

Blended Families Continue to Grow

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Estate Planning for Blended Families

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A. INTRODUCTION

Fifty years ago, estate planning was relatively simple. The average Will said something like: everything to my spouse, and then to our children equally. We may still do the occasional Will that looks like that, but more often than not our clients circumstances are far more complicated, and such a simple Will would not be sufficient to ensure that the client's wishes are carried out.

Many clients are in a second marriage or relationship, or one of their adult children is involved in a blended family or second marriage, there may be step or adopted children or grandchildren, and issues about adult children who are living with a partner where it is not clear to the parent/client how that relationship is going to evolve. Family dynamics have made estate planning considerably more "interesting".

As well, many clients have significant business or personal assets which may or may not have been acquired during their current marriage.

This paper will discuss the role of domestic contracts as part of an overall estate plan. There are many texts on family law which discuss domestic contracts in detail - I will not begin to provide an exhaustive review of the law in this area - but rather I will try to provide a useful summary of the law on domestic contracts for use by estate practitioners.

Domestic contracts take many forms, including cohabitation agreements, prenuptial agreements, postnuptial agreements, mutual will agreements, separation agreements and Minutes of Settlement documenting the terms of a divorce. Any of these agreements may be part of an estate plan, but this paper will focus on cohabitation agreements, pre-nuptials and post-nuptials.

Over the last several years there has been an increasing cross-pollination between family law and wills and estates, and a good understanding of family law principles is necessary for us as wills and estates practitioners to adequately advise our clients as to how to accomplish whatever it is that they are hoping to do.

The terminology which has been used to describe agreements between spouse and 'common law' partners has varied over time and between provinces. More and more commonly such agreements are being referred to as domestic contracts or marriage agreements rather than as cohabitation agreements, pre-nuptials, or post-nuptials. I will try to use the term domestic contract, although where a specific case uses a different term, that term will be used in the discussion of the case.

Some Marriage Statistics

To give us some understanding of the prevalence of second or third marriage and the age of the spouses at the time of marriage, a somewhat dated report that discussed 2001 data on the Statistics Canada web page says that:

On average, Canadian adults entered their **first marriage** when they were about 25 years old (for 89%, their first marriage is their current marriage). The grooms had been about two and a half years older than their brides, at 26.2 and 23.6 years old, respectively. ¹

With respect to second marriages, the study notes that:

...about 43% of Canadian adults whose first marriage had ended in divorce had married again by the time of the GSS (General Social Survey of 2001) as had about 16% of those whose first spouse had died.

Canadians who married a **second time averaged about 39 years old** at the time of the wedding. Over half (55%) exchanged vows with someone who had also been married before, and more than one-third (37%) had already lived common-law with their new spouse.

At the time of the GSS, about 1.3 million of them (71%) were still married to their second spouse of almost 13 years.

With respect to the third marriage, the study notes that:

In 2001, according to the GSS, almost 137,500 Canadian adults had been legally married more than twice. They represented less than 1% of the ever-married population aged 25 and over. Virtually all of them had tied the knot three times.

...They had **entered their third marriage at an average age of almost 46**, generally to someone who had also been married before.

We know that about 1 in 4 marriages now ends in divorce, so second or third (or fourth or fifth) marriages can only become increasingly common.

We can safely presume that cohabitation statistics are similar.

Tools in the Estate Planning Tool Kit

The basic estate plan includes a will, an enduring power of attorney (EPA) and a personal directive (PD). The tool kit can also include any or some combination of the following:

¹ Statistics Canada, "Till Death Do Us Part? The Risk of First and Second Marriage Dissolution" Ottawa: Statistics Canada, 2011