

EPISODE 81

[INTRODUCTION]

[0:00:05.7] Benjamin Felix: This is the Rational Reminder Podcast, a weekly reality check on sensible investing and financial decision-making for Canadians. We are hosted by me, Benjamin Felix and Cameron Passmore.

[0:00:16.1] Cameron Passmore: This week, we have a local guest on our show. Kim Melanson is a lawyer here in Ottawa, who we work with a lot of our clients. She's a specialist in family law.

[0:00:27.1] BF: It's funny, the local guest is a big deal. All of our guests early on were local.

[0:00:32.2] CP: Yeah. We invited her on and she wasn't sure what to expect, but she came to our office and we did it live in our studio here. I thought it was a terrific interview. She has a lot of great insights in drafting wills.

[0:00:44.6] BF: I think one, so we have an actual legal disclaimer that we're going to read out from Kim. The other really important thing to point out is that this is all Ontario-based. I know we have listeners across Canada. This is specific to Ontario. The laws that we're talking about here are going to be different from province to province.

[0:01:05.0] CP: Having said that, the principles I think will add value.

[0:01:07.3] BF: Agree.

[0:01:08.0] CP: In your own estate planning and legal decision-making.

[0:01:11.4] BF: Yeah, the thought process is the same, just the nuances and the laws might be a little bit different.

[0:01:15.1] CP: Kim runs a practice here in town. She was called to the bar in 2000.

[0:01:18.6] BF: We work with her a lot in terms of having common clients.

[0:01:21.4] CP: We got lots of questions through the podcast about these subjects. That's why we thought we'd have her on. There's also a discussion around you if you have assets, any co-habitation agreements and prenuptial agreements.

[0:01:32.8] BF: Oh, these are questions that come up all the time. I think it's something that's in general, very poorly understood. I think one of the things that happens is that well, what I mention with provincial laws where something that is a thing in one province, or even in a different part of the law, like from a tax perspective for example, common law is considered one thing, but from a family law perspective, common law is considered a different thing. People make all these decisions and think about all these things in a lot of cases with bad, or completely incorrect information.

[0:02:02.6] CP: Yeah, I really don't need a will for whatever reason. My spouse will be fine well –

[0:02:07.3] BF: Until you hear what happens in Ontario if you die without a will.

[0:02:10.1] CP: She gives some examples of why that might not be best, or I did my will. I just hand wrote it. It's like, well, that might not be best either for – the reasons she goes through that she has seen in her experience.

[0:02:19.9] BF: Anyway, do you want to read the disclaimer and we'll go with the episode?

[0:02:21.9] CP: I will. The information given during this podcast is for general information only. It should not be construed as giving legal advice. You should seek appropriate, qualified legal advice before acting, or omitting to act based on any information provided during this podcast as each individual situation varies.

[0:02:39.6] BF: Funny how this is the first time we've read that and it's for a lawyer guest. Funny how that works.

[0:02:44.0] CP: Anyways, with that, enjoy our interview with Kim Melanson.

[INTERVIEW]

[0:02:52.4] CP: Welcome to Episode 77. This week we're super excited to have Kim Melanson here.

Kim, welcome to the Rational Reminder Podcast.

[0:02:59.3] Kim Melanson: Hi. Thanks for having me.

[0:03:00.8] CP: We've been talking about having a lawyer on this show since the beginning. We finally have you here, so this is amazing. First question for you, what happens if someone dies in Ontario and they don't have a will?

[0:03:13.6] KM: Well, I think there's a large misconception by the public that people think if they die without a will, the government automatically receives all of their assets and a lot of people are fearful of that. That's really not the case. Instead, people dying without a will, basically there's a legislation that provides where their assets are to go. Instead of their wishes being respected, the government does dictate who's to receive it.

For example, if you are a married spouse and you have children, your spouse receives the first 200,000 of your assets, provided they don't decide to seek other remedies. The children then receive with the spouse a portion between them. There's a procedure to be followed. If you don't happen to be married or have children, it's your parents who inherit and then it goes to your brothers and sisters. Down the bloodline is the whole idea.

[0:04:06.4] CP: Who becomes the executor in that case?

[0:04:09.0] KM: Someone would actually have to apply to the court to be appointed. Dying without a will becomes far more complicated than it needs to be if you actually take the time to do some proper planning.

[0:04:21.0] BF: You mentioned — so there is a mandated amount that the spouse would receive if someone dies without a will, but you said that the spouse could seek other remedy. Does that mean the spouse could try and get more than the \$200,000?

[0:04:30.0] KM: Yes. A spouse has an option to elect, either to take under a will. If there's no will, they can elect to take with there to receive by law, it's called intestacy. Or they can seek to equalize their property, almost like what would happen if they were to go through a divorce. Those are the options. A spouse normally consults a lawyer and it becomes a matter of mathematics, determining the best result then for the spouse and division of property.

[0:04:57.8] BF: Now we're talking about Ontario and we have people all over the world listen to podcast, but just within Canada, how different would this be province-to-province?

[0:05:05.4] KM: Estates and wills are governed provincially. Every province would have their own rules, they'd have their own determination of these matters. We really can only speak about Ontario.

[0:05:15.2] CP: Now I've read somewhere that over 50% of Canadians do not have a will. Is it common that there's issues like this that happen?

[0:05:22.0] KM: Quite regularly, actually.

[0:05:24.4] CP: Wow. Is there a stage in life where you think having a will becomes much more important after having kids perhaps, or getting married?

[0:05:34.7] KM: In my view, I think it's important for every adult, so an adult is someone 18 years of age and older who has — owns assets, they should have a will. Because ultimately, you want to be in the driver seat determining where your assets go should you pass away, and so you want your wishes to be upheld, rather than that formulaic legislative decision that's telling you who's to receive what.

[0:06:00.2] BF: Do you think there's a point where it becomes critical? I know when I had kids, I was like, “Now I really, really want to have a will, because then I get to choose how the assets and kids get treated.”

[0:06:12.2] KM: Absolutely. I would say kids are a major motivating factor, because one thing that you can put in your will is you can explain your wishes as to who you'd like to be the guardians for your children. As parents, that's our biggest fear if something happens to us, we want to know that our children are well-cared for.

That's something that your will provides for. Now another misconception is a lot of people believe that whoever you named in your will that they're automatically made guardians and that's not the case. Rather, your will allows for your guardians to be appointed for 90 days. Then after that that individual needs to apply to the court and seek a formal court order.

[0:06:50.4] CP: I didn't know that.

[0:06:51.4] KM: Yes.

[0:06:52.0] CP: It's not a permanent posting.

[0:06:55.1] KM: It's not. Rather, the court always wants to make sure that the individual, or individuals named are actually capable of raising these children. While the parents' wishes outlined in a will are upheld for the most part, the court still says are these people appropriate? Especially, since we know a lot of times people will make a will when they have a baby and they may never revisit it in 15 years. A lot can change. If you've named your parents, they may no longer be capable of raising your children.

[0:07:29.0] BF: That leads to a good question, how often do you think that a will should be updated?

[0:07:32.7] KM: All major changes in life. Number one, if you have a will and you get married, you absolutely need to get a new will, because a marriage revokes a will. Having kids, if anybody named in your will becomes incapacitated, they pass away, otherwise I normally say marriage, children, retirement and then death of a spouse, kind of thing. Those are the major milestones.

[0:07:56.4] CP: In Ontario, can you write a will in anticipation of getting married and it will be valid?

[0:08:00.7] KM: Absolutely. That's one of the questions I always ask clients when I'm doing my will interviews, are you likely to get married? Especially if there are people who are living together. Then we put special language in there to make sure then that the will isn't accidentally revoked when they get married.

[0:08:15.6] BF: That's really interesting. If you die without that language in a will, but you had a will and then got married, it's as if you died intestate without a will?

[0:08:23.1] KM: That's correct. Yes.

[0:08:23.9] BF: Wow.

[0:08:25.2] CP: Another question about the guardian. I was once told not to tell the guardian that they've been chosen in case you unchoose them later on. Any thoughts around that?

[0:08:34.6] KM: Oh, interesting. I haven't heard that. See, I'm of the view that managing expectations of everyone in your family I think is important. I would want my clients to actually approach the guardians and make sure that they'd be willing to take on this role. Again, I think there's a big misconception, we have all seen the Hollywood movies and things like that, where people feel that there's going to be a number of people running across the finish line to be appointed as guardians. When in reality, if you think of your own lives, if you have two children and you become the guardians and you're adding perhaps two more children to your family, that's life-changing.

[0:09:11.0] CP: No kidding.

[0:09:11.7] KM: You're needing a new home, all kinds of things. It's such a major decision that I think you need to have that heart-to-heart with the people that you're appointing. You want to make sure they have the same values as you and that they're capable of taking this extraordinary task on.

[0:09:27.8] BF: You can appoint a guardian, or you can recommend a guardian. Can you have a different person be the trustee of the assets?

[0:09:34.9] KM: Absolutely. That's a really good point to make. You can divide it into two roles. The first question is is who will actually be the person, or persons caring for your children? Where are they're going to live and that type of thing. The second question is is who's going to manage their property, or the trust fund that's been created for them?

Sometimes, people like to separate out those roles, because obviously, there's a potential for abuse, or just people, quite frankly, are overwhelmed. Someone needs to be able to determine how best to spend the money, perhaps inject money into that household to help them get set up and then on an ongoing manner.

[0:10:13.9] CP: Can you set rules around the use of that money, like capital-only, or income-only, income and capital?

[0:10:20.0] KM: You can. We can craft very specific rules on how it's to be used. The difficulty of course though is that no one wants to be running in and changing their will frequently. What we suggest is that you define certain capital distributions to the minor, or your children, when they might receive a lump sum.

Other than that, you really want to sit down then with the guardian of property and talk about your goals and your wishes. We need that discretion in order to function, because we never know what life is going to bring, and so we need to have it open enough that they can achieve what's best for those children, but yet, restrained enough that they're not abusing their power.

[0:11:04.5] BF: Now in practice, do you see – I can just imagine that creating somewhat of a conflict, where if the guardian is one person and they have to go to the trustee to ask for money for stuff, do you see in practice that creating that type of conflict?

[0:11:17.1] KM: Absolutely, because they're then running off then to each other and especially the guardians for the care. We often recommend when we're dealing with situations like this that people get in touch with investment advisors like yourself, right? To create a plan where they can look at an income stream and inject money where it helps and operates on its own without people needing to pick up the phone every time they need some money.

[0:11:41.9] CP: Do you often see people come in with really complicated wishes in their will that become frankly too complicated to craft?

[0:11:49.2] KM: I always say that we can as lawyers, craft almost anything, or I would hope so. It really comes down to a matter of the cost, number one of drafting those wishes and the cost to implement them. A big one that I see quite often is that some families decide that they'd like to leave small amounts of money to their grandchildren and they may have a number of grandchildren.

The cost of administering those formal trusts, which are taxpayers, becomes just prohibitive and it's not effective, so we try to dissuade people from leaving small amounts of money to their grandchildren, instead to do it while they're living, because they then get the benefit of seeing the joy in reaping the rewards of that.

[0:12:36.4] CP: What about naming an executor? Is there a good way to think about that? Should you name your brother as an executor, or should you go with a professional, like a law firm, or I don't know who else would do it?

[0:12:45.4] KM: It really depends on the circumstances of each client. For a lot of families, it makes sense to actually name your spouse, for example, or a family member and in particular, someone who is a beneficiary of the estate. The reason we like that is they have a vested interest in carrying out what ends up being quite a lot of work in administering someone's estate. The other thing is really to ensure that there's a trust factor among the other beneficiaries. There are some estates either due to family conflict, or complexity that then I would recommend a professional executor be appointed.

As well if we think of age, a lot of us tend to appoint people that are contemporaries. If you have trusts for children or grandchildren that needs to last a long time, by having a professional advisor, you have the ability to have younger succession within that organization taking care of your needs.

[0:13:44.3] CP: The question about when you decide who to leave the money to and in situation once where someone's parent left money to a number of charities in a fixed dollar amount, as opposed to a percentage allocation of the estate and he happened to pass away after a severe market correction and

there actually wasn't enough money to pay out the charities, because it was fixed dollar, let alone have anything left over for the family. Any thoughts around percentage allocation versus dollar? Or I've seen people use a point system allocations?

[0:14:14.4] KM: Yes. My recommendations tend to be that you use the percentage, or the points, or a share, because we never know how much money we're going to require for our care as we age. The last thing that you want to do is cut someone out of your will, or not have your wishes reflected by virtue of the fact that you don't have enough money to carry it out.

[0:14:36.0] BF: Can you talk about probate?

[0:14:38.2] KM: Sure. Probate seems to be one of those really bad words. A lot of people approach my office when we're doing estate planning and they tell me that their primary goal is to avoid probate at all cost. I think that's a really big misconception, in the sense that – so, let's talk about what probate is. Probate is the formal process of submitting your will to court and having the court then affirm that this is your valid last will and testament and giving your named executor power to act.

The courts then produce what's called a certificate of appointment. As part of this process, you need to pay something called the estate administration tax. The estate administration tax is something that is the highest in Ontario for across Canada in terms of the amount charged. When you look at the amount, it's really about 1.5% of the value of the estate that needs to be paid for the purposes of this administration.

The benefit of probate often is that it gives third parties, like investment companies, banks, land title system the authorization and the confirmation that they're not going to get sued and they can have the confidence to then distribute assets to the executor. There's a lot of situations where we avoid it among spouses and things like that, but there are times where I've recommended it clients where we could have avoided it, but it would have given the executor the protection that was necessary and allowed any claims to be flushed out early on in the process, rather than being on the eve of distribution and everyone running off to court.

[0:16:18.1] CP: It's safe to say that you think a lot of people would go too far in the efforts of avoiding that cost?

[0:16:26.1] KM: They do. One of the things that I see quite often is where you have the final parent remaining, so their spouse has died. That parent, let's say they have three children. They decide then to make their accounts joint with one other child. Unless that's done in a very carefully planned manner, that can lead to a lot of difficulties. Again, you put your bank account joint with your adult child. If they go through a bankruptcy, if they separate from their spouse, they're considered then to own 50% of the property that you've made them joint with. That becomes problematic.

The other difficulty becomes on death then is that child alone to inherit the rest of the bank account, or are they really holding it in trust for their other siblings? We do recommend joint accounts some of the time, but we then do additional planning with it, which would involve something like a declaration of trust, which would set out the intention, right? We just want to paper exactly what the intentions were and to protect both the parent and the adult child.

[0:17:34.1] BF: What about things like naming direct beneficiaries on registered accounts? That's always low-hanging planting fruit, but can that lead to issues as well?

[0:17:41.1] KM: It can. Certainly, our goal often is to take advantage of the name beneficiaries, because then you avoid probate. Those assets can flow to the beneficiary more easily. One of the things that people don't consider is if you leave everything, all of your assets, you've named beneficiaries or you hold joint accounts and you would like someone other than the name beneficiaries to receive a part of your estate, in practicality and through the operation of how it works, the name charity for example, wouldn't actually receive the money under your estate, because it's all flowed to other named individuals.

[0:18:18.6] CP: Or what if you had a large ruff for example. The beneficiary gets the proceeds, but the tax liability stays in the estate, correct?

[0:18:25.3] KM: Correct.

[0:18:25.7] CP: What happens to that liability?

[0:18:27.6] KM: The liability will actually in the case of a will will flow to the ultimate beneficiary if the tax is not paid. Typically, yeah, if you have a small amount going through your will that would satisfy it, but then defeat the other beneficiaries you might have named in your will. I know there's a lot of do-it-yourselfers, we like all to save money.

That's really a concern is that with a lot of times, you see these will kits where they're asking questions about your wishes. Who's your executor? Who would you like to receive your estate? I think hiring a lawyer involves looking at your greater assets, how you hold title, and looking to make sure that your wishes are actually carried out in practice.

[0:19:12.2] BF: Can you describe how a dual will works?

[0:19:14.3] KM: Sure. A dual will is where a person who owns shares in a private company would create two wills. One will would be a will that dealt with their personal assets. The second will would be one that would deal with their shares in their company and any other assets where you are trying to avoid probate, where you're not reliant on third parties to require that probate certificate.

The benefit of doing that is that you allow the shares in this privately held corporation to be left to the named beneficiaries without the need to have the shares of the company professionally valued and go through that expensive probate process.

[0:19:59.0] BF: Is it safe to say that anybody with CCPC shares, does it make sense for them to have a dual will?

[0:20:06.6] KM: Most of the time, it does. The one qualifying thing that I often warn clients is is just because you create it, you still have to have the authorization from the other shareholders, or the director. Just because they're privately held shares, if the people running the corporation demand the certificate of appointment, then you still have to go through that process. It's often not the case, but that's one qualification to keep in mind.

[0:20:33.3] CP: Is there a certain dollar value that company or the asset should be worth to make it worthwhile?

[0:20:37.7] KM: Yes and no. If you think of the probate process, one of the requirements for the purpose of calculating the estate administration tax is determining the fair market value of all assets. The cost associated with having a corporation valued, even a corporation that has little value can often be in the thousands of dollars. The cost of having a second will done could be as little as a couple thousand dollars as well. We sometimes run the math early on, but again, for prudent planning and especially if your company ends up doing well in the future, it makes sense.

[0:21:19.0] BF: You mentioned that will kit idea and there have been a ton of these online companies that make that really easy and look nice and user-friendly and things like that. I have not personally used one. What types of issues could somebody expect downstream by using one of those services? Maybe another question on the same line of thinking is do you think it ever makes sense to use that type of service?

[0:21:39.6] KM: I as well unfortunately have not looked at any of these kits. They could I guess potentially address a number of these issues. My sense though in seeing the end result where people have done a will kit and then when they go to update it, they seek my services, I see that there's often a gap in how these programs, or the will kits are working.

Like I was explaining earlier, really, a will is only part of the question. I think when you're doing estate planning, you really need to look at the relationships of family members. People require advice on whether it's a good idea to name a non-resident executor, so that's one issue. You need to advise people on what their legal duties are. We all, as adults, have a duty to provide for our dependents in our will. Someone may have a dependent spouse or children and decide to leave all of their assets to charity, then they're exposing their estate to claims.

[0:22:40.0] CP: Really?

[0:22:40.6] KM: Yes.

[0:22:42.0] BF: That's interesting. You haven't tried the softwares, but you've seen the end result.

[0:22:46.2] KM: That's right. When I do my standard will-questionnaire with my clients, I try to get to know them, know their family dynamics, their family tree, their relationship their assets, their income. Then I realize that some of the end result and what they believe that their wishes are going to be carried out through these wills in practicality, they wouldn't. Because again, they've named beneficiaries on everything and yet, they've left specific bequest to individuals in their will and no money is going to flow through their will.

[0:23:15.0] BF: Interesting.

[0:23:16.5] CP: Can you describe what a mutual will is?

[0:23:19.1] KM: Yes. A mutual will is different from what's called a double, or mirror will. I think we need to start with that. Normally in a spousal relationship, whether a couple is married or common-law, they would typically create what are known as mirror wills. That's where they look the same as each other. You have named each other as executors. Your beneficiaries are the same.

With double wills, either of those spouses are allowed to change their will at any point in time. In so doing, they could defeat their combined wishes, right? If one spouse dies for example, the surviving spouse could then create a brand-new will and leave the money to beneficiaries other than who they jointly had decided upon. With mutual wills, it becomes a legal contract where the couples agree that they will not at any point in time be allowed to change their wills.

On the death of the first spouse, they can die with confidence knowing that the named beneficiaries will remain the same, even after they're gone and that the surviving spouse then must honor those obligations.

[0:24:33.3] CP: They might be able to oversee the money, but where the money ultimately goes on their death, continues on, is that the benefit from that?

[0:24:40.6] KM: That's correct. Yes.

[0:24:42.3] CP: How is that policed?

[0:24:44.5] KM: It's similar to creating a domestic contract, where you have a prenuptial agreement. Again, it's a binding legal contract and again, when you get into administration of the will, that's how it's dealt with. Even if someone were to become, let's say no longer competent and older age, their power of attorney would be bound by the requirements of this contract.

[0:25:06.7] BF: Are there any and this is the last question on wills and then I want to move into some family law questions. Are there any common, but may be easy to correct, but also very expensive if they're not corrected errors that you see when it comes to estate planning?

[0:25:19.4] KM: One of the big things this day and age where we have a number of blended families, second relationships is some of the old drafting that lawyers used to use is we would refer to people's children, or issue. Children or issue really relate to adopted, or blood relatives and it goes down the family line.

If you have a stepchild who's perhaps been in your family with your new spouse since the age of one and your will said, "I leave my assets to be equally divided among my issue, or my children," you would exclude then the stepchild. The safer course of action is to actually name all individuals.

Now it's difficult, because when people are young and they're still having children, they're not going to run back to your office to make a change every time they have a child. The younger the clients, we tend to name and say that their children are to receive under their will. When we're dealing with second relationships, then I tend to name the actual individuals.

I think that's again why it's important to see a lawyer, because you wouldn't think of those things, right? I go through a number of questions with my clients. They at times seem invasive, but they all have a purpose really to make sure that the ultimate goal is achieved. That's making sure that people's wishes are actually carried out in practice and not some semantic, or drafting doesn't get in the way.

[0:26:46.4] CP: We'll move on to family law. We have some questions for you on that.

[0:26:49.3] KM: Okay.

[0:26:50.6] CP: Can you tell us what defines a common law relationship in Ontario?

[0:26:56.0] KM: Common law relationship, it depends on the piece of legislation you're dealing with. Let's just talk maybe about family law matters. Under the Family Law Act in Ontario, you become a common law spouse if you have lived with someone for three years, or if you're the parents of a child together and you're living in a relationship of some permanence.

[0:27:20.7] CP: Three years.

[0:27:21.6] KM: Three years.

[0:27:22.3] CP: So many people think it's one year.

[0:27:23.9] KM: Well, there are other pieces of legislation where you would be considered common-law after one year. For the purposes of family law, it's three years.

[0:27:34.5] BF: Again, this is specific to Ontario and would be different in other provinces?

[0:27:37.2] KM: Agreed. Yes, very much so. I think the other important distinction between married spouses and common-law spouses is so you're living with someone for three years, that only opens the door for spouses in the event of separation to claim support. Under the Family Law Act, you separate you, then are entitled as a common-law spouse after three years to make a claim for support and you'd have to look obviously to see whether you meet the test. It's a bit more of a complicated process, but you need to at least meet that threshold that you are considered a spouse first of all.

[0:28:14.4] BF: After three years common-law relationship, you can get support on breakdown of the relationship. Are there other differences between – well, I guess that's a similarity. Are there differences between married and common-law couples on break down a relationship?

[0:28:26.6] KM: Absolutely. Married spouses actually buy into a bit of a shared property regime in Ontario. In the event of a separation or divorce, a married spouse can make a claim for what's called an equalization of net family property. On very simple terms, it means that the spouses are sharing in the growth of the assets during their relationship. Whereas, common-law spouses don't have the ability to make the same claim.

Instead, they would have to advance trust claims, things based on equitable principles, that they've for example, put some sweat equity into the home that should justify that they have some ownership, or trust interest in it. It's a more difficult test to meet. There is still a very big distinction in Ontario between being married and being common-law.

[0:29:18.0] CP: Regardless if you're more than three years.

[0:29:20.2] KM: Correct.

[0:29:21.3] CP: If you have stock options, or a private business, or other assets, if you're never married, they don't get put into that equalization calculation.

[0:29:31.1] KM: Correct. They would have to make a trust claim. Then if we go back to the will issue, again, you're an unmarried spouse. On death, let's say you're only just a couple, you have no children and we talked about the rules of intestate, that common-law spouse would not have any entitlement under the intestacy rules to share in your estate. Instead, that spouse would have to bring a dependents claim against the estate in order to seek some level of support.

[0:30:01.6] BF: Wow, that's huge. If you're a common-law couple with financial codependence, having a will becomes more important than if you were married almost.

[0:30:08.8] KM: Extraordinarily so.

[0:30:10.6] BF: Wow. Yeah, I didn't know that one. That's really interesting.

[0:30:13.9] KM: Because in that case if you had adult children for example, your assets within under the rules of intestacy flow to your adult children, whereas your wishes may be for it to flow to your spouse, right? But you just didn't happen to get married.

[0:30:27.0] BF: If you're not going to get married, but you have kids together or any financial codependence, then that will become – if you're not going to get married, at least get a will.

[0:30:34.2] KM: That's why I say if you're an adult and you have assets and if you move in with someone, get a will.

[0:30:40.2] BF: Now on that topic of moving in with someone, what do you think about domestic contracts and when does that make sense and in your experience, how do you even approach that conversation with a spouse?

[0:30:48.6] KM: I think domestic contracts are very important, but they're not sexy, they're not romantic. A lot of people, they frown upon it. Couples really struggle with the concept of that, because when you're getting married, it's meant to be something exciting. I usually recommend that couples sit down and have a discussion about finances and that they start by talking about their expectations regarding how finances are going to be dealt with during their relationship.

Then that tends to lead to a good segue to say, “Well, what if we weren't together? How do you believe that we should separate things?” Then that becomes a good opportunity to discuss that. By creating a prenuptial agreement, you're then managing expectations, right? You're setting the roadmap to say this is what happens if things don't work out. With separation, divorce being extraordinarily high, it's quite important these days.

[0:31:43.9] CP: How does that process work of drafting up a prenup agreement?

[0:31:48.3] KM: Typically, only one of the parties, one spouse would meet with a lawyer and receive advice on what the Family Law Act provides and how they want to opt out of that regime, right? Because without having a prenuptial agreement, you're then having to follow what the family law access. It's like dying without a will, right?

There's rules for intestacy, it's the same in a family law situation and you're then dependent on what legislators have decided is appropriate for the division of assets. Whereas, if you say we want to create a prenuptial agreement, you're writing the roadmap as to how you'd like things to happen in the future, again on division of assets and potentially, on support issues as well.

[0:32:34.6] BF: Yeah. Support issues, that's interesting, because we're talking about doing this before getting married. What if you're moving in with somebody for the first time? Or if you're coming up on three years, do you think it makes sense to have domestic contracts in that case as well?

[0:32:46.4] KM: Yes. I think in my experience, it's much easier to broach that subject before you move in, before you get married, the earlier the better. I'm consulted by clients, sometimes people will go through a rough period where they might have a trial separation and they reconcile and that's another time that people say, "Okay, finances are at the heart of what we're arguing over. Let's create the roadmap now."

In order to make these agreements, though, stand the test of time, right? Because they're often challenged. People make them early when they perhaps don't own as much. They could be together a long time. It's important that both sides have their own lawyer.

[0:33:24.6] CP: I've dealt with people that do have quite a bit of assets and it can be quite a complicated, especially private investments, because you do have to do a full disclosure, correct?

[0:33:32.8] KM: You do. That's one of the other necessary items is to completely disclose the extent of your assets, right? So that the party that's really giving up the rights under the family law knows what they're giving up and that they're then agreeing to sign up for a different state of affairs.

The third, I guess criteria that needs to be met is that there's no undue exertion or pressure. Having that delicate conversation is important. If someone were to say, "I'm not going to marry you, unless you sign this prenup." Then they sign it under duress, that could be a ground for setting that contract aside in the future.

[0:34:12.0] BF: Even if they have independent legal advice, they could still say they're under duress when they signed?

[0:34:16.8] KM: They could try to. Each set of circumstances has to be evaluated. When I advise clients on these matters, it's really the three items that each side needs effective legal representation. Secondly, that they need to fully disclose the extent of their assets and debts. Thirdly, that there can't be any undue exertion or pressure and that's what we try to achieve.

[0:34:40.1] BF: Now in talking about the prenup, we were talking about deciding on a division of assets that falls outside of the Family Law Act. What does the Family Law Act say about division of assets? What assets have to be divided and is anything excluded?

[0:34:54.4] KM: Married spouses then on separation would have to go through a calculation of their equalization of their net family property. What is that? It's almost like a balance sheet is created by each party. You say, on our date separation, so the date number one becomes very relevant, what did each party own? You're looking at the fair market value of all of each person's assets. You subtract their debts. Each person gets to take out their net worth on date of marriage, right? Whatever you brought into the relationship, you're allowed to deduct from your family property. The other thing is gift or inheritance from a third party during your marriage, subject to some certain tracing rules, but that also gets to be excluded property.

[0:35:40.6] BF: Interesting. Are the things that people should be thinking about, if they do receive a gift or an inheritance while they are married, in terms of you like mentioned, traceability. Should people keep those assets separate?

[0:35:49.4] KM: Absolutely. Often when I'm doing estate planning for some parents and they're leaving large sums of money to their adult children, I often recommend to them that if their own children don't have marriage contracts, that they have a conversation with their children to advise that if they receive the inheritance, it should go into a discreet account, one that can be traced and that is in their name alone.

I think a lot of people though when they get an inheritance, the first thing they do is they pay off their mortgage, so they're in essence gifting 50% to their spouse. Then if they were to separate, they cannot carve out that money that they received from their family, because it's lost. It's been spent and commingled.

[0:36:28.7] CP: Kim, last question. We always end each interview with the same question. Ben and I are curious as to how you define success in your own life.

[0:36:36.2] KM: That's a tough one. I would say, I would feel that I have achieved success if I have a positive impact on the people that I come in contact with. Professionally if I can have a positive impact on my client's life by giving them advice and recommendations, so that they can make informed decisions that will help them feel that I've achieved it. Personally the same thing, if I can forge those relationships where I'm helping people bring out the best in each other, I think that would be great.

[0:37:07.7] BF: It's a great answer.

[0:37:09.1] CP: Terrific answer. Kim, thanks –

[0:37:10.3] KM: Thank you.

[0:37:11.2] CP: - very much for joining us. Had been a great time spent.

[0:37:13.2] BF: Yeah, it was excellent. Thank you.

[0:37:14.3] KM: Thank you very much.

[END]

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