

**TO SET ASIDE OR TO NOT SET ASIDE THE AGREEMENT PURSUANT
TO SECTION 56(4) OF THE *FAMILY LAW ACT*: APPLYING
RELATIONAL THEORY TO DOMESTIC CONTRACTS INVOLVING
SPOUSAL SUPPORT RELEASES AND WAIVERS**

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Abstract

This work applies the lens of relational theory to five Ontario Superior Court of Justice cases where a party previously executed a spousal support agreement, but subsequently sought to have it set aside pursuant to section 56(4) of the *Family Law Act*. While the outcomes in the five cases differed as to whether section 56(4) of the *Family Law Act* was successfully engaged and, if so, whether the judge in turn exercised his discretion to set aside the agreement, it is argued that the cases are united by a common theme that is resonant with relational theory. The distinct relational feature of the five cases is the judges' understanding of autonomy through the context-specific estimation of the wives' capacity for informed consent and reflection.

Chapter 1 will provide an overview of spousal support, domestic contracts and contractual autonomy in Canada. While the focus of this thesis is contractual support, the introductory section will briefly outline how entitlement to spousal support may be established on three conceptual bases. Chapter 2 will provide an overview of relational theory and review the limited scholarly literature that exists in analyzing spousal support agreements through the lens of relational theory. In this way, Chapters 1 and 2 will situate the reader and provide the necessary background to the legal analysis, commentary, reflections and critique found in Chapter 3. Chapter 3 will argue that assessing domestic contracts through a relational lens helps to explain the judicial reasoning as to why agreements were upheld or set aside while also highlighting some of the deficits in the court process and analysis. It will also highlight the lessons learned and the important implications for family law practitioners and scholars going forward.

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Chapter One: An Introduction to Spousal Support, Domestic Contracts and Contractual Autonomy

The policy of promoting contractual autonomy is dependent on the integrity of the bargaining process.¹ While parties are encouraged to settle their marital affairs on their own terms by way of a domestic contract,² judicial intervention is generally justified where the agreements are found to be either procedurally or substantively flawed. A party seeking spousal support in the face of a previous contractual release or waiver of same may decide to do so pursuant to the *Family Law Act*³ and/or the *Divorce Act*,⁴ although the latter legislation only applies to married parties. The party may, for example, resort to section 56(4) of the *Family Law Act*⁵ and/or paragraph 15.2(4)(c) of the *Divorce Act* in an effort to obtain a judicial order for spousal support despite facing a contractual term in the party's cohabitation agreement, marriage contract or separation agreement that expressly states otherwise. While "[t]he test under s. 56(4) is different than the test to set aside a release under the *Divorce Act*...it may often be the case that the same facts are relevant to both,"⁶ especially where the party is challenging the spousal support provision in the agreement pursuant to both acts. Under section 56(4), the party's challenge pertains to circumstances surrounding the formation of the contract. Similarly, the test under section 15.2(4)(c) of the *Divorce Act* requires a two-stage *Miglin* analysis, which was

¹ *Rick v Brandsema*, 2009 SCC 10, [2009] 1 SCR 295 at para 46.

² Section 51 of the *Family Law Act*, RSO 1990, c F3 [*Family Law Act*] states that a "'domestic contract' means a marriage contract, separation agreement, cohabitation agreement, paternity agreement or family arbitration agreement." For the purposes of this article, domestic contract refers only to a party's cohabitation agreement, marriage contract and/or separation agreement.

³ *Ibid*, section 33, which states "[a] court may, on application, order a person to provide support for his or her dependants and determine the amount of support."

⁴ A party may seek spousal support pursuant to section 15.2 of the *Divorce Act*, RSC 1985, c 3 (2nd Supp) [*Divorce Act*], which states that "[a] court... may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse."

⁵ The party can also refer to section 33(4) of the *Family Law Act*, *supra* note 2, if "the provision for support or the waiver of the right support *results* in unconscionable circumstances." [Emphasis added].

⁶ *Murray v Murray*, [2003] OJ No 3350 (Sup Ct).

enunciated in the Supreme Court of Canada decision of the same name: *Miglin v. Miglin*.⁷ Where a party is challenging a spousal support agreement pursuant to both section 56(4) of the *Family Law Act* and section 15.2(4)(c) of the *Divorce Act* requiring the *Miglin* two-stage test,⁸ if the analysis reaches a *Miglin* inquiry,⁹ it is at the first stage of the *Miglin* test where there is the potential for the greatest overlap in the relevant facts.¹⁰ This is because section 56(4) takes into account the relevant facts pertaining to the *formation* of the agreement while the court under stage one of the *Miglin* inquiry also considers “the *circumstances of negotiation and execution* to determine whether the applicant has established a reason to discount the agreement.”¹¹

Miglin became the landmark Supreme Court of Canada decision on domestic contracts and freedom of contract in family law as it addressed a spousal support release in the context of a separation agreement under the *Divorce Act*. Although the Court upheld the spousal support release in the separation agreement, it set out a contextual two-stage test regarding the reopening of a domestic contract. While the approach in *Miglin* generated various scholarly commentaries, the scholarly responses that provide the focal point for this work applied the lens of relational

⁷ *Miglin v Miglin*, [2003] 1 SCR 303 [*Miglin*]. Stage 1: focuses on the circumstances surrounding the negotiation and execution of the agreement at the time of its formation. The judge must also assess whether the agreement is in substantial compliance with the *Divorce Act* or if it represents a significant departure from the *Act*'s general objectives when read as a whole. (2) Stage 2: asks whether the enforcement of the agreement still reflects the intentions of the parties and whether it is still in substantial compliance with the objectives of the *Divorce Act* at the time of application? For a complete discussion, see *Miglin* at paras 83-85 and 87-90.

⁸ In terms of the process, “the validity and enforceability of a [spousal support] agreement (under the common law, and in Ontario under s 56 of the FLA) should logically be dealt with first, followed by a *Miglin* analysis if there is a valid and enforceable agreement.” See Mary Jane Mossman, *Families and the Law: Cases and Commentary, Second Edition* (Concord, ON: Captus Press, 2015) at 732 [*Families and the Law*] citing Carol Rogerson, “Spousal Support Agreements and the Legacy of *Miglin*” (2012) 31 CFLQ 13 at 25-26 [The Legacy of *Miglin*].

⁹ After applying section 56, “*Miglin* should be used to determine whether *an otherwise valid agreement* should nonetheless be overridden or disregarded in an application for spousal support under the *Divorce Act*.” See *Ibid*.

¹⁰ Rogerson observed “clear distinctions between the validity analysis and the *Miglin* analysis are rarely found in practice” with a “doctrinal blurring aris[ing] when the agreements in issue deal with matters other than spousal support.” *Ibid* at 25-26 and 27-28. In particular, she observed that a concerning application of the *Miglin* test relates to the doctrinal blurring between the common law standards for unconscionability and stage 1 of the *Miglin* analysis.

¹¹ Under stage one, the court also considers “whether the substance of the agreement, at formation, complied substantially with the general objectives of the *Act*.” See *Miglin*, *supra* note 7 at para 4 [Emphasis added].

theory to the reasoning of both the majority and dissenting judges.¹² This is significant as relational theory, which stands in distinction from liberal theory, views subjects as “socially constituted, embedded in their contexts, their selfhood and agency formed by thick relationships with others.”¹³ Thus, in determining whether an agreement should be set aside, an understanding of autonomy through a relational lens strives “[t]o reconcile these apparently opposing objectives- the vindication of choice and the recognition of constraints on the exercise of that choice.”¹⁴

This work examines relational theory in a related statutory context by examining the application of section 56(4) of the *Family Law Act*. The statutory language itself requires a contextual analysis as both the provincial and federal legislation provide guidelines rather than stringent rules, which in turn provides the scope to enter into the discussion of contextualism and relational theory. For example, section 56(4) lists factors based on which a court may set aside a domestic contract. These include: (a) whether a party failed to disclose 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. This exercise is both fact and context specific.

The lens of relational theory will be applied to five Ontario Superior Court of Justice cases where a party previously executed a spousal support agreement, but subsequently sought to have it set aside pursuant to section 56(4) of the *Family Law Act* in an effort to obtain a more

¹² Robert Leckey and Lucy-Ann Buckley adopt a relational theory approach in the spousal support context. See Robert Leckey, “Contracting Claims and Family Law Feuds” (2007) 57 U Toronto LJ 1 [*Contracting Claims*] and Lucy-Ann Buckley, “Relational Theory and Choice Rhetoric in the Supreme Court of Canada” (2015) 29 Can J Fam L 251 [*Choice Rhetoric*].

¹³ Robert Leckey, *Contextual Subjects: Family, State, and Relational Theory* (Toronto: University of Toronto Press, 2008) at 106 [*Contextual Subjects*].

¹⁴ *Choice Rhetoric*, *supra* note 12 at 253.

favourable determination of spousal support. Chapter 1 will provide an overview of spousal support, domestic contracts and contractual autonomy in Canada. While the focus of this thesis is contractual support, the introductory section will briefly outline how entitlement to spousal support may be established on three conceptual bases. Chapter 2 will provide an overview of relational theory and review the limited scholarly literature that exists in analyzing spousal support agreements through the lens of relational theory. In this way, Chapters 1 and 2 will situate the reader and provide the necessary background to the legal analysis found in Chapter 3. Chapter 3 will argue that assessing domestic contracts through a relational lens helps to explain the judicial reasoning as to why agreements were upheld or set aside while also highlighting some of the deficits in the court process and analysis.

Section A: An Overview of Spousal Support: Discretion, Entitlement and Principles

Spousal support is a discretionary area of law. Unlike child support, which is the right of the child that cannot be waived by the parents,¹⁵ spousal support is not only discretionary, but it can also be waived. Given that there is no presumptive right to spousal support, entitlement to spousal support is a crucial threshold issue that must be addressed before the determination of the quantum and duration of an award for spousal support.¹⁶ In order to establish entitlement, a recipient's spousal support claim must be grounded in at least one of three bases: compensatory, non-compensatory or contractual.¹⁷ These three bases are recognized by the Supreme Court of

¹⁵ *DBS v SRG*, [2006] 2 SCR 231 at para 104 citing *Richardson v Richardson*, [1987] 1 SCR 857 at 869. See also *Lukovnjak v Weir*, 2016 ONSC 6893.

¹⁶ *Fisher v Fisher*, [2008] OJ No 38, 2008 ONCA 11. Before the application of the *Spousal Support Advisory Guidelines* ("SSAG"), entitlement must first be established. Although they are advisory only and not binding on the court, the SSAG were drafted to bring more certainty and predictability to spousal support awards.

¹⁷ *Bracklow v Bracklow*, [1999] 1 SCR 420 [*Bracklow*].

Canada and are reflected in the principles, objectives and purposes of spousal support as outlined by the federal and provincial statutes.

1) Legislative Purposes for Spousal Support: The *Divorce Act* and the *Family Law Act*

Since entitlement to spousal support is discretionary, it requires the balancing of different legislative spousal support objectives and factors. For example, section 15.2(4) of the *Divorce Act* states that “the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including: (a) the length of time the spouse cohabited; (b) the functions performed by each spouse during cohabitation; and (c) any order, agreement or arrangement relating to support of either spouse.”¹⁸ In addition, section 15.2(6)¹⁹ specifically sets out four objectives of a spousal support order:

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

Similarly, section 33(8) of the *Family Law Act*, sets out the purposes of a spousal support order:

- (a) recognize the spouse’s contribution to the relationship and the economic consequences of the relationship for the spouse;
- (b) share the economic burden of child support equitably;
- (c) make fair provision to assist the spouse to become able to contribute to his or her own support; and
- (d) relieve financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home).²⁰

¹⁸ *Divorce Act*, *supra* note 4, s 15.2(4). The interpretation and application of these principles, objectives and factors were in issue in *Moge v Moge*, [1992] 3 SCR 813 [*Moge*].

¹⁹ *Divorce Act*, *supra* note 4, s 15.2(6).”

²⁰ *Family Law Act*, *supra* note 2, s 33(8).

Further, subsection 33(9) of the *Family Law Act* outlines non-exhaustive factors that are to be taken into account in determining the amount and duration of spousal support. Although reference is made to the circumstances of both parties, some factors include consideration of only the recipient spouse's circumstances: assets and means; capacity to contribute to their own support; age and health; needs with reference to the accustomed standard of living; the desirability to remain at home to care for a child; and, contribution to the realization of the other spouse's career potential. In addition, paragraph 33(9)(l) specifically notes that where the dependant is a spouse, the following shall be considered: (i) the length of cohabitation; (ii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation; (iii) whether the spouse cares for a child over 18 years of age who is unable to withdraw from the parent's charge by reason of illness, disability, or other cause or (iv) by reason of the continuation of a program of education; (v) any domestic or child care service performed by the spouse for the family as if it were remunerative employment; and (vi) the effect of the responsibility of caring for a child on the spouse's earnings and career development.²¹ These principles and objectives of spousal support outlined in the statutes relate to the three main bases of spousal support.

2) Compensatory, Non-Compensatory and Contractual Spousal Support

The Supreme Court of Canada decision *Bracklow* is often referenced as a framework case for the three conceptual bases of spousal support: compensatory, non-compensatory and contractual.²² In addition, *Bracklow* remains the leading case addressing non-compensatory

²¹ *Ibid*, s 33(9).

²² Carol Rogerson, "Spousal Support Post-*Bracklow*: The Pendulum Swings Again?" (2001) 19 CLFQ 185 at 187-188 [Rogerson, "Post-*Bracklow*"]. In this article, Rogerson discusses the significant impact *Bracklow* had on spousal support. She observes that "*Bracklow* is generally regarded as further broadening the basis of spousal support even beyond what was accomplished by *Moge*." (*Ibid* at 188).

support while *Moge*²³ pertains to compensatory support. These two decisions inform the analysis of whether a spousal support claim is based on compensation, need, or a combination of both compensation and need, which in turn plays a significant role in the quantum and duration of the spousal support award at first instance and on variation.²⁴ On the other hand, *Miglin* remains the landmark decision on contractual support as it addressed the weight to be given to an agreement waiving or limiting spousal support where a spouse subsequently seeks a more favorable spousal support determination – inconsistent with that agreement - under the *Divorce Act*. While the focus of this thesis is contractual support and the setting aside of an agreement (or part of an agreement) under subsection 56(4) of the *Family Law Act*, this section will briefly outline how entitlement to spousal support may be established on all three bases. When crafting their own agreements and choosing to create or waive a spousal support obligation, it is important for parties to know what the state of spousal support law is where there is no agreement. Even when parties choose to create a contractual spousal support obligation or waiver, they are informed of the bases for spousal support so that they better understand the spousal support principles and law at play. Moreover, where a contract is set aside, the courts will consider whether the spousal support entitlement exists based on any of the three grounds.

1. Compensatory Support

Moge confirmed that where spousal support has not been resolved by way of agreement, the legislative language setting out four objectives for spousal support governs entitlement and all

²³ For a detailed discussion of *Moge* and its impact on spousal support, including its gendered sensitivity to the economic reality of women's lives and a pattern of more generous support awards, see Susan Boyd and Claire Young, "Feminism, Law, and Public Policy: Family Feuds and Taxing Times" (2004) 42 Osgoode Hall LJ 545 at 557 [Boyd and Young] and Carol Rogerson, "Spousal Support After *Moge*" (1996-1997) 14 CLFQ 281 ff (WestlawNext Canada) [Rogerson, "After *Moge*"].

²⁴ See, for example, Mary-Jo Maur, "Compensatory Support Update: Why It's Important to Get the Basis for Spousal Support Entitlement Right," *The Six-Minute Family Law Lawyer*, 2010 (on file with the author).

four objectives must be taken into account without according primacy to any of them.²⁵ Most significantly, *Moge* broadened the basis for spousal support with “its re-conceptualization of spousal support around the idea of compensation.”²⁶ Although the compensatory principle is “very broad indeed, encompassing just about every possible compensatory theory,”²⁷ the role of compensatory support is described most often as “the equitable sharing of the economic consequences of marriage or marriage breakdown.”²⁸ For example, the recipient spouse might suffer economic disadvantages such as:²⁹ the financial impact of withdrawing from or not being in the paid labour force (i.e. loss of future earning power, loss of skills, continuity and seniority, missed promotions and lack of access to fringe employment benefits);³⁰ the economic impact of children both during and after marriage;³¹ the economic consequence of prioritizing one spouse's career interests or contributing to the other spouse's business;³² and, the inherent economic disadvantages revealed in the role assumed by one party through the “great disparities in the standard of living that would be experienced by spouses in the absence of support.”³³

²⁵ This was significant as it confirmed that “the clean break model of spousal support, with its harsh application of the principle of self-sufficiency, has clearly been rejected in Canada.” See Rogerson, “After *Moge*,” *supra* note 23.

²⁶ Rogerson, “Post-*Bracklow*,” *supra* note 22 at 187-188.

²⁷ Rollic Thompson, “Ideas of Spousal Support Entitlement” (2015) 34 CFLQ 1 at 6 and 11-13. Markers include where one spouse: (1) stays home full/part-time to care for children while the other maintains full employment; (2) takes a less demanding full-time job to assume greater childcare responsibility; (3) relocates to further the other's career or employment, but disrupts or modifies own employment; (4) earns income in order to support the other spouse who completes education/training to improve income; (5) enters a relationship before acquiring much in the way of labour market skills and is home full/part-time, or structures employment around childcare demands; (6) is primarily responsible for the care of children after separation; (7) the sacrifices enhance the other spouse's earning potential who is free to pursue own economic goals; (8) contributes to the other's career, including to the operation of a business or taking on increased domestic or financial responsibilities to enable the other spouse to pursue licenses, degrees, training, education etc.

²⁸ *Ibid.*

²⁹ *Moge*, *supra* note 18 recognizes that these disadvantages disproportionately affect women.

³⁰ *Ibid* at 867.

³¹ *Ibid* at 867-869.

³² *Ibid* at 869-870.

³³ *Ibid* at 870.

2. *Non-Compensatory Support*

Although *Bracklow* is often treated as a framework case for the three conceptual bases of spousal support, it was primarily a case about non-compensatory support. *Bracklow* broadened the role of spousal support by confirming that even in a case where there is no entitlement to spousal support on a compensatory basis, entitlement may be found where there is “need” alone. “[I]f need is interpreted broadly to cover any significant drop in standard of living, the basis for entitlement is very broad. Spousal support law was already moving in this direction after *Moge*, but *Bracklow* has confirmed the trend.”³⁴ Carol Rogerson observed this trend and acknowledged that “[a]ll spouses in need tend to get support. ‘Need,’ the central concept that grounds entitlement to non-compensatory support, is being interpreted fairly broadly.”³⁵ She also noted that there is a finding of a non-compensatory claim “so long as there was economic dependence or interdependency during the course of the relationship.”³⁶ While it does not pin down “need” to a specific definition, post-*Bracklow* case law reveals that “need” is conceptualized and found to exist in cases where the spousal support claimant’s circumstances are characterized as involving:

- a) illness and disability (i.e. seriously limiting or precluding employment);
- b) limited earnings or earning capacity for other reasons (i.e. any situation... including age, lack of education and skills, loss of employment due to shifts in the labour market, or withdrawal from the labour market during the course of the relationship for reasons other than childcare);
- c) a significant drop in the standard of living (i.e. situations involving glaring need where the claimant is in dire economic circumstances due to severely limited earnings or earning capacity or even if working, a significant drop due to loss of access to the income of the higher-earning spouse); and,
- d) short marriages.³⁷

³⁴ Rogerson, “Post-*Bracklow*,” *supra* note 22 at 223.

³⁵ *Ibid* at 228.

³⁶ *Ibid* at 226.

³⁷ *Ibid*.

3. *Contractual Support*

A spousal support recipient can also establish entitlement in a third way: on a contractual basis. For example, the parties might agree on the quantum and duration of spousal support in a cohabitation agreement, marriage contract or separation agreement.³⁸ However, in the same way that parties might agree to a recipient spouse's entitlement in this manner, they are also able to agree that there is no spousal support entitlement or limit it by including extensive spousal support waivers and/or releases in their domestic contract.³⁹ While the parties are encouraged to settle their own affairs, what happens when a party later decides to seek spousal support in the face of a contractual waiver or release of same? The remaining part of this chapter will set out the main principles at play in this context.

Section B: Freedom of Contract and Seeking Spousal Support despite the Domestic Contract

While *Miglin* remains the landmark Supreme Court of Canada decision on domestic contracts and freedom of contract in family law involving spousal support, it is important to briefly touch upon the *Pelech* trilogy that governed judicial variation of spousal support agreements prior to the *Miglin* decision. Significantly, the 1987 Supreme Court of Canada *Pelech* trilogy⁴⁰ reflected liberal notions of the autonomous individual and endorsed the clean break model of spousal support, self-sufficiency and freedom of contract.

³⁸ *Family Law Act*, *supra* note 2, ss 51-54.

³⁹ The domestic contract can provide for no spousal support whatsoever or provide for both the quantum and/or duration of support with or without releases.

⁴⁰ The *Pelech* trilogy is comprised of: *Pelech v Pelech* [1987] 1 SCR 801 [*Pelech*]; *Richardson v Richardson* [1987] 1 SCR 857; and, *Caron v Caron* [1987] 1 SCR 892 [collectively referred to as the "*Pelech* trilogy" or "trilogy"]. In all three cases, the spouses had agreed on spousal support with the benefit of legal advice. The wives subsequently sought to vary the agreement. They were all unsuccessful.

1) The *Pelech* Trilogy: Clean Break, Freedom of Contract and Self-Sufficiency

In the *Pelech* trilogy, the Supreme Court of Canada was tasked with addressing judicial variation of spousal support agreements. Specifically, the issue the Court grappled with was the choice between a deferential and an interventionist judicial approach to requests to alter agreements that the parties had previously negotiated. This involved a discretionary balancing act by the judiciary between the competing values of finality and fairness. Despite clear evidence of dramatic economic inequalities and economic need on the part of the former wives (i.e. they were all receiving social assistance) coupled with evidence of their former husband's ability to pay, the Supreme Court of Canada refused to order an increase in spousal support in all three cases. The Court noted that the parties had negotiated spousal support agreements and insisted that they should be respected absent evidence that met the Court's causal connection test. The causal connection test guiding variation applications required a radical and unforeseen change in circumstances, causally connected to the marriage, before a court could alter the terms of an agreement intended to be a full and final settlement of the claims arising from the breakdown of the marriage. This approach permitted spousal support to be limited by domestic contracts except in those circumstances satisfying the narrow interpretation and high threshold of the causal connection test. Sheppard, for example, noted that "[i]n the interests of promoting negotiated settlements of post-marriage economic matters and of making possible a clean and complete break in economic obligations between former spouses, judicial deference was appropriate in applications for variation of spousal support agreements."⁴¹

⁴¹ Colleen Sheppard, "Uncomfortable Victories and Unanswered Questions: Lessons from *Moge*" (1995) 12 Can J Fam L 283 at 288.

The trilogy is described as “a product of its era...the era when the clean break model of spousal support, with its emphasis on spousal-sufficiency after divorce, became dominant.”⁴² The trilogy reflected concerns and values dominating the first wave of modern family law reform as evidenced by the policy choice of upholding spousal support agreements and restricting the courts’ ability to relieve spouses of bad bargains.⁴³ On a practical level, domestic contracts were construed as a pragmatically efficient mechanism of dispute resolution, while on a symbolic level, the legal concept of contract resonated with new images of marriage and divorce. As Rogerson explained:

The new view of marriage was as a contract between two autonomous and equal individuals freely choosing the structure of their relationship to meet their own needs and aspirations, without the paternalistic intervention of the state. New values of gender equality meant that women were fully capable of making their own choices and no longer assumed to be in need of protection. And just as spouses chose the terms of their coming together, they would choose the terms of their coming apart. If spouses made bad bargains, they had only themselves to blame. A law upholding agreements would encourage people to act more responsibly...Individual choice and individual responsibility were the mantras of the time.⁴⁴

The *Pelech* trilogy marked a substantial departure from the traditional view of need-based spousal support. Instead, it “acknowledged that modern marriage is often not a life-long commitment and suggested that couples should be able to extricate themselves, both financially and emotionally, from their former marriage partners.”⁴⁵ In practice, this translated into a twofold effect. First, by endorsing the clean break model with support orders’ primary goal of severing “the ties between the ex-spouses as quickly as possible...[the trilogy] had a profound impact on spousal support awards for some time.”⁴⁶ Second, the causal connection test’s high threshold for

⁴² Carol Rogerson, “*Miglin v. Miglin* 2003 SCC 24: ‘They Are Agreements Nonetheless’” (2003) 20 Can J Fam L 197 at 198 [Rogerson, *Miglin*].

⁴³ *Ibid.*

⁴⁴ *Ibid* at 198-199.

⁴⁵ Sheppard, *supra* note 42 at 289.

⁴⁶ Martha Shaffer, “Separation Agreements Post-*Moge*, *Willick* and *L.G. v. G.B.*: A New Trilogy?” (1999) 16 Can J Fam L 51 at 54 [Shaffer].

variation “led to the predictable result that it became extremely difficult to vary agreements deemed to be final settlements of the entitlements arising from the marriage.”⁴⁷ Given the high variation standard, “people were often stuck with ‘bad’ deals - bad in the sense that they left one of the former spouses in a precarious financial state. This was particularly pronounced for women who frequently agreed to short term support on the expectation that it would not take them long to become financially self-sufficient - an expectation that often failed to materialize.”⁴⁸

The trilogy’s emphasis on self-sufficiency and freedom of contract inspired considerable feminist commentary, which highlighted these adverse effects and their problematic impact on divorcing women. The abstract principle of freedom of contract was criticized for sacrificing the economic well-being of women. Feminist scholars⁴⁹ advocated for a substantive equality approach arguing that judges need to be attuned to “the gender-based inequality of women within heterosexual families...as well as the unequal bargaining power as they interpreted legislation, particularly in the spousal support context.”⁵⁰ The feminist consensus found that “[i]t was premature to treat women and men identically in family law, or in bargaining over domestic contracts, because women and men were not yet equal within families, or indeed, within society.”⁵¹

Martha Bailey captured the trilogy’s insensitivity to these live issues when she explained:

The decisions are consistent with the global trend toward privatization, our traditional protection of the private sphere of the family from state intervention, the current push for settlement of family law cases, and the new family law's emphasis on self-sufficiency and a clean break phenomena which are all problematic for the disadvantaged. The privatized family, long exposed by feminists as a state-sanctioned arena for male abuse of power, will not produce agreements consistent with the standards of fairness embodied in our family laws because of the inequality

⁴⁷ *Ibid* at 55.

⁴⁸ *Ibid*.

⁴⁹ Boyd and Young, *supra* note 23 at 556 citing authors such as Carol Rogerson, Martha Bailey and Brenda Cossman.

⁵⁰ *Ibid*.

⁵¹ *Ibid*.

of bargaining power between men and women in a patriarchal society ... The trilogy's atomistic view of the family is consistent with dominant liberal discourse, which represents the oppressive relationship between husband and wife as a freely chosen contract between rational, unencumbered, autonomous individuals.⁵²

It was against this backdrop that *Moge* entered the debate and significantly re-conceptualized the role of spousal support, transforming “the legal landscape of spousal support, just as the *Pelech* Trilogy had five years earlier.”⁵³ It was said that despite the narrowing effects of the *Pelech* trilogy on spousal support, “the pendulum swung back in the direction of a broader basis for spousal support with the release of *Moge* and its re-conceptualization of spousal support around the idea of compensation.”⁵⁴ However, it was not until the release of *Miglin* that the *Pelech* trilogy (formally) no longer governed cases where spousal support was claimed in the face of an existing domestic contract.

2) *Miglin*’s Contractual Finality, Fairness and Autonomy

In *Miglin*, instead of resorting to litigation, the parties⁵⁵ initially negotiated a comprehensive settlement of their affairs. The separation agreement contained, *inter alia*, a full and final release of spousal support following a 14-year marriage with four children that the parties characterized differently. On the husband’s account, the parties had a modern marriage: they were equal business partners and the wife advanced her career and education during the marriage. On the wife’s account, the marriage was a traditional one with the husband managing the family’s

⁵² Martha Bailey, “*Pelech, Caron, and Richardson*” (1989-90) 3 CJWL 615 at 616.

⁵³ Rogerson, “After *Moge*,” *supra* note 23.

⁵⁴ Rogerson, “Post-*Bracklow*,” *supra* note 22 at 187-188.

⁵⁵ The Miglins married in 1979 and separated in 1993 after a 14-year marriage and four children. When they met, they worked at a bank with the husband completing an MBA at Harvard University. The wife obtained a BA from the University of Toronto earlier in the marriage. The parties ran a successful resort business in northern Ontario for most of the marriage. They were joint shareholders of the Killarney Lodge; the husband oversaw the financial and business aspects while the wife was responsible for the day-to-day operations. They lived in Toronto during the off-season, but when in season, the parties lived and worked at the Lodge while a babysitter looked after the children. Once some of the children started school, the wife commuted between Killarney and Toronto as she was the primary caregiver. At the time of separation, the wife was receiving an annual salary of approximately \$80,000.00 from the lodge. She was 41 years old, the husband 43 and the children’s ages ranged from two to seven years old.

finances while she raised the children and helped out with the family business. Against this backdrop of the parties' marital dynamics and despite the agreement, the wife subsequently applied for and obtained a spousal support order under the *Divorce Act*, which the Supreme Court of Canada overturned on appeal. The issue on appeal before the Court was the proper approach to determining an originating application for spousal support under the *Divorce Act*, where the parties have executed a pre-existing agreement that is inconsistent with the claim for spousal support. This provided the Court "with an opportunity to address directly the question of the continued application of the *Pelech* trilogy."⁵⁶ The Court held that the spousal support release in the parties' separation agreement should be enforced and the wife's claim for support dismissed.

While the Court's ruling in *Miglin* is consistent with a pattern of deference to separation agreements and with the endorsement of the principle of freedom of contract, the Court took a less deferential approach than the one previously adopted in *Pelech*, explicitly rejecting "a near-impermeable standard such that a court will endorse any agreement, regardless of the inequities it reveals."⁵⁷ The Court held that where spousal support is sought in the face of a pre-existing agreement, a two-stage investigation is required "into all the circumstances surrounding that agreement, first at the time of its formation, and second, at the time of the application."⁵⁸

Under stage one, "the court should first look to the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it."⁵⁹ The judges are to consider both the circumstances of execution and the substance of the agreement. For the former, this includes determining "whether there were any circumstances of oppression, pressure,

⁵⁶ *Miglin*, *supra* note 7 at para 1.

⁵⁷ *Ibid* at para 45.

⁵⁸ *Ibid* at para 64. The complete explanation of the two-stage test is found at paras 80-91.

⁵⁹ *Ibid* at para 80.

or other vulnerabilities...and the conditions under which the negotiations were held, such as their duration and whether there was professional assistance.”⁶⁰ In terms of the level of deference and respect that should be accorded to the agreement, the judges noted:

Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.⁶¹

If the conditions surrounding the negotiation of the agreement are found to be “satisfactory”, the court must then direct its attention to the substance of the agreement. In particular,

The court must determine the extent to which the agreement takes into account the factors and objectives listed in the Act, thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown. Only a significant departure from the general objectives of the Act will warrant the court's intervention on the basis that there is not substantial compliance with the Act. The court must not view spousal support arrangements in a vacuum, however; it must look at the agreement or arrangement in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves.⁶²

While “the court should defer to the wishes of the parties and afford the agreement great weight”⁶³ where the agreement is not impugned under step one of the inquiry pertaining to the time of its formation, stage two recognizes that “the vicissitudes of life mean that, in some circumstances, parties may find themselves down the road of their post-divorce life in circumstances not contemplated.”⁶⁴ As a result, “the court should assess the extent to which

⁶⁰ *Ibid* at para 81.

⁶¹ *Ibid* at para 83.

⁶² *Ibid* at para 84. The general objectives of the *Divorce Act* include the spousal support considerations in s 15.2 as well as finality, certainty and the parties' ability to determine their own affairs. See *Ibid* at para 85.

⁶³ *Ibid* at para 87.

⁶⁴ *Ibid*.

enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act.”⁶⁵ The court explained:

The parties' intentions, as reflected by the agreement, are the backdrop against which the court must consider whether the situation of the parties at the time of the application makes it no longer appropriate to accord the agreement conclusive weight. We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation...⁶⁶

... we do not consider "change" of any particular nature to be a threshold requirement which, once established, entitles the court to jettison the agreement entirely. Rather, the court should be persuaded that both the intervention and the degree of intervention are warranted...⁶⁷

The two-stage test in *Miglin* ostensibly overruled the trilogy, but the extent of its impact and rejection of the *Pelech* trilogy was questioned. Rogerson noted that although the *Miglin*'s majority reasons found the trilogy's "privileging of values of clean break inappropriate in the current legislative and jurisprudential context...[they] also emphasize the continued relevance of the policy concerns that underlie the trilogy—certainty, finality, and autonomy.”⁶⁸ Boyd and Young argued that “the discourse that dominated the *Pelech* trilogy—of choice and individual responsibility, and freedom from state-imposed norms—emerge once more;”⁶⁹ so too Rogerson observed that *Miglin* strikingly evokes the language of the trilogy, which is captured by the majority quote: “Although we recognize the unique nature of separation agreements and their differences from commercial contracts, they are contracts nonetheless. Parties must take

⁶⁵ *Ibid.*

⁶⁶ *Ibid* at para 88. The court also acknowledged at para 89 that a “certain degree of change is foreseeable most of the time.”

⁶⁷ *Ibid* at para 90.

⁶⁸ Rogerson, *Miglin*, *supra* note 43 at 202.

⁶⁹ Boyd and Young, *supra* note 23 at 565. *Miglin* is seen as “the resistance of acknowledging women’s systemic inequality within marriage” where “[t]he liberal individual unfettered by gender or familial ideology has arguably returned to family law, at least in the contractual context.” See *Ibid* at 565 and 567. However, some feminist commentators suggest that the *Miglin* decision rests on narrow facts and does not necessarily reflect the overarching gender-neutralizing trend or a rebirth of formal equality. See *Ibid* citing E. Llana Nakonechny, “Spousal Support Decisions at the Supreme Court of Canada: New Model or Moving Target?” (2003) 15 CJWL 102.

responsibility for the contract they execute as well as for their own lives.”⁷⁰ Despite *Miglin*’s “more ‘balanced’”⁷¹ two-tier test, Rogerson went on to caution, “[a]t best the new test will create considerable confusion in the law as to its meaning, thus failing to resolve the uncertainty that has plagued this area of the law for at least a decade. At worst, the new test reintroduces the stringency of the trilogy test in a new guise.”⁷² As a result, the development of subsequent case law was and continues to be the only way to determine the effects of its application and whether “[i]n the end, finality continues to trump fairness.”⁷³

The actual impact of *Miglin* in practice revealed that although lower courts initially interpreted the ruling strictly, they increasingly became more concerned with both procedural and substantive fairness. Rogerson observed this trend after conducting an extensive review of post-*Miglin* case law up to 2011.⁷⁴ The initial strict interpretation by lower courts resulted in agreements being upheld unless there were serious flaws in the negotiation process.⁷⁵ Little attention was paid to the overall substantive fairness or compliance with the statutory objectives as the courts in their deferential approach upheld many unfair agreements.⁷⁶ However, this initial strict interpretation paved the way for a more gradual interpretation that emphasized fairness whereby courts became reluctant to uphold agreements that were found to depart significantly from the objectives and norms of the *Divorce Act*.⁷⁷ The development of such case law arguably erodes what is construed

⁷⁰ *Miglin*, *supra* note 7 at para 91.

⁷¹ Rogerson, *Miglin*, *supra* note 43 at 202.

⁷² *Ibid* at 202.

⁷³ *Ibid* at 203.

⁷⁴ Rogerson, *The Legacy of Miglin*, *supra* note 8.

⁷⁵ *Ibid* at 14.

⁷⁶ *Ibid*.

⁷⁷ *Ibid* at 20.

as *Miglin*'s emphasis on upholding agreements.⁷⁸ As Buckley noted, "[i]f the *Pelech* trilogy represents the high point of enforcing agreements, *Miglin* represents an uneasy compromise between the desire to uphold bargains and the recognition that agreements may be unfair or exploitative."⁷⁹

Moreover, *Miglin* is now often read alongside *Hartshorne v Hartshorne*,⁸⁰ which is another Supreme Court of Canada decision on domestic contracts and freedom of contracts in family law. While *Miglin* addresses spousal support in the context of a separation agreement, *Hartshorne* addresses marital property in the context of a prenuptial agreement. In *Hartshorne*, both parties were lawyers, although the wife withdrew from legal practice to raise the children. The husband was previously married and decided he would never again subject his assets to property division in the event of a divorce. Shortly before the wedding, and at his insistence, a marriage contract was drafted and executed to that effect. According to the terms, the parties were separate as to property except for the matrimonial home on which the wife would earn a percentage for each year she lived there. Despite being advised that the agreement was "grossly unfair" and receiving independent legal advice, the wife signed the agreement. The majority judges enforced contracts in both *Miglin* and *Hartshorne*.

In *Miglin*, the majority judges held that the global Separation Agreement should be accorded significant and determinative weight. The parties engaged in extensive negotiation over a lengthy period of approximately 15 months. They engaged the services of professionals, including experienced and expert counsel. The wife received legal and detailed financial advice

⁷⁸ Buckley similarly argues that *Miglin*'s emphasis on upholding agreements has been further eroded by two recent decisions, *LMP v LS*, [2011] SCJ No 64, [2011] 3 SCR 775 and *RP v RC*, [2011] SCJ No 65, [2011] 3 SCR 819. See Buckley's *Choice Rhetoric*, *supra* note 12 at 281 onwards.

⁷⁹ *Ibid* at 280.

⁸⁰ *Hartshorne v Hartshorne*, [2004] 1 SCR 550 [*Hartshorne*].

throughout the negotiation process and there was nothing to indicate that the circumstances surrounding the negotiation and execution of the Separation Agreement were fraught with vulnerabilities. While the wife testified at trial that she felt pressured by her husband to agree to the spousal support release, was not content with the Separation Agreement and found it a confusing and emotional time, the majority judges held that any vulnerability experienced by the wife was more than adequately compensated by the independent and competent legal counsel representing her interests over the substantial period of negotiation as well as the services provided to her by other professionals. Similarly, nothing in the substance of the agreement demonstrated a significant departure from the overall objectives of the *Divorce Act*. The division of assets in the Separation Agreement reflected the parties' needs and wishes at the time and fairly distributed the assets acquired and created by them throughout their marriage. Moreover, the quantum of child support was established in full contemplation of the wife's spousal support release. The judges held that the Separation Agreement at the time of its formation was in substantial compliance with the *Divorce Act*.

In *Hartshorne*, the majority judges noted that the marriage agreement was entered into after the wife received independent legal advice at the time of negotiation, which is an important means of ensuring an informed decision to enter into an agreement. The majority judges found that the wife was forewarned of the agreement's shortcomings, which was evidenced by her lawyer's detailed opinion letter. Despite her lawyer's advice, the wife still signed the agreement. The majority judges held that the wife could not now rely on her lawyer's opinion to support the allegation that because she thought the agreement was unfair from its inception that she never intended to live up to her end of the bargain.

3) Section 56(4) of the *Family Law Act* and the Judicial Discretion to Set Aside a Contract

While the two-stage *Miglin* analysis under the *Divorce Act* is one way that a party may try to obtain a more favourable determination of spousal support in the face of a domestic contract, section 56(4) of the *Family Law Act* provides a party seeking spousal support with the opportunity to set aside the domestic contract. Pursuant to section 56(4) of the *Family Law Act*, a court may set aside a domestic contract or one or more of its provisions if at least one of three grounds is engaged. As noted in subsections (a)-(c), this may happen if: “(a) a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic 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.”⁸¹ With respect to subsection 56(4)(c)’s “law of contract” provision, a party’s pleadings may refer to various contractual law principles, including for example, the existence of undue influence, duress, fraud, coercion, unconscionability or misrepresentation.⁸² While different definitions and criteria apply to successfully establish the existence of these diverse doctrines, the “law of contract” grounds are united in their shared concern: whether the formation of the contract is compromised and warrants judicial intervention. Regardless of which ground(s) a party is relying on, section 56(4) consists of a two-stage analysis: (1) Can the party seeking to set aside the agreement demonstrate that one or more of the s. 56(4) circumstances is engaged? (2) If so, is it appropriate for the court to exercise its discretion to set aside the agreement?⁸³ It is to this two-stage judicial exercise under section 56(4) that this author

⁸¹ *Family Law Act*, *supra* note 2 at s 56(4)(a)-(c).

⁸² Undue influence, for example, is “defined as the ‘unconscientious use by one person of power possessed by him over another in order to induce the other’ to do something” while “in order for pressure to amount to duress it must be ‘a coercion of the will,’ or it must place the party to whom the pressure is directed in such a position to have ‘no realistic alternative’ but to submit to it.” See *Golton v Golton*, [2018] OJ No 5446 (Sup Ct) at para 219 [*Golton*] citing *Berdette v Berdette*, 1991 CarswellOnt 280 (ONCA).

⁸³ *Virv v Blair*, [2014] OJ No 2301, 2014 ONCA 392.

wishes to apply the lens of relational theory in order to illuminate the judicial reasoning as to when judicial intervention is warranted.

While scholars have applied relational theory to the spousal support agreement context under the *Divorce Act*, this author will apply relational theory to a different yet related statutory context by examining five cases where the judges were tasked with determining whether to set aside the domestic contract pursuant to section 56(4) of the *Family Law Act*. The statutory language itself requires a contextual analysis as the legislation provides guidelines rather than stringent rules, which in turn provides the scope to enter into the discussion of contextualism and therefore relational theory. Although relational theory helps to explain how the judges approach the validity of the domestic contract, the relational approach also exposes some of the deficits and limitations in the court process and reasoning. Prior to embarking on this author's analysis found in Chapter 3, Chapter 2 will provide an overview of relational theory and will then explore the scholarly literature that applies relational theory to the spousal support agreement context in Canada.

Chapter Two: An Overview of Relational Theory and its Application to the Canadian Spousal Support Context

This chapter will introduce relational theory and review the scholarly literature that applies relational theory to the spousal support agreement context in Canada. The literature is comprised of Robert Leckey's and Lucy-Ann Buckley's relational analysis under the *Divorce Act*. Section A will provide an overview of relational theory. Section B will discuss Leckey's *Contracting Claims and Family Law Feuds* and Section C will focus on Buckley's *Relational Theory and Choice Rhetoric in the Supreme Court of Canada*. As part of this account, the relevant paragraphs of *Miglin* and *Hartshorne*⁸⁴ will be incorporated and referenced to illustrate Buckley's and Leckey's claims about relational theory and its role in the decisions. It should be noted that although *Hartshorne* is not a spousal support case as it deals with property in the context of a marriage contract, the analysis regarding relational theory is still informative. This relational analysis will act as a useful point of reference for the subsequent chapter in which the relational lens will be applied to section 56(4) of the *Family Law Act*.

Section A: An Overview of Relational Theory

In *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, Jennifer Nedelsky conceptualizes a contextual, relationally embedded self. She observes the constitutively interdependent and interconnected nature of human beings and the centrality of their

⁸⁴ *Miglin* is now often read alongside *Hartshorne*, *supra* note 80, which is another decision on domestic contracts and freedom of contracts in family law. While *Miglin* addresses spousal support in the context of a separation agreement, *Hartshorne* addresses marital property in the context of a prenuptial agreement. In *Hartshorne*, both parties were lawyers, although the wife withdrew from legal practice to raise the children. The husband was previously married and decided he would never again subject his assets to property division in the event of a divorce. Shortly before the wedding, and at his insistence, a marriage contract was drafted and executed to that effect. According to the terms, the parties were separate as to property except for the matrimonial home on which the wife would earn a percentage for each year she lived there. Despite being advised that the agreement was "grossly unfair" and receiving independent legal advice, the wife signed the agreement. The majority judges enforced contracts in both *Miglin* and *Hartshorne*. This repeats what you have already said in the text.

relationships. As she explains, “[i]t is the very nature of human selves to be in interaction with others”⁸⁵ and “[t]he self is relational because human beings become who they are – their identities, their capacities, their desires- through the relationships in which they participate.”⁸⁶ On her account, “[t]he individual self is...constituted in an ongoing, dynamic way by the relationships through which each person interacts with others.”⁸⁷ Thus, she emphasizes that “[w]hen we see the self as constituted by relations, then the core values of human life have to be understood in ways that take account of this centrality of relationship.”⁸⁸ This understanding is significant; it provides the main premise of relational theory given that relational theorists are united in their “shared conviction that persons are socially embedded and that agents’ identities are formed within the context of social relationships shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity.”⁸⁹

Writing in the context of both family law and administrative law in Canada, Robert Leckey observes that “law has come to suppose and produce *contextual* subjects...that is, subjects regarded as rooted in their relationships and social settings [who] have come to replace ones defined rather more abstractly by legal categorizations.”⁹⁰ According to Leckey, this shift in emphasis from abstraction and categorical framings to a focus on relationships, embeddedness and context is relational theory’s basic premise. Considered “[a] branch of feminist political theory,” Leckey notes that “relational theory is not an officially constituted school, and its

⁸⁵ Jennifer Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011) at 55 [*Law’s Relations*].

⁸⁶ *Ibid* at 4.

⁸⁷ *Ibid* at 3.

⁸⁸ *Ibid* at 4.

⁸⁹ Catriona Mackenzie and Natalie Stoljar, eds., *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford: Oxford University Press, 2000) at 4 [Mackenzie and Stoljar].

⁹⁰ *Contextual Subjects*, *supra* note 13 at 3.

boundaries are contestable.”⁹¹ Yet despite contestable boundaries, differing conceptualizations and internal tensions⁹² among individual relational theorists, Leckey observes that there are shared threads underlying relational theorists’ overall approach. In particular, he identifies three discernible elements, which not only provide a summary understanding of relational theory, but also act as “a useful reference point for legal analysis.”⁹³ These three common elements are: (1) “the description of subjects as relationally embedded;” (2) “a methodology of contextualism;” and, (3) “relational theory’s normative commitment to relational autonomy and to promoting constructive relationships conducive to it.”⁹⁴

1) First Element: The Contextual, Relationally Embedded Self

Relational theorists are united in their “shared conviction that persons are socially embedded and that agents’ identities are formed within the context of social relationships shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity.”⁹⁵ As Leckey explains, this shared conviction is relational theory’s “point of departure;”⁹⁶ the “descriptive premise”⁹⁷ of subjects as embedded and relationally constituted is the first key element of relational theory. In contrast to the image of a separate liberal self, the “self exists fundamentally in relation to others.”⁹⁸ On the relational account, “subjects are socially

⁹¹ *Contracting Claims*, *supra* note 12 at 6 and *Contextual Subjects*, *supra* note 13 at 7 and 11.

⁹² As Leckey explains, “relational theorists will not always concur on appropriate policy prescriptions. There will naturally be tensions internal to relational analysis, ones between attention to the formative influence of relationships and context and the wish to vindicate freedom and autonomy.” *Contracting Claims*, *supra* note 13 at 10.

⁹³ *Choice Rhetoric*, *supra* note 12 at 263.

⁹⁴ *Contracting Claims*, *supra* note 12 at 9-10.

⁹⁵ Mackenzie and Stoljar, *supra* note 89 at 4.

⁹⁶ *Contracting Claims*, *supra* note 12 at 7.

⁹⁷ *Ibid.*

⁹⁸ Anne Donchin, “Autonomy and Interdependence: Quandaries in Genetic Decision-Making” in MacKenzie and Stoljar, *supra* note 89 at 239 [Donchin].

constituted, embedded in their contexts, their selfhood and agency formed by thick relationships with others.”⁹⁹

Nedelsky observes the constitutively interdependent and interconnected nature of human beings and the centrality of their relationships. She states that “[t]he self is relational because human beings become who they are – their identities, their capacities, their desires- through the relationships in which they participate.”¹⁰⁰ In order to illustrate the varied nature of these relationships ranging from the intimate and interpersonal to the systemic, Nedelsky explains:

People’s interactions with one another matter not simply because their interests may collide. In my view, each individual is in basic ways constituted by networks of relationships of which they are a part – networks that range from intimate relations with parents, friends, or lovers to relations between student and teacher, welfare recipient and caseworker, citizen and state, to being participants in a global economy, migrants in a world of gross economic inequality, inhabitants of a world shaped by global warming.¹⁰¹

Nedelsky captures the meaning of being “constituted by relationships rather than just living among others”¹⁰² by using the familiar example of children to highlight this relational notion of “people being fundamentally shaped by relationship.”¹⁰³ As she explains, it “is the idea that children are shaped by their families, often their parents in particular...Both the child and the future adult are recognized to be profoundly shaped by the kinds of relationships they had with their parents.”¹⁰⁴ Accordingly, instead of viewing a human being as the liberal, atomistic and separate self whose interactions are relevant only when linked by agreement or when interests

⁹⁹ *Contextual Subjects*, *supra* note 13 at 106.

¹⁰⁰ *Law’s Relations*, *supra* note 85 at 4.

¹⁰¹ *Ibid* at 19.

¹⁰² *Ibid*.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid* at 19-20.

collide, the relational approach recognizes “the idea that people continue to be profoundly shaped by relationships.”¹⁰⁵

This conceptualization of the self is similarly captured by other scholars. For example, Donchin acknowledges that the “self exists fundamentally in relation to others”¹⁰⁶ and Williams explains that selves “are formed in time and in relational space.”¹⁰⁷ Time plays an important role as the view of the self is also historical in nature while the passage of time itself is important in terms of revealing the effect of relations over time.¹⁰⁸ On Fletcher’s account, the “historical self” may comprise the notion of obligations, which is implied by the “sense of being historically rooted in a set of defining familial, institutional, and national relationships.”¹⁰⁹ Once again, this emphasizes the broad range of relations and their continued effects over time, highlighting the importance of people’s embeddedness and context.

2) Second Element: The Methodology of Contextualism

In addition to the first element of relationally embedded and contextual subjects, Leckey observes that the second element is “a methodology of contextualism.”¹¹⁰ As Leckey explains by drawing on Nedelsky’s work, “[r]elational theorists consistently advocate close attention to the contexts in which individuals interact...Good feminist theorizing begins with people in their social contexts, insisting on context and particularity over abstract universality.”¹¹¹ This context,

¹⁰⁵ *Ibid* at 20.

¹⁰⁶ Donchin, *supra* note 115 at 239.

¹⁰⁷ Rowan Williams, *Lost Icons: Reflections on Cultural Bereavement* (Edinburgh: T&T Clark, 2000) at 138 [Rowan Williams].

¹⁰⁸ Donchin, *supra* note 135 at 239.

¹⁰⁹ George Fletcher, *Loyalty: An Essay on the Morality of Relationships* (New York: Oxford University Press, 1993) at 21.

¹¹⁰ *Contracting Claims*, *supra* note 12 at 9.

¹¹¹ *Ibid* at 10 citing: Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1 Yale JL & Fem 7 at 8 [*Reconceiving Autonomy*] and Jennifer Nedelsky, “Citizenship and Relational Feminism” in Ronald Beiner & Wayne Norman, eds., *Canadian Political Philosophy: Contemporary Reflections* (Oxford: Oxford University Press, 2001) 131 at 135.

however, is “larger than the set of personal relationships”¹¹² as it also includes the broader “political, socio-economic, and cultural conditions.”¹¹³ As Mackenzie and Stoljar emphasize, in order to understand the capacities and characteristics of the relational self, it is important to “pay attention to the rich and complex social and historical contexts in which agents are embedded.”¹¹⁴

Contrary to liberal theory’s atomistic self, relational theory’s embedded contextual self relates to the third element of relational theory: autonomy. Relational theorists recognize the importance of having a true understanding of the self, because an inaccurate understanding of the self is likely to create an erroneous conception of autonomy. As Nedelsky points out, “[a] distorted picture of the self is likely to generate a distorted understanding of autonomy [and other values], and a system of rights designed to promote and protect that vision of self and autonomy is unlikely to optimally foster and protect human capacities, needs and entitlements.”¹¹⁵ Instead, the relational conception of the self and relationships recognizes that “[a]ll core values, such as security, dignity, equality, liberty, freedom of speech, are made possible by (or undermined by) structures of relationships.”¹¹⁶

Similarly, Buckley recognizes this interaction when she observes that there has been “a continuing debate on the significance and the nature of personal choice,”¹¹⁷ which “derives from the competing models of autonomy posited by neoliberal and feminist theorists.”¹¹⁸ As she explains, when the self is seen as an “atomistic, independent agent,”¹¹⁹ it is deemed to have “the

¹¹² *Contracting Claims*, *supra* note 12 at 10.

¹¹³ Martha Minow and Elizabeth V. Spelman, “In Context” (1990) 63 S Cal L Rev 1597 at 1651.

¹¹⁴ Mackenzie and Stoljar, *supra* note 89 at 21.

¹¹⁵ *Law’s Relations*, *supra* note 85 at 159.

¹¹⁶ *Ibid* at 41.

¹¹⁷ *Choice Rhetoric*, *supra* note 12 at 252.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*.

ability, and the duty, to make ‘responsible’ decisions in one’s “own best interests.”¹²⁰

Conversely, personal decision-making is cast in a different light when “the effects of structural barriers and social context”¹²¹ on the relationally embedded self are considered. This includes taking into account and emphasizing “the structural implications of what Williams has termed the ‘rhetoric of choice’ where negative consequences are deemed to flow from ‘personal choice,’ without further interrogation of that ‘choice’ or its gender implications.”¹²² Thus, “[r]elational autonomy requires attention to the impact of oppressive social and political structures on individuals’ lives and opportunities.”¹²³ In an effort to vindicate women’s agency, relational autonomy strives to “[t]o reconcile these apparently opposing objectives- the vindication of choice and the recognition of constraints on the exercise of that choice.”¹²⁴

3) Third Element: Relational Autonomy

The third common element of relational theory is its “normative commitment to relational autonomy and to promoting constructive relationships conducive to it.”¹²⁵ On the note of constructive relationships, relational theorists perceive liberal theory’s extreme individualism as a failure “to account for the ways in which our essential humanity is neither possible nor comprehensible without the network of relationships of which it is a part.”¹²⁶ Contrary to the relational self, the liberal selves “protected by rights are seen as essentially separate and not creatures whose interests, needs and capacities are mutually constitutive.”¹²⁷ Thus, by

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Choice Rhetoric*, *supra* note 12 citing Joan Williams, “Gender Wars: Selfless Women in the Republic of Choice” (1991) 66 NYUL Rev 1559 at 1561.

¹²³ *Contracting Claims*, *supra* note 12 at 8 and *Contextual Subjects*, *supra* note 13 at 10.

¹²⁴ *Choice Rhetoric*, *supra* note 12 at 253.

¹²⁵ *Contracting Claims*, *supra* note 12 at 10.

¹²⁶ *Law’s Relations*, *supra* note 85 at 248-249.

¹²⁷ *Ibid.*

conceptualizing autonomy as relational in nature, relational theorists starkly oppose the liberal notion of autonomy. Mackenzie and Stoljar, for example, characterize the liberal conception as being “inherently masculinist.”¹²⁸ On their account, it is “inextricably bound up with masculine character ideals, with assumptions about selfhood and agency that are metaphysically, epistemologically, and ethically problematic from a feminist perspective.”¹²⁹ On the other hand, relational responses “focus attention on the need for a more fine-grained and richer account of the autonomous agent.”¹³⁰ To this end, a corresponding emphasis is placed on “autonomy as a characteristic of agents who are emotional, embodied, desiring, creative, and feeling, as well as rational creatures.”¹³¹

This reconstruction of autonomy in relational terms disassociates the concept of autonomy from its traditional liberal associations, which commonly include terms such as “independence,” “self-determination” and “control.”¹³² Nedelsky explains that “[b]ecause we are always dependent on others for the possibility of autonomy, it follows that autonomy cannot mean independence” or “control.”¹³³ Nedelsky best captures this reality when she focuses on the choice of language and notes that “the best language for autonomy is not independence, self-determination, or control – despite their common associations with autonomy.”¹³⁴ Instead, the language she proposes is “autonomy as part of the capacity for creative interaction- which

¹²⁸ Mackenzie and Stoljar, *supra* note 89 at 3.

¹²⁹ *Ibid.*

¹³⁰ *Ibid* at 21.

¹³¹ *Ibid.*

¹³² *Law's Relations*, *supra* note 85 and 159.

¹³³ *Ibid* at 46.

¹³⁴ *Ibid* at 159.

includes the capacity for self-creation.”¹³⁵ On her account, “this approach makes the embodied, affective, and relational nature of human beings central rather than peripheral.”¹³⁶

Nedelsky highlights the importance of capacity and its role in the conception of autonomy. She states that she shares “the widely held belief in the capacity for autonomy and its value... focus[ing] on what enables this capacity to develop, to thrive, to manifest in autonomous behavior and the experience of autonomy.”¹³⁷ In order to capture this focus and emphasis, Nedelsky explains that the best language to use “is ‘relations of autonomy.’”¹³⁸ On this point, she elaborates as follows:

I prefer this language to ‘conditions’ for autonomy because I think the language of relations of autonomy highlights the dynamic, interactive quality of autonomy- in contrast to a picture of it as a strictly internal state of mind that comes into being when certain- separable- conditions are in place. The functioning of the capacity for autonomy is highly fluid; it varies across time and spheres of our lives. Autonomy exists on a continuum. As we act (usually partially) autonomously, we are always in interaction with the relationships (intimate and social-structural) that enable our autonomy. Relations are then constitutive of autonomy rather than conditions for it.¹³⁹

Hence, on her account, autonomy is not best conceived “as a static presumption about human nature, but a capacity whose realization is ever shifting”¹⁴⁰ in relation to “the inherently fluid and contingent dynamics of process and relationship.”¹⁴¹

As captured by the quoted passage above, both the self and autonomy are constitutively relational, an important point that Leckey similarly acknowledges when he states that relational “autonomy is not a capacity that can be exercised in isolation.”¹⁴² Instead, he emphasizes that

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid* at 46.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid* at 119.

¹⁴¹ *Ibid.*

¹⁴² *Contracting Claims*, *supra* note 12 at 8 and *Contextual Subjects*, *supra* note 13 at 10.

“[t]he crucial insight is that it depends ‘also on our relations with others.’”¹⁴³ In the same vein, and broadly speaking, Buckley states that relational models of autonomy “focus on the social situation of the individual (including the social connections and pressures that may affect personal decision making), and the impact of social forces on the development of personal capacities for reflection and action.”¹⁴⁴ Speaking in the family law context, Buckley explains that “[d]rawing on the common elements identified by Leckey, a relational approach to autonomy emphasizes the social situation of the actors and the context in which bargaining occurred.”¹⁴⁵ To illustrate this point in practice, she cites a real-life family law example and explains:

This highlighted discrepancies in the parties’ bargaining positions, as well as the emotional concerns and vulnerability arising in the prenuptial and marital breakdown contexts and the pressures arising from abusive relationships or concern for children. It highlights the implications of structural inequalities (such as gender inequality in the market place and in caring work) for individual decision making. The relational approach also acknowledges the social constitution of individuals and the significance of broader social context (such as the cultural location of the subject). All of these offer potential grounds for contesting the neoliberal assumption of atomistic self-interest.¹⁴⁶

Despite this thematic emphasis on “the role of emotion and interdependency in personal decision making”¹⁴⁷ and “the significance of relationships and context,”¹⁴⁸ Buckley explains that for relational theorists, emotion or emotional pressure does not preclude autonomy. Otherwise, “as Leckey has argued, women might be pathologized by assumptions of emotionalism and vulnerability.”¹⁴⁹ As Leckey explains, “the contestable patriarchal construction of men as

¹⁴³ *Ibid* citing Elizabeth Frazer and Nicola Lacey, *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (Toronto: University of Toronto Press, 1993) at 151.

¹⁴⁴ *Choice Rhetoric*, *supra* note 12 at 253.

¹⁴⁵ *Ibid* at 264.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid*.

¹⁴⁹ *Ibid* citing *Contracting Claims*, *supra* note 12 at 14. To quote Leckey, this “tacitly ratifies the contestable patriarchal construction of men as rational and women as emotional.”

rational and women as emotional”¹⁵⁰ would serve to imply “that the only conduct that can be taken seriously in the juridical sphere, and to which autonomy can be ascribed, is unemotional.”¹⁵¹ Speaking in the context of the (un)enforceability of contracts, he elaborates:

Such an implication stands in direct opposition to relational theorists' efforts to reconceive autonomy in embodied, relational terms. Asserting the unenforceability of contracts concluded by emotional women reinforces the ideal that women, to contract effectively, should strive to be unemotional and more like men. On the contrary, the strategic objective must surely be to foster a state of affairs in which there is space for all subjects, irrespective of their gender, to be simultaneously emotional and reasonable, emotional and autonomous. The presence of emotion should not lightly be coded as indicative of the absence of agency and thus of consent.¹⁵²

As recognized by various scholars, relational theory moves beyond gender constructions and categorical framings with its “emphasis upon relational autonomy and family diversity.”¹⁵³ For instance, Leckey highlights relational theory’s “commitment to promoting a diversity of family forms”¹⁵⁴ and its “openness to diverse models of thick family relationship, including same-sex couples.”¹⁵⁵ He emphasizes relational theory’s “commitment to the capacity for individuals, especially women, to revise their life plans and choose ways of living other than those presented to them by the social contexts in which they are embedded and by which they are constituted.”¹⁵⁶ In the same vein and drawing on Nedelsky’s work, Buckley states that relational theory “also holds that individuals can move beyond those contexts and shape their own lives, rather than simply accepting social roles and definitions.”¹⁵⁷ Similarly, on Barclay’s account, relational

¹⁵⁰ *Contracting Claims*, *supra* note 12 at 14.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid* at 19.

¹⁵⁴ *Ibid* at 18.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* at 8 and *Contextual Subjects*, *supra* note 13 at 10.

¹⁵⁷ *Choice Rhetoric*, *supra* note 12 at 264 citing *Law’s Relations*, *supra* note 85 at 47.

theorists emphasize that autonomy is necessary “[t]o consider which particular attachments we should reshape, which to reject, which to choose, and which to promote.”¹⁵⁸

This all resonates with Nedelsky’s account of “finding one’s own” law.¹⁵⁹ As Nedelsky states, “[i]ndeed, feminists are centrally concerned with freeing women to shape their own lives, to define who they (each) are, rather than accepting the definition given by others (men and male-dominated society, in particular.)”¹⁶⁰ For Nedelsky, “the essence of autonomy”¹⁶¹ is the possibility of selecting “which of the myriad of influences in one’s life to make ‘one’s own.’”¹⁶² To this end, Nedelsky’s reference to autonomy consists of “finding one’s own” law¹⁶³ where “one’s own” is to be conceptualized in relational terms.¹⁶⁴ As Nedelsky explains:

I see autonomy as the core of a capacity to engage in the ongoing, interactive creation of our selves- our relational selves, our selves that are constituted, yet not determined, by the web of nested relations within which we live. We have the capacity to interact creatively, that is, in an undetermined way, with all the relationships that shape us- and thus to reshape, re-create, both the relationships and ourselves. The idea that such acts arise from the actor rather than being determined by something else is captured by the notion of autonomy. The value of the capacity for creative interaction is at the heart of why I care about autonomy.¹⁶⁵

Referring to Nedelsky’s work, Leckey summarizes that “[b]ecoming autonomous - being able to find and live in accordance with one’s own law - is necessarily social in two dimensions.”¹⁶⁶ As he explains, “the capacity to find one’s own law develops only in the context

¹⁵⁸ Mackenzie and Stoljar, *supra* note 89 at 6.

¹⁵⁹ *Law’s Relations*, *supra* note 85 at 46.

¹⁶⁰ *Ibid* at 121.

¹⁶¹ *Ibid* at 58.

¹⁶² *Ibid*.

¹⁶³ *Ibid* at 46.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid* at 45-46.

¹⁶⁶ *Contracting Claims*, *supra* note 12 at 9 and *Contextual Subjects*, *supra* note 13 at 11.

of relations with others; autonomy is made possible not by separation but by relationships”¹⁶⁷ while “the ‘content’ of one’s own law is comprehensible only with reference to shared social norms, values, and concepts.”¹⁶⁸ Hence, “[r]elatedness is seen as a precondition of autonomy, with interdependence one of its constant components”¹⁶⁹ whereby “[a]utonomy becomes possible in social interaction through relationships, such as those with parents, teachers, friends, and agents of the state.”¹⁷⁰

As set out above, there are three main elements of relational theory. While this author has attempted to set them out separately, it is important to note that given their overlap and interconnected nature, the embedded nature of the relational subject, the methodology of contextualism and the corresponding relational autonomy are in constant interaction and do not exist in isolation from one another.

Section B: Leckey’s *Contracting Claims and Family Law Feuds*

In *Contracting Claims and Family Law Feuds*, Leckey applies relational theory to the *Miglin* and *Hartshorne* decisions. In response to the majority judges’ enforcement of both contracts (i.e. a separation agreement and a prenuptial agreement respectively) whereas the dissenting judges would have set them aside, Leckey notes that the prevailing scholarly narrative views the decisions as the story of “two diametrically opposed camps.”¹⁷¹ On this account, “the majority ideologically holds people to their so-called choices, producing family law subjects as abstract choosing agents” while the dissenting judges consider “contextual factors,” adopt a

¹⁶⁷ *Contracting Claims*, *supra* note 12 at 8 and *Contextual Subjects*, *supra* note 13 at 10 citing Jennifer Nedelsky, “Should Property Law Be Constitutionalized? A Relational and Comparative Approach” in G.E. van Maanen & A.J. van der Walt, eds., *Property Law on the Threshold of the 21st Century* (Apeldoorn: Maklu, 1996) at 429.

¹⁶⁸ *Contracting Claims*, *supra* note 12 citing *Reconceiving Autonomy*, *supra* note 127 at 11.

¹⁶⁹ *Contracting Claims*, *supra* note 12 at 9 and *Contextual Subjects*, *supra* note 13 at 11.

¹⁷⁰ *Contracting Claims*, *supra* note 12 at 8 and *Contextual Subjects*, *supra* note 13 at 10.

¹⁷¹ *Contracting Claims*, *supra* note 12 at 3.

“richer view of negotiation and consent” and apply a “contextually sensitive criticism of ‘autonomy’ and ‘choice.’”¹⁷² However, according to Leckey, “[a]ll the judges explicitly adopt a contextual method... [and] maintain the necessity of chalking out some scope for individual choice.”¹⁷³ While Leckey focuses on proving that “relational theory provides a middle ground”¹⁷⁴ instead of the dominant “story of a stark opposition”¹⁷⁵ between the majority and dissenting judges, this section will outline the elements of relational theory that Leckey identifies in *Miglin* and *Hartshorne*. These elements and where they are found in the decision will serve as a useful and illustrative point of reference for the next chapter. In particular, the two significant elements that Leckey discusses in great detail are the “methodology of contextualism” and the “need to recognize the autonomy to craft intimate relationships on one’s own model.”¹⁷⁶

1) The Relational Approach in *Miglin*: A Contextual Methodology

a. A “Contextual Assessment of All the Circumstances” and a “More Flexible and Contextual Approach:” The Rich Complexity of the Two-Stage Investigation or Approach

Leckey identifies the methodology of contextualism as an element of relational theory that is found throughout *Miglin*. First, it is evidenced by the use of interchangeable and indistinguishable wording to that effect. For example, the emphasis on context is captured by the

¹⁷² *Ibid* at 2. As Leckey explains, “[s]ome scholarship gives the sense that family law is gripped by a Manichean struggle between atomistic liberalism and a socially contextualized feminism,” in which “liberalism presupposes abstract, formally equal subjects bargaining in the marketplace” while feminist thinking “sees the complex ways that individuals are enmeshed in relationships, their options constrained by ideology, gender, and socio-economic forces.” See *Ibid* at 1.

¹⁷³ *Ibid* at 2.

¹⁷⁴ *Ibid* at 18.

¹⁷⁵ *Ibid*.

¹⁷⁶ *Ibid* at 20. Leckey also identifies a third element: the description of subjects as “embedded.” He concludes the “judges concur on the need to look to context and on the particular embeddedness of persons making contracts with their spouses. Both sides agree on the need for attention to vulnerability in negotiation and on the necessity of ensuring parties some autonomy to translate their own objectives into agreements. They agree, to slightly varying degrees, on what it means for arrangements to comply with the applicable legislation. It is thus unproductive to suggest that the majority reasons produce abstract, disembodied subjects...[and] reflect an atomistic liberalism.” *Ibid* at 28.

majority's directive that "a contextual assessment of all the circumstances"¹⁷⁷ is required when a spouse applies for support inconsistent with a prior agreement, which mirrors the dissent's language of "a more flexible and contextual approach."¹⁷⁸ The judges describe this endeavor as an "investigation into all the circumstances surrounding that agreement,"¹⁷⁹ which they explicitly situate in its "appropriate temporal context."¹⁸⁰ Specifically, the judges state:

*An initial application for spousal support inconsistent with a pre-existing agreement requires an investigation into all the circumstances surrounding that agreement, first, at the time of its formation, and second, at the time of the application. In our view, this two-stage analysis provides the court with a principled way of balancing the competing objectives underlying the Divorce Act and of locating the potentially problematic aspects of spousal support arrangements in their appropriate temporal context...*¹⁸¹

The contextual methodology is further found in the paragraphs explaining that the contextual approach is grounded in the *Divorce Act* and exemplified by *Moge* and *Bracklow*. The judges state "[t]he fact that the 1985 Act mandates a flexible and contextual approach to spousal support is underscored by the Act's treatment of support agreements themselves."¹⁸² In reference to the case law, they go on to observe:

*... The contemporary framework cases on spousal support, Moge and Bracklow... both espouse a contextual approach to spousal support that is fundamentally inconsistent with the emphasis on absolute autonomy, formal equality, and deemed self-sufficiency... This contextual approach reflects the varied models of marriage and is sensitive to the difficulties inherent in unbundling a marital relationship...*¹⁸³

As a result, and against this backdrop, the contextual methodology is found within the contextual complexity of the two-stage approach itself¹⁸⁴ and highlighted in the paragraphs explaining the

¹⁷⁷ *Miglin*, *supra* note 7 at para 46.

¹⁷⁸ *Ibid* at para 162.

¹⁷⁹ *Ibid* at para 64.

¹⁸⁰ *Ibid*. [Emphasis added].

¹⁸¹ *Ibid*.

¹⁸² *Ibid* at para 191. [Emphasis added].

¹⁸³ *Ibid* at para 195. [Emphasis added].

¹⁸⁴ Leckey references the two-stage test itself for the contextual approach. While the approach in *Miglin* has been criticized by some for its complexity and uncertainty, for Leckey "in tacit acknowledgement of the complexity and openness, the majority judges refer to their enterprise more as 'investigation' or 'approach' than as a 'test'" and "this

two-stage *Miglin* analysis. For example, the judges note that the process of determining the fairness of an agreement “*will of necessity be fact and context specific... [and] require... case-by-case determinations based on the whole picture of the parties' relationship, including their respective functions during the marriage, their allocation of capital and income upon the breakup, their childcare responsibilities, their employment prospects, and a range of other factors.*”¹⁸⁵ While “[t]he parties’ own attempts to achieve the [Divorce Act’s] objectives...in the context of their unique situation should not lightly be disregarded,”¹⁸⁶ the inquiry necessitates a contextual analysis. As the judges emphasize in paragraph 241:

...To this end, as I indicated above, parties will need to do more in an agreement than merely parrot the objectives of the 1985 Act, or the language of this Court's jurisprudence stripped of its context. *The inquiry into whether an agreement is objectively fair at the time of the application is not a formalistic one, about whether the terms of the agreement appear to be in technical compliance with the Act. Rather, this inquiry involves a probing, contextual analysis of the content of the agreement and the circumstances of the parties at the time of the application...*¹⁸⁷

b. Sensitivity to Context: The Unique Family Law Context as opposed to the Commercial Context

The contextual methodology in *Miglin* is found in the paragraphs capturing the judges’ sensitive awareness of the unique context of marital negotiations as compared to the commercial context. Described as “a time of intense personal and emotional turmoil,”¹⁸⁸ the judges note that

rich complexity is precisely in line with relational theory’s contextual approach.” See *Contracting Claims*, *supra* note 12 at 27 and *Miglin*, *supra* note 7 at paras 64, 1, 73, 79 and 91. For criticism about the “complexity and uncertainty” of the approach, see Carol Rogerson, “Developments in Family Law: The 2002-2003 Term,” (2003) 22 Supreme Court LR (2d) 273 at 320 and Michel Tétrault, *Droit de la famille*, 3d ed. (Cowansville, QC: Yvon Blais, 2005) at 314-5.

¹⁸⁵ *Miglin*, *supra* note 7 at para 231. [Emphasis added].

¹⁸⁶ *Ibid* at para 232. [Emphasis added].

¹⁸⁷ *Ibid* at para 241. [Emphasis added].

¹⁸⁸ *Ibid* at para 74.

“Negotiations in the family law context of separation or divorce are conducted in a unique environment.”¹⁸⁹ As they go on to state,

In the typical divorce scenario, spouses negotiate a settlement, often with the aid of lawyers, at a time when they are still experiencing *the emotional trauma of marriage breakdown*. Spouses who have not come to terms with the death of their marriage and who feel guilty, depressed or angry in consequence of the marriage breakdown are ill-equipped to form decisions of a permanent and legally binding nature...¹⁹⁰

The judges observe “the intimate nature of the marital relationship that makes it difficult to overcome potential power imbalances and modes of influence.”¹⁹¹ As they go on to explain, “The reality ... is that often *both contracting parties are vulnerable emotionally, with their judgment and ability to plan diminished, without the other spouse preying upon or influencing the other*. The complex marital relationship is full of potential power imbalance. In a sense, vulnerability is implicit in the *difficult emotional process of separation*.”¹⁹² As a result, the judges emphasize the unique¹⁹³ marital context as distinct from the commercial context:

... *The test should ultimately recognize the particular ways in which separation agreements generally and spousal support arrangements specifically are vulnerable to a risk of inequitable sharing at the time of negotiation and in the future...*¹⁹⁴

... *We see this in the direction to the court to consider an agreement as only one factor among others, rather than to treat it as binding, subject merely to remedies in contract law. Accordingly, contract law principles are not only better suited to the commercial context,*

¹⁸⁹ *Ibid* at para 75. [Emphasis added].

¹⁹⁰ *Ibid*. [Emphasis added].

¹⁹¹ *Ibid*. [Emphasis added].

¹⁹² *Ibid*. [Emphasis added].

¹⁹³ Several parts of the decision also capture the “uniqueness” narrative in general. For example, the word “unique” explicitly peppers the judges’ discussion of the unique: marital relationships, environment of family law negotiations, concerns arising in the post-divorce context, legal context, nature of separation and spousal support agreements and dynamics of family law. See *Ibid* at paras 75, 74, 78, 82, 91, 172, 192, 206, 209, 220, 230 and 246.

¹⁹⁴ *Ibid* at para 73. [Emphasis added].

*but it is implicit in s. 15 of the 1985 Act that they were not intended to govern the applicability of private contractual arrangements for spousal support.*¹⁹⁵

*Therefore, in searching for a proper balance between consensus and finality on the one hand, and sensitivity to the unique concerns that arise in the post-divorce context on the other, a court should be guided by the objectives of spousal support listed in the Act...*¹⁹⁶

In addition to the sensitive contextual discussion of marital negotiations, the contextual methodology is found in paragraphs 214 and 215 where the “discussion of the circumstances of negotiation *explicitly notices factors that may disadvantage women vis-à-vis their male partners.*”¹⁹⁷ Elaborating on the gendered inequalities in bargaining power, the judges observe:

*Comments such as these underscore the importance of recognizing the degree to which social and economic factors may constrain individuals' choices at the bargaining table...The inequalities in bargaining power at play in the settlement process are not gender neutral...*¹⁹⁸

*... it is typically women who come to the bargaining table as the financially dependent spouse, and hence the more vulnerable party in the negotiating process...*¹⁹⁹

Moreover, the dissent openly recognizes that the negotiation of separation agreements “may be further complicated by what are typically gender-based inequities in bargaining positions between the parties.”²⁰⁰ The judges highlight these gender nuances as follows:

*The unconscionability test is blind to these and other subtle ways in which the economic disparities between the parties and the parties' respective familial roles, both of which continue to be gender-based, may play into the negotiating process and significantly influence its outcome...*²⁰¹

... Separation agreements may "require individuals to make predictions about every aspect of their future lives" and... are "inherently speculative"...Their accuracy may be

¹⁹⁵ *Ibid* at para 77. [Emphasis added]. For a discussion of the unique family law context and the “danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is a unique legal context,” see also paras 82, 210, 211, 212 and 213.

¹⁹⁶ *Ibid* at para 78. [Emphasis added].

¹⁹⁷ *Contracting Claims*, *supra* note 12 at 22. [Emphasis added].

¹⁹⁸ *Miglin*, *supra* note 7 at para 214 [Emphasis added].

¹⁹⁹ *Ibid* at para 215 [Emphasis added].

²⁰⁰ *Ibid* at para 209.

²⁰¹ *Ibid* at para 216. [Emphasis added].

*undermined by the emotional overlay... and by the gendered disparities in bargaining power ...*²⁰²

*...While it is important to respect the will of the parties, courts cannot assume that the parties' spousal support agreements necessarily provide a clear and transparent guide to their intentions, which ... are often difficult to ascertain. In the family law context, the parties' "freedom" to contract may be significantly constrained by social and economic factors, and may be decidedly unequal...*²⁰³

Overall, whether gendered nuances are explicitly acknowledged or not, the above paragraphs capture the contextual methodology and the judges' sensitive awareness of the unique context of marital negotiations.

c. The Contextual Methodology of Working Out the Meaning of Justice in a Particular Setting

Despite the fact that the judges acknowledge the unique nature of the marital context and of separation agreements, they “do not ascribe an irrebuttable autonomy to the spouses by virtue of their rational personhood.”²⁰⁴ Leckey notes that the judges are “cognizant of the contextual constraints upon contracting spouses”²⁰⁵ and “the emotional stress of separation or divorce.”²⁰⁶ However, they are “unwilling to place the burden of proof upon the party who wishes to enforce an agreement” and warn against certain presumptions.²⁰⁷ These include “presuming an imbalance of power” or presuming that “parties are incapable of assenting to a binding agreement.”²⁰⁸ As a result, Leckey observes that “[t]he idea that the meaning of justice is to be worked out in a particular setting is consistent with relational theory’s contextual methodology.”²⁰⁹

²⁰² *Ibid* at para 217. [Emphasis added].

²⁰³ *Ibid* at para 218. [Emphasis added].

²⁰⁴ *Contracting Claims*, *supra* note 12 at 22.

²⁰⁵ *Ibid*.

²⁰⁶ *Ibid*.

²⁰⁷ *Ibid*.

²⁰⁸ *Ibid*.

²⁰⁹ *Ibid* at 24.

Paragraphs 82 and 91 of *Miglin* are telling in this regard. While both paragraphs acknowledge the uniqueness of the marital context, the majority judges temper their discussion with “three important points”²¹⁰ and acknowledge that separation agreements are “contracts nonetheless.”²¹¹ Specifically, in these paragraphs, the majority judges note the following:

*...First, we are not suggesting that courts must necessarily look for ‘unconscionability’ as it is understood in the common law of contract... Next, the court should not presume an imbalance of power in the relationship or a vulnerability on the part of one party, nor... that the apparently stronger party took advantage of any vulnerability... Rather, there must be evidence...of a fundamental flaw in the negotiation process. Recognition of the emotional stress of separation or divorce should not be taken as giving rise to a presumption that parties... are incapable of assenting to a binding agreement... Finally, we stress that the mere presence of vulnerabilities will not, in and of itself, justify the court’s intervention. The degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties.*²¹²

Although we recognize the unique nature of separation agreements and their differences from commercial contracts, *they are contracts nonetheless. Parties must take responsibility for the contract they execute as well as for their own lives.* It is only where the current circumstances represent a significant departure from the range of reasonable outcomes... in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight....²¹³

These paragraphs acknowledge the unique family law context without reaching automatic conclusions or presumptions that would make it devoid of its contextual methodology. Instead, they capture the contextual approach where “the meaning of justice is to be worked out in a particular setting.”²¹⁴ This ties into another element of relational theory that is present in *Miglin*: the normative commitment and “need to recognize the autonomy to craft intimate relationships on one’s own model.”²¹⁵ In light of this, and in order to fully appreciate the contextual

²¹⁰ *Miglin*, *supra* note 7 at para 82.

²¹¹ *Ibid* at para 91.

²¹² *Ibid* at para 82. [Emphasis added].

²¹³ *Ibid* at para 91.

²¹⁴ *Contracting Claims*, *supra* note 12 at 24.

²¹⁵ *Ibid* at 20.

methodology, it is necessary to explore the conceptualization of autonomy and “the necessity of chalking out some scope for individual choice.”²¹⁶

2) The Relational Approach in *Miglin*: The Conceptualization of Autonomy

A Capacity, Being Governed by One’s Own Law, Diversity and Space for Individual Choice

Leckey identifies the conceptualization of autonomy in *Miglin* as an important element of relational theory with the judges concurring “on the necessity of space for the parties to structure their own relationship.”²¹⁷ This relational understanding of autonomy maintains “the necessity of chalking out some scope for individual choice”²¹⁸ while also being “consistent with the word’s literal meaning, the idea of being ‘governed by one’s own law.’”²¹⁹ As Leckey explains, autonomy is understood as “a capacity of the couple to resolve their differences in accordance with their own values and their own understanding of the relationship.”²²⁰ While the parties have “a large discretion in establishing their own priorities and goals,”²²¹ the understanding of autonomy as “a capacity that must have been exercised for an agreement to be upheld”²²² is demonstrated by the majority’s “attention to vulnerability during negotiation and the palliating effect of professional assistance.”²²³ Indeed, autonomy is “a capacity that can be measured, not something to be stipulated or universally ascribed to agents.”²²⁴ As Leckey observes, “[e]ven the explicit legislative objective of self-sufficiency has been interpreted, following the general

²¹⁶ *Ibid* at 2.

²¹⁷ *Ibid* at 24.

²¹⁸ *Ibid* at 2.

²¹⁹ *Ibid* at 24.

²²⁰ *Ibid*.

²²¹ *Ibid*.

²²² *Ibid* at 25.

²²³ *Ibid*.

²²⁴ *Ibid*. Leckey also explains that [t]he ability to exercise autonomous choice is a function of the extent to which one has a ‘wide enough range of available *significant* options to yield an adequate capability set.’” He cites Susan Brison, “Relational Autonomy and Freedom of Expression” in Mackenzie and Stoljar, *supra* note 89 at 285.

orientation in *Miglin*, as a capacity rather than a responsibility.”²²⁵ On Leckey’s account, the conception of autonomy in *Miglin* is not “something necessarily abstract and conceptual. Indeed, following *Miglin*, a judge may regard *autonomy as explicitly relational*.”²²⁶

Several paragraphs of the decision capture this relational understanding of autonomy as a capacity of the parties to resolve their differences in keeping with the idea of being “governed by one’s own law.”²²⁷ Leckey cites paragraph 73 and also makes reference to paragraphs 55 and 66 of the decision in support of this position. In discussing the appropriate legal approach, the majority judges note that “the test must not undermine the parties’ right to decide for themselves what constitutes for them, in the circumstances of their marriage, mutually acceptable equitable sharing.”²²⁸ They emphasize that “spousal support objectives should not operate so as to preclude parties from bringing *their own concerns, desires and objectives to the table in negotiating what they view as a mutually acceptable agreement*.”²²⁹ In addition, the language of these three paragraphs also focuses on: the “parties’ autonomy and freedom to structure their post-divorce lives in a manner that reflects their own objectives and concerns”²³⁰ in a way that is “mutually acceptable to them;”²³¹ the “parties’ right to decide for themselves what constitutes for them, in the circumstances of their marriage, mutually acceptable sharing;”²³² and “the autonomy to organize their lives as they see fit and to pursue their own sense of what is mutually acceptable in their individual circumstances.”²³³

²²⁵ *Contracting Claims*, *supra* note 12 at 25.

²²⁶ *Ibid* at 26. [Emphasis added].

²²⁷ *Ibid* at 24.

²²⁸ *Miglin*, *supra* note 7 at para 73. [Emphasis added].

²²⁹ *Ibid* at para 55. [Emphasis added].

²³⁰ *Ibid* at para 66. [Emphasis added].

²³¹ *Ibid*.

²³² *Ibid* at para 73.

²³³ *Ibid* at para 55.

Given the importance of the relational conception of autonomy, it is worth briefly mentioning a few key excerpts about the role of autonomy itself within the decision. Now that autonomy is understood as a “capacity” and being “governed by one’s own law” in the establishment of the two-stage inquiry, what weight is it accorded and how is it to be balanced by the competing objectives given that it is one of the policy goals and objectives of the *Divorce Act*? Paragraphs 56, 67 and 78 are informative in this regard. The majority judges state:

*This is not to suggest that courts should prioritize the policy goal of autonomy to the exclusion of all other concerns. Nor are we suggesting that courts should condone agreements that manifestly prejudice one party...*²³⁴

*Having said this, we are of the view that there is nevertheless a significant public interest in ensuring that the goal of negotiated settlements not be pursued, through judicial approbation of agreements, with such a vengeance that individual autonomy becomes a straitjacket. Therefore, assessment of the appropriate weight to be accorded a pre-existing agreement requires a balancing of the parties' interest in determining their own affairs with an appreciation of the peculiar aspects of separation agreements generally and spousal support in particular.*²³⁵

The passage above acknowledges once again “the parties’ interest in determining their own affairs,”²³⁶ which echoes the paragraphs reproduced earlier for the notion of autonomy as “a capacity of the couple to resolve their differences in accordance with their own values and their own understanding of their relationship.”²³⁷ However, the judges temper the role of autonomy through the two cautionary paragraphs outlined above and conclude:

Therefore, in searching for a proper balance between consensus and finality on the one hand, and sensitivity to the unique concerns that arise in the post-divorce context on the other, a court should be guided by the objectives of spousal support listed in the Act. In doing so, however, the court should treat the parties' reasonable best efforts to meet those objectives as presumptively dispositive of the spousal support issue. The court should set aside the wishes of the parties as expressed in a pre-existing agreement only where the

²³⁴ *Ibid* at para 56. [Emphasis added].

²³⁵ *Ibid* at para 67. [Emphasis added].

²³⁶ *Ibid*. [Emphasis added].

²³⁷ *Contracting Claims*, *supra* note 12 at 24.

*applicant shows that the agreement fails to be in substantial compliance with the overall objectives of the Act. These include ...certainty, finality and autonomy.*²³⁸

This conceptualization of autonomy can also be found in the dissenting judgment. As Leckey notes, “[w]hile the dissent would test the fairness of agreements by an objective measure, it nonetheless contemplates a ‘generous ambit’ within which reasonable disagreement is possible.”²³⁹ This generous ambit provides the parties with the space to attempt to achieve the objectives in the *Divorce Act* and to structure their affairs in a way that accords with their own law, their own desires, concerns, objectives and priorities. For instance, the judges state:

*Any attempt to apply the objectives in s. 15.2(6) in a particular case will involve judgment calls, accommodation, and interpretation. The parties' own attempts to achieve the objectives codified in s. 15.2(6) in the context of their unique situation should not lightly be disregarded... To be given substantial weight, the parties' agreement, objectively assessed, must indicate a genuine attempt to achieve the objectives in s. 15.2(6), and must fall within the parameters of "the generous ambit within which reasonable disagreement is possible" in terms of actually achieving them...*²⁴⁰

This can also be seen in the discussion of the parties’ autonomy. As the judges explain:

*... Provided that at the time of the application the arrangement falls within the generous ambit within which reasonable disagreement is possible in terms of realizing the objectives in s. 15.2(6), it will be enforced. This approach does not deny individuals the autonomy to organize their lives as they see fit or prevent them from bringing their own concerns, desires and objectives to the negotiating table as the majority suggests. Instead, it accords parties a considerable degree of flexibility in negotiating arrangements that reflect their particular priorities...*²⁴¹

3) The Relational Approach in *Hartshorne*

Leckey also applies the relational lens to *Hartshorne*, a Supreme Court of Canada case addressing marital property in the context of a marriage contract (prenuptial agreement).²⁴² As

²³⁸ *Miglin*, *supra* note 7 at para 78. [Emphasis added].

²³⁹ *Contracting Claims*, *supra* note 12 at 24.

²⁴⁰ *Miglin*, *supra* note 7 at para 232. [Emphasis added].

²⁴¹ *Ibid* at para 235. [Emphasis added]. See also para 244.

²⁴² See *Contracting Claims*, *supra* note 12 at 28-33 for Leckey’s comments regarding the differences and difficulties between *ex ante* and *ex post* contracting. In general, separation agreements accept the default legislative regime.

he explains, “[t]he contention is that *Hartshorne*, like *Miglin*...presumes a vision of choosing and bargaining that treats the spouses as formal equals but overlooks the myriad ways in which spouses do not act as commercial players at arm’s length.”²⁴³ Leckey acknowledges that some scholars find *Hartshorne* “disappointing for its lack of contextualism,”²⁴⁴ yet for him “this criticism understates the contextualism of the majority judgment.”²⁴⁵ While he argues that there is less convergence between the two groups of judges in *Hartshorne* as compared to *Miglin*,²⁴⁶ the relational elements that Leckey identifies are of interest for this thesis. Specifically, this section will discuss these relational principles that Leckey identifies in *Hartshorne*: the methodology of contextualism, the context-specific estimation of one’s capacity for informed consent and the space for autonomy.

4) Relational Theory’s Contextual Methodology in Practice: An Estimation of One’s Capacity for Informed Consent and the Space for Autonomy

Leckey argues that the majority undertakes a contextual approach, but “simply draws a different conclusion than do the dissenting judges and some critics.”²⁴⁷ Given that Ms. Hartshorne is a lawyer, Leckey observes that the majority might have sensed “a whiff of bad faith” and are “reluctant to accept that a lawyer would not understand the implications of a

“One defends a separation agreement by arguing that it instantiates the legislative objectives, including equitable sharing of the consequences of the marriage...By contrast, a defender of a prenuptial agreement argues precisely that it displaces the default norms...[he] does not contend that it instantiates the norm of equal sharing in the context of their marriage; rather, he argues that they have exempted their marriage from that norm.” *Ibid* at 33.

²⁴³ *Ibid* at 29.

²⁴⁴ *Ibid*.

²⁴⁵ *Ibid* at 29-30. However, he acknowledges that there is less convergence between the two groups of judges in *Hartshorne* as compared to *Miglin*.

²⁴⁶ For Leckey, *Hartshorne* “shows less convergence between the majority and the minority, but, where the judges diverge, the contested concerns still lie snugly within relational theory.” *Ibid* at 28. He notes the “reasons perhaps dwell on the facts less than *Miglin* does, but the majority is aware of the complex emotional dynamics.” *Ibid* at 30.

²⁴⁷ *Ibid* at 30. However, Leckey explains that “[t]o the extent that the majority judgment underdevelops the contextual considerations about prenuptial negotiations, it is because the majority judges believe the crux of the case to lie in other, more evidently normative concerns.” *Ibid* at 31.

contract she signed.”²⁴⁸ Rather, they “weigh heavily” the fact that she is a lawyer.²⁴⁹ As Leckey explains, the “judges probably detect a whiff of bad faith on [her] part that makes them reluctant to minimize factors – such as her receipt of independent legal advice – that ought to have palliated any potential vulnerability.”²⁵⁰ He goes on to state “[t]his sense of bad faith may be discerned in the discussion of the legal opinion obtained by Ms. Hartshorne, which underscored the agreement’s prejudice to her.”²⁵¹ Paragraph 61 of the decision is of interest in this regard. There, the judges observe that the lawyer forewarned the respondent about the agreement’s “shortcomings” and that it was “grossly unfair”, which was clear from the lawyer’s detailed opinion letter. However, the judges went on to state:

*Despite this advice, or because of it... the respondent signed the Agreement. The respondent cannot now rely on her lawyer's opinion to support her allegation that because she thought the Agreement was unfair from its inception, for all intents and purposes, she never intended to live up to her end of the bargain. It is trite that a party could never be allowed to avoid his or her contractual obligations on the basis that he or she believed, from the moment of its formation, that the contract was void or unenforceable.*²⁵²

On Leckey’s account, “[t]he majority rely not upon an abstract conception of choice but a context-specific estimation of Ms. Hartshorne’s capacity for informed consent.”²⁵³ For him, it is not that the majority judges overlooked contextual factors. Instead, he explains that what exists is a disagreement “over the relative salience of different facts: [the majority] leans on legal training, [the dissent] upon child rearing and homemaking.”²⁵⁴ Thus, he states “...where one person weighs

²⁴⁸ *Ibid* at 30.

²⁴⁹ *Ibid*.

²⁵⁰ *Ibid*.

²⁵¹ *Ibid*.

²⁵² *Miglin, supra* note 7 at para 61. [Emphasis added].

²⁵³ *Contracting Claims, supra* note 12 at 30.

²⁵⁴ *Ibid*.

a bundle of contextual factors differently than another would, it does not follow that the other person overlooks those factors.”²⁵⁵

In addition, Leckey opines that the majority’s upholding of the agreement is chiefly based on the fact that the Hartshorne’s “married life carried out precisely the terms of their agreement.”²⁵⁶ Instead of promoting “formal choice over the ‘reality of the parties’ circumstances,”²⁵⁷ Leckey observes that “[t]here was no conflict, since the reality of the parties’ circumstances tidily executed the contractual blueprint.”²⁵⁸ The judges note this in paragraph 45:

*At the time of the triggering event, both the financial and domestic arrangements between the appellant and the respondent were unfolding just as the parties had expected. With respect to their financial arrangement, they were living out their intention to "remain completely independent of the other as regard to their own property, both real and personal". There was no commingling of funds, there were no joint accounts of significant value, and the assets that the appellant brought into the marriage remained in his name. On a personal level, as planned, the appellant and respondent had a second child and, as decided by the respondent, she did not resume her position at the law firm but remained at home to raise their two children.*²⁵⁹

Leckey acknowledges that the parties’ intentions can be viewed in a different light by referencing Shaffer who observes that it was in fact “Mr. Hartshorne living out *his* intention to maintain control of his income and his assets.”²⁶⁰ However, Leckey states that “irrespective of whose will shaped the parties’ lived reality, it is hard to oppose to the contract any significantly different normative regime derived from conduct or custom.”²⁶¹

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid* at 31.

²⁵⁷ *Ibid* at 32.

²⁵⁸ *Ibid.*

²⁵⁹ Miglin, *supra* note 7 at para 45. [Emphasis added].

²⁶⁰ Martha Shaffer, “Domestic Contracts, Part II: The Supreme Court’s Decision in *Hartshorne v. Hartshorne*,” (2004) 20 Can J Fam L 261 at 285 [*Domestic Contracts*].

²⁶¹ *Contracting Claims*, *supra* note 12 at 32.

In order to illustrate the “majority’s conception of fairness,” Leckey once again cites Shaffer whom he considers as “nicely presenting the disputed point.”²⁶² On Shaffer’s account of *Hartshorne*, fairness is construed “less about ensuring that agreements are substantively fair according to public norms of fairness, but more about ensuring that people are entitled to enter into and rely upon contracts that reflect their personal vision of fairness in the context of their intimate relationships.”²⁶³ In response, Leckey observes that this is resonant with relational theory; “[t]he majority’s recognition of the potential for contract to make space for diversity within the state’s matrimonial regime resonates with a recent account of relational contract”²⁶⁴ in addition to relational theory’s “commitment to the aspiration of autonomy and the idea that women, in particular, need to be able to criticize and revise the roles socially assigned to them.”²⁶⁵ As he explains, this commitment inclines “against automatically enforcing the state’s regime in order to invalidate relationship-specific arrangements.”²⁶⁶ Instead, Leckey emphasizes “that in an increasingly diverse society, it is inappropriate for the state to impose unilaterally upon its citizenry a single conception of marriage. Individuals and couples vary, and it is appropriate to allow couples to alter their rights and obligations.”²⁶⁷

Leckey clarifies that “it is mistaken to read *Hartshorne* as implying that all persons will be held unflinchingly to their *ex ante* marriage agreements.”²⁶⁸ Despite the allegations of

²⁶² *Ibid* at 34.

²⁶³ Martha Shaffer, “Developments in Family Law: The 2003-2004 Term” (2004) 26 Supreme Court LR (2d) 407 at 426.

²⁶⁴ *Contracting Claims*, *supra* note 12 at 34.

²⁶⁵ *Ibid* at 36.

²⁶⁶ *Ibid*.

²⁶⁷ *Ibid* at 34. Leckey refers to Alain Roy, *Le contrat de mariage inventé: perspectives socio-juridiques pour une réforme* (Montreal: Themis, 2002).

²⁶⁸ *Ibid* at 30-31.

abstractness and acontextualism, Leckey argues that the judges employ a contextual approach.

On this note, he concludes as follows:

The point to retain from this analysis for that occasion is how little work is performed by the ostensible contrast between abstract and contextual views of the subject and abstract and contextual conceptions of autonomy and choice. What seems to have happened, in the judgments discussed here, is that the judges have adopted a contextual approach but normative disagreements persist.²⁶⁹

5) Leckey's Conclusion regarding *Miglin* and *Hartshorne*

In *Contracting Claims*, Leckey acknowledges that “the prevailing story characterizes *Miglin* and *Hartshorne* as defeats for feminists... slot[ting] the majority and minority reasons into a matrix in which abstract liberalism and contextual feminism contend in what could be called a family law feud.”²⁷⁰ On this interpretation, the majority and minority reasons produce respectively “atomistic liberal subjects, uncritically holding parties to their bargains in the furtherance of choice and autonomy” and their “contextually embedded” counterparts.²⁷¹ However, on Leckey's account, the “better reading of the judgments is a second story, one that shows both camps of judges to have decided consistently with the lessons and ongoing dilemmas of relational theory.”²⁷² In reference to both *Miglin* and *Hartshorne*, Leckey summarizes:

This second version reveals significant convergence on the part of the judges. It detects commitment on the part of all judges to relational theory's methodology of contextualism. Further, the judges explicitly concur on the importance of recognizing the complexity of interdependent relationships while seeking to preserve space for autonomy. ... Yet even here- the normative disagreements- conditions for the exercise of relational autonomy and its scope- concern tensions elucidated within relational theory rather than radically opposing ideologies.²⁷³

²⁶⁹ *Ibid* at 36, where he also says the normative and “thorny issues jostle on ground mapped by relational theory.”

²⁷⁰ *Ibid*.

²⁷¹ *Ibid* at 36-37.

²⁷² *Ibid* at 37.

²⁷³ *Ibid* at 37.

Section C: Buckley's *Relational Theory and Choice Rhetoric in the Supreme Court of Canada*

Lucy-Ann Buckley in *Relational Theory and Choice Rhetoric in the Supreme Court of Canada* engages with “Leckey’s critique, concurring with some aspects of his case analysis, disagreeing with others, and extending the analysis to subsequent decisions.”²⁷⁴ Specifically, she agrees that the judgments of both groups of judges in *Miglin* are “highly relational in their conceptualization of autonomy.”²⁷⁵ Regarding *Hartshorne*, however, she finds that the “parties’ autonomy was something of a side issue” and that there are “clear problems with the majority interpretation of autonomy.”²⁷⁶ Given that she engages with Leckey’s analysis, this section will explore Buckley’s comments and main arguments about relational theory and its role in *Miglin* and *Hartshorne* without reproducing the paragraphs of the decisions that have already been provided under Leckey’s *Contracting Claims* above. In addition to the contextual methodology and conceptualization of autonomy, Buckley’s insights and arguments about relational theory will also serve as a useful point of reference for the next chapter.²⁷⁷

²⁷⁴ *Ibid* at 254.

²⁷⁵ *Ibid* at 299. Unlike Leckey, she is less critical of the dissent’s conception of autonomy. She notes instead that “the dissent went further than the majority in terms of relational analysis (for example, expanding greatly on the inherently gendered nature of bargaining inequalities and the fraught nature of separation agreements)” and that “one might argue that the dissent’s narrative was more relational in practice.” *Ibid*.

²⁷⁶ *Ibid* at 301.

²⁷⁷ While Leckey discusses the differences and difficulties between *ex ante* and *ex post* contracting, Buckley discusses the conceptualization of autonomy in the marital property versus spousal support context. The default marital sharing regimes could enhance the bargaining power of the weaker negotiating spouse, as compared to the discretionary nature of spousal support. “From an autonomy perspective, the absence of fixed support entitlements means that women lack bargaining endowments in this context, except insofar as the guidelines create parameters for the quantification of support in practice, where support is deemed appropriate.” See *Ibid* at 270 and 267-270.

1) Relational Theory in Brief: Emotions, Autonomy, Diversity, Choice, Context and Capacity

Before analyzing the decisions, like Leckey, Buckley notes that “although relational theory emphasizes the role of emotion and interdependency in personal decision making, it does not suggest that either emotion or emotional pressure precludes autonomy” as otherwise “women might be pathologized by assumptions of emotionalism and vulnerability.”²⁷⁸ Instead, emotions can enhance decision-making and be empowering, although certain emotions like fear may undermine it. As Buckley notes, “emotional pressure does not necessarily vitiate an individual’s decision-making capacity, since capacity is a continuum, with a wide range between competence and incompetence.”²⁷⁹ Where agreements are disadvantageous or noticeably unequal, “[o]ne substantive approach might incorporate normative equality standards, so that unequal agreements or agreements which deviate significantly from statutory entitlements based on equality principles, would be deemed non-autonomous.”²⁸⁰ However, this would preclude “diversity and undermine freedom of choice” and while “choice rhetoric is clearly open to abuse, it does not follow that bad choices even those made in bad circumstances, are invariably non-autonomous.”²⁸¹

Another substantive response might be based on the promotion of “constructive relationships,” which are thick, interdependent and autonomy-enhancing relationships, yet Buckley’s preference is in a third approach, which “encourages a consideration of a broader range of factors than those traditionally legally recognized as potentially negating volition” and

²⁷⁸ *Ibid* at 264-265.

²⁷⁹ *Ibid* at 265.

²⁸⁰ *Ibid*.

²⁸¹ *Ibid*.

“suggests an increased level of scrutiny where an agreement made in emotional or pressured circumstances seems particularly one-sided, without however adopting any presumption of non-autonomy.”²⁸² This third approach rests on holding that “individuals must be able to reflect critically on equality norms, even if they ultimately depart from them, and must feel that they have a real choice in how they respond to a particular situation.”²⁸³ On her account, “[t]his would permit both diversity and responsiveness to the particular context, consistent with relational methodology and would also, as Leckey notes, ensure that the weaker party, as well as the stronger, can reasonably rely on agreements.”²⁸⁴

2) The Relational Conceptualization of Autonomy in *Miglin*: Placing Autonomy in Context

Buckley notes that *Miglin* is the “Supreme Court of Canada’s most detailed discussion of autonomy in the spousal support context.”²⁸⁵ Although the Court “rejected any presumption of unequal bargaining power, and emphasized that professional advice might counteract vulnerabilities,”²⁸⁶ Buckley agrees with Leckey that the majority’s approach is not only “sufficiently nuanced and alive to contextual considerations to fall within the relational camp,”²⁸⁷ but it is also similar to that of the dissent given its “highly relational...conceptualization of autonomy.”²⁸⁸ While Buckley opines that the dissent “went significantly further” in its conceptualization of autonomy,²⁸⁹ she notes that relational theory’s methodology of contextualism is found throughout the majority judgment.

²⁸² *Ibid* at 266.

²⁸³ *Ibid*.

²⁸⁴ *Ibid*.

²⁸⁵ *Ibid* at 288.

²⁸⁶ *Ibid*.

²⁸⁷ *Ibid* at 289-290 and 299.

²⁸⁸ *Ibid*.

²⁸⁹ *Ibid* at 289.

First, the contextual methodology is found in the paragraphs where the judges use terminology that emphasizes the unique context of marital negotiations. Specifically, these paragraphs reference the “unique environment” of marital breakdown negotiations, the “emotional turmoil,” the “potential power imbalances” and “any circumstances of oppression, pressure, or other vulnerabilities.”²⁹⁰ Like Leckey, Buckley cites specific paragraphs that use this terminology in order to reveal where the methodology of contextualism is found.²⁹¹ For Buckley, this relational approach is further captured when the majority judges situate the wife Linda Miglin within her context. Instead of characterizing her as an abstracted individual of liberal theory, Buckley notes the judges’ observation that “Linda claimed to have felt pressured, confused, and emotional at the time of the agreement.”²⁹² As such, Buckley goes on to state:

...both the majority and dissenting judgments are highly relational in their conceptualization of autonomy. Both emphasize the importance of context, including all the circumstances of the agreement, and the parties’ needs and concerns. Although the dissent went further than the majority in terms of relational analysis (for example, expanding greatly on the inherently gendered nature of bargaining inequalities and the fraught nature of separation negotiations), the majority also appeared fully alive to these issues.²⁹³

This leads to Buckley’s second observation about relational theory in *Miglin*: in its relational approach, the dissent “went significantly further, emphasizing that autonomy is affected by situational differences and established patterns of interaction as much as by obvious power imbalances and exploitation.”²⁹⁴ To this end, Buckley acknowledges their emphasis on: “the significance of ‘social context;” the “importance of recognizing the degree to which social and

²⁹⁰ *Ibid* at 287-288.

²⁹¹ Given that the relevant paragraphs of the decision were previously produced at great length in Leckey’s Section B, this section will highlight Buckley’s arguments without reproducing them once again.

²⁹² Although both judgments noted this about Linda, Buckley also observes that “while the dissent seemed inclined to give more credence to this than the majority, neither judgment actually ruled on this issue.” *Choice Rhetoric*, *supra* note 12 at 299-300.

²⁹³ *Ibid* at 299.

²⁹⁴ *Ibid* at 289.

economic factors may constrain individuals' choices at the bargaining table;" the "complicated and gender-based interdependencies;" and, that "women generally have less bargaining strength than men due to financial dependency."²⁹⁵ Once again, Buckley references the relevant paragraphs analyzed by Leckey and produced earlier in this work. However, Buckley also references paragraphs 199 and 204. In paragraph 199, , the dissent's emphasis on social realities and social context is found:

L'Heureux-Dubé J.'s emphasis on social context in *Moge* contrasts sharply with Wilson J.'s reluctance in the trilogy to acknowledge systemic gender inequality in establishing the threshold for judicial intervention in spousal support agreements... it was "not paternalism, but realism" to recognize continuing disparities along gender lines in spouses' bargaining power and ability to become economically self-sufficient following marriage breakdown.

...in a majority of cases the marriage will have involved economic sacrifices by one spouse, typically the wife, and corresponding economic benefits to the other... The logic of compensatory support requires that these respective roles be reflected in the spousal support arrangement ... recognizes that work within the home has undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under a deemed self-sufficiency model, to a substantive imperative.²⁹⁶

Meanwhile, the dissent's emphasis on the complicated and gender-based interdependencies that often arise during marriage is found in paragraph 204. Here the judges elaborate as follows:

Bracklow, like *Moge*, thus emphasizes a more holistic and fact-based approach to spousal support, in keeping with the diversity of factors and objectives in the 1985 Act. The recognition in *Moge* and [page404] *Bracklow* that the relationship of marriage often creates complicated and gender-based interdependencies that cannot adequately be addressed by stressing formal equality or deemed self-sufficiency is incompatible with the mantra of individualism that underscores the trilogy: individual choice, individual responsibility, and individual autonomy. *Moge* and *Bracklow* provide compelling support for the proposition that it is inappropriate to defer to a support agreement based on unrealistic assumptions about the absolute autonomy or deemed self-sufficiency of the parties...²⁹⁷

²⁹⁵ *Ibid.*

²⁹⁶ *Miglin*, *supra* note 7 at para 199. [Emphasis added].

²⁹⁷ *Ibid* at para 204.

Against this background, Buckley raised the issue of relational theory in practice. Having found that “the conceptual analysis of autonomy was relational in each judgment,”²⁹⁸ Buckley notes “[t]he question is therefore whether relational theory made, or could have made, any practical difference to the outcome?”²⁹⁹ In response, she first observes that “one might argue that the dissent’s narrative was more relational in practice,”³⁰⁰ a point on which she elaborates as follows:

The dissent depicted Linda, the wife, as economically vulnerable and with little human capital, as she had not worked outside the family business for many years, whereas the majority felt that because she had worked, she should be employable. The dissent considered that Linda was prevented from working outside the home due to her increased childcare burden; the majority felt that she could have employed a baby-sitter, as she had done while married, irrespective of her changed circumstances. The dissent, but not the majority, also implicitly represented Eric, the husband, as controlling, though it did not explicitly consider whether this impacted on the negotiation process.³⁰¹

According to Buckley, “the tenor of the dissenting judgment suggests that, if pushed, the dissent would have found that the bargaining process was not unimpeachable, even with legal advice.”³⁰² Furthermore, she notes that a question left open by the majority judges, given that they did not feel that there was a need to address it, is “the question of whether, given *inadequate* advice, Linda’s evidence of pressure would have been sufficient to demonstrate either vulnerability or exploitation for the purposes of the *Act*.”³⁰³ In light of the foregoing, Buckley concludes:

Both narratives therefore depend on contextual interpretation. The dissent highlights concerns identified in the feminist literature, and while its interpretation is arguably stereotypical and disempowering, it is also more relational in its deeper

²⁹⁸ *Choice Rhetoric*, *supra* note 12 at 299.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.* She refers to para 125 of *Miglin*, *supra* note 7 regarding Eric’s implicit control.

³⁰² *Choice Rhetoric*, *supra* note 12 at 300.

³⁰³ *Ibid.*

examination of context. Nevertheless, even if the majority had adopted a similar characterization, it might well still have considered that any vulnerabilities were counteracted by the high level of professional advice Linda received. Accordingly, a more relational analysis of the facts might have made little significant difference, once the majority had decided to eschew the dissent's greater emphasis on objective fairness.³⁰⁴

3) Choosing Questions in *Hartshorne*: Relational Theory or Atomistic Context and Choice Rhetoric?

Although Buckley agrees with Leckey regarding *Miglin*'s "richer sense of autonomy...more consistent with relational theory,"³⁰⁵ she disagrees with his view regarding *Hartshorne*. Specifically, she notes that while the majority does adopt a contextual analysis, "the analysis is limited and constrained by atomistic assumptions" omitting "a truly 'relational perspective.'"³⁰⁶ Buckley opines that the judgment does not support Leckey's argument that "the majority 'is aware of the complex emotional dynamics' and 'simply draws a different conclusion than do the dissenting judges and some critics.'"³⁰⁷ For her, "there is no evidence of this in the judgment."³⁰⁸ Instead, Buckley explains that "[t]he repeated use of 'choice rhetoric' is highly suggestive in terms of how the court conceptualized broader autonomy issues."³⁰⁹

To illustrate this point, Buckley notes that the majority "repeatedly characterized" Mrs. Hartshorne's decision to give up her career in order to care for the parties' children as a "personal 'choice' and [that] she was assumed to have understood and accepted the consequences of what she had 'chosen.'"³¹⁰ Paragraphs 45, 46 and 63 are relevant in this regard. While paragraph 45 does

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid* at 290.

³⁰⁶ *Ibid* at 292.

³⁰⁷ *Ibid* at 292-293.

³⁰⁸ *Ibid* at 293.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid* at 292.

not explicitly use the word “choice”, the majority judges describe Mrs. Hartshorne’s act of staying at home and not resuming her legal career as something that she “decided.” Specifically, the majority states that “both the financial and domestic arrangements...were unfolding just as the parties had expected... On a personal level, as planned, the appellant and respondent had a second child and, as **decided** by the respondent, she did not resume her position at the law firm but remained at home to raise their two children.”³¹¹ Interestingly, in paragraphs 46 and 63, Mrs. Hartshorne’s decision and the corresponding consequences are characterized through the use of “choice rhetoric:”

*Where, as in the present case, the parties have anticipated with accuracy their personal and financial circumstances... and... truly considered the impact of their **choices**, then, without more, a finding that their Agreement operates unfairly should not be made lightly. This does not mean that no attention should be given to the possible deficit in the assets and future income of the spouse who **chose** to stay at home and facilitate the professional development of the other spouse... A fair distribution of assets must... take into account sacrifices made and their impact... But this must be done in light of the personal **choices** made and of the overall situation considering all property rights under the marriage agreement and other entitlements. In the present case, the main feature of the Agreement was the desire that each spouse retain the assets earned before the marriage...*³¹²

*...It has not been overlooked that the respondent **gave up** her own law practice to take primary care of their two children and postponed any further career development. However, these were **decisions** that the respondent herself made prior to the marriage. It is not realistic to assume that the consequences of such a **choice** were not understood and that the **decision** made should now be totally ignored. The implications of the Agreement were understood as well, the respondent having specifically reviewed its shortcomings with her lawyer...*³¹³

In light of the foregoing and drawing on relational theory, Buckley argues that while “[r]elational autonomy should allow her to make this decision, provided she can reflect critically on the issue,” it also “holds that the context in which the decision was made is relevant and should not be simply screened out, so that the decision and its consequences are automatically

³¹¹ *Hartshorne*, *supra* note 80 at para 45 [Emphasis added].

³¹² *Ibid* at para 46. [Emphasis added].

³¹³ *Ibid* at para 63. [Emphasis added].

attributed to ‘personal choice.’”³¹⁴ Buckley stresses the importance that instead of making the assumption that Mrs. Hartshorne “understood and accepted the consequences of what she had ‘chosen,’” questions like the following need to be considered: “why” did she make this choice?; “where was [Mr. Hartshorne] in the decision-making process?;” how did the special needs of one of the children “(something not mentioned by the majority)...affect [her] decision to remain at home?”³¹⁵ For Buckley, these are important considerations as they illuminate the relational context and shed more insight on one’s decision-making and autonomy. Thus, Buckley is critical of the judges’ characterization of Mrs. Hartshorne’s “decision” to stay at home as the context within which it was made needs to be considered in greater detail by these fundamental questions. Otherwise, one runs the risk of reaching a superficial characterization and an automatic presumption either of a “personal choice” or an “unequal power dynamic.”

Buckley explains that “[t]he repeated use of ‘choice rhetoric’ is highly suggestive in terms of how the court conceptualized broader autonomy issues” with the attribution of an “unrealistic level of mutuality to the parties’ financial arrangements, implicitly assuming that separate bank accounts were a matter of mutual agreement and satisfaction.”³¹⁶ This can be seen in paragraph 45 of the decision, which was also set out above during Leckey’s analysis, where the majority judges state:... At the time of the triggering event, both *the financial and domestic arrangements between the appellant and the respondent were unfolding just as the parties had expected. With respect to their financial arrangement, they were living out their intention to "remain completely independent of the other as regard to their own property, both real and personal". There was no commingling of funds, there were no joint accounts of significant value, and the assets that the appellant brought into the marriage remained in his name.* On a personal level, as planned, the appellant and respondent had a second child and, as decided by the respondent, she did not resume her position at the law firm but remained at home to raise their two children.”³¹⁷

³¹⁴ *Choice Rhetoric*, *supra* note 12 at 292. Buckley is also critical of the dissent. In reference to paragraph 90 of the dissenting decision, she notes that it is “incorrect to suggest” that Mrs. Hartshorne’s decision to stay at home indicates “an unequal power dynamic” given that it might have been based on other driving forces and factors. For instance, she states the wife “may have been happy to adopt a caring role, may have believed it was ‘right,’ or may simply have believed that it was necessary, given her child’s needs.” See *Ibid.*

³¹⁵ *Ibid.*

³¹⁶ *Ibid* at 293.

³¹⁷ *Hartshorne*, *supra* note 80 at para 45. [Emphasis added].

“Yet,” Buckley notes in response, Mr. Hartshorne “was the sole earner and clearly the controlling party in terms of making financial arrangements.”³¹⁸ To further highlight the role of “choice rhetoric,” Buckley explains that Mrs. Hartshorne’s act of having “signed the agreement is taken to imply that it represented her wishes and understanding of fairness, even though the agreement explicitly stated otherwise.”³¹⁹ She references the majority’s emphasis on the idea that if Mrs. Hartshorne “truly believed that the Agreement was unacceptable at that time, she should not have signed it.”³²⁰ For Buckley, “[t]his ignores the relational aspects of the decision-making process, including the clear power imbalance between the parties.”³²¹ However, she goes on to state that “[n]one of this is to suggest that the agreement should not be upheld. The point is that the contextual discussion actually ignores or misrepresents significant aspects of the context, which contained sufficient indications of vulnerability (as the dissent put it) to suggest potential unfairness and warrant additional scrutiny.”³²² She references paragraph 90 in this regard:

There are indications that the respondent was in a vulnerable position in negotiation -- not enough for the agreement to be unconscionable, but enough to suggest that the trial judge should be alive to the possibility that the agreement was unfair. The respondent had already been out of the workforce and dependent on the appellant for almost two years and had only ever worked as a lawyer (and before that, an articling student) in the appellant's firm. The agreement was concluded under pressure with the wedding fast approaching. The respondent sought changes to the agreement before execution but was unable to persuade the appellant to agree, except with respect to minor changes, such as the insertion of a clause to the effect that her signature was not voluntary and was at his insistence. These circumstances illustrate the appellant's position of power within the relationship, as well as the respondent's correlative dependence. That she remained at home for the rest of the marriage relationship to take care of the couple's children further illustrates the power

³¹⁸ *Choice Rhetoric*, *supra* note 12 at 293.

³¹⁹ *Ibid.*

³²⁰ *Hartshorne*, *supra* note 80 at para 65. [Emphasis added].

³²¹ *Choice Rhetoric*, *supra* note 12 at 293 referring to Schaffer, *Domestic Contracts*, *supra* note 260 and Martha Bailey, “Marriage a la carte: A Comment on *Hartshorne v. Hartshorne*” (2004) 20 Can J Fam L 249 for a detailed analysis.

³²² *Choice Rhetoric*, *supra* note 12 at 293.

dynamics at play. *Taken as a whole, these circumstances justify reviewing the agreement with increased scrutiny.*³²³

Despite these indications, Buckley explains that “[t]he Court’s reluctance to engage with these concerns may be due to what Rogerson describes as its ‘commitment to the value of upholding spousal support agreements.’”³²⁴ This commitment is “bolstered by an interpretation of *Miglin* that focuses on that decision’s general presumption of spousal autonomy, rather than its emphasis on potential power disparities and recognition of vulnerabilities.”³²⁵

4) Buckley’s Conclusion: A Relational Paradigm Shift?

In reference to and contrary to Leckey’s conclusion, Buckley suggests that “while Leckey has argued that the self-sufficient, rational, ‘choosing’ subject of liberal theory has now been supplanted by the contextualized legal subjects in Canadian family law...this transition is still highly contested, and...liberal and neoliberal conceptualizations of the subject continue to compete with more relational understandings, even in contextualized judicial discourse.”³²⁶

Buckley, however, notes:

It is difficult to draw firm conclusions regarding overarching ideological trends from so few cases. Taken at face value, the cases on both spousal support agreements and marital property agreements suggest a movement from a neoliberal model of autonomy to a more relational perspective. In relation to spousal support, this is evidenced by the differences between the early *Pelech* trilogy and the later decision in *Miglin*, while in relation to property, there is a clear difference in the model of autonomy applied in *Hartshorne* and that underlying *Rick*.³²⁷

In conclusion, Buckley goes on to state that “it cannot be said that there is a clear, overall shift from neoliberal to relational views within the Court” given that “(neoliberal) *Hartshorne* was

³²³ *Hartshorne*, *supra* note 80 at para 90. [Emphasis added].

³²⁴ *Choice Rhetoric*, *supra* note 12 at 293-294 citing Rogerson, *The Legacy of Miglin*, *supra* note 8 at 15.

³²⁵ *Choice Rhetoric*, *supra* note 12 at 294.

³²⁶ *Ibid* at 254.

³²⁷ *Ibid* at 295.

decided a year after (relational) *Miglin*.³²⁸ Moreover, she opines “[n]or can the different paradigms be explained simply by reference to the constitution of the Court, as the approaches of individual judges vary considerably.”³²⁹ For her, “[t]he real distinction may be between prenuptial and separation agreements, with the Court attaching greater weight to relational factors and pressures in the emotional context of marital breakdown.”³³⁰

Buckley also concludes that despite relational theory’s “more realistic and nuanced” conceptualization of autonomy than neoliberalism, it “may not always make the degree of practical difference that many feminists might expect.”³³¹ She offers three explanations for this. The first relates to “statutory fairness standards: where courts can intervene to rectify agreements that are considered objectively unfair, the issue of autonomy becomes less important.”³³² The second “lies in the potential for different relational narratives” and the third “is that the variable approaches to marital property and spousal support agreements simply reflect the broader legal debate in Canada on autonomy concerns.”³³³ She concludes: “[g]iven the intensity of the debate, it is hoped that the Supreme Court of Canada does not regress from its adoption of relational theory and continues to apply relational understandings to marital agreements.”³³⁴

Having reviewed the scholarly literature on relational theory in the Canadian spousal support agreement context, the attention now turns to this author’s analysis of recent case law dealing with section 56(4) of the *Family Law Act* through the lens of relational theory.

³²⁸ *Ibid* at 296.

³²⁹ *Ibid*.

³³⁰ *Ibid* at 296-297. This author suggests that another point of distinction could be between domestic contracts waiving spousal support fully and those providing for some spousal support and followed by releases.

³³¹ *Ibid* at 306.

³³² *Ibid*.

³³³ *Ibid* at 306-308.

³³⁴ *Ibid* at 308.

Chapter Three: Understanding Contractual Autonomy: An Analysis of the Formation of the Contract through the Lens of Relational Theory

Section A: Introduction

While the review within this work described scholars' application of relational theory to the spousal support agreement context under the *Divorce Act*, this chapter will engage in a comparable analysis in the context of the *Family Law Act*. In particular, this author will examine five cases³³⁵ where the judges were tasked with determining whether to set aside the domestic contract involving a spousal support release or waiver pursuant to section 56(4) of the *Family Law Act*. It should be noted that like the *Divorce Act* the statutory language itself requires a contextual analysis as the legislation provides guidelines rather than stringent rules. This in turn provides the scope to engage with contextualism and therefore relational theory. In addition to the methodology of contextualism, this chapter will explore the relational conceptualization of autonomy as an estimation of parties' capacity for informed consent and reflection.

The five cases are comprised of two cohabitation agreement cases³³⁶ and three separation agreement cases. Spousal support was awarded in three of the cases,³³⁷ but on different grounds. In two of the cases,³³⁸ the judges awarded spousal support after exercising their discretion to set aside the agreement pursuant to section 56(4) of the *Family Law Act*. In particular, one case failed under section 56(4)(c) for unconscionability and the other failed under both sections 56(4)(a) and 56(4)(c) for the failure to disclose and misrepresentation respectively. Having found that the wives successfully engaged section 56(4) in these two cases, the judges exercised

³³⁵ *Golton*, *supra* note 82; *JS v DBS*, [2016] OJ No 1485 (Sup Ct), *aff'd* [2017] OJ No 5115 (CA) ["*JS*"]; *McKenna v McKenna*, [2015] OJ No 2814 (Sup Ct) ["*McKenna*"]; *Butler v Butler*, [2015] OJ No 6881 (Sup Ct) ["*Butler*"]; and, *Viric v Blair*, [2016] OJ No 2813 (Sup Ct), *aff'd* *Viric v Blair* 2017 ONCA 394 ["*Viric*"].

³³⁶ *Golton*, *supra* note 82 and *JS*, *supra* note 335 are the cohabitation cases.

³³⁷ Spousal support was not awarded in two cases: *JS*, *supra* note 335 and *McKenna*, *supra* note 335. It was awarded in the three cases of: *Golton*, *supra* note 82, *Butler*, *supra* note 335 and *Viric*, *supra* note 335.

³³⁸ *Butler*, *supra* note 335 and *Viric*, *supra* note 335.

their discretion to set aside the agreement on this basis. However, in the third case,³³⁹ spousal support was not awarded as a result of the application of section 56(4). Although the wife successfully engaged section 56(4)(a) for the husband's failure to disclose, the judge did not exercise their discretion to set aside the agreement on this basis, but awarded spousal support after applying the *Miglin* test.³⁴⁰

This Chapter is divided into five parts. Section B provides an introductory overview of the cases, the methodology used in selecting them and a summary of section 56(4) and its application in the five cases. Section C analyzes the cases through the lens of relational theory while Section D provides this author's commentary, reflections and critique of the cases. Sections C and D reveal that approaching domestic contracts through the relational lens helps to explain the judicial reasoning as to why agreements were upheld or set aside while also highlighting some of the deficits in the court process and reasoning. Section E highlights the lessons learned and the important implications for family law practitioners and scholars going forward.

³³⁹ *Golton*, *supra* note 82.

³⁴⁰ The judge declined to exercise his discretion to set aside the Cohabitation Agreement for the husband's failure to provide proper financial disclosure. In support of this position, he noted: "it seems to me unfair to permit Kim to now rely upon non-disclosure when she knew at the time that she was entitled to ask for financial disclosure and did not." In addition, the judge did not believe that even with proper disclosure that the wife "would have refused to enter into the agreement or the terms of that agreement would have been any different they are." The judge also took issue with the wife's "failure to move expeditiously to set aside the agreement and...only after she has reaped the benefits of the agreement albeit limited as they are." See *Ibid* at para 215. However, after applying stage 2 of the *Miglin* analysis, he concluded that "the agreement no longer reflects the original intention of the parties as reflected in the terms of the Cohabitation Agreement in light of Kim's unexpected and significant health issues...[her] changed circumstances are such that the strict application of the Cohabitation Agreement would no longer be in substantial compliance with the objectives of the Act." *Ibid* at para 280.

Section B: An Overview of *Golton, JS, McKenna, Butler and Virc* and Section 56(4)'s Application

1) Methodology

The cases of interest to the author were those where a party sought spousal support in the face of a domestic contract involving a contractual release or waiver. To facilitate this research, the author used Lexis Advance Quicklaw and WestlawNext Canada. The initial search noted up section 56(4) of the *Family Law Act*. In addition, three separate searches with the following terms were done: “spousal support and Miglin and release,” “spousal support and Miglin and (release or waive! /s support)” and “spousal support and Miglin and (‘no spousal’ or waive! /s support).” These initial searches were very broad in order to capture as many cases as possible within the search results.³⁴¹ *Miglin* was specifically used as one of the search terms, because the author hoped to obtain cases where both the *Family Law Act* and the *Miglin* analysis were applied. The author hypothesized that a case that dealt with both would be more elaborate in its reasoning given the application of two different yet related statutory contexts and thus provide a better basis for the analysis. Moreover, at the outset, the author did not limit her analysis to the *Family Law Act* alone, but narrowed down the approach after further discussions with her supervisor.

The research project was concerned exclusively with Canadian spousal support jurisprudence and in particular Ontario decisions from 2015 onwards. The results were narrowed

³⁴¹ Given that the search terms were not in close proximity to one another, there were many cases that were irrelevant or not directly on point. Specifically, some of them did not even involve a spousal support release or waiver or the party was not even seeking spousal support in the face of a domestic contract stating otherwise. For example, one such decision was the case of *Toscano v Toscano*, [2015] OJ No 315 (Sup Ct) [“*Toscano*”]. It was a well-written decision that dealt with a marriage contract, but the issue there was that the contract provided that the parties would be separate as to property. There was no spousal support release or waiver within the contract and so the case was not relevant to this author’s research.

by the timeframe of January 1, 2015 to December 31, 2018. With regard to the scope of time of the jurisprudence, the author wished to review more current case law while having an opportunity to examine four years of recent developing case law in Ontario, which addressed the issue of a party seeking spousal support despite a contractual term that explicitly denied or waived that entitlement. The author's focus was on the Ontario Superior Court of Justice cases as they dealt with the matter at first instance and would thus contain a more fulsome factual analysis.

Cases that did not involve a party seeking spousal support in the face of a contractual release or waiver were discarded. Thus, the search for the most relevant cases was limited by this topic and the author's hopes to find well-written cases that engaged in a discussion as to whether spousal support should be awarded despite the contractual agreement. Given that lower court decisions can vary in terms of their length and substantive analysis of the issues in dispute, this author hoped to find decisions that contained a more substantial and informative analysis of section 56(4). By approaching the search results with this in mind and the author's supervisor's advice that the case sample should be narrowed to a manageable three or four cases, this author looked at the cohabitation agreement/marriage contract cases on their own as well as the separation agreement cases on their own that applied section 56(4) of the *Family Law Act*. Specifically, the goal was to find a decision where spousal support was awarded and where it was denied within these respective types of agreements. In the end, five well-written cases were selected for the analysis: *Golton*, *JS*, *Butler*, *Viric* and *McKenna*.³⁴²

Having selected these five cases, this author read them in depth with attention to the judges' analysis of whether spousal support should be awarded and to their understanding of

³⁴² For the prenuptial agreement cases, spousal support was awarded in *Golton*, but denied in *JS*. For the separation agreement cases, spousal support was awarded in *Butler* and *Viric*, but denied in *McKenna*.

contractual autonomy. Given that the analysis regarding the formation of the agreement is first considered under section 56(4) of the *Family Law Act* in these five cases and mostly unrepeatable at stage 1 of the *Miglin* analysis due to the evidentiary overlap of relevant facts, the analysis below of contractual autonomy as it relates to the formation of the contract is restricted to the judges' determination of the validity of the agreement pursuant to section 56(4).

2) An Overview of the Cases

This section provides a summary to familiarize the reader with the cases generally. The overview is divided into two sections: the cohabitation agreement cases and the separation agreement cases. This is followed by an introduction to section 56(4)'s application in the five cases.

The Cohabitation Agreement Cases – Golton and JS

Golton

In *Golton*, the parties met in the late 1980s at a hotel where the husband was a patron and the wife a waitress/bartender. She was a single mother and he was married to his ex-spouse at the time that the parties began an extramarital relationship. Following the husband's separation, the parties began living together in September 1993 and married in July 1998. They initially separated in April 2002, reconciled in the spring of 2007 and had their final separation in May 2010. Each party had a daughter from a prior relationship.

The parties have an 11-year age difference. When they first met, the wife had a high school education, but she attended an adult job retraining program in the 1980s to upgrade in computers. The husband was a truck owner operator until he started an office job. He initially worked as a general manager, but eventually became a VP. In December 2017, he retired from this position.

In 1991, the wife also started working at Laidlaw, the same company where the husband worked, but quit while the parties' relationship was briefly suspended. However, after the parties began cohabiting in 1993, she returned to Laidlaw in 1994 and held various positions until 2005 when she sustained a back injury. She did not work after her last part-time job in 2013 and was in receipt of disability payments since 2005.

During the parties' marriage, the wife was primarily responsible for domestic duties. She cared for her daughter and also assisted in the care of the husband's daughter both when she stayed with them and also when she moved in and lived with the parties on a full-time basis. The husband was the main income earner who took the lead in dealing with the parties' finances, including assisting the wife with her financial matters post-separation.

The parties signed a Cohabitation Agreement in 1996. It was entirely the husband's idea to enter into the agreement given that he was unhappy that he had paid his former spouse a significant sum for both property division and spousal support. He did not want to find himself in that situation again or to have any financial obligations to the wife upon relationship breakdown. As a result, the agreement addressed three issues: (1) division of property; (2) spousal support; and, (3) child support for the wife's daughter. Pursuant to the terms, there was a mutual waiver of spousal support and a mutual release of property claims. The wife was only to receive the appreciation value of the residence in which they cohabited. Although the husband's lawyer prepared the agreement, both parties received independent legal advice.

The wife brought proceedings in October 2015 seeking to set aside the domestic contract, equalization and spousal support. Following a four-day trial, Justice Raikes concluded that the agreement was a valid and binding domestic contract, which should not be set aside. However, after applying the *Miglin* analysis, Justice Raikes found that the agreement no longer reflected

the original intention of the parties in light of the wife's unexpected and significant health issues. He ordered the husband to pay a lump sum spousal support payment in the amount of \$250,000.00.

JS

In *JS*, the parties began cohabiting in March 1997 at the husband's mother's residence and they moved into their custom built home in December 1997. They had their first child in 2001. They married in 2003 and their second child was born the same year. The parties separated in September 2013. When the parties met, the husband had a daughter from a previous relationship. That relationship ended shortly after the child's birth and resulted in family proceedings with his ex-partner prevailing in court. After this experience and prior to moving into the parties' home, the husband presented the wife with the cohabitation agreement in October 1997. The wife skimmed it and signed it without seeking independent legal advice or making inquiries about the value of the husband's assets. At the time, both parties had annual incomes of \$70,000.00.

At the time of the proceedings, the husband was 55 years old. He was working at the Ford Oakville plant, a job he held since 1979. The wife was working on a part-time basis and earning \$18,204.00 as she left her last full-time employment in 2004.³⁴³ Throughout the parties' marriage, both parties overspent and the husband's mother helped them financially.

The wife sought to have the agreement set aside claiming that she did not read the agreement carefully, did not receive independent legal advice and made no inquiries about the value of the

³⁴³ The judge found that it was reasonable to conclude that the wife intended to return to work in 2007 when the children were in school on a full-time basis, but that she never obtained full-time work "despite her and [the parties'] severe financial difficulties which both were responsible for. Had it not been for family help, this couple would have lost their home long ago." *JS, supra* note 335 at paras 106-107. Also, the wife "admitted that in December of 2014 she was offered a data entry full-time job...[but] told them she was not interested as she was separated and going to court." *Ibid* at para 110.

husband's assets. She sought, among other things,³⁴⁴ spousal support despite the agreement's mutual spousal support release. The judge held that the agreement was valid and enforceable and found that the wife was not entitled to spousal support.³⁴⁵

The Separation Agreement Cases – Butler, Virc and McKenna

Butler

In *Butler*, the parties started living together in 1979 when the wife was 18 and the husband 21 years old. They married in 1982 and separated in 2013 after a 31-year traditional marriage and two children. Early in the parties' relationship and before her pregnancy, the wife had some short-term jobs. After the birth of the parties' two children, she adopted a homemaker role for almost 35 years, maintaining the parties' jointly owned home while the husband worked. At the time of separation, the wife had not engaged in any gainful employment for 26 years or any competitive work experience or training. The husband, on the other hand, worked throughout the marriage and continued to work at the time of separation in a stable and well-paid job. He was earning over \$80,000.00 per year plus significant benefits, which included a pension, for his work on the automotive assembly line at Honda Canada.

The wife decided to leave the marriage. About two weeks after telling the husband about this decision, she received a letter from the husband's lawyer, which enclosed the Separation Agreement for her signature and two post-dated cheques for \$10,000.00. The husband's lawyer prepared the agreement on his instructions. The husband also told the wife that she was not

³⁴⁴ Additional issues included the wife's entitlement to proceeds from the sale of the matrimonial home and the husband's requirement to pay child support and the amount. *Ibid* at para 3.

³⁴⁵ On the other issues, the judge held that the wife was entitled to the net proceeds of the sale of the home in the amount of \$21,385. Having found that she was intentionally underemployed and that she failed to obtain full-time employment, her income was imputed at \$40,000 for the purposes of child support. On the issue of imputation, he noted that the wife's "non-attempts to obtain employment and maximize her court-ordered support payments is a common practice in my experience and must be discouraged by the courts. This unscrupulous practice in reality harms the children...deliberately lowers the possible lifestyle of the children. Further, this practice embitters the payor spouse." *Ibid* at para 114.

entitled to anything from him as she did not work outside the home or contribute financially. The wife trusted him. She signed the agreement a few days after the husband's lawyer sent it to her without retaining a lawyer or receiving independent legal advice. The husband did not sign the agreement until much later, but almost immediately after the parties' failed reconciliation attempt.³⁴⁶ According to the husband, the main reason prompting the wife's decision to leave was "the stress of what was going on with our family"³⁴⁷ as well as her desire to start a new life with her new boyfriend. The husband felt hurt and betrayed while the wife wanted to avoid any prejudice to the parties' adult children³⁴⁸ and grandson.

On June 29, 2015, the wife brought a summary judgment motion seeking, among other things, to set aside the parties' separation agreement dated May 12, 2014. Pursuant to the agreement, the wife: waived any spousal support upon the husband's payment of \$25,000.00; transferred her interest in the parties' home to the husband who was to pay off the parties' debts (the equity of the home was \$210,000.00 and the debts amounted to \$39,000.00); and, waived any claim to the husband's pension and equalization of assets. The husband's pension was worth approximately \$272,000.00 and he would receive approximately \$34,000.00 per year upon retirement. The value of the equalization payment to which the wife was entitled was approximately \$160,000.00 at separation or \$275,000.00 when including the family law valuation of the pension.

³⁴⁶ The judge noted that the husband's "feelings of hurt and betrayal when Ms. Butler first said she was leaving the marriage paled when compared with his reaction now." He noted that it was a "false reconciliation" on her part and that the "reconciliation attempt was a fraud" as the wife "tricked [him] into making an attempt because of her lies" and her "pretending to get back together" although she was "carrying on her relationship with [the new boyfriend]." *Butler*, *supra* note 335 at para 31.

³⁴⁷ *Ibid* at para 28.

³⁴⁸ The parties' son and daughter (26 and 31 years old respectively) were described by the judge as "exhibiting significant difficulties in finally achieving a semblance of adult responsibility." *Ibid*.

The judge found that the agreement was grossly improvident and set it aside on the grounds of unconscionability.

Virco

In *Virco*, the parties met in 1991, when the wife was 26 years old and working as a lawyer at a small Toronto litigation firm with a focus on commercial litigation. The husband was 46 years old and a firm client. He was involved in several lawsuits both in a personal capacity and through corporations that he controlled. The husband had a controlling interest in a corporation,³⁴⁹ which was a holding company that was also the primary corporate litigant. The wife was a junior lawyer on his files. At the time, she was married while the husband was separated from his spouse of 27 years, but not yet divorced. The wife separated from her spouse in 1992.

The parties began cohabiting by 1993. In that year, the wife left her law firm and started working almost exclusively for the husband. She began handling his litigation in varying capacities as well as his related corporate affairs, but in most cases, not as counsel of record. The parties married in 1994 and soon after had their first child.³⁵⁰ In 1997 and 1999, the parties had two more children. As the parties' family grew so too did the husband's business interests. He directed the parties' finances while the wife administered the parties' joint bank account.

The wife continued to practice law until 2001. She did not work outside of the home with the exception of some part-time work between 2004 and 2006. Although the husband was an involved father, the wife had primary caregiving responsibilities for the children. The parties had

³⁴⁹ The husband was a 60% controlling shareholder of Renegade Capital Corporation ("Renegade") with his then spouse holding the remaining 40% interest.

³⁵⁰ The husband also had two children from a previous marriage.

“a busy recreational and traveled lifestyle”³⁵¹ with the husband noting that the children’s lifestyle was also “privileged.”³⁵²

In 2007, the wife became involved with someone else. The husband found out, but the parties continued with their married life until their separation in early 2008. In early January 2008, the husband emailed a *pro forma* Separation Agreement to the wife, but there were no further drafts exchanged until May 16, 2008. Throughout that time, the husband was in regular contact with his lawyer, arranging disclosure and refining the agreement. In the latter half of May 2008, the parties made several revisions to the May 16th draft. However, around mid-May, the husband provided the wife with a Net Family Property statement. According to this statement, the wife owed the husband an equalization payment of almost \$954,000.00 given the values the husband used in (mis)representing his date of marriage interest. While this surprised the wife, she did not consult a lawyer for the purposes of reviewing the husband’s representations. Among other reasons, the wife testified that she would have needed to find an error of more than \$1,900,000.00 in his statement in order to negate the payment the husband claimed she owed.

The parties signed the Separation Agreement on May 31, 2008 in which they agreed, among other things,³⁵³ that the wife would be released from her obligation to make the \$954,000.00 equalization payment. She would receive spousal support in the amount of \$10,000.00 per month

³⁵¹ The parties were private ski club members, enjoyed the use of a chalet, travelled to various holiday destinations on their own and with children and spent \$100,000 on ballroom lessons.

³⁵² In addition to the lifestyle noted in footnote 369, the children also attended private school.

³⁵³ 1) Children’s Issues: (a) joint custody; (b) no child support due to equal parenting time (reviewable prior to December 31, 2010 and annually thereafter); and, (c) the husband was solely responsible for section 7 expenses amounting to \$97,760 annually. 2) Matrimonial home: (a) the wife was to move out by September 2008; (b) the husband’s right to buy the home from the wife for \$1,250,000.00, proceeds from which she was to discharge the \$500,000 mortgage; (c) Renegade would lend the wife \$250,000 towards a home purchase if requested. 3) Renegade interest and parties’ incomes: (a) the wife was to transfer or permit a redemption of her Renegade shares for \$250,000 (NB: the NFP statement valued them at \$368,512.65); (b) Renegade would invest \$150,000.00-\$250,000.00 in a private company the wife was considering incorporating to carry on a business; (c) the husband’s annual income was \$590,000.00/year and the wife’s \$329,000.00/year, inclusive of support; (d) Renegade would retain the wife until December 31, 2010 as a corporate secretary and general counsel at a rate of \$10,000.00/month. See, *Virco*, *supra* note 335 at para 26.

until December 31, 2010, which was followed by extensive releases regarding property and spousal support obligations. However, after taking vocational upgrading courses, the wife emailed the husband in June 2009 asking for an explanation as to why different methodologies had been used in the valuation of his marriage and valuation date interests. After the husband's response, which was not reassuring, and an unproductive email exchange, the wife retained counsel.

In 2010, the wife applied to have the Separation Agreement set aside, but the husband successfully obtained summary judgment. In 2014, the Court of Appeal set aside the judgment and directed the matter to trial on all issues, except one. At trial, Justice Jarvis exercised his discretion to set aside the Separation Agreement pursuant to section 56(4) having found that the husband's material misrepresentation induced the wife to sign it. As he went on to hold, "[t]he husband's non-compliance with the obligations imposed by sections 56(4)(a) and (c) of the *Act*, and the parties' evidence about their Separation Agreement, when viewed contextually, lead to no other conclusion than that the Agreement should be, and is hereby, set aside."³⁵⁴

McKenna

In *McKenna*, the parties married in 1992 when the wife was 23 and the husband 33 years old. They separated in 2012 after 20 years of marriage, two children and a million-dollar home. The wife had a college education while the husband's highest level of education was grade 8. She worked as a city traffic-planning technologist. The husband ran his own excavating business. The parties enjoyed a lavish lifestyle as they were "excellent business partners... [who] reduced their tax burden in a questionable manner by taking cash payments and writing personal expenses through the husband's business."³⁵⁵ The husband did the physical labour for his

³⁵⁴ *Ibid* at para 128.

³⁵⁵ *McKenna*, *supra* note 335 at para 2.

business and made the business decisions, but given his limited education and difficulty with both reading and writing, the wife was in charge of bookkeeping, payrolls, invoicing and the general ledger.

The wife left the marriage and claimed that the husband abused her for many years. The police and CAS investigated, but only concluded that the parties had a volatile relationship. Although the husband admitted that he was a recovering alcoholic and a diagnosed sex addict, he denied the wife's abuse allegations. The wife consulted a lawyer and a Separation Agreement was drawn up 37 days after the wife left the matrimonial home. According to the wife's evidence, the husband handed her a pamphlet from a lawyer and instructed her to get a separation agreement. The wife contacted Angeline Clarke ("Ms. Clarke") and the parties attended a meeting Ms. Clarke. Both parties indicated the terms they wanted in the separation agreement. Pursuant to the terms of the agreement: the wife received her share of the matrimonial home in the amount of \$600,000.00; the wife kept her pension and the husband kept his businesses, which were valued \$400,000.00 and \$500,000.00 respectively; the husband paid \$1,000.00/month in child support with annual increases; and, there was no spousal support.

The wife subsequently sought to have the agreement set aside due to: duress, threats and fear; insufficient disclosure; and, lack of independent legal advice. She also sought spousal support, a greater share of the marital assets and increased child support. The judge held that the Separation Agreement was valid and enforceable subject only to child support adjustments.

Section 56(4) of the Family Law Act Applied

In the face of a domestic contract, section 56(4) of the *Family Law Act* provides a party seeking spousal support with the opportunity to set aside the domestic contract. Pursuant to section 56(4) of the *Family Law Act*, a court may set aside a domestic contract or its provision if

at least one of three grounds is engaged. As noted in subsections (a)-(c), this may happen if: “(a) a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic 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.”³⁵⁶ Regardless of which ground(s) a party is relying on, section 56(4) consists of a two-stage analysis: (1) Can the party seeking to set aside the agreement demonstrate that one or more of the s. 56(4) circumstances is engaged? (2) If so, is it appropriate for the court to exercise its discretion to set aside the agreement?³⁵⁷

Against this legislative backdrop, the wives in the five cases of *Golton*, *JS*, *McKenna*, *Butler* and *Viric* had the onus of proving that section 56(4) was successfully engaged and persuading the judges to exercise their discretion to set aside the agreement. Despite this common goal, the outcomes in the five cases varied. In particular, only two wives successfully set aside the contract pursuant to section 56(4) of the *Family Law Act*. For the reader’s ease of reference, a case summary chart outlining the application and outcome of the section 56(4) analysis is included below.

³⁵⁶ *Family Law Act*, *supra* note 2 at s 56(4)(a)-(c).

³⁵⁷ *Viric v Blair*, *supra* note 335.

	<i>Golton</i>	<i>JS</i>	<i>Viric</i>	<i>Butler</i>	<i>McKenna</i>
56(4)(a) successfully engaged?	Yes	No	Yes	No	No
If yes, why?	Non-disclosure		Misrepresentation DOM value		
56(4)(b) successfully engaged?	N/A	No	N/A		
56(4)(c) successfully engaged?	No	N/A	Yes	Yes	
If yes, why?			Misrepresentation	Unconscionability	
Wife had ILA?	Yes	No	No	No	Yes
Discretion to set aside exercised?	No*	No	Yes	Yes	No
Spousal Support Awarded	Yes**	No	Yes	Yes	No

*The judge declined to exercise his discretion to set aside the Cohabitation Agreement.³⁵⁸

**The matter failed at stage 2 of the *Miglin* analysis.³⁵⁹

No Judicial Intervention: A Summary of Section 56(4) in Golton, JS and McKenna

Golton, *JS* and *McKenna* are three of the five³⁶⁰ cases where the judges found that the circumstances surrounding the formation of the contract, including the conditions of negotiation and execution, did not warrant judicial intervention. In these cases, the validity of the agreement was challenged pursuant to section 56(4) of the *Family Law Act* on the following grounds: (1) failure to disclose (in all three cases); and, (2) pursuant to the law of contract i.e. (i) signing under duress or undue influence (in *Golton* and *McKenna*) and (ii) signing in unconscionable circumstances (*Golton*). The wives in *JS* and *McKenna* also raised the lack of independent legal

³⁵⁸ See footnote 340 for the explanation.

³⁵⁹ *Ibid.*

³⁶⁰ In *Viric*, *supra* note 335 and *Golton*, *supra* note 82 the judges found otherwise and set aside the agreement pursuant to section 56(4).

advice as an important consideration although the wife in the former case was the only wife in these three cases who was actually not in receipt of independent legal advice. The judge framed the issue in *JS* as whether a cohabitation agreement is valid in circumstances where “[t]he wife does not seek independent legal advice.”³⁶¹ In determining the validity of the agreement, the judge considered whether the lack of independent legal advice in the circumstances of this case successfully engaged section 56(4)(b), the failure to “understand the nature or consequences of the domestic contract.”³⁶² On the other hand, the wives in *Golton* and *McKenna* both received independent legal advice, but the wife in the latter case claimed that she did not.³⁶³ The reason for this claim was the belief that her lawyer, Ms. Clarke, met with the husband alone and represented him, which even led to a Law Society complaint against Ms. Clarke by the wife’s counsel.³⁶⁴ However, the judge found that the wife in *McKenna* did in fact receive independent legal advice based on the evidentiary record. While the wives in all three cases attempted to engage section 56(4), *Golton* was the only case in which the wife was successful and specifically on the basis of the husband’s failure to disclose. However, Justice Raikes decided not to exercise his discretion to set aside the agreement for the husband’s failure to provide proper financial disclosure. In support of this determination, he noted:

I decline to exercise my discretion to set aside the Cohabitation Agreement for failure to provide proper financial disclosure. As in *Butty*, it seems to me unfair to permit Kim to now rely upon non-disclosure when she knew at the time that she was entitled to ask for financial disclosure and did not. Further, I am not satisfied that if proper disclosure had been made, Kim would have refused to enter into the agreement or the terms of that agreement would have been any different than they are. Finally, I am troubled by Kim's failure to move expeditiously to set aside the agreement and by the fact that she has done so only after she has reaped the benefits of the agreement albeit limited as they are.³⁶⁵

³⁶¹ *JS*, *supra* note 335 at para 3.

³⁶² *Ibid* at paras 43 and 51.

³⁶³ *McKenna*, *supra* note 335 at para 4.

³⁶⁴ *Ibid* at paras 106-107. The husband’s evidence at questioning supported this belief. For example, he stated that during one of the meetings, he “went by himself and met with Ms. Clarke.” *Ibid* at 106.

³⁶⁵ *Golton*, *supra* note 82 at para 215. However, after applying stage 2 of the *Miglin* analysis, he concluded that “the agreement no longer reflects the original intention of the parties as reflected in the terms of the Cohabitation

As a result, in all three of these cases the wives were unsuccessful in setting aside the contract pursuant to section 56(4) of the *Family Law Act*.

Judicial Intervention Cases: A Summary of Section 56(4) in Butler and Virc

Although the judges in *Golton, JS* and *McKenna* found that the circumstances pertaining to the formation of the contract did not warrant judicial intervention in accordance with section 56(4) of the *Family Law Act*, the judges in *Butler* and *Virc* held otherwise. In these two cases, the validity of the agreement was challenged pursuant to the 56(4)(a) failure to disclose and 56(4)(c) the law of contract provisions of the *Family Law Act*. With respect to the law of contract, the wives in these two cases pleaded: (a) duress (in *Virc*), (b) unconscionability (in *Butler* and *Virc*) and (c) misrepresentation (in *Virc*). Neither wife received independent legal advice, a factor that was considered under unconscionability. In the end, the agreement was set aside for unconscionability in *Butler* and for failure to disclose and misrepresentation in *Virc*.³⁶⁶

Section C: The Relational Application of Section 56(4): Contractual Autonomy in Context

While the outcomes in the five cases differed as to whether the wife discharged her burden to successfully engage section 56(4) of the *Family Law Act* and, if so, whether the judge in turn exercised his discretion to set aside the agreement on this basis, the cases are united by a common theme in the application of sections 56(4)(a) and 56(4)(c) of the *Family Law Act*. Specifically, the notable feature of the five cases is that the judges understood party's autonomy not through an abstract conception of choice, but through one that is resonant with relational

Agreement in light of Kim's unexpected and significant health issues...[her] changed circumstances are such that the strict application of the Cohabitation Agreement would no longer be in substantial compliance with the objectives of the Act." *Ibid* at para 280.

³⁶⁶ The husband's failure to disclose and misrepresentation grounds in *Virc*, *supra* note 335 were related as they both pertained to the husband's representation of his date of marriage value interest in Renegade, a company of which he was a controlling shareholder.

theory as outlined by both Leckey and Buckley.³⁶⁷ In particular, the relational aspect is evidenced by the fact that the analysis pertaining to the formation of the contract was driven by a contextualized conception of choice and a context-specific estimation of the wives' capacity for informed consent. Part I will analyze the judges' application of section 56(4)(a) (failure to disclose), whereas Part II will discuss the judges' analysis and application of section 56(4)(c) ("otherwise in accordance with the law of contract").

Part I: 56(4)(a): The Failure to Disclose discloses Contextualized Choice

The validity of the agreement was challenged on the grounds of financial disclosure pursuant to section 56(4)(a) of the *Family Law Act* in *Golton*, *JS*, *McKenna*, *Butler* and *Viric*. Despite the issue of financial disclosure being raised in these five cases, section 56(4)(a) was successfully engaged by the wife in two of the cases, *Golton* and *Viric*, yet only one judge exercised the discretion to set aside the agreement. This occurred in *Viric* whereas the judge in *Golton* decided to not exercise his discretion in this regard.³⁶⁸ While the outcomes in these five cases differed, the cases are united by a common theme in the application of section 56(4)(a). All five cases feature a relational understanding of the party's autonomy. In particular, the distinct relational feature of *Golton*, *JS*, *McKenna*, *Butler* and *Viric* is the understanding of autonomy through the context-specific estimation of the wives' capacity for informed consent and reflection. The judges' context-specific estimation of the wives' capacity for informed consent and reflection is revealed through their consideration of three elements: (1) the nature of (non)disclosure on the part of the husbands; (2) the extent of the wives' knowledge about financial issues; and (3) the effect of the non-disclosure on the wives' decision to enter into the

³⁶⁷ While their relational analysis is applied to *Miglin*, here the relational analysis is applied to section 56(4) of the *Family Law Act*.

³⁶⁸ The judge did not exercise the discretion to set it aside on this ground. See footnote 340.

agreement. A general overview will first be provided with respect to the issue of non-disclosure in the five cases with some preliminary comments about choice rhetoric. This will be followed by an analysis of the five cases through the lens of relational theory and specifically the three contextual elements identified above, which show the judges' context-specific estimation of the wives' capacity for informed consent and reflection.

1) An Overview of the Issue of Non-Disclosure in the Cases

The backdrop to non-disclosure was characterized similarly in the three cases of *Golton*, *JS* and *McKenna*. While the issue of financial disclosure was framed as the wife in *Golton* claiming that the husband “failed to provide financial disclosure as required,”³⁶⁹ the wife in *JS* being generally “aware of the husband’s assets but... not know[ing] the value of them” and “mak[ing] no inquiries as to their valuation,”³⁷⁰ and, the wife in *McKenna* claiming she received “insufficient disclosure,”³⁷¹ the three cases share a common premise. Specifically, this premise is based on a lack of disclosure with the wives not exchanging, receiving or pursuing financial disclosure, not making further inquiries or not valuing the husbands’ income and assets. On the other hand, the nature of the non-disclosure allegation in *Butler* and *Viric* was different. The issue of financial disclosure in these two cases was structured respectively as “the possibility of a failure to disclose *significant* assets on the part of Mr. Butler”³⁷² and the husband’s failure to disclose that “the book value of Renegade’s³⁷³ long term investments was significantly different from their market value.”³⁷⁴

³⁶⁹ *Golton*, *supra* note 82 and para 188.

³⁷⁰ *JS*, *supra* note 335 at para 3.

³⁷¹ *McKenna*, *supra* note 335 at para 4.

³⁷² *Butler*, *supra* note 335 at para 43. [Emphasis added].

³⁷³ Renegade is a holding company in which the husband held a controlling interest. *Viric*, *supra* note 335 at para 4.

³⁷⁴ *Ibid* at para 95.

In *Golton*, the judge observed that “no formal financial statements were provided, nor was there an exchange of even a rudimentary list of assets, debts and other liabilities. There was no financial disclosure beyond what each knew of the other's income, assets and debts from living together.”³⁷⁵ The Cohabitation Agreement did not include “financial information as a schedule” and was “silent as to the parties’ incomes and assets/debts.”³⁷⁶ As the judge went on to state, “[s]imply put, there was no financial disclosure by either of them to the other beyond what they already knew of each other’s finances.”³⁷⁷ The judge concluded that the wife discharged her burden in proving that the husband “did not provide financial disclosure of his assets and debts or other liabilities including estimates of value or amount”³⁷⁸ and that his “failure to provide financial disclosure... is perhaps understandable but does not comply with the requirements of the *Family Law Act*.”³⁷⁹ Despite the husband’s failure to provide financial disclosure, which was “wholly inadequate; in fact, there was no disclosure *per se*,”³⁸⁰ the judge decided to not exercise his discretion to set aside the Cohabitation Agreement.³⁸¹ He noted that it seemed “unfair to permit Kim to now rely upon non-disclosure when she knew at the time that she was entitled to ask for financial disclosure and did not.”³⁸² Even if proper disclosure had been made, he was not satisfied that she “would have refused to enter into the agreement or the terms of that agreement would have been any different than they are.”³⁸³ Lastly, the judge noted that he was “troubled by

³⁷⁵ *Golton*, *supra* note 82 at 202.

³⁷⁶ *Ibid* at 203.

³⁷⁷ *Ibid* at 206.

³⁷⁸ *Ibid* at 207.

³⁷⁹ *Ibid* at 210.

³⁸⁰ *Ibid* at 213.

³⁸¹ The judge declined to exercise his discretion to set it aside. See footnote 340.

³⁸² *Golton*, *supra* note 82 at para 215.

³⁸³ *Ibid*.

Kim's failure to move expeditiously to set aside the agreement and by the fact that she has done so only after she has reaped the benefits of the agreement albeit limited as they are."³⁸⁴

Unlike in *Golton*, where the judge found that section 56(4)(a) was contravened, in *JS* and *McKenna* the judges concluded otherwise. In *JS*, the judge noted that based on the evidence the wife "was aware of all of [the husband's] sources of income and assets" and that "[s]he may or may not have been aware of their values,"³⁸⁵ but that "[s]he did not pursue further disclosure."³⁸⁶ On his account, she in fact "failed to make any further enquiries."³⁸⁷ In holding that "section 56(4) disclosure obligations have not been contravened,"³⁸⁸ he concluded that the wife "consented to the incomplete disclosure;" "had the means to ascertain precisely the exact amount of [the husband's] assets;" "had a general awareness of [the] assets;" and, "was aware of the shortcomings of the disclosure."³⁸⁹ Similarly, in *McKenna*, the judge also found that "[n]one of the s. 56(4) FLA circumstances have been engaged."³⁹⁰ In that case, the wife "maintained that she wanted to conclude the separation agreement as soon as possible and did not need financial disclosure."³⁹¹ In response to her lawyer's repeated insistence that "it was in her best interests to get financial disclosure,"³⁹² the wife insisted that "she did not need financial disclosure because she was taking care of the books and finances, and was fully aware of [the husband's] financial situation."³⁹³ Against this backdrop, the wife argued that the separation agreement should be set aside for a lack of disclosure, but the judge concluded otherwise.

³⁸⁴ *Ibid.*

³⁸⁵ *JS*, *supra* note 335 at paras 25 and 38.

³⁸⁶ *Ibid* at para 25.

³⁸⁷ *Ibid* at para 48.

³⁸⁸ *Ibid* at para 49.

³⁸⁹ *Ibid.*

³⁹⁰ *McKenna*, *supra* note 335 at para 184.

³⁹¹ *Ibid* at para 89.

³⁹² *Ibid* at para 88.

³⁹³ *Ibid* at para 86.

In contrast to *Golton, JS* and *McKenna*, the nature of non-disclosure was different in *Butler* and *Viric*. In *Butler*, there was no detailed discussion about the allegation of non-disclosure aside from the failure to disclose “*significant assets*.”³⁹⁴ According to the facts and evidence section of the case, the wife received a letter from her husband’s lawyer “who enclosed the agreement for her signature and two post-dated cheques.”³⁹⁵ There was no mention made as to what financial details were included, if any, within the agreement, but the case law that was referenced referred to the principle that “formal disclosure by way of sworn financial statements prior to executing an agreement is not necessary to meet the obligations to disclose”³⁹⁶ given that a “general awareness of the assets of the other party may be sufficient to avoid setting aside an agreement.”³⁹⁷ It can thus be inferred that sworn financial statements were likely not exchanged. Moreover, the judge acknowledged that “[s]ome argument was directed to the possibility...[of the husband failing to disclose] *significant assets*,”³⁹⁸ but held that “[t]here is no merit to the complaint of non-disclosure.”³⁹⁹

In *Viric*, the nature of non-disclosure was unlike any of the other four cases. Specifically, here the husband used the book value for the purpose of valuing his date of marriage interest in Renegade,⁴⁰⁰ but the liquidation value at the date of separation.⁴⁰¹ In that case, the judge noted that when “the wife requested the husband’s explanation why [this] was ‘appropriate,’”⁴⁰² the

³⁹⁴ *Butler*, *supra* note 335 at para 43. [Emphasis added].

³⁹⁵ *Ibid* at para 21.

³⁹⁶ *Ibid* at para 43 citing *Quinn v Epstein Cole LLP* (2007), 2007 CanLII 45714 (Sup Ct), affirmed 2008 ONCA 662.

³⁹⁷ *Ibid*.

³⁹⁸ *Ibid*. [Emphasis added].

³⁹⁹ *Ibid* at para 44.

⁴⁰⁰ The husband’s failure to disclose and misrepresentation grounds in *Viric* were related as they both pertained to the husband’s representation of his date of marriage value interest in Renegade, a company of which he was a controlling shareholder.

⁴⁰¹ *Viric*, *supra* note 335 at para 34.

⁴⁰² *Ibid*.

husband's response "was not reassuring."⁴⁰³ The judge concluded that "[t]he husband never alerted the wife to the fact that the book value of Renegade's investments significantly exceeded their market value"⁴⁰⁴ and found that "the husband failed to fully and honestly comply with the duty imposed on him by s. 56(4)(a)."⁴⁰⁵

2) Choice Rhetoric at First Glance

Given the similar characterization of the non-disclosure allegation in *Golton, JS* and *McKenna*, it is unsurprising that the judges' choice of words and descriptions are comparable. When reading these decisions, what immediately becomes apparent is how the wife's role with respect to the non-disclosure complaint is portrayed. In particular, it is explicitly characterized either as a choice or a decision. If explicit wording to that effect is not used, the judge considers it an act attributable to the wife, and one that she failed to undertake despite knowing that she could do so. Again, the inference is that this was her choice or decision.

Specific word choices in each case illustrate this attribution of choice. In *Golton*, the judge noted that the wife "*chose* not to ask and to execute the agreement"⁴⁰⁶ and that it was her "*decisions* not to seek disclosure and to sign the Cohabitation Agreement."⁴⁰⁷ In terms of her failed action, the judge observed that: "[s]he *did not ask* and he did not volunteer the information;"⁴⁰⁸ "she was entitled to ask for financial disclosure and *did not*,"⁴⁰⁹ she "*did nothing*"⁴¹⁰ and she "*made no effort* to seek disclosure...[yet]...There was nothing preventing [her] or her lawyer from asking for financial disclosure."⁴¹¹ Importantly, this was done in the

⁴⁰³ *Ibid* at para 35.

⁴⁰⁴ *Ibid* at para 94.

⁴⁰⁵ *Ibid* at para 95.

⁴⁰⁶ *Golton, supra* note 82 at para 214.

⁴⁰⁷ *Ibid*. [Emphasis added].

⁴⁰⁸ *Ibid* at para 206.

⁴⁰⁹ *Ibid* at para 215.

⁴¹⁰ *Ibid* at para 213.

⁴¹¹ *Ibid* at para 212. [Emphasis added].

context of having the knowledge that she could do so. For example, the judge observed at various paragraphs of the decision that: “Kim *knew* she could ask for disclosure from Dave and did not do so;”⁴¹² she “*knew* that she could ask... but did nothing;”⁴¹³ “[s]he *knew* what she could ask for by way of disclosure”⁴¹⁴ and “she *knew* at the time that she was entitled to ask for financial disclosure and did not.”⁴¹⁵

Similarly, in *JS*, the judge explicitly characterized the wife’s role in the non-disclosure context as a choice or a failed action. For instance, he observed that the wife “consented to the incomplete disclosure and had the means to ascertain precisely the exact amount of [the husband’s] assets but *chose* not to...She was aware of the shortcomings of the disclosure that she had and *chose* not to investigate further.”⁴¹⁶ It was a failed action on her part as she “was aware of all of [the husband’s] assets and *failed* to make further inquiries.”⁴¹⁷ In the same vein, the judge in *McKenna* noted that the wife chose not to pursue or wait for full financial disclosure although she knew that she could do so. The judge observed that the wife “was advised of her rights to disclosure by her lawyer, but was satisfied with the disclosure she had.”⁴¹⁸ He went on to state, “...as testified to by [her lawyer] Ms. Clarke, Tanya was told that it was in her best interests to get financial disclosure.”⁴¹⁹ However, despite this knowledge and despite being “advised by [her lawyer] to be patient and to wait[,] Tanya *chose* to ignore this advice.”⁴²⁰

⁴¹² *Ibid.*

⁴¹³ *Ibid* at para 213.

⁴¹⁴ *Ibid* at para 214.

⁴¹⁵ *Ibid* at para 215. [Emphasis added].

⁴¹⁶ *JS*, *supra* note 335 at para 49. [Emphasis added]. In addition to wife’s “choice” to not pursue disclosure, he also noted that she “was aware of her right to obtain ILA. She simply either *chose* not or *refused* to obtain ILA and section 56(4)(b) has not been satisfied...” (*Ibid* at para 51).

⁴¹⁷ *Ibid* at paras 30 and 48. [Emphasis added].

⁴¹⁸ *McKenna*, *supra* note 335 at para 172.

⁴¹⁹ *Ibid* at para 88.

⁴²⁰ *Ibid* at para 173. [Emphasis added].

While the choice-rhetoric employed by the judges in *Golton*, *JS* and *McKenna* is readily apparent, a closer reading of the cases reveals that the context and consequences of this choice are not abstracted. When reading these cases alongside *Butler*⁴²¹ and *Virg*, the distinct relational feature that comes to light is the understanding of autonomy through the context-specific estimation of the wives' capacity for informed consent and reflection, which is revealed through the judges' consideration of three significant elements. Specifically, these elements are: (1) the nature of (non)disclosure on the part of the husbands; (2) the extent of the wives' knowledge about financial issues; and (3) the effect of the non-disclosure on the wives' decision to enter into the agreement.

1. The Nature of the Husbands' (Non)Disclosure

First, in order to determine the context-specific estimation of the wives' capacity for informed consent and reflection, the judges considered the nature of (non)disclosure on the part of the husbands.⁴²² This included, for example, whether there was a lack of transparency or concealment in the husband's dealings with the wife or whether the information that the husband provided was misleading, incomplete, misrepresented or omitted. This is significant, because these considerations impact the wife's capacity to make an informed decision. In *Butler*, for example, where the wife made "*some* argument" with respect to the possibility of the husband failing to disclose "*significant* assets" and without any evidence in this regard, the judge found that the "the evidence shows nothing close to the sort of infringement which might lead to

⁴²¹ The analysis with respect to *Butler*, *supra* note 335, is limited given that only "*some* argument" was made at the possibility of the husband not having disclosed "*significant* assets," but where an analysis can actually be applied, it coincides with the shared relational feature that is found in the other four cases.

⁴²² The non(disclosure) in *McKenna*, *supra* note 335, was at the behest of the wife. The transparency in this case can be inferred given that the wife was "taking care of the books and finances, and was fully aware of [the husband's] financial situation." *Ibid* at para 86.

redress.”⁴²³ As he went on to observe, “[h]ere, the assets held by the parties were simple, obvious and not extensive. There was nothing in any of the evidence to suggest that there had ever been *any concealment or lack of transparency* with respect to any financial dealing by the couple over 34 years.”⁴²⁴ In the same vein, this can also be seen in *JS* and in *Golton*. In the former case, the judge found that “[t]here were *no misrepresentations or concealing* of assets by [the husband].”⁴²⁵ In the latter case, the judge similarly observed that “[t]his is not a case where the parties exchanged financial information that was *misleading or incomplete* in the sense that one side *misrepresented or omitted* some information.”⁴²⁶ In fact, the judge found that “[t]here was *no concealment* in the sense of hiding assets nor any *misrepresentation* as to value. There was simply no disclosure.”⁴²⁷

In contrast to both *JS* and *Golton* where the judges noted that there was no misrepresentation, the facts and findings in *Viric* were unique. In *Viric*, the judge stressed the principle that “[i]nformational asymmetry as a result of innocent or deliberate non-disclosure compromises the bargaining process on which the integrity of a domestic contract depends.”⁴²⁸ In determining the nature of the husband’s (non)disclosure and its impact on the wife’s ability to exercise informed choice, the judge considered the husband’s “valuation expertise and the wife’s deference to that expertise.”⁴²⁹ He noted that the husband was “uniquely qualified,”⁴³⁰ and that in this context, he had to do more than merely “stand by silently and leave it for the wife to verify the accuracy of his representation.”⁴³¹ This can be seen in the following paragraphs:

⁴²³ *Butler*, *supra* note 335 at para 43.

⁴²⁴ *Ibid.* [Emphasis added].

⁴²⁵ *JS*, *supra* note 335 at para 48. [Emphasis added].

⁴²⁶ *Golton*, *supra* note 82 at para 202. [Emphasis added].

⁴²⁷ *Ibid* at para 212. [Emphasis added].

⁴²⁸ *Viric*, *supra* note 335 at para 93.

⁴²⁹ *Ibid* at para 94.

⁴³⁰ *Ibid* at para 95.

⁴³¹ *Ibid* at para 94.

94 The evidence in this case is that the husband *never alerted the wife* to the fact that the book value of Renegade's investments significantly exceeded their market value. At best, the husband's evidence is that *he did nothing to prevent the wife from testing the veracity of his representation* of the company's value. That, in my view, is not a sufficient discharge of his duty. *In the circumstances of this case, especially given the husband's valuation expertise and the wife's deference to that expertise, it was incumbent on him to do more than stand by silently and leave it for the wife to verify the accuracy of his representation.*

95 Not all cases will impose such a positive obligation. That, of course, will depend on the facts of each case. But the husband in this case was *uniquely qualified*. He knew that the book value of Renegade's long term investments was significantly different from their market value. *He said nothing*. This is precisely the kind of *informational asymmetry* noted in *Brandsema*, and is why, in my view, the husband failed to fully and honestly comply with the duty imposed on him by s. 56 (4) (a).⁴³²

Moreover, the judge explicitly found that the husband's "disclosure was materially defective and deliberate."⁴³³ Given the degree to which "materially defective" disclosure compromises one's capacity for informed consent, it is unsurprising that the judge in *Virco* decided to exercise his discretion to set aside the agreement on this basis.⁴³⁴ However, regardless of whether section 56(4) was successfully engaged, the judges attempted to determine the wives' capacity for informed consent and reflection by considering the nature and degree of the husbands' (non)disclosure and especially in the context of a second contextual element: the wives' financial knowledge.

2. The Wives' Financial Knowledge

Second, the judges' context-specific estimation of the wives' capacity for informed consent and reflection is revealed through their consideration of the extent of the wives' knowledge about financial issues. This is an important consideration as it once more impacts the wife's reflective capacity for informed consent and contractual autonomy.

⁴³² *Ibid* at paras 94-95. [Emphasis added].

⁴³³ *Ibid* at para 117.

⁴³⁴ It was also set aside because of the correlated law of contract "misrepresentation" ground under s 56(4)(c).

In *Golton*, for example, the judge observed the wife’s general awareness and knowledge pertaining to the husband’s finances in light of the evidentiary record. He observed that “[s]he knew generally what Dave owned but not everything.”⁴³⁵ In terms of her actual knowledge, the judge elaborated that the wife knew of the husband’s “company, his cottage, and that the house was in his name and there was a mortgage. She knew that he had investments... She knew he had a good paying job at Laidlaw. She did not know nor did Dave provide any estimates of value for any assets.”⁴³⁶ Similarly, in *JS*, the wife admitted in cross-examination that “at the time of the signing of the agreement she was aware of J.S.(1)’s Mustang, Ford pension and rental property. After the signing of the agreement, she discovered that J.S.(1) had no other property.”⁴³⁷ Based on this evidence at trial, the judge concluded that she “was aware of all of [the husband’s] sources of income and assets. She may or may not have been aware of their values...She did not pursue further disclosure....”⁴³⁸ While the wife in *Golton* “knew *generally* what [the husband] owned but not everything,”⁴³⁹ in *JS* the wife also had “a *general awareness* of [the husband’s] assets.”⁴⁴⁰ Moreover, the judge in *JS* similarly observed that while the wife was aware of all of the husband’s assets, “[s]he may or not have known their approximate values.”⁴⁴¹

The judge in *Butler* also recognized the “general awareness” on the part of the wife. In light of the evidence, the judge concluded “[t]here is no merit to the complaint of non-disclosure. Ms. Butler had the requisite *general awareness* of the couple’s finances. The onus remains on her and she has failed to meet her evidentiary burden on this point.”⁴⁴² In reaching this

⁴³⁵ *Golton*, *supra* note 82 at para 213.

⁴³⁶ *Ibid* at para 212.

⁴³⁷ *JS*, *supra* note 335 at para 22.

⁴³⁸ *Ibid* at para 25.

⁴³⁹ *Golton*, *supra* note 82 at 213.

⁴⁴⁰ *JS*, *supra* note 335 at para 49. [Emphasis added].

⁴⁴¹ *Ibid* at para 48.

⁴⁴² *Butler*, *supra* note 335 at para 44.

conclusion, the judge observed the “simple, obvious, and not extensive”⁴⁴³ nature of the parties’ assets and noted that “[w]hile Mr. Butler may have been given general responsibility to look after the money and distribute it... Ms. Butler knew their financial circumstances at separation with the exception of what Mr. Butler’s pension would yield as a family law value – but Mr. Butler himself then had no idea what that figure would be.”⁴⁴⁴

In contrast to the wives’ general awareness that was considered and determined by the judges in *Golton, JS* and *Butler*, the judges’ findings in *McKenna* are *Virco* were different. In the former case, the wife was found to not just be “generally aware,” but “fully aware” of the parties’ financial issues whereas the wife in *Virco* was not financially aware at all about the husband’s misrepresentation with respect to his interest in Renegade.

In *McKenna*, the parties were described as “excellent business partners, in part due to the fact that they reduced their tax burden in a questionable manner by taking cash payments and writing personal expenses through the husband’s business.”⁴⁴⁵ The context of financial non-disclosure was at the behest of the wife and the extent of the wife’s overall financial knowledge about the parties’ affairs was significant. For example, the judge noted as follows:

There were discussions [with the wife’s lawyer] regarding financial disclosure. Tanya stated that *she did not need financial disclosure* because she was taking care of the books and finances, and was *fully aware* of Howard's financial situation. Tanya knew what the situation was with reference to Revenue Canada, and *she did not want financial disclosure*.⁴⁴⁶

Tanya was asked about the value of Howard's business. Tanya again indicated that she was *fully aware* of her and Howard's finances and was okay with what she knew...⁴⁴⁷

Tanya maintained that *she wanted to conclude the separation agreement as soon as possible and did not need financial disclosure*...⁴⁴⁸

⁴⁴³ *Ibid* at para 43.

⁴⁴⁴ *Ibid*.

⁴⁴⁵ *McKenna*, *supra* note 335 at para 2.

⁴⁴⁶ *Ibid* at para 86. [Emphasis added].

⁴⁴⁷ *Ibid* at para 87. [Emphasis added].

⁴⁴⁸ *Ibid* at para 89. [Emphasis added].

The wife further emailed her lawyer to that effect advising “we are satisfied with the financial disclosure.”⁴⁴⁹ While the agreement did not include any “income or asset information from either party,”⁴⁵⁰ it was the wife who actually provided the values of the parties’ matrimonial home and the husband’s business.⁴⁵¹ Her values were later revealed to be fairly accurate. As the judge noted, the wife “was remarkably astute in her valuation of the family assets.”⁴⁵² Unlike the wives in *Golton* and *JS*, who had a “general awareness,” in *McKenna* the wife’s knowledge was even more extensive and “full.” By virtue of being “the bookkeeper and beneficiary of the income being drawn from the company,”⁴⁵³ the judge concluded that the wife “was aware of her rights to disclosure and was *fully aware* of what matrimonial assets were and what their approximate value was. She was also *fully aware* of Howard’s income status.”⁴⁵⁴

On the other hand, although the wife in *Viric* was a lawyer, she was not imputed abstract knowledge based on this fact. The judge once again in this case adopted a contextual consideration of the wife’s capacity for informed consent when he considered the evidence as to whether the wife was aware and had actual knowledge of the husband’s defective disclosure, and specifically, his representation about the value of his marriage date interest in *Renegade*. He noted the wife’s unawareness about the veracity of the husband’s financial representation given that the husband “never alerted the wife” and her “deference” to the husband’s expertise.⁴⁵⁵ The judge took into account the totality of the evidence and concluded that given “...all of the foregoing... the husband failed to comply with sections 56(4)(a) and (c)... the wife...did not know that the husband overvalued his marriage date interest in *Renegade* when the Separation

⁴⁴⁹ *Ibid* at paras 102 and 116.

⁴⁵⁰ *Ibid* at para 94.

⁴⁵¹ *Ibid* at para 94.

⁴⁵² *Ibid* at para 174.

⁴⁵³ *Ibid* at para 172.

⁴⁵⁴ *Ibid* at para 177. [Emphasis added].

⁴⁵⁵ *Viric*, *supra* note 335 at paras 94-95.

Agreement was signed. His disclosure was materially defective and deliberate.”⁴⁵⁶ This highlights both the first and second contextual elements in terms of the nature of the husband’s non-disclosure and the wife’s knowledge about financial matters, which in turn interact with a third important contextual element – the effect of non-disclosure on the wife’s capacity for informed consent and reflection.

3. The Effect of Non-Disclosure

The third contextual element that is related to both the nature of the husband’s non-disclosure and the wife’s knowledge about financial matters is the effect of the non-disclosure on the wives’ decision to enter into the agreement. In *Golton* and *JS*, the two cases involving a cohabitation agreement, the judges found that the effect of the non-disclosure in the context of these cases was immaterial to the wives’ decision to enter the agreement. In *Golton*, for example, the judge specifically found that it was “immaterial”⁴⁵⁷ and that the wife was “content to enter into the agreement without that disclosure.”⁴⁵⁸ As the judge explained:

Dave's non-disclosure was *immaterial* to Kim's decision to enter into the Cohabitation Agreement. There is absolutely no evidence that Kim would have refused to enter into the agreement if she had known the full details of Dave's financial affairs. To the contrary, Kim executed the agreement which expressly provided that she was content with the financial disclosure she had. She made no inquiries of Dave whatsoever. As she indicated to others, she signed the agreement because she loved Dave and did not want to lose him. Kim would have signed the Cohabitation Agreement on the same terms in any event.⁴⁵⁹

On the note of immateriality and the wife’s satisfaction to enter into the agreement, the judge in *JS* inferred both given the totality of the evidentiary record. The judge noted that “[t]here was no

⁴⁵⁶ *Ibid* at para 117.

⁴⁵⁷ *Golton*, *supra* note 82 at para 212.

⁴⁵⁸ *Ibid* at 213.

⁴⁵⁹ *Ibid* at 212. [Emphasis added].

duress or unconscionable circumstances. She said the contract was fair and I *infer she would have signed the contract even if full disclosure had occurred*. In the result, section 56(4) disclosure obligations have not been contravened.”⁴⁶⁰ Similarly, as in *Golton* and *JS*, the judge in *McKenna* found that the wife “was advised of her rights to disclosure by her lawyer, but was *satisfied* with the disclosure that she had.”⁴⁶¹ Moreover, the judge described her as an “extremely intelligent, articulate, educated woman who knows what she wants. She wanted out of this marriage and wanted the separation agreement done as quickly as possible... Tanya was advised by Ms. Clarke to be patient and to wait. Tanya chose to ignore this advice.”⁴⁶² This evidence was both documentary and testimonial. For example, it included her lawyer’s testimony as well as documentary evidence by way of the wife’s email to her lawyer, which stated: “[w]e would like to get the Separation Agreement done as quickly as possible.”⁴⁶³ The immateriality of the disclosure was inferred given the totality of the wife’s actions, including the fact that the non-disclosure was at her behest.⁴⁶⁴

On the other hand, in *Virco*, where the agreement was set aside after the wife successfully engaged subsection 56(4)(a), the non-disclosure section, as well as subsection 56(4)(c) on the ground of misrepresentation, the effect of non-disclosure on the wife’s capacity for an informed decision was material. While this will be considered in more detail under Section B below, it is important to highlight here that unlike in *Golton*, *JS* and *McKenna*, the husband’s misrepresentation of asset value significantly undermined the wife’s capacity for informed

⁴⁶⁰ *JS*, *supra* note 335 at para 49. [Emphasis added]. It should also be remembered that the wife in *JS* did not plead this ground, so this was not even a factual finding by the judge, but rather the wife’s own evidence.

⁴⁶¹ *McKenna*, *supra* note 335 at para 172. [Emphasis added].

⁴⁶² *Ibid* at para 173.

⁴⁶³ *Ibid* at para 101.

⁴⁶⁴ As mentioned, the wife in *McKenna* was the one who provided the information regarding the disclosure; she provided the values that she wished to provide while also insisting that she did not wish to pursue disclosure.

consent as it induced her to enter into the agreement. As the judge acknowledged during his analysis of whether or not the doctrine of misrepresentation had been satisfied:

105 The husband's representation that the value of his interest in Renegade on the marriage date was \$7,603,685 materially impacted the calculation of his net family property, and resulted in the wife being led to believe that she owed him a \$954,000 equalization payment. The husband was prepared to waive this payment. There can be no doubt, in my view, that this waiver was a major, if not the motivating, inducement to the wife agreeing to the financial terms of the Separation Agreement.⁴⁶⁵

When these three important contextual elements are considered together, they shed light on the wife's capacity for informed consent. This is important, because as both Leckey and Buckley have argued, capacity is a continuum. As a result, these three interrelated contextual factors are in interaction with one another and when considered together, they significantly impacted and informed the judges' understanding of the wife's autonomy by providing them with an estimation of whether the wife exercised an informed choice and had a real reflective capacity⁴⁶⁶ to do so. Where her reflective capacity was not undermined, the wife was at liberty to exercise her choice and enter into an agreement waiving spousal support and/or releasing any further or future claims. This relational approach illuminates the judges' reasoning and highlights the importance of relational theory's "more realistic and nuanced" conceptualization of contractual autonomy.⁴⁶⁷

While Section A focused on the judges' estimation of the wife's capacity for informed consent in the context of the non-disclosure provision, Section B will explore the judges' understanding of autonomy as they considered whether to set aside the agreement pursuant to the law of contract. It will be shown that, similar to the application of the non-disclosure provision, the five cases reveal that the judges were once again driven by a context-specific estimation of

⁴⁶⁵ *Virv*, *supra* note 335 at para 105.

⁴⁶⁶ *Choice Rhetoric*, *supra* note 12 at 267.

⁴⁶⁷ *Ibid* at 306.

the wives' capacity for informed consent when approaching the agreement from the law of contract ground. In particular, the estimation of the wives' capacity for consent was achieved through the judges' consideration of the context surrounding the formation of the agreement as presented by the parties in their testimonial and documentary evidence.

Part II: 56(4)(c): Contextualizing the Law of Contract with the Capacity for Informed Consent and Reflection

The wives in the four⁴⁶⁸ cases of *Golton*, *McKenna*, *Butler* and *Viric* sought to set aside the agreement in accordance with the law of contract pursuant to section 56(4)(c) of the *Family Law Act*. With respect to this ground, the wives claimed: (a) duress (in *Golton*, *McKenna* and *Viric*) and undue influence (in *Golton* and *McKenna*); (b) unconscionability (in *Golton*, *Butler* and *Viric*); and, (c) misrepresentation (in *Viric*). The agreement was set aside successfully in *Viric* and *Butler* on the basis of misrepresentation and unconscionability respectively. Neither wife received independent legal advice,⁴⁶⁹ a factor that was considered under unconscionability. Despite the similarities and differences among the cases, the driving force in the judges' determination as to whether the contract should be set aside was the relational estimation of the

⁴⁶⁸ The wife in *JS* stated in her Answer that "the agreement is not valid because she did not have ILA and the clauses contravened a variety of family, property, and estate principles." *JS*, *supra* note 335 at para 22. She did not indicate that there was any fraud, duress, coercion or misrepresentation. The wife only sought to set aside the agreement pursuant to ss 56(4)(a) and (b) and so the lack of independent legal advice was considered under section 56(4)(b). On the other hand, the lack of independent legal advice in *Butler* and *Viric*, *supra* note 335, was considered under 56(4)(c). The wives in these two latter cases did not seek to set aside the agreement pursuant to section 56(4)(b), and in fact, this ground was not raised by any of the wives in the other cases.

⁴⁶⁹ The wives in *JS* and *McKenna* also stated that they did not receive legal advice. The wife in *JS* did not receive independent legal advice. The judge noted that given the evidence showed the wife "had ample time to seek ILA and failed to do so. She indicated there was no fraud or coercion and that the agreement reflected their discussions regarding the disposition of the...home." *JS*, *supra* note 335 at para 42. The judge also found that the agreement outlined her "right to obtain ILA" and that "on a balance of probabilities, contrary to her claims otherwise...she understood the nature and consequences of the contract." *Ibid* at para 50. On the other hand, the wife in *McKenna* did receive legal advice, but claimed that she did not. *McKenna*, *supra* note 335 at para 4. The reason for this claim was the belief that her lawyer, Ms. Clarke, met with the husband alone and represented him, which led to a Law Society complaint against Ms. Clarke by the wife's counsel. *Ibid* at paras 106-107. The judge entertained this claim and heard extensive evidence in this regard, including the testimony of Ms. Clarke. He found that "Ms. Clarke's evidence clearly establishes that Tanya received independent legal advice." *Ibid* at para 183.

wives' capacity for informed consent and reflection. This was achieved through the judges' attentiveness to the context surrounding the formation of the agreement as presented by the parties in their testimonial and documentary evidence. These contextual considerations included: the duration, timing and nature of the parties' negotiations; who the parties are and their dynamics; the driving motive for entering into the agreements; and, the potential role of fear, abuse, lack of free will and emotion, if any, as established by the evidence and synthesized by this author.

1) Duress and Undue Influence in Context

Duress and undue influence were both pleaded in the two cases of *Golton* and *McKenna* while the wife in *Viric* pleaded the former ground. With respect to the grounds of duress and undue influence, the wife in *McKenna* made allegations of abuse and claimed that "she was in fear and this motivated her to sign the separation agreement. She states that she told her lawyer, Ms. Clarke, that money was no good to her if she was dead."⁴⁷⁰ The wife in *Golton* also raised fear claiming "she did not want to sign the agreement and only did so because [the husband] Dave threatened to throw her and [her daughter] Kaelyn out on the street. She also feared that he would cause her to be fired by Laidlaw where they both worked. She and Kaelyn would be destitute."⁴⁷¹ Moreover, the wife described him as "the dominant personality in their relationship" where she was "submissive to his wishes to the point where she had no free will."⁴⁷² On the other hand, instead of fear, the wife in *Viric* raised emotion in support of the allegation of duress. Specifically, the wife "testified that she was physically affected by and emotionally fragile as a result of the breakdown of the marriage, and particularly vulnerable during the weeks leading up to the signing of the

⁴⁷⁰ *McKenna*, *supra* note 335 at paras 178-179.

⁴⁷¹ *Golton*, *supra* note 82 at para 222.

⁴⁷² *Ibid* at para 223.

Separation Agreement.”⁴⁷³ In all three cases, the judges found that the wives did not sign the agreement out of duress and/or undue influence. In reaching this conclusion, the judges were attentive to the context surrounding the formation of the agreement as presented by the parties in their testimonial and documentary evidence.

The judges in both *Golton* and *McKenna* considered the duration, timing and nature of negotiations in order to contextualize the wives’ choice and determine whether it was exercised under duress or undue influence. In *Golton*, the judge found that the wife “signed the agreement freely and voluntarily as she confirmed in the Acknowledgement witnessed by Ms. Hornick, her lawyer.”⁴⁷⁴ In reaching this conclusion, the judge listed thirteen factors that were taken into consideration. Instead of an abstracted choice based on an automatic conclusion given the wife’s receipt of independent legal advice, the first seven findings of fact that the judge pointed out revolved around the conditions surrounding the Cohabitation Agreement. This included: Mr. Golton first presented a draft agreement to Mrs. Golton “a year or more before she signed it;” the wife met during the course of this year on three occasions with her counsel, “a well-known local family lawyer” and received independent legal advice; amendments were made to the draft agreement upon Ms. Hornick’s request; Mr. Golton was “not present” during any of these meetings; Mrs. Golton “never indicated to Ms. Hornick that she felt compelled or pressured to sign the agreement and her Acknowledgment says otherwise;” and, “[a]lthough they spoke of the agreement from time to time, Dave did not exert any pressure on Kim to get the agreement finalized and signed.”⁴⁷⁵ In fact, in a separate part of the decision titled “Circumstances

⁴⁷³ *Virv*, *supra* note 335 at para 99.

⁴⁷⁴ *Golton*, *supra* note 82 at para 224.

⁴⁷⁵ *Ibid* at para 225.

Surrounding Cohabitation Agreement,” the judge explicitly found that the process unfolded “at a relatively pedestrian pace.”⁴⁷⁶ This can be seen in the following excerpt:

Dave and Kim had infrequent discussions about the agreement in 1995 and early 1996. It is not the case that Dave was pestering Kim or imposing arbitrary deadlines for execution of the agreement. To the contrary, I find that process of negotiating and finalizing the terms of the agreement took place at a relatively *pedestrian pace*.⁴⁷⁷

The duration, timing and nature of negotiations informed the court’s assessment of the wife’s ability for reflective capacity and informed consent. The circumstances did not undermine the wife’s ability to take the time to reflect and there was no urgency or pressure to make a hasty decision about the parties’ relationship or agreement.

In order to determine whether fear played a role as alleged by the wife, the judge in *Golton* also turned his mind to the evidentiary record and what it revealed about the contextual considerations of who the parties are, their dynamics and what the driving motive was for entering into the agreement. The judge found that the evidentiary record did not support the wife’s allegations that the husband threatened to throw her out on the street⁴⁷⁸ and that she feared he would have her fired. Instead, the judge explicitly found that the husband did not make either threat. For example, the judge noted that “[t]here is no evidence that [he] threatened to have her employment at Laidlaw terminated if she did not sign.”⁴⁷⁹ As the judge went on to explain, the husband actually worked, “in a separate division and had no ability to do so. Her evidence that she believed he would do so strikes me as entirely convenient at this stage. She never even hinted at

⁴⁷⁶ *Ibid* at para 50.

⁴⁷⁷ *Ibid*. [Emphasis added].

⁴⁷⁸ The judge also noted that the husband’s “conduct post-separation is consistent with evidence that when they were discussing his desire for an agreement, he would not have thrown Kim and Kaelyn out of the house; that he would never see Kim be in hardship. Dave still cared for Kim even if the marriage was at an end. His conduct confirms that Kim needed financial help when they separated and since then. Because of her health and the expenses related to those issues, Kim cannot be self-dependent.” *Ibid* at para 275.

⁴⁷⁹ *Ibid* at para 225.

such a concern when speaking with friends or family at the time.”⁴⁸⁰ Importantly, the judge also considered the contextual backdrop to the agreement by considering who the wife was at the time by turning his attention to her level of self-sufficiency, skills, resources and support. He observed that she “had lived on her own with [her daughter] relatively recently. She had family in the area. She had a job. She had work skills.”⁴⁸¹ In addition to considering what the evidence established about who the wife was, the judge also considered the parties’ dynamics and what motivated them to enter into the agreement. This can be seen when the judge elaborated on the parties’ unremarkable dynamics and motivating desire to arrange their own affairs:

Dave's advice that their relationship was over and she would have to move out if they did not have a Cohabitation Agreement does not constitute a threat. It simply reflects frankly his willingness to end the relationship if they did not sign a Cohabitation Agreement, and the natural consequence of that end.

....

The evidence that Kim tried to please Dave -- that things had to be done as he wanted them -- again strikes me as an exaggeration. I have no doubt that Kim tried to please Dave by doing things he liked. He undoubtedly did the same for her. The power dynamic of this relationship was unremarkable. She was not lacking in free will when she signed the agreement or at any point in their relationship.

....

When she signed the agreement she knew exactly what she was signing and what it meant. She signed it because she loved Dave and did not want to lose him. She may have preferred not to have an agreement but signing the agreement so that their relationship would continue does not amount to duress.⁴⁸²

Thus, the judge concluded that the wife in *Golton* did not sign the agreement because of duress or as a result of undue influence; it was not a matter of the husband holding “power” over her or inducing her to sign the Cohabitation Agreement.⁴⁸³ Instead, given these contextual considerations surrounding the formation of the agreement, which included the nature, duration and timing of negotiations, who the parties are and their dynamics and the motive for entering

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid.*

⁴⁸² *Ibid.*

⁴⁸³ *Ibid* at paras 224 and 226.

into the agreement as established by the evidentiary record, the wife had the capacity to reflect and make an informed decision about entering into the agreement on these terms.

Similarly, in *McKenna*, extensive testimonial and documentary evidence was considered in contextualizing the wife's capacity for informed consent to enter into the separation agreement. Like the judge in *Golton*, the judge in *McKenna* took into account the following contextual factors: the parties and their dynamics; the nature of negotiations involving the wife's receipt of legal advice; and, the motive for entering into the agreement, which was found to be entirely driven by and in accordance with the wife's wishes. For example, with respect to the parties' dynamics and interaction, the judge considered the wife's allegations of abuse, but found that the evidentiary record did not support them. He noted that the "police conclusion was that this was a volatile relationship. And so it was."⁴⁸⁴ Instead of establishing that the wife was intimidated or pressured, the judge held that "[t]he evidence establishes only that the parties had a volatile relationship."⁴⁸⁵ These dynamics were a contextual factor that the judge considered in addition to who the parties are themselves. For instance, the judge observed that the husband "is an uneducated, unrefined and inarticulate man"⁴⁸⁶ while the wife "on the other hand is a sophisticated, educated and articulate woman."⁴⁸⁷ For the judge, these indicia highlighted the wife's capacity for informed consent. This was especially true given the nature of the negotiations, which involved her lawyer's legal advice and acknowledgment that she was acting

⁴⁸⁴ *McKenna*, *supra* note 335 at para 179.

⁴⁸⁵ *Ibid* at para 181. [Emphasis added]. In reference to a British Columbia Superior Court case of *Malone*, 2014 BCSC 1621, Susan Boyd and Ruben Lindy comment in their article, "Violence Against Women and the B.C. Family Law Act: Early Jurisprudence" (2016) 35 CFLQ 101, that the judge's approach in that case is "notable not only for its attempt to engage with current research on family violence, but also for her robust approach to fact finding in the context of a limited evidentiary record. These kinds of efforts to draw inferences from the circumstantial evidence before the court are critical in the context of family violence, where direct evidence from other eyewitnesses will often be unavailable" (page 7).

⁴⁸⁶ *McKenna*, *supra* note 335 at para 179.

⁴⁸⁷ *Ibid*.

of her own volition, as well as the wife's financial astuteness, sophistication and motivation to enter into the agreement on her own terms. This can be seen in the following excerpts:

179 ... Tanya's lawyer dealt with Tanya during these negotiations and met with her regularly, and certified that Tanya acted of her own volition without fear, threats or compulsion by Howard or any other person -- see Exhibit 10 [Certificate of Independent Legal Advice]. ...I accept the Exhibit 10 opinion of Ms. Clarke who was a professional lawyer with six years of experience doing 25 per cent of her practice in family law.⁴⁸⁸

181 ...I find that there is no credible evidence that Tanya was subjected to intimidation or illegitimate pressure to sign the agreement. I find the contrary. Tanya wanted rid of Howard and wanted a separation agreement as quickly as possible in order to move on. Her lawyer urged her to wait, but this advice was ignored. The separation agreement was not unconscionable or even unfair, as Tanya was remarkably astute and prescient as to what the assets were worth and what she was entitled to under the agreement.⁴⁸⁹

Thus, by considering who the parties are on their own and in relation to one another, their dynamics, the nature of negotiations, the wife's astuteness and her driving motive for entering into the agreement, the judge was attentive to the wife's capacity for informed consent and reflection. Moreover, the provision of legal advice and the lawyer's acknowledgement that the wife was acting on her own volition further confirmed the judge's findings pertaining to the context surrounding the formation of the contract. This was especially the case as the testimony of the lawyer who provided the wife with independent legal advice was found to be credible in its totality and especially where it differed from the evidence of the wife and the husband. Instead of supporting the wife's allegations of duress and undue influence, it persuasively confirmed the context of the wife's informed consent and her contextualized choice.

Just as the judges' contextualized relational analysis in *Golton* and *McKenna* became apparent, so too the judge's analysis in *Viric* revealed a relational conceptualization. In particular, this was exhibited by the judge's consideration of whether there was duress as advanced by the

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Ibid* at para 181.

wife on the basis that she was “emotional” at the time of contract formation. The judge considered the wife’s “emotional” state, but concluded that there was “insufficient evidence of duress.”⁴⁹⁰ In reaching this conclusion, the judge’s understanding of emotion including its role and implication for informed consent was relational. As both Leckey and Buckley have acknowledged, “[t]he presence of emotion should not lightly be coded as indicative of the absence of agency and thus of consent.”⁴⁹¹ In this vein, the judge in *Viric* considered the wife’s capacity for informed consent without automatically concluding that her emotion was presumptively indicative of her lack of agency and consent. Instead, in hearing the wife’s testimony regarding her emotional and vulnerable state, the judge’s analysis was driven by a close consideration of what the totality of the evidence suggested about the wife’s capacity for consent. The judge considered the role of emotion against the backdrop of the usual experiences of a separating or divorcing person with a contextual sensitivity as to whether there was any “domineering, manipulative and coercive conduct”⁴⁹² affecting the formation of the agreement. This can be seen in the following excerpt:

The wife testified that she was physically affected by and emotionally fragile as a result of the breakdown of the marriage, and particularly vulnerable during the weeks leading up to the signing of the Separation Agreement. But, as observed by the Supreme Court in *Miglin...* emotional stress associated with a separation or divorce "should not be taken as giving rise to a presumption that parties in such circumstances are incapable of assenting to a binding agreement", and to quote the motions judge in this case, the wife's description of her condition "is not an unusual constellation of experiences for a person undergoing a separation or divorce". I agree. The evidence in this case falls short of demonstrating the kind of domineering, manipulative and coercive conduct as described in *Rolland*.⁴⁹³

⁴⁹⁰ *Viric*, *supra* note 335 at para 98.

⁴⁹¹ *Contracting Claims*, *supra* note 12 at 14. Otherwise, it implies that only unemotional conduct “can be taken seriously in the juridical sphere, and to which autonomy can be ascribed,” an implication that is “in direct opposition to relational theorists’ efforts to reconceive autonomy in embodied relational terms.” *Ibid*.

⁴⁹² *Viric*, *supra* note 335 at para 99.

⁴⁹³ *Ibid*.

Thus, by considering the role of emotion without making general assumptions or jumping to automatic conclusions, the judge's conceptualization of the wife's decision-making capacity was understood as falling somewhere on the continuum where the wife was able to exercise her agency and consent. Once again, this is resonant with the relational understanding that "emotional pressure does not necessarily vitiate an individual's decision-making capacity, since capacity is a continuum, with a wide range between competence and incompetence."⁴⁹⁴ Instead, there should be "an increased level of scrutiny where an agreement [is] made in emotional or pressured circumstances [and where it] seems particularly one-sided, without however adopting any presumption of non-autonomy."⁴⁹⁵

2) Unconscionability in Context

The wife in *Viric* also raised the role of emotion with respect to unconscionability. According to her, "the Agreement was unconscionable in that it was negotiated under impeachable circumstances. These included her *emotional* state, the absence of independent legal advice and the short duration of the negotiations."⁴⁹⁶ To frame his analysis, the judge first referred to a summary of the law regarding the doctrine of unconscionability.⁴⁹⁷ In general, the doctrine "focuses on whether or not there were unconscionable circumstances surrounding the formation of the contract"⁴⁹⁸ and "the question to be asked is whether there were 'any circumstances of *oppression, pressure, or other vulnerabilities*, and if one party's exploitation of such vulnerabilities during the negotiation process resulted in a separation agreement that

⁴⁹⁴ *Choice Rhetoric*, *supra* note 12 at 265.

⁴⁹⁵ *Ibid* at 266.

⁴⁹⁶ *Viric*, *supra* note 335 at para 100. [Emphasis added].

⁴⁹⁷ *Ibid* citing *Toscano*, *supra* note 341.

⁴⁹⁸ *Ibid*. Under this criterion the circumstances are examined, not the results. However, an exception exists when a party is seeking to set aside an agreement pursuant to section 33(4) of the *Family Law Act*. Under section 33(4), the agreement can be set aside if the waiver results in unconscionable circumstances.

deviated substantially from the legislation.”⁴⁹⁹ The judge went on to cite examples of bargaining inequality and to emphasize the role of preying that produces unconscionability:

[65] *Examples of inequality in bargaining may include one party being intellectually weaker by reason of a disease of the mind, economically weaker or situationally weaker. Vulnerability may also arise due to a special relationship of trust and confidence...* However, the "mere presence of vulnerabilities will not, in and of itself, justify the court's intervention. The *degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties...*"

[66] ... the Ontario Court of Appeal states the question to be answered in determining unconscionability is *whether there was inequality between the parties, or a preying of one upon the other, that placed an onus on the stronger party to act with scrupulous care for the welfare and interests of the vulnerable*. At para. 13 the Court notes it is: "*not the ability of one party to make a better bargain that counts. Seldom are contracting parties equal. It is the taking advantage of that ability to prey upon the other party that produces the unconscionability*". [Emphasis added.]⁵⁰⁰

Within this framework, the judge in *Virco* considered what the evidence established with respect to the context surrounding the formation of the agreement including the parties and their dynamics, the motive for the agreement and the existence of a power imbalance, if any. Applying the case law cited by the parties, the judge's observations highlighted the driving force of his analysis: his estimation of the wife's capacity to understand and consent to the agreement. For example, he noted that in one case, the wife alleged that "she was so distraught by the parties' separation that she was forced to take medical stress leave...[yet] the evidence viewed in its totality did not show a power imbalance between the spouses."⁵⁰¹ He also observed that "[t]he wife in that case was described as *intelligent and interested in moving forward with the separation--not unlike the wife in this case*."⁵⁰² Moreover, he distinguished his case from other cases on which the wife relied where "there was compelling medical evidence of '*dominance*

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid* at para 101.

⁵⁰² *Ibid.*

and control ... and *mental illness*..., neither of which were factors in this case.”⁵⁰³ As the judge noted, “[t]he distinctive feature of all these cases... is a *power imbalance that impacts a party's ability to understand and freely assent to a legally binding agreement*. This should not be confused with signing an agreement in stressful circumstances where there has been financial misrepresentation.”⁵⁰⁴

On this note, it is important to remember that Buckley stated that relational theory “offers a more profound and detailed contextual examination of autonomy, which goes much further than traditional legal doctrines in its examination of pressure and capacity, yet which still recognizes and maintains the role of contract and permits diverse choices where individuals have real reflective capacities.”⁵⁰⁵ While it can be argued that the judge did rely on the traditional legal doctrines and case law as presented by the wife in examining her contractual autonomy, these excerpts highlight that the judge considered closely whether the context surrounding the formation of the contract included the presence of any of these features (ex: dominance, control or mental illness) in order to determine whether the wife’s capacity for reflection and informed choice was undermined. Having found that they were nonexistent, the judge concluded that the wife failed to establish unconscionability.

Unconscionability was also raised in *Golton* and *Butler* with this argument succeeding only in the latter case. In *Golton*, the issue of unconscionability was framed as follows: “[i]s the Cohabitation Agreement unconscionable in the circumstances at the time it was entered into?”⁵⁰⁶ Like the judge in *Viric*, the judge in *Golton* similarly emphasized the notion that “[w]e *must always remember that it is not the ability of one party to make a better bargain that counts. Seldom are*

⁵⁰³ *Ibid.*

⁵⁰⁴ *Ibid* at para 102.

⁵⁰⁵ *Choice Rhetoric*, *supra* note 12 at 267.

⁵⁰⁶ *Golton*, *supra* note 82 at para 170.

*contracting parties equal. It is the taking advantage of that ability to prey upon the other party that produces the unconscionability...*⁵⁰⁷ In this case, the judge's analysis was once again driven by a determination of the wife's capacity to understand and consent to the agreement.

First, and as previously discussed above in the "Duress and Undue Influence in Context" section, this can be seen by the judge's consideration of the context surrounding the formation of the contract. For example, this included the nature and duration of the negotiations in an attempt to determine whether the husband exerted control over the wife and in turn her capacity to consent. In addition, the judge considered mental illness as a factor, one that was previously raised by the unconscionability case law on which the wife in *Virco* also relied. On this note, the judge in *Golton* observed that there "is no evidence that Kim's mental health issues [were] then in play."⁵⁰⁸ He concluded that he was "not satisfied that there was an inequality between the parties that was material to the negotiations and discussions surrounding the Cohabitation Agreement."⁵⁰⁹ However, this conclusion was not made in a void. While the judge acknowledged that the husband "came into the relationship with more assets and the better paying job...clearly st[anding] on firmer financial footing...Kim was by no means economically dependent upon Dave."⁵¹⁰ He also acknowledged that both parties "had a child for whom they had financial responsibilities"⁵¹¹ and that the wife was employed, in receipt of child support and the child tax benefit, having "lived independently before [with her daughter] and could no doubt do so again if need be."⁵¹² This is significant, because just as capacity exists on a continuum, so too does one's level of self-

⁵⁰⁷ *Ibid* at para 228 citing *Rosen v Rosen* (1994), 1994 CanLII 2769 (CA), 3 RFL (4th) 267.

⁵⁰⁸ *Ibid* at para 231.

⁵⁰⁹ *Ibid* at para 230.

⁵¹⁰ *Ibid* at para 232.

⁵¹¹ *Ibid*.

⁵¹² *Ibid* at para 233.

sufficiency and independence even in the face of different levels of income or professional roles, which also exist on a spectrum.

As the judge went on to explain, “[t]hat the agreement is more beneficial in the long term to Dave than Kim, that he pays less than what would be required for equalization under the *Family Law Act* or for spousal support under the *Divorce Act* many years later does not mean the agreement was unconscionable at the time it was formed.”⁵¹³ Instead, what was driving the cohabitation agreement was the general theme of “there is only mine and yours, no ours. If we break up, you keep yours, I keep mine. We go our separate ways with no obligations owing to the other”⁵¹⁴ and the wife’s desire to continue the relationship. To quote Buckley, there was nothing in the circumstances surrounding the negotiation of the contract that deprived the wife of her ability to “reflect critically on equality norms...ultimately depart from them, and...feel that [she has] a real choice in how [she responds] to a particular situation.”⁵¹⁵ In this contextual environment, the judge did not find that there was unconscionability.⁵¹⁶

In *Butler*, the agreement was set aside for unconscionability. In this case, the wife claimed that “all of the facts surrounding the making of the contract demonstrated a clear inequality of bargaining position and the agreement itself was thereby rendered patently unconscionable.”⁵¹⁷ In determining that the wife successfully established unconscionability, the judge’s contextual sensitivity came to light as well as the driving force in his analysis: the wife’s lack of capacity for informed consent and reflection. Specifically, the judge turned his mind to important contextual factors, which included the wife’s lack of sophistication, her trust and deference to the husband,

⁵¹³ *Ibid* at para 235.

⁵¹⁴ *Ibid* at para 256.

⁵¹⁵ *Choice Rhetoric*, *supra* note 12 at 266.

⁵¹⁶ The judge also considered the general fairness of the agreement in light of the parties’ “relatively modest” period of cohabitation. *Golton*, *supra* note 82 at para 235.

⁵¹⁷ *Butler*, *supra* note 335 at para 45.

the husband's exertion of his will and her overall lack of capacity for reflection in light of these interconnected factors. This can be seen in two important paragraphs that are illustrative of the judge's reasoning as follows:

50 Ms. Butler demonstrated a remarkable lack of sophistication when Mr. Butler was sorting out their post-separation financial affairs for them. An important concern for her was not to cause prejudice to Mr. Butler or the two rather feckless adult children the parents had been protecting and assisting financially. It is not a difficult inference that Ms. Butler felt some significant guilt that she was leaving an established family and a very long marriage for another man. To their credit, neither spouse appears to have been angry or vindictive towards the other, and Ms. Butler was forthright about her trust that Mr. Butler, who had always been primarily responsible for financial matters, would be fair and take care of everything. Unfortunately, the result was that she virtually threw herself on his mercy -- instead of actually bargaining -- with respect to her reasonable entitlements on separation. Her capitulation, while appearing magnanimous, was actually a demonstration of a sad misunderstanding of her position and her actual rights.

51 In my view, Mr. Butler exerted his will over Ms. Butler and was in a demonstrably stronger position which had the result of a real disadvantage to Ms. Butler. His telling her what the result would be, in the context of her trust in him that he would be fair, represented a pressure on her will that left her no realistic ability to freely decide...

These paragraphs capture both the judge's contextual sensitivity and determination of the wife's lack of capacity for informed consent and reflection. Unlike the findings of the judges in *Virv* and *Golton*, where the wives understood their rights and had the capacity to bargain and consent, the judge in *Butler* held otherwise.⁵¹⁸ Despite reaching a different conclusion, the analytical process in reaching it was based on a shared relational driving force in the judicial analysis: whether the wives had the capacity for informed consent and reflection.

3) Misrepresentation in Context

The judge's contextual sensitivity is highlighted in the case of *Virv* where the judge set aside the agreement in light of the misrepresentation on the part of the husband. This was actually

⁵¹⁸ For a brief commentary finding otherwise, see Epstein's This Week in Family Law, Family Law Newsletters, March 7, 2016, Fam L Nws. 2016-09, Phil Epstein. To quote Mr. Epstein, "It is hard to believe in this day and age that the wife could be so naïve, but perhaps her feelings of guilt over leaving the marriage for another man outweighed any sense of entitlement."

the ground that was driving the wife's entire case with respect to challenging the validity of the agreement pursuant to the law of contract. While she did plead duress and unconscionability, "the focus of her case was misrepresentation by the husband of the marriage date value of his interest in Renegade."⁵¹⁹ As the judge observed, contract law requires that "a misrepresentation must be material in the sense that a reasonable person would consider it relevant to the decision to enter the agreement...[and it] must have constituted an inducement to enter the agreement upon which the party relied."⁵²⁰ This is understandable given that the materiality of a misrepresentation significantly impacts a party's ability for informed consent and reflective capacity regarding the agreement. In observing whether the husband's representation was material, the judge noted:

105 The husband's representation that the value of his interest in Renegade on the marriage date was \$7,603,685 materially impacted the calculation of his net family property, and resulted in the wife being led to believe that she owed him a \$954,000 equalization payment. The husband was prepared to waive this payment. There can be no doubt, in my view, that this waiver was a major, if not the motivating, inducement to the wife agreeing to the financial terms of the Separation Agreement.⁵²¹

In light of the foregoing, the judge concluded "the husband's representations about the value of his marriage date interest... were material. They significantly impact the determination of which party must make the equalization payment due in these proceedings, and the amount thereof."⁵²² Moreover, the "material misrepresentation... induced the wife to sign the Separation Agreement,"⁵²³ which significantly undermined the wife's capacity for informed consent.

However, despite having found that there was a material misrepresentation, the judge further noted that the framework for his analysis placed the *prima facie* onus on the wife of "demonstrating that the husband misrepresented the value of his marriage date interest in

⁵¹⁹ *Virv*, *supra* note 335 at para 103.

⁵²⁰ *Ibid* at para 104 citing *Dougherty v Dougherty*, 2008 ONCA 302 at para 13.

⁵²¹ *Ibid* at para 105.

⁵²² *Ibid* at para 113.

⁵²³ *Ibid* at para 119.

Renegade. However, once a *prima facie* case... has been made out, the onus shifts to the disclosing party to establish that the recipient actually knew about the falsehood.”⁵²⁴ On this note, the judge found that “the wife has led sufficient evidence to call into question the veracity of the husband’s representation about the value of his marriage date interest in Renegade.”⁵²⁵ In light of this, the judge explained that the issue “is determining whether the husband has satisfied the onus of proving the wife’s actual knowledge, the extent (or materiality) of his allegedly defective disclosure and the degree to which that disclosure, if defective was deliberate.”⁵²⁶ While these considerations are outlined by the case law itself, they are significant as they all impact and highlight a judge’s context-specific estimation of a party’s informed consent and capacity for reflection.

The judge considered extensively the evidentiary record before him. He recognized that “[n]owhere in the husband’s evidence does he assert that the wife actually knew that he had overvalued his marriage date interest in Renegade when the parties signed their Agreement”⁵²⁷ and that “given this evidence and my assessment of the husband’s credibility, the representations he made to the wife were deliberate.”⁵²⁸ In reaching his conclusion that the defective disclosure was deliberate, the judge placed his analysis in context. In particular, he considered the husband’s valuation skills, astuteness, expertise, experience and sophistication in dealing with complex financial issues with reference to what the investment community, the courts and the husband himself had said in this regard.

⁵²⁴ *Ibid* at para 109.

⁵²⁵ *Ibid* at para 111.

⁵²⁶ *Ibid*.

⁵²⁷ *Ibid* at para 112.

⁵²⁸ *Ibid* at para 115.

For example, the judge noted that the investment community regarded the husband “as an astute investor”⁵²⁹ and the Court of Appeal agreed with the motion judge’s characterization that the husband is “an experienced and sophisticated businessman.”⁵³⁰ The judge himself concurred with this description “[a]fter observing him in court and *the ease with which he dealt with complicated financial issues.*”⁵³¹ These characterizations were not just those of third parties as the husband himself admittedly “claimed *substantial experience valuing businesses and enterprises...* he considered himself *an expert in business valuations*, and that he was quite *capable of explaining complex financial calculations and information to people.*”⁵³² As the judge acknowledged, “[t]hese *skills were evident at trial.*”⁵³³ Against this contextual backdrop, it seemed rather convenient and self-serving that the husband’s financial calculations and representations about the value of Renegade in the legal proceedings with his former spouse were “materially different from the value he represented in his NFP statement to the wife in this case.”⁵³⁴ While the husband claimed “he would not have deceptively presented these calculations to his former spouse,”⁵³⁵ the judge observed the financial advantage favoring the husband that this irreconcilable discrepancy in values created. This can be seen in the following excerpt:

[T]he representations about the depressed value of their interests in Renegade made to his former spouse in their litigation, reduced the husband's EP exposure in that case. Conversely, the representations made to the wife in this case about Renegade's value when they married suggested a different value, more than \$6,000,000 higher, at almost the same point in time. This latter representation increased his marriage date net worth, dramatically reducing the value of his net family property and, it follows, his equalization payment exposure. *These representations were made in different legal*

⁵²⁹ *Ibid* at para 114.

⁵³⁰ *Ibid.*

⁵³¹ *Ibid.*

⁵³² *Ibid.*

⁵³³ *Ibid.*

⁵³⁴ *Ibid.*

⁵³⁵ *Ibid.*

*proceedings, but in terms of content, proximate in time to each other. They cannot be reconciled. Each was financially advantageous to the husband.*⁵³⁶

In light of all of these contextual considerations and the totality of the evidence, the judge found that “wife was induced to sign an agreement that presumptively and, as analyzed later in these Reasons, substantially misstated the parties' net family properties, to her financial prejudice.”⁵³⁷ The wife’s capacity for informed consent was significantly compromised and thus the judge went on to conclude, “[t]he husband's non-compliance with the obligations imposed by sections 56 (4) (a) and (c) of the *Act*, and the parties' evidence about their Separation Agreement, when viewed contextually, lead to no other conclusion than that the Agreement should be, and is hereby, set aside.”⁵³⁸

Section D: Constrained Contextualism - Commentary, Critique and Reflections

While Sections B and C above addressed the judges’ shared relational approach through their contextual sensitivity pertaining to contract formation in their effort to determine the wives’ capacity for informed consent, Section D will provide this author’s commentary, critique and reflections about the limitations of the relational contextual approach in the decisions of *Golton*, *JS*, *McKenna*, *Viric* and *Butler*. Three main critiques about the cases are offered. First, the judges in some of the cases did not consider all of the relevant contextual factors that could have impacted the wife’s capacity for informed consent. Second, the judges were significantly constrained by the pleadings and/or evidentiary record before them, which in turn limited their ability to apply the (un)proven significant contextual factors to the context-specific estimation of the wives’ capacity

⁵³⁶ The judge also called the husband’s transparency and credibility into question given both the husband’s lack of cooperation in providing disclosure despite a judicial order for his computer hard drives and the overall ease and regularity with which he did mark-to-market valuations, yet none in this case. As the judge observed, “[g]iven his expertise and attention to detail, especially in matters affecting his financial interests, the husband’s disclaimer is not credible.” *Ibid*.

⁵³⁷ *Ibid* at para 127.

⁵³⁸ *Ibid* at para 128.

for consent and reflection. Third, even though the judges were driven by a context-specific estimation of the wives' capacity for informed consent and reflection, it became apparent when reading the cases that there were additional motivating forces or perspectives that drove the judges' analysis and outcome in the cases as they appear to have been given great weight. These three aspects of the cases will allow for reflection on lessons learned from a practitioner's perspective and the interesting implications for scholars going forward in Section E.

Part I: Additional Relevant Factors for Consideration and Context?

The judges in some of the cases did not consider, or as will be discussed further below, were perhaps not in a position to entertain all of the relevant contextual factors in their estimation of the wives' capacity for informed choice and reflection. This includes a consideration of factors like the differences in terms of the parties' age, nature and length of employment, previous experience with family law proceedings and the financial complexity of those proceedings, all of which are additional factors that might stem either from age disparity or the unfolding of one's life experience. While the outcome in the cases might still have remained the same, as it all depends on the weight attributed to factors, it would have been contextually prudent if the judges at least could turn their mind to these considerations when performing their analysis. For example, this contextual analysis can be seen in a case called *Dillon v Dillon*,⁵³⁹ where Justice Gordon noted these factors stating that "[t]here may have been an *inequality of bargaining power*. Mr. Dillon was *older and employed in the business sector for some years. He had been through a separation*. There was no indication, however, that he took advantage of her situation."⁵⁴⁰ In that case, the age difference between the parties was 9 years. When the parties initially met, the wife was a university student and the husband was working in his parents' business. The judge in *Dillon* was attuned to

⁵³⁹ *Dillon v Dillon*, [2014] OJ No 1992 (Sup Ct).

⁵⁴⁰ *Ibid* at 273. [Emphasis added].

these considerations as they may have been indicative of an “inequality of bargaining power,”⁵⁴¹ but his ultimate conclusion was unaffected by them as he held that they were not in play or impacting the wife’s capacity for informed consent and reflection.

In contrast with the *Dillon* case, where the 9-year age difference was considered as one of the factors indicating a potential inequality of bargaining power, in the three cases where the age discrepancy was more than 9 years, it was not even acknowledged as a contextual factor with a potential impact on the parties’ bargaining power and the consequent effect on the wife’s capacity for informed consent. In particular, in the cases of *Golton*, *Viric* and *McKenna*, the age difference between the parties was 11, 20 and 10 years respectively with the husband being the older party. Moreover, paralleling the cases to the reasoning in *Dillon*, while both parties went through a previous separation in *Golton* and *Viric*, the husband’s separation in *Viric* was more comprehensive and complex in terms of issues - especially financial ones.⁵⁴²

In addition, the husbands in both *Golton* and *Viric* were employed in the business sector longer than the wives, in higher positions and earning higher salaries. In *Golton*, for example, the husband eventually became a VP although this was not relevant to the point in time of the formation of the cohabitation agreement. At the time when the parties met and the years leading up to the cohabitation agreement, the wife was working as a waitress/bartender and when she was

⁵⁴¹ *Ibid.*

⁵⁴² For example, in *Golton*, *supra* note 82 at para 38, it was noted that the husband was “unhappy that he had paid [his former spouse] a substantial sum for property division and for spousal support” (emphasis mine). As for the wife’s separation, the judge only mentioned how the biological father had access visits. In *Viric*, it was noted that the wife “resolved all issues arising from that marriage by a Separation Agreement...[which] had been prepared by a lawyer the spouse had retained- the wife waived independent legal advice.” *Viric*, *supra* note 335 at para 6. The separation happened in July 1992 and less than half a year later, in November 1992, they resolved their matters. The husband, on the other hand, in early 1993 “applied for a simple divorce from his spouse. In response, she claimed, among other things, an equalization of net family properties and spousal support.” *Ibid* at para 7. It was not until late 1999, six years later that his family law proceedings settled. As the judge noted: “[t]here is considerable dispute in this case about the nature and degree of the wife’s involvement in helping the husband in those proceedings, particularly about her knowledge of family law and, more generally, business valuation methodologies and principles.” *Ibid* at para 9. This was important due to the complexity of the husband’s financial matters.

formally hired in 1991 at Laidlaw, the husband was already a general manager there.⁵⁴³ It is true that the judge in *Golton* acknowledged the disparity in the parties' incomes and assets when he noted: "[i]f the disparity in their incomes and assets does give rise to an inequality in bargaining power or vulnerability on Kim's part, [it] ...was compensated for adequately as Kim had independent legal advice."⁵⁴⁴ However, this failed to acknowledge the additional potential implications of the husband's higher position and work experience coupled with the additional life experience arising from the age difference, which all may have affected the parties' bargaining powers. This is not to say that even if the judge had considered and weighed these factors that the outcome would have necessarily been different. The judge might have still found that independent legal advice "compensated...adequately" for the bargaining inequality "or vulnerability on [the wife's] part."⁵⁴⁵ The point is that the factors could have been acknowledged and weighed when determining whether there was a bargaining inequality and in turn whether they potentially lead to the conclusion that the agreement should be set aside considering the totality of the evidence.

On this note of evidence, however, it is important to return to the author's initial comment at the outset of Part I: the judges were perhaps not in a position to entertain all of the relevant contextual factors pertaining to a potential finding of bargaining inequality or to their estimation of the wives' capacity for informed choice and reflection. This is based on the fact that they were limited by the pleadings, the arguments advanced by the parties and the evidentiary record itself. For example, in *Virg*, there was a 20-year age difference and a significant discrepancy in terms of the parties' incomes and careers. Although the wife was a professional with the judge even acknowledging that "the roles adopted by the parties during their cohabitation *were those of two*

⁵⁴³ *Golton*, *supra* note 82 at paras 20-21.

⁵⁴⁴ *Ibid* at para 234. [Emphasis added].

⁵⁴⁵ *Ibid*.

professionals, each of whom pursued their own career, although to different extents and in different stages of development,”⁵⁴⁶ the age difference, income disparity, different professional levels and length of experience were not advanced by the wife as factors affecting the parties’ bargaining (in)equality. The judge certainly considered the husband’s financial expertise and the wife’s deference to that expertise within the grounds of misrepresentation. However, when it came to the grounds of unconscionability, where the existence of a potential bargaining inequality is a consideration under this doctrine, the judge noted that the wife’s arguments about the unimpeachable circumstances included her “*emotional* state, the absence of independent legal advice and the short duration of the negotiations.”⁵⁴⁷ The judge did note that the arguments “included” those factors, thus implying that there were additional ones, but the point is that the factors as outlined by *Dillon* and potentially in play here do not appear to have been advanced by the wife and thereby affected the judge’s ability to consider same. In light of this, even with the adoption of a contextual sensitivity, the judges were inevitably constrained by the pleadings, the arguments advanced by the parties and the evidentiary record itself. This can especially be seen in the cases of *Golton*, *JS* and *McKenna*, which will be discussed in Section B below.

Part II: Constrained Contextualism: Credibility and Evidence

As mentioned, the judges in *Golton*, *JS* and *McKenna* were significantly constrained by the pleadings and evidentiary record before them, which in turn limited their ability to apply what would have been otherwise significant contextual factor(s) for the context-specific estimation of the wives’ capacity for consent and reflection. Specifically, the existence of abuse was a factor that was raised in both *Golton* and *McKenna* and touched upon in *JS*, the case where the wife only

⁵⁴⁶ *Virv*, *supra* note 335 at para 433. [Emphasis added]. This was acknowledged in the reasons when the judge turned his mind to the discussion of the wife’s spousal support entitlement (i.e. on a compensatory basis) and the discussion of quantum.

⁵⁴⁷ *Ibid* at para 100.

sought to set aside the agreement for lack of disclosure and lack of independent legal advice.⁵⁴⁸

While abuse was cited in all three cases, *Golton* also mentioned an additional element: mental health issues on the part of the wife. However, to quote Buckley, although “additional scrutiny” is warranted where there are “sufficient indications of vulnerabilities,”⁵⁴⁹ the judicial analysis in these cases was limited by the court process in this regard.

In *Golton*, where the wife signed a cohabitation agreement, she had experienced physical abuse at the hands of her ex-partner. As part of the judges’ introduction of the parties, the judge noted that the wife testified to being admitted to a hospital “for a period of time for mental health issues. She received counselling to help her deal with a physically abusive relationship and to build her self-esteem. Kim was prescribed medication for depression.”⁵⁵⁰ It appears that this happened sometime in the 1980s while the parties in *Golton* signed the cohabitation agreement in 1996. Although the wife did not experience any abuse at the hands of Mr. Golton, the past abuse could have potentially impacted her sense of self including her capacity for consent and reflection when interacting with Mr. Golton, whom she described as a “dominant personality.” Researchers have acknowledged that “survivors of intimate partner violence have lost a sense of self while being with their abuser”⁵⁵¹ and that “partner violence damages women’s sense of self by way of an ongoing process of physical and psychological abuse. Intimate Partner Violence devalues women’s self-perceptions, needs and capacity to operate effectively.”⁵⁵² Applying this to *Golton*, given the wife’s intimate relationship history, she might have felt that she had no voice or choice,

⁵⁴⁸ In *JS*, *supra* note 335, the wife did not plead section 56(4)(c) i.e. the law of contract grounds.

⁵⁴⁹ *Choice Rhetoric*, *supra* note 12 at 293.

⁵⁵⁰ *Golton*, *supra* note 82 at para 12.

⁵⁵¹ See Tiffany Crayton, “Rediscovery of Self After Counseling for Female Survivors of Intimate Partner Violence” (2018). *Walden Dissertations and Doctoral Studies* at pp. 1-2 and 17. See also Shannon Lynch, “Not Good Enough and On a Tether: Exploring How Violent Relationships Impact Women’s Sense of Self” (2013) 41 *Psychodynamic Psychiatry* at 219-246.

⁵⁵² *Ibid.*

but to submit and defer to the husband's wishes and desires. In fact, she did claim that in her relationship with Mr. Golton she was "submissive to his wishes to the point where she had no free will,"⁵⁵³ but the judge found that "[t]he power dynamic of this relationship was unremarkable."⁵⁵⁴ However, considering this power dynamic against her formative past abusive relationship might have played a role as to whether the judge would have reached this conclusion.

Throughout the decision there was also evidence of more serious episodes of mental health,⁵⁵⁵ but these occurred much later during the parties' marriage and were thus not relevant to the judge's consideration of the context surrounding the formation of the cohabitation agreement. However, while at first glance this author did have some concerns that perhaps the past assault and mental health issues should have been considered in more detail in the judge's application of section 56(4), it became clear that the judge was limited in this regard given the evidentiary record before him. Specifically, in concluding that there was "no inequality between the parties that was material to the negotiations and discussions surrounding the Cohabitation Agreement,"⁵⁵⁶ he noted at the outset of his list of reasons in support of his conclusion that "[f]irst, there is *no evidence that Kim's mental health issues was then in play*."⁵⁵⁷ While the mental health issues presented as early as the wife's past assaultive relationship and could have been dormant if not actively present, this conclusion based on the evidentiary record says it all. It highlights the fact that the wife's mental health was a factor that was considered, but based on the evidence presented, it was not in play at the relevant point in time from the perspective of the judicial process. As a result, it could not be weighed as a relevant contextual factor pertaining to the formation of the cohabitation agreement.

⁵⁵³ *Ibid* at para 223.

⁵⁵⁴ *Ibid* at para 225.

⁵⁵⁵ For example, she pointed a gun in the direction of her friend.

⁵⁵⁶ *Golton*, *supra* note 82 at para 230.

⁵⁵⁷ *Ibid* at para 231. [Emphasis added].

While the judge in *Golton* was limited by the evidentiary record, the judge in *McKenna* was especially constrained by it. The wife in *McKenna* testified to her husband's abuse. She "testified that over time, [the husband] became more and more abusive. The abuse was mostly verbal, with some pushing and shoving. Tanya did not take any action."⁵⁵⁸ Significantly, there were "no contacts to the police, the CAS or anyone else regarding abuse of any kind by Howard prior to the parties' September 16, 2012 separation date."⁵⁵⁹ After the date of separation, the wife contacted the police, who in turn contacted the CAS. She advised that the husband: "had threatened to slit her throat;" "had a rake and threatened to put it between her eyes;" and, "threatened that there would be a murder/suicide."⁵⁶⁰ In addition to these threats, the wife "reported sexual abuse by Howard, but provided no further details."⁵⁶¹ Following the police investigation, which the judge described as appearing "to be a thorough investigation,"⁵⁶² the police concluded "there is insufficient evidence, everyone reports a volatile relationship with no direct confirmation of threats but they have cautioned him."⁵⁶³ In the end, the police did not lay any charges against the husband, who had no criminal record to date, and the CAS also closed their file.

In light of this, the judge did consider the allegations of abuse, but found that they were unsubstantiated. It is not to say that it is impossible for the criminal justice system to fail a victim of domestic violence,⁵⁶⁴ but given the totality of the evidence including the wife's general lack of credibility, the judge was left to conclude that the wife "attempted to portray Howard as a man

⁵⁵⁸ *McKenna*, *supra* note 335 at para 17.

⁵⁵⁹ *Ibid* at para 19.

⁵⁶⁰ *Ibid* at para 20.

⁵⁶¹ *Ibid*.

⁵⁶² *Ibid* at para 23.

⁵⁶³ *Ibid*.

⁵⁶⁴ It is also possible that her lawyer could have done more. For example, the lawyer acknowledged that the wife mentioned that "Tanya stated that there was some abuse during the relationship. Tanya did not elaborate or give any details regarding how recent the abuse was." *Ibid* at para 84. However, her lawyer could have inquired further and asked follow-up questions.

who could not control his temper and who abused her by engaging in threats, violence (pushing and shoving) and sexual abuse. *Little of this is actually borne out by a detailed analysis of the facts proven at trial.*”⁵⁶⁵ While the author also acknowledges that separating spouses are at an increased risk of violence at the time of separation,⁵⁶⁶ the judge noted the questionable timing of the wife’s unsubstantiated allegations observing that “[i]t was only after Tanya left the house and was negotiating the separation agreement that she reported to the police a number of threats alleged to have been made by Howard, as recently as....11 days before the separation agreement was signed.”⁵⁶⁷ However, this further highlights the evidentiary constraints when dealing with allegations of domestic violence; the credibility and the timing of the victims’ reports might be called into question despite the reality that they might only feel safe after leaving the house and the abusive relationship. In general, the harsh reality remains that there are evidentiary challenges of proving allegations of domestic violence including in the context of family law. As Boyd and Lindy⁵⁶⁸ found, “Evidentiary issues remain among the most significant challenges faced by victims of family violence when they come to court.”⁵⁶⁹ Given the “generally private nature of domestic violence...litigation often takes the form of a he-said, she-said scenario, in which proving the violence turns largely on the court’s assessments of each party’s credibility.”⁵⁷⁰ However, “[e]stablishing credibility is an uncertain judicial exercise, arguably complicated by the family violence context”⁵⁷¹ and “fitting into male-developed credibility norms is difficult for a victim,

⁵⁶⁵ *Ibid* at para 33. [Emphasis added].

⁵⁶⁶ A recent and tragic example is the case of the wife, Dr. Elana Fric-Shamji, a well-respected family doctor who was murdered by her husband, a well-known Toronto neurosurgeon, two days after she served him with divorce papers. The violence escalated to this fatal point after a history of past assaults.

⁵⁶⁷ *McKenna*, *supra* note 335 at para 35.

⁵⁶⁸ Susan Boyd and Ruben Lindy, “Violence Against Women and the B.C. *Family Law Act*: Early Jurisprudence” (2016) 35 CFLQ 101 at 6.

⁵⁶⁹ *Ibid*.

⁵⁷⁰ *Ibid*.

⁵⁷¹ *Ibid*.

particularly abused women.”⁵⁷² Not only is the credibility of women being assessed based on both stereotypes and myths in the justice system, but family law is also found to be an area where they are more likely to arise. These unfound or unproven assumptions include the following: “a credible woman would disclose violence early; a credible women would report the assault to the police; a credible women would leave the relationship; ... there is now family violence symmetry--women are just as “guilty” as men; and abuse will likely stop once the relationship ends so there is no risk of future harm.”⁵⁷³

Similarly, the judge in *JS* was limited by the pleadings and evidence presented at trial. Initially, this author was concerned that the existence of abuse was a factor that was perhaps overlooked or overshadowed by other elements in the judges’ determination of the wife’s autonomy under section 56(4). In *JS*, the husband was described by the wife “as a drunk and abusive.”⁵⁷⁴ In addition to testimonial evidence about his verbal and physical abuse, there was evidence of the husband’s assaults on the wife, at least on two occasions by way of his criminal charges and resulting assault convictions in 1998 and 2009.⁵⁷⁵ The former date is relevant as the parties’ cohabitation agreement was signed in 1997.

It is relevant to consider the possibility that the abusive and assaultive behavior already existed at the time of the cohabitation agreement. This assumption was based on the general knowledge that partner violence is generally underreported (i.e. not all instances of assault result in the police being called)⁵⁷⁶ and that the assault charge could have been laid sometime in 1997, but that it took until 1998 to resolve given the speed of criminal justice and the accused’s right to

⁵⁷² Allen M. Bailey, “Prioritizing Child Safety as the Prime Best-Interest Factor” (2013) 47:1 Fam. L.Q. 35 at 44-45.

⁵⁷³ The Honourable Donna Martinson and Professor Emerita Margaret Jackson, “Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases” (2017) Can J Fam L 11 at 18.

⁵⁷⁴ *JS*, *supra* note 335 at para 100.

⁵⁷⁵ *Ibid.*

⁵⁷⁶ See for example Decker, M.R., Holliday et al. “You Do Not Think of Me as a Human being”: Race and Gender Inequities Intersect to Discourage Police Reporting of Violence against Women. (2019) 96 *J Urban Health* 772-783.

decide and change his mind whether to plead guilty or take the case to trial. Even if the physical assault did not occur as early as the time surrounding the formation of the agreement, there are still other characteristics and party dynamics leading up to the first assault when a party is in a relationship with an abuser and someone capable of abuse. The potential presence of abuse at the time of contract formation or the important nuances of the parties' interaction given that they paved the way for future incidents of assault warrant additional scrutiny. However, it became clear that it was not considered under section 56(4) as the wife only sought to set the agreement aside based on not knowing the value of the husband's assets and not having received independent legal advice. In terms of setting aside the agreement pursuant to section 56(4), the judge was limited by the pleadings, the evidence and the arguments advanced by the wife at trial in support of her claims as pleaded.

Thus, the allegation of abuse was a factor to which the judges turned their attention, but in determining whether or not it played a role, the judges were restricted by the evidence before them and as it related to the conditions surrounding the formation and execution of the agreement. Although this element is significant for the purposes of relational theory and its understanding of autonomy, applying relational theory to these cases exposed the limitations of the court process.

Part III: The Weighing of Contextual Factors and Resulting Outcomes: Motivating Forces beyond the Context-Specific Estimation for Consent

Third, even though the judges were driven by a context-specific estimation of the wives' capacity for informed consent and reflection, it became apparent when reading the cases that there were motivating factors that drove the judges' analysis and outcome in the cases as they were given great weight. As Leckey acknowledged, "where one person weighs a bundle of contextual factors differently than another would, it does not follow that the other person overlooks those

factors.”⁵⁷⁷ Building on this notion, while it can be said that the factors as presented by the parties were not overlooked, it also became apparent that some underlying factors or considerations were emphasized or perhaps prioritized as they were given great weight in the judge’s determination of the wife’s capacity for informed consent. Against this backdrop, this section will explore what appears to be the judges’ additional driving emphasis in the cases of *Golton*, *JS*, *McKenna*, *Virv* and *Butler*. It is this author’s position that in the cases where the agreement was not set aside pursuant to section 56(4), themes and factors such as the importance of the parties’ ability to structure their own affairs and the provision of legal advice played an important role in the judges’ final determination. On the other hand, in the cases where the agreement was set aside pursuant to section 56(4), the contextual interplay of factors such as sophistication, expertise, deference and trust highlighting the parties’ dynamics had a significant impact on the final outcome.

You Want It, You Got It: Contracting Motives and Legal Advice Seal the Deal

In *Golton*, *JS* and *McKenna*, where the agreements were not set aside pursuant to section 56(4), it became apparent that the judges valued “the power of the parties to determine their own affairs”⁵⁷⁸ and that the provision of legal advice or the opportunity to obtain it was given great weight. The importance of the parties’ power to determine their own affairs can be seen in the two cohabitation agreement cases of *Golton* and *JS* as well *McKenna*, the separation agreement case. The judges in these cases placed a great emphasis on the parties’ desire to enter into and execute these agreements. For example, in both cases, the judges acknowledged the husbands’ motives to execute the cohabitation agreements as well as the fact that the wives knew what they themselves wanted and what motivated them to enter into the agreements. Both husbands had bad previous breakups and wanted to not go through the same turmoil again. In *Golton*, it was acknowledged

⁵⁷⁷ *Contracting Claims*, *supra* note 12 at 30.

⁵⁷⁸ *JS*, *supra* note 335 at para 126.

that the agreement was “entirely” the husband’s idea as he wanted “no financial obligations to [the wife] if their relationship broke down.”⁵⁷⁹ He was “unhappy that he had paid [his ex-spouse] a substantial sum for property division and for spousal support” and was thus “determined not to find himself in that predicament again.”⁵⁸⁰ In the same vein, in *JS*, the husband’s “bad previous breakup”⁵⁸¹ served as the motive for “his desire to have a cohabitation agreement.”⁵⁸² As the husband explained, his prior relationship was “a ‘nightmare’ and he wished to avoid the turmoil he had gone through....and said he would not go through that again.”⁵⁸³ As Leckey acknowledged, while it is precisely the desire to protect one’s assets or to have a peace of mind of what will happen upon the breakdown of one’s marital relationship that motivates a prenuptial agreement,⁵⁸⁴ the judges also acknowledged the wives’ motivations for entering into the cohabitation agreements.

In *Golton*, for example, the judge observed that “[w]hen [the wife] signed the agreement she knew exactly what she was signing and what it meant. She signed it because she loved Dave and did not want to lose him. She may have preferred not to have an agreement but signing the agreement so that their relationship would continue does not amount to duress.”⁵⁸⁵ While the fact that Mr. Golton was prepared to walk away from their relationship (i.e. there would be no future unless they entered into a cohabitation agreement) may be construed as indicative of the parties’ dynamics, this was a choice that the wife was free to make. He did not coerce her to stay in the relationship. Instead, she was free to exercise the choice of whether she wanted the relationship to continue, and if so, the parties would be separate as to property in the event of the relationship’s rupture in the future.

⁵⁷⁹ *Golton*, *supra* note 82 at para 44.

⁵⁸⁰ *JS*, *supra* note 335 at para 126.

⁵⁸¹ *Ibid* at para 25.

⁵⁸² *Ibid*.

⁵⁸³ *Ibid* at para 16.

⁵⁸⁴ *Contracting Claims*, *supra* note 12 at 34 citing *Hartshorne*, *supra* note 80.

⁵⁸⁵ *Golton*, *supra* note 12 at para 225.

On this note, it is important to mention that out of all five cases, this characterization of “choice” in *Golton* is most akin to the characterization of choice in *Hartshorne* with Mr. Golton living out his intention to maintain control of his income and his assets.⁵⁸⁶ However, as Buckley observed, “[r]elational autonomy should allow her to make this decision, provided she can reflect critically on the issue”⁵⁸⁷ and questions like “why” did she make this choice and “where was [the husband] in the decision-making process”⁵⁸⁸ need to be asked. Interestingly, it can be inferred that the judge in *Golton* found that she could reflect critically on the issue after turning his mind to the wife’s motive (i.e. wanting the relationship to continue) and the husband’s involvement in the decision-making process. On the latter note, the judge found that while the husband was clear that the relationship would be over if the cohabitation agreement was not signed, the “process of negotiating and finalizing the terms of the agreement of took place at a relatively pedestrian pace”⁵⁸⁹ and “there was no duress, undue influence or unconscionable circumstances.”⁵⁹⁰ However, it could be argued that where one is offered an ultimatum with respect to the relationship yet wishes for the relationship to continue, then the ability to reflect is reduced to a dichotomous choice, which consists of the two following options: (1) agree to the terms or (2) do not marry and/or do not have the relationship continue.⁵⁹¹ For example, the wife claimed, “I’m just going to

⁵⁸⁶ This language is borrowed from Shaffer’s observation that it was in fact “Mr. Hartshorne living out *his* intention to maintain control of his income and his assets.” See *Domestic Contracts*, *supra* note 260 at 285 [original emphasis].

⁵⁸⁷ Buckley is also critical of the dissent. In reference to paragraph 90 of the dissenting decision, she notes that it is “incorrect to suggest” that Mrs. Hartshorne’s decision to stay at home indicates “an unequal power dynamic” given that it might have been based on other driving forces and factors. For instance, she states the wife “may have been happy to adopt a caring role, may have believed it was ‘right,’ or may simply have believed that it was necessary, given her child’s needs.” *Choice Rhetoric*, *supra* note 12 at 292.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Golton*, *supra* note 82 at 50.

⁵⁹⁰ *Ibid* at 211.

⁵⁹¹ See for example Orit Gan, “Contractual Duress and Relations of Power,” (2013) 36(1) Harvard Journal of Law & Gender 171 [“Contractual Duress”]. Gan discusses a case where the court viewed the wife’s choice as dichotomous. According to the court, if the wife-to be was not satisfied with “the terms of the agreement she could have chosen not to marry Timothy...[she] had only two options: marry Timothy on his terms or not marry him.” However, as Gan comments, “The court, relying on this binary thinking, disregarded a third option: negotiating a

sign it. I am not going to lose him. I love him too much”⁵⁹² and “I guess love does crazy things” in response to her brother’s opinion that “she was ‘crazy’ to sign it.”⁵⁹³ The timing⁵⁹⁴ of the ultimatum appears to play a role as courts likely wish to avoid the slippery slope that can be created if this dichotomous choice would result in marriage agreements being set aside as a matter of course given the fact that prenuptial agreements are often created precisely for the purposes of protecting one’s assets. This is especially true in subsequent marriages where the requirement to execute such an agreement might make or break the relationship. As can be seen in the decision, the judge inferred that the wife could reflect critically when he concluded, “[s]he may have preferred not to have an agreement but signing the agreement so that their relationship would continue does not amount to duress.”⁵⁹⁵

prenuptial agreement to both parties’ satisfaction. By not considering this option, the court reinforced the power inequality between Mary and Timothy and legitimized Timothy’s misuse of his greater bargaining power to essentially force Mary to sign a one-sided prenuptial agreement.” Similarly, in another case, an ultimatum was not unlawful where the husband-to-be informed his wife-to-be that he would not get married again without a prenuptial agreement as the wife had a reasonable alternative of canceling the wedding. See *Ibid* at 212-214, FN 231.

⁵⁹² *Ibid* at 56.

⁵⁹³ *Ibid* at 57.

⁵⁹⁴ It is one thing to cancel the wedding, but another to cancel the marriage (i.e. get a divorce). In the Ontario case of *McCain v McCain*, 2017 ONSC 7344, the judge found that the contract was unconscionable where the wife was provided an implicit ultimatum approximately 15 years into their marriage: “you must sign this contract or I [Mr. McCain] will divorce you.” See Mark Cornish, “Case Comment: *McCain v McCain* and *Barton v Sauve*: A New Approach to Autonomous Domestic Contractual Bargaining in Ontario,” 32 Can J Fam L 195.

⁵⁹⁵ *Ibid* at para 225. This can also be seen in the English courts. As Sharon Thompson found, “Case law suggests that it is unlikely that an English court would find that [the wife] had been subject to undue influence because she technically could have chosen to enter the pre-nup and to not marry.” However, where the wife is given an ultimatum to “sign the post-nup or end the marriage...the court found severe pressure because the husband ‘knew that she wanted above all to save the marriage...’” Courts “are more likely to determine there is no undue influence because there is a realistic alternative to signing by not getting married. Cancelling a wedding is different from the wife...being forced to leave her marriage, her home and her children if she did not sign.” See Sharon Thompson, “Feminist Relational Contract Theory: A New Model for Family Property Agreements” (2018) 45 Journal of Law and Society 617 at 639. Even then, it remains a contextual analysis. For instance, in both a Canadian and American case involving a foreign wife, a prenuptial agreement was found to be invalid. In the Canadian case of *Tian v Cheung*, 2016 BCSC 950, the prenuptial agreement was set aside. In that case, the wife was found to be vulnerable as a result of the language barrier, power imbalance, ultimatum and consequences of not signing the agreement. In the American case discussed in *Contractual Duress*, a prenuptial agreement was found to be invalid where the husband gave an ultimatum that if the wife-to-be did not sign the agreement she would have to go back to Russia. See *Contractual Duress*, *supra* note 591 at 210, FN 212.

Similarly, in *JS*, the judge observed that the wife wanted to move into the parties' newly built home and that this motivated her to enter into the agreement.⁵⁹⁶ However, he also acknowledged that "[a]t the time of the signing of the agreement, [the wife] thought it was fair and that it fairly outlined their discussions regarding the house purchase. As they were each making \$70,000 per year, the provision regarding neither paying spousal support was fair and reasonable..."⁵⁹⁷ While the wife in *JS* advised that the husband "said he was not going through with the house purchase unless the contract was signed,"⁵⁹⁸ which can be paralleled to the husband in *Golton* stating that he was not going through with the parties' relationship unless the contract was signed, the judge observed that the wife "thought the agreement was fair at that time regarding the home."⁵⁹⁹ Like the husband in *Golton*, the husband in *JS* was found not to have coerced the wife to enter into the agreement. Instead, the judge explicitly noted that "[t]here was no fraud, coercion, or duress."⁶⁰⁰ The wife did not allege any of these factors and the parties were thereby free to arrange their affairs as they saw fit and in accordance with their respective motives.

Like the wives in *Golton* and *JS*, the wife in *McKenna* also knew what she wanted. While the wives in *Golton* and *JS* wanted to stay in the relationship, the wife in *McKenna* wanted out. As the judge observed, "I find that there is no credible evidence that Tanya was subjected to intimidation or illegitimate pressure to sign the agreement. I find the contrary. Tanya wanted rid of Howard and wanted a separation agreement as quickly as possible in order to move on."⁶⁰¹ This is again resonant with the theme of this section that the parties are free and encouraged to arrange their own affairs especially where there is no evidence of intimidation, coercion or pressure. On

⁵⁹⁶ *JS*, *supra* note 335 at para 25.

⁵⁹⁷ *Ibid*. However he also noted that the husband "would have had a significant pension but since they had only cohabitated for a short period, and they both had pensions, she was giving up little at that time." *Ibid*.

⁵⁹⁸ *Ibid* at para 21.

⁵⁹⁹ *Ibid* at para 22.

⁶⁰⁰ *Ibid* at paras 22 and 26.

⁶⁰¹ *McKenna*, *supra* note 335 at para 181.

this note, the significant weighing of the provision of legal advice as a contextual factor enters the picture.

The cases of *Golton* and *McKenna* show that it is difficult to establish that a bargaining inequality affected the formation of the contract where the party was in receipt of independent legal advice. This can be seen in the cases as the judges placed a significant emphasis and weight on legal advice as a contextual factor pertaining to the formation of the contract. However, even where legal advice was not obtained, like in the case of *JS*, it proved difficult to set aside the agreement in the context where there was ample time to obtain independent legal advice and no evidence or allegations of fraud, coercion or duress.

In *Golton*, the significance of the wife's receipt of legal advice was apparent in several parts of the decision as it was found to compensate for any vulnerabilities or bargaining inequalities. First, when discussing the disparity in the parties' income and assets, the judge opined that if it "does give rise to an inequality in bargaining power or vulnerability on Kim's part, *I find that was compensated for adequately as Kim had independent legal advice for which she was paying nothing.*"⁶⁰² Second, the judge went on to find that the husband "did not prey upon [the wife]. *The provision of independent legal advice in these circumstances negates that inference.*"⁶⁰³ In addition, the role of legal advice as ample or adequate compensation was also emphasized in relation to the existence of any vulnerabilities on part of the wife generally. While the judge did not elaborate on the specifics of those vulnerabilities, he opined that he was "satisfied that there were *no vulnerabilities or, if present, they were amply compensated for by the involvement of legal*

⁶⁰² *Golton*, *supra* note 82 at para 234. [Emphasis added].

⁶⁰³ *Ibid* at para 235. [Emphasis added].

counsel. There is nothing in the manner in which the agreement came about that causes me to discount it.”⁶⁰⁴

The importance of legal advice can also be seen in *McKenna*. While the wife in *McKenna* was not found to be a credible witness overall,⁶⁰⁵ with the credibility factor certainly playing a part in how her evidence regarding the husband’s alleged abuse was received, the significant role of legal advice became evident within the judge’s reasoning. When the judge explicitly elaborated on all of the evidence that was not supportive of the wife’s allegations, he also showed the great weight he attributed to the wife’s receipt of independent legal advice as can be seen in the following excerpt:

Tanya's lawyer dealt with Tanya during these negotiations and met with her regularly, and certified that Tanya acted of her own volition without fear, threats or compulsion by Howard or any other person -- see Exhibit 10 [Certificate of Independent Legal Advice]. I note that in an e-mail ... Tanya writes to her lawyer that Howard is being difficult. No mention is made of abuse, threats or violence. I accept the Exhibit 10 ... opinion of Ms. Clarke who was a professional lawyer with six years of experience doing 25 per cent of her practice in family law.⁶⁰⁶

JS is bit of an outlier amongst the three cases in the sense that the wife there did not seek or receive independent legal advice. However, as mentioned earlier in this section, even if a party did not obtain independent advice, but there was no evidence or allegations of coercion, fraud, duress or any other type of intimidation or pressure exerted on the will of the party trying to set aside the agreement, this too will be damaging for the party seeking to set aside the agreement. For example, in addition to acknowledging that “[t]here was no fraud, coercion, or duress,”⁶⁰⁷ the

⁶⁰⁴ *Ibid* at para 252. [Emphasis added]. This was written when the judge was turning to stage one of the analysis and prefaced with the fact that he “already considered the circumstances in which the agreement was negotiated and executed [under section 56(4)], I need not repeat that analysis here. I am satisfied that there were no vulnerabilities or, if present, they were amply compensated for by the involvement of legal counsel.”

⁶⁰⁵ *Ibid* at para 181.

⁶⁰⁶ *Ibid* at para 179.

⁶⁰⁷ *JS*, *supra* note 335 at para 25.

judge noted that the agreement outlined the wife's "right to obtain ILA... [and that] on her evidence she had at least six weeks to get ILA and on his evidence several months to get ILA."⁶⁰⁸ The judge noted at the outset that one of the issues to be determined in the case was whether "a cohabitation agreement is valid in circumstances where...[t]he wife does not seek independent legal advice."⁶⁰⁹ On this note, he emphasized that the wife "had ample time to seek ILA and failed to do so. She indicated there was no fraud or coercion and that the agreement reflected their discussions regarding the disposition of the home."⁶¹⁰ This combination proved to be fatal to her case as the judge went on to conclude that in addition to having "ample time to obtain ILA if she had wished to...she thought the agreement was fair at the time it was signed and I find...contrary to her claims otherwise, that she understood the nature and consequences of the contract."⁶¹¹

The overall impression created by these judgments is that the judges value the parties' desire to contract and will uphold the contract unless there are significant factors that would suggest otherwise. However, any potential factors suggesting otherwise are de-emphasized as a great emphasis is placed on the provision and receipt of independent legal advice or the ability of the party to have sought it. In those cases, the provision of independent legal advice plays an important role in the final outcome of the cases as to whether the agreement should be set aside.

The Dynamics of Trust, Deference, Expertise and Sophistication

Interestingly, the cases of *Butler* and *Virv*, where the judges exercised their discretion to set aside the agreement pursuant to section 56(4) of the *Family Law Act*, also share some thematic similarities, which once more highlight the contextual factors that are significantly

⁶⁰⁸ *Ibid.*

⁶⁰⁹ *Ibid* at para 3.

⁶¹⁰ *Ibid* at para 42.

⁶¹¹ *Ibid* at para 50.

weighed and emphasized by the judges. In both cases, given the length⁶¹² of the parties' marriage, there are prevalent interrelated themes of trust, deference, expertise and sophistication. For example, in *Butler*, the wife trusted and relied on the husband's claims about her financial entitlements like the wife in *Virg* relied on her husband's claims about his date of marriage interest in *Renegade*. This trust, deference and reliance in turn impacted both wives' understanding of their financial entitlements and obligations (i.e. the wife in *Butler* was told that she was not entitled to anything whereas the wife in *Virg* was told that she owed a significant equalization payment), which significantly undermined their capacity for informed consent.

In her cross-examination, the wife in *Butler* "swore that Mr. Butler, after seeing [his lawyer] Mr. Friend, told her that she was not entitled to anything from him because she did not work outside the home and therefore did not contribute."⁶¹³ As she explained, "I didn't question him because I didn't think he would lie to me about that."⁶¹⁴ Instead, when she was confronted at trial as to why she would give up her financial entitlements, the wife in *Butler* responded: "I was trusting him. So yes, when I read it, I thought, okay, that's what he had said. I didn't contribute because I wasn't working so I wasn't entitled to half the house...I believed him. I've never been through a divorce before."⁶¹⁵ The wife's general trust and deference to the husband was based on the parties' lengthy marriage with the wife stating as follows: "I was trusting that I was being treated fairly after 34 years of marriage"⁶¹⁶ and "[n]o, I did not [ask a lawyer]. Again, I trusted the 34 year old relationship."⁶¹⁷ The wife's trust and deference to the husband was even acknowledged by him when he "[i]mportantly... admitted that Ms. Butler was 'trusting [him] to

⁶¹² In *Butler* it was 34 years of marriage and in *Virg* the judge noted 16 years of cohabitation. In both cases, the wives had an affair, left the marriage and felt guilty.

⁶¹³ *Butler*, *supra* note 335 at para 22.

⁶¹⁴ *Ibid*.

⁶¹⁵ *Ibid* at para 23.

⁶¹⁶ *Ibid* at para 24.

⁶¹⁷ *Ibid* at para 25.

handle everything.”⁶¹⁸ While neither the wife nor the husband had any “expertise” in *Butler* unlike the husband’s expertise in *Virg*, the wife in relation to the husband and on her own “demonstrated a remarkable lack of sophistication when Mr. Butler was sorting out their post-separation financial affairs for them.”⁶¹⁹ This was once again significant in informing the judge’s estimation of the wife’s capacity for informed consent and reflection and was in turn weighed significantly by the judge.

Similarly, in *Virg*, the wife trusted and deferred to her husband, a fact that was known by the husband himself. As the wife indicated in her testimony, “she would need to find a ‘large error’ (in fact more than \$1,900,000) in the husband’s NFP to negate the payment he claimed she owed. *And she trusted him.*”⁶²⁰ As the judge observed, “[t]he husband knew that the wife respected and deferred to his expertise in business valuations... His waiver of her payment of an EP of \$954,000 was, notwithstanding the other financial terms of the Separation Agreement, a material inducement.”⁶²¹ As the judge acknowledged, the wife exhibited a “general deference to the husband’s financial abilities”⁶²² and especially in the context of where she would have needed “to find a very significant discrepancy in the husband’s figures...to negate any [equalization payment]...”⁶²³ As the judge went on to explain “[h]er experience during the 16 years of their cohabitation was that the husband had mostly prevailed in the many lawsuits...[and the evidence shows] that she relied on the general probity of the husband’s disclosure and was reluctant in the circumstances to challenge him.”⁶²⁴ This is resonant with the *Butler* paragraphs reproduced

⁶¹⁸ *Ibid* at para 29.

⁶¹⁹ *Butler*, *supra* note 335 at para 50.

⁶²⁰ *Virg*, *supra* note 335 at para 21. [Emphasis added].

⁶²¹ *Ibid* at para 116.

⁶²² *Ibid* at para 121. The wife’s deference to her husband’s “financial expertise is also evident from the fact that soon after taking vocational upgrading courses, she raised with him the issue of why different methodologies had been used when valuing his marriage and valuation date interests in Renegade...” *Ibid* at para 124.

⁶²³ *Ibid* at para 121.

⁶²⁴ *Ibid*.

above. Like the wife in *Butler* trusted the husband and their 34-year marriage, so too “[t]he wife in these proceedings testified that she did not know the value of the husband's marriage date interest in Renegade, and that given the husband's expertise in financial matters, she had no reason to doubt him....⁶²⁵ These similarities between the two cases highlight the significant emphasis placed by the judges on the factors of sophistication, expertise, deference and trust.⁶²⁶ While the wife in *Virco* was a lawyer by profession and the wife in *Butler* a homemaker for the last 26 years, the judges’ significant consideration and weighing of these factors comes to light and impacts the similar outcome in these two cases that are so different and yet so alike.

Section E: Conclusion

This chapter explored the concept of contractual autonomy through the lens of relational theory with a focus on the circumstances surrounding the formation of a contract involving a spousal support release or waiver. This analysis of contractual autonomy as it relates to the formation of the contract was made with reference to five cases, *Golton*, *JS*, *McKenna*, *Butler* and *Virco*, and was restricted to the judge’s determination of the validity of the agreement pursuant to section 56(4) of the *Family Law Act*. However, regardless of whether section 56(4) was successfully engaged and whether the judges in turn exercised their discretion to set aside the agreement, a notable feature resonant with relational theory and shared by all five cases came to light. Specifically, the judges’ analysis pertaining to the formation of the contract was driven by a contextualized conception of choice and a context-specific estimation of the wives’ capacity for informed consent and reflection. Despite this notable feature, there were limitations on the judges’ relational contextual analysis in the cases as well as the greater emphasis placed by

⁶²⁵ *Ibid* at para 123.

⁶²⁶ They all relate to the wives’ capacity for informed consent, but are especially weighed and emphasized as contextual factors affecting the final outcome of the decision.

judges on certain contextual factors, which all produce lessons to be learned from both a practitioner's and scholar's perspective.

First, these cases serve as a reminder that the judges are constrained by the pleadings and the evidence as presented by the parties and their lawyers. Even if the judges wish to adopt a relationally sensitive contextual assessment, there will be limits placed on their ability to do so if the parties do not raise and apply the existence of relevant contextual factors themselves. Understandably, given the role of the judges, the parties and their lawyers need to carefully consider the facts and how they might support the relevant legal tests. For example, while a difference between the parties in terms of age and professional experience might be relevant in determining whether there was a bargaining inequality, the judges will not consider this contextual factor in their analysis if this fact was merely raised as part of a party's background and not presented by the parties and their lawyers as a relevant fact in support of the legal doctrines they are relying on. Thus, it is critical that the parties and their lawyers reflect carefully on the facts and how they pertain to the relevant legal analyses. In turn, the pleadings need to be carefully drafted and the documentary and testimonial evidence at trial needs to be focused and supportive of what the parties are trying to achieve. The lawyer's role is paramount in this regard as the clients will be able to relate the relevant facts to the lawyer if the lawyer asks the right questions and follows up on the information provided. However, it is incumbent that the lawyer then reflects on how certain facts support the relevant legal test and ensures that the evidence in support of it is provided and applied. Thus, while parties and lawyers need to be aware that the courts are adopting a contextual approach, the lawyers must effectively present the relevant contextual factors before the judge. Otherwise, the judge will not be in a position to consider them.

Second, a well-executed relational approach will not provide a determinate outcome. Even if the judges adopt a relational approach and consider all the contextual factors, outcomes might still vary in cases going forward depending on the weight and importance that judges give to certain factors. This of course is true in any case where the judge has to weigh and consider the totality of the evidence in order to reach his or her final determination. Thus, more factors might be taken into account, but depending on how they are weighed, they might not make a tangible impact in the end. From this perspective, while a contextual and relational approach is more sensitive in nature, from a practical standpoint it might not always make a difference in the final outcome of the cases.

Third, these cases serve as a cautionary tale that a great emphasis will likely be placed on the provision of legal advice and that it might be difficult to establish successfully that an agreement should be set aside in accordance with section 56(4) of the *Family Law Act* in that context. Where a lawyer certified that a party acted on their own volition or where a lawyer did not pursue disclosure yet could have, it will prove difficult to convince the judge that the agreement should be set aside for a lack of disclosure, an inability to understand the terms of the contract or on a law of contract grounds. Moreover, if a party did not receive independent legal advice, but also did not plead any of the law of contract grounds, it will also be challenging to set aside the contract on the basis that no legal advice was obtained.

Fourth, it would prove useful for future research to obtain a copy of complete court files as well as the transcripts of the summary judgment or trial proceedings in order to have a full appreciation of how the parties pleaded and presented their evidence instead of relying on the court's written decision alone. Given that lower court judgments are not written in great depth like Supreme Court of Canada ones, this analysis was limited by how the judges themselves

wrote their decisions and how they summarized the evidence as presented. While great deference is given to a trial judge, it would be interesting to obtain the complete picture as presented to the judge instead of relying on the judge's final presentation of the facts and evidence.

Fifth, it would also be interesting, to analyze a more substantial case sample and categorize it by judges to see if certain judges tend to weigh certain factors above others or tend to emphasize the finality of agreements. For instance, even in this case sample, it is interesting to note that two cases where the agreement was not set aside were both judgments of Justice Skarica. Perhaps there are patterns and trends that would be revealed or other thematic and contextual factors that would come to light when comparing the case sample.

Sixth, the larger case sample should categorize the cases by those involving prenuptial and separation agreements as well as domestic contracts waiving spousal support fully and those providing for some spousal support followed by releases. These distinctions might play a role when the judges are weighing certain factors and deciding whether to set aside the agreement pursuant to section 56(4) of the *Family Law Act*.⁶²⁷

In conclusion, and as Buckley herself acknowledged, while “relational theory is more realistic and nuanced in its conceptualization of autonomy...relational theory may not always make the degree of practical difference that many feminists might expect.”⁶²⁸ As she explained, “a relational approach does not necessarily mean that the court will automatically overturn ‘bad’ agreements since relational theory must accommodate agency and choice. Accordingly, much depends on the contextual analysis and the application of theory to the facts.”⁶²⁹ However, as she

⁶²⁷ For example, Buckley noted that “[t]he real distinction may be between prenuptial and separation agreements, with the Court attaching greater weight to relational factors and pressures in the emotional context of marital breakdown.” *Choice Rhetoric*, *supra* note 12 at 297.

⁶²⁸ *Ibid* at 306.

⁶²⁹ *Ibid*.

recognized, it can make a significant difference in certain cases as “[c]ourts taking a relational approach to autonomy may accord less weight to agreements or set them aside where they were tainted by exploitation or unfair pressure, where legal advice was inadequate to counteract vulnerability, or where procedures are questionable in some way that potentially undermines the quality of consent.”⁶³⁰ While she stated that “it is to be hoped that the Supreme Court of Canada does not regress from its adoption of relational theory and continues to apply relational understandings to marital agreements,”⁶³¹ it is also desired that lower courts follow suit and continue to apply a relational lens in their determination of a party’s contractual autonomy by way of an estimation of a party’s capacity for informed consent and reflection.

⁶³⁰ *Ibid* at 307.

⁶³¹ *Ibid* at 308.

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