

# **Prenuptial Agreements: Fear and Loathing by both Counsel and Clients**

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*Domestic Contracts*

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**PRENUPTIAL AGREEMENTS:  
FEAR AND LOATHING BY BOTH COUNSEL AND CLIENTS**

By Roxanna Petts and Rachel C. Woynorowski

**INTRODUCTION**

Most couples when contemplating marriage are filled with hope and joy – on the eve of a wedding ask any couple and they will surely tell you “our relationship and marriage will last forever”. When there are last minute music selections, flower arrangements and seating plans to be finalized, contemplating entering into an agreement that addresses the possible breakdown of their marriage is not a high priority in many couples’ minds.

However, as many lawyers within the family law bar can attest, the chances of a couple living their entire life together “happily ever after” with each other is becoming increasingly uncommon. A quick look at the statistics surrounding divorce in Canada fully supports this antidote with an average of 1 in 4 marriages ending in divorce within four years<sup>1</sup>.

Before you know it, that same couple that only a few years earlier was happily discussing seating arrangements for their wedding is now in your office arguing over how to split investments and who is going to keep the pewter candle sticks on the dining room table.

As a lawyer, the question that we should be asking is this:

“What can we, as lawyers, do to ensure a smooth separation and divorce for the couple while ensuring our client’s rights are fully protected?”

Unfortunately, in Canada we do not (yet) have any institutions that are offering marriage/divorce insurance – an instant lottery like payout in the event a relationship breakdown<sup>2</sup>. And in the absence of an instant payday to smooth the transition for each party upon separation, as lawyers we are left counselling our clients about steps they can take now to proactively protect their rights and assets.

These conversations and the process of drafting and entering into a prenuptial agreement can be intimidating for both counsel and clients alike.

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<sup>1</sup> Statistics Canada, Divorce Database and Marriage Database. Ottawa: Statistics Canada, 2011. The rate of divorce increases to 40.7% when examining marriages that last 30 years. This is actually a decrease from the high divorce rates that Canada saw in the mid-1980s. Canada’s highest ever divorce rate was reached in 1987 with 50.6% of all marriages ending in divorce before the couples 30<sup>th</sup> wedding anniversary.

<sup>2</sup> See “Marriage Insurance being pitched in US, Canada”, April 30, 2012. Canadian Broadcasting Corporation (CBC). Despite the 2012 claim by SafeGuard Insurance that they would be shortly launching marriage insurance products in Canada as of today’s date this product is still not available. The company has failed to find an underwriter for this insurance product.

## **THE CLIENT PERSPECTIVE: DO I REALLY NEED A PRENUPTIAL AGREEMENT? A FEAR OF THE UNKNOWN AND UNCERTAIN**

Many couples happily enter into marriage without a prenuptial agreement – some individuals being unaware of how a prenuptial agreement could protect them, and others simply being too afraid to ask or broach this subject with their future spouse.

From the clients' perspective, common concerns and questions when considering a prenuptial Agreement include:

- Lawyers are expensive – do I really need a prenuptial agreement and what does it actually do?
- I hear that prenuptial agreements are often overturned – is it worth entering into an agreement if it is not going to be upheld?
- What is a fair arrangement between me and my spouse? And how do I talk to them about this?
- What if my spouse refuses to sign a prenuptial agreement – what happens next? Will we still be able to get married?
- When does the prenuptial agreement need to be signed?

As counsel, we must approach and provide answers and guidance to these common questions with both confidence and tact.

## **WHEN IS HAVING A PRENUPTIAL AGREEMENT BENEFICIAL?**

It is a common misconception that prenuptial agreements are only for couples who have significant property and assets. When in fact, this type of agreement can be beneficial to any couple contemplating marriage who wishes to have clarity and certainty around how their property and finances will be treated both during their marriage and in the event their marriage should break down.

While all couples could benefit from having a prenuptial agreement in place, in practice, these agreements are most commonly sought by couples in the following circumstances:

- 1) Significant Discrepancy in Pre-Marriage Assets or Debts. Where one spouse has more pre-marriage property than the other they may wish to ensure that this property remains their