

# **Pitfalls of Matrimonial Agreements**

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The purpose of this paper and presentation is to focus on the pitfalls facing young/inexperienced lawyers when faced with a task of providing legal advice on and executing matrimonial agreements. It is not intended to be, the be all and end all of case law research, but instead to point out the pitfalls and provide practical tips.

The Agreements that this paper will focus on are what I believe to be the three main Agreements used by intimate couples, when attempting to contract out of the legislation.

### **PRENUPTIAL AGREEMENTS**

These types of Agreements are generally executed in advance of the party's marriage. Prenuptial Agreements deal mainly with property and its treatment upon separation. However, they can also deal with spousal support and other issues such as standing *in loco parentis*. Once in awhile, the parties execute these shortly after their marriage or even in some cases, a long time after their marriage. After the marriage of the parties these Agreements are called Post-Nuptial Agreements or Ante Nuptial Agreements.

Out of the three Matrimonial Agreements that lawyers work on, these are by far the most frightening. Essentially, you are preparing a Separation Agreement in advance of the party's marriage, and are required to do some crystal ball gazing. Particularly with younger people entering into such an Agreement, you are not really sure what their lives will hold. Will their marriage last longer than two years? Will they have children? Will the marriage breakdown pursuant to one of the clauses that you have defined as a relationship breakdown? Considering the rate of divorce in Canada, it is only a matter of time until the strength of your Agreement will be tested.

In order to ensure that we have the strongest Agreement possible, our office has a policy that Prenuptial Agreements must be screened by two senior lawyers in the office prior to their execution by the parties. This allows junior lawyers to get much needed valuable experience in drafting and provides a few extra sets of eyes look at the Agreement, to catch any items that may have been missed.

### **COHABITATION AGREEMENTS**

Generally, these Agreements are very similar to Prenuptial Agreements with the exception that the parties are either not married or not intending to get married. If that is indeed the case, then your agreement must be tailored somewhat differently, as neither the *Divorce Act* nor the *Matrimonial Property Act* apply; however, the parties may still want the same safeguards as you might find in a Prenuptial Agreement. A lawyer must also consider trust claims, which either party may be entitled to, and waive them if requested.

Occasionally, you may be asked to draft and execute a Cohabitation/Prenuptial Agreement, whereby the parties are currently living together and may plan to marry at some point in the future. These Agreements have to cover the entire spectrum of the relationship/marriage as one cannot

be sure which statutes will be relevant at the time of their separation. In such circumstances, where the parties are unsure if they will become married at some point in the future, it is preferable to do a cohabitation agreement for now and a separate prenuptial agreement in the future. However, clients do not like the additional expense of negotiating and drafting two separate agreements.

If a lawyer does draft a Cohabitation/Prenuptial Agreement, they will need to modify the waivers in the agreement to ensure that they will meet the client's need regardless of what they choose to do. Below is a modified Matrimonial Property Act Waiver for such an Agreement.

*MATRIMONIAL PROPERTY ACT WAIVER (COHABITATION)*

*The lawyer for each party has explained the Matrimonial Property Act, R.S.A. 2000, c. M 8, (the "Act"), to his or her client. The Parties understand the effect of the Act. The Parties also understand that the Act does not currently apply to them, but that it may apply to them in the future. It is their intention to have Part 3, Sections 37 and 38 of the Act apply to their property owned now and in the future. Notwithstanding that they are not married, the Parties agree that Part 1 of the Act shall not apply to their property owned now and in the future.*

Spousal Support waivers in the context of a Cohabitation/Prenuptial Agreement are very difficult for a client and a lawyer to contemplate. So much is unknown to the parties at the time of the signing of the agreement, that circumstances may dictate that such a waiver would be unenforceable. It is important to advise your client of this potential reality. Most lawyers are uncomfortable with signing waivers of support in these circumstances and will advise their client's not to sign.

**SEPARATION AGREEMENTS**

These types of Agreements are by and far the most common of the Matrimonial Agreements. As a young lawyer, these are likely the types of Agreements you will be called on to draft and execute. In comparison to Prenuptial and Cohabitation Agreements, you will know the circumstances surrounding the separation and will be able to avail yourself of all of the pertinent facts of the parties, including length of marriage; roles played during the marriage; whether or not the parties have children; and the property that is to be divided. The differences between the Prenuptial and Cohabitation Agreements can also be found in Separation Agreements, as the parties seeking a Separation Agreement may not have been married when they come to see you.

As a junior lawyer, once you are asked to draft any of the above Agreements, you must then turn your mind to disclosure.

**DISCLOSURE**

A good rule with disclosure is "more is better". The best way to keep these Agreements from being over turned is to have the parties fully disclose to each other. As a junior lawyer, you will often run