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In this edition of the Canadian Financial Planner, we shall review the use of marriage contracts to resolve various issues related to marriage and divorce. Family law legislation falls under provincial jurisdiction and although it is similar in most provinces, there are differences. In all marital issues it is vital to attain the services of a lawyer who specializes in family law.

The legal concept of marriage has expanded over the past few years. In addition to traditional marriages between a man and a woman, the following relationships may result in individuals being treated as spouses for various legislation:

- gay marriages are legal and subject to provincial family law rules
- individuals that live together in a conjugal relationship are considered married for purposes of the income tax act, if they have lived together for 12 months or have a child together. Despite the income tax recognition of common law relationships, provincial family law does not recognize such individuals as married
- for family law purposes, the rules vary by province in regard to common law relationships. For example in Ontario, individuals that live together for three years are considered spouses for purposes of spousal support obligations, but not for the equalization of assets upon separation

Beyond the traditional benefits of marriage, it is also a statement that a couple has formed an economic partnership that has the following legal ramifications:

- the couple agrees to equally split the increase in the value of assets acquired during the period while they were married
- although each individual has an obligation to support themselves, spousal support may be necessary to fund the needs of the lower income spouse
- the value of the matrimonial home will be divided equally regardless of who first owned the home, who paid for it or whose name the title is registered. Upon separation, each spouse has an equal right to stay in the home and neither spouse

can sell, rent or mortgage the home without the permission of the other spouse

- if the spouses do not believe these rules are appropriate in their circumstances, they can opt of many aspects of the family law rules by creating a marriage contract. Custody of the children cannot be resolved in such a contract

It is important to note that the equalization of assets applies at death as well as separation. Surviving spouses have the option of receiving the greater of their inheritance, or the amount which would have been received if the couple separated as at the date of death.

Marriage contracts are most common in the following circumstances:

- the spouses enter the marriage with a significant variation in their assets
- one spouse has significant debts at the time of marriage
- there are children from a previous marriage and the spouse wants to ensure an inheritance will transfer to these children, regardless of the status of the current marriage
- one spouse believes that a 50/50 split of the marital home is inappropriate. For example, one spouse may own a home valued at \$500,000 and the other spouse does not bring significant assets into the marriage. The spouse who owned the home has a concern that his spouse could leave after a few months of marriage and be entitled to a \$250,000 payment based on the value of the home

Note – The remainder of this article is only available to subscribers of the Canadian Tax Planners Newsletter. If you elect to subscribe and wish to receive a copy of this newsletter, advise us accordingly and the complete article will be forwarded by return mail.