



**Lancaster, Brooks & Welch** LLP  
Niagara's Lawyers Since 1882

# Estate planning in the midst of a marriage breakdown



## Accessibility and Convenience

**Lancaster, Brooks & Welch LLP** have offices in both St. Catharines and

Welland which are conveniently located in the downtown core.

Regular office hours are Monday to Friday from 8:30am to 5:00pm.

We are happy to make appointments at other times to satisfy our clients' needs.

80 King St., Ste. 800, St. Catharines, ON  
905.641.1551

3 Cross St., Ste. 202, Welland, ON  
905.735.5684

**905.641.1551**

**[www.lbwlawyers.com](http://www.lbwlawyers.com)**

This is difficult since there are so many other things going on. Considering estate planning hardly seems like a high priority, but it is important that you address such issues early on. The reason for this is simple: Most couples have set up their finances and personal affairs at a time when their marriages were solid, but these arrangements are usually inappropriate when marriages fail. Something sudden and tragic could occur in the midst of marital negotiations, and it is for this reason we suggest the following matters be addressed as soon as marital difficulties arise.

### **Should I do anything about my Home and my Assets?**

Usually spouses hold title to their assets in a joint fashion. Residences, in particular, are almost always held in joint tenancy with the result that, in the event of the death of one spouse, the other spouse will be the sole owner. This is appropriate when the marriage is solid, but likely inappropriate when the marriage fails. We suggest that when a marriage fails, consideration be given to the transfer of title from joint tenancy to tenancy in common (co-ownership). As such, each spouse maintains an interest in the property, but that interest does not flow automatically to the other spouse in the event of an untimely death. This is a relatively straightforward and inexpensive procedure. There may be circumstances when such a transfer is inappropriate, but the option should at least be examined, upon a breakdown.

Similarly, couples often have other jointly held assets, such as bank accounts and investment certificates that should be reviewed as well. Again, this does not take away any interest the other spouse has in the asset. Rather, it simply prevents one spouse's interest from automatically flowing over to the other spouse in the event of a death. The severance of joint ownership of assets should be discussed with a lawyer at the earliest opportunity.

### **I've named my spouse as Beneficiary, so how do I deal with that?**

During happier times, couples usually name each other as beneficiary on documents such as life insurance policies, pensions and RRSP/RRIF portfolios. All of these designations need to be reviewed immediately upon a marriage breakdown since it is likely no longer appropriate that a spouse, in such circumstances, be the beneficiary. It is important that any such change in beneficiary be in clear, concise written form and that appropriate advice be obtained from your insurance or financial advisor. In fact, any change of beneficiary should be discussed with your lawyer as well.

### **What about my last Will and Testament?**

When marriage difficulties arise, married couples either have wills in place or they do not. In either situation, there are potential problems. If a will exists, it was almost certainly signed in earlier, happier times and likely leaves everything the couple owns to the other spouse. If no will exists, the law dictates that assets will either flow entirely to a spouse (when there are no children) or partially to a spouse (when there are children). Again, the marriage breakdown has created an entirely new environment and one in which an old will, or no will at all, is unacceptable.



Legal advice is most important if you make any changes to your will. The Family Law Act protects spouses in the event of a death and, accordingly, any changes to your will must be made in light of that legislation.

### **Other than Assets, are there other concerns I should have?**

Yes, three specific concerns arise over and above the passing of assets upon death.

First, most couples designate each other in the first instance as the executor and trustee in their will. When the relationship fails, this designation is likely inappropriate. Secondly, you will need to review the question of guardianship of your children in light of a pending separation because the provisions set out in your will pertaining to your children are likely no longer valid. Finally, funeral and burial arrangements set forth during happy times may change considerably. A separated spouse, for example, may not be the person you would want to be responsible for making all of your funeral arrangements. These arrangements are the responsibility of the executor and trustee. As such, that designation requires revision.

### **What about my Powers of Attorney?**

Powers of attorney are the documents prepared while you are healthy and designate a person(s) to make decisions for you related to your finances (property) or your health and safety (personal care). Again, couples will have these documents in place or they won't at the time of a marriage failure. If they are in place, a spouse is usually designated as the primary attorney for financial matters and for matters relating to health and safety. Likely, this would no longer be appropriate when a marriage fails.



## **Estate Law Group**

H. E. Thorsteinson, Q.C.  
Gary L. Black  
Barry R. McNaughton  
David A. Thomas  
Robert W. P. Welch  
Michael A. Mann  
Yaroslav O. Diduch  
Maria G. Lucarelli  
Robert W. Galloway



If these documents do not exist, they certainly should be put in place at the earliest opportunity to cover a sudden incapacity in the midst of a marriage breakdown. The other spouse in a breakdown situation is likely not the appropriate person to be making such major decisions, so you likely need to prepare new documents designating your choice of a different decision maker.

All of these issues will likely be addressed at some point in the marriage breakdown process, and eventually new documents reflecting your new circumstances will be prepared to replace the old. The problem with this approach is that traumatic consequences could result if a death or incapacity occurred unexpectedly during the negotiations. It is for that reason we strongly suggest you address all of these matters at the outset with your lawyer. You can make temporary changes and can review them when the marriage issues have been finally resolved. In fact, once the matrimonial issues have been resolved, any of the changes made during negotiations will need to be reviewed again to ensure that such changes are appropriate in light of the final settlement.

Throughout this pamphlet, we have been referring to the breakdown of an actual marriage, but our comments would essentially apply in the breakdown of other meaningful relationships as well, particularly if those relationships involve cohabitation even though they may not be actual marriages. When these relationships come to an end, we strongly suggest you seek legal advice.

At Lancaster Brooks & Welch, we recognize that marriage breakdown is difficult and stressful and it is a time when major decisions have to be made under less than ideal circumstances. Any of the lawyers in either our family law group or our estate law group would be happy to advise you on these significant issues.

For additional information on some of the issues addressed in this pamphlet, please see our other brochures:

- ◆ **Your Will & Power of Attorney**
- ◆ **Duties Under Powers of Attorney**
- ◆ **Duties of Estate Trustees**
- ◆ **Estate Planning: Avoiding the Pitfalls**

---

*The information provided in this brochure is designed to provide topical information of a general nature only. You may wish to discuss any specific matter with your lawyer and you should feel free to do so at any time. This material is provided for information purposes only, not as legal advice, and is not intended to be exhaustive of your rights under the relevant legislation.*

*Provided by way of public information as a courtesy by: Lancaster Brooks & Welch, Barristers & Solicitors*