

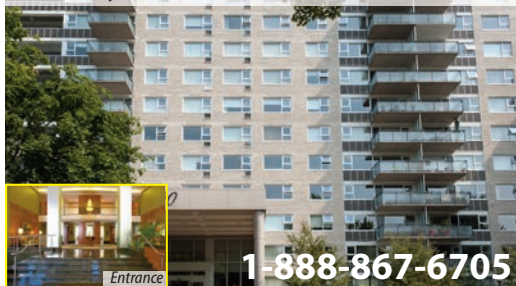
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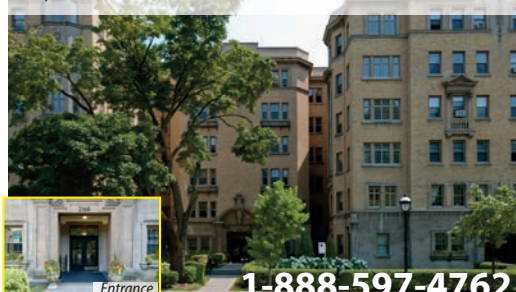


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POINT OF VIEW

Are prenuptial agreements invalid without independent advice?



Charles B. Wagner

Suppose a couple sign an agreement not to sue each other's estate and one spouse did not get legal advice before signing the agreement. Would a judge hold that spouse to the agreement?

In 2003, Justice Desotti, an Ontario Superior Court judge, said, "While I cannot conclude that there will be no agreement involving an unrepresented party that is not declared to be valid, I am certain that it will be the exception and not the rule." Based on this decision it seems as if, as a general rule, when one of the spouses did not have a lawyer the agreement will be set aside. It's 11 years later – let's see how the law has evolved.

People are allowed to negotiate their own deal

Ontario's Family Law Act, R.S.O. 1990, c. F.3 ("FLA") allows people to negotiate their own deal. In other words, subject to certain exceptions, people can choose to have the FLA not apply to them. So when a prenuptial is signed the executors can defend claims for support or division of property normally made under the FLA. But that defence is not foolproof.

Equally important as the rights of parties to contract out of the legislative scheme is that under the FLA the court has discretion to set aside a domestic contract under a number of circumstances. One example where a court may set aside a domestic contract is if a party did not understand the nature or consequences of the domestic contract or otherwise in accordance with the law of contract. So now the disinherited widow/widower who signed a deal giving up their rights can ask the judge to set aside the agreement because they did not understand what they were doing as evidenced by a lack of independent advice (ILA)

In *Davis v. Davis* the court set aside a domes-

tic contract because, in part, the wife did not have independent legal advice. The husband received legal advice; he also did not disclose his financial assets, and the agreement did not address the economic disadvantages to the wife or burden of child care. This is what the judge said, "...an unrepresented party to an agreement opens a plethora of potential problems should the validity of the agreement be challenged...While I cannot conclude that there will be no agreement involving an unrepresented party that is not declared to be valid, I am certain that it will be the exception and not the rule." (emphasis added)

Not all judges agreed that allowing agreements to stand without ILA would be the "exception and not the rule." In *Gregory v. Brown*, Justice Clark said, "Although the court is not prepared to endorse the position taken in *Davis v. Davis* (2003), 44 R.F.L. (5th) 56 [...] that an agreement with a self-represented litigant is worthless, the court should take a long hard look at such agreements to confirm and satisfy itself that the self-represented party knew what he was doing and did so voluntarily. Justice Clark's comments seem to reflect the sentiment of judges in most cases.

It may very well be that failure to obtain independent legal advice alone will not be sufficient to set aside a domestic contract. In my experience, when determining the validity of domestic contracts judges are not mindlessly ticking off a checklist where they set aside an agreement where ILA was not provided. A judge will not simply throw out a negotiated agreement because there is no ILA. The case law suggests that judges will look to the unfairness of the transaction as evidenced by the criteria set out in the legislation and common law before deciding whether to set aside a domestic contract.

A final caution to the reader. This article is intended to help those researching the law regarding how the absence of ILA may give rise to the widow's/widower's claim to set aside a domestic contract. It is not a substitute for legal research or consulting with a lawyer whose own research and analysis may be relied upon. It is not intended to provide substantive legal advice.

Charles B. Wagner is a Certified Specialist in Estates and Trusts and partner at Wagner Sidlofsky LLP.

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