Drafting Minutes in the 21st Century

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Family Law Beyond the Basics

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Whenever we open a file, the goal is to arrive at a consensual resolution rather than one imposed by the Court after a trial. In the vast majority of cases, this goal is achieved. In order to arrive at a (hopefully equitable) resolution of the issues in dispute, our clients rely on our listening ability, our knowledge of the law, our analytical skills and our negotiating ability. Sometimes a file may be settled relatively expeditiously without great emotional or financial cost. At other times, it is a long and painful process with the attendant cost. This may be due to the complexity of the facts and legal issues, or may be due to the cooperation and reasonable expectations of the clients. In either case, once the parties have settled we are called upon to document that settlement.

Whatever the concluding document is called (Separation Agreement /Minutes of Settlement / Property Agreement/ Parenting Agreement/ Divorce Contract etc.), it is a contract. All the usual rules of contract apply. It is a contract that the parties must live with and should be complete, the terms must be clear and unambiguous, and the language should be comprehensible. Each settlement is unique.

After expending the time and money to negotiate resolution, it is surprising how little time is sometimes spent to document that resolution. It is as if we have lost interest at that stage and have turned our attention to new files. After all, we have precedent Agreements, word processing with merge functions and smart assistants. We sometimes simply hand our notes or exchange of letters to our assistants, asking them to prepare a draft document that we will then review and revise. The difficulty with such an approach is that we, like our clients, tend to see what we expect to see. It is always a good idea if possible, particularly with more complex settlements, to have another lawyer in the office peruse the document once it has been drafted and reviewed by the responsible lawyer. It is remarkable how often fresh eyes can spot omissions, inconsistencies and ambiguities.

We need not reinvent the wheel by drafting each and every clause afresh when preparing Minutes.1 Attached are precedent clauses which may be useful as a starting point, subject to whatever revisions or additions may be necessary to document a particular settlement.

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1 For the sake of simplicity, the term “Minutes” is used throughout to describe the document reflecting the parties’ agreement.
Having precedents not only saves time and money, but also alerts us to issues that we may not have directed our minds to when negotiating resolution.

We are family law lawyers. We may have learned the basics of tax, corporate, creditors rights and bankruptcy law when in law school. For many of us, that was years ago. We have since had to acquire or reacquire at least a passing familiarity with those and other areas of law, and acquire the ability to recognize issues as they arise. When they do arise, typically we retain experts to assist us in arriving at the settlement. Despite the cost, when in doubt we should not be reluctant to ask those experts to review the clauses in the Minutes relating to their expertise to ensure that we have “got it right”. Our clients and insurers will thank us.

As the law and society changes, the provisions in Minutes become outdated. They are no longer relevant. Outlined below are general comments relating to drafting Minutes in today’s world.

**LANGUAGE:**

Clients must understand the written document they are asked to sign not only at the time of signing, but also later. Where possible, simple language should be used but do not sacrifice certainty or enforceability for the sake of simplicity.

- Avoid words and phrases such as *hereby, hereinafter, thereupon, covenants, indentures, in the event that, notwithstanding, the said * etc.

- Don’t be unnecessarily wordy: e.g. *mutually agree or mutually cohabit* as husband and wife. What other ways will the parties agree or cohabit? *waives, relinquishes and gives up* a claim – if a party gives up a claim, that is the end of it.

- Use defined terms to avoid unnecessary repetition and confusion:
  - wordy→*John Doe (hereinafter referred to as the “Husband”)* vs. better→*John Doe (the “Husband”)*
  - example→*the cost of tuition, fees, books and supplies at McEwan University (the “Education Costs”) and the cost of his extracurricular activities including registration and equipment for hockey and"