IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Cooper v. Cooper, 2007 NSSC 239

Date: 20070809
Docket: SFK No. 051180
Registry: Kentville

Between:

Jo-anne Doreen Cooper

Applicant

v.

Nigel Brian Cooper

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	June 29, 2007, in Kentville, Nova Scotia
Final Written Submissions:	July 13, 2007
Counsel:	Kim A. Johnson, Counsel for the Applicant Jane Lenehan, Counsel for the Respondent

By the Court:

A. ISSUE AND INTRODUCTION

[1] On application of the *Miglin* analysis, should a Separation Agreement which provides fixed term spousal support following a long-term traditional marriage in exchange for a significant unequal division of assets be upheld or overridden? What constitutes a reasonable level of self-sufficiency?

[2] The parties separated in February 1998 after a long-term “traditional” marriage. After extended negotiations with experienced counsel a Separation Agreement was executed in October 2000. The agreement: split equally Mr. Cooper’s military pension ($212,000. to Ms. Cooper); gave Ms. Cooper more matrimonial assets than their net value (assets of $300,000, debts of $200,000); left Mr. Cooper with a deficit (assets of $3,000, debts of $40,000); and directed payment of spouse support of $2500.00 per month (40% of Mr. Cooper's employment income) for six years (in addition to the two and a half years between separation and the agreement).

[3] Mr. Cooper petitioned for and obtained a Divorce Judgment in Ontario in May 2001. A Corollary Relief Judgment was not applied for or issued at that time. Spousal support ended in November 2006. In February 2007 Ms. Cooper applied in Nova Scotia for a Corollary Relief Judgment seeking continuation of indefinite spousal support. Mr. Cooper asks that the terms of the Separation Agreement be upheld. The jurisdiction of this court to determine the issue, and the applicability of the Miglin analysis, are not disputed.

B. FACTUAL BACKGROUND

[4] The Coopers were married in 1972. Mr. Cooper was a twenty-one-year-old private in the Air Force with a Grade 10 education. Ms. Cooper was a twenty-five-year-old single parent of a six month old child on social assistance, with a Grade 12 education. They had two children together. Mr. Cooper raised Ms. Cooper's first child as his own. The children are now independent. By agreement the marriage was a “traditional” one. Ms. Cooper was a stay-at-home parent and Mr. Cooper the breadwinner.

[5] Early in the marriage, Mr. Cooper attended military college and obtained an engineering degree. Ms. Cooper says these were “lean economic years”. Mr. Cooper disagrees; he says his salary continued and his education was paid for by the military. Ms. Cooper acknowledges that Mr. Cooper's education plan was agreed to by her and that the attainment of the engineering degree provided a much higher standard of living for the family thereafter.

[6] As is typical of military families, the Coopers moved eight times between 1972 and 1995 when Mr. Cooper took early retirement. I find no reliable evidence that Ms. Cooper expressed a desire to pursue higher education or career opportunities outside the home until 1995 when she expressed the desire to purchase a farm in rural Nova Scotia and commence llama farming, in which pursuit she received Mr. Cooper's full support.

[7] On retirement, Mr. Cooper initially obtained employment with the nearby Michelin Tire plant. The Coopers’ income totalled $68,000.00 (Mr. Cooper’s employment income and pension) less farm losses. In August 1997 Mr. Cooper accepted a position in Ontario as a professional engineer. Ms. Cooper remained on the farm. In February 1998 Mr. Cooper informed Ms. Cooper that the marriage was over.

Post-separation

[8] At the time of separation and the Separation Agreement, Mr. Cooper's annual income consisted of $ 74,984.00 employment income from ADGA Group and an unindexed military pension of $28,224.00.

[9] After separation Ms. Cooper continued to operate the llama farm at East Dalhousie, Nova Scotia. When started, the parties had agreed to try to establish it as a going concern for a period of five years. The five years were up in 2000. Post-separation the farm continued to incur an annual deficit and consumed a significant portion of Mr. Cooper's income, the family savings, and caused further debt. The financial records before the Court show that, since the Separation Agreement, the llama farm has continued to incur annual deficits; it has never generated a net profit or income.

[10] Both parties were cross-examined on their affidavits. While Ms. Cooper challenged the financial records and accounting contained in Mr. Cooper's lengthy

affidavit, she does not provide a coherent alternative accounting. The cross-examination of Mr. Cooper by Ms. Johnson strengthened my comfort in the integrity and coherence of his records as to the accounts, and transactions between the parties. In the end, I accept Mr. Cooper's evidence of their finances as set out in his Affidavit and Statement of Financial Information - before, at the time of, and since the separation.

[11] In the two and a half years between the separation and Separation Agreement, Mr. Cooper paid Ms. Cooper (as shown in Exhibit 5G) approximately $122,000.00 - $66,000.00 as tax-deductible spousal support and the remainder without income tax relief.

[12] At the time of the Separation Agreement, the assets of the parties, with the approximate values at that time were as follows (Exhibit 5D):

(a)	Mr. Cooper's military pension valued at approximately		$424,000.00
	(based on the value of $212,198.00 placed by National Defence's Superannuation office of the ½ paid to Ms. Cooper at the time of division);		
(b)	The farm property (including the house),		$130,000.00;
(c)	The Llamas -		$120,000.00;
(d)	RSPs -		$ 22,300.00;
(e)	Vehicles -		$ 9,500.00;
(f)	Household effects -		$ 25,000.00;
		Subtotal:	$ 750,800.00

DEBTS:

(g)	House Mortgage:	$	85,000.00
(h)	Farm and llama loan:	$	32,000.00
(i)	1997 Income Tax:	$	6,800.00
(j)	Ms. Cooper's Visa bill:	$	12,000.00
(k)	Mr. Cooper's Visa bill:	$	1,800.00
	Subtotal:	$	147,600.00

[13] Attached to Mr. Cooper's Affidavit as exhibit 5B and 5H are 172 pages of correspondence and emails between the parties and their lawyers related to the negotiation and execution of the Separation Agreement. From not later than September 1998, Ms. Cooper was represented by Lynn Reierson, one of the pre-eminent lawyers practising family law. Exhibit 5B and 5H confirm that all the relevant legal and factual issues were thoroughly canvassed. It is clear Ms. Reierson advised Ms. Cooper and told Mr. Cooper on many occasions that courts do not generally support fixed term spousal support orders for long-term traditional marriages.

[14] As a result of the Separation Agreement:

> (a) Mr. Cooper's military pension was divided equally, with Ms. Cooper receiving $ 212,192.00 in January 2001;
>
> (b) Ms. Cooper received the farm, llamas, RSPs, one vehicle and most of the household effects with a value of approximately $300,000.00, and she assumed the mortgage and her VISA bill in the amount of approximately $ 97,000.00 for net assets in excess of $ 200,000.00;
>
> (c) Mr. Cooper ended up with one vehicle and a few household effects, worth $ 3,000.00, and the remaining debts of approximately $ 41,000.00; that is, net debt of $37,000.00;
>
> (e) Mr. Cooper's pension income was reduced by $1,006.00 per month ($12,000.00 per year) or from $ 28,000.00 to $16,000.00 per year (to be further reduced at age sixty-five);
>
> (f) Ms. Cooper invested all or most of her share of the pension in a manner that nets her approximately $ 800.00 per month;
>
> (g) In addition to $120,000.00 paid by Mr. Cooper for two and a half years before the Agreement, he paid spousal support of $ 2,500.00 per month - approximately 40% of his employment income at that time for six more years.

[15] The Separation Agreement included the following terms:

> AGREEMENT AND INTENTION
>
> 8. In consideration of the promises and conditions in this Agreement, and other good and valuable consideration, the receipt and sufficiency of

which is hereby acknowledged, the parties covenant and agree as follows:

b) This Agreement is a full and final settlement between the parties and may be pleaded as a complete defence to any action brought by either party to assert a claim in respect of any matter dealt with by this Agreement, except where:

   i) this agreement expressly provides for review or variation of a particular term of conditions, or
   ii) where a party has failed to disclose a significant circumstance with respect to his or her financial or asset position which should have been raised during negotiation of this Agreement;

c) This Agreement constitutes a Separation Agreement pursuant to the Family Law Act of Ontario, or any successor legislation and subject only to the jurisdiction and approval of the Court, this Agreement shall also be the Minutes of Settlement of all corollary matters and shall be incorporated in and form part of the Corollary Relief Order in any divorce proceedings between the parties;

e) Both parties intend that this Agreement of support and division of assets and debts be a full, final and binding financial settlement and resolve all claims upon each other except as specifically mentioned in this Agreement.

RELEASES

13. Subject to the terms of this Agreement and any rights given by either party by a Will executed after the effective date of this Agreement, the parties agree that:

a) All of their property and responsibility for debts have been divided between the parties to their mutual satisfaction. An unequal division of assets and debts, in favour of the Wife, has occurred. The monetary value of this unequal division could not

be mutually agreed upon. The parties consent to this division as a division of property within the meaning of the Family Law Act of Ontario or any successor legislation.

b) All rights and obligations of the parties arising during cohabitation or on separation are governed by this Agreement. Subject to the terms of this Agreement, the parties each release and discharge all rights and obligations he or she may have under any laws of any jurisdiction;

c) The term “rights and obligations” in this section means all those rights and obligations arising with respect to:

   i) occupation or use of property;

   ii) ownership or division of property (including property which one party may hold for the other as trustee on a resulting trust or any other type of trust;

   iii) compensation by payment of an amount of money, or by a share of property for contributions of any kind whether direct or indirect, made to property;

   iv) support of one party by the other;

   v) claims to any share or to the administration of the estate of the other that either party might have under the laws of any jurisdiction including any claims as a dependant, whether the other party has died testate or intestate;

   vi) pensions and other employment benefits;

d) The releases in this section with respect to property shall not come into effect until all transfers of property, money or other consideration in lieu of property required by this Agreement have been completed.

ADVICE AND CONSIDERATIONS ON SIGNING

17. The parties acknowledge that:

a) The Wife has had independent legal advice;

b) The Husband has had independent legal advice;

c) Each party understands their respective rights and obligations under this Agreement;

d) Each party hereby warrants that he or she has given the other full and complete information about all his or her significant financial circumstances, prospects, assets and liabilities to the date of signature (herein after called “financial information”);

e) Each of them have entered into this Agreement without undue influence, fraud, misrepresentation or coercion, have read the entire Agreement and is signing it voluntarily;

f) This Agreement cancels all prior negotiations or Agreements (written or oral) between the parties and contains the entire Agreement between the parties. Neither party shall rely on any verbal or written communications or conduct which may suggest one party's intent to hold any property in trust for the other or otherwise depart from the terms of this Agreement. This Agreement may be varied only by a written amendment executed by both parties.

SCHEDULE A - SPOUSAL SUPPORT

9. Full Satisfaction

Both Husband and Wife acknowledge that upon the property transfers and payments being made set out in Schedule A and Schedule B of this agreement that each will be deemed to be self-supporting and not in need of support from the other. Both accept the terms hereof in full satisfaction of all claims and causes of action which he/she now has or may thereafter acquire against the other for support whether under the Family Law Act, 1986 S.O. 1986, c. 4; R.S.O. 1990, C.F. 3; Divorce Act, 1985 S.C. 1986, c. 4; Succession Law Reform Act, R.S.O. 1990,

Chap. S. 26 and other amendments; or otherwise, under presently existing legislation or future legislation whether in this jurisdiction or any other jurisdiction. This agreement and this paragraph in particular may be pleaded as a complete defence to any claim brought by either spouse to assert a claim for support.

10. Catastrophic Change
The Husband and Wife both realize that there may be future changes in their financial circumstances by reason of their health, the cost of living, their employment, financial management, financial reversals, inheritance or otherwise. No change whatsoever, even if it be material, profound, catastrophic or otherwise, will give either the right to cliam or obtain support from the other pursuant to the Family Law Act, 1986 S.O. 1986, c. 4; R.S.O. 1990, CF. 3; Divorce Act, 1985 S.C. 1986, c. 4; Succession Law Reform Act, R.S.O. 1990, Chap. S 26 and other amendments; or any other statute or law in any province or federally. More particularly, both parties acknowledge that he or she may be called upon during the rest of his or her life to use, either wholly or in part, his or her capital for his or her own support and he or she agrees to do so without any recourse to the other at any time.

C. PARTIES' SUBMISSIONS

APPLICANT'S ARGUMENT

[16] The Applicant acknowledges that the *Miglin* analysis is the applicable test. She acknowledges that the negotiation of the agreement itself (*stage 1 step 1*) was unimpeachable. She argues, with respect to the *stage 1 step 2* analysis, that the agreement did not meet the objectives of the **Divorce Act** when negotiated because self-sufficiency was not an attainable goal within the time allowed. She cites *Camp v. Camp*, 2006 BCSC 608 as support for this submission.

[17] Given her age (51 at separation), education (High School) and work experience (sporadic minimum-wage jobs during a long-term marriage), and despite her optimism at the time of the agreement, self-sufficiency through employment was not an attainable goal. Self-sufficiency was dependent upon investment income,

supplemented by the Canada Pension and some minimum-wage employment. The maximum attainable investment income (assuming liquidation of all assets) was $ 20,400.00 per year, Canada Pension was $ 323.00 per month or $ 3,876.00 per year, and minimum wage employment would earn her a maximum of $ 1,300.00 per month or $ 15,600.00 per year. She argues that this level of income would not suffice to attain a reasonable economic self-sufficiency. Although not expressly argued in her memorandum, I assume that Ms. Cooper's budget (Exhibit 2), which lists expenses of $ 4,200.00 per month or $ 50,000.00 per year exclusive of income tax, constitutes her representation of reasonable economic self-sufficiency in her circumstances.

[18] With respect to the *stage 2* analysis, the Applicant argues that if the agreement did pass the *stage 1 step 2* test, the agreement does not meet the objectives of the **Divorce Act** today, since the unequal division of assets (the value of which assets is less today than at the time of the agreement), has not generated sufficient income for reasonable self-sufficiency.

[19] The Applicant acknowledges that the Respondent's circumstances have also changed:

> a) He remarried; his new wife had a remunerative career, but by reason of a serious illness has been hospitalized and is unable to contribute to the family income except minimally; in addition, her condition has contributed to higher living expenses in their household.
>
> b) In 2003, in anticipation of the termination of spousal support, the Respondent and his wife (then age 46 and without a child) adopted a one-year-old child from China at a significant cost; that child is now starting school.
>
> c) The Respondent suffered a financial setback from the sale of a property for less than the expected value; this, added to other debts, with a significantly higher debt load than at the time of the agreement ($190,000.00 now versus $41,000.00 then); his ability to borrow money has been maxed out.

d) He intended to retire within two years - to stay home to raise their child and do woodworking while his wife continued her career. The Applicant submits (correctly in my view) that this plan is unreasonable in light of the inability of his wife to work more than minimally, his substantial debts, and the cost of raising a young child, even if Mr. Cooper is correct in concluding that he is burnt out from stressful employment since the age of seventeen.

[20] Despite the Respondent's setbacks, the Applicant argues that the Respondent has employment income of about $ 90,000.00 per year plus his share of the military pension ($ 18,000.00 per year) and can afford to pay some spousal support.

RESPONDENT'S ARGUMENT

[21] Regarding the *stage 1 step 2* analysis, the Respondent argues that the *Camp* decision is distinguishable from this case for several reasons:

a) Mr. Camp never made full financial disclosure (para. 32). From the disclosed information, the court concluded that Ms. Camp's one-half share of the matrimonial assets would have totalled $ 590,000.00 (versus the $ 750,000.00 capital sum invested for her under the agreement) but this $ 590,000.00 excluded many items. It appears that he concluded that Mr. Camp did not prove an uneven division of assets in favour of Ms. Camp.

b) Mr. Camp breached his guarantee that Ms. Camp's capital fund would generate at least 8% return for fifteen years.

c) Despite Ms, Camp's reasonable efforts to seek and maintain employment during the marriage, she had a serious heart-related health issue that prevented her from obtaining employment income after separation.

[22] With respect to the *stage 2* analysis, the Respondent argues that the Applicant was and is a healthy and productive person who is able to contribute to her own support through employment income. He argues that since she agreed to exchange indefinite or open spousal support for a substantially unequal division of matrimonial assets in her favour, she has made choices that were unreasonable. These choices included continuing to pursue her passion for llama farming when it clearly was not economic and when it consumed the spousal support paid and the assets acquired since separation. The Respondent argues that this choice was made

with knowledge of the consequences. He submits that the Applicant's position that these consequences were not foreseeable or were beyond her control, did not hold up on cross-examination. His post-hearing memorandum summarized his position as follows:

> The Respondent signed an agreement that was intended to allow the Applicant to attain self-sufficiency. Rather than running the llama farm as a business and making reasonable and diligent efforts to become self-sufficient, the Applicant instead chose to run the farm as a hobby supported by her spousal support and almost all the assets she received in the unequal division in her favour. In short the Applicant ran her operation as a "gentleman farmer" and now takes the position that she is entitled to continue doing so and the Respondent should be required to continue supporting her and the llamas indefinitely.
>
> The Respondent respectfully submits that in these circumstances an order for continued spousal support would be unjust. The only "asset" the Respondent was left with after signing the Agreement was his ability to earn an income. He intends to retire within the next couple of years and must allocate his income wisely over that period of time in order to provide for his 5 year old daughter and his wife. The Respondent honoured his end of the bargain with the Applicant and should now be permitted to focus his attention on his new family.

D. LAW

[23] The law has not changed since this Court's decision in *Day v. Day*, 2006 NSSC 111. I adopt and incorporate the statement of law set out in paras. 31-42 of that decision, without repeating them.

[24] The leading case is still *Miglin v. Miglin*, 2003 SCC 24. Annual Review of Family Law 2006, by the late James G. McLeod and Alfred A. Mamo (2006: Carswell, Toronto), c. 5, contains a useful enumeration of factors relevant to the application of the *Miglin* test to this case. McLeod and Mamo divide their analysis into the four inter-related issues of validity, enforcement, overriding the agreement and interpretation of the agreement.

[25] They write that courts encourage spouses to settle their disputes, and if they do, generally respect their settlements. This does not mean courts will uphold unfair but valid agreements, or agreements which become unfair as a result of changed circumstances outside the spouses' reasonable contemplation; however, the onus is

on the person challenging the agreement to establish that it is either not valid or should be overridden.

E. ANALYSIS

[26] *Stage 1 step 1* of the *Miglin* analysis requires the Court to look at the circumstances of the negotiation and execution of the agreement. The Applicant does not argue that the circumstances surrounding the negotiation and execution of the agreement make the agreement invalid. A review of the affidavits, and the cross-examination of the parties on their affidavits, and in particular a review of Exhibit 5B and 5H, the emails and correspondence between the parties over the two years of their negotiations, gives a clear picture of the process that led to the agreement. It shows that:

a) Both spouses were directly involved in the protracted negotiations and were at all times aware of the circumstances and the position of each other.

b) Both spouses were represented by legal counsel throughout. Ms. Cooper was represented by Lynn Reierson, one of the preeminent lawyers in the area of family law. She advised the Applicant and advocated to the Respondent in an aggressive and capable manner throughout the negotiation and execution process. The Applicant's present case is based on the proposition that spousal support should have been indefinite. Exhibit 5B shows many occasions when Ms. Reierson advised the Applicant and advocated to the Respondent the attitude of courts on this issue. They include, for example:

i) an October 13, 1999 fax from Ms. Reierson in which she refers to her earlier formal Offer to Settle that included two spousal support options. She writes: “My client, at 52 years old, is not in a position to consider the very limited spousal support which your client has offered. It is my intention to set this matter for trial. I am assuming at this point that the trial will be limited to the issue of spousal support. I am confident that the court will not impose a termination date on spousal support.”

ii) On December 14, 1999 she again emailed Mr. Cooper, with a copy to Ms. Cooper, as follows: “I have advised Jo-Anne that if any

> application for spousal support is made either on an interim basis or at a final divorce trial you will likely be ordered to pay between $3,500.00 and $4,000.00 per month ($1,750.00 to $ 2,000.00 net of tax to you) and that there will be no fixed termination date for support. Jo-anne has a long-term spousal support entitlement - possibly even permanent. Please take this letter to Joseph Hammond to satisfy yourself that my comments in this regard are not simply “posturing”. I have not recommended this settlement offer to Jo-Anne, nor have I advised her to refuse an offer of terminating spousal support. That decision is entirely Jo-Anne's and she is making the decision with the knowledge that a court would not terminate her support or limit her income to $ 20,000.00 per year. ... Jo-Anne will require spousal support of $ 3,000.00 per month retroactive to September 1, 1999. She is prepared to consent to a termination order of 2008. In my opinion this termination date is a major concession on her part.”

[27] The emails and correspondence in Exhibit 5B further demonstrate the Applicant's and Respondent’s views with regards to the contribution that llama farming could make towards her efforts to attain self-sufficiency. The exchanges include:

a) A July 23, 1999 email from the Applicant to the Respondent, “I was shocked at your suggestion of outside employment...we have discussed a five-year plan where we expected to build a reputation and a good line of breeding stock. When you originally moved to Ottawa no mention was made to change the plan. I am far ahead of this plan on my own in less than four years and have sold more llamas than anyone in Atlantic Canada...if one looks at the books and sees only the red at the infancy of this business, it does not measure the success so far.”

b) In an October 25, 1999 email to the Applicant the Respondent wrote, “When we got into the llama business we agreed that we would give it five years to make money, which to my way of thinking meant that if it was not making a profit by year five then it would be time to get out of the business. I supported the business for four years investing most of my retirement money, my spare time working on the barn, house and fields...I do not want to fight over this separation, but I also do not want to be taken advantage of just because you want to keep a business

that you yourself said was ahead of the five year plan after only four years, yet has not come even close to making a profit. If you insist on keeping the farm and animals then you must be prepared to subsidize the business yourself. ... You are an intelligent and resourceful woman and I know that you would have little difficulty getting a job and eventually becoming self-sufficient. The five years that I have offered to pay this spousal support would allow you time to get settled and possibly allow you to save some money for retirement."

c) In a December 16, 1999 email to Lynn Reierson, copied to the Applicant, the Respondent discussed the effect that the llama farm had on their assets, and wrote, "But I would hope that Jo-Anne also understands the financial implications of the llama business, having been a llama farmer for the better part of five years, and that these facts have entered into her decision. I believe, rightly or wrongly, that it is not unreasonable to think that at this point Jo-Anne should assume the consequences of her decisions. Keeping the farm and its financial burden may be her wish, but it is not her only option. As I am sure you will understand, keeping the farm has never been my favourite option. ... I have done my best to respect her wishes. However, I think that no fair-minded person would find me unreasonable, greedy or irresponsible to ask not to have to continue carrying, after five years, a business that shows a considerable loss each year."

d) In a January 17, 2000 email to the Respondent, the Applicant wrote, "I have a job. I am a farmer or have you forgotten. This is my career of choice."

e) On March 14, 2000 the Applicant emailed the Respondent, "Since I can no longer afford the animals or the mortgage I will be forced to take drastic steps. Starting April 1st I will begin to look for good homes for the llamas." On March 15, 2000, the Respondent replied, "The business and lifestyle may have been wonderful, but losing $18,000.00/year is not called a business, it is just a lifestyle."

[28] The affidavits and cross-examination confirm that the Applicant was informed of and understood the effect and implication of her decision to negotiate

for retention of the farm and llama business in exchange for time-limited spousal support, and that she was prepared to accept the consequences of that choice.

[29] In this case it is not contested that the Respondent provided full financial disclosure. The agreement itself is detailed and explicit and without ambiguities of any kind.

[30] In some cases, both before and since *Miglin*, courts have set aside agreements where duress, compulsion or “practical compulsion” is shown to exist. Some courts have relaxed the concept of duress in divorce circumstances, but it is clear that the concept of practical compulsion does not arise solely from the parties being under stress associated with the marriage breakdown. In the case at bar, the Applicant was under no particular financial pressure. Her expenses were being paid by the Respondent together with spousal support on an unofficial basis. The Respondent's retirement allowance and some RSPs had been cashed in to support the farm and llama business. There was no particular urgency to resolve the issue, even though both spouses expressed frustration with respect to the position of the other.

[31] There was no evidence of undue influence based on any control or power that the Respondent had over the Applicant. There was no evidence of imbalance arising from the dynamics of the relationship of the spouses to each other from which the Court might imply that the Respondent took advantage of the Applicant to obtain an unfair bargain. On the contrary, the advocacy of the Applicant in her communications to the Respondent and in her lawyer's communications to the Respondent were clear, effective and aggressive.

[32] No mistake of law or fact was claimed or shown to exist during the negotiations or in respect of the execution of the agreement.

[33] No misrepresentation or misstatement of any material fact by the Respondent was alleged or shown to exist.

[34] The fact that the Applicant was represented by eminent legal counsel speaks to the validity of the agreement and to the unambiguous clarity with which it sets out the intentions of the parties at the time of its execution. Ms. Cooper says that Ms. Reierson advised her against signing the Agreement. No direct evidence was given for her reason (or reasons). It would be conjecture to conclude that her advice was based on a believe that the uneven division of assets in the Applicant’s favour

was not sufficient to compensate for the limitation on payment of spousal support. The representations to the court were that the “limited” certificate of independent legal advice signed by Mr. Reierson was limited only because, as stated in the certificate, she was “not qualified to provide an opinion to Ontario law, and where Ontario law is referred to and pertinent in the agreement, I am not giving an opinion or providing guidance therein”. The certificate of the Respondent’s lawyer was similarly limited.

[35] Relying on the *Camp* decision, the Applicant argues that the agreement did not meet the objectives of the **Divorce Act** because self-sufficiency was not an attainable goal (at paragraph 86, Justice Groves wrote, “where financial independence is unrealistic or impracticable”) within the eight and a half years after the separation.

[36] I agree that generally the objectives of the Divorce Act call for open-ended spousal support on the breakdown of a long term traditional marriage, based substantially on the common sense concern as to the prospects of the dependent spouse attaining economic self-sufficiency. I also agree with counsel for the Respondent that the facts in *Camp* as they relate to the *Miglin* analysis are not the same in the case at bar and do not support the Applicant's position.

[37] The trial judge in *Camp* found as a fact that Mr. Camp did not establish an unequal division of assets in favour of Ms. Camp and he remained sceptical as to what in fact the assets retained by Mr. Camp were, which scepticism was founded on Mr. Camp’s failure to give full financial disclosure. Secondly, Mr. Camp defaulted in his guarantee with respect to the capital sum that might have allowed Ms. Camp to accumulate enough from which to, possibly, attain self-sufficiency. Thirdly, the judge found as a fact that Ms. Camp could not earn employment income because of a serious medical condition. When this fact was combined with the size of the capital sum, there was no way that Ms. Camp could have attained financial independence.

[38] Two other circumstances in *Camp*, not raised in the Respondent's post-hearing memorandum, distinguish the circumstances in that case from those in this case. First, the *Camp* agreement called for Mr. Camp to pay spousal support for five years, averaging $ 60,000.00 per year. At the time of the agreement Mr. Camp's income appears to have exceeded $ 260,000.00 (para. 41). Spousal support was only 23% of his income. Secondly, (and this point is relevant to the *stage 2*

analysis) Mr. Camp's income at the time of the application to set aside the fixed-term spousal support agreement exceeded 1.2 million dollars per year and he had substantial capital assets. The importance of these observations lies in the question asked and answer given by Justice Groves at paragraph 93: “what is the standard against which self-sufficiency should be measured?” to which he replied ‘roughly the standard that prevailed during the marriage’.

[39] All of these circumstances distinguish *Camp* from the case at bar.

[40] It is not argued by the Respondent that the Court does not have a discretion to set aside agreements that are unfair at the time they were made. The Respondent argues that, while the *Camp* agreement may have been unfair at the time it was entered into, this agreement was not.

[41] I agree that the Applicant is intelligent and resourceful and during the eight and a half years that she received spousal support had time and the ability to embark upon a career, or undertake retraining, to eventually pay some of her living expenses. Instead she became a hobby farmer and pursued a passion which she knew, or should have known, would not contribute to her financial well-being. It drained the capital from which she could eventually receive investment income. The division of assets was entirely in the Applicant’s favour. Including the division of the military pension, the Applicant received over two-thirds of their assets. She made the choice to accept the farm and llama “business” in exchange for time-limited spousal support in order to maintain a lifestyle that she chose. At the time of the Agreement, financial independence - to the standard that prevailed during the marriage- was a realistic and attainable goal with the combination of investment income and employment income. Based on my assessment of her obvious intelligence, if she had pursued further training or education, she could have attained a standard of living greater than that which appears to have prevailed during most of the marriage (which household included three dependent children).

[42] The Applicant's sworn Statement of Financial Information of January 18, 1999 shows personal monthly expenses (before income tax) of over $ 3,600.00 per month or $ 43,000.00 per year. Her sworn Statement of Financial Information of February 13, 2007 shows personal expenses of $ 4,200.00 per month or $51,000.00 per year (before income taxes). Adding estimated income tax liability, she in effect represents that to achieve financial independence she needed $60,000.00 at the time of the Agreement and $ 75,000.00 today. These amounts exceed the total family

income used to support a family of five during most of their marriage. It equals the total family income earned in the two years (1995 - 1997) when the Respondent was employed at Michelin and receiving the military pension ($68,000.00). Her 1999 budget figure is 65% of the Respondent's total employment and pension income at the time of the agreement ($93,000.00). Her 2007 budget figure is 71% of the Respondent's total employment and pension income ($106,000.00). Accepting that self-sufficiency relates to the standard of living that prevailed during the marriage, the Applicant's analysis of the quantum is excessive and unreasonable.

[43] I conclude that prudent investment of the Applicant's share of the military pension, together with reasonable steps to supplement that income with pursuit of employment opportunities during the eight plus years since the separation (including retraining if necessary), even without the Canada Pension that she now receives, could have provided her with a level of self-sufficiency based on the lifestyle of the parties that prevailed during most of their marriage.

[44] At paragraph 46 in *Miglin*, the Supreme Court confirms that trial courts must balance Parliament's objective of equitable sharing of the consequences of marriage and its breakdown, with the parties freed to arrange their affairs as they see fit.

[45] Section 15.2(6) of the **Divorce Act** sets out the objectives of spousal support and sets the standard for determining entitlement. The Supreme Court's decisions in *Moge* and *Bracklow* clarify the legal principles of entitlement, duration and amount. The Spousal Support Advisory Guidelines, released in January 2005, purport to be advisory, and, being non-legislative, do not purport to change the existing law. Some argue that the foundational principle in the *SSAG* - "merger over time", does introduce an overly-simplistic formula for the calculation of entitlement, and fails to recognize that the level of entitlement does not necessarily equate simply with the length of the marriage. It is generally the case that a spouse who is unable to maintain the accustomed lifestyle following separation is entitled to support. Generally spousal support continues until any disadvantage (or advantage) has been alleviated. The division of assets is a factor in the analysis of the amount and duration of spousal support appropriate to effect an equitable sharing of the consequences of the marriage and its breakdown.

[46] A summary of my analysis of the four objectives in s. 15.1(6) of the **Divorce Act** as they apply to this case are as follows:

a) First Objective:
The Applicant's circumstances at the time she entered the marriage were not made worse, but rather improved, by the marriage, and there was no offsetting financial advantage to the Respondent. During the marriage the Applicant did not appear to intend to pursue a career outside the home; however, she did adopt a role in the marriage that caused her not to focus on financial self-sufficiency in the future. This circumstance creates some entitlement. This circumstance is balanced against the sharing of the financial benefits accrued through the Respondent's employment, that is, the lifestyle during the marriage and the division of the assets (including military pension) at separation.

b) Second Objective:
The children were independent as of the separation Agreement. The Respondent supported the youngest child after the separation.

c) Third Objective:
While the Applicant has not identified any specific advantage to the Respondent, or disadvantage to her, by reason of their marriage, she clearly would, but for the division of assets and provision of spousal support, have suffered economic hardship by reason of the breakdown of the marriage. Despite the division of their assets, unequally in her favour, she had not focussed during the marriage on financial independence in the event of its breakdown. In my view, this third objective is the primary basis upon which the Applicant has an entitlement to spousal support.

d) Fourth Objective:
The practicality of the Applicant attaining economic self-sufficiency within the eight and half years after separation has been the battleground of this application. The Applicant's age and lack of post-secondary education constitute the limitations on her ability to attain self-sufficiency through employment alone. This limitation has been cushioned by the division of the military pension and by the fact that the Applicant received all of the family's assets, leaving the Respondent with net debt.

[47] It appears that the Applicant acted as if she were entitled to continue to operate the llama farm at a substantial annual loss long after it became apparent, or should have become apparent, that it was not a viable source of income. She had

and has intelligence and energy. She has the capacity to retrain and to otherwise establish herself in the workforce. The combination of her age and lack of post-secondary education, that made it unlikely that she could attain a reasonable financial independence through employment alone, does not release her from the obligation to use her obvious intelligence to pursue employment, or retraining, that would supplement her investment income. The evidence, and in particular the cross-examination of the Applicant, left no doubt that the Applicant did not act on her obligation to promote her own self-sufficiency until the spousal support contained in the Separation Agreement ended.

F. CONCLUSION

[48] Self-sufficiency, based on investment income and employment income, combined with the family home, effects, and other assets she retained, was a reasonably attainable goal at the time of the negotiation and entering into of the agreement.

[49] The Respondent too has suffered many reverses since the Separation Agreement. Some of these reverses were unforeseen. The serious illness of his wife that has taken her out of the workforce and the reverses in respect of a property transaction in Ontario were unforeseen. These circumstances would likely not have been sufficient, in light of the clear and unambiguous terms of the Separation Agreement, to entitle the Respondent to relief from the terms of the agreement. The Respondent's undertaking, late in life, to adopt a child (now five years of age) was reasonable conduct with the expectation that his support obligation would end in 2006. These circumstances are relevant factors in the *stage 2* analysis. They affect the Respondent's ability to pay at this time, and mitigate against overriding the agreement. The *stage 2 Miglin* analysis deals with unfairness to the parties, not just unfairness to the Applicant.

[50] The Separation Agreement was a fair settlement of the financial consequences of the breakdown of the marriage when it was negotiated and executed. There have been changes in circumstances since the Separation Agreement; however, none of those changes makes the agreement as originally executed unfair. I measure unfairness in the context of the objectives described in s. 15.2(6) of the **Divorce Act**.

[51] I grant the Corollary Relief Judgment incorporating the terms of the Separation Agreement.

[52] If the parties cannot agree in respect of the matter of costs, I will receive written submissions.

Warner, J.