

NetWorth

Complex family dynamics call for clear and effective estate planning

The structure of the Canadian family is ever changing. Statistics Canada's most recent national census data show that multiple marriages, stepfamilies, common law relationships, and same-sex families are adding more complexity to the family dynamic – which is how families interact and relate with each other. For instance, 12.6% of all families with children aged 24 or less — more than 460,000 Canadian families — are stepfamilies. Of these, about 60% have children from just one of the parents¹.

These changing family structures are having an impact on how Canadians choose to leave their assets, and underscore the importance of having open and honest discussions with your loved ones when it comes to estate planning.

The new normal

In a recent survey², BMO Wealth Management asked Canadians for their views on inheritance and the communication of estate plans within families. About half of those surveyed felt that the distribution of their parents' estates was not done fairly.

The groups most likely to feel that the distributions were unfair were those in any type of relationship other than a first marriage. However, even though these respondents felt they were not being fairly treated, many still accepted their parents' decisions.

These findings make clear the importance of communicating your intentions about your estate plan — it can help reduce misunderstandings, feelings of resentment, and potential conflict among your heirs, and ensure that your estate is distributed as you intended.

Comprehensive estate planning

It's also important to take a comprehensive view to estate planning. This requires taking into account your legacy and the cherished memories that are left behind — in addition to how and when traditional assets with a financial value are shared with your heirs. For it's not always the most expensive items that cause conflict among heirs. Sometimes simple, but personal, items have the most meaning for children and loved ones — such as a special piece of jewellery, a favourite photo, or other mementos.

To help you make the most of your comprehensive estate planning, here are some helpful tips to smooth out the process.



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Review your Will. Does your Will reflect your current family situation? Changes in marital status, the birth of children and grandchildren, the purchase of life insurance, retirement, the receipt of an inheritance, and health changes are all reasons to go back and re-evaluate your Will. Be sure that your executors and beneficiaries know where to locate your Will, and other important documents such as your Power of Attorney.

Choose your executor wisely. This is one of the most important decisions you'll make. Consider the example of an adult child being named as the executor for a deceased parent who had remarried and had additional children. This could lead to tensions between the adult child of the first marriage and the surviving step-parent and half-siblings. An impartial executor, such as a corporate executor, can help to bring a balanced and fair approach to the responsibilities of estate management and distribution.

Communicate your charitable wishes. Charitable intentions are important and should be discussed in advance with your executor and your heirs so they know what's important to you.

Talk and share openly. Having open discussions with future heirs can help to reduce conflicts, and acclimatize them to the outcomes of your estate plan. In addition, be sure to discuss how your sentimental assets will be distributed.

Pay attention to taxes. Taxation is an important part of estate planning. Relevant taxes include income taxes, probate fees and, in some cases, estate taxes. Your estate plan should help you achieve the fair after-tax distributions you desire, while minimizing the amount of tax that your estate will be liable to pay.



It is important to prioritize your estate planning and put an up-to-date Will in place before the need arises. Engaging a legal professional who can work together with your financial and tax professionals is highly recommended; a well-designed Will and estate plan will be fairer to your heirs and stand up better to those who might otherwise challenge your intentions.

We can help guide you through the process and give comfort and peace of mind to both you and your family.

¹ Table 4 – Distribution (number and percentage) of couple families with children by stepfamily status, Canada, 2011. Statistics Canada, December 22, 2015. statcan.gc.ca

² BMO Wealth Management survey conducted by ValidateIt Technologies Inc. between the dates of December 7 and 17, 2016. The online sample size was 1,003 Canadian respondents age 18 and over. The survey has a confidence interval of +/-3.02% at the 95% confidence level.

War of the Surviving Spouses – Who Gets the Pension?



In today's world of overlapping family structures, it is possible for an individual to have more than one spouse simultaneously for purposes of entitlement to certain assets at death. Such circumstances arise where an individual has cohabited for the

requisite number of years to be considered in a common law relationship at date of death (in some provinces 3 years, in others 2 years or less), while still married to another – an estranged, legally separated – but still married, spouse. At death, a surviving married spouse who was cohabiting with the deceased, or, a common law spouse (who by definition was cohabiting with the deceased), is entitled to share in the deceased spouse's Pension funds. However, where the surviving married spouse was living separate and apart from the deceased spouse at time of death, that surviving spouse does not have an entitlement. What are the implications if on the date of death the Pension Plan member is married but living separate and apart from his or her married spouse, and, is living with a common-law spouse? The common-law spouse is entitled to the prescribed percentage of the Pension Plan funds.

Love and Marriage and... Contracts

For recently engaged couples the future looks promising, filled with wedded bliss and happily-ever-after. However, in love and marriage, the law giveth and the law taketh away. This article discusses how a prenuptial agreement (also referred to as a marriage contract) can help protect your assets from being “taken” in the event of a divorce.

Marriage Contracts

Upon divorce, depending on specific circumstances, a divorcing spouse may be entitled to one-half of the value of property owned by the other spouse which was acquired or accumulated during the marriage¹. The only property not divisible at divorce is property which was received as a gift or inherited during the marriage by a spouse, and remained segregated (title not mingled) during the marriage. To bypass the law that governs division of acquired and accumulated property upon marriage breakup, many couples enter into a marriage contract². The purpose of the marriage contract is to prevent the legal regime of the province from governing property division between the spouses, in the event of a marriage breakup³. The marriage contract is an attempt to prevent the law of Equalization of Net Family Property (and other laws pertaining to division or “sharing” of property between divorcing spouses) from applying.

Marriage contracts are typically entered into prior to the marriage (hence the term ‘pre’ nuptial). However, they can also be signed during the marriage, or amended, at any time during the marriage. Marriage contracts typically address what is to happen not only in the event of divorce, but also what is to happen in the event of a spouse’s death. In such circumstances the marriage contract and the Will must be “in sync.” That is, marriage contracts override Wills (as do all contracts), and the Will must comply with the terms of the marriage contract. For example, you cannot gift more generously to your surviving spouse via your Will than in the marriage contract, unless the contract states that you can do so. Typically, the Will states that the testator is a party to a marriage contract already in existence, citing the marriage contract by its date.

Provincial Differences

Regardless of age, there are many reasons spouses-to-be enter into marriage contracts. Provincial family law regimes equalize the difference in net worth acquired or accumulated by each spouse during the marriage, as at Valuation Date (date of separation)⁴. In Quebec, the effect of a marriage contract is to “engage” the law which the spouses have elected (e.g. Separate as to Property, Partnership of Acquests) to govern the division of their property in the event of marriage termination. In all other provinces, a marriage contract is typically used to limit (or eliminate) the effect of the law from governing property division in the event of divorce.

First time newlyweds from wealthy families are often encouraged to request of their fiancé or fiancée to sign such a contract. Since a marriage contract operates by ousting the provincial family law, it is important to be cognizant of the province’s acceptable standards to ensure validity and enforceability of the contract. For example, if a divorcing or survivor spouse is left inadequately provided for, the court can exercise its jurisdiction and intervene in favour of that spouse.

The matrimonial home

The matrimonial home (“home”) is a “sacred cow” among assets. It is treated differently from all other types of property in the context of family law. Each spouse has an equal right of possession and occupation of the home, regardless of titled ownership. Where both spouses own the home, neither spouse can sell or mortgage the home without written consent of the other. For this reason a marriage contract will contain a section that deals specifically with the matrimonial home. Thus, while the marriage contract can limit or exclude altogether a non-owner spouse from receiving a share of the value of the home, a provision in a marriage contract purporting to limit a spouse’s rights to possess and occupy the home is unenforceable. The divorcing spouses’ respective occupation of the home, and short- and long-term living arrangements in the home, will be made by the court at the time of marriage breakup, and will depend on many factors, including the age of any children and circumstances involving them.

Seek Professional Advice

Marriage contracts are not only for the rich and famous. They are legally binding and enforceable agreements which, if drafted properly, provide a viable alternative to litigious court appearances. If a marriage is in your future, and you’re concerned about protecting your assets in the event of divorce, speak to a family law lawyer to discuss how a marriage contract could benefit your situation.

Let’s discuss if you have any questions.

¹ Quebec Civil Code differs from common law provinces’ matrimonial or family law regimes.

² In Quebec, as explained briefly below, marriage contracts operate differently.

³ Marriage breakup occurs due to either separation/divorce, OR, death, with each type of event bringing about its own consequences regarding division of property. This article focuses on the breakup as a result of separation/divorce.

⁴ The default position of the law in Quebec may differ.



Who will take care of my pets when I die?

For pet owners, the question in the title of this article may be of significant concern. A family pet, especially if owned for many years, may be considered part of the family.

Pets are considered property from a legal perspective, although there is a movement towards classifying animals as “sentient beings”. For example, the Province of Quebec has introduced the Animal Welfare and Safety Act, which indicates that “animals are sentient beings that have biological needs”.

It is not legally possible to leave money or physical property to a pet. Accordingly, many pet owners include special provision in their Wills to provide for the care and maintenance of their beloved pets after the owner has passed away.

The Will must indicate which beneficiary will receive the pet. In the absence of other related provisions in the Will, the beneficiary (assuming he or she accepts the gift of the pet) will need to spend his or her own resources to take care of the pet. This could be an expensive proposition, and the beneficiary may decide not to accept the gift.

One option is to set aside a fund for the care and maintenance of the pet. The funding provisions in the Will may take the form of a trust, appointing a trustee to manage the fund. However, such trust provisions may be found to be unenforceable due to the legal requirements regarding trusts. Another option is to give the pet to a particular person along with a cash legacy to express appreciation to the person and to defray the costs of caring for the pet.

If there is no special provision for the pet in the Will, the executor will decide what will happen to the pet. Although the general provisions in the Will may permit the executor to give the pet to a beneficiary, the Will may also permit the executor to sell the pet and distribute the proceeds in accordance with the terms of the Will. If a pet owner has specific wishes with respect to the care and maintenance of his or her pet following the death of the owner, consideration should be given to including these wishes in the estate plan.



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