanding several opinion letters to the contrary, she also testified that she never knew her legal rights (even though she acknowledged at one point that Ms. Reierson always gave a direct answer to a question, whether it was favourable or not). All of these allegations were flatly denied by Ms. MacKenzie and Ms. Reierson respectively.

[35] I do not accept Ms. Coady's evidence wherever it is contradictory to the evidence given by either by Ms. MacKenzie or Ms. Reierson. Both counsel gave their evidence in a forthright and balanced manner and were invariably supported by their file records of documents prepared, opinion letters sent and timekeeping of services performed. I find that the quality of the legal services which both Ms. MacKenzie and Ms. Reierson provided to Ms. Coady was unassailable.

[36] Ms. Coady, on the other hand, demonstrated a selective memory about past events that took place eight to ten years ago, especially in relation to her dealings with her lawyers. Apart from the many implausible allegations she made against her counsel, her evidence was otherwise shaped by contradictions, avoidance of direct answers with rambling asides on several occasions, and a constant spin to portray herself at every opportunity in like circumstances as the wife petitioner in *Crouse* (a case in which the court found that the husband was in a stronger bargaining position by exploiting the wife's concern to see her child, considered an unconscionable use of power).

[37] In making these findings of credibility, I do not mean to infer that Ms. Coady was deliberately falsifying her evidence. Rather, I am left with the impression that in her mindset of persecution by her husband, she believes what she wants to believe. A notable example lies in her testimony about a letter sent directly to her by her husband dated January 21, 1995. After discussing the financial aspects of their separation, Dr. Osberg concluded his letter as follows:

> As to the non-financial clauses of our separation agreement, I hope that we can come to a more formal agreement - as it is now I think there is no disagreement among us about the key principles, that we both want to be

> involved in the boys' lives and we both want their wishes to be respected should they wish to change their living arrangements, but for now they continue to live with me and I continue to be solely responsible financially for their well being.
>
> If there is a different "packaging" of the separation of our financial affairs that you now think is preferable from your point of view, please let me know and we can talk about it.

[38] Although this passage is plainly conciliatory in tone, Ms. Coady nonetheless testified that she interpreted it as a threat that Dr. Osberg would leverage her access to the boys to get the agreement he wanted on the financial side of the agreement. Curiously, even though the boys remained living in the matrimonial home with their father who bore sole financial responsibility for them, Ms. Coady testified elsewhere in her evidence that she nonetheless held the belief that she was the primary caregiver in her sons' lives.

[39] In his own testimony, Dr. Osberg described his efforts to reach a negotiated separation agreement on a global basis. He emphatically denied using any form of threats or interference in respect of Ms. Coady's access to the boys as a means of getting a better agreement for himself on the financial side. His financial objective was to secure a separation agreement that contained a spousal support termination date. It was on that premise that as the negotiations wore on, Dr. Osberg proposed spousal support of $1,000 per month for 15 years which was designed to coincide with his planned retirement date. Ms. Coady, he said, wanted security and when they met directly on or about April 10, 1996 Ms. Coady indicated that a deal could be reached on terms whereby she was to receive twice the amount for half the period, (i.e., $2,000 per month in spousal support over a guaranteed period of 7½

years). Dr. Osberg communicated this to his legal counsel and a spousal support provision in these terms thus found its way into the final version of the agreement as chronicled earlier in this decision.

[40] Dr. Osberg refuted his wife's allegation that he was domineering and controlling of her either during the marriage or after the separation. He testified that Ms. Coady has a strong personality and that there were lots of ways in which she was the dominant figure in their relationship.

[41] In support of her version of the imbalance of power in their marital relationship, Ms. Coady's counsel called Dr. Mary Lynch as an expert witness who was qualified to give opinion evidence in general adult psychiatry. Ms. Coady has been a patient of Dr. Lynch's since 1994. Dr. Lynch confirmed that her client in 1994 had presented with a diagnosis of depression and anxiety, something which Dr. Lynch attributed to an abusive marital relationship on the basis of what she was told by her patient and her patient's behaviour.

[42] Dr. Lynch expressed the opinion that at the time the agreement was signed in 1996, Ms. Coady was not in an appropriate frame of mind to provide reasonable instructions to counsel or to negotiate a separation agreement directly with her ex-husband. She was very clear in her evidence, however, that Ms. Coady's operative state of mind at the time was not one of depression nor was she lacking in mental capacity or mental competence in signing the agreement. Rather, Dr. Lynch based her opinion on what she perceived as a power imbalance between the parties, namely, an intimidating and authoritative husband who manipulated his vulnerable

wife into signing an improvident separation agreement for fear that things would be worse for the kids if she refused. Dr. Lynch added that because Ms. Coady had a past history of child abuse, she could more easily become dominated by an authoritative husband. The real issue here, in Dr. Lynch's view, was one of a power imbalance where Ms. Coady signed the agreement out of fear and not because she was incapable of understanding what the agreement said.

[43] The difficulty I have with Dr. Lynch's opinion evidence is twofold. First, she candidly acknowledged her understanding, based on what she was told, that Ms. Coady's lawyer had stopped representing her, leaving her in a position of having to negotiate a separation agreement with her husband on her own. She acknowledged that it might be different if Ms. Coady had been in a position to instruct a lawyer advocate in whom she held confidence.

[44] This assumption, through no fault of Dr. Lynch's, is simply wrong and could only have come from Ms. Coady, since at no time did Dr. Lynch ever speak with either Ms. MacKenzie or Ms. Reierson. It is completely untenable to say that because of the breakthrough reached at their private April 10, 1996 meeting, this separation agreement was signed without independent legal advice or adequate legal representation otherwise.

[45] The second difficulty I have with Dr. Lynch's opinion is that she went beyond her field of expertise by twice saying that this was an unfair separation agreement and one that Ms. Coady should not have signed. Quite apart from the fact that she could not say that she had ever been given a copy of the actual

separation agreement (and therefore did not likely know all the facts), it was not her place to express such an opinion or to slip into the role of an advocate for her patient's position which she plainly did in giving her evidence. These deficiencies in the soundness of the underlying assumptions and the lack of objectivity in expressing her expert opinion lead me to the conclusion that little weight should be placed upon it.

[46] I draw this conclusion quite apart from the counter expert evidence given by Dr. Ed Rosenberg on behalf of Dr. Osberg who, after reviewing the clinical file and reports of Dr. Lynch, expressed the opinion that Ms. Coady was euthymic (of normal mood) at the time she entered into the separation agreement and was in a proper frame of mind to instruct legal counsel. Although Dr. Rosenberg did not himself examine Ms. Coady at any time, he observed in his testimony that there was nothing contained in any of Dr. Lynch's clinical notes to indicate that Ms. Coady lacked insight into what she was doing or was impaired from the effects of intimidation or duress in her judgment making ability.

FINDINGS AND CONCLUSIONS

Section 29 Analysis

[47] I now turn to the necessary findings to be made on the evidence, beginning with the first branch of the analysis under s.29 of the *Matrimonial Property Act*. As noted earlier, in order to succeed on the ground that the separation agreement was unconscionable, Ms. Coady must show that there was an inequality in the position of the parties which left her vulnerable to the power of her husband and that the agreement signed was substantially unfair to her.

[48] I do not accept the argument that Dr. Osberg attempted to gain leverage in the settlement negotiations by making threats, veiled or otherwise, to curtail Ms. Coady's access to the two sons or to otherwise interfere with her relationship with them. The only evidence supporting that proposition came from Ms. Coady and from Dr. Lynch who essentially relied on what she was told by her patient. Ms. Coady may well hold that belief in her own mind but it does not stack up against the preponderance of the rest of the evidence. Dr. Osberg adamantly denied engaging in any such conduct and consistent with that evidence are his contemporaneous notes of various meetings held and communications sent to Ms. Coady and/or her solicitor. Ms. Reierson herself testified that she saw no indication of any such intimidation tactics being perpetrated on her client by Dr. Osberg; nor are such recorded in the clinical file notes of Dr. Lynch as impairing her judgment making ability.

[49] Ms. Reierson further testified, after referring to her file records, that she received instructions from Ms. Coady during their March 25, 1996 meeting to send a settlement proposal to Mr. Pizzo which contained a provision for sole custody in favour of Dr. Osberg, coupled with a provision for liberal and flexible access in favour of Ms. Coady. Ms. Reierson had no concern with that, as opposed to a joint custody provision, because as she put it, the details of the parenting arrangement, especially for teenage children, are more important than what it is called. The proposed arrangement also reflected the status quo over the previous two years since the separation began.

[50] Ms. Reierson also described her client as astute, assertive and capable, very involved in the negotiations, and never one reluctant to express her views. Ms. MacKenzie similarly described her as capable, competent, assertive of what she wanted to do and that she was a sophisticated client.

[51] Accepting their evidence about the dynamic of the settlement negotiations as I do, I am unable to conclude that there was any real power imbalance between the parties in reaching the final separation agreement signed on June 6, 1996. I have no doubt but that Ms. Coady was undergoing a good deal of emotional stress at the time but that condition does not necessarily translate into an inequality of bargaining power. To the extent that it was a factor, or even if there was a power imbalance to some degree, I find that it was effectively negated by the legal assistance provided to her.

[52] Turning to the substance of the agreement as it pertains to property issues under the s. 29 analysis, neither do I accept the proposition that the terms reached were substantially unfair to Ms. Coady. The parties really had only two major assets, namely, the matrimonial home, and the husband's pension. It was agreed that the pension benefits accumulated during the period of cohabitation be equally divided. Other matrimonial assets largely went to Ms. Coady, all as outlined in the terms of the final agreement earlier recited. Where the parties are at odds in this litigation is in respect of the realization of Ms. Coady's half interest in the value of the matrimonial home.

[53] I am satisfied that the intent of this agreement was that Ms. Coady would realize her half interest in the matrimonial home in the form of increased spousal support payments. The agreed upon increase was $700 per month for a guaranteed period of 7½ years, which in the aggregate amounts to $63,000. Granted, that amount will have been somewhat eroded insofar as spousal support is taxable but it must be borne in mind that Ms. Coady then had an insignificant income, and was intending to go back to university for her Masters degree in Social Work with the view to gradually attaining self-sufficiency. Given the amount of the equalization payment otherwise required from Dr. Osberg, calculated by his counsel at approximately $50,000, I am satisfied that the net effect of this arrangement was a roughly equal division of matrimonial assets overall. That, incidentally, was also the view expressed by Ms. Reierson who crunched the numbers on behalf of her client. She readily acknowledged that the structure of the agreement was unusual but felt that it was one that worked for Ms. Coady in achieving her objectives.

[54] Where the tests of inequality of power and substantial unfairness have not been met for the foregoing reasons, the application to set aside the agreement pursuant to s.29 of the *Matrimonial Property Act* cannot succeed.

Miglin Analysis

[55] There remains to decide whether the separation agreement can successfully be set aside under the *Miglin* test. As noted earlier, an initial application for spousal support inconsistent with a pre-existing agreement, like the situation here, requires a two-stage investigation into all the surrounding circumstances, first at the time of its formation, and second, at the time of the application.

[56] The first step in the stage one analysis is to look at the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it. For the reasons given earlier in this decision in the counterpart analysis under s.29 of the *Matrimonial Property Act*, I am satisfied that the conditions under which the agreement was negotiated are satisfactory and that the bargaining process was not vitiated by the effects of a power imbalance.

[57] That leads me to the next step which is to determine the extent to which the agreement takes into account the factors and objectives listed in the *Divorce Act*, thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown. As the Supreme Court further observed in *Miglin* (at paras. 84-85):

> Only a significant departure from the general objectives of the Act will warrant the court's intervention on the basis that there is not substantial compliance with the Act. The court must not view spousal support arrangements in a vacuum, however; it must look at the agreement or arrangement in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves.
>
> When examining the substance of the agreement, the court should ask itself whether the agreement is in substantial compliance with the Divorce Act. As just noted, this "substantial compliance" should be determined by considering whether the agreement represents a significant departure from the general objectives of the Act, which necessarily include, as well as the spousal support considerations in s.15.2, finality, certainty, and the invitation in the Act for parties to determine their own affairs. The greater the vulnerabilities present at the time of formation, the more searching the court's review at this stage.

[58] In negotiating the agreement at hand, Dr. Osberg wanted a termination date for spousal support. Ms. Coady wanted indefinite spousal support . The compromise reached was that Dr. Osberg committed to paying spousal support for a further guaranteed period of 7½ years (a result not guaranteed from a court) while at the same time agreeing to fund Ms. Coady's tuition and books for her Masters program in Social Work. He also agreed to provide a mortgage guarantee up to a limit of $100,000 if Ms. Coady wished to purchase a home. All of this was designed to enable Ms. Coady to attain self-sufficiency over the next 7½ years by obtaining her Masters degree and gradually reentering the workforce. Ms. Reierson testified (and Ms. MacKenzie before her) that this was considered a reasonable expectation at the time and was the anticipated outcome in discussions with her client. Ms. Coady would not admit to this in her evidence at trial but the fabric of the agreement, coupled with the evidence of her counsel, convinces me otherwise.

[59] The other dimension of spousal support, of course, is the amount of the payments. Although the agreement speaks in terms of $2,000 per month in spousal support, $700 of that was earmarked as a means of Ms. Coady's realization of her half interest in the value of the matrimonial home. The true amount of spousal support being paid, therefore, was $1,300 per month, the same amount to which the parties consented in the interim order taken out before the Chambers judge on December 21, 1995. It is to be remembered, of course, that the two sons of the marriage continued to reside with Dr. Osberg in the matrimonial home and that Ms. Coady was, under the express terms of the agreement, not to have any responsibility for paying child support or making any other financial

contribution to any of the children's expenses.

[60] Ms. Reierson testified that in her estimation, a spousal support payment of $1,300 per month was in the acceptable range having regard to the spectrum of factors at play, including her assumption that Dr. Osberg's annual income would likely fluctuate between $80,000 and $90,000 based on the historical data and an earlier affidavit. As it happened, Dr. Osberg's income rose to approximately $95,000 in 1994 and a similar amount in 1995. Ms. Reierson acknowledged that that might justify some difference in the spousal support level but would not make for a substantial increase considering all the factors at play. This is reflective of what Justice Goodfellow said in *Mosher v. Mosher* (1999) 177 N.S.R. (2d) 236 where he reiterated that reasonable support is not a mathematical entitlement to a percentage of whatever is the income of the paying spouse but rather, the high income earning payor must meet the priority of child support and the obligation of spousal support to a reasonable level.

[61] Although Dr. Osberg's 1995 tax return had apparently not been provided before the separation agreement was signed on June 6, 1996, his 1994 income at roughly the same level was known. Although his income then took a sharp rise temporarily in 1996 and 1997 because of a private outside consulting contract, I am satisfied that this income opportunity arose only after the separation agreement was signed and without any advance knowledge or anticipation. This is not a case, therefore, where there has been any material non-disclosure by the husband in negotiating an agreement.

[62] Having regard to the factors and objectives listed in s.15.2(4) and 15.2(6), which I simply incorporate by reference in this decision, and the broader objectives of certainty, finality and autonomy, I conclude that the separation agreement in issue in this case is in substantial compliance with the *Divorce Act*. Its terms may not be what a court would or could have imposed, but it does not represent, in my view, a significant departure from the general objectives of the Act. It is an agreement that was tailored in the discretion of the parties to achieve their respective priorities and goals of the day. Ms. Coady obtained spousal support in an acceptable range for a guaranteed duration of 7½ more years while being free to pursue her educational and career goals in working towards self-sufficiency. Dr. Osberg achieved his objective of a date certain for the termination of spousal support payments. The prospect of having to sell the matrimonial home was also avoided by compensating Ms. Coady for her half interest in it through the avenue of increased support payments. In the result, I conclude that the negotiation of the separation agreement cannot be impugned on the basis of the stage one analysis under the *Miglin* test.

[63] The second stage of the analysis under the *Miglin* test is more complex and more difficult in its practical application. The approach to be taken was articulated by the Supreme Court in the following passages (at paras. 87-88):

> Where negotiation of the agreement is not impugned on the basis set out above and the agreement was in substantial compliance with the general objectives of the Act at its time of creation, the court should defer to the wishes of the parties and afford the agreement great weight. Nevertheless, the vicissitudes of life mean that, in some circumstances, parties may find themselves down the road of their post-divorce life in circumstances not contemplated. Accordingly, on the bringing of an application under s.15.2, the court should assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent

> to which it is still in substantial compliance with the objectives of the Act.
>
> The parties' intentions, as reflected by the agreement, are the backdrop against which the court must consider whether the situation of the parties at the time of the application makes it no longer appropriate to accord the agreement conclusive weight...the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.

[64] In my respectful observation, this second stage of the test is fairly malleable and gives trial courts fairly wide latitude in its application. The Supreme Court has stated, however, that the focus is not whether a change has occurred *per se* (this not being a s.17 variation situation), but rather should be on the agreement's continued correspondence to the parties' original intentions as to their relative positions and the overall objectives of the Act.

[65] In the present case, events did not unfold in the years following the separation agreement exactly as planned. Although Ms. Coady commenced her Masters in Social Work degree in 1996, she did not complete it until 2001. She attributed the delay to her difficulty in coping with the amount of work involved and to the time devoted in giving priority to her son Brandon.

[66] Between 1997 and 2000, Ms. Coady also engaged in research project work from time to time. After getting her degree in 2001, she says that she applied for a number of jobs in 2002 and was eventually hired by Statistics Canada in 2003 as an outside personal survey interviewer. She has since become a permanent employee with that organization. Ms. Coady has otherwise devoted considerable

time and energy in recent years in litigating this matter on her own.

[67] It is true that Ms. Coady has not achieved self-sufficiency to the degree and at the pace that was contemplated when the separation agreement was signed eight years ago. I conclude, however, that the current circumstances do not represent a significant departure from the range of reasonable outcomes anticipated by the parties in a manner that puts them at odds with the objectives of the *Divorce Act*. Furthermore, as the Supreme Court observed in *Miglin* (at para. 91), "parties must take responsibility for the contract they execute as well as for their own lives". Ms. Coady's delayed progress is a product of her own priorities and is not in any way attributable to any impediments by Dr. Osberg.

[68] As was the result in *Miglin*, I find overall that Ms. Coady's evidence regarding her present circumstances fails to demonstrate that the separation agreement, fairly negotiated and substantially compliant with the objectives of the Act at its formation, is no longer so and therefore should not continue to govern the parties' post-divorce obligations towards each other.

[69] It follows that the June 6, 1996 separation agreement stands as a valid and binding agreement between the parties and should be incorporated into the appropriate Corollary Relief Judgment. If costs are sought by Dr. Osberg, and the parties are unable to agree, I will hear written submissions from counsel to be filed by July 30th.

J.