

FOCUS ON FAMILY LAW

Top court changes the rules for property settlements

What are the new ground rules for lawyers conducting property settlement negotiations?

In *Rick v. Brandsema*, [2009] S.C.J. No. 10, the Supreme Court of Canada (SCC) has singled out family law to impose a duty of “full and honest disclosure” because family law negotiations are conducted in a “singularly emotional negotiating environment” and this is a “uniquely difficult context.” I leave it to the reader, experienced through years of conducting family law negotiations, to decide whether the SCC is accurate in distinguishing the emotional level of family law from other disputes — for example, estate litigation.

To set aside the *Brandsema* property settlement, the SCC relied on the concept of unconscionability, which in turn required that the husband’s actions be labelled exploitive. But if the court created a new positive duty of full and honest disclosure, the correct concept should be good faith. This can be defined as promotion of cooperation between



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parties to a relationship, curtailment of the use of one’s power over another and the exaction of “neighbourhood” responsibilities in a relationship (P.D. Finn, “The Fiduciary Principle” in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Canada, Carswell, 1989)). In *Brandsema*, the court was sloppy in its choice of terminology and, in fact, based its decision on the concept of good faith.

Concerning ground rules, imagine how this new duty of full and honest disclosure affects the adversarial process. For example, consider an estate-litigation file I dealt with in which the dependant adult was suing her deceased trustee over a house. The trial established what percentage of the house was owned by the trustee’s estate, and then a fair market value (FMV) needed to be established.

The trustee’s estate suppressed an accurate house appraisal done in secret while advocating to the court that an unrealistically high appraiser be used to establish FMV.

In the circumstances, the dependant adult threw up her hands and went with the high appraiser. After the trustee’s estate had been paid out and the judgment roll entered, it came out by coincidence that an accurate appraisal had been suppressed and the dependant adult had been taken advantage of.

The dependant adult brought an application to the trial justice to correct the situation. The justice refused to impose any duty of honest disclosure on the trustee’s estate, stating that a deal is deal, even if unfair and based on deception. The trustee’s estate was technically no longer a trustee, and there were no fiduciary duties per se.

Now, imagine the same situation in a family law context. Would the family law trial justice use the duty of “full and honest disclosure” to rectify the agreed-

upon house value, where the agreement had been based on deception? *Brandsema* gives us no direction whatsoever on that. Next, imagine the same situation in a purely negotiation context with no judge involved. The new duty of full and honest disclosure eliminates any possibility of suppressing information if you want your negotiated property agreement to be binding.

The SCC has clearly impugned the traditional adversarial process and the ability to act completely in one’s own self interest. In the purely negotiation context, the ground rules are based on the concept of good faith as defined above.

Is the SCC’s paternalism in family law going to affect the public policy of encouraging settlement and the parties’ autonomy to meet their own subjective goals? It seriously undermines that public policy. Imagine that the husband in *Brandsema* had been completely honest about the property in issue, the wife made the settlement based on non-monetary considerations and the wife after-

wards experienced seller’s remorse. In *Brandsema*, the wife made the settlement offer that the husband accepted, and the wife’s lawyer prepared the consent order dismissing the wife’s claims against the husband.

In *Webb v. Birkett*, [2009] A.J. No. 502, the court gives seller’s remorse short shrift. In *Webb*, the husband had been completely honest about the property and the wife’s settlement decision was based in part on non-monetary considerations. Then the wife experienced seller’s remorse and attempted to set aside the property settlement — and sued her own lawyer as well.

The justice hearing the application fully acknowledged the non-monetary considerations, did not find the lawyer negligent and held the wife to the property settlement. Note to the SCC: Property settlements are not only about money. ■

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