



Article

Family Law

July 2022

Think your marriage contract is a sweetheart deal? Case shows courts may not be so sure

By Adam N. Black

Marriage contracts can be an effective tool for a couple wishing to create certainty in the event of their future separation. But failing to take care in the negotiation process can lead to the opposite result, as was evident in a recent case before Justice Michael J. Valente of the Ontario Superior Court of Justice.

Over the course of their 23-year marriage, the husband and wife in the case had four children. Approximately ten years after their marriage, they started a lumber brokerage business, which achieved considerable success. In the years leading up to the parties' separation in 2019, the business generated income for the family of approximately \$2.5 million per year. The husband owned 51 per cent of the business, while the wife owned the remaining 49 per cent.

While in the beginning of their relationship the parties struggled to make ends meet, the success of the business ultimately enabled the family to enjoy a lavish lifestyle. They lived in a 12,000-square-foot home with two pools. They owned two vacation properties, one in Florida and a cottage in Ontario. The children were educated exclusively at private schools. For this family, money was not an issue.

In 2008, the parties signed a shareholder agreement that required the wife to sell her interest in the lumber business to the husband if the parties ever separated. According to the husband, that agreement was designed to give the wife certainty should their relationship end. The wife, conversely, said that she did not know the purpose of the agreement and signed it because the husband "became threatening when questioned."

Five years later, the parties entered into a marriage contract. The contract provided that, if the parties were to separate, the wife would receive \$750,000 for her share in the business and a one-time payment of \$100,000 covering the entirety of her entitlement to spousal support. When the parties indeed separated in 2019, the husband made both payments to the wife.

But the value of the business at the time was estimated in the range of \$11 million to \$15.8 million and as a result the wife commenced court proceedings in order to correct the financial imbalance generated by the marriage contract.

The matter before Justice Valente was at an interim stage of the court proceedings – potentially years before the trial at which the enforceability of the marriage contract would ultimately be determined. In a motion, the wife sought interim spousal support from the husband in the amount of \$27,916 per month, notwithstanding the terms of the marriage contract with which the husband had complied. The husband resisted the wife’s claim, arguing the contract should be honoured. The question was thus: Should the wife receive spousal support now or be forced to wait until a decision was made at trial?

For Justice Valente, the starting point was a recognition that “courts should strive to uphold domestic contracts.”

He cited a Supreme Court of Canada case of *Miglin v. Miglin* which set out a two-stage analysis to determine if spousal support should be paid in the face of a marriage contract that says otherwise.

In the first stage, a judge must consider the “circumstances in which the agreement was negotiated and executed” and to weigh whether the terms were consistent with the Divorce Act’s objectives. If the agreement passes muster in the first stage of the analysis, the second stage requires a judge to consider “the current circumstances of the parties to determine whether the agreement still reflects their original intentions” and again, to assess it against the objectives of the Divorce Act.

Justice Valente found no issue with Stage 1 of the Miglin test, but in addressing Stage 2 concluded that after a 23-year marriage, the wife’s entitlement to a one-time spousal support payment of \$100,000 and the husband’s retention of the profitable family business did not “recognize the economic advantages or disadvantages to the spouses arising from the marriage or its breakdown.” Such an outcome was inconsistent with the objectives of the Divorce Act.

Justice Valente’s conclusion does not end the dispute, however. Rather, it pinpoints a serious issue with the marriage contract and recognizes that a trial is necessary to determine if it should be upheld or set aside. That serious issue opened the door to an interim order for spousal support and Justice Valente ordered the husband to pay the wife spousal support of \$25,500 per month pending the trial.

But those payments came with a caveat for the wife: Justice Valente made it clear that the payment of spousal support at the interim stage was subject to adjustment based on the outcome at the trial – in other words, that if the trial judge were to uphold the contract, the wife would be obligated to reimburse the husband.

The judge noted she had “sufficient assets” to cover such compensation, if needed.

This article was originally published in the Financial Post.

Author

Adam N. Black
Partner

Adam is a partner at [Torkin Manes](#) and practises in all aspects of family law.

Tel: 416 643 8808
ablack@torkinmanes.com

The issues raised in this publication are for information purposes only. The comments contained in this document should not be relied upon to replace specific legal advice. Readers should contact professional advisors prior to acting on the basis of material contained herein.