

Days of Wine and Roses ... and Prenups

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

Entering a marriage, both partners hope that with best intentions and hard work the marriage will blossom, prosper and strengthen, resulting in a fulfilling, long life together. But, what if it doesn't? Upon divorce, depending on the circumstances and the particular details and nuances of the situation (for example, whether or not the marriage lasted longer than five years), each divorcing spouse may be entitled to make a claim against one-half of the value of property owned by the other spouse which was acquired or accumulated during the marriage.¹ The only property not divisible at divorce is property which was received as a gift or inherited during the marriage. To bypass the law, many couples enter into a marriage contract.² The purpose of the marriage contract is to bypass the legal regime of the province from governing financial arrangements and property division between the spouses, in the event of a marriage breakup. 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, albeit in perhaps more stressful circumstances with less flexibility and less latitude and good will. They can also be amended, repeatedly, at any time during the marriage. It is important to note that in the context of comprehensive estate planning, which includes after death succession, 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 standards

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).³ In today's world of multiple marriages, some of which are short lived, many individuals wish to avoid having to share so much of their wealth. Those marrying for the second or third time, particularly where children from previous relationships are included in the mix, are conscious of the need to set out the manner in which their finances and property will be shared or divided in the event of divorce based on their wishes and intentions, not on provincial statutory law.

First time newlyweds from wealthy families are often encouraged to request their fiancé or fiancée to sign such a contract. Since a marriage contract operates by bypassing the provincial family law regime – a law which is in place to protect each spouse's rights vis-à-vis each other's property – 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. This can be done by way of either setting aside the contract or parts of it, and deeming certain assets, which otherwise would be excluded from equalization as per the terms of the contract, as part of family assets for purposes of division, so that the less wealthy spouse is adequately provided for.

In Quebec, the effect of a marriage contract is to "engage" the law which the spouses elect (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 used to "bypass" the law from governing in the event of divorce.

Marriage contracts are limited in their scope. For example, while the parties can bypass certain aspects of the law regarding their financial arrangements, they cannot contract out of dependants' relief legislation, nor can they address child custody and child support issues. Notably, while the matter of spousal support can be addressed in the marriage contract, the actual support payments will be determined at a later time, based on circumstances as they appear, factually, after the breakdown of the marriage. This means that terms which attempt to limit or eliminate spousal support may not be as enforceable as terms restricting division of property. Types of property typically addressed in a marriage contract include pensions, business interests, trust interests, future acquisitions, future inheritances and the matrimonial home.

In order for a marriage contract to be valid and enforceable, the spouses must have made full and complete disclosure of all their assets and values, including trust interests and all debts and liabilities. It is typical that the wealthier spouse wishes to protect his or her assets through the use of a marriage contract. Accordingly, it is typically that spouse who bears the legal costs for both parties. While it is not a legal requirement, it is prudent to obtain a Certificate of Independent Legal Advice so that the marriage contract is less vulnerable to challenge and

to being set aside by the court. The marriage contract should be signed well in advance of the date of the wedding. Since a marriage contract is subject to the principles of contract law, it is not enforceable if, in its effect, it is "unconscionable." In some provinces the standard may be lower, namely, one of unreasonableness.

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.

Other common asset protection strategies

Protecting assets from the ravages of divorce suffered by those who enter the marriage unprepared is an important goal of many high-net worth families. Strategic gifting to adult children can advance this goal. If you're planning to make significant gifts to your adult children who are about to marry, wait to hear the wedding bells first, then give the gift. In the event of divorce, the law protects gifts received during marriage, including inheritances. If the gift is going to be the matrimonial home or a part of it, a common protective measure is for parents to attach a Demand Promissory Note ("Note") to the gift. The encumbrance on the couple's matrimonial home for the value cited in the Note is the protection. In the event of a pending divorce, the Note is called in by the parents.

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.



For more information please contact your BMO financial professional.

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

² Not in Quebec, as explained briefly, below.

³ The law in Quebec differs.



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