COURT OF APPEAL FOR ONTARIO

CITATION: MacEwen v. Daljit, 2026 ONCA 398
DATE: 20260610
DOCKET: COA-24-CV-0780

Trotter, Zarnett and Madsen JJ.A.

BETWEEN

Lisa Lynn MacEwen

Applicant
(Appellant)

and

Sunil Dharmendra Singh Daljit

Respondent
(Respondent)

Jonathan J. Sommer, for the appellant

Andrew Feldstein and Roma S. Mungol, for the respondent

Heard: April 15, 2026

On appeal from the order of Justice Ivan S. Bloom of the Superior Court of Justice, dated June 17, 2024, with reasons reported at 2024 ONSC 3149, and from the cost order, dated August 13, 2024.

Madsen J.A.:

I. OVERVIEW

[1] The appellant (the "Wife") appeals from an order setting aside a separation agreement dated May 26, 2016 (the "Final Agreement") under s. 56(4)(b) of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*") and the related cost order.

[2] Section 56(4)(b) of the *FLA* provides that the court may set aside a domestic contract or a provision in it, "if a party did not understand the nature or consequences of the domestic contract".

[3] Following a focused hearing, and after interjecting a theory neither pleaded nor advanced by the respondent (the "Husband"), the hearing judge found that the Wife engaged in trickery and had dishonestly changed certain paragraphs in the Final Agreement. On that basis, he concluded that the Husband did not understand the nature and consequences of the Final Agreement and exercised his discretion to set it aside.[1] For the reasons that follow, neither these findings nor this conclusion can stand.

[4] I would therefore allow this appeal.

---

[1] Section 56(4)(b) of the *FLA* is disjunctive, referring to the "nature or consequences" of the domestic contract (emphasis added). As in many trial decisions applying this section, the hearing judge used the conjunctive phrase, concluding that the Husband did not understand the "nature and consequences" of the Final Agreement.

II. BACKGROUND

[5] The sequence of events leading to the execution of the Final Agreement is fundamental to the issues on appeal. I set out that sequence below.

[6] The parties separated on August 1, 2015, after a 12-year marriage. At separation, both worked as realtors at Keller Williams ("KW").

[7] In June 2016, at the Husband's suggestion, the parties jointly retained a family law lawyer who assisted them in a mediation capacity. The parties met with her together, provided financial information, and received initial advice on the issues resulting from the breakdown of their marriage. Having received this preliminary advice, the parties began to explore possible terms of settlement.

[8] The parties wished to sell the matrimonial home. In May 2016, they retained a divorce consultant (the "Consultant"[2]) to help them negotiate an agreement.

[9] The Consultant was not legally trained. She repeatedly recommended that the parties seek independent legal advice ("ILA"). She told them that the agreement under negotiation would be an "Interim Separation Agreement" to assist with the sale of the matrimonial home and that their "Separation Agreement" should be drafted by a lawyer.

[2] Although the parties referred to this individual as the "mediator" and she referred to herself as a "divorce coach", it became apparent in oral evidence that she was not trained as either, later referring to herself as a "consultant". I therefore use the term "consultant" throughout these reasons.

[10] On May 5, 2016, the parties and the Consultant met for several hours to discuss possible terms for an agreement and to prepare documents. During these discussions, the Husband offered to pay the Wife $119,508 from the sale proceeds of the matrimonial home to recognize the value of a property she brought into the marriage. The parties would later disagree about whether the Husband's offer was to pay this amount from the total sale proceeds or from the Husband's share. He further offered to pay her 30% of his KW profit share and KW business dividends, in addition to spousal and child support payments. The Wife agreed to these terms.

[11] The Husband's evidence was that on the morning of May 16, 2016, he emailed the Consultant and asked for a copy of the draft separation agreement. The Consultant sent him a draft agreement (the "May 16th Draft"). The Wife was not copied on this email. The Husband testified that he reviewed the May 16th Draft.

[12] Later that day, the Consultant sent both parties a draft agreement and Net Family Property ("NFP") statement in Word form. The parties continued to negotiate terms and make changes to the documents.

[13] On May 24, 2016, the parties met and made further changes to the draft documents together. The Wife then sent the revised documents to the Consultant, who subsequently released them to the parties and gave them instructions on how to execute them. The Husband took the documents to a real estate lawyer in his

office the following day and arranged for her to witness his signature. Before he signed the documents, the real estate lawyer recommended he obtain legal advice from a family law lawyer. Despite the recommendations from both this lawyer and the Consultant, the Husband did not obtain ILA.

[14] On May 26, 2016, the Wife met with the family law lawyer with whom the parties previously consulted together to obtain ILA and to execute the documents, now signed by the Husband. The lawyer, now acting only for the Wife[3], suggested clarifications and revisions to the draft agreement, primarily in relation to support. Handwritten changes were made. The Wife signed the NFP statement and this version of the agreement, and the lawyer witnessed it. Although the lawyer did not sign the ILA certificate, the Wife stated that she received ILA from her.

[15] The parties met later that day to discuss the now signed agreement with the handwritten revisions. They both initialed the handwritten changes, fully executing the Final Agreement.

[16] Although primarily negotiated to assist with the sale of the matrimonial home, the Final Agreement addressed issues including equalization, the division of the proceeds of the matrimonial home, the calculation of the parties' income, child support, and spousal support. The Final Agreement also contemplated the

[3] While not an issue at the hearing or the appeal, I would note that, unless there was express informed consent, it would have been improper for a lawyer to first assist both parties and then provide legal advice to one party. See: Rule 3 of the Law Society's *Rules of Professional Conduct* and the Ontario Association for Family Mediation's *Standards of Practice and Code of Ethics*, in particular Part D, paragraphs 19-20.

parties entering into a subsequent “Separation Agreement”, but paragraph 11.5 expressly provided that it would be a final agreement absent amendments or a subsequent agreement.

[17] The sale of the parties’ matrimonial home closed in September 2016. Pursuant to the Final Agreement, the Husband paid the Wife an equalization amount of approximately $4,000 alongside the payment of $119,508 from his “portion of funds received from the sale of the home”.

[18] In November 2018, the Wife filed the Final Agreement with the Family Responsibility Office for enforcement. Shortly thereafter she applied for an uncontested divorce.

[19] In his Answer filed in December 2018, more than two years after signing the Final Agreement and the sale of the matrimonial home, the Husband challenged the Final Agreement’s validity and sought to have it set aside. He asserted: the circumstances surrounding the execution of the Final Agreement were “concerning”; he was under duress upon execution; he did not have legal advice; there was no financial disclosure; and the Final Agreement was poorly drafted and illogical. He further stated that the Final Agreement and the NFP statement prepared by the Consultant contained mistakes.

[20] In her Reply, the Wife pleaded that the Final Agreement was the product of the parties’ negotiations and reflected their intentions. While, from her perspective,

certain support terms required updating, the Final Agreement was valid and enforceable and should not be set aside.

[21] As the validity of the Final Agreement was central to the resolution of the parties' issues, the settlement conference judge directed the parties to proceed to a focused hearing on that issue.

III. THE FOCUSED HEARING

[22] The focused hearing was held over three days in April 2024.

[23] Both parties filed affidavits, briefly testified in chief, and were cross-examined. In addition, the Consultant filed an affidavit and was cross-examined.

1. The Husband's Evidence and Submissions

[24] In his affidavit, the Husband narrowed his position from that set out in his Answer. He now sought to set aside only specific paragraphs of the Final Agreement—namely paragraphs 8.3 and 10.2 (the "impugned paragraphs"). The Husband relied particularly on what he said were changes from the May 16th Draft that he said was sent to him (and not to the Wife) by the Consultant and the Final Agreement as executed on May 26, 2016.

[25] Specifically, the Husband asserted that paragraph 8.3 of the May 16th Draft specified that he would pay the Wife $119,508.00 from "the proceeds of the sale", while the Final Agreement stated that he would pay this amount from "his portion of funds received" from the sale of the matrimonial home. Further, he said that

subparagraph 10.2(d), which appeared in the May 16th Draft and specified that the duration of the profit-sharing payments was the same as the agreed upon support period (8 years), was absent from the Final Agreement. Without subparagraph 10.2(d), the Final Agreement provides for profit-sharing payments to the Wife for an undefined period.

[26] The Husband described the impugned paragraphs as "altered" and said he did not "pick up on" the changes before signing. He did not claim that the impugned paragraphs were altered by the Wife. Indeed, his affidavit describes the Wife and him together making "several edits and additions [to the documents] electronically" and sending the drafts to the Consultant. The only potential suggestion of deceit in his affidavit is the implication that the impugned changes were made by the Consultant without his consent. The Husband also stated that the disclosure provided by both parties was inadequate.[4]

[27] In oral evidence, the Husband testified that he did not agree to the impugned paragraphs of the Final Agreement. He reiterated that he reviewed the May 16th Draft the Consultant sent to him, but that paragraphs 8.3 and 10.2 were subsequently changed. He said he was not alerted to these changes, which were less favourable to him, and he did not notice them before signing. He said he

[4] While the Husband complained of inadequate disclosure, he did not propose that this be rectified, stating: "I do not wish to incur substantial costs by requesting the exchange of disclosure in order to calculate the equalization payment but I do wish that the payment from the proceeds of sale be recalculated…" in his affidavit.

"briefly review[ed]" the Final Agreement before executing it, relying on his previous review of the May 16th Draft.

[28] The Husband submitted that the impugned paragraphs should be set aside pursuant to ss. 56(1.1) and 56(4)(a)-(c) of the *FLA*. In addition to the alleged alterations to the May 16th Draft, he argued that the Wife provided insufficient disclosure, that he did not understand the nature or consequences of the Final Agreement, and that it was unconscionable, unfair, and lacked certainty.

2. The Wife's Evidence and Submissions

[29] In her affidavit, the Wife described the process by which the Final Agreement was prepared, including the involvement of the jointly retained family law lawyer and the Consultant. She said that the Husband was aware of the terms of the Final Agreement and knew what he was signing. She emphasized that the purpose of paragraph 8.3 was to recognize the property she brought into marriage and her use of its proceeds towards the matrimonial home. She did not directly address the Husband's statement in his affidavit that a time-limit on profit sharing set out in subparagraph 10.2(d) had been removed, but described the parties' discussions regarding profit-sharing more generally. She maintained that the terms of the Final Agreement reflected the parties' discussions during negotiation.

[30] The Wife testified at the hearing that she had not seen the May 16th Draft appended to the Husband's affidavit, which the Husband said was sent by the

Consultant only to him. Further, she was not aware of any change in paragraphs 8.3 and 10.2. She stated that she had not seen subparagraph 10.2(d) before and did not know how that subparagraph was put in the May 16th Draft or taken out of the Final Agreement. She said the wording of subparagraph 10.2(d) would not, in any event, make sense, as it did not align with the "retirement situation" the parties had been discussing, in which the profit-sharing payments would continue after the support period ended. She further testified that paragraph 8.3, which provided for payment from the Husband's share of the proceeds of sale of the matrimonial home, reflected the parties' discussions and intentions. She claimed that the NFP statement and the parties' handwritten notes from July 9, 2015, filed as an exhibit at the hearing, further support this intention.

[31] The Wife submitted that the Husband was a sophisticated party, had a duty to read the impugned paragraphs but chose not to do so, declined to seek legal advice despite being told on multiple occasions by several professionals to do so, and delayed mounting his attack on the Final Agreement. In the alternative, she submitted that if any of the impugned paragraphs were invalid, the entire Final Agreement should be set aside, as the property and support terms were intertwined.

3. The Consultant's Evidence

[32] A brief affidavit of the Consultant was before the court, in which she described the process of working with the parties and offered her view that both

parties understood the Final Agreement and agreed to the NFP statement with the benefit of full disclosure. She said that she repeatedly told the parties that she is not a lawyer and that they should get ILA. This is confirmed in the emails before the court.

[33] In her oral testimony, the Consultant confirmed that she had received financial information from both parties and that she repeatedly told the parties to get ILA. She recalled sending a copy of the draft agreement to the parties on May 24, 2016 for execution and said she "would not put things in the [Final] Agreement unless both parties agreed to it". She stated that she did not change paragraph 8.3 or remove subparagraph 10.2(d).

IV. DECISION BELOW

[34] In his decision, the hearing judge largely rejected the Husband's arguments.

[35] First, he found that any argument under s. 56(1.1) of the *FLA*[5] was outside of the scope of the focused hearing, as framed by the settlement conference judge. Second, he found there was insufficient evidence to support a finding in the Husband's favour under either s. 56(4)(a), in relation to lack of disclosure, or s. 56(4)(c), "otherwise in accordance with the law of contract".

[5] Section 56(1.1) of the *FLA* addresses child support provisions that may fall outside the *Child Support Guidelines,* O. Reg. 391/97.

[36] The hearing judge made the following findings of fact, none of which are challenged on appeal:

- the Husband was an experienced businessman with a "substantial career in the real estate industry";
- he was "at least as sophisticated in business" as the Wife;
- he chose not to seek ILA despite the Consultant's repeated recommendations to do so;
- he did not detail his allegations of lack of disclosure, and failed to ask for further disclosure; and
- there was no inequality of bargaining power.

[37] The hearing judge concluded that the "real issue" in the hearing was the Husband's lack of understanding of the impugned paragraphs of the Final Agreement. He found that both of the alleged changes to the Final Agreement had a negative impact on the Husband's economic interests: the alleged change to paragraph 8.3 reduced the Husband's share of proceeds from the matrimonial home; and the alleged removal of subparagraph 10.2(d) rendered the profit-sharing payments of indefinite duration. He concluded: "[i]t is illogical and unreasonable to find that the [Husband] would have welcomed the changes under discussion."

[38] Relying on his own theory, the hearing judge concluded that the Wife had engaged in trickery (the “trickery theory”) by making the alleged changes to the impugned paragraphs without the Husband’s approval and sending the revised agreement to the Consultant for release to the parties. He further found that because the Wife had “dishonestly and unilaterally changed” these two significant paragraphs of the Final Agreement without drawing them to the Husband’s attention, the Husband was not bound by the changes notwithstanding his failure to read the Final Agreement or obtain ILA. On this basis, the hearing judge concluded that the Husband did not understand the nature and consequences of the Final Agreement, as contemplated by s. 56(4)(b).

[39] In terms of remedy, the hearing judge accepted the Wife’s alternative submission that the property and support provisions were intertwined and that if the court were inclined to intervene, the whole Final Agreement should be set aside.

[40] The hearing judge awarded costs in the amount of $31,072.77 to the Husband, finding that the Wife acted in bad faith and that the Husband was the more successful party.

V. THE APPEAL

1. The Parties’ Submissions

[41] The Wife makes the following submissions on appeal:

(1) The hearing judge erred in finding that she engaged in dishonesty, trickery, and deception, interjecting into the hearing and raising a theory that the Husband had not pleaded;

(2) The hearing judge erred in finding that the Husband did not understand the nature or consequences of the Final Agreement under s. 56(4)(b) of the *FLA*; and,

(3) The hearing judge erred by failing to conclude that the Husband submitted fabricated and incomplete evidence to the court. The Wife seeks to introduce fresh evidence in support of this submission.

[42] The Husband submits that there was no procedural unfairness in the focused hearing and that the Wife was aware of the case she had to meet. He asserts that the hearing judge correctly applied s. 56(4)(b) to the evidence before him. In the alternative, he argues that if the hearing judge did err in his application of s. 56(4)(b), the Final Agreement should be rescinded based on the doctrine of either mutual or common mistake.

VI. ANALYSIS

1. Procedural Unfairness: The Finding of "Deception" and "Trickery" Cannot Stand

[43] I accept the Wife's submission that there was procedural unfairness in how the hearing judge reached his conclusion that she intentionally changed the

impugned paragraphs the Final Agreement without the Husband's consent. This highly prejudicial finding cannot stand.

[44] The hearing judge was very active in the management of the hearing, interjecting frequently in the parties' cross-examinations and their closing submissions.

[45] The hearing judge stated, for example: "I'll ask these questions now and then you can ask about them and then [the Wife's counsel] can re-examine, but I need this clarified…". He declined the Husband's counsel's offer to assist and asked a series of questions of the Wife about the May 16th Draft, the Final Agreement, and the alleged changes to the impugned paragraphs.

[46] The hearing judge continued to intervene during counsel for the Husband's closing submissions, stating: "I'm going to test both counsel about the concerns I have, and you'll respond to that, OK?" Challenging the Husband's counsel, he stated: "[y]our theory… and the only one that makes sense at all, is that [the Wife] slipped those two clauses in there after [the parties] had negotiated on May 24th, and then he never looked at them when he signed off…?"

[47] When the Husband's counsel clarified that the Husband's argument was that "someone" gave the Consultant instructions to change the language of the Final Agreement from the May 16th Draft, the hearing judge responded:

> Well, who else would do it?... You agree with me that the only logical inference of your theory is that [the Wife] told [the Consultant] to put that change in… **the central point… is that [the Husband], while he understood the issues, just was, essentially, tricked by [the Wife] into signing the agreement in front of his lawyer –** or, in front of [the real estate lawyer who witnessed his signature]. [Emphasis added.]

[48] The Husband's counsel accepted the hearing judge's trickery theory.

[49] It is fundamental to the litigation process that parties know the case they are expected to meet: *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.), at paras. 60–61. Our justice system does not countenance trial by ambush. That basic tenet is supported by several principles.

[50] Pleadings define the boundaries of lawsuits: *Rodaro*, at para. 60; *Grand Financial Management Inc. v. Solemio Transportation Inc.*, 2016 ONCA 175, 395 D.L.R. (4th) 529, at para. 27. While this court has endorsed a more flexible approach in the family law context, pursuant to r. 2(2) and 2(3) of the *Family Law Rules*, O. Reg. 114/99, the principle that parties are entitled to know the case they must meet remains axiomatic: *Frick v. Frick*, 2016 ONCA 799, 132 O.R. (3d) 321, at paras. 16, 29.

[51] It is also trite law that a party intending to challenge a witness' evidence must do so in cross-examination: *Browne v. Dunn* (1893), 6 R. 67 (H.L.). A witness must be given an opportunity to explain. While this basic rule of trial fairness does not require that "every scrap of evidence" be put to the witness, cross-examination

should confront the witness on matters of true substance on which the party seeks to impeach credibility: *R. v. Quansah*, 2015 ONCA 237, 125 O.R. (3d) 81, at paras. 75-81, leave to appeal to the S.C.C. refused, [2016] S.C.C.A. No. 203.

[52] It is also foundational that the parties, not the court, articulate the case to be met: *Rodaro,* at paras. 61-62; *Hayward v. Hayward*, 2021 ONCA 175, at paras. 3-4. Reasons should therefore respond to the case advanced by each party, not a judicial theory not advanced by the parties. As this court noted in *Hayward*, at para. 4, relying on a ground that was never argued in the reasons for judgment is "fundamentally unfair and potentially unreliable because it was not tested in the adversarial process."[6]

[53] The hearing judge's approach in this case was, in my view, procedurally unfair. In his reasons for his decision, he stated: "The [Wife] had dishonestly and unilaterally changed significant clauses without drawing them to the [Husband's] attention." He then concluded that he was satisfied "because of the trickery practiced by the [Wife]" that "the [Husband] did not understand the nature and consequences of the [Final Agreement]".

---

[6] In cases involving self-represented litigants, judges are encouraged to consider assisting self-represented litigants in asserting their rights and raising arguments before the court. They are also to ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented litigants: see the Canadian Judicial Council's 2006 *Statement of Principles on Self-represented Litigants and Accused Persons,* endorsed by the Supreme Court of Canada in *Pintea v. Johns*, 2017 SCC 23, [2017] 1 S.C.R. 470, at para. 4. Nothing in this decision should be taken to detract from these obligations. In the present case, both litigants were represented by counsel at the hearing.

[54] Unfortunately, the hearing judge's conclusion departed significantly from the Husband's pleadings, as described above. The Wife was not on notice, through the pleadings or the Husband's affidavit, of an allegation of fraud, trickery, or deception, as found by the hearing judge.

[55] Nor did the Husband's counsel put to the Wife that she had altered the Final Agreement without the Husband's knowledge or suggest that she engaged in deception. As mentioned earlier, the Husband asserted only that the Final Agreement differed from the May 16th Draft, and he did not appreciate nor agree to these changes before executing the Final Agreement. There is a marked difference between this theory and the trickery theory.

[56] The hearing judge intervened significantly and directed the Husband's counsel's closing submissions in accordance with his theory of the case. He suggested that the Husband's theory was: that the Wife "slipped in" the changes to the Final Agreement; that the Wife had told the Consultant to make those changes to the impugned paragraphs; and that the changes were not agreed to by the Husband.

[57] I would add, further, that the Wife's earlier testimony, when pressed in cross-examination by the hearing judge, did <u>not</u> support the suggestion of dishonesty advanced by the court. Rather, her testimony included the following: that she had not seen the May 16th Draft, which the Husband acknowledged was not sent to

her by the Consultant; that the wording in paragraph 8.3 in the May 16th Draft did not reflect the parties' discussions as to how she would be paid the $119,508, and that this payment was always to come from "his share" of the proceeds of the matrimonial home; that she did not know how subparagraph 10.2(d) got put in the May 16th Draft or taken out; and that, in any event, limiting the duration of the profit-sharing payments was inconsistent with the parties' discussions.

[58] This court has routinely held that deciding a case on a basis that was not anchored in the pleadings, evidence, positions or submissions of any of the parties displaces deference and warrants appellate intervention: *Marketology Media Inc. v. D.G.A. North American Inc.*, 2024 ONCA 799; *Labatt Brewing Co. v. NHL Enterprises Canada L.P.*, 2011 ONCA 511, 106 O.R. (3d) 677, at para. 5.

[59] The hearing judge's finding of dishonesty and trickery arose from a procedurally unfair process and cannot stand.

2. There was no Other Justification for Setting Aside the Final Agreement Under s. 56(4)(b) of the *FLA*

[60] Having found that the finding of dishonesty and trickery cannot stand, the question remains whether the hearing judge's decision to set aside the Final Agreement under s. 56(4)(b) was in error. For the reasons that follow, I find that it was. There was no proper justification for setting aside the Final Agreement under s. 56(4)(b) of the *FLA*.

a. The Analytical Framework

[61] The law favours parties' autonomy to reach their own settlements on the issues arising from separation. As set out in *Anderson v. Anderson*, 2023 SCC 13, [2023] 1 S.C.R. 473, at para. 33, "[a]s a starting point, domestic contracts should generally be encouraged by courts, within the bounds permitted by the legislature, absent a compelling reason to discount the agreement." See also: *Davies v. Jane*, 2025 ONCA 752, 21 R.F.L. (9th) 1, at para. 30.

[62] At the same time, however, courts recognize that the negotiations of domestic contracts take place in a unique and singularly challenging environment where emotions are charged and one or both parties may be vulnerable: *Anderson*, at para. 33, citing *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, at para. 74; *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at para. 40.

[63] Section 56(4) of the *FLA* operates protectively in this context, recognizing that intrinsic flaws in the formation of the contract may nullify parties' apparent consent and invalidate the domestic contract. Section 56(4) was designed to address the concern that both parties fully understand their rights under the law when contracting: *Faiello v. Faiello*, 2019 ONCA 710, 438 D.L.R. (4th) 91, at para. 17; *LeVan v. LeVan*, 2008 ONCA 388, 90 O.R. (3d) 1, at para. 50, leave to appeal to S.C.C. refused, [2008] 3 S.C.R. viii (note); *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550, at para. 14.

[64] Section 56(4) authorizes a court to set aside a domestic contract or one of its provisions under the following three conditions:

(a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the contract was made;

(b) if a party did not understand the nature or consequences of the domestic contract; or

(c) otherwise in accordance with the law of contract.

[65] This court has endorsed a two-step approach to the application of s. 56(4), as set out in *LeVan.* First, the party challenging the domestic contract or a term within it must demonstrate that s. 56(4)(a), (b), or (c) are engaged; and second, the court must then determine whether it is appropriate to exercise its discretion to set the contract aside: *LeVan,* at para. 51; *Virc v. Blair*, 2014 ONCA 392, 119 O.R. (3d) 721, at para. 52. Subsections (a), (b), and (c) are not silos, and facts may support findings under more than one subsection.

[66] Subsection 56(4)(b) addresses the claimants “understanding” of the domestic contract. The party seeking to set aside the domestic contract must establish either that they did not understand the “nature” of the domestic contract or that they did not understand its “consequences”. This court has held that s. 56(4)(b) is “broader than the common law grounds for setting aside a contract,

such as *non est factum* or unconscionability": *Dougherty v. Dougherty*, 2008 ONCA 302, 89 O.R. (3d) 760, at para. 25.

[67] Failure to understand the nature of the domestic contract refers to the failure to understand either the type of contract being entered into, or specific terms of that contract. For example, in *Maka v. Maka*, 2015 ONSC 3480, the court set aside a separation agreement where the claimant understood the agreement to be essentially a tax agreement. Failure to understand the "consequences" of a domestic contract refers to the failure to understand either the practical or legal effects of the contract or one or more of its terms. For example, in *El Rassi-Wight v. Arnold*, 2024 ONCA 2, 170 O.R. (3d) 687, this court upheld a trial judge's decision to set aside a separation agreement under s. 56(4)(b) where the claimant did not understand the consequences of forfeiting "the house and all the assets, equity, and so on".

[68] In applying the two-step approach to s. 56(4)(b), courts have considered factors that may be loosely grouped into three categories:

(1) Personal vulnerabilities

(2) External pressures

(3) Procedural safeguards

[69] Personal vulnerabilities may include:

(a) language barriers: *Stupka v. Stupka*, 2012 ONSC 1133, at para. 76, aff'd 2013 ONCA 365;

(b) significant mental or physical health challenges: *Stevens v. Stevens*, 2012 ONSC 706, 109 O.R. (3d) 421, at paras. 111-49, aff'd 2013 ONCA 267, 114 O.R. (3d) 721; *Ward v. Ward*, 2011 ONCA 178, 104 O.R. (3d) 401, at paras. 28-30; and

(c) the level of "sophistication" of a party: *Tozer v. Tassone*, 2019 ONCA 285, 25 R.F.L. (8th) 159, at para. 10; and,

(d) power imbalances or other inequalities in the relationship: *Anderson,* at paras. 8, 34, 69-71; *Rick*, at para. 61.

[70] External pressures may include:

(a) pressure from a spouse or third party not to obtain ILA or resulting in inadequate or conflicted ILA: *LeVan*, at paras. 35, 61;

(b) financial, professional or emotional pressure(s): *Ward*, at paras. 28-30; *LeVan*, at paras. 25-26;

(c) perceived or actual time constraints: *LeVan,* at para. 37; and

(d) any misrepresentation as to the nature, purpose, or consequences of the agreement: *LeVan*, at paras. 35, 37; *Maka*, at para. 65.

[71] Procedural safeguards may include:

(a) full and frank disclosure of all relevant financial information: *LeVan*, at paras. 34-37; *Stupka*, at para. 3;

(b) timely and comprehensive independent legal advice: *Anderson*, at paras. 69-70; *Rick*, at paras. 46-48;

(c) other professional assistance, such as adequate translation or accounting assistance: *Virc*, at para. 15; *Raaymakers v. Green* (2006), 25 R.F.L. (6th) 54 (Ont. C.A.), at paras. 47, 50.

[72] None of these descriptions should be taken as exhaustive. All, however, may be relevant to a holistic determination of whether s. 56(4) is engaged as well as whether the court should exercise its discretion to set a domestic contract aside. The absence of the safeguards identified above will not necessarily be fatal to a domestic contract. Conversely, their presence will not necessarily immunize a contract against the impact of personal vulnerabilities and/or external pressures. The more balanced the process, the more comprehensive and timely the disclosure, and the more impartial the legal advice, the greater the likelihood of a domestic contract surviving judicial scrutiny: *Anderson*, at paras. 34- 35.

[73] I would add the following: Inherent in the autonomy recognized by permitting parties to contract out of the legislative scheme through a domestic contract is an element of personal due diligence. That is, courts have recognized an obligation on a party to take reasonable steps, within their capacity and control, and

recognizing any vulnerabilities or pressures as discussed above, to protect and advance their own interests.

[74] These proactive measures are not onerous, but include, at a minimum: fully and carefully reading the domestic contract before signing; clarifying terms where necessary; and taking steps to remedy known deficiencies in the domestic contract: *Singh v. Khalill,* 2024 ONCA 909, 20 R.F.L. (9th) 119, at paras. 12, 15; *Smith v. Smith*, 2017 ONCA 759, 418 D.L.R. (4th) 454. A party who declines to take proactive measures or who chooses to sign a domestic contract despite awareness of flaws, may be unable to later resile from the contract: *Butty v. Butty*, 2009 ONCA 852; 99 O.R. (3d) 228, at paras. 57, 60.

[75] The relevant time to assess the impact of any asserted personal vulnerabilities, external factors, safeguards, and personal due diligence is during negotiations and at execution of the domestic contract, not at the time of the claim: *Ward*, at para. 29.

[76] Further, a court will consider the complexity and purpose of the domestic contract; any delays on the part of a party moving to set aside a domestic contract, and any reasons for same; whether part or all of the contract has already been implemented; and any benefits already realized by the claimant under the domestic contract.

[77] In applying both steps of the analysis set out in *LeVan* to the application of s. 56(4)(b), the court takes a contextual view, weighing the interrelationship of factors such as those listed above. The factors are not a "checklist" and will often overlap. What is required in each case is a careful and holistic assessment rooted in the "starting point" of respect for parties' autonomy to reach their own agreements: *Anderson*, at para. 33. This is a highly discretionary exercise entitled to significant deference.

b. Application to this Case

[78] In his analysis of the facts as he found them, though not directly within his treatment of s. 56(4)(b), the hearing judge considered many of the factors set out above. He identified no personal vulnerabilities on the part of the Husband, found no inequality of bargaining power, and specifically noted the Husband's sophistication. The hearing judge rejected the Husband's submission that he was pressured, vulnerable, and exploited by the Wife.

[79] At the same time, the hearing judge found that the Husband was repeatedly told to obtain ILA and chose not to. He rejected the Husband's complaints about disclosure, noting that he "admitted he failed to ask for further disclosure from the [Wife] in the days before he signed the [Final] Agreement."

[80] On the the hearing judge's own analysis, absent the finding of dishonesty by the Wife, a finding that I have found cannot stand due to procedural unfairness, no

other factors supported the hearing judge's finding that the Husband failed to understand the nature or consequences of the Final Agreement or augured in favour of setting it aside.

[81] Accordingly, the hearing judge erred in setting aside the Final Agreement.

3. The Husband's Alternative Argument

[82] The Husband submitted, in the alternative, that if the hearing judge erred in his application of s. 56(4)(b), the Final Agreement would be rescindable or paragraphs 8.3 and 10.2 should be rectified under the doctrine of mistake. He argues that the parties misunderstood the initial legal advice they received from the jointly-retained family law lawyer. Specifically, the parties did not understand that the Wife was entitled to a marriage date deduction for the property she brought into marriage but wanted to compensate her for her contribution to the down payment for the matrimonial home. However, paragraph 8.3 of the Final Agreement, as drafted, goes beyond giving the Wife her date of marriage deduction and results in a windfall.

[83] I would note that paragraph 8.3 of the Final Agreement does appear to result in a windfall to the Wife in relation to her date of marriage deduction. However, the remedy of rectification is not open to the Husband on the Wife's appeal, having not been advanced in the hearing below. Further, even if it were available, given the Wife's sustained position that the Final Agreement reflects the parties' intentions,

the existence of the parties' signed NFP statement and hand-written notes which appear to support paragraph 8.3 of the Final Agreement, and the hearing judge's findings that the Husband declined to take proactive measures before signing the Final Agreement, including obtaining ILA, I would not be prepared to find that paragraph 8.3 is a product of mutual or common mistake.

[84] There is no basis to find that the Husband did not understand the nature or consequences of the Final Agreement. It follows that the Final Agreement accurately reflects the parties' negotiated agreement.

4. Fresh Evidence and the Wife's Third Ground of Appeal

[85] As noted above, the Wife tendered fresh evidence in support of her third submission, namely that the hearing judge erred in not concluding that the Husband submitted fraudulent and incomplete evidence to the court. Specifically, her allegation on appeal was that the Husband falsified the May 16th Draft. Given my conclusion above, it is unnecessary to consider the fresh evidence or this submission.

VII. DISPOSITION

[86] I would allow the appeal. The order of the hearing judge is set aside, with the effect that all terms of the Final Agreement continue with full force and effect.

[87] The cost order made in connection with that decision is also set aside.

[88] If the parties cannot resolve the issue of costs of the appeal or of the hearing below, they may make written submissions. Such submissions shall be limited to five pages double spaced, to be delivered within 10 days of the date of these reasons.

Released: June 10, 2026 “G.T.T.”

“L. Madsen J.A.”
“I agree. Gary Trotter J.A.”
“I agree. B. Zarnett J.A.”