



Heritage Law*

Second Marriages

Asset Protection and Estate Issues

Capilano Golf & Country Club

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The Problem

- a blended family cries out for proactive planning
- failure to engage in such planning increases the likelihood that upon the death of the first of the spouses to die, someone will see redress from the courts
- The Solution: what are the most effective planning tools?



Planning Tools

- The 3 Ds
- Fit the pieces of the puzzle together
- Disability/Incapacity - Enduring Power of Attorney & Representation Agreement
- Divorce/Splitting Up – Marriage Agreements, Co-Habitation Agreements and Trusts
- Death – Wills, Intestacy, Trusts, Inter Vivos Gifting, Joint Tenancies, Designated Beneficiaries
- Wills, Intestacy, Trusts, Inter Vivos Gifting, Joint Tenancies, Designated Beneficiaries



Disability/Incapacity Planning

- Enduring Power of Attorney – money
- Representation Agreement - body

Divorce/Separation of Common Law Spouses

- The relevant law you need to know
- Planning tools: marriage agreements, cohabitation agreements, trusts

Death

- Relevant law you need to know
- Tools: Wills, Trusts, Inter Vivos Gifting, Life Interests, Designated Beneficiaries, Intestacy



Division of Assets of a Marriage

- Division of property between spouses on a marriage breakdown in B.C. is governed by Part 5 of the *Family Relations Act*, R.S.B.C. 1996, c. 128 ("*FRA*").
- Without a marriage agreement, assets that qualify as family assets are presumptively owned and divisible equally between spouses.
- This presumption of equal ownership and division can be rebutted by a spouse who satisfies the Court that an equal division would be unfair taking into account specific factors listed in s. 65 of the *FRA*.

Judicial reapportionment on basis of fairness

- 65(1)** *If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to*
- (a) the duration of the marriage,*
 - (b) the duration of the period during which the spouses have lived separate and apart,*
 - (c) the date when property was acquired or disposed of,*
 - (d) the extent to which property was acquired by one spouse through inheritance or gift,*
 - (e) the needs of each spouse to become or remain economically independent and self sufficient, or*
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,*



Marriage Agreements

- It is possible for spouses to contract out of the asset division regime under Part 5 of the *FRA* by entering into a marriage agreement.
- However, the terms of a marriage agreement can be varied by the court on application by one spouse if they are found to be unfair



Typical Property Division Arrangements in Marriage Agreements

- Parties retain their respective property as separate property during and after the marriage, except for property which is specifically registered or recorded in joint names which is divided equally or under Part 5 of the FRA;
- All property owned by either party before marriage is kept separate during and after the marriage, but assets acquired by either party during marriage are divided equally, or under Part 5 of the FRA;
- All property kept separate except that a graduated percentage share is acquired over time in the matrimonial home and/or RRSPs by the non-owning spouse (eg. 3% per year to a maximum of 50%); and
- All property kept separate but graduated lump sum compensation to less affluent spouse on a marriage breakdown instead of share of property.

As an Asset Protection Tool Upon Death

Example of Waiver of Testamentary Claims

- A and B each give up all claims either party may have during or after the Marriage End Date to the other's estate under the *Wills Variation Act* (British Columbia) and the *Estate Administration Act* (British Columbia).
- A waiver of rights under the *WVA* does not automatically bar a separated spouse to bring a claim under that statute (*Ward v. Ward*, 2006 BCSC 448 among other cases).

Effectiveness of Marriage Agreements Post-Hartshorne

- *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550 ("*Hartshorne*")
- *The Court enforced a marriage agreement in a long-term traditional marriage, in which the wife's entitlement was significantly less than she would have obtained under the FRA.*
- *The Hartshorne decision was a departure from years of jurisprudence in B.C. in which courts regularly intervened to vary the terms of marriage agreements.*
- *The Court emphasized that an agreement does not need to reflect the 50/50 entitlement provided by the FRA to be substantively fair. Instead, courts should give effect to legislative intention by enforcing marriage agreements that are fair in the circumstances of the marriage.*

Test to Determine if Marriage Agreement Unfair

In *Hartshorne*, the Supreme Court of Canada held that, to determine if a marriage agreement is unfair, the Court must:

- Apply the marriage agreement to determine what each spouse is entitled to under the agreement and from other entitlements, such as spousal and child support.
- Determine whether the agreement is unfair, considering the factors listed in s. 65(1).

In doing so, the Court must determine if:

- the circumstances of the parties at the time of separation were within the reasonable contemplation of the parties at the time the agreement was made; and
- adequate arrangements were made in response to those anticipated circumstances.

Legacy of Hartshorne

- The cases that have been decided since *Hartshorne* demonstrate the tension between giving effect to the informed choice of parties and ensuring they are not held to an unfair agreement
- Since Hartshorne, the bar has been raised to set aside or vary family law agreements in B.C

Cohabitation Agreements

- Since 1997, unmarried, cohabitating couples may also become subject to the provisions under Part 5 of the *FRA* pursuant to s. 120.1
- has led to considerable uncertainty with respect to whether or not a cohabitating couple should enter into a cohabitation agreement.

Pros/Cons of a Cohabitation Agm

- On the one hand, by entering into an agreement that falls under s. 120.1, the unmarried spouses may become subject to a property division regime under the *FRA* that gives considerably more presumptive entitlement to a non-owning spouse than the common law grants unmarried spouses without an agreement.
- On the other hand, a cohabitation agreement provides some certainty for unmarried couples with respect to property arrangements on a relationship breakdown. In addition, in light of *Hartshorne*, the terms of a cohabitation agreement today have a good chance of being upheld if they were impeccably negotiated and circumstances have unfolded as expected.

Trusts

- As between the spouses during their lives, trusts have been and remain an imperfect tool and in the wake of the decision in *Hartshorne*, spouses are far better off to rely on marriage agreements.
- a trust is an obligation relating to property that binds one person (the trustee) to deal with property for the benefit of other persons (the beneficiaries). The person who creates the trust is the settlor.
- A trust may be created as the result of a death (i.e., pursuant to the terms of a Will).
- Alternatively, a trust may be created while the settlor is alive, called an *inter vivos* trust.

How the FRA Impacts Trust Interests

- The provisions of Part 5 of the FRA that have a potential impact on trust interests are ss. 58(3), 65(2) and 68
- contemplate that both trust interests and property owned by a trust can be family assets or, additionally or alternatively, order that any other property of one spouse—including property that does *not* constitute a family asset—be vested in the other spouse

Bottom Line: Trusts are Problematic for Marriage Breakdown Planning

- The trust can be a useful tool for blended families in an estate-planning context. However, if the goal is to protect spouses against each other's claims in the event of a marriage breakdown, it is an imperfect tool. As noted by Sigurdson J. in *MacDonald* at para. 56:

The cases ... illustrate that the determination of whether inherited assets, interests in trusts and private companies are family assets can be a very difficult issue, the determination of which depends on the particular facts.
- The scope of uncertainty with marriage agreements is now far less than is the case with trust interests.
- For that reason, the marriage agreement is the preferred planning tool when dealing with the blended family.

Death & the Rights of Married, Common Law, Separated and Divorced Spouses

- Death and divorce both end a marriage, but at least under estate law, divorce is much more final
- If legally married persons divorce, have their marriage declared void or annulled or a judicial separation has been ordered (after Aug 1, 1981), they are no longer spouses and cannot assert any rights to the estate of the other incidental on marriage
- s. 16 of the Wills Act specifically provides that these three events will invalidate a testamentary gift or appointment made to that spouse before the occurrence of the event, unless the will shows a contrary intention.
- s. 16 does not apply to the rights of non-legally married persons who might also be defined as spouses

Death & the Rights of Married, Common Law, Separated and Divorced Spouses - Cont

- s. 2 of the *Wills Variation Act* (“WVA”), limits claimants to children and spouses as defined in the WVA thus excluding former spouses any interest or right in the estate of the deceased
- But if a legally married spouse dies **before** a divorce, the situation changes, and the rights of the surviving spouse to the estate of the deceased may continue, even if the spouses had separated long before the death of one spouse and had intended to divorce
- Death, unlike a divorce, written separation agreement, and the other circumstances set out in s. 56 of the FRA, does not trigger the operation of s. 56, and does not provide the surviving spouse with an entitlement to an undivided one-half interest in the family assets.
- Quite often, depending on the circumstances of the parties, death can give the surviving spouse considerably more.

Fact Pattern & Answers



Wills Variation Act Considerations

- Where a will is intended to exclude or provide lesser for a spouse, including a separated spouse, a child, consideration must be given to the provisions of the *Wills Variation Act*, R.S.B.C. 1996, c. 490 (the "WVA").
- High litigation risk for blended families
- Where a will does not make adequate provision for the proper maintenance and support of a spouse (including common law spouses) or child, such spouse or child has the ability to bring an application to the court for greater provision out of the deceased's estate (WVA s. 2).
- The court has discretion to vary the terms of a will to make the provision that it considers adequate, just and equitable in the circumstances.

Tataryn v. Tataryn Estate

- The seminal case with respect to what is proper provision for spouses
- The Court held that in assessing whether the testator had adequately provided for the applicant the Court should consider the testator's legal and moral obligations to the applicant.
- "Legal obligations" are those obligations that the claimant has at law during the testator's lifetime, such as what would be provided on matrimonial breakdown.
- In addition, the testator has "moral obligations" that are to be defined with reference to society's reasonable expectations of what a judicious person would provide in the circumstances.
- In applying this analysis, the Court will consider a number of elements including the applicant's status as a spouse or separated spouse, the applicant's and the testator's standard of living and the standard of living of the other potential claimants under the will as well as the financial need of the applicant. Health issues, contribution to the estate and strength of relationship are also relevant both with respect to the claimant but also other potential claimants such as children.

Current Status of WVA Cases

- Because the analysis in *WVA* cases is primarily fact driven and involves the discretion of the court, the outcome of a case is difficult to predict

Planning Tools: Keep Assets In Estate

- Wills – Spousal Trusts
- Planned Intestacy

Planning Tools: Get Assets out of Estate

- Trusts: Alter Ego and Joint Partner Trusts
- Inter Vivos Gifting – Consider Tax Consequences!
- Joint Tenancies – Beware, especially with adult children, and Document Intentions
- Designated Beneficiaries – Consider Tax Consequences!



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Thank you!

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