

## A Marriage Contract: For the Optimal Planning of a Second Marriage

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with the collaboration of Gerald Stotland and Pascale Blanchet

### Introduction: A Second Union is a “Marriage” of Competing Interests

As a general rule, individuals who enter into a second marriage or a second union are more than 40 years of age, have accumulated their own property and have enjoyed a standard of living that they want to maintain or even improve upon.

Each spouse may thus have to reconcile divergent expectations or interests, such as:

- protecting assets owned prior to the second marriage - vs - constituting or increasing his or her spouse’s assets to ensure such spouse’s future security;
- the wish to favour his or her surviving spouse - vs - that of transmitting his or her property to descendants or potential heirs;
- the project to jointly acquire one or many family residences - vs - the individual wish of each spouse not to share the gifts or inheritances received prior to or during the marriage, or reinvestment during the marriage of property that was owned at the time of marriage.

It seldom – if ever – happens that both spouses contribute exactly in the same proportion to household expenses, the acquisition of property and investments.



In order to reach a certain level of equality between the spouses, both during and upon the termination of the marriage (in the event of a breakdown or death) and reconcile the competing interests we just described, two solutions are available, which any sensible individual should consider as part of the prior planning of a second union:

- a marriage contract; and
- estate planning, including the preparation of a will and of a mandate in anticipation of incapacity (please note that this aspect shall be addressed in a forthcoming newsletter).

Such planning, by way of marriage contract and/or will, is also advisable in the case of a first union, with the adaptations appropriate to each case.

### The Marriage Contract

#### Why Enter Into a Marriage Contract

A marriage contract is much more than just choosing a matrimonial regime:

- seeking information on their rights and having a marriage contract drafted ensures that the spouses are informed as to the implications and consequences of the matrimonial regime and the rules governing family patrimony (which are of public order and apply to all spouses; the future spouses may not in advance, by way of their marriage contract or otherwise, waive the rules of the family patrimony - such waiver is only possible at the time they become entitled to the partition of the family patrimony, that is, upon dissolution of the marriage or death of either spouse);
- even if entering into a marriage contract does not entirely resolve the issues resulting from the “opposing” expectations or interests of the spouses who enter into a second union, it nevertheless allows them to remarry with an understanding of the issues, being well informed of the consequences of their life choices and financial decisions;



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- courts generally uphold the arrangements made by spouses respecting the partition of their assets in the case of the dissolution of their marriage, especially when each spouse received prior independent legal advice.

### Validity of the Marriage Contract

To be valid in the province of Quebec and other jurisdictions, a marriage contract (and any subsequent matrimonial agreement) entered into in Quebec may be drafted by either a lawyer or a notary and in all cases, must be established by a notarial act and be accompanied by, among other things, the following certificates:

- a certificate signed by the attorney of each party, stating that the future spouses were provided with independent legal advice prior to signing the marriage contract;
- a current balance sheet signed by each spouse in the form of a sworn declaration, stating the value of their assets and liabilities at the time of marriage.

### The Marriage Contract as an Optimal Planning Tool

The preparation of a marriage contract provides the spouses with the opportunity to address the following issues and adapt them to their needs and situation:

- the choice of their matrimonial regime (separation as to property or conventional partnership of acquests);

- the establishment of the net value of each member of the couple at the time of marriage;
- the contribution of each spouse toward the expenses of the marriage;
- gifts *inter vivos* or *mortis causa* (with stipulations of unseizability of the property given and return of the property given to the donor in the event the donee predeceases the donor). Such gifts may shelter important property from creditors when one of the spouses is personally liable in respect of his or her business or professional affairs and wishes to safeguard family assets by giving them to his or her spouse;
- a “divorce clause” providing that a gift becomes due immediately upon separation of bed and board or divorce, notwithstanding a stipulated later date or, conversely, providing that the issuance of a separation of bed and board or divorce judgement will constitute a redemptive condition cancelling any uncompleted gift;
- contractual institution (gift *mortis causa* providing for the devolution of the property to the surviving spouse; such a gift is irrevocable unless otherwise stipulated, in which case the donor is precluded from making a will in the future);
- plan the consequences of moving or retiring outside Quebec:

- a) foreign family and matrimonial laws may affect property owned by the spouses and the treatment of such property in the event of the dissolution of the marriage or death of a spouse;

- b) a marriage contract may help anticipate and deal with the consequences of these foreign laws;

- a clause stipulating that the spouses do not waive the benefit of the deductions provided for in Article 418 C.C.Q. in the event that during the marriage a spouse invests funds received as a gift or inheritance prior to or during the marriage into property included in the family patrimony or make reinvestment during the marriage of property that was owned at the time of the marriage (according to a majority of court decisions in Quebec, the fact that a family residence or other property is acquired jointly by the spouses may entail, in the event of partition, a waiver of any allowable deduction that a spouse may otherwise have claimed for sums received as gifts or inheritances or with respect to reinvestments used to finance the acquisition or improvement of property included in the family patrimony);

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- anticipate the economic consequences of the dissolution of a marriage, such as: limit the rights to a lump sum or a compensatory allowance (although they are not bound by such a clause, courts may nevertheless take it into account when determining support obligations between former spouses [*Droit de la famille* 3384 J.E. 99-1707 (S.C.), discontinuance of appeal November 2, 1999]);
- provide for clauses that will limit the adverse tax consequences of the transfer of specific assets between the spouses, for instance, stipulate that the spouses will make a joint election in order to avoid attributing to the transferor the capital gain realized at the disposition of property that was previously transferred between the spouses prior to or during the marriage and that each spouse undertakes to indemnify the other spouse for any amount that he or she may be called upon to pay as a result of the joint and several liability set out in Section 160 of the *Income Tax Act*;
- determine which residence will be the “principal residence” for tax exemption purposes and indicate which of the spouses will be allowed to claim such exemption for any tax year prior to divorce. Otherwise, the spouse who is the first to sell one of the family residences could be the only one allowed to claim the exemption and, depending on the circumstances, this may be neither the fairest nor the most equitable result between the spouses;

- provide for any terms that are not contrary to public order or immoral.

It may be advisable to enter into a new marriage contract when the current marriage contract does not conform to the above-mentioned criteria for its validity or if its terms are no longer realistic for the couple or when major life changes are anticipated.

The members of our Family, Personal and Estate Law Group can assist you in negotiation or drafting your marriage contract, cohabitation contract or any other matrimonial agreement.

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