



## Family Law

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### Until Deceit Do Us Part

Rick and Nancy met when they were young. Both of their families were religious, and when Nancy became pregnant, they had to marry. They started out poor, but over their 28-year marriage, they worked hard. They built a successful dairy farm and raised five children.

But both parties agreed that the marriage wasn't a happy one. They argued frequently. Nancy said that Rick repeatedly assaulted her. Rick said that it was never more than occasional pushing and shoving. When they separated in 2000, Nancy was in serious mental distress. Her husband freely admitted that she was emotionally unstable – in fact, he said that she was paranoid and delusional. A psychiatrist later concluded that Nancy had a psychiatric disorder.

But Nancy insisted on settling things. She consulted a series of professionals – a lawyer, then a mediator, back to the lawyer, to a second mediator, and then to a second lawyer. The second lawyer formalized a Memorandum of Understanding prepared by the second mediator. Both Nancy and Rick intended that their assets would be shared equally. Unfortunately, Nancy did not take her lawyer's advice to get more financial disclosure from her husband, so it did not turn out that way.

Nancy was primarily the homemaker, and Rick controlled the family businesses and finances. Rick took advantage of his position and fiddled the books to undervalue their assets. He pocketed an extra \$650,000 which should have gone to his wife.

Nancy later learned about the deceit and went to court to set aside the settlement agreement. After a long battle, the Supreme Court of Canada (SCC) agreed with Nancy.

The SCC said that separation agreements are not the same as commercial business contracts. They are negotiated “on the fault line of one of the emotionally charged junctures of a couple's relationship; when it unravels.” Husbands and wives may not be parties of equal strength. A mentally-ill person may be vulnerable to deceit and manipulation by a financially-controlling spouse. The SCC agreed that Nancy was one of those people; her husband knew this, and he took advantage of it. The contract went far beyond what was reasonable and the Court set it aside.

The SCC said that spouses have a duty to fully and honestly disclose all financial information that might be relevant. Both parties need to know what is on the table before deciding what concessions to make or offer.

Not every case will have the facts to support such a finding. Nancy had to jump five hurdles. She had to prove:

- deliberate defective disclosure by her husband;
- her vulnerability;

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- her husband knowingly exploited her vulnerability;
- her vulnerability was not compensated for by her lawyers' professional advice; and
- the result was so unfair that it did not meet the general objectives of the law governing property distribution on marriage breakdown.

If one of these factors is missing, the spouse may be held to the bargain.

Many people have criticized the case for singling out family law for full and honest disclosure, when this duty is not imposed in other cases. They say that the emotional level of estate disputes can be just as high as in family law. Buyers and sellers are completely free to act in their own self-interest, why not spouses?

I do think family law is different. When you're fighting for a share of an estate, you are making a claim to *someone else's* property. When you buy something, for example a house or a business, you exchange your money for *someone else's* property. When you sue for injuries in a motor vehicle accident, you want *someone else's* money to compensate you for your loss. You are distinct parties with separate interests. In *Brandsema*, Rick deliberately lied to Nancy about the value of property *she already owned* when she wasn't in a position to find out otherwise. They weren't distinct parties; they were financially – and emotionally – intertwined joint property owners.

Consider the preamble to Alberta's *Marriage Act*: "Whereas marriage is an institution the maintenance of which in its purity the public is deeply interested, and whereas marriage is the foundation of family and society, without which there would be neither civilization nor progress;" There is no such relationship between buyers and sellers, or landlords and tenants. Spouses live in a relationship of trust, and society expects them to help, not defraud, each other. Our law gives special status to married people. In my view, the SCC was not being paternalistic – it recognized the reality of marriage. If spouses want to be able to act purely in their own self-interest, they should spell this out in a contract negotiated at the beginning of the relationship and not by blindsiding their spouse at the end.

*Rick v. Brandsema* [2009] S.C.J. No. 10

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