

Domestic Contracts

Estate planning for millennials: The importance of family law considerations

By **Emma Hamilton**



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(February 20, 2019, 3:17 PM EST) -- In my July 2018 article Estate planning for millennials: No time like the present, I discussed the importance of millennials and estate planning and the unintended consequences that can result from failing to have proper planning in place.

In addition to estate planning, it is important that the younger generation also understands and considers the family law implications of relationships, living situations and even marriage. Parties can have different rights and legal standing depending on the situation, and upon a relationship breakdown, there could be serious consequences.

Before marrying or cohabitating with a spouse or partner, it is important to understand the legal implications of this important step. The first consideration is to understand the difference in legal rights that arise between being in a common law relationship and being legally married. A common misconception is that a common law partner has the same rights and legal standing as a married spouse.

Under family law legislation in Ontario, upon a marital breakdown, married spouses are subject to equalization of their net family property. Equalization, in general terms, means each calculates how much of their net worth (with certain exclusions such as gifts and inheritances) was accumulated during their marriage and the spouse with the lesser amount has a claim to equalize property. Common law partners are not entitled equalization upon a relationship breakdown and have no right to the share in their partner's estate on an intestacy if their partner does not leave a will.

With respect to support claims, common law partners, like married spouses, have the right to make claims for spousal support under Ontario family law legislation once they have lived together for three years, or earlier if they have a child together (the "threshold test"). For example, if a young couple decides to live together after completing their post-secondary degrees, as many millennials do, and eventually, after several years, end their relationship, a claim for support could be made by one against the other.

Living common law creates a significantly vulnerable situation compared to that of married couples when it comes to division of property and the issue of support until the threshold test for support has been met. However, the law differs between jurisdictions on the rights of common law partners.

For example, in Alberta, the term "adult interdependent partner" is used to describe a common law partner who has support rights upon a relationship breakdown, but, previously, there was no Alberta legislation that addressed the division of property for common law spouses upon separation.

However, due to legislative amendments last fall to the *Matrimonial Property Act* (soon to be called the *Family Property Act*), the Act will now apply to both adult interdependent partners and spouses with respect to property division. These changes will come into effect Jan. 1, 2020.

Regardless of the jurisdiction, it is essential to understand that the rights of a common law partner are often very different than that of a married spouse, which could create significant issues if proper planning is not in place.

How can these concerns for common law partners and married spouses be addressed?

One way to mitigate against these issues is through a domestic contract, such as a cohabitation agreement or prenuptial or postnuptial agreement. A domestic contract can address concerns about protecting certain assets, including:

- a residence;
- shares of a company;
- significant wealth; or
- a family inheritance.

This allows parties to contract out of equalization and spousal support upon a relationship breakdown or death. For example, take the situation where two parties are living common law and one party, who purchased the property they reside in, has a significant interest in a family trust and the other party with fewer assets has been paying rent and assisting with capital repairs and upgrades to the property.

Not only does the one party want to make sure their inheritance and ownership of the property is protected from any claims by the other on a relationship breakdown, the party paying rent and putting a significant investment into the property also wants to be protected so their contribution is not disregarded on a relationship breakdown.

This is also true for situations where each party has contributed equally throughout a marriage or common law relationship to ensure there is a clean break if they separate at a later date.

Domestic contracts can, however, be a highly sensitive topic to discuss with a spouse or partner and requires full financial disclosure and proper independent legal advice. That being said, there are encouraging statistics in the U.S. that signal a change in the perception of these contracts, particularly by the younger generation, as millennials are more accepting of the idea of having of domestic contract, specifically (interestingly) in regards to protecting intellectual property. This is a hopeful trend, but there is still a long way to go.

At such an early stage in both their personal and professional lives, it is not altogether surprising that the majority of millennials are failing to consider the repercussions of a relationship breakdown or how to protect themselves in these situations. Encouraging millennials to seek proper legal advice as their circumstances change and continue a dialogue around these issues is imperative in preventing devastating and unintended consequences resulting from a relationship breakdown.

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