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Pre-nuptial Agreements – Protecting Your Assets Before Marriage

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Many individuals are concerned about protecting their assets when entering into a marriage. They may have spent years developing their considerable assets into something they are truly proud of. Such individuals do not want to lose their hard-won progress due to a divorce. Many turn to a pre-nuptial agreement, or as they are known in Canada ‘Marriage Contracts, in order to secure their assets against any potential break down in the marriage.

Division of Property

An individual should be aware of precisely what assets are at risk during a divorce. In Ontario, the division of property upon a divorce is dealt with in *Part I* of the *Family Law Act*. The *Family Law Act* requires each person to determine the assets and liabilities they possessed on the date of marriage. This amount is then deducted, even if it is negative, from the person’s assets and liabilities on the valuation date. The valuation date under the *Family Law Act* is the date of separation in most cases. This amount is referred to as each spouse’s *Net Family Property* (or NFP). Half the difference between each person’s NFP is then paid to the spouse with the lower NFP. This is called the *equalization payment*. There is no transfer of property rights, but rather it is purely based on money. There are some exceptions to this rule based on inheritances, gifts and some other issues.

The matrimonial home, defined in the *Family Law Act* section 18(1) as a place where one of the spouses owns an interest in and “ordinarily occupied by the person and his or her spouse as their family residence” is valued in a specific way under the *Family Law Act*. The Matrimonial home, if it was owned before marriage, is not included in the individual’s marriage day value if it is still owned by the spouse on the date of separation. This is an important consideration in terms of protecting an individual’s assets, as if they cannot deduct the value of the matrimonial home, it could vastly increase an individual’s NFP

The division of property regime in Ontario means that an individual’s pre-marriage assets are not able to be damaged. It is focused on how much the individual’s value has increased over the marriage. Any gifts given to an individual after the date of marriage is not included in the NFP calculation providing it can be traced to the date of separation. The assets owned before marriage are not in danger of being claimed by the spouse, unless the partners both had an interest in the property before the marriage. When drafting a marriage contract, an individual should be concerned with the assets obtained after the date of marriage.



Marriage Contracts in Ontario

Marriage contracts in Ontario are governed by the *Family Law Act*. Section 52(1) of the *Family Law Act* states what can be entered into in a valid marriage contract:

52. (1) Two persons who are married to each other or intend to marry may enter into an agreement in which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage or on death, including,

- (a) ownership in or division of property;
- (b) support obligations;
- (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and
- (d) any other matter in the settlement of their affairs. R.S.O. 1990, c. F.3, s. 52 (1); 2005, c. 5, s. 27 (25).

A couple has a wide range of freedom in determining the terms of their marriage contract. Individuals, if they desire, can contract completely out of the division of property scheme as it is set out in Part I of the *Family Law Act*. It is important to be very careful in the terms used in a marriage contract. In the case of *Bosch v. Bosch* a marriage contract did not oust Part I of the *Family Law Act* because it dealt with the ownership of an asset. The Supreme Court in this case determined that because they had not dealt with the value of the house, it would still be considered in the calculation of the equalization payment. Obtaining the assistance of a family law lawyer can be crucial when drafting a marriage contract. Marriage contracts should be as explicit as possible, in clear unambiguous language dealing with the issues a spouse is concerned about specifically.

Marriage contracts can be very useful. A marriage contract which is well drafted can help a couple avoid strife and hostility if their marriage breaks down. This can save both partners significantly large amounts of time and money.

Setting Aside a Marriage Contract

It is important to be aware, however, that in Ontario marriage contracts can be set aside by the courts. This power cannot be blocked by a contract and is contained in section 56 (4) of the *Family Law Act*:

- (4) A court may, on application, set aside a domestic contract or a provision in it,
- (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;



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- (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. R.S.O. 1990, c. F.3, s. 56 (4).

If a court sets aside a domestic contract, a marriage contract is a type of domestic contract; it will then replace it with a court order of its own. This is something which is not present in a normal contract. The Ontario Family Law courts have stated that marriage contracts are different from a contract between two private individuals or businesses, which is why a marriage contract is dealt with in a unique way.

Disclosure is particularly important in a marriage contract. A failure to provide full and frank disclosure can result in a marriage contract being set-aside by a court. This is precisely what occurred in the case of *Levan v. Levan* in which a husband's failure to disclose resulted in the court setting aside a marriage contract. It is, in the end, a poor choice to attempt to hide an asset in order to protect them when entering into a marriage contract. If it is discovered, and lawyers are often very skilled at finding such occurrences, it will result in the marriage contract being set aside. Further, during any subsequent litigation a person who fails to disclose important information will have seriously damaged their credibility.

A marriage contract can also be set aside if the parties were not aware of the consequences or nature of the contract, or if it is otherwise not in accordance with the law of contract. One of the most important doctrines which can cause a contract to be set aside is the doctrine of unconscionability. The Supreme Court of Canada set out how unconscionability is dealt with in a Family Law context in the case of *Rick v. Brandsema*. In that case the court determined that unconscionability occurs when a contract is highly unfair either at the time the contract is signed, or later on. Therefore, over time, a marriage contract can become unconscionable, and the court may set it aside. This doctrine must be kept in mind when drafting a marriage contract; if its terms are unfair or at not sufficiently far looking to ensure that it will remain fair and enforceable into the future.

Conclusion

A marriage contract can be an excellent way for parties to determine how assets will be split upon the breakdown of a marriage. The Ontario division of property system, and the capacity of the court to set aside domestic contracts create unique considerations for individuals when they are considering a marriage contract. This is a topic which an individual truly requires a family law lawyer. A lawyer will be able to guide their client in the drafting of a marriage contract that can both; fulfill their objectives and be legally enforceable. Using a faulty marriage contract could end up becoming very expensive as litigation costs rapidly build up.