

Marriage Rights and Responsibilities In Ontario

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“Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership, and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children . . .”

Preamble from the Family Law Act (Ontario)

Love and roses ... companionship ... family ... Marriage can be a wonderful institution. And then there's the law. Through years of tradition and, more recently, years of lobbying by women's groups, the institution has been defined and reworked through court decisions and legislation.

This paper is intended to provide you with information and general advice as to your status as married spouses. It does not take the place of advice from your own lawyer and who will consider your particular circumstances.

There are things that you should know so that you can properly plan the rest of your lives. My hope is that you will consider the laws that affect you as legally married spouses and that you organize your lives to suit your own situation. I hope that you will immediately see to it that you have proper Wills and Powers of Attorney in place, and that you seriously consider the need for a domestic (pre-nuptial, marriage) agreement.

Entering into a legal marriage means:

1. Any previous existing Will you had in place will be void. (The one exception is a Will made in contemplation of marriage, a very particular form of Will requiring specific wording, best handled by a knowledgeable lawyer). Where you have no will, your spouse will inherit according to rules set out in legislation.
2. You and your spouse are subject to the *Family Law Act (Ontario)* provisions relating to family property and your matrimonial home. Contrary to what many folks believe, property rights under the legislation only kick in if you are legally married.
3. Under the Act, you are subject to support obligations. While support obligations can arise after a period of time or where there is a child in the case of cohabitation (common law relationships) an obligation to support is immediate on legal marriage.

Family Property

When you marry, broadly speaking, from that day on, the increase in value of your assets is shared by both of you as family assets, as in an equal partnership. While you are married, it is unlikely any issue as to ownership will arise. However, when the marriage is over, again in broad terms, you will each be entitled to half of the increase in value of your family assets calculated from the date of your marriage to its termination.

There are certain exceptions, such as inheritances, particular gifts, legal settlements, which may not fall into the category of family assets. Often, these items become mixed with family assets and tracing is impossible. For example, you provide furniture for the house out of an inheritance, it gets worn out, and you sell it and use the

proceeds for a down payment for newer furniture. In addition, particular circumstances can be argued to override the legislation, based on complex trust principles. But these are difficult and risky arguments and inevitably will involve lawyers, the courts and related expense. A properly worded agreement and good bookkeeping can avoid many of these disputes.

Matrimonial Home

In addition to a sharing of family assets, the home you share will become a matrimonial home to which both of you are entitled possession. Even if one of you holds title in your own name, you will not be able to deal with it without your spouse's consent. And on termination of the marriage, possession of the home will have to be resolved.

Support

The *Family Law Act* provides that "every spouse ... has an obligation to provide support for himself or herself and for the other spouse ..., in accordance with need, to the extent that he or she is capable of doing so". Cohabiting spouses have similar obligations, but these only kick in after a period of time of cohabitation or the presence of a child of the couple. In calculating the amount of support to be provided, the courts will look at the needs of the dependant spouse, including his or her ability to "get on their feet" after a period of time, and the ability of the non-dependant spouse to provide. The courts encourage support of a dependant for a period of time to enable them to gain independence and will consider the length of time the spouse was dependant on the other, and his or her reasonable potential to become self-sufficient.

Your Wills

On the eve of marriage, with all the trust and promise that the future holds, few newly weds want to raise the issue of a break-up. Marriage is for life after all.

But all marriages do terminate. Even the good ones are only "until death do us part." And on death, without a Will, legislation will kick in to make decisions for you. In the simplest, smallest of estates, your spouse may well get everything. But even in such cases, there will be the cost and time involved in applying to the courts for a Certificate to allow the survivor to administer the estate and access the benefits. Holding assets in joint ownership and naming beneficiaries directly in insurance policies may avoid a court application where there is not a Will, but in most cases there are some assets held by institutions that cannot be accessed without a Certificate of Administration issued by the court.

Most couples decide on "mutual" or "mirror" Wills. The property goes to the surviving spouse, with alternative arrangements should they die together. In the situation of one marriage in a lifetime, this will accomplish what they both intended, so long as the surviving spouse continues to agree with what was in the original will. But in our times, many widows/widowers remarry. The new marriage voids the old Will. Without an additional proper agreement, the remaining spouse need not adhere to the original terms of the mutual Wills in making a new one. Without a Will, the new spouse and any future children of both, can end up with everything, including heirlooms, leaving the children and kin of the first deceased spouse out in the cold

Domestic Agreements.

A domestic agreement, binding the estate of the deceased and entered into with the purpose of guaranteeing benefits to children of previous marriages can be a thoughtful measure recognizing that life goes on for a surviving spouse. It does not mean that it was only entered into because the newly weds were anticipating a divorce! In the case of second marriages, a domestic agreement can be a reflection of understanding and caring of the circumstances of both spouses entering into the new marriage.

Domestic agreements are often used in business situations where the survival of a business may require that its assets are kept out of the family property regime. If you are in a business where you have entered into a partnership or shareholder agreement, it is very likely that the agreement requires you to have a domestic agreement in place to ensure that business assets will not be subject to family law legislation.

Wills and domestic agreements allow couples to customize the division of their assets on termination of marriage whether through separation/divorce or through death and thereby avoid the regimentation of legislation.

Powers of Attorney

In addition to a Will and domestic agreement, where appropriate, a Power of Attorney for Property and a Power of Attorney for Personal Care are important planning tools. While a Will speaks “from the grave”, the Powers of Attorney speak “from the hospital bed.” In some ways, providing for a substitute decision maker in the case of one’s incapacity is more significant to the giver than a Will. After all, how would you like to be slightly aware, but too incapacitated to make decisions for yourself, while someone is appointed by the court to be your guardian. Maybe mean old sister Kay is your closest kin and ends up as your guardian instead of your kindly cousin Sally. How would you like to have Kay deciding on where you live, what you eat and the appropriate expenditures for those items?

Most married couples appoint each other as their first choice of Attorney under a Power of Attorney, but also appoint a substitute Attorney or Attorneys in case they both become incapacitated or one predeceases the other.

In sum

This a very brief and general overview of the complex legal regime into which you enter upon marriage. Make sure you both understand and agree to the terms and consequences of your new union so that there are no misunderstandings!