Documenting The Deal
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Cohabitation and Pre-Nuptial Agreements

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INTRODUCTION

It used to be that we, as lawyers, knew more or less what we were dealing with and how to do our job. The client came in, told us why he or she had come to see us and what he or she wanted. The client provided information and preliminary instructions. Disclosure was exchanged. We provided legal information and legal advice. We educated our clients such that we could then obtain informed instructions from them. Negotiations ensued made more or less pleasant depending upon whether the other counsel were someone we liked or someone who ought to have been voted off the island. We could be as creative as the parties wanted and as circumstances dictated.

The deal was then made, documented, a job well done, file closed and account paid. Not so much anymore. By whatever method is used – traditional / cooperative / collaborative / mediation etc – the manner in which the deal is documented has become increasingly important. The role that we as the lawyers actually play or may be deemed to have played in the whole process has become increasingly perilous. The tension we face between following the client’s instructions on a cost and time efficient basis and meeting our professional responsibility has probably never been greater.

There has been a plethora of cautionary notices, courses and papers devoted to the topic of legal writing. What more can be said about drafting that hasn’t already been said, and probably said by me? It’s hard to imagine, particularly given that I presented papers in 2005\(^1\) and in 2011 on legal drafting. So as to avoid reinventing the wheel, attached as Appendix A is a truncated version of the general drafting considerations discussed in 2011.

In 2005 we discussed Pre-Nuptial Agreements and in 2012 we are discussing Cohabitation and Pre-Nuptial Agreements\(^2\). There are some subtle differences between the two types of agreements, but both involve parties wanting, by contract, to determine today how their financial lives will be disentangled at an unknown future date if they separate. Neither we nor our clients have crystal balls. Is it truly possible to negotiate and then document an iron clad enforceable contract in that regard? Not entirely.

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\(^1\) The 2005 paper was prepared for a panel presentation on PreNuptial Agreements and was entitled “Drafting Considerations”, the same name as has been used by LESA to advertise this presentation.

\(^2\) In 2011 we discussed drafting of Minutes of Settlement, a much less risky task or at least one that has less potential for keeping the lawyer awake at night.
We know the law today but laws change. We understand, more or less, how domestic contracts are interpreted today in our jurisdiction but we can give no more than a very qualified opinion on how a contract drafted in 2012 might be interpreted in 20 or 30 years. For that reason, it is submitted that the Recitals in such Agreements are much more crucial than in other types of agreements where the substantive provisions come into effect immediately, such as Separation Agreements or Minutes of Settlement.

THE BACKDROP OR WHEN DOES ONE DRAFT AN AGREEMENT?3
Although, to me, the answer to the question is obvious, from experience it would appear that my views are certainly not shared by all family law practitioners.

With few exceptions4, one does not begin drafting a Separation Agreement / Minutes of Settlement until such time as there has been a meeting of the minds - a clear deal reached by the parties in relation to the substantive terms. Occasionally, however, family law counsel will meet with a new client who will advise that he/she and the estranged spouse have agreed on everything. The lawyer is asked:

(a) To document /draft the agreement;
(b) To advise when the agreement will be signed by the spouse; and
(c) To advise as to the total projected legal fees.

Usually it does not take too much questioning to ascertain that in fact there has been no agreement reached but rather, at best, an agreement to agree and a wish to get it done, get it done quickly and not to spend money on lawyers. At that point the client is advised of the provisions of the relevant law, the requirement for disclosure, the various dispute resolution processes available and is told that the length of time it takes to resolve all matters, and the cost, depend upon the reasonable cooperation and reasonable expectation of both parties.

Drafting of the Separation Agreement /Minutes of Settlement will not occur until a settlement has actually been reached. That makes sense. It should be no different with Cohabitation or Pre-Nuptial Agreements. The deal should firstly be negotiated, the parties come to a meeting of the

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3 In this paper, unless otherwise indicated, the term “Agreement” is used to denote both a Cohabitation and a Pre-Nuptial Agreement.
4 The exceptions would include, for example, where the marriage is of short duration, both parties are self-sufficient, there are no children, little property acquired and the client wants to make an offer early on by way of presenting a form of Agreement. Another example would be where litigation or negotiations have been ongoing for a considerable period of time, with some periods of total inactivity and seemingly no progress. For whatever reason, one party might believe that if the estranged spouse is presented with Minutes of Settlement and a cheque releasable upon execution, the matter might settle. In fact, sometimes it does.