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What is the Legal Effect of an Unenforceable Agreement in an Unjust Enrichment Claim?

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Case commented on: *Lemoine v Griffith*, 2014 ABCA 46

The recent decision of the Alberta Court of Appeal in *Lemoine v Griffith* is interesting for what it tells us, in the context of a claim of unjust enrichment, about the legal effects of a prenuptial agreement that was both found and admitted to be unenforceable because of undue influence and a lack of independent legal advice. According to the majority, Justices Ronald Berger and Clifton O'Brien, once the trial judge found the agreement unenforceable for those reasons — and the appellant abandoned his challenge to that finding — the prenuptial agreement was not a factor in either supplying a juristic reason for any enrichment or evidence of the parties' intentions. However, despite the fact that the unenforceability of the prenuptial agreement was not an issue, in his dissent Justice Frans Slatter would have overturned the finding of undue influence, holding (at para 103) that the "trial judgment cannot stand." While that is not the only point of disagreement between the majority and the dissent, it is the point that I will focus on in this comment.

Facts

The couple in this case, James Griffith and Constance May Lemoine, began cohabiting in 1995. They became engaged shortly thereafter, but never married. Four years into the relationship, in 1999, they entered into a prenuptial agreement which stated that it would apply whether or not they married. The couple had a son in 2001, and a child of Lemoine's from a previous relationship was also a member of the family. The relationship between Lemoine and Griffith lasted for 14 years, until the couple's separation in 2009. During their cohabitation, Griffith was primarily a farmer, initially as part of the Griffith Farms partnership with his father, although Griffith's wealth was mainly due to his buying and selling of land. Lemoine assumed the major role in domestic matters, while also contributing to the farm operations and, in 2006, opening her own western wear store.

There is much more that can be said about the couple's relationship and the property of one or the other or both of them, but I want to focus on the facts surrounding the drafting and execution of what I will refer to as the prenuptial agreement (in preference to the court's use of matrimonial property agreement, which suggests the couple did marry and were governed by the

Matrimonial Property Act, RSA 2000, c M-8, s. 37). That prenuptial agreement set up a "separation of property" regime. It protected each of the party's assets from the other, even providing that Lemoine would not become entitled to share in any increase in the value of Griffith's assets or in any property acquired by him during their cohabitation. Almost all of the evidence concerning the prenuptial agreement was given by Lemoine, but her evidence was uncontradicted by Griffith and the two lawyers involved and it was accepted by the trial judge.

The prenuptial agreement arose following the remarriage of Griffith's father in 1998. According to the trial judge, Justice S.L. Hunt McDonald, in *Lemoine v Griffith*, 2012 ABQB 685 at paras 36-46, Lemoine was advised that the Partnership Agreement for Griffith Farms contained a clause wherein the parties agreed to "enter into a pre-marriage contract with any perspective [sic] spouse providing for, in part, the protection of the partnership assets herein." It was not disputed that Lemoine orally agreed to sign a contract with Griffiths in order to protect his father's interest in Griffith Farms.

The facts which formed the basis of the undue influence allegation were the following. Lemoine testified that she was told that she had to sign the prenuptial agreement or else Griffith's father would make her move out of the farm house which she had occupied with Griffith and the children for 4 ½ years and which was located on the father's land. Lemoine never saw a draft of the prenuptial agreement before attending with Griffith at the office of his lawyer, Robert Young, to execute the agreement. Both Griffith and Lemoine sat in Young's office while he read through and explained the prenuptial agreement to them and Young had Lemoine initial the bottom right hand corner of each page as he read it aloud to them. Griffith then signed the prenuptial agreement in Lemoine's presence.

Then Young called in another lawyer, Gerald Quigley, to meet with Lemoine for the purpose of providing independent legal advice. While Lemoine met with Quigley, Griffith waited in Young's waiting room. Quigley asked Lemoine if she understood what she was signing and she confirmed to him that she did because Young had just read the document to her. Quigley then had her sign the prenuptial agreement. Quigley did not explain the agreement to her or its consequences for her. He witnessed her signature and then signed a Certificate of Independent Legal Advice and a Matrimonial Property Act Certificate. The whole interaction between Lemoine and Quigley took no more than 10 or 15 minutes, according to Lemoine. She was never billed for Quigley's legal services. Instead his fees were paid by Griffith as disbursements in Young's statement of account. The total amount of the disbursement for Quigley's services was $75. Quigley testified that his hourly rate at the time was $120 to $250. As a result, the trial judge found that the amount he charged reflected a total time commitment of 18 to 30 minutes.

Law

Lemoine's action included an unjust enrichment claim, as well as requests for support. It is necessary to set out the elements of a claim for unjust enrichment briefly in order to identify the points where the existence of a prenuptial agreement might be relevant.

The property rights of cohabiting parties are governed by the common law of unjust enrichment, most recently synthesized by the Supreme Court of Canada in *Kerr v Baranow*, 2011 SCC 10 (CanLII). That decision set out the elements of an unjust enrichment claim as follows (at paras 36-45):

> (a) whether the defendant has been enriched by the plaintiff, with the plaintiff needing to show that he or she gave something to the defendant which the defendant received and retained;
> (b) whether the plaintiff has suffered a corresponding deprivation, with the plaintiff needing to show that the defendant has been enriched and that the enrichment corresponds to a deprivation which the plaintiff has suffered; and
> (c) the absence of a juristic reason for the benefit and corresponding detriment, i.e., proof that "there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case" (at para 40).

There is a two-step analysis for the third element, the absence of juristic reason:

> [43] The first step of the juristic reason analysis applies the established categories of juristic reasons [e.g., a contract, a disposition of law, a donative intent]; in their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied.

At the remedy stage, *Kerr* recognized the traditional two bases of recovery — a claim for the provision of unpaid services and a claim for contribution to the acquisition, improvement, maintenance or preservation of a specific property — and added a third basis for recovery for situations where the parties were engaged in a "joint family venture" (at paras. 57-60). If a joint family venture is identified, then the appropriate remedy is a monetary award that is a share of the increase in wealth over the course of the relationship. Joint family ventures are identified by looking at the relationship and, within it, mutual effort, economic integration, actual intent, and priority of the family (at paras 87-100). It is the "actual intent" aspect of the joint family venture that might make an agreement relevant, this time at the remedy stage.

Thus, a prenuptial agreement can have two roles in an unjust enrichment claim, either as a juristic reason justifying any enrichment or as an indication of the parties' actual intention affecting whether there was a joint family venture entitling the claimant to a share of the increase in wealth.

Queen's Bench Decision

At trial, Justice Hunt McDonald found that the prenuptial agreement was tainted by undue influence. She pointed (at para 134) to the fact that Lemoine was told the agreement was only about the partnership, told she would have to leave the farm if she did not sign, never received an advance copy of the agreement to review, was taken to Griffith's lawyers' offices where his lawyer went through the agreement in Griffith's presence, and was "sent off with a complete stranger who spent approximately 15 minutes with her before she signed the agreement."

Once the party to an agreement who is challenging it proves that circumstances amounting to undue influence surrounded the execution of the agreement, it is up to the party trying to have the agreement enforced to try to remove that taint. That is usually done by showing that the party challenging the agreement entered into it voluntarily and with a full understanding of his or her legal position and the effect of the agreement on their legal position. Proving they had access to, and took advantage of, independent legal advice is one way to prove voluntariness, knowledge

and understanding. As the Alberta Court of Appeal stated in *Corbeil v Bebris* (1993), 105 DLR (4th) 759, 141 AR 215, 49 RFL (3d) 77:

> [13] The function of the advice, in that context, is to remove a taint that, left unremoved, might, according to contract or equity law, invalidate the contract. Judges cannot therefore simply say that an agreement is unenforceable for lack of independent legal advice. At the very least, they must first find a taint.

Both Griffith and Lemoine had called expert evidence as to the standard of care applicable to a lawyer retained to provide independent legal advice on an agreement of this nature in 1999. Lemoine called Lonnie Balbi, QC, and Griffith called Wendy Best, QC, both well-known Calgary family law lawyers. Justice Hunt McDonald decided (at para 108) that Quigley did not meet the standard of care articulated by either expert. She found he fell short on both the "independent" requirement and the "legal advice" requirement.

Justice Hunt McDonald concluded (at para 141) "Mr. Quigley was chosen, briefed and paid by [Griffith] and his lawyers. There was nothing 'independent' at all in his services." To reach this conclusion she relied upon (at paras 137-141) the fact that Lemoine did not retain Quigley's services, that Quigley was presented to Griffith's lawyer in his office, that Quigley did not open a file for Lemoine, that Quigley sent his statement of account to Griffith's lawyer, and that Griffith paid Quigley's account.

In considering whether legal advice was given, Justice Hunt McDonald determined (at paras 108 and 142-43) that, because Quigley spent only 18 to 30 minutes in total on the matter, he could not have made sure that Lemoine knew what she was signing, what she was giving up, and what her options were, in addition to discussing the agreement with Young and reviewing the agreement, in the time available. She suggested that the independent legal advice that was required in this context, following a finding of undue influence, mandated that Quigley provide Lemoine with legal advice about the implications of the prenuptial agreement by citing (at para 144) the Alberta Court of Appeal decision in *Corbeil v. Bebris* (at para 12):

> But I distinguish attendance on execution from advice about the wisdom of entering into the agreement. The term "independent legal advice" has a very specific meaning in law. The duty of advising counsel has been summarized in *Halsbury's Laws of England*, Fourth Edition, Vol. 18, Para. 343, at p.157:
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> > The duty of the independent adviser is not merely to satisfy himself that the donor understands the effect of and wishes to make the gift, but to protect the donor from himself as well as from the influence of the donee. A solicitor who is called upon to advise the donor must satisfy himself that the gift is one that is right and proper in all the circumstances of the case, and if he cannot so satisfy himself he should advise his client not to proceed.

Justice Hunt McDonald therefore concluded that Lemoine did not receive independent legal advice in connection with her execution of the prenuptial agreement. Her expectations for independent legal advice in the context of a finding of undue influence seem quite modest in comparison to the Alberta Court of Appeal's decision in *Webb v. Birkett*, 2011 ABCA 13 (CanLII), which places very high demands on lawyers in family law matters, as does the Law Society of Alberta in "Giving Independent Legal Advice." It has often been acknowledged that

in cases of undue influence, independent legal advice requires informed advice about the nature and consequences of an agreement: e.g., *Wright v. Carter* (1902), 87 L.T. 624 at paras 57-58, *Brosseau v Brosseau*, [1990] 2 WWR 34, 100 AR 15 (ABCA) at paras 22-23.

As a result of her findings on undue influence and independent legal advice, Justice Hunt McDonald found the prenuptial agreement could not provide a juristic reason to justify the enrichment that benefited Griffith. Lemoine was therefore entitled to make a claim for a division of the property in his name. She awarded Lemoine a 30 percent share of the increase in Griffith's net worth over the 14 years they cohabited, based on her contribution to the joint family venture, which amounted to just over $915,000.

Grounds of Appeal

Griffith originally challenged, as one of three grounds of appeal, Justice Hunt McDonald's failure to find that the prenuptial agreement was either a binding legal contract or compelling evidence of the parties' intentions and as such a juristic reason to deny, or limit, Lemoine's recovery. However, when the appeal was heard, Griffith did not contest her finding that the agreement was unenforceable due to undue influence. The majority characterize this decision (at para 22) as "understandable." Nevertheless, Griffith still argued that the unenforceable prenuptial agreement should have been taken into account in determining the parties' intent with respect to the division of property upon separation.

Court of Appeal Decision

The majority decision

In their decision, Justices Ronald Berger and Clifton O'Brien first dealt with the issue of whether the prenuptial agreement represented the intentions of the parties regarding a property division, notwithstanding that the agreement was found to be unenforceable due to undue influence.

Griffith's argument was that the subjective intent of cohabiting parties may be relevant to whether there is a joint family venture, or, if there is one, to its scope. Therefore, the trial judge erred in law by failing to give the prenuptial agreement significant weight because, even if it was unenforceable, it reflected the parties' intentions about property division. He relied upon *Kuehn v Kuehn*, 2012 ABCA 67 (CanLII), for this argument. In *Kuehn*, the trial judge ignored an unenforceable prenuptial agreement for the purposes of property division. On appeal, however, the Court of Appeal held that an unenforceable agreement could still be relevant to the distribution of matrimonial property and pointed to section 8(g) of the *Matrimonial Property Act* which requires the terms of an oral or written agreement between the spouses be taken into consideration in dividing the matrimonial property, relying on its earlier judgment in *Corbeil v Bebris.*

The majority in *Griffith v Lemoine* easily distinguished *Kuehn* and *Corbeil v Bebris* because the agreements in the latter two cases were unenforceable since they did not comply with the formal requirements set out in the *Matrimonial Property Act*. That Act does not apply to unmarried couples. More importantly, the problem with the agreement in this case was undue influence, not the formalities of execution. The majority therefore concluded (at para 28) that because Lemoine did not sign the prenuptial agreement of her own free will, it could not be relied upon to provide evidence of her true intentions or expectations.

The only evidence of Lemoine's true intent that the majority found relevant (at paras 30-31) was her intent to protect the Griffith Farms partnership and Griffith's father from any claims that she might have. The Griffith Farms partnership, however, only leased the farm lands owned by Griffith. Lemoine's intent was therefore irrelevant to the division of the increase in value of the lands owned by Griffith.

The majority summarized its conclusions on the legal effect of the unenforceable prenuptial agreement as follows:

> [32] We conclude, therefore, that the [prenuptial agreement] cannot be relied upon to show (a) that the parties did not intend to enter into a joint family venture, (b) that they intended to exclude certain property from an existing joint family venture, or (c) that there was a juristic reason for Mr. Griffith to retain the benefits of Ms. Lemoine's contribution to the joint enterprise.

For the majority, the answer to the question posed in the title to this post — "What is the Legal Effect of an Unenforceable Agreement in an Unjust Enrichment Claim?" — is that it has none.

The dissent

The most interesting aspect of this case is the dissent by Justice Frans Slatter.

The foundation of Justice Slatter's dissent appears to be based upon the concept of autonomy and the role he sees it playing in whether parties marry or cohabit and whether they enter into property agreements or not. Near the start of his lengthy opinion (twice as long as that of the majority), he notes (at para 73) the *Matrimonial Property Act* has excluded cohabiting couples from its regime, and the distinction between married and unmarried couples when it comes to property division on the breakdown of relationships was most recently upheld by the Supreme Court of Canada in *Quebec (Attorney General) v. A*, 2013 SCC 5. Throughout his opinion he returns many times (at paras 75, 77, 116, 119, 123, 127) to his point that the law in Alberta makes a clear distinction between married and unmarried couples and therefore the law of unjust enrichment should not replicate the presumptions applicable to the sharing of property mandated by the *Matrimonial Property Act.* He asserts that matrimonial property law — by which he appears to mean property regimes governing both married and unmarried or cohabiting couples — assumes the autonomy of the spouses:

> [78] The law assumes that the spouses have the free will, intelligence, and capacity to decide a) to marry or not marry, and to cohabitate or not cohabitate, and b) to decide what matrimonial property regime will apply to their relationship.

Autonomy did figure prominently in the decision of Justice LeBel in *Quebec (Attorney General) v. A*, but Justice LeBel was not in the majority when he relied on the concept of autonomy to determine that treating married and unmarried couples differently in connection with property divisions on the breakdown of relationships was not a violation of equality rights. And it is true that in *Kerr v Baranow* the Supreme Court of Canada allowed for "due consideration of the autonomy of the parties" (at para 41) at the second step of the third stage of the unjust enrichment analysis, if the case fell outside of existing categories. However, Justice Slatter does not confine his use of autonomy one step in his unjust enrichment analysis. Instead, it appears to be the foundation of his entire opinion. It is the heart of the section in his opinion headed

"Spousal Property Division" (at paras 68-79), which follows immediately after his summary of the facts, the lower court decision and the standard of review and it therefore sets the stage for his analysis of the division of property in this case.

With respect to the grounds of appeal, like the majority, Justice Slatter deals with the impact of the prenuptial agreement first (at paras 82-103). But Justice Slatter first looks at the prenuptial agreement in the context of whether it offers a juristic reason justifying any enrichment. He acknowledges that Griffith "unexpectedly abandoned" his reliance on the prenuptial agreement during oral argument (at para 86) and did not contest the unenforceability of the agreement on the basis of undue influence (at para 91). Nevertheless, Justice Slatter reviews the trial judge's reasons for finding undue influence (at paras 84-91) and finds them to be wanting. He critiques her reasons on the following bases:

- Her mistaken view that courts are entitled to interfere with contracts (at paras 84-86)
- Her inclusion of misrepresentation about, or ignorance of, the contents of the prenuptial agreement as a factor in finding undue influence (at para 87)
- Her use of the nature of the relationship as giving rise to a presumption of undue influence, on the basis such a presumption would undermine the parties' autonomy (at para 88)
- Her use of the fact Lemoine was told she would have to leave the farm if she did not sign to find actual undue influence, on the basis that refusing to be in a relationship without an agreement is both normal and an exercise of autonomy (at paras 89-90)

In his critique, Justice Slatter therefore undermines every reason the trial judge gave for finding undue influence. He then goes on to critique her finding that there was no consideration for the prenuptial agreement (at paras 94-97) and her failure to give effect to the recital in the agreement that said it was to apply whether they got married or not (at para 98).

On the independent legal advice issue, Justice Slatter says very little. Of course, because the prenuptial agreement is not tainted by undue influence, in his opinion, independent legal advice is not needed to save it.

Still, what he does have to say about independent legal advice is intriguing. In his summary of his analysis of the abandoned ground of appeal (at para 102), he states "Further unfairness arises from the court having "gone behind" the statutory certificate attached to the agreement; whether this is permissible as a matter of law was not argued." This sentence does not refer to Quigley's Certificate of Independent Advice, but to his Matrimonial Property Act Certificate. That is the only "statutory certificate". Why this is the relevant document when the *Matrimonial Property Act* is not applicable is not addressed. Neither is the fact that a Matrimonial Property Act Certificate under section 38 of the *Matrimonial Property Act* is not "independent legal advice" in the sense of advice about the wisdom of entering into an agreement: *Brosseau v Brosseau*, [1990] 2 WWR 34, 100 AR 15 (CA), *Corbeil v Bebris* (1993), 141 AR 215 (CA), *Hanson v Hanson*, 2009 ABCA 222 at para 12, *Tardif v Campbell*, 2008 ABQB 776 at para 25, *Cope v Hill*, 2005 ABQB 625 at paras 209-210. Justice Slatter's only comment on the challenge to the independence of the legal advice Lemoine received is found in the same paragraph:

> So far as [Griffith] knew, the appellant had complied fully with the law. He had no way of knowing whether the privileged advice provided by the lawyer who signed the certificate of independent advice was adequate, or the circumstances

> under which it was given. It is unfair, 13 years later, to advise him that the agreement is unenforceable.

Although Justice Slatter concludes otherwise, Griffith did have knowledge of most of the circumstances the trial judge relied upon when finding the independent advice was not "independent" because Griffith was present for all but 15 minutes and paid the bill for the advice.

With his reference to "13 years later," Justice Slatter seems to be suggesting some sort of time limitation for a challenge to independent advice or to a Matrimonial Property Certificate . Or perhaps he is suggesting that the independence or the sufficiency of independent legal advice can never be challenged so long as the spouse not receiving the advice is not in the room for the actual execution of the agreement by the spouse receiving the independent legal advice.

One might compare this opinion to his 10-year-old decision in *Hearn v. Hearn*, 2004 ABQB 75. That was a case where a settlement including property, custody, access and support provisions was challenged on the ground of duress, despite a Certificate of Independent Advice. Justice Slatter noted (at para 57) in that case that the effect of such certificates, which have no statutory authority, had not received much judicial consideration. He quoted from *Corbeil v. Bebris* which held that any party is free to attack an agreement on the ground it was unenforceable at law (e.g., unconscionable) despite a Certificate under section 38 of the *Matrimonial Property Act* and a Certificate of Independent Legal Advice. He noted that ruling was inconsistent with the effect given certificates under the *Guarantees Acknowledgement Act*, RSA 2000, c G-11. While conceding that section 5 of that statute makes its certificates "conclusive" and the *Matrimonial Property Act* does not, he thought that certificates in the family law context should also be taken at face value (at para 58), or at least negate *non est factum* and duress defences, based on their wording (at para 59). He also noted that Certificates of Acknowledgment under the *Dower Act*, RSA 2000, c D-15, were held to be conclusive in *Senstad v Makus*, [1978] 2 SCR 44 at 60. In the end, he was willing to see the occasional agreement that was in fact tainted by duress be enforced: "That would be an unfortunate circumstance, but it must be weighed against the advantages of bringing finality to the resolution of disputes and upholding the enforceability to settlement agreements" (at para 63).

Because a Certificate of Independent Legal Advice cannot be confined to defences of duress or *non est factum*, as can a Certificate under section 38 of the *Matrimonial Property Act*, it would seem that Justice Slatter may well be of the view in that a Certificate of Independent Advice can never be challenged, no matter the reason and no matter its lack of a statutory basis.

Were it not for the fact that the other three judges who heard the matter disagreed with Justice Slatter, one also might be forgiven for thinking that Griffith made a big mistake in dropping his challenge to the enforceability of the prenuptial agreement. In fact, Justice Slatter appears to forget that the "correctness" of the trial judge's decision about the unenforceability of the prenuptial agreement is not an issue before him, seemingly disregarding the autonomy of the parties to abandon grounds of appeal.

What about a role for the prenuptial agreement in determining the existence and scope of a "joint family venture", a role that the majority did consider? Looking at the "actual intent" element of this analysis, Justice Slatter refers to Lemoine's intent to disclaim an interest in the Griffith

Farms partnership assets (at para 115), as did the majority judgment (at paras 30-31). But the majority went on to note that the partnership only leased the lands in which Lemoine claimed an interest. Justice Slatter does not mention the fact the lands were leased. Because the land was listed in the partnership agreement that was appended to the unenforceable prenuptial agreement, Justice Slatter appears (at paras 115-116) to see a clear intent to exclude the farming assets and to see those farming assets as including Griffith's ownership interest in the lands.

The entire discussion about "actual intent" is very short and not very clear. This reinforces the appearance that Justice Slatter's focus is on the prenuptial agreement as a juristic reason for any enrichment. It appears to be on this basis that he concludes that the "trial judgment cannot stand" (at para 103), a conclusion stated in the summary to his discussion of the role of the agreement as a juristic reason for any unjust enrichment. This, however, is the ground of appeal that was abandoned: Griffith was no longer contesting the trial judge's finding that the prenuptial agreement was unenforceable due to undue influence. How it can be the basis of a conclusion that the "trial judgment cannot stand" is not addressed.