

Be Careful What You Plan For

When one realizes that almost fifty percent of marriages in Canada end in divorce, one likewise realizes that prenuptial agreements and domestic contracts can be valuable things. The use of domestic contracts is considered customary when second marriages are concerned, as individuals entering into second marriages have a better understanding of the complications caused by the merging and dividing of assets.

There are, however, drawbacks to such contracts of which one should be aware. A number of these drawbacks are clearly illustrated in the case of the Ontario Teachers' Pension Plan Board versus Superintendent of Financial Services and Stairs. In this case, Subsection 51(2) of the PBA placed a restriction on the amount of pension benefits that could be transferred to a second party in a domestic contract. "This section is not effective to cause a party to the domestic contract or order to become entitled to more than fifty percent of the pension benefit". The Ontario Court of Appeal, however, ruled that a "Plan member has an assignable interest in a benefit payable under the Plan". The statutory scheme of the PBA also supports the idea that a Plan member may assign pre-retirement death benefits by the means of a domestic contract. The court further argued that the date of termination of benefits was that of the Plan member's death, and not the date of separation of the two parties in the domestic contract. Under the section named above, Stairs was entitled to have a portion of the survivor pension paid to her directly. Furthermore, subsection 62(3) of the PBA allowed her entitlement throughout her lifetime, illustrating that entitlement is not linked to the second beneficiary's date of

death. This case clearly shows that the domestic contract is a vital document to employ in the tracking of assets to achieve equalization.

In a recent case, I was called upon by the lawyers involved to trace a financial asset which had started out as part of a pension, and which had been excluded from the pre-nuptial agreement. Through a financial audit of the property, as well as through a leverage account and two margin calls, I was able eventually to exclude over \$250,000 from the Net Family Property Statement. This is an example of a case in which the expertise of a Certified Divorce Financial Analyst can assist a lawyer in producing the appropriate numbers that will add to the strength of his or her client's case. With only a slight additional cost, as well as with considerable validity added to his or her case, the client will doubtless see the benefit of employing the services of a Certified Divorce Financial Analyst.

An RRSP brought into a marriage is yet another asset which may not be listed in a domestic contract, but which is not usually considered to be an asset for equalization. In a relationship lasting longer than five years, it is unlikely that the original investment of the RRSP would still be standing, and tracing it would be very difficult. As more and more investment products are brought onto the market, an asset can appear very different than it did several years earlier. Relying entirely on the client's memory when locating the original investment would be very challenging; moreover, one might run the risk of not allocating enough value to the investment. Thus, the knowledge of a Certified Divorce Financial Analyst would be beneficial in such a situation.

One other asset that is important where domestic contracts are concerned, and which I will discuss in more detail at a later date, is Life Insurance. Life Insurance is one area of financial planning that is not only complex, but also continually evolving. It would require a great deal of time and effort for a lawyer to gain an understanding of the financial workings of a Life Insurance company. In addition, it would be challenging for lawyers to understand the many problems that can arise from a Life Insurance agreement that has been written several years earlier. For example, a domestic contract is not sufficient in order to change the beneficiary of a person's Life Insurance. This fact is exemplified in a case that took place in 1989, in which the courts ruled that the parameters of the Insurance Act did not allow for a provision in an agreement (such as a domestic contract) to be considered a "declaration". This drawback to domestic contracts can cause problems, especially when a second spouse is involved. For this reason the skills of a Certified Divorce Financial Analyst would be useful when dealing with an asset such as Life Insurance.

A Certified Divorce Financial Analyst is an ideal professional upon which to rely when drafting agreements during a divorce; he or she can help to ensure that both parties are agreeing upon terms that are financially fair, considering the potential values that assets may acquire in the future. Whether one is using a "phased-in division of property" approach or a "share of the wealth" approach, a future value presentation offered by a Certified Divorce Financial Analyst will facilitate a fair agreement between both parties. Gaining a comprehensive insight on the short- and long-term financial effects of any

domestic contract can save money, time, and stress. As divorce entails the division of an economic unit, as well as of a family unit, the process should be planned for carefully.

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