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Case Comment: *McCain v McCain* and *Barton v Sauvé*: A New Approach to Autonomous Domestic Contractual Bargaining in Ontario

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CASE COMMENT: *MCCAIN V MCCAIN* AND *BARTON V SAUVÉ*: A NEW APPROACH TO AUTONOMOUS DOMESTIC CONTRACTUAL BARGAINING IN ONTARIO

Mark Cornish*

This case comment explores the tension between principles that guide domestic contractual bargaining and interpretation in Ontario with reference to two recent trial-level decisions. The courts' analyses in McCain *and* Barton *suggest a way to reconcile the apparent tension between principles of autonomy and fairness. In light of these decisions, and drawing on the literature in this area, the paper suggests a two-pronged approach for courts to adopt when deciding whether to set aside a domestic contract. This approach attempts to ensure that courts only uphold*

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domestic contracts that are negotiated by truly autonomous parties.

INTRODUCTION

The 1975 decision of *Dal Santo v Dal Santo*[1] provides a clear and succinct statement of the underlying policy for domestic contracts:[2] "It is of great importance not only to the parties but to the community as a whole that contracts of this kind should not be lightly disturbed."[3] Drawing on this policy, the law in Ontario effectively prioritizes the primacy and finality of domestic contracts, making them *prima facie* enforceable with the onus on the party wishing to set the contract or a provision thereof aside pursuant to criteria set out in s 56(4) of Ontario's *Family Law Act* (*FLA*).[4] This framework gives rise to the question: what is the appropriate balance between the principles of private autonomy and overall fairness in the context of domestic contractual bargaining? This paper will consider this question in the context of two Ontario Superior Court of Justice decisions: *McCain v McCain*[5] and *Barton v Sauvé*.[6] Drawing on these cases, the paper offers a two-pronged

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1 (1975), 21 RFL 117, 1975 CarswellBC 45 (BCSC) [*Dal Santo* cited to RFL].

2 For the purpose of this paper, the term "domestic contracts" is meant to cover marriage contracts and cohabitation agreements, but not separation agreements. In Ontario, these terms are defined by ss 52, 53, and 54 of the *Family Law Act*, RSO 1990, c F3 respectively. As such, this paper focusses on contracts made before or during a relationship—i.e., not at its end.

3 *Dal Santo*, *supra* note 1 at para 16.

4 *Family Law Act*, RSO 1990, c F3 [*FLA*].

5 2012 ONSC 7344, 34 RFL (7th) 82 [*McCain*].

6 2010 ONSC 1072 [*Barton*].

inquiry for courts in Ontario to consider to ensure that parties involved in domestic contractual bargaining were indeed autonomous. This determination would, in turn, assist courts in deciding whether to set aside a particular domestic contract executed by said parties.

LEGAL BACKGROUND

Both *McCain* and *Barton* were decided in the context of a tension between two principles that appear to be at odds with each other: autonomy and fairness. Autonomy is understood as the right and ability to make one's own decisions and to have those decisions respected and upheld by others.[7] Fairness is the act and process of treating people equally or in a way that is right or reasonable, usually with reference to an ostensibly objective set of criteria.

For the purposes of this paper, judicial decisions that respect parties' autonomy would uphold their domestic contracts. Decisions that espouse fairness would more readily intervene and even set aside domestic contracts where the court finds that one party did not treat the other procedurally fairly or because the domestic contract results in an ostensibly unreasonable or unjust substantive outcome.

As such, in the context of domestic contracts, fairness can be broken down into two categories: procedural fairness and substantive fairness. The Supreme Court of Canada understands procedural fairness as

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7 For the purpose of this paper, the most significant of those "others" are courts.

ensuring that the process of negotiation and execution of agreements is fair. The court should ensure that neither of the bargaining parties are vulnerable[8] vis-à-vis the other party or, if one party is indeed vulnerable, that the other party did not take advantage of that vulnerability.[9] In this vein, procedural fairness would include the opportunity and ability to negotiate, the provision of full financial disclosure on behalf of both parties, the absence of threats or pressure, and the presence of independent legal advice.

Substantive fairness is achieved when "the substance of the agreement, at formation, complied substantially with the general objectives of the [*Divorce Act*[10] or *FLA*]."[11] As such, the more a domestic contract deviates from the objectives or anticipated outcomes of the relevant Act, the less substantively fair it is.[12] However, a domestic contract that so deviates may, and should, still be viewed as substantively fair if there is a valid reason or justification for it, such as if one party gives up something

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8 "Vulnerable" meaning significantly physically, mentally, emotionally, or financially inferior to the other bargaining party.

9 See *Rick v Brandsema*, 2009 SCC 10 at para 42 [*Rick*], citing *Miglin v Miglin*, 2003 SCC 24 at para 4 [*Miglin*].

10 *Divorce Act*, RSC 1985, c 3 (2nd Supp).

11 *Rick*, *supra* note 9 at para 42.

12 For example, a domestic contract that splits a married couple's net family property in Ontario five percent to one spouse and nintety-five percent to the other would very likely be considered substantively unfair because it differs significantly from the equal (i.e., 50–50) property sharing regime established in s 5 of the *FLA*.

to which they would be statutorily entitled in exchange for a benefit they would not otherwise have.[13]

Two appellate-level judgments serve as exemplifications of these two principles. The majority decision in *Hartshorne v Hartshorne*[14] is driven by autonomy interests while the decision in *LeVan v LeVan*[15] promotes fairness.

In *Hartshorne*, a wife, after obtaining independent legal advice, signed a marriage agreement on her wedding day.[16] The agreement significantly limited her entitlement to property sharing in the event she and her husband separated in the future.[17] The Supreme Court of Canada upheld the marriage contract, despite it being signed in a jurisdiction where the legislation specifies that the courts' role in division of assets on marital breakdown is fairness (i.e., British Columbia).[18] Bastarache J, for the majority, stated:

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13 For instance, a contract where one spouse that agrees to partake in only 25 percent of the couple's net family property in exchange for being made a joint tenant owning a portion of the matrimonial home equal to their spouse could, depending on the value of the home, be viewed as substantively fair.

14 2004 SCC 22 [*Hartshorne*].

15 2008 ONCA 388 [*LeVan*].

16 See *Hartshorne*, *supra* note 14 at paras 2, 6.

17 See *ibid* at paras 5–6.

18 See *ibid* at para 13.

> [I]n a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement.[19]

Contrast *Hartshorne*'s emphasis on private autonomy with *LeVan*'s concern for fairness. In *LeVan*, a wealthy future husband wanted his future wife to enter into a marriage contract in an attempt to shield his assets in the event of separation.[20] Although the future wife initially received independent legal advice, her future husband sent her to a lawyer who had connections to his family.[21] The Court of Appeal found that the future wife did not receive effective independent legal advice and that the future husband failed to disclose his assets to his future wife pursuant to s 56(4)(a) of the *FLA*.[22] The Court stated:

> Although there is nothing in the governing legislation that suggests that fairness is a consideration in deciding whether or not to set aside a marriage contract, I do not see why fairness is not an appropriate consideration in the exercise of the court's discretion in the second stage of the s. 56(4)(a) analysis. In my view, once a judge has found one of [the]

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19 *Ibid* at para 67.

20 See *LeVan*, *supra* note 15 at paras 7, 9–11.

21 See *ibid* at para 26.

22 See *ibid* at paras 61–62.

> statutory preconditions to exist, he or she should be entitled to consider the fairness of the contract together with other factors in the exercise of his or her discretion. It seems to me that a judge would be more inclined to set aside a clearly unfair contract than one that treated the parties fairly.[23]

LeVan therefore sets up a two-step process for courts to follow when deciding whether to set aside a domestic contract in Ontario. The party seeking to have the domestic contract or provision thereof set aside must show (1) that one of conditions in *FLA* s 56(4) exists and, if so, (2) why the court *should* exercise its discretion to set the domestic contract aside (the *LeVan* process).[24] The court is clear that it is possible and appropriate to consider the fairness of the domestic contract in the second step of this analysis.[25]

The Ontario Court of Appeal in *LeVan* thus reads fairness into the exercise of discretion in the *FLA* s 56(4)[26] whilst the Supreme Court in *Hartshorne* diminishes the role of fairness in the applicable British Columbia legislation in an effort to promote individual autonomy. Later cases from the Supreme Court of Canada, such as

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23 *Ibid* at para 60.

24 See *ibid* at para 33.

25 See *ibid* at para 60.

26 Section 56(4) of the *FLA* does not identify "fairness" as a consideration for setting aside domestic contracts.

Miglin v Miglin[27] and *Rick v Brandsema*,[28] arguably mandate that fairness play a more prominent role when courts are deciding whether or not a domestic contract should be set aside.[29] However, the Supreme Court was clear that the guidance in *Miglin* and *Rick* is applicable to separation agreements only.[30] The Supreme Court saw separation agreements as requiring a more exacting test for review than commercial contracts because they are "negotiated between spouses on the fault line of one of the most emotionally charged junctures of their relationship—when it unravels."[31] As such, both *Miglin* and *Rick* have limited applicability for the purpose of reviewing and potentially setting aside domestic contracts.[32]

Therefore, *Hartshrone* and *LeVan* set up an apparent tension between autonomy and fairness[33] that serves as the backdrop for *McCain* and *Barton*.

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27 *Miglin*, *supra* note 9.

28 *Rick*, *supra* note 9.

29 See *Miglin*, *supra* note 9 at paras 4, 67, 73–75, 82–83; *Rick*, *supra* note 9 at paras 1, 40–44, 49.

30 See *Rick*, *supra* note 9 at paras 39–40.

31 *Ibid* at para 40.

32 "Domestic contracts" as defined in note 2 of this paper.

33 Other writers have picked up on this apparent tension. See Carol Rogerson, "Spousal Support Agreements and the Legacy of *Miglin*" (2012) 31:1 Can Fam LQ 13 at 32 (positing autonomy and fairness as principles that are difficult to balance). See also: Lucy-Ann Buckley, "Relational Theory and Choice Rhetoric in the Supreme Court of Canada" (2015) 29:2 Can J Fam L 251 at 254 (discussing autonomy and fairness as an ongoing "debate" and "tension").

FACTUAL AND LEGAL SUMMARY: *MCCAIN*

In an attempt to preserve his family's wealth, Mr. McCain's father required that his children enter into marriage contracts with their spouses to limit those spouses' entitlement to property and spousal support at family dissolution, lest his children be disinherited.[34] His son (Mr. McCain), an extremely wealthy business man worth approximately $500 million dollars, passed on this information to his wife (Ms. McCain) approximately 15 years into their marriage, and after receiving independent legal advice, she signed the contract.[35] When the parties eventually separated (after 30 years of marriage), Ms. McCain sought to set aside the provision of the contract waiving spousal support and made a claim for interim spousal support.[36]

Greer J concluded that the contract was unconscionable.[37] She found that Ms. McCain had little choice but to sign the agreement, knowing that her husband would be disinherited if she refused to sign.[38] Further, she held that Ms. McCain was under subtle and psychological duress when she signed the marriage contract because her

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34 See *McCain*, *supra* note 5 at paras 4–6.

35 See *ibid* at paras 13, 57, 65.

36 See *ibid* at paras 1, 9.

37 See *ibid* at para 88.

38 See *ibid* at paras 65–66.

decision to sign determined whether her husband would remain an heir to his father's fortune.[39]

As a result of these findings, Greer J severed the provision of the marriage contract that precluded Ms. McCain from receiving spousal support and ordered support in the amount of $175,000 per month in addition to $2.8 million of retroactive spousal support.[40]

LEGAL AND FACTUAL SUMMARY: *BARTON*

The parties, Ms. Barton and Mr. Sauvé, entered into a cohabitation agreement several months before the end of their 8-year relationship.[41] They discussed their cohabitation agreement at a time when Mr. Sauvé was suffering from depression and living on worker's compensation due to a work injury.[42] Ms. Barton had recently received a $2 million inheritance, which she used a portion of to pay off Mr. Sauvé's debts. She also made him the joint-owner of a house she paid for.[43] Essentially, in return for including him on title for the new home, Ms. Barton asked Mr. Sauvé to sign an agreement limiting his entitlement to a payment of $70,000 as compensation for his contribution to the family home in the event of a

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39 See *ibid* at para 74.

40 See *ibid* at paras 75, 103, 108

41 See *Barton*, *supra* note 6 at paras 1, 15.

42 See *ibid* at paras 20, 55, 66.

43 See *ibid* at paras 10–12, 15.

separation.[44] When the parties separated, Mr. Sauvé applied under s 56(4) of the *FLA* to set aside the $70,000 limitation.[45]

Blishen J, in upholding the $70,000 limitation as stipulated in the agreement, noted that the presence of vulnerabilities do not, without more, evince unconscionablility, duress or undue influence.[46] She concluded that although Mr. Sauvé was "a somewhat vulnerable party. . . he did receive independent legal advice, understood the nature and consequences of the agreement and signed it voluntarily."[47] Blishen J framed the discussion of the cohabitation agreement and decision to have the new home purchased in both parties' names as a true negotiation, and one where Ms. Barton was not taking advantage of Mr. Sauvé. The contract was therefore not unconscionable, did not involve undue influence, and nor was it signed under duress—all of which are considerations under s 56(4)(c) of the *FLA*.[48]

Blishen J thus upheld the cohabitation agreement's limited allocation of $70,000 to Mr. Sauvé,[49] although the court set aside the waiver of spousal support in the same agreement

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44 See *ibid* at paras 54, 60.

45 See *ibid* at paras 22, 47.

46 See *ibid* at para 66.

47 *Ibid* at para 67.

48 See *ibid* at paras 64–67.

49 See *ibid* at paras 71–72.

pursuant to s 33(4) of the *FLA* on the basis that it resulted in "unconscionable circumstances" for Mr. Sauvé.[50]

ANALYSIS

The *outcome* of the decisions in *McCain* and *Barton* ostensibly espouse different principles—*McCain*, in setting aside the provision of the marriage contract under review, espouses fairness, while *Barton*, in upholding the cohabitation agreement (with the exception of the provision waiving spousal support), espouses individual autonomy.

Although *McCain* does not use *FLA* s 56(4) to set aside the waiver of spousal support, Greer J's findings of unconscionability and duress[51] demonstrate that concerns about fairness were paramount. She is sensitive to the context and underlying power dynamics of the parties at the time they signed the agreement. This approach thus follows *LeVan* insofar as Greer J considers fairness in her discussion of unconscionability and duress. Indeed, fairness has a direct bearing on the outcome of her judgment.[52]

Blishen J in *Barton* indirectly considers the fairness of the agreement as she assesses issues such as the parties'

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50 *Ibid* at para 87.

51 See *McCain*, *supra* note 5 at paras 65–66, 88.

52 See *ibid* at paras 54, 83, 88. See especially: "Even the Husband, in his examination, agreed that the Contract was not *fair* to his Wife. It is clear on the face of the Contract that it is unfair, improvident and unconscionable." (*Ibid* at para 88 [emphasis added]).

vulnerabilities and presence of duress.[53] However, Blishen J ultimately upholds the agreement, which suggests she put more emphasis on respecting the individual autonomy of the bargaining parties, thus following the Supreme Court's approach in *Hartshorne*. Indeed, *Hartshorne* is the first case cited by Blishen J in the portion of her judgment examining the cohabitation agreement.[54]

Notwithstanding the foregoing discussion, an examination of *Barton* that focuses more on the court's *reasoning* and less on the *outcome* reveals that concerns about fairness were also relevant, if not vital, to Blishen J's decision. For example, she considered the fact that Ms. Barton paid off all of Mr. Sauvé's debts,[55] bought a new house in joint tenancy with Mr. Sauvé,[56] and engaged in back-and-forth negotiation about whether to buy the new house as joint tenants and what the allocation of funds to Mr. Sauvé should be in the event of separation.[57] These considerations evince that Blishen J was ensuring that both parties were treating each other *fairly*, procedurally, such that any power imbalance was mitigated by real, non-threatening negotiation. This is in contrast to *McCain*, where there was no real opportunity for Ms. McCain to negotiate since she was provided with an implicit

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53 See *Barton*, *supra* note 6 at paras 66–68.

54 See *ibid* at para 41.

55 See *ibid* at paras 11–12, 18, 67.

56 See *ibid* at paras 15–16, 62, 67.

57 See *ibid* at paras 54, 67.

ultimatum: "you must sign this contract or I [Mr. McCain] will divorce you."[58]

Fairness was also key to one aspect of the *outcome* in *Barton*, namely the issue of spousal support. Blishen J turned her mind to Mr. Sauvé's financial circumstances, his financial contributions to the relationship, and the fact that he was unable to return to any meaningful employment due to physical and psychological disabilities.[59] The fact that Blishen J highlighted and addressed these concerns by setting aside the waiver of spousal support in the agreement evince that she was attuned to the circumstances of Mr. Sauvé, whom she describes as "a somewhat vulnerable party,"[60] in an attempt to achieve a substantively *fair* outcome.

Furthermore, one key factual difference at the time the parties signed their respective agreements sheds light on how different outcomes were reached in *McCain* and

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58 See *McCain*, *supra* note 5 at para 74. Note that although the pressure to sign the domestic contract stemmed from Mr. McCain's father, who threatened disinheritance, Greer J (properly) equally attributed the pressure to Mr. McCain himself. Mr. McCain could have refused to ask his wife to sign the contract and dealt with his father's threat to disinherit him directly, but he did not do. Thus, by asking Ms. McCain to sign the contract, to quote Greer J, "the duress was subtle and psychological, in that [Ms. McCain] appeared to be the key to [Mr. McCain] remaining as one of his father's heirs. Of course [Mr. McCain] did not say 'you must sign this contract or I will divorce you,' but that was the underlying stake in it all."

59 See *Barton*, *supra* note 6 at para 87.

60 See *ibid* at para 67.

Barton.[61] That key difference is fear of imminent separation in the event that one party does not sign the agreement. In *McCain*, Ms. McCain experienced this fear when she "was told that if she did not [sign] the contract, the parties' lifestyle as a family would greatly suffer."[62] Greer J properly found that Mr. McCain's implicit message to his wife was, "You must sign this contract or I will divorce you."[63] Contrast this with Mr. Sauvé's situation in *Barton*, where the immediate consequence of failure to sign the cohabitation agreement was not separation, but rather, a refusal to put him on title for the new house Ms. Barton was purchasing. Ms. Barton does not threaten the relationship whereas Mr. McCain does.

The disparity between the consequences for failure to sign the agreements in each case is a key distinguishing factor that courts reviewing domestic contracts must be alive to. This is especially so considering that domestic contracts are often signed when circumstances between the parties are favourable—they are either entering into a new and exciting chapter of their life (i.e., marriage) or are already happily married or cohabiting. As such, the party being asked to sign a domestic contract often does not see

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61 Note that I am examining only the circumstances at the time the parties signed the agreement that factored into the courts' analysis in each case, and not the position the parties were left in at the time of separation. A discussion and analysis of how the courts do and/or should handle the resulting circumstances the parties find themselves in at the dissolution of the relationship is an important discussion, but one that is beyond the scope of this paper.

62 *McCain*, *supra* note 5 at para 6.

63 *Ibid* at para 74.

the future dissolution of the relationship as a realistic possibility—a dissolution which would trigger the provisions of a domestic contract that are not in their best interest. Similar critiques have been levelled by leading family law scholars who argue that assessing the fairness of domestic contracts must take into account the power imbalances between spouses/cohabiting couples,[64] gender inequalities, and flaws in the parties' capacity to contract.[65] While jurisprudence from the Supreme Court of Canada has picked up on these nuances in the context of separation agreements,[66] which have been framed as agreements negotiated in an "emotionally charged juncture" of a relationship,[67] domestic contracts have not been discussed in as much detail.[68] *McCain* and *Barton* evince that the more subtle forms of pressure, such as coercion (and even duress), at play when parties sign domestic contracts in the prime of their relationship warrant the same degree of judicial attention as separation agreements—with a focus

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64 See Martha Shaffer, "Domestic Contracts, Part II: The Supreme Court's Decision in *Hartshorne v Hartshorne*" (2004) 20:2 Can J Fam L 261 at 280–88.

65 See Sarah Whitmore, "Deconstructing 'Economic Man's' Application to Marriage Agreements: An Analysis of the Method of Contractual Enforcement in *Hartshorne v Hartshorne*" (2010) 29:3 Can Fam LQ 303 at 315.

66 See e.g. *Rick*, *supra* note 9 at para 41, citing from *Miglin*, *supra* note 9, Lebel J, dissenting: "the law must be sensitive to the 'social and socio-economic realities' that shape parties' roles in spousal relationships and have the potential to negatively impact settlement negotiations upon marriage breakdown."

67 *Ibid* at para 40.

68 Buckley, *supra* note 33 at 307.

on how heart-shaped glasses, rather than heartbreak, may catalyze and manifest as vulnerability.

Even independent legal advice, which presumably would bring the risks of a particular domestic contract or provision thereof to the forefront of the party's mind, is often not enough to convince a party to refuse to sign. We notice this phenomenon occurring in many of the cases cited in this paper (*McCain*, *Barton*, and even *Hartshorne* and *LeVan*) where, despite receiving legal advice, the parties signed agreements that they later attempted to have set aside.

PROPOSAL: A NEW FRAMEWORK

The courts in both *McCain* and *Barton* struggle with fairness concerns even though they understand, pursuant to the Supreme Court's comments in *Hartshorne* and *Miglin*,[69] that domestic contracts should not be set aside lightly. This struggle may be the product of fairness and autonomy being posited as a dichotomy, where one principle appears to be in conflict with the other.[70]

The courts in *McCain* and *Barton*, although not expressly saying so, are giving primacy to individual

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69 *Miglin* speaks more directly to waivers of spousal support in separation agreements, which are subject to different principles and more exacting tests for review, as discussed above in part (2) of this paper. See *Miglin*, *supra* note 9. Nonetheless, there are portions of *Miglin* that espouse individual autonomy in a manner similar to *Hartshorne*. See *McCain*, *supra* note 5 at paras 69–71.

70 See Rogerson, *supra* note 33 at 32; Buckley, *supra* note 33 at 254.

autonomy, while ensuring that the parties are on a level bargaining plane. If the parties are not on a level bargaining plane, the courts review the circumstances to determine what, if any, contractual bargaining occurred to ensure that no party exploited any inequality in bargaining power when the domestic contract was considered and eventually executed. Greer J, alive to the pressures Ms. McCain was experiencing, including concerns about her husband's inheritance and preservation of the family unit,[71] properly concluded that Ms. McCain was under duress and that the contract itself was unconscionable.[72] In other words, Ms. McCain was not actually an autonomous bargaining party in the circumstances. Blishen J noted that Mr. Sauvé was a "somewhat vulnerable party," but that he was still able to bargain with Ms. Barton. She also noted that Ms. Barton did not take advantage of his vulnerabilities or unduly influence him. Blishen J correctly concluded that there was no unconscionability, duress, or undue influence.[73] Put differently, Mr. Sauvé was an autonomous bargaining party *vis a vis* Ms. Barton.

As such, Ontario courts may view fairness and autonomy not as mutually exclusive principles, but rather as two guiding principles to set up a two-pronged analysis at the second step of the *LeVan* process[74] for deciding

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71 See *McCain*, *supra* note 5 at paras 4–6, 65–66.

72 See *ibid* at paras 74, 88.

73 See *Barton*, *supra* note 5 at paras 66–68.

74 I.e., the step where the court considers whether it should exercise its discretion to set aside the contract after finding that one of the conditions in *FLA* s 56(4) exists.

whether to set aside a domestic contract or a provision thereof: (i) that the goal of court, pursuant to the court's policy rationales in *Hartshorne* and, to a lesser extent, *Miglin*, should indeed be to uphold a domestic contract to foster autonomy, but in so doing, (ii) the court must ensure the contract is truly the product of two autonomous parties.[75] It is at this second prong where concerns about fairness ought to be considered. More traditional contract law concepts that touch on fairness, such as inequality in bargaining power, unconscionability, duress, and undue influence, would already have been addressed at step one of the *LeVan* process (i.e., under *FLA* s 56(4)(c)). As such, the focus of the second prong of step two of the *LeVan* process would be on procedural and substantive fairness, as defined in part (2) of this paper. To ensure the parties were truly autonomous, the court would consider whether the domestic contract was negotiated in a procedurally fair manner and whether the contract resulted in a substantively fair outcome for both parties. While there would not, and could not, be a definite threshold for a finding of procedural or substantive unfairness, the more indicia of either form of unfairness, the more likely a court would be to exercise its discretion to set aside some or all of the domestic contract.

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[75] To summarize, the two prongs being suggested would fit into the *LeVan* process as follows: the party seeking to have the domestic contract or provision thereof set aside must show that (1) one of conditions in *FLA* s 56(4) exists and, if so, (2) why the court should exercise its discretion to set the domestic contract aside. Under this discretionary second step, the court would undertake a two-pronged inquiry to ensure both autonomy *and* fairness: (i) the court should indeed uphold the domestic contract under review to foster autonomy, but in so doing, (ii) the court must ensure the contract is truly the product of two autonomous parties.

At the second prong where fairness concerns are to be taken into account, the court should be particularly attuned to the considerations discussed in the final two paragraphs of the "Analysis" segment of this paper. This includes (a) assessing implicit threats or fears of the dissolution of the relationship on behalf of the party being asked to sign and (b) recognizing that parties entering into a domestic contract are in love or infatuated with one another, making them less focused on protecting their best interests and more concerned with fostering the continuation of their relationship. The party being asked to sign may thus be blind to any and all risks they might take on when signing a domestic contract, even if they receive independent legal advice.

Further, contextual and structural forms of coercion and oppression, such as gender inequality, must also be considered by courts at the second prong. This approach concurs with suggestions offered by Diana Majury, who argues that courts reviewing domestic contracts must be "willing to recognize system inequality of bargaining power" and adopt a gender-based approach to unconscionability.[76] I would take Majury's analysis one step further by suggesting that courts not limit assessments of systemic inequality to considerations of gender, but rather to utilize an intersectional approach that recognizes how other systems of oppression, such as racism, queerphobia, classism, and ableism, also affect domestic contractual bargaining and fairness.

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[76] Diana Majury, "Unconscionability in an Equality Context" (1991) 7 Can Fam LQ 123 at 133–34.

For example, consider a closeted LGBTQ+[77] partner who comes from a queerphobic[78] family or society who wants to remain with their supportive intimate partner. Such an individual may not wish to marry their intimate partner, given how public the act of marriage is and the repercussions that may flow from that act. However, this individual's intimate partner may, instead of getting married, wish to enter into a domestic contract mandating a property sharing scheme similar to the one imposed on married couples under the *FLA*. The closeted individual may be more inclined to sign such a contract, even if it would result in a financial disadvantage to them, in an attempt to appease their intimate partner, seeing it as an alternative to marriage. They may even forgo independent legal advice in this circumstance, believing it to be unnecessary because they have an otherwise healthy relationship or because they do not even want to disclose their sexuality/relationship status to a lawyer. A court attuned to these nuances of queerphobia and other systemic and structural forms of oppression would be better able to understand how the domestic contract in this example may not have been negotiated in a procedurally fair manner—the closeted individual's reluctance to marry or otherwise disclose their sexuality/relationship status is likely

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77 Lesbian, gay, bisexual, transgender, queer+ (including, *inter alia*, questioning, intersex, pansexual, and two-spirited individuals).

78 Defined to concern fear and/or hatred of things and relationships not heterosexual and cisgender.

inhibiting their ability to negotiate as an autonomous party.[79]

As such, courts must not only be attuned to duress, undue influence, and unconscionability, but also to how systemic and structural forms of oppression manifest themselves in intimate relationships in ways that are much more subtle than in arms-length business transactions.[80] The proposed second prong of the second step of the *LeVan* process provides an apt locus for such considerations.

This two-pronged approach largely conforms with Lucy-Ann Buckley's conception of a relational-autonomy approach to spousal support and property agreements—an approach that focusses 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."[81] Buckley prefers a relational-autonomy response to financially disadvantageous or manifestly unequal domestic contracts that "holds that individuals must be able to reflect critically on equality

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79 This is the case notwithstanding that the domestic contract may otherwise be substantively fair, if it did indeed mirror the property sharing provisions of the *FLA*.

80 See Rogerson, *supra* note 33 at 20. Note that *Miglin* itself highlights these concerns: *Miglin*, *supra* note 9 at paras 74–75. As such, courts should breathe new life into these paragraphs and strive to give primacy to such comments when called upon to decide whether to set aside domestic contracts, and not only when deciding whether to set aside separation agreements.

81 Buckley, *supra* note 33 at 253.

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."[82] The two-pronged approach suggested in this paper attempts to achieve this by ensuring, at the first prong, that courts understand that domestic contracts ought to be respected and upheld to preserve parties' autonomy,[83] but also, at the second prong, that the bargaining parties were truly autonomous in that they had a "real choice" and opportunity to reflect critically on equality norms, even if they depart from them in executing or choosing not to execute a domestic contract. While Buckley has reservations as to how much difference a relational-autonomy approach would make in practice to spousal support[84] and marital property agreement cases,[85] she does end up concluding that it is "normatively preferable" in the context of family relationships insofar as it vindicates the importance of emotion and connection in the decision-making process.[86] The two-pronged inquiry suggested in this paper simply ensures that courts consider and engage with relational autonomy concerns when deciding whether to set aside a given domestic contract.

Presumptions embedded in many of Bastarache J's comments in *Hartshorne* further underscore the need for

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82 *Ibid* at 266.

83 Or, to borrow Buckley's language, to preserve the parties' "real choice[s]" to decide whether or not to depart from "equality norms." See *ibid*.

84 *Ibid* at 298–391.

85 *Ibid* at 301–04.

86 *Ibid* at 305.

this two-pronged approach. Consider comments such as "by signing the Agreement, the appellant and the respondent entered their marriage with certain expectations on which they were reasonably entitled to rely"[87] and "in a framework within which private parties are permitted to take personal responsibility for their financial well-being."[88] Bastarache J presumes that both parties are fully autonomous and able to bargain reasonably and rationally. Whitmore makes a similar observation, noting that Bastarache J's analysis assumes that parties conduct "a rational cost-benefit analysis to maximize their own utilities . . . weigh[ing] these consequences [of relationship dissolution] with objective probabilities in mind."[89] If both bargaining parties were indeed "factually" autonomous and were always capable of conducting "rational cost-benefit analyses,"[90] then Bastarche J's comments would be apt and appropriate; hence the need to ensure that both parties in a given case are indeed autonomous before deferring to the parties' intentions as expressed in a domestic contract.

This concern to ensure parties' autonomy concurs with a trend in how courts have come to interpret *Miglin* approximately a decade after its release, as observed by Carol Rogerson. That interpretation is that "*fairly negotiated*" or "*reasonable* agreements" should be upheld, as opposed to respecting and upholding final agreements without qualification.[91] This interpretation, insofar as

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87 *Hartshorne*, *supra* note 14 at para 65.

88 *Ibid* at para 67.

89 Whitmore, *supra* note 65 at 314.

90 *Ibid*.

91 Rogerson, *supra*, note 33 at 20.

courts may have limited it to separation agreements, can be extended to the realm of domestic contracts simply by adopting the two-pronged approach suggested in this paper.

CONCLUSION

The courts' analyses in *McCain* and *Barton* suggest a way to reconcile the apparent tension between the principles of autonomy and fairness in the context of domestic contracts. The above two-pronged approach ensures that parties involved in domestic contractual bargaining are truly autonomous. This safeguards *Hartshorne*'s effort to preserve individual autonomy while simultaneously making space for *LeVan*'s concern for fairness, thus finding harmony amid two principles that at first glance seem diametrically opposed.