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Family Trusts

Ounce of prevention: Marriage contracts and family trusts

By **Margaret Rintoul and James Edney**

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(September 19, 2019, 10:50 AM EDT) -- The utility of marriage contracts is often measured in a vacuum. And rarely do lawyers and their clients consider the benefits that they can provide in protecting the sanctity of family trusts.

Common parlance has it that marriage contracts are, among other things, unduly provocative, easily set aside by family law courts and not worth the time, effort and expense they demand.

There's little doubt that challenges to the validity of marriage contracts have been profuse of late. Mere statistics, however, are not in this case particularly revealing. More intense scrutiny, in fact, reveals that the basis for many of these challenges lies in the past, rather than the present.

Historically, marriage contracts were negotiated and prepared at the insistence of the spouse, predominantly the husband-to-be, holding the majority of assets. These agreements were frequently subject to the pressures of time and presented for execution in circumstances that were far from equitable from a bargaining perspective. More often than not they were characterized by some or all of inadequate financial disclosure, a lack of independent legal advice and an inequality of bargaining power.

Too often, an insistent prospective husband or father-in-law would present the contract a day or two before the wedding, accompanied by the direct or implied threat that there would be no wedding unless the contract was signed. Consequently (and rightfully so), the provisions of s. 56 of the *Family Law Act* might be triggered many years down the line following the unforeseen and unknowable valuation date also known as the date of separation.

Section 56 provides that a court may set aside a domestic contract if a party did not disclose significant assets; did not understand the nature of the contract; and/or otherwise in accordance with the law of contract.

In short, courts can set aside marriage contracts where one or both parties lack informed consent.

Thankfully, "The times they are a-changin.' "

Today, women (generally, the historically disadvantaged spouse) outpace men in admission to graduate and professional schools. For the most part, parties are much more informed and aware than they have been in the past. Gone is the ubiquity of adamant spouses and docile fiancées entering into marriage contracts unsupported by informed consent.

The *Family Law Act* defines "property" broadly. Trite law now holds that "property" includes interests in the capital and income of a family trust, which is often prepared to address succession concerns for a family business that involves several family members.

In the authors' practice, marriage contracts are often utilized to exclude the capital of a family trust for equalization of net family property purposes. This is particularly so where our client is the beneficiary of the trust as of the date of marriage (as opposed to a trust settled during the marriage, which would be "excluded property" under the *Family Law Act*).

At our firm, we have a protocol when acting for clients in the negotiation and preparation of prenuptial agreements. They embrace:

1. Full and frank financial disclosure by way of execution of a sworn financial statement accompanied by a supportive financial disclosure brief;
2. Independent legal advice; and
3. A process that must commence sufficiently before the wedding to allow adequate time for the exchange of financial information and several rounds of negotiations (if necessary) prior to execution.

Under these circumstances, with the parties exchanging proposals on a level playing field, including eyes wide open to the fact that the contract excludes an interest in a family trust, a finding of informed consent is almost definitely assured.

The upshot is that properly negotiated and executed marriage contracts are the best way to exclude family trusts from forming part of net family property on the date of separation. The Supreme Court of Canada has unequivocally held that parties have wide discretion to include and exclude any property from division, so long as the governing agreement complies with applicable legislation, has been fairly negotiated and represents the intentions and expectations of the parties.

The recipe used to bake a properly executed domestic contract, then, includes both family and estate planning ingredients. This is particularly evident where the client's (or more often than not, their parents') objective is the protection of intergenerational family wealth. In such complex circumstances, expertise and experience in the intersection of these two areas of the law is essential. After all, the devil is in the dabble.

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