MARRIAGE CONTRACTS
"How sharper then a serpent's tooth it is to have a thankless child (or spouse)"
Shakespeare, King Lear (almost)

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Divorce rates remain consistently high throughout Canada and the Common Law world and at the same time, people are living longer. As a result of these two phenomena alone, second and third marriages are becoming common. What is more, second and third marriages, often occur in the face of the parties having children from the first or second marriage. While this "Brady Bunch" situation may result in an interesting television sitcom, there are a host of problems not often contemplated by the parties when they enter into these relationships. Thus, the death of one of the spouses or a subsequent divorce can play havoc with the parties' financial affairs and financially disinherit or significantly financially effect their children. This paper discusses pre-marital and post-marital contracts as a potential solution to these problems.

Pre-marital contracts only achieved legitimacy in Ontario in 1976 and the rest of the country soon followed. Quebec always had a form of marriage contract that was permitted but it was limited in scope. Today, across Canada with the exception of dealing with custody rights, future child support and exclusive possession of the matrimonial home the parties can, by contract, settle any issues that might arise as a result of their marriage breakdown or death.

Most Common Law countries recognize marriage contracts, although two notable exceptions are England and Australia. However, even in England recent appellate authority has made it clear that henceforth English courts will give some weight to pre-marital contracts although they will not be determinative of the issue. Some of you may wonder why Paul McCartney did not have a marriage contract. There were two reasons. Firstly, he stated that they were "anti-romantic" and did not want one and secondly, at the time English

courts gave them no weight at all. The romance soon died and the £30 million that Paul McCartney had to pay might have caused him to have yearned for the opportunity of a "do over". [1]

Although marriage contracts became legally valid in 1976, they did not really come into their own until 1986 when the *Family Law Act* was passed and all of the parties assets were placed on the table for equalization on the Ontario property scheme of equalizing net family property. Virtually all Common Law jurisdictions divide property in one way or the other and while all have different approaches and different methods, the ultimate result is that most of the marital property is equalized. If the property is going to be equalized, there is a concern amongst those who marry for a second time as to what will happen to their children of their first marriage. Hence, the desire to protect their assets in some way so that their children do not suffer financially as a result of the second or even third relationship.

There will also be situations in which parties, getting married for a second time, bring a marital home into the marriage. Under the Ontario *Family Law Act* the deduction for pre-marital property is lost if the pre-marital property is a matrimonial property brought into the marriage and still exists as a matrimonial home at the time of separation. This is a very common occurrence in second marriages, particularly amongst older people. Frequently, the spouse wishes to protect the property in the event the relationship breaks down and, even more importantly, to maintain the deduction for the value of the property brought into the relationship.

Quite often there is a family cottage that has sometimes been used for generations. The parties getting married a second time, if they use that cottage, convert that cottage into a matrimonial home which affords it the special protections under the *Family Law Act* and also causes the loss of the deduction normally afforded. As a result, there is often a desire to protect the family cottage and make sure it stays within the family.

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[1] *McCartney v. Mills* (2008) E.W.H.C. (FAM) Case F006003721

If the parties marry and have children of the first marriage and then they have subsequent children, there is an issue as to whether the non-biological parent stands in the place of the parent of the child and is liable for child support in the event that the relationship breaks down or there is a death. The parties will want to know if they can protect themselves from such a claim and how they might go about it.

This is but a sampling of some of the problems that occur in second marriages and why there is a growing demand for pre-marital and post-marital contracts.

The Pre-Nuptial Contract

Unlike separation agreements which follow a definite pattern and are largely based on precedent and boiler plate, marriage contracts are individually tailored to the case at hand. They run the gambit from contracts that provide that neither party has any claim whatsoever in the event of a marriage breakdown or death (we call that the "why get married contract") to the contracts that provide detailed support provisions and property provisions and provide for every contingency arising out of divorce or death. Some contracts run seven pages and some run thirty seven pages. Some are negotiated over a few weeks and some over many months. The two most common issues dealt with in a marriage contract are property and support. We turn to each of these in turn.

Property

The most common form of marriage contract is to exclude certain property from being included in the division of property under the *Family Law Act.* It may be the matrimonial home, an interest in a trust, property received from third parties such as parents or grandparents by inheritance or gift before the marriage or the business in which one of the parties is engaged. The parties are free to negotiate any property resolution, including dealing with the matrimonial home and making it an excluded asset. What the parties may not do is provide for exclusive possession of the matrimonial home. That is a bit of paternalism by the Ontario government since one might seriously question why parties ought not to be able to deal with possession of a matrimonial home, particularly in the absence of

children and particularly in a freely negotiated agreement. But, for the time being, one cannot deal with that issue. Everything else, however, with respect to property is on the table and may be negotiated. Counsel and the parties clearly have to understand the difference between deductions and exclusions under the *Family Law Act* and these contracts are not to be done at the kitchen table or based on a precedent one can buy at a legal stationary store. These contracts have important and lasting effects and the parties need to consider a host of potential circumstances. What if the divorce occurs within two or three years of the marriage? What if it occurs 22 years after the marriage? What if the wife is working at the time of the marriage and has given up work at the time of separation? Not only will this impact upon support but, if all property is excluded, the wife will find herself without support and without a place to live except on a temporary basis. What will happen if one of the parties dies early on in the relationship? What happens if it is later on in the relationship? What happens if there are young children living in a home which is proposed to be excluded by the other party? If the home is to be somehow to be divided, what is the mechanism for sale? How long does the survivor get to stay in a matrimonial home before it is sold and the proceeds given to the children of the first marriage? What happens if one of the parties becomes ill or disabled? Who should have the right to make the substitute health care decisions or have a power of attorney to deal with the person's property? And on and on it goes. The lawyer is required to look into the crystal ball and think of all of the things that can go wrong since, if all goes right, they will have no need of the contract. There may not be a divorce but, ultimately, there will be death. The lawyer will have to consider all of the potential problems that could arise and how these inter-relate to the children of the first marriage and help the parties work out a solution that they both find satisfactory.

This is a difficult task. The parties are discussing these issues while they are in love and believe that this new relationship, unlike the last one, will last forever. On the other hand, one or both may have been burnt by the financial and emotional consequences of the last breakup. They do not want to experience it again and, accordingly want an inflexible and rigid contract that provides for certainty and finality if there is a marriage breakup. This is a difficult task for the lawyer, particularly when the lawyer knows it is somewhat of an

industry for lawyers to attack marriage contracts when the marriage does break down and inevitably blame the lawyer who drafted the marriage contract in the first place.

If the lawyer charges a few thousand dollars for a marriage contract, which is probably high for the average contract then, the lawyer is exposing his insurance deductible and levy every time he or she drafts one of these agreements. It is another reason why lawyers face an impossible task in this arena and have an instinctive dislike of these agreements.

Frequently, the client wants to throw caution to the wind and sign anything and frequently one of the parties says "no contract, no marriage". While that does not constitute duress in law, creating a right to set aside the agreement, it does create enormous pressure on both the party being asked to sign and the lawyer who is trying to assist.

Support

Frequently, husbands who have been burned in a previous break up want to ensure that if their new relationship breaks up, they will not be obliged to pay support. It may well be that at the time of the agreement the parties are both working and self-sufficient. If they separated that day, there would be no support but, if they stay together for a reasonable length of time and the wife, for whatever reason, gives up her job and is unemployed at the time of the break up and has perhaps sacrificed career choices at the request of the husband or otherwise, upholding the support provision may well render the wife financially compromised or even destitute. Hence, the Supreme Court of Canada in *Miglin* [2] has made it clear that an agreement that releases support may not always be effective. If the agreement was not signed in unimpeachable circumstances and if it did not meet the objectives of the *Divorce Act* at the time of execution, then it may well fail the stage one *Miglin* test and open the door for support. If there has been a change of circumstance that is so dramatic that it was beyond the contemplation of the parties at the time of separation under the stage two test

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[2] *Miglin v. Miglin* [2003] 34 R.F.L. 5th 185

of *Miglin*, the waiver of support may also be set aside. Thus, clients entering into support agreements need to understand that the further they depart from the objectives of the *Divorce Act* i.e., the more rigid and inflexible the support provisions, the more risk they run, the court will override the support provisions of the agreement. Justice Mossip, an experienced family judge, did precisely that in *Pollard v. Pollard* [3]. She found that the parties negotiated in unimpeachable circumstances and there was full and complete financial disclosure but, in releasing spousal support at a time when the wife could not really become self-sufficient, the agreement failed to meet the objectives of support under the *Divorce Act* and was set aside.

Simply put, there is no finality in family law with respect to support obligations. Even as recently as last week, a court refused to dismiss a spousal support claim brought by a wife 33 years after a divorce. While that does constitute some sort of record, it also makes it clear that the support door is never closed and, while agreements may be carefully drafted to try to prevent this eventuality, there still remains a narrow window of opportunity for the court to intervene if the agreement does not meet the objectives of the *Divorce Act.* Put in other words, an agreement that provides too good a deal for one of the parties, may well be set aside.

Financial Disclosure

In determining whether the agreement was negotiated in unimpeachable circumstances, there are really two central issues. The first is whether one of the parties took advantage of any vulnerability of the other side. Negotiating a marriage contract with a vulnerable party is a dangerous proposition and while independent legal advice will usually overcome any vulnerabilities, it may not necessarily always do so. See for example *Rick v. Brandsema* [4]. Parties have to be particularly cautious in negotiating marriage contracts to ensure that the other side has full opportunity to consult a competent family lawyer and that the party is not rushed or pressured into signing an agreement. For this reason, it is unwise in

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[3] *Pollard v. Pollard*, May 2009, Mossip J., unreported.
[4] *Rick v. Brandsema* [2009] S.C.C. No. 10

the extreme to prepare marriage contracts and tender them weeks or days before the wedding. Parties thinking about a marriage contract need to do so months before the wedding and give the lawyers ample opportunity to negotiate so that no one can say that they were pressured into making concessions in the agreement. Secondly, and of fundamental importance to the validity of a marriage contract is full, complete, fair and honest financial disclosure. Financial disclosure is mandated in Ontario under s. 56(4) of the *Family Law Act* and this provision cannot be waived. While this does not mean that it is necessary for the parties to go out and get business valuations and appraisals, it does mean that the parties have to set out with a reasonable degree of specificity their income, their assets and their liabilities. The most exhaustive discussion of this theme occurs in *LeVan v. LeVan* [5] and is repeated in short form in *Rick v. Brandsema.* There is a remaining controversy as to whether there is an obligation to value excluded assets that are intended to be excluded in the contract as opposed to identifying them. The Court of Appeal in *LeVan* was silent on this point but the courts below have universally decreed that it is not only necessary to identify the assets but also necessary to put a value on them. That seems to make eminently good sense because what is the point of telling the other party that one holds shares or property without putting some value on it. The purpose of financial disclosure is to tell the other side what you have so that they can understand what they may well be giving up in a marriage contract. A party cannot understand what you might have as a result of a description of your assets without some value. As we said, the valuation exercise does not require expert advice but, it does require the party making the disclosure to act reasonably. The failure to do so in both *LeVan* and *Rick v. Brandsema* were fatal, both on the support and the property provisions of the contracts.

The Matrimonial Home

We have mentioned above the problems that can be created by a matrimonial home in light of the legislation. Parties to a marriage contract need to carefully address this issue,

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[5] *LeVan v. LeVan* 2008, 51 R.F.L. (6th) 237 C.A. – Leave to appeal to S.C.C. refused, 2008, CarswellOnt 6207

particularly when there are young children who want to remain in the home and where there may be children of another relationship who want to receive the proceeds that if this second relationship breaks down. On the other hand, the non-titled spouse who lives and works on the house, wants to ensure that he or she acquires some interest in the property over time, particularly if they too are in the workforce and are contributing to the financial upkeep, mortgage and taxes on the home. Parties often agree on a formula, which gives one of the parties a percentage interest in the home for each year of the relationship. Whatever method one uses, the parties need to delineate with certainty what happens on marriage break down or death and provide for occupation rights that are appropriate as well as delineating the financial obligations to maintain the property.

In Loco Parentis

It is a common occurrence that a party entering into a relationship in which the other party already has children does not want to be placed in a position where if there is a breakdown in the relationship, he or she might be liable for child support. This problem has been created by how the Child Support Guidelines have been interpreted and, in particular, by the Supreme Court of Canada case of C*hartier v. Chartier* [6]. It seems relatively clear that the parties cannot contract out of the obligation to support children with whom one has become *in loco parentis*. However, an agreement that sets out that the parties do not intend the other party to be *in loco parentis* may be of some minor assistance when the court has to address all of the factors that determine whether one of the parties has stood in the place of a parent. There is no effective way of solving this problem and one can only put a band-aid on it. However, even a discussion of this issue should help the parties because it will tell the parties what they must do to avoid being found in the place of a parent or, what the consequences are of being in the place of a parent, should they fall into that category.

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[6] *Chartier v. Chartier*, 1999, 1 S.C.R. 242

Death

While the parties may want to contemplate, with great specificity, what will happen upon divorce, it may well be that far different results should occur upon the death of one of the parties. After all, there is a huge difference between the unhappy breakdown of a relationship and the death of one spouse while the parties were happily married. Marriage contracts are a perfect vehicle for allowing parties to set out what will happen upon the death of the other spouse and, in many respects are more important than a Will. While a Will is an essential document for the parties to consider and sign, the *Family Law Act* overrides a Will and allows a surviving party to elect to take their equalization right under the *Family Law Act* or what they are left in a Will. Hence, the primacy of a pre-marital contract over a Will, and the necessity for the parties to consider this in the discussion of their affairs. A pre-marital contract may deal with a host of issues, including substitute decision makers, power of attorney, life insurance, possession of the home and financial arrangements. The parties should not be satisfied that their other spouse has promised to protect them in a Will and a pre-marital contract may often help avoid the nasty fight between a surviving spouse and the deceased children and other extended family, not to mention the deceased first wife.

Post-Marital Contracts

There is nothing that can be done in a pre-marital contract that cannot be done in a post-marital contract. The danger with a post-marital contract is that one is never entirely sure of the motives of the parties and whether one is attempting to obtain a post-marital contract and then use it for an immediate separation. Post-marital contracts are thus negotiated perhaps a little more adversarially since there is some concern about the use to which it will be put. Nevertheless, parties who are older, remarried and have not considered doing a marriage contract and are just learning about its advantages, may wish to consider a post-marital contract simply to deal with the vexing issues that are outlined above. The public in Ontario really understands very little about the *Family Law Act*, the impact of title

or ownership, how equalization works, the importance of valuation date, the obligations on death under the *Succession Law Reform Act* and a host of other family law issues. If clients learned more about these issues or they come to learn about them through education or their own lawyer, they may understand the need for post-marital contracts that are engendered without any improper motives. They would be created simply out of a desire to properly protect their assets for their natural children or at least have a mechanism for sharing the assets between their children and their new spouse. Thus, avoiding an unpleasant and unseemly fight after their death. We recommend you discuss these issues with your clients who might already be married and believe they have solved all of their financial issues that will arise upon death by having left a Will.

Children who do not benefit in a Will from a deceased parent as a result of the step parent taking the bulk of the deceased's estate are quick to litigate and seek their due. Marriage contracts that carefully consider the future are a potential solution to this problem.