

How to keep down-payment gifts safe when couples split

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Aaron Smith has a difficult conversation coming up with his future wife.

Last year, Mr. Smith (whose last name has been changed) was given a \$25,000 gift from his mother to buy a house in the Greater Toronto Area. Since then, he proposed to his girlfriend and the couple plan to get married and move into it next year.

Mr. Smith is happy in his relationship but, if they were to divorce down the road, he'd want to keep the entire \$25,000 gift. His mother would also prefer it.

That might become an issue unless the couple sign a marriage contract, which outlines that money is his. Otherwise, his ex would be legally entitled to half of it, given that it's part of their matrimonial home.

"I don't know how you bring something like that up ... without sparking tension," the 30-year-old Toronto resident says.

It's a tricky conversation many couples are facing these days as more parents gift money to their children to help them pay for the rapidly rising price of housing in many parts of Canada.

Down-payment gifts from parents have doubled to 15 per cent for homes purchased between 2014 and 2016, up from 7 per



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cent in 2000, according to statistics from Mortgage Professionals Canada. Given that about four in 10 marriages end in divorce, according to Statistics Canada, more families are looking to protect their cash.

"Parents give money to their children and expect it to remain with their children, not with an ex-spouse," says Rick Peticca, an associate at Shulman Law Firm in Toronto, who sees a number of clients who are parents looking to keep their gift money in the family if their child gets a divorce.

It's usually only an issue when gift money, or an inheritance, is put into a joint asset such as a bank account or the matrimonial home.

"When married couples purchase a home, it is considered a matrimonial home - which has a specific legal definition," Mr. Peticca says. It is also possible to have more than one matrimonial home, such as a cottage, he says.

To keep the gift money on one side of the family, Mr. Peticca recommends couples have a marriage contract in place,

which he acknowledges is a sensitive subject in some relationships.

"It may create bad feelings at first, but you take the elephant out of the room," Mr. Peticca says. "It's like an insurance policy you hope you never had to use, but that you can rely on."

A marriage contract can also save couples money down the road if they do divorce and may wind up spending a lot more money on lawyers to fight over assets.

"The cases where they have a marriage contract in place are the simplest to resolve on separation because everything is mapped out. Everyone knows where they stand," Mr. Peticca says, while urging couples not to rely on verbal agreements, which aren't binding.

The rules are similar for couples that are legally considered to be in a common-law relationship, he says.

Michael Dorfman, portfolio manager and managing director at BMO Nesbitt Burns, says parents can try to protect the gift money that goes into a matrimonial home by registering the gift as a loan, which can be forgiven.

"Someone going the extra mile in being pro-active would want to make the gift in the form of a forgivable loan," says Mr. Dorfman, who recommends it be properly documented and run

past a lawyer. "If the marriage breaks down, the lender can be asked to be repaid. Since it's a loan and not an asset, it is generally not considered divisible as part of the family property."

Gifts and inheritances that are kept outside of the matrimonial home, such as a bank or investment account, are usually considered protected from a claim by an ex-spouse. Still, Mr. Dorfman recommends keeping a gift or inheritance in a separate account from other personal accounts as extra protection.

"The best practices for not getting into this kind of problem is for someone who receives an inheritance or a gift to put it in their sole name and segregate it from other pre-existing assets," Mr. Dorfman says. "You need to make it as clear-cut as possible."

While these moves won't prevent an ex-spouse from potentially trying to get at the assets, it helps to lessen their chances.

"Once the gloves come off in a marital breakdown, people will say and do lots of really antagonistic things," Mr. Dorfman says. "Nothing prevents another party from trying to go after you, but the more organized you are and the better you protect yourself using these structures in the way they're supposed to be used, the better your chances are of prevailing."

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