

STICK TO YOUR (TIME) LIMITS WHEN SETTING ASIDE A DOMESTIC CONTRACT

By Ken Nathens

Courts like domestic contracts. Domestic Contracts such as Marriage Contracts and Separation Agreements encourage parties to settle their own matrimonial affairs, either before or after separation, and by-pass expensive and acrimonious litigation. Courts will generally enforce domestic contracts when challenged, subject to section 56(4) of the *Family Law Act* that permits the Court to set aside a domestic contract or provisions in it 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.

The recent Ontario Court of Appeal case of *Kyle v. Atwill* 2020 ONCA 476 (CanLII) raises a novel issue concerning the setting aside of domestic contracts. In this case, the parties signed a marriage contract one week before their wedding in July 2005 based on a template they drafted themselves that they obtained on the internet. Neither party obtained independent legal advice prior to the execution of the marriage contract nor was financial disclosure exchanged.

The parties separated in August 2012; seven years after marriage. Five years later, in August 2017, the Husband commenced a court application seeking spousal support and the equalization of net family property. By implication, the Husband also requested the setting aside of the domestic contract that on its face prevented him from making the support and property claims.

In her defence, the Wife put forth a novel argument: That the Husband is not permitted to request the setting aside of the marriage contract as pursuant to section 4 of the *Limitations Act, Ontario* he is time barred from doing so. According to section 4 of the *Limitations Act* the Husband only had two years from the discovery of the claim to commence a court action for the relief he sought. This would have been roughly been two years from the date of separation. The two year limitation period contained in Section 4 of the *Limitations Act* is the general limitation period in Ontario for claiming a remedy for recovery or a loss, if no other more specific limitation period applies to the particular claim for relief sought.

The Motions Judge in first instance agreed with the Wife, and on summary judgment dismissed the Husband's claim. The Husband appealed to the Ontario Court of Appeal.

The majority of the Court of Appeal relied on section 16(1)(a) of the *Limitation Act* in its decision that the Husband was not time barred from

proceeding with his claim. Section 16(1)(a) of the *Limitation Act* provides that “there is no limitation period in respect of ...a proceeding for a declaration if no consequential relief is sought.” In essence, the Court of Appeal determined that the Husband’s request that the marriage contract is nul and void is a request for a declaration of the factual state of affairs between the parties, and thus section 16(1)(a) of the *Limitation Act* applies. That the Husband also sought orders for spousal support and the equalization of net family property was not, according to the Court, “consequential relief” as referred to in section 16(1)(a) of the *Limitation Act*, but separate claims in law aside from the declaration that the marriage contract was invalid. As the claims for spousal support and the equalization of net family property were viewed as independent claims, the specific limitation periods for these two claims applied. In the case of the request for spousal support, there is no limitation period pursuant to section 16(1)(c) of the *Limitations Act*, and in the case of claiming equalization of net family property, there is a six year limitation period as set out in section 7(3) of the *Family Law Act*.

Justice Brown wrote a minority decision. He agreed with the conclusion of the majority that the Husband was not time barred from pursuing his family law claims. However, Justice Brown was of the view that the *Limitations Act* did not apply. Simply stated, the Husband’s request for the setting aside of the Marriage Contract was the “gateway” to his request for spousal support and the equalization of net family property, and not a “proceeding for a declaration” pursuant to section 16(1)(a) of the *Limitations Act*. Therefore the only relevant limitation periods were the ones applicable to the claim for spousal support and the equalization of net family property both of which did not bar the Husband from proceeding with his claims for relief.

In the end the Court of Appeal held that the Husband was free to pursue his claims for the setting aside of the marriage contract, spousal support from the Wife and the equalization of net family property of the parties and was not time barred from so doing.

The case of *Kyle v Atwill* is illustrative of how the family law system in Ontario does not work in a vacuum. Courts and litigants have to take into account many legal principles and concepts, such as competing limitation periods, in order to successfully navigate the family law maze.

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