COVERING YOUR BASES:

TOP LEGAL CONSIDERATIONS IN THE TRANSFER OF WEALTH

What you need to know about protecting your assets and planning for the future.

Original artwork by Holly Stapleton

The legal aspects that come with generational wealth and legacy planning are important to consider, as Victoria E. Winter and Audrey A. Shecter of Beard Winter LLP thoroughly explained during a workshop hosted by Burgundy Vice President and Investment Counsellor Lauren Davis Landau. Here, we are sharing their crucial insights when it comes to the key elements of protecting assets through your lifetime and planning for the transfer of wealth upon death in two distinct sections. First, family lawyer Shecter explores asset protection, including the safeguarding of family property in the event of a relationship breakdown and navigating the complexities of gifting or lending. Then Winter addresses the essential considerations for a comprehensive estate plan, focusing on ensuring that your legacy is conveyed exactly as intended.

Whether you aim to solidify an existing wealth-transfer plan, identify new considerations, or lay the foundation for future arrangements, this article aims to equip you with enhanced knowledge and confidence in your planning strategies and ensure you are on the right path for the eventual transition of wealth within your family.

FAMILY LAW CONSIDERATIONS

Audrey A. Shecter, B.A., M.A. M.L.S, LL.B

In the world of family law, the breakdown of relationships often brings a variety of legal challenges, particularly concerning property and asset protection. Here, I aim to shed light on the legal tools we can use to navigate these challenges and safeguard property effectively.

The Role of Domestic Contracts

Though domestic contracts are commonly known as prenups or postnups in the United States, under the *Family Law Act* in Ontario, they are called cohabitation agreements or marriage contracts. At a high level, these contracts—which must be recorded in writing and witnessed to be considered valid—address issues like the division of property and spousal support upon the breakdown of a relationship. Importantly, they are designed to allow individuals to opt out of certain legal rights and entitlements they would otherwise have as a spouse or partner.

These contracts primarily aim to exclude specific assets—anything an individual has a current, future, or contingent interest in—from being equalized or shared upon the end of a relationship. For example, an investment account earmarked for protection can be explicitly excluded from sharing in the event of a relationship breakdown. Other items often covered in domestic contracts include gifts and inheritances (like real estate, investment accounts, or shares in a family business from parents or relatives), family trust interests, and contributions to a house purchase (such as a situation in which one partner moves into a property owned by the other).

Who Needs a Domestic Contract?

Drawing from my decades of experience drafting domestic contracts, I've come to recognize certain patterns and scenarios in which these agreements are crucial. One frequent situation involves young couples who are preparing for marriage, and one partner stands to inherit or accumulate significant family wealth.

Another common scenario unfolds when individuals enter subsequent relationships. These are typically people who have been married before, are either divorced or widowed, and are now entering new partnerships later in life. They bring with them tangible assets, businesses, or children from previous relationships, and a primary concern is ensuring that their estate is passed on to their own children.

A third frequent scenario involves the purchase of property by a couple with unequal contributions to the purchase—it may even include a loan or gift from family. Consider a situation where a parent financially assists their child in buying a house. The nature of this contribution—whether it's a loan to be repaid or a straightforward gift—needs to be explicitly defined. Without such clarity, the dissolution of a relationship can turn these situations into points of contention.

In all these situations, a domestic contract isn't just a legal document; it's a framework for understanding and agreement, establishing the terms of property ownership, and avoiding future disputes.

What Happens When You Don't Have a Domestic Contract?

In the absence of a domestic contract, the division of property upon the breakdown of a marriage is governed by the *Family Law Act*, which states that all assets (property) and debts accrued during the marriage must be equalized. This process involves equally dividing the growth in value of all assets and debts as of the date of separation and subtracting out the value of property owned on the date of marriage. Each partner calculates their respective assets and debts, and the person with the higher net worth

pays half of the difference to the other. This ensures that both parties leave the marriage with equal financial standing.

Part of this process is dealing with the matrimonial home. Contrary to other assets, like Retirement Savings Plans (RSPs), where only the increase in value during the marriage is subject to equal sharing, the full value of the matrimonial home that was owned on the date of marriage and that still was a matrimonial home as of the date of separation is included in the equalization calculation. So, a person who owned a home on their own for many years before getting married, then shared that home with their spouse, might find themselves dividing its full value with their spouse upon divorce unless there is a domestic contract in place.

For unmarried couples in Ontario, the situation differs. There is no automatic legal right to property division, so if an unmarried couple separates, property is not automatically divided as it is for married couples. However, claims can still be made based on legal principles, though these cases tend to be more complex and evidence-based.

Making a Domestic Contract Enforceable

When it comes to making a domestic contract enforceable, there are several key considerations to keep in mind. Firstly, the idea of an "ironclad" contract is a myth. While we strive to provide the best protection possible, it's important to understand that any contract can potentially be challenged. Family law is also very dependent on the specific facts of each case. This reality underscores the need for meticulous drafting and thoughtful negotiation in domestic contract creation.

A crucial aspect of ensuring enforceability is the timing of the negotiation. Rushing into a lawyer's office mere weeks before a marriage is not recommended or advised. To create a robust contract, the process should ideally begin four to six months before the marriage. This lead time allows for thorough discussions and proper negotiation, significantly reducing the risk of future challenges. In cases where a marriage contract is signed after the wedding, the spouse already has certain rights under the *Family Law Act*. If they decide not to sign a post-marriage contract, the standard legal provisions apply.

Full financial disclosure is also required to make an enforceable contract. The courts have repeatedly emphasized the importance of complete transparency in financial matters. Withholding information or misrepresenting financial assets can be grounds for setting aside a contract. This transparency is both a legal requirement and a matter of fairness—it allows each party to fully understand what rights and entitlements they may be relinquishing.

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Lastly, an element that is often overlooked but is vital in the enforceability of a contract is its overall fairness. Overly one-sided contracts, especially those that leave one party significantly disadvantaged, are more likely to be challenged and potentially set aside. The contract should not leave one party with no future financial security, particularly in long-term relationships.

And after a contract is negotiated, you have to be sure to handle finances as stated in the terms of the contract, particularly the non-co-mingling of protected funds. If, for example, someone has a protected investment account and merges a portion of it into a jointly owned home without amending the contract, they risk losing the exclusion for that portion of the funds. Maintaining clear financial boundaries is therefore critical.

ESTATE PLANNING CONSIDERATIONS

Victoria E. Winter, LL.B, TEP

An estate plan—a comprehensive strategy for transferring wealth, primarily upon death—is essential for any wealth generator, entrepreneur, or individual. While there are many dimensions to estate planning, drafting a will to detail one's asset distribution wishes is a crucial cornerstone of a good strategy.

To understand the importance of having a will, it's helpful to examine what happens to an estate without one. In Ontario, for instance, intestacy provisions apply. Any assets that are jointly held or have a beneficiary designated would pass directly to the surviving spouse or beneficiary. However, for any assets passing through the estate, intestacy provisions dictate that the first $350,000 goes to the surviving married spouse, with the remainder divided among the spouse and children. If there is no spouse

From left: Rachel Davies, Chris Clarke, Victoria E. Winter, Audrey A. Shecter, Dr. Sharilyn Hale, Joan DiFuria, & Anne Maggisano on stage at Minerva Summit

or there are no children, the estate passes to the closest next of kin (like parents or siblings).

It's important to note that common-law spouses have no automatic rights under intestacy. Additionally, if a minor child is entitled to part of an estate, their share is paid into court until a guardian of property is appointed. Even if there is a surviving parent, they must apply to the court to obtain that right. This involves interaction with the Office of the Children's Lawyer, a government ministry protecting minors' rights, and it can be a particularly cumbersome process if the estate includes assets like a family home.

Issues to Consider When Preparing a Will

When preparing a will, the general principle is that it can be structured according to your wishes, with a few legal exceptions. Some items to consider:

- ***Family Law Act*:** Under this act, a married spouse can either accept what has been left to them under the will or make an equalization claim, similar to a divorce settlement, provided there is no domestic contract.
- ***Succession Law Reform Act*:** This act considers individuals who are financially dependent on you. Though you have the discretion to exclude individuals, such as a child, from your will, this exclusion is contingent on their financial independence from you. If you have been regularly providing financial support, or if you are legally obligated to do so, you can choose to exclude them; however, they have a right to make a dependence relief claim against your estate.
- **Provisions Against Public Policy:** The court may invalidate a will that includes a provision requiring a beneficiary to engage in actions considered against public policy to receive their inheritance. Examples include requiring someone to change their religion or divorce their spouse.
- **Jointly Held Property:** If an asset is held in joint tenancy with another person, it would transfer to the surviving owner outside the will. So control over the shared asset is limited if you pass away first. For example, we encounter clients who have inherited a family cottage jointly with their siblings, believing they can control their share. However, it's crucial to conduct a title search to verify the nature of the joint ownership. If the property is held as joint tenants, the interest of the deceased directly transfers to the surviving siblings, eliminating any control over what was presumed to be their share. Another common situation we see involves clients adding adult children as joint owners of assets (like bank or investment accounts) to avoid probate fees. While this approach can be effective for bypassing probate, from an

Above right: Minerva Summit panel discussion

Top to bottom: Kate Mostowyk, Sarah MacNicol, & Lisa Ritchie at Minerva Summit; Victoria E. Winter at Minerva Summit; Audrey A. Shecter speaks to the Women of Burgundy community

estate perspective it raises questions about the true intention behind the joint ownership. Was it meant for the asset to fully transfer to one child, excluding others? The Supreme Court of Canada has addressed similar cases, ruling that unless there's proof to the contrary, such jointly held assets are presumed to be part of the estate. Without careful planning, these assets can inadvertently become subject to the probate process.

- **Property on Which a Beneficiary Is Named:** In these cases, the asset (i.e. an RSP/RIF, TFSA, insurance policy) passes directly to the beneficiary outside the will. A key consideration here, especially during a separation, is the importance of keeping beneficiary designations current as they do not automatically update.
- **Business Assets Subject to Shareholder or Partnership Agreements**: When business assets are governed by shareholder or partnership agreements, the terms of these contracts prevail over the provisions of a will.
- **Income or Interest in a Trust:** If you have an interest in a trust that does not form part of your estate, it will typically be transferred according to the specific terms outlined in the trust agreement.

Complex Assets and Family Considerations in Estate Planning

With an understanding of the restrictions on what can be done with a will, we can now focus on overall estate planning. The complexity of an estate plan is not necessarily dependent on the size or value of the estate; instead, it is more often driven by the nature of the assets involved and family circumstances.

In my experience, the assets that generally necessitate more sophisticated planning strategies include the following:

- **Private Company Ownership:** Holding private company shares presents an opportunity for strategic planning to minimize

probate fees. By directing these shares through a separate will, it's possible to save approximately 1.5 percent of their value (in Ontario) that would otherwise go to probate fees.

- **Business Interests:** With active businesses, it's essential to review any existing shareholder's agreements. These agreements may contain specific requirements or restrictions that come into effect upon death. And when it comes to family businesses, it's not uncommon to find that only one of the children is actively involved while the others are not. This scenario necessitates a careful examination of the succession plan for the business shares or value upon the owner's death. Typically, the family business is the major asset in the estate, so the challenge becomes developing a strategy that provides fair value to all children.
- **Foreign Assets:** If an individual owns real estate outside of Canada, that property is subject to the transfer laws of the country it's located in. To ensure that a will complies with these international legal requirements, consultation with a legal expert in that jurisdiction is often necessary—it may even be more useful to create a separate will exclusively for the foreign property to account for any distinct legal requirements.
- **Assets Co-owned with Individuals Other Than the Spouse:** Determining the true intent behind such ownership—for example, a family cottage co-owned with siblings—is crucial. Is the structure of ownership set up to reflect the true intention of all parties involved?
- **Loans or Advances Made to Children:** An increasingly common situation involves parents who have made loans or advances to their children. It's imperative to clarify the parents' intentions regarding these loans. Are they to be forgiven upon the parents' passing? Is there an intention that children are equalized? These intentions can be integrated into the will to ensure equitable treatment of all heirs when an estate is distributed.

There are also family circumstances that generally lead to more sophisticated planning, including:

- **Second Marriages:** In the context of second marriages, a critical consideration is whether a marriage contract exists and if it contains stipulations that need to be incorporated into the will. It's not uncommon in second marriages for one spouse to have significantly more assets than the other. The wealthier spouse often seeks to ensure the financial security of the surviving spouse while also wanting to guarantee that the assets ultimately come back to their respective children after both spouses have passed away. The most common solution is the establishment of a spousal trust that holds assets individually rather than jointly. Upon one spouse's death, the assets are placed into a trust for the benefit of the surviving spouse. The surviving spouse is entitled to the income from the trust and, with the trustee's permission, may also receive portions of the principal. However, the balance of the trust is protected so that it passes to the children after the surviving spouse's death.
- **Children From Previous Marriages:** Individuals who have remarried must also consider the timing of their children's inheritance. Should they receive funds immediately following death, or must they wait until the passing of the surviving spouse? It's essential to review the estate's assets to determine if there are sufficient funds to provide an immediate inheritance to the children, with the remainder allocated to the spousal trust. Certain assets, such as life insurance proceeds, which are not significantly impacted by tax implications regardless of the beneficiary, can be distributed to the children straight away.
- **Dependants with Special Needs:** If you have dependents with special needs, such as a child with a mental disability, it's advisable not to leave assets directly to them. Direct inheritance may not only be challenging for them to manage, but it can also affect their eligibility for disability support programs. To address this, a Henson Trust is often employed. This is a discretionary trust designed to provide for the dependent throughout their lifetime without compromising their right to receive government benefits. Assets are placed into the trust rather than given to them directly, and trustees are granted the ability to distribute income or capital to the beneficiary as needed, without any obligation to do so at any particular time.
- **Family Members in Other Jurisdictions:** When dealing with family members living outside Canada, it's crucial to be mindful of various legal implications. For instance, it's typically not advisable to name them as

an executor of the estate. Otherwise, there can be a requirement to post a security bond. Additionally, there can be different tax implications on inheritance outside of Canada. Strategic planning can sometimes mitigate this.

- **Foreign Citizenship:** Finally, foreign citizenship of the testator or their spouse is an important consideration, particularly with regards to U.S. citizenship. The United States taxes based on citizenship rather than residency. Careful planning is necessary to minimize potential U.S. estate tax liabilities, and this often involves working with a U.S. attorney.

Probate Planning and Fee Minimization Strategies

Probate planning is another key focus when preparing a will. Probate is the judicial process of validating a will as the final testament of the deceased. Not all assets require probate; it depends on the requirements of third parties like banks, financial institutions, or real estate registries for allowing executors to manage the assets. Probate fees vary by province or territory, and are highest in Ontario, British Columbia, and Nova Scotia.

To reduce probate fees between spouses, jointly holding assets is a common strategy, as ownership automatically transfers to the surviving owner. However, caution is needed with this approach, especially when involving children or to avoid the co-mingling of protected assets. In cases where someone is added as a joint owner solely to bypass probate, a "bare trust" arrangement can be used. Under this arrangement, the joint owner acknowledges they don't actually own the asset but are holding it to avoid probate. Then a second will is drafted to manage these jointly held assets. Additionally, using multiple wills is an effective method to bypass probate fees for assets that do not require probate, such as private company interests, outstanding loans owed to you, and personal items like art and jewelry.

Regarding assets with named beneficiaries—such as RSPs, TFSAs, and life insurance policies—it's generally preferable to name the spouse as the beneficiary for tax reasons. However, in the absence of a spouse, children can be named instead. Caution is advised with RSPs: while the proceeds are directly transferred to the named beneficiary, any tax liabilities incurred remain with the estate. This necessitates careful coordination to avoid discrepancies between the recipient of the RSP proceeds and the party responsible for the associated tax liabilities.

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Other strategies to avoid probate fees include creating an inter vivos trust, either by transferring assets into the trust or using a prescribed rate loan. An estate freeze is another option, and is particularly useful for transferring investments to a holding company that can later pass through a secondary will. Or, if you're comfortable with the amount of assets you have, you can freeze the value of your current assets and create a trust with the new growth shares for the benefit of future generations.

Lastly, for Canadians aged 65 or older, alter ego or joint partner trusts offer a unique estate planning tool. The creator of the trust can control it and must be the sole beneficiary during their lifetime. Upon death, the trust acts as a will substitute, transferring assets, for example, to children. This structure is especially advantageous for high-value residences, as it still allows for the principal residence exemption and can hold other investments. However, it requires filing an annual tax return, which is a consideration to bear in mind.

The Importance of Powers of Attorney

It is always recommended to have powers of attorney established, and we typically prepare them concurrently with a will. The power of attorney for property, which addresses financial affairs, is particularly vital because there is no default arrangement in place. In the event of incapacity, without a power of attorney, no one—not a spouse, parent, or any other person—automatically has the right to manage or handle your assets. In such cases, your trusted person would need to apply to the court to become your guardian, which is a costly undertaking that can be easily averted with this simple document. Furthermore, powers of attorney for personal care are equally important. This document is instrumental in communicating what your specific healthcare and end-of-life wishes may be. **M**

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