

# **Common Drafting Errors – From a Litigation Perspective**

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*Domestic Contracts*

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## COMMON DRAFTING ERRORS – FROM A LITIGATION PERSPECTIVE

In preparing this paper, the writer considered how to best address the issue of common drafting errors in domestic contracts in a way that was within her area of experience. Accordingly, this paper assumes that the best way to correct problems in drafting is to review domestic contracts that have been the subject of litigation. From those decisions, changes can be made in subsequent Agreements - we can learn from our mistakes, or the mistakes of others.

The use of the terms prenuptial agreement, cohabitation agreement, domestic contract, etc. are simply referenced in this paper as the “Agreement”.

### STATUTORY FORMALITIES – THE PLACE TO START

The first exercise is to determine what kind of domestic contract is required. Is it a cohabitation agreement, adult interdependent agreement, prenuptial agreement, or ante nuptial agreement? What are the statutory requirements in each case? With respect to prenuptial or ante nuptial Agreements, they are governed by the *Matrimonial Property Act*, R.S.A. 2000, c. M-8 (“the *Matrimonial Property Act*”). However, the *Matrimonial Property Act* can offer guidance even in the case of cohabitation agreements, where it offers a ready-compiled set of best practices to ensure an Agreement is binding on the parties.

There are specific requirements within the *Matrimonial Property Act* to ensure the Agreement is valid.

#### **A. Section 37 of the *Matrimonial Property Act***

1. Parties can contract out of Part I of the *Matrimonial Property Act* provided the requirements in s. 38 are met. Section 37 provides that you can contract out of the *Matrimonial Property Act* if:
  - a. You enter into a subsisting **written** Agreement with each other;
  - b. The written Agreement is **enforceable** under s. 38;
  - c. The written Agreement provides for the **status, ownership and division of property**; and,
  - d. The Agreement applies to property owned at the time you enter into the Agreement or property that may be acquired by either party after they enter into the Agreement.

2. Section 37(2) specifically contemplates that a written Agreement dealing with property can be entered into by two people who are **contemplating marriage** but is not enforceable until after the marriage.
3. Accordingly, the parties can take control of their property division even before they have property to divide. Pursuant to s. 37(3), the Agreement can provide for the distribution of that property at the **time of separation or divorce and it can apply to property owned by both spouses, or each of them, at or after the date the Agreement is made.**
4. To clarify, an Agreement can deal with property held by each party prior to marriage as well as property acquired during the marriage. Therefore, a well-drafted Agreement answers these two questions: first, what will happen to all forms of property in the event of a separation; and second, how will that property be divided?
5. Section 7(2) of the *Matrimonial Property Act* deals with exemptions and provides some protection for a party's property held prior to marriage. However, an Agreement can go further than those statutory protections. For example, in many cases of separation under the *Matrimonial Property Act*, the property each spouse owned at the time of the marriage, or part thereof, can be pulled out of the matrimonial "pot", but the increase in the value of that property is usually equally divisible between the two spouses. In contrast, Agreements typically protect the increase in value of otherwise exempt property. If a husband owned a house at the time of the marriage, it was worth \$500,000.00 and had a \$200,000.00 mortgage, he could claim an exemption of \$300,000.00 in that house. If the house is worth \$700,000.00 at the time of separation, under the *Matrimonial Property Act* the husband would receive his \$300,000.00 exemption and one half of the \$200,000.00 increase in value. He comes away with \$400,000.00 in equity. If he had an Agreement protecting his previously owned property and any increase in the value to the same, he would come away with \$500,000.00 in equity. The Agreement goes further than the statute allows.
6. It is therefore important to define what is meant by property within the Agreement. From the precedents we use, a typical clause to that effect is as follows:

*The Wife's Separate Property shall mean:*

- *Property of the Wife described in Schedule "A";*
- *Property of the Wife acquired by her in the future with the proceeds of sale or redemption of the Wife's Separate Property described in Schedule "A", or any portion thereof;*

- *Any property acquired by the Wife in the future as a result of inheritance, gift to her alone from a third party, an award or settlement for damages in tort in favour of the Wife, and payment under an insurance policy that is not insurance in respect of the Wife's Separate Property; and,*
- *Any increase in value or proceeds of sale, or property acquired in substitution of, the above three categories of property.*

Typically, the Husband's Separate Property would similarly be defined.

7. Once the Separate Property is defined, the Agreement typically describes how it is to be dealt with. It may be as simple as a clause that reflects the following:
  - *Each of the parties will retain their "Separate Property" free and clear of any claim by the other, in the same manner as if the parties had not married, without any claim or interference from the other party.*
8. With respect to how the parties deal with property acquired **after** the Agreement is made, there are a number of options available depending on their objectives. For example, the parties may agree that if they both contribute to the acquisition of property after signing the Agreement, they will divide it in proportion to the contributions each has made. A clause to that effect may look something like this:

**Joint Property:**

*In the event of the joint acquisition of property acquired after the date of the execution of this Agreement, the property shall be owned in accordance with the portion of each party's investment, unless the parties otherwise agree in writing.*

**OR**

*Notwithstanding any other clause in agreement, in the event of joint acquisition of property acquired after the date of execution of this Agreement, the property shall be owned equally by the parties, regardless of his or her actual investment into the same.*

(In such cases, it is important to remember that Separate Property must somehow be reconciled with jointly acquired property that may be acquired with proceeds from one or both parties' Separate Property). If the husband in the previous example sells his house, buys a new one, and puts the new house into joint names, how is his original investment to be dealt with? If he puts it into joint names, is he intending on giving up some or all of his original