Divorce and the Family Farm – An Introduction to Prenuptial, Adult Interdependent Partner and Cohabitation Agreements

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INTRODUCTION

The Matrimonial Property Act describes how the matrimonial property of a married couple is to be divided. The starting point is that the property acquired during the marriage is to be divided equally between the parties, unless it falls under one of the categories described in the Act.¹ For owners and operators of a farming or ranching operation, this type of division may not meet their particular need. For example, he or she may want the farming operation to be carried on by one or more of their children, and may want to ensure that the property associated with the operation does not get involved in a matrimonial property dispute. Fortunately, the Matrimonial Property Act permits individuals to contract out of the property division set out in the Act. This paper is to serve as an introduction to prenuptial agreements, as well as taking a brief look at other types of agreements which may be useful to your clients, such as adult interdependent partner agreements and cohabitation agreements. ²

PRENUPTIAL AGREEMENTS – AN INTRODUCTION

A prenuptial agreement is a contract entered into by two people who are going to marry which allows them to determine how their property will be dealt with during, and after, the marriage. The ability for a couple to enter into a prenuptial agreement is specifically permitted by legislation, and originates from sections 37 and 38 of the Matrimonial Property Act. These sections allow spouses, or prospective spouses, to enter into an agreement to divide their property in an agreed upon manner, and describes the formal requirements for doing so. For your convenience, these sections are reproduced below:

“37(1) Part 1 does not apply to property that is owned by either or both spouses or that may be acquired by either or both of them, if, in respect of that property, the spouses have entered into a subsisting written agreement with each other that is enforceable under section 38 and that provides for the status, ownership and division of that property.

(2) An agreement under subsection (1) may be entered into by 2 persons in contemplation of their marriage to each other but is unenforceable until after the marriage.

¹ Matrimonial Property Act, RSA 2000, c M-8 section 7 and 8
² I am indebted to the authors of the papers that were presented at the LESA seminar for Cohabitation and Prenuptial Agreements, particularly Krysta H. Ostwald and Brett Y. Shikaze for their paper “The Nature of the Beast”, Nigel S.A. Montoute and Cindy F. Lee for their paper “Challenging the Validity of Cohabitation and Pre-Nuptial Agreements In Alberta”. Their efforts allowed me to save time in my efforts, and credit to them is certainly due.