MASTERING MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS: PRACTICAL INSIGHTS AND CREATIVE DRAFTING SOLUTIONS

FAMILY LAW

June 16, 2022

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June 16, 2022

PROGRAM CHAIRS
Ilana Arje-Goldenthal, Frodis Family Law (Toronto)
Emma Katz, Kelly D. Jordan Family Law Firm (Toronto)

AGENDA

9:00 am	**Welcome and Opening Remarks**
9:05 am	**Pre-Drafting Considerations: Setting Yourself Up for Success** **Janice Ho,** Holam Law PC (Markham) **Jacqueline M. Mills,** Jacqueline Mills Family Law (Toronto)
9:30 am	**Key Insights on Avoiding Mishaps and Errors – Limiting Liability** **Brahm Siegel,** Nathens, Siegel LLP (Toronto)
9:45 am	**Key Insights on Avoiding Mishaps and Errors – Preventing Your Contract From Being Overturned** **Kori Levitt**, Frodis Family Law (Toronto)
10:10 am	**Unique Considerations When Preparing Cohabitation Agreements** **Sarah Strathopolous**, Epstein Cole LLP (Toronto)
10:30 am	**Collaborative Law Opportunities** **Cori Kalinowski,** Kalinowski Law and Mediation (Toronto)
10:50 am	**Enforcing or Setting Aside Marriage Contracts** **Kevin Caspersz,** Shulman & Partners LLP (Toronto) **Katherine Robinson,** Kain & Ball Professional Corporation (Mississauga)
11:20 am	Questions
11:25 am	Break

11:35 am **Tackling Spousal Support**
Jennifer Gold, Wood Gold LLP (Brampton)
Laurie H. Pawlitza, Torkin Manes (Toronto)

Dealing with Property
Hilary Jenkins, McKenzie Lake Lawyers (London)

12:20 pm **Navigating After Marriage Contracts, Second Marriages and Estate Planning Considerations**
Jenna Preston, Nelligan O'Brien Payne LLP (Ottawa)
Shawn Richard, Lenkinski, Carr, & Richard LLP (Toronto)

12:55 pm Questions and Concluding Remarks

1:00 pm Program Concludes

Professionalism Hours: This program contains **1h 0m**
Substantive Hours: This program is eligible for up to **3h 0m**

The OBA has been approved as an Accredited Provider of Professionalism Content by The Law Society of Ontario

PROGRAM **PARTICIPANTS**

ILANA ARJE-GOLDENTHAL (PROGRAM CO-CHAIR)

Ilana Arje-Goldenthal is a lawyer at Frodis Family Law. Since being admitted to the Bar of Ontario in 2016, Ilana's practice has concentrated exclusively in family law. Ilana represents clients in court in Ontario, and participates regularly in alternative dispute resolution processes, with a view to crafting creative settlements for clients. Her practice involves the full breadth of family law issues, including parenting, support, income issues, property disputes, as well as complex financial matters. Ilana is a member of the Ontario Bar Association (OBA) and currently sits as an executive in the Family Law Section of the OBA. Prior to commencing her practice, Ilana completed a clerkship for the judges of the Ontario Superior Court of Justice in Toronto. She holds a Juris Doctor (JD) from the University of Toronto Faculty of Law.

EMMA KATZ (PROGRAM CO-CHAIR)

Associate lawyer with Kelly D. Jordan Family Law Firm, in Toronto, Ontario. Called to the Bar in 2013. Practising in all aspects of family law and fertility law. After practising civil litigation at a boutique firm for four years, transitioned into practising family law and joined Kelly Jordan in 2018. Completed Juris Doctor at Osgoode Hall Law School, during which time spent one semester working at Parkdale Community Legal Services. Contributed to family law chapter in new edition of *Death of a Taxpayer*. Contributed to writing resources regarding decision-making responsibility and parenting time for Family Law Education for Women. Current Member At Large on OBA Family Law Executive and CPD liaison for upcoming year. Involved with the OBA Young Lawyer's Division as past member of executive. Member of Board of Directors of the legal aid clinic, Justice for Children and Youth.

KEVIN G. CASPERSZ

Kevin G. Caspersz has been practicing law since being called to the State Bar of New York in 2005. In 2008, he was called to the bar in Ontario having practiced as a foreign legal consultant in the province until then. Kevin practiced in the areas of commercial, civil, and class action litigation, before applying his varied legal experience to the exclusive practice of family law since 2013. He has advocated on behalf of his clients at all levels of court in Ontario, always seeking to resolve their matters in the most efficient and effective manner. Kevin is also a strong advocate of binge-watching Netflix or other worthy streaming platforms as an effective method to escape the stresses of family law practice.

JENNIFER GOLD

Jennifer Gold is President of the Women's Law Association of Ontario and a partner of the law firm, Wood Gold LLP, a boutique Family Law firm in Peel Region. She has practiced Family Law since being called in 2002. Jennifer has a keen interest in the art of Family Law, de-escalating conflict, and seeing parties achieve a positive resolution. She is a Dispute Resolution Officer for the Superior Court of Justice in Kitchener and Welland and a Board Member of Legal Aid Ontario. Jennifer is the 2021 recipient of the Award of Excellence in the Promotion of Women's Equality presented by the Ontario Bar Association Women Lawyers Forum. She was recently appointed a member of the Advisory Council for the Law Society of Ontario's Access to Innovation (A2I) pilot project which will allow providers of innovative technological legal services to serve consumers while complying with operating conditions that protect the public.

JANICE HO

Janice practices in all areas of family law including parenting issues, child and spousal support, property and equalization, and complex financial issues. With professionalism and integrity, she advocates creative and cost-effective solutions for her clients. Janice has appeared at most levels of the Ontario Courts, including Divisional, but is also well-versed in alternative dispute resolution processes such as negotiation, mediation, and arbitration.

HILARY JENKINS

Since Hilary's call to the bar in 2016, she has practiced family law in London, Ontario. While Hilary was in law school, she developed a passion for family law as the Family Law Student Supervisor at Western University's student legal clinic. As a law student, Hilary was the recipient of the Edna Yuet-Lui Memorial Award, the Douglas May Memorial Award, and the Genest Murray Award for Advocacy. Hilary's passion for her work and for the legal profession continues on today. When she is not serving her clients, Hilary is the Secretary/Vice President of the Middlesex Family Law Association and on the Board of Trustees for the Middlesex Law Association. Hilary is also an executive member of London Lawyer's Feed the Hungry and she regularly volunteers at the meal service. In her spare time, Hilary enjoys cooking, reading, and spending time with friends and family.

CORI KALINOWSKI

Cori Kalinowski is a family lawyer and mediator accredited by the OAFM as a mediator and the OACP as an Advanced Collaborative Practitioner. Cori was the Chair of Collaborative Divorce Toronto and has trained lawyers and mediators in Canada, France, and Italy in Collaborative Practice. After many years of litigating, Cori's practice is now focussed on settlement processes to negotiate the terms of Cohabitation Agreements, Marriage Contracts and Separation

Agreements. She works with families who have high net worth, high income, complex business and trust interests as well as those with more modest financial resources.

KORI LEVITT

Kori's interest in the area of family law was sparked in her second year of U of T law school where she took her very first family law course with the late great Phil Epstein. Kori articled at Epstein Cole and went on to practice Family Law for 3 years at McCarthy Tetrault. In 2003 she joined then sole practitioner, Dani Frodis. Almost 20 years and 10 associates later, she remains a big part of Frodis Family Law. Kori handles all aspects of family law matters from negotiations to litigation. She particularly enjoys the work involved in the preparation of cohabitation agreements and marriage contracts, and has been involved in a number of litigation cases where a party has sought to set aside such an agreement. Of note is that Kori is trained in collaborative law and is an active member of a local collaborative law group.

JACQUELINE M. MILLS

Jacqueline M. Mills is a certified specialist in family law and has practiced exclusively in this field since 1986. She was an associate and a partner with Lang Michener for 14 years before forming the partnership of Doran & Mills in 1998 and has been a sole practitioner since 2006. She was a member of the executive of the Family Law Section of the Ontario Bar Association from 1988 to 2010 and chaired the section from 2001 to 2003. She taught family law at the Bar Admission Course for many years, and has chaired and spoken at numerous conferences on all aspects of family law. Jacqueline has acted as counsel on a number of precedent-setting and diverse family law issues appearing in the Court of Appeal, the Superior Court of Justice, and the Ontario Court of Justice. Since 1995, she has consistently been named one of Canada's leading family law practitioners by the Canadian Lexpert Legal Directory and was elected Fellow, International Academy of Matrimonial Lawyers. Jacqueline is originally from Much Wenlock, England, and lived there and in Cyprus before moving to Canada in 1967. She is a proud mother of two sons and enjoys adventure vacations.

LAURIE H. PAWLITZA

Laurie is a partner at Torkin Manes LLP in Toronto. Laurie works with high income clients on property and support disputes and also regularly deals with parenting issues. Laurie is also trained as both a family law mediator and as an arbitrator. Laurie writes a regular family law column in the National Post. She is consistently recognized for her excellence in family law, including in The Lexpert Directory and Best Lawyers in Canada. Laurie has also been named one of the "Top 25 Most Influential Lawyers in Canada", was recognized as one of the "Women Who Make a Difference" by the Legal Education and Action Fund and was awarded the Zenith Award by Lexpert, for exemplifying leadership by women in the profession. Laurie was also awarded

the President's Award by the Women's Law Association and has received an Honorary Doctorate of Laws for her work in the legal profession. Laurie was elected as the 63rd Treasurer (president) of the Law Society of Ontario, being only the 3rd woman to hold this distinction since the Society was founded in 1797. The Law Society of Ontario is the largest legal regulator in Canada, and governs over 50,000 lawyers and over 9,000 independent paralegals. Laurie is often interviewed by journalists on family law issues, and regularly speaks on family law and professional issues in such far flung places as Australia, the Bahamas, India, Mexico, Scotland, Northern Ireland and Zambia.

JENNA PRESTON

After practicing as a Family Lawyer in Toronto, Jenna moved to Ottawa and has been practising with Nelligan Law for the past four years. Jenna's practice involves all areas of Family Law; however, she primarily focuses on the financial issues affecting separating families in both ADR and litigation contexts, as well as assists cohabiting and married spouses plan for their futures through domestic contracts.

SHAWN RICHARD

Shawn takes a creative, forward-thinking approach to finding solutions for clients' family and estate litigation issues. By paying attention to his clients' goals and providing smart, practical advice, he has built a reputation for being a resolute but reasonable lawyer. Shawn is a published author and frequent presented. He taught trial advocacy at the University of Toronto Faculty of Law, and he currently teaches torts at the Ryerson University Faculty of Law. Shawn is the co-chair of the Law Society of Ontario's E-Course on Advancing Equality, Diversity, and Inclusion in the Legal Professions, and he is also the co-chair of the Law Society of Ontario's Family Law Summit.

KATHERINE ROBINSON

Katherine is a senior associate at Kain & Ball Professional Corporation practicing exclusively in Family Law for 10 years. Katherine took a 14-month leave to travel the world in 2018 and 2019, but found her way back to working as a family law lawyer. Marriage contracts, both drafting and challenging, have become a larger part of Katherine's practice in the last 3 years, and she is happy to share what she has learned.

BRAHM D. SIEGEL

Brahm is a lawyer, mediator and arbitrator at Nathens, Siegel, LLP, a family law and divorce boutique firm with offices in North York and Mississauga. Brahm received his Bachelor of Arts

with First Class Honours from McGill University in 1990, his law degree from Queen's in 1993, and was called to the Bar in 1995. Certified as a Specialist in Family Law by the Law Society since 2008 and recognized by *Best Lawyers* in 2021, Brahm co-authored *McLeod's Ontario Family Law Rules Annotated* for ten years and is the consulting editor of the *Consolidated Ontario Family Law Statutes and Regulations,* published by Thomson Carswell. He is also the author of the chapters on Divorce, Procedure and Alternative Dispute Resolution for the Law Society's Licensing Process. Brahm is a certified Family Mediator with the Ontario Association of Family Mediators (OAFM) and a certified arbitrator with Family Dispute Resolution Institute (FDRIO). He enjoys speaking at conferences and seminars, including the Law Society, Advocates Society, and Ontario Association of Family Mediators. His work has been published in *Canadian Family Law Quarterly* and *Money and Family Law*. He is also the founder of the Nathens, Siegel Scholarship, which goes to the highest mark in the Family Clinic course at Queen's University, and the *Family Court Calendar,* a daily free subscription providing the best family law quote from caselaw from that day in history.

SARAH STRATHOPOLOUS

Sarah is a Partner at Epstein Cole LLP. Since her call to the Bar in 2013, Sarah has practiced exclusively family law. Her practice covers all areas of family law, through both the alternative dispute resolution (mediation and arbitration) and litigation processes. Sarah has confidently acted as counsel in matters before all levels of court in Ontario, including the Court of Appeal for Ontario, as well as interprovincial matters. Sarah completed the *Screening for Power Imbalances Including Intimate Partner Violence* training and the Certificate program in Family Mediation from York University School of Continuing Studies. For select files, including for self-represented parties, Sarah acts as parenting coordinator, mediator, or arbitrator to help families resolve disputes in a cost-effective and thoughtful way. Sarah is actively involved in the legal community, sitting on the Ontario Bar Association Family Law Executive since 2020 (she was elected Secretary for the 2020/2021 term, Member-at-Large for the 2021/2022 term, and Secretary for the upcoming 2022/2023 term). Sarah has also co-authored various papers for various professional development programs, and has chaired such programs offered by the OBA. Sarah is committed to advancing access to justice and acts as a Pro Bono Lawyer Supervisor with the Family Justice Centre (an initiative with Legal Aid Ontario, Pro Bono Students Canada, and Epstein Cole LLP) and a Volunteer Lawyer for Luke's Place Virtual Legal Clinic.

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June 16, 2022

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FAMILY LAW

Marriage Contract/Cohabitation Intake Form

Janice Ho, **Holam Law PC (Markham)**

MARRIAGE CONTRACT/COHABITATION INTAKE FORM

NOTE: THIS DOCUMENT IS STRICTLY CONFIDENTIAL AND WILL ONLY BE SEEN BY THIS OFFICE. While some of the information we request may seem irrelevant, it is necessary for us to best assist you with your domestic contract and providing independent legal advice. No steps will be taken by HOLAM LAW PC without a formal retainer agreement being executed and a financial retainer provided.

Intended Date of marriage/cohabitation ______________________________

YOUR PERSONAL INFORMATION:

Full Name: ______________________________
Your Date of Birth: ______________________________
Current address:
Street/Apt. No. ______________________________
City ______________________________
Postal Code ______________________________
Home/Cell Phone: ______________________________
Email Address: ______________________________
Is your email address confidential? Yes No

Where would you like postal mail to be sent?
Same as above
Or to: ______________________________
____
____

Your Occupation: ______________________________
Name and address of
your employer: ______________________________
____
____
____
____

Your approximate income: ______________________________
From employment ______________________________
From other sources ______________________________

YOUR PARTNER'S INFORMATION:

Full Name: ______________________________
Date of Birth: ______________________________

Current address:
Street/Apt. No. ____________________
City ____________________
Postal Code ____________________
Email Address: ____________________
Is the email address confidential? Yes No

Partner's Occupation: ____________________
Name and address of
your employer: ____________________
____
____
____
____

Partner's approximate income: ____________________
From employment ____________________
From other sources ____________________

Does your partner have a lawyer?
No

Yes
Name: ____________________
Address: ____________________
____
____
Phone: ____________________
Email: ____________________

Have you and your partner discussed the potential marriage contract/cohabitation agreement?

No

Yes

Details:
____
____
____
____
____
____

DETAILS OF YOUR UPCOMING MARRIAGE/COHABITATION:

Do you live together now?
No

Yes

From: ______________________ To: __________________________
Address: ____________________________________
Who owns the property? ____________________________________
Who pays property tax, ____________________________________
insurance, mortgage? ____________________________________
Will you live there after
marriage? Yes

No If no, **complete** Family Residence Section.

Have you been married before? Yes No
If *yes*,
Date of previous divorce: ____________________________________
Place of previous divorce: ____________________________________

Has your partner been
married before? Yes No
If *yes*,
Date of previous divorce: ____________________________________
Place of previous divorce: ____________________________________

Do you or your partner have children (under 18 years or still dependent on you or your partner), either together or from a prior relationship?

No

Yes

Child's Full Name	Date of Birth	Parents	Parenting Arrangements	Child Support Details, if any/

FAMILY RESIDENCE

Where will you live after marriage/
upon cohabitation? Address ______________________
____
____

Acquisition Date & Cost: ______________________
Down payment amount: ______________________

Your Share & Source of Funds: ______________________
____

Your Partner's Share &
Source of Funds ______________________
____

Mortgage/Loan Balance: ______________________
Approximate Value: ______________________
Who is or will be on title? ______________________
Who will pay for property tax, ______________________
insurance, mortgage? Proportion? ______________________

OTHER MAJOR ASSETS

Business Interests

Do you or your partner own or have an interest in a business?

No

Yes

Name of Business 1: ______________________
Type of Business: ______________________
Address: ______________________
____
____

Owned by: You Partner

If incorporated, Private Corporation Number:

____

Active Business? Yes No
Holding Company? Yes No

Shareholder Agreement? Yes No
If yes, provide copy

If incorporated, what is your or your partner's percentage interest? ______________________

Partnership Agreement? Yes No
If yes, provide copy

Approximate value of Business Interests: ______________________

Name of Business 2: ______________________
Type of Business: ______________________
Address: ______________________
____
____

Owned by: You Partner

If incorporated, Private Corporation Number:
____

Active Business? Yes No
Holding Company? Yes No
Shareholder Agreement? Yes No
If yes, provide copy

If incorporated, what is your or your partner's percentage interest? ______________________

Partnership Agreement? Yes No
If yes, provide copy

Approximate value of Business Interests: ______________________

Expected Gifts/Inheritance

Have you or your spouse received or expect to receive any of the following:

An inheritance: Yes No

Details: ______________________
____
____

A substantial gift from someone else (e.g. family member, friend, etc.)

Yes No

Details:

Other Assets

Dated:

Signature

MASTERING MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS: PRACTICAL INSIGHTS AND CREATIVE DRAFTING SOLUTIONS

FAMILY LAW

Mother of all marriage contract letters

Jacqueline M. Mills, **Jacqueline Mills Family Law (Toronto)**

Jacqueline M. Mills

Certified Specialist in Family Law

June 14, 2022

SENT BY E-MAIL

*

Dear *:

RE: Cohabitation

This letter is to give you some information about your rights and obligations in terms of support and property, whether you are cohabiting or married. It is also to explain how the *Family Law Act* affects property upon a separation.

Normally when we prepare a cohabitation agreement we ensure that it automatically becomes a marriage contract if the parties marry. This saves having to negotiate a new contract in future, particularly before a wedding.

Rights on Cohabitation

You do not acquire property or support rights or obligations automatically upon cohabitation.

You may have an obligation to pay spousal support if you cohabit continuously for three years, or if you have a child (by birth or adoption) together. The words “cohabit” and “continuously” have been interpreted in unusual ways by the courts. People can cohabit even if they are living in different places, or cities. Conversely, people can be separated even though living in the same house. The question is whether there is “consortium”: companionship, love, affection, comfort, mutual services, and usually (but not always) sexual intercourse. An example of this definition of “cohabit” is parties who are residing in different cities due to job requirements, but otherwise being in a marriage-like relationship.

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Similarly, "continuously" has been defined rather widely, and can include a couple who live apart for 5 months of the year because one goes to Florida for the winter, or a couple who separate from time to time (an example of this is Harold and Yolanda Ballard).

You do not automatically acquire property rights or obligations upon cohabitation. Property is divided according to title. If a home is jointly owned, the proceeds of sale will be split in accordance with how title is held (joint tenants means that the property is owned in equal shares; tenants in common can own property in equal or unequal shares). Similarly a bank account in both names will be split equally. Furniture and electronics are retained by the person who purchased them, similar with cars, boats and other assets. The law is evolving in this area and may approach the rights of married couples at some point in time. At the moment, the fact of cohabitation does not give either of you any rights to share property under the legislation.

It is possible to establish an entitlement to a share of property on the basis of a substantial contribution to the property involved. For example, if you own a cottage, and your partner contributes either money or work to the improvement of the property, such as building a dock, he may a claim against the value of the cottage.

A contribution to personal or family expenses, such as groceries, travel and so on, does not meet this test.

Given that you are purchasing a property together and that a large part of the initial funds are coming from you and/or your family, you should have a contract to protect your investment.

Rights of Married Couples

(a) Support

Unlike with cohabitation, support rights and obligations arise immediately upon marriage. That does not mean that if you separate six months after the marriage you will have to pay spousal support or have a right to receive it. There are a lot of factors that are considered in determining whether spousal support is actually payable, such as the length of the marriage, the age of the parties, the impact of the marriage on either person's ability to earn an income, the respective income levels, the lifestyle enjoyed while together and so on.

(b) Property

Property rights are governed by the *Family Law Act*. The philosophy of the *Family Law Act* is that, subject to certain exceptions, any financial growth during the marriage is to be shared equally by both spouses. Accordingly, upon separation or death, a calculation

is done separately for each spouse to determine the growth in the value of that spouse's assets during the marriage (called "net family property") and a payment is then made by one party to the other (called "an equalization payment"). Under the *Family Law Act*, there is no actual sharing of property (except by title) and each party is entitled to retain whatever property they own, subject to the requirement that at the end of the day one spouse may have to make a cash payment to the other spouse.

In order to do the calculation, each party prepares a statement of his or her assets and debts at the date of marriage and at the date of separation or death. The value of the net assets at the date of marriage is deducted from the value of the net assets at the date of separation or death.

Some rough examples follow.

A. Both your assets and your partner's assets increase in value:

	Your assets	Your partner's assets
At date of marriage (a)	$ 400,000	40,000
At date of separation (b)	500,000	200,000
Net Family Property (b - a)	100,000	160,000
Difference	$60,000	
Payment to you	$30,000	

B. Your assets increase in value, your partner's assets decrease in value:

	Your assets	Your partner's assets
At date of marriage (a)	$ 400,000	40,000
At date of separation (b)	500,000	20,000
Net Family Property (b - a)	100,000	nil
Difference	$ 100,000	
Payment by you	$ 50,000	

C. Your assets decrease in value and your partner's assets increase in value:

	Your assets	Your partner's assets

At date of marriage (a)	$ 400,000	40,000
At date of separation (b)	399,000	200,000
Net Family Property (b - a)	nil	$160,000
Your partner pays you	$80,000	

These examples are very general, but they should give you some idea of how the scheme works, in the absence of any contract.

The exceptions mentioned above relate primarily to matrimonial homes and inheritances and gifts. A matrimonial home is a home in which you are both residing at the date of separation or death. It is usually impossible to tell at the date of marriage whether a particular home will be a matrimonial home or not, since you cannot predict separation or death and do not know where you will be residing at that time.

If you are living in the same home at the date of marriage as at the date of separation or death, the value of the home at the date of marriage cannot be deducted from the value of the net assets at the date of separation or death. In effect, the entire net value of the home is shared equally between the spouses.

Secondly, any gift or inheritance received by a spouse after the date of marriage is not to be included in that spouse's net family property, provided that the gift is made properly, and it is not comingled with other assets. Any growth from the gift or inheritance will also be excluded. However, any income derived from the gift or inheritance will be included in the calculation unless the donor of the gift expressly states otherwise. In order for a gift to be made properly, it must look like a gift and not like anything else, such as an estate freeze. Many times, transactions are completed a certain way for tax purposes, but that can defeat a claim that an asset was gifted during the marriage. At the very least there should be a deed of gift and a simple transfer with no tax consequences.

If the gift or inheritance is used to purchase a matrimonial home or to increase the equity in such a home, it loses its protection. You can have more than one matrimonial home. A country residence, a ski chalet, a Florida residence can all be considered to be matrimonial homes, provided that they are used by the couple or the family in accordance with their normal use. For example, a ski chalet in the winter, even if only used on weekends.

If you are the beneficiary of any sort of family trust, the gift is made when the trust is created, not when funds are deposited to the trust. If the trust was created prior to marriage, the growth in value between the date of marriage and the date of separation is

included in the calculation. If the trust is created during the marriage, the trust interest is excluded.

The above information is a basic explanation of how the *Family Law Act* applies in the absence of an agreement. Obviously there are a lot of fine details beyond this basic explanation.

Issues that Cannot be Dealt With in a Marriage Contract

There are some things that cannot be included in a marriage contract, or that will not be enforceable. That includes custody of and access to children, and child support. In the determination of a matter respecting the support, education, moral training, or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining to the matter where, in the opinion of the court, to do so is in the best interests of the child. For example, there have been many cases where the court has found that agreements respecting lump sum or monthly child support should not be upheld because it is the child who suffers from inadequate support.

This is particularly important for you, as child support can be payable by a step-parent. Under the legislation, "child" is defined a person whom a parent has demonstrated a settled intention to treat as a child of his or her family (in Latin, *in loco parentis* – standing in the place of the parent). The courts almost invariably give a wide scope to this provision, favoring the child or the child's birth or adoptive parent. Therefore, it does not take much to be *in loco parentis*. Mother's Day cards from the child, "happy family" pictures, outings, celebrations of important events. You cannot be released from this obligation.

Also, Part II of the *Family Law Act* creates special rights with respect to matrimonial homes. It provides that each spouse has an equal right of possession of any matrimonial home upon separation. The statute also provides that neither party can sell or mortgage a matrimonial home without the written consent of the other spouse. A provision in a marriage contract purporting to limit a spouse's rights under Part II (matrimonial home) is unenforceable.

Setting Aside a Marriage Contract

There are numerous cases where courts have set aside marriage contracts and treated it as void and unenforceable. There are no guarantees in this regard. All we can do is our utmost to make the contract as strong and enforceable as possible. That involves your partner having good independent legal advice, full disclosure all around and a contract that is not without benefits to your partner.

The following is the provision in the Family Law Act for setting aside a marriage contract:

> "A court may, on application, set aside a domestic contract or a provision in it:
>
> (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
>
> (b) if a party did not understand the nature or consequences of the domestic contract; or
>
> (c) otherwise in accordance with the law of contract."

(a) Failure to Disclose

A failure to make full financial disclosure may entitle your partner to have the marriage contract set aside in its entirety. The obligation to disclose is a positive one and is not dependent on the other spouse's request. You cannot contract out of or waive this obligation. At a minimum, a statement of net worth and an explanation of the assets and the income should be provided. If further information is requested, it should be provided, if the request is reasonable. I can advise you as to whether a request is reasonable or not.

(b) Understanding the Nature and Consequences of the Contract

In order to ensure that both parties understand the nature and consequences of the contract, each party must have independent legal advice. Each party should choose and pay the fees of his or her own solicitor. Before executing the contract, each party will meet with his or her own solicitor who will explain the contents of the contract, review the financial disclosure, answer any questions or concerns, satisfy himself or herself that each party is signing freely and without undue influence or duress, and will execute the certificate to that effect. The requirement of independent legal advice should not be waived and all parties are strongly recommended to obtain it.

(c) The Law of Contract

Like any contract, a domestic contract can be attacked on the basis of improper conduct by either party either at or prior to the execution of the agreement. Such grounds for attack include the following:

(a) Duress: A wrongful act or threat by one party which deprives the other of the exercise of his free will;

(b) Undue Influence: The abuse by one in whom a confidence is reposed by another of such confidence or authority for the purpose of obtaining an unfair advantage over the latter;

(c) Fraud: A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that the latter acts upon it to his or her legal detriment;

(d) Unconscionability: Where the terms of the agreement are so one-sided as to oppress one party or unreasonably favour the other;

(e) Fundamental Breach: A breach by one party of a fundamental term of the agreement which warrants relieving the other party from further performance (rarely since in family law cases);

(f) Other Equitable Grounds: The validity of a domestic contract may also be called into question on the grounds of inequality of bargaining power, unfair surprise, mistake, material misrepresentation or non-disclosure.

Setting Aside Provisions for Spousal Support

Generally speaking, property provisions and releases in a marriage contract are stronger than the spousal support provisions. That is because the court has jurisdiction to set aside the spousal support provisions or the waiver of spousal support if:

(a) The provision for support or the waiver of the right to support results in unconscionable circumstances;

(b) If the provision for support is in favour of or the waiver is by or on behalf of a dependent who qualifies for an allowance for support out of public money; or

(c) If there is default in the payment of support under the contract at the time the application is made.

It is in this area that the consideration of fairness and unconscionability comes into play and where many challenges are made. A provision in a marriage contract either limiting or precluding a claim for future support is very much subject to the discretion of the court at the time an application for support is made. The court can override an agreement that was fair and reasonable when it was executed if it would be "unconscionable" at the time of a court action to maintain the support agreement. Recent case law suggests that the term "unconscionable" means "shocking to the conscience". Having said that, some judges seem to be more shocked at times than others. Some consider "unconscionable" to be more like "unfair". I think it would be prudent to make provision for spousal support, given the lifestyle disparity and we can discuss that in more detail.

Where one party seeks spousal support in the face of a support release or time-limited support, the court has the jurisdiction to decline to follow the terms of the contract. The existence of the marriage contract is one factor that will be considered by the court; however it is not the only one. The seminal case on this issue is *Miglin v. Miglin* in the Supreme Court of Canada. Pursuant to this case, the following factors will also be followed:

(a) The circumstances under which the contract was negotiated and executed;

(b) Whether the contract was in substantial compliance with the *Divorce Act* at the time it was signed;

(c) Whether the terms of the contract continue to reflect the original intention of the parties; and

(d) The autonomy, certainty and finality that the parties intended to achieve when they signed the contract.

The *Miglin* case is relatively recent and there is no further definitive case law. Therefore a party entering into a marriage contract should be aware that it is still unclear what test the court will apply in deciding to overturn a support provision in a marriage contract.

Jurisdiction

The *Family Law Act* provides that the property rights of spouses arising out of the marital relationship are governed by the law of the place where both spouses had their last common habitual residence or, if there is no place where the spouses had a common habitual residence, by the law of Ontario.

If you presently have or if you acquire in the future ties to a jurisdiction other than Ontario, it is possible that you or your spouse may acquire rights or obligations

under the laws of that other jurisdiction: While your domestic contract will attempt to deal with all assets wherever located and rights and obligations anywhere in the world, such provisions may not be enforceable in other jurisdictions.

Future Changes in Legislation

Prior to 1978, Ontario law considered marriage contracts to be unenforceable on the basis that they were contrary to public policy. This rule of common law is no longer in effect. It is extremely unlikely, but it is possible that a future government could amend or repeal the current legislation, the result of which could be to either limit or preclude such contracts, or to make changes to the enforceability of contracts.

Summary

This is a very long letter, but I wanted to set out clearly your rights and obligations, and the strengths and weaknesses of any marriage contract, as all of the above issues should be considered in order to make the contract as strong and enforceable as possible.

Optional:

I understand that you will be using about $400,000 from the sale of your condominium to purchase a new house and that you parent will be giving you approximately $150,000 towards the purchase/renovations/furnishings.

As we discussed on the telephone, it is best to keep the agreement as simple as possible based on your circumstances. Because you are both young and this is your first marriage (and hopefully last) it is not advisable to address any issues of support at all. Support will be determined if necessary based on the existing legislation at the time of any separation.

As we also discussed on the telephone, you should think carefully about whether you want to have a different result if one of you dies while you are still together, as opposed to a separation. You can deal with this in a will, but wills can be challenged, or changed unilaterally, whereas both parties have to agree to change a cohabitation agreement.

Yours very truly,

Jacqueline M. Mills

MASTERING MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS: PRACTICAL INSIGHTS AND CREATIVE DRAFTING SOLUTIONS

FAMILY LAW

The Compact: A (Proposed) New Way Forward For Marriage Contracts & Cohabitation Agreements

Brahm Siegel, **Nathens, Siegel LLP (Toronto)**

The Compact: A (Proposed) New Way Forward For Marriage Contracts & Cohabitation Agreements[1]

Introduction

As you can probably tell from the title, this paper is not a survey of cases about a particular topic or a detailed examination of an area of family law. Rather, it is a proposal, an invitation if you will, which I submit we as a profession need to accept if we are to save ourselves from, well, ourselves.

Let me elaborate. If insufficient financial disclosure is the "cancer" of family law, the "heart disease" of our field at present is the frequency with which attacks on marriage contracts and cohabitation agreements are launched – and succeed.[2] Never before have we seen challenges to these kind of agreements with such regularity, ferocity and pervasiveness. In almost every single case where an agreement has been signed and one party now seeks to uphold it, significant time is spent analyzing how strong one side's argument is that the court will ignore the contract, trying to determine how the case will play out if in fact it's set aside and trying to come up with a settlement proposal that avoids the time and expense of finding out.

It's gotten so bad that recently a family court judge asked me, with utmost frankness, why, in light of the rather small remuneration involved for these kinds of contracts and the high level of risk of a negligence claim involved,[3] would any of us ever even want to *do* these kind of contracts?

I was stunned. Marriage contracts and cohabitation agreements provide a tremendous benefit to all couples who wish to opt out from, in the case of marrieds the harsh formula of equalization, to common law partnerships the pitted journey involved in unjust enrichment/ constructive trust claims, and to all those considered "spouses" under the *Family Law Act*, the increasingly tight-fitting contours of the Spousal Support Advisory Guidelines. In light of the very good chance that the relationship will ultimately fail[4], who wouldn't want the ability to tailor-make an agreement about what happens if it falls apart?

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[1] Brahm D. Siegel, C.S., Nathens, Siegel LLP, March 2015. This paper is dedicated to my friend and colleague Andrew Feldstein and all family lawyers like him, who, I hope, will reconsider doing cohabitation agreements and marriage contracts after reading it.

[2] By success, I refer not only to being set aside or ignored by the courts but cases where a financial settlement for more than what is set out in the contract is reached.

[3] Between 2009 and 2013, 23% of all family law claims related to domestic contracts. Even worse, domestic contract claims accounted for a whopping 47% of the cost of all family law claims for that period. Source: Yvonne Bernstein, Litigation Director & Counsel, Lawyers' Professional Indemnity Company (LAWPRO), email dated December 11, 2014.

[4] Although the number of divorces has shown recent declines (due primarily to the increase in common law relationships), in 2008 it was estimated that 41% of marriages will end in divorce before the 30th year of marriage,

Why All The Trouble?

The relevant provisions regarding marriage contracts and cohabitation agreements are simple enough. Found in sections 52 and 53 of the *Family Law Act,*[5] they are as follows:

> **Marriage contracts**
>
> 52. (1) Two persons who are married to each other or intend to marry may enter into an agreement in which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage or on death, including,
>
> (a) ownership in or division of property;
>
> (b) support obligations;
>
> (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and
>
> (d) any other matter in the settlement of their affairs. R.S.O. 1990, c. F.3, s. 52 (1); 2005, c. 5, s. 27 (25).
>
> **Rights re matrimonial home excepted**
>
> (2) A provision in a marriage contract purporting to limit a spouse's rights under Part II (Matrimonial Home) is unenforceable. R.S.O. 1990, c. F.3, s. 52 (2).
>
> **Cohabitation agreements**
>
> 53. (1) Two persons who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, including,
>
> (a) ownership in or division of property;
>
> (b) support obligations;
>
> (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and
>
> (d) any other matter in the settlement of their affairs. R.S.O. 1990, c. F.3, s. 53 (1); 1999, c. 6, s. 25 (23); 2005, c. 5, s. 27 (26).

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an increase from 36% in 1998: Statistics Canada, Health Statistics Division, Canadian Vital Statistics, Divorce Database and Marriage Database.

[5] *Family Law Act*, R.S.O, 1990, c. F.3, as amended.

Effect of marriage on agreement

(2) If the parties to a cohabitation agreement marry each other, the agreement shall be deemed to be a marriage contract. R.S.O. 1990, c. F.3, s. 53 (2).

Marriage contracts and cohabitation agreements are of course "domestic contracts" as that term is defined in the *Family Law Act*.[6] A court's ability to set aside a domestic contract is governed by s. 56(4) of the *Family Law Act*. That subsection provides as follows:

> 56(4) A court may, on application, set aside a domestic contract or a provision in it,
>
> (a) If a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the contract was made;
>
> (b) If a party did not understand the nature or consequences of the domestic contract; or
>
> (c) Otherwise in accordance with the law of contract.

In *LeVan v. LeVan*[7], the Ontario Court of Appeal confirmed that the:

> analysis undertaken under s. 56(4) is essentially comprised of a two-part process. First, the court must consider whether the party seeking to set aside the agreement can demonstrate that one or more of the circumstances set out within the provision have been engaged. Once that hurdle has been overcome, the court must then consider whether it is appropriate to exercise discretion in favour of setting aside the agreement.

In light of this rather straight-forward structure, why do we have so many cases where these contracts are challenged? In my view, there are five major reasons.

First, based on twenty years of experience handling these matters, clients consistently tell me that they did not put enough thought and time into their contract because they never thought they would be divorced. They tell me they were so in love with their partner and trusted him or her so much that they never thought they would ever break up and never for a moment thought that the contract would be invoked in a manner that would harm them financially. Giddy with love, they are much more focussed on all of the positive aspects of their future than dwelling on the possibility that things will not work out as planned.

[6] "Domestic contract" means a marriage contract, separation agreement, cohabitation agreement, paternity agreement or family arbitration agreement: s. 51, *Family Law Act*.

[7] *Levan v. Levan,* 2008 ONCA 388 (CanLII), 90 O.R. (3d) 1, leave to appeal refused, [2008] S.C.C.A. No. 331, at para. 51.

Second, there is no recommended protocol for how to go about doing an agreement the right way. Although everyone knows each side should have independent legal advice and provide a modicum of financial disclosure, neither the Law Society, the courts nor any other body that I know of has, to my knowledge, taken a firm position on the steps counsel should be taking in order to comply with the intent of the legislation. In the absence of such protocol, clients and lawyers often take the easy way out, which, often involves less than rigorous financial disclosure, failing to really understand what each party seeks and needs, and paying careful attention to drafting and the future consequences of various clauses. Clients, not anticipating they will ever need to rely on the contract, are extremely reluctant to pay a lot for them, which feeds into the lack of effort.

Third, many lawyers accept files for "independent legal advice" too eagerly, without ensuring that all proper steps and a detailed examination of the proposed terms has taken place and without giving careful thought to the risk they are putting their clients and themselves to future attack and the corresponding ultimate negligence claims. Not surprisingly, lawyers willing to attack these agreements seize on these files as evidence that no real bargaining took place and that, by definition, there was duress visited upon the weaker party[8].

Fourth, lawyers have come to realize there is no real downside to attacking an agreement. Either the attack results in an out-of-court settlement for more money than provided for in the contract[9], or a court case ensues and at the least the case is bifurcated with a significant amount of disclosure is produced. Since only the most resolute wind up at trial to defend the agreement, many of these cases settle, with the defending party left scratching his/her head wondering why they spent so much money going to the time and trouble of getting a contract in the first place.

Finally, the courts. In an effort to give each side a fair opportunity to air their side, judges strive to be balanced, which often means ordering significant disclosure even when these contracts are negotiated specifically so that financial disclosure will not have to be produced in the future. It also means that when these issues are case-conferenced or settlement-conferenced, judges bend over backwards to try to see both sides. This results in each side taking what they want from what the judge said, which tends to hamper, not encourage, settlement.

The Compact

The combined effect of these factors often leads to a bizarro-world scenario where everything is set up in favour of the person seeking to set aside the agreement, when, in fact, it should be the opposite. Things should, I submit, be set up so that absent some very clear and unfair

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[8] These kinds of quickie "ILA" kinds of files unfortunately do nothing to detract from the weaker party's sense that this is just a "formality" with no real financial consequences should the relationship fail.

[9] Usually because one side assesses the cost associated with defending it (whether financial, emotional or a combination) as too high.

situations, these agreements should be *upheld* and the message from the bench should consistently echo this. Otherwise, the family court judge's comment to me makes ultimate sense: why bother even doing them?[10]

So how do we do this?

This is what gave rise to the "Compact", a simple set of standard procedures I propose be used in *all* cases involving marriage contracts and cohabitation agreements. They are nothing more than seven steps to be followed by lawyers retained on these sorts of files. They are:

1. *No work is to be started on a file unless the wedding is at least four months away.*

2. *Each party must have his/her own lawyer from the outset, before any negotiations begin.*

3. *Each party provides a financial disclosure brief before any negotiations begin.*

4. *At least one four-way without prejudice meeting shall be held.*

5. *The lawyers fully report to the clients in writing after the four-way meeting.*

6. *A term sheet is prepared and approved before the agreement is drafted.*

7. *The agreement is drafted and signed with certain "key clauses".*

Borrowing from collaborative law, the steps are agreed upon *before* any real work is done on the agreement. Counsel will thus know from the outset how the file will be run and be able to advise the client exactly what happens and when. This will be of great benefit to clients who, at present, have very different experiences depending on the particular practice of his/her lawyer.[11]

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[10] Let me be clear. I am not blaming individual lawyers or lawyers at large or any judge for the quilted way in which these agreements are handled. I understand it. We are all just responding to what we see in front of us at that time, based on the particular agreement in front of us, and after asking the "customer" how it came to be prepared that way and what preceded its signing. But we can do better.

[11] At the risk of over-emphasizing the point, some lawyers have a pre-set way of insisting on how things should be done, regardless of who the client is, how much they own or earn or who the other lawyer is. Some are more flexible and strive to find a tailor-made set of rules for how each file should go. Finally, some counsel simply give way to whichever way the other, more experienced lawyer says things should be done. The point is that it is this extremely varied approach that is getting us into trouble. It is because we do not have an agreed-upon protocol which gives rise to different levels of quality with these agreements, which in turn leads so many openings for them to be challenged.

The steps are simple in and of themselves; many of you will recognize them from your own files.[12] Put together however, they provide a powerful structure, a framework if you will, for a contract that will stand up to scrutiny by anyone who looks at it in the future. I submit that a contract put together under the Compact will be upheld in all but the most exceptional circumstances - which is exactly what our clients expect when they walk through our doors.

Although the procedures can be followed by non-lawyers they are truly designed for counsel, not self-represented parties. These are difficult and often very challenging contracts for even lawyers to negotiate and draft. Like a dangerous stunt in the hands of a capable expert, I caution all self-representeds to abstain from trying this "at home".

The steps in the Compact are not meant to be substantive, only procedural. The Compact is not about trying to determine what goes into these contracts, only to ensuring that the manner in which they are put together is consistent, fair and reflects full participation by each side before it is signed.

As I say, none of the steps are revolutionary. However, when they are followed in full and in order, the resulting agreement will be extremely hard to attack, ignore or set aside for it will have been thoroughly negotiated, sufficient disclosure will have been provided and it will be impossible for a person to successfully claim duress.

Commentary on the Compact

> *1. The Four-Month Rule: No work shall be started on a file unless the wedding is at least four months away.*

We are all used to getting calls at the last minute, sometimes days before the wedding, asking for our help in either drafting an agreement or providing independent legal advice. While many lawyers are smart enough to refuse to take these clients, many still do. These are inevitably the cases which lend themselves to later claims of duress, one-sidedness and incomplete disclosure.

Simply put, the four-month rule ensures no such files ever occur again. In the event a prospective client contacts you and asks you to do a marriage contract and the wedding date is less than four months away, reject it, even if you know the client and have worked with him or her before. Reject it even if they tell you the contract will be "easy" and the other potential spouse "knows about all my assets", two of the most frequent push-backs you get. In terms of options, the best advice in this situation is either to postpone the wedding or call back and start the file after the honeymoon. While neither is particularly palatable, I find the latter has worked well in certain situations.

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[12] Rarely, however, do I work on a file where all of the steps are followed in that file.

I propose four months because even the most simple of marriage contracts take at least three months to complete when the Compact is followed, and, ideally, there should be at least one month between the signing of the contract and the wedding date. From the time it takes to get both counsel onboard, to exchanging financials, to negotiating the deal and to drafting it up, I find only the most organized and determined couples can get a good agreement done in less time.

The reader will notice that I am not suggesting that the contract itself must be signed more than four months before the wedding date. Although I toyed with this idea, I ultimately rejected it as being too unreasonable. The reality of the world at this time is that folks often leave these contracts to the last minute. If and when the Compact is uniformly applied we will be, in a sense, training the public not to leave them to the literal last minute, but that is different from a rule requiring a contract to be actually signed at least four months before the big day.[13]

The final point I'd like to make about this rule is that even if the work on a contract is started more than four months prior, that does not, in and of itself, mean the contract should be signed prior to the wedding date. In the event, for example, that the other steps in the Compact are not completed in time, the lawyers should advise the clients to either postpone the date or complete the steps and sign the contract after the wedding.

2. *Each party must have his/her own lawyer from the outset, before any negotiations begin or anything is drafted.*

This rule is designed to address the problem, all too common in many contracts I have attacked and defended in court, where one party has significantly more wealth than the other, already has a solid relationship with a lawyer (usually from a previous separation) and simply drops a draft agreement in the hands of the other party days before the wedding. Despite how fair the content of the agreement may actually be, the entire process becomes stained from the outset. The parties in such a situation cannot be said to be in equal bargaining positions, they do not have equal power and knowledge and, consequently, the resulting agreement cannot be a product of their joint participation no matter what it says.

Consequently, before any negotiations begin, before any meetings occur, and way before any contract is drafted, each side needs to have his or her own lawyer. Note that while it is preferable that the lawyer's practice be restricted to family law, that is not essential. Provided all the steps in the Compact are followed, I believe a generalist practitioner can safely navigate the waters of cohabitation agreements and marriage contracts.

[13] While I would be personally extremely nervous about a contract being signed the day of the wedding, the proximity of the actual signing to the wedding date does not, in and of itself, determine whether the contract is valid. The astute reader will recall that the marriage contract in *Hartshorne*, signed the day of the wedding, was upheld. Provided the terms of the Compact are fully followed, the fact that the contract is signed the day of the wedding should not, it is submitted, result in a declaration the contract is invalid or unenforceable.

In terms of suggested practice, a simple letter from one party's lawyer directly to the other party looks like this:

> "Dear Ms. Khan:
>
> I have been retained by your partner Kevin Jones to explore the possibility of a marriage contract. I understand your wedding is some six months away and ask that you retain a family lawyer of your choosing and have him or her contact me within three weeks so that we can commence the process.
>
> Yours truly,
>
> Brahm D. Siegel"

The letter does not need to be complicated or threatening. Keep it simple and formal. As long as the message is firmly communicated, that is all you need at this point.

Before the letter is sent, I would email it to the client to have him approve the draft. This gives him a good opportunity to discuss what is happening with his would-be spouse, which is a good thing. There should be no surprises. Surprises give rise to future allegations of "I didn't know" and "I didn't feel I had a choice".

A thorny issue arises when your client contacts you a week after the letter is sent and tells you that the would-be spouse is not interested in retaining counsel. This does not happen often but when it does, you need to explain that the spouse having independent legal advice is for *his* benefit, not just for your spouse's. Once I explain this, and how the eventual agreement will be more likely to be upheld if his spouse has had good solid representation, he usually takes that knowledge back, further discussions are held between the spouses and I almost always hear from counsel a short while thereafter.

Another issue sometimes arises when the client asks you to provide a name or some names of good family lawyers to give to the would-be spouse. Resist all such temptation. Even if you have a good working relationship with various lawyers on these kinds of contracts, if the parties ever break up you will definitely hear a complaint in the form of "The lawyers had it all worked out beforehand" or "I never really chose my own lawyer" or something of that nature. I know because it happens all the time. Finally, when your client comes back to you (as happened to me recently) and says his would-be spouse tried to find a lawyer but none would take her case, tell him it is her job to do so, that you will not be offering up any names and that the agreement will be stronger and less prone to attack if she finds her own lawyer on her own. Full stop.

3. Each party provides full financial disclosure before any negotiations begin.

Other than allegations of duress, the most common argument as to why an agreement should be set aside is "I didn't know what he earned" or "I didn't know what he owned". The

assumption here is that had the spouse known what he earned or owned she would have negotiated for a more favourable deal, which is usually (but not always) false. While there is no way to know whether that (rather presumptuous) assumption is true or not in a particular case, many courts have found that a significant failure to disclose is sufficient to void a contract. Thus, in order to strengthen a contract, full financial disclosure should occur in every case, even when the client tells you (as they often do), "My spouse knows everything I have".

Accordingly, step 3 is the exchange of a disclosure brief, complete with Form 13 Financial Statement, complete income tax returns with notices of assessment for three years, three recent paystubs and statements proving the values of all major investments and debts. In the event one party is self-employed, corporate tax returns and business financial statements for the past three years should be attached as well.[14] This is not to say this is all the disclosure that should ever be produced but it should constitute the minimum.

This disclosure is not costly nor does it take a lot of time to produce. I usually have an associate work on the draft with the client, either by phone or in person, and then meet with me a week or so later to go over everything in detail, making sure all the appropriate back-up is attached, to have it revised, signed and commissioned.

Sometimes lawyers get fussed about valuations. Nothing in the caselaw requires spouses to spend thousands of dollars on costly valuations.[15] The disclosure should, however, be more than a few lines on one page appended as a schedule, which, unfortunately at present, seems to be the norm.

As long as the material is exchanged between counsel and there is a good record of it,[16] I see no need to attach anything to the actual contract. It's a waste of paper and the Financial Statement only represents a portion of the disclosure provided anyways. It is important, however, to ensure that in the "ILA/Financial Disclosure" section of the agreement the drafter highlights that not only sworn Financial Statements but supporting documentation was also provided. A good example from a recent agreement is as follows:

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[14] While it's tempting not to complete the "budget" section (after 20 years if I have to ask one more client how much they spend on toiletries I think I'm going to lose it), it should be completed as well as it provides a good yardstick against one's claimed income.

[15] Having said that, if during the negotiations one party disputes the value of the other's business the issue will need to be resolved one way or the other because by the end of the process the parties both need to be satisfied with the values put forth by the other. As a result, in some cases a valuation by a chartered business valuator may be the best way of proving such value.

[16] I typically keep all financial disclosure in two folders, one from my client and the other from the other party.

INDEPENDENT LEGAL ADVICE/FINANCIAL DISCLOSURE

Selma and Rick each acknowledge that:

(a) Selma has had independent legal advice from Jack Straitman, Barrister & Solicitor;

(b) Rick has had independent legal advice from Brahm D. Siegel, C.S., Barrister & Solicitor;

(c) each of them has read the agreement in its entirety and has full knowledge of its contents;

(d) each understands the nature and consequences of the agreement and his or her respective rights and obligations hereunder;

(e) each believes this agreement is fair and reasonable and that its provisions are entirely adequate to discharge the present and future responsibilities of the parties and will not result in circumstances unconscionable to either party;

(f) each has made full financial disclosure to the other of his and her respective financial assets and liabilities as evidenced by sworn Financial Statements sworn by Selma on August 21, 2014 and by Rick on August 20, 2014. Further, Rick has provided tax returns, proof of his investments and balance sheets, income statements and T3 slips for the Kawartha Family Trusts referred to above in paragraph 12;

(g) each has given all information and particulars about his or her income, assets and liabilities that have been requested by the other, is satisfied with the information and particulars received and acknowledges that there are no requests for further information that have not been met to his or her complete satisfaction; and

(h) is entering into this agreement without any undue influence, fraud or coercion whatsoever and is signing this agreement voluntarily.

4. At Least One Four-Way Without Prejudice Meeting Must Be Held

After the financial disclosure has been exchanged the parties and counsel should have a without prejudice four-way meeting. The meeting should take place even if counsel believe the parties are *ad idem* on the key points.[17] Even on files where I believe, going in, that the meeting will not lead to anything new being agreed upon I am always proven wrong, for there always seems to be a myriad of things that were either not fully understood by one party or topics that the

[17] e.g., full releases and waivers on spousal support and property. Almost every client marrying for the second (or third) time will want these and will tell you, way before the meeting, their spouse has already agreed to it.

lawyers bring up which neither party even thought about which require some fulsome discussion.[18]

Even in cases where both parties have been married before and agree to full releases and waivers, it is very helpful, not only for the parties but for the integrity of the agreement, for the lawyers to discuss, openly, what "full and final releases and waivers" means. Sometimes after discussing this, one party changes his mind and the terms are modified so that they apply only in the event the parties do not have children or only after their marriage lasts less a certain minimum period. Other times, the parties have fully understood what the terms mean in which case sitting around a table and confirming them, with the lawyers serving as devil's advocates ensuring that all scenarios have been contemplated, is a solid proving ground and reality-testing as to whether the parties are being reasonable and fair with each other.

5. The Reporting Letter

After the four-way meeting each lawyer reports in writing to his/her client on what transpired, making sure the letter reflects on what each party's position was, what the lawyer's advice is and what they feel the next steps should be. The importance of all of this documentation proves invaluable in cases of future attack where the court is often called upon to piece together what the terms of the agreement were – or were not.[19] It also is usually very helpful in cases where the negotiations were complicated, the client needs to process what happened and there are various scenarios to be considered. Laying it out carefully in writing for the client helps lead to more fuller discussions between lawyer and client and, hopefully, a more carefully considered contract.

6. Term Sheet

In most cases the four-way meeting is a success and all four participants leave with a good understanding of what has been agreed to. This should then be followed up by a short letter from one counsel to the other, outlining the terms understood to be agreed upon at the four-way. The letter should make it clear that *before* the contract will be prepared, a letter from the other lawyer is requested confirming that the proposed terms are in fact agreeable in all respects.

The benefit of this step cannot be overstated. First, because the letter is usually sent a few days after the meeting, it gives each side time to consider and reflect upon what was discussed. Although to counsel these issues are often rather straight-forward and customary, for clients they are sometimes overwhelming. Things happen in a blur and they need time to understand

[18] e.g., life insurance, how long a spouse gets to stay in a home if the other dies, changing wills to reflect the terms of the agreement to name a few.

[19] See for example *D'Andrade v. Schrage,* 2011 ONSC 1174 (Ont. S.C.J.) at paras 35-40, where Justice Sachs relied upon a reporting letter from this writer to the client as a "reliable account" of what transpired at the four-way meeting, the terms of which were later incorporated into the marriage contract.

what was discussed, read the reporting letter, perhaps even discuss it with counsel and make sure they are still good with the terms discussed at the meeting.

The second benefit is that almost always the letter that comes back either modifies the proposed terms or significantly changes them. This is either because one party (or one lawyer) misunderstood something that was discussed at the meeting, or sometimes one party changes their mind. This is a good thing and should be welcomed, for it shows how an agreement comes together. It shows the back and forth involved in a genuine negotiation and prevents agreements from being drafted which are later labelled unconscionable.[20]

Counsel should bear in mind that in rare cases this step is where one party realizes they do not really want the contract at all. Often it is only at this stage where one client appreciates the larger consequences of what is on the table and after careful reflection and discussion with counsel come to realize that the terms are not in their interests. Whether the parties later revisit the issues at a subsequent four-way meeting and finally agree on terms or marry/live without a contract, it is submitted that both scenarios are far better than a contract being signed where one party either does not really like what is being proposed or does not understand its implications fully.

Finally, it should go without saying that as with any important letter, a draft should be sent to the client first and be clearly approved by them by email before it is signed and sent off to the other lawyer.

7. Drafting & Signing

Once the confirming letter comes back approving the terms, you are then – and only then – ready to proceed to draft. Draft the agreement, review it with the client in all respects before it is sent to the other lawyer (making sure to get the client's approval by email on it before it is sent out) and forward it to the other side for approval as to form and content. No matter what, do not have your client sign and send over four copies until the other lawyer has approved the draft.

If things go smoothly the other lawyer will approve the draft in short order with a simple email stating it is satisfactory and to please send over executed copies. If the other lawyer writes back seeking changes, these will obviously have to be dealt with, negotiated if necessary and resolved before the final version can be signed.[21]

[20] In rare cases (I can only think of one in my career) another four-way meeting will be necessary.

[21] It should go without saying that all drafts should be retained in the file, making it clear the date when they were prepared and sent to the other side if applicable. I say "if applicable" because often I go through a few different drafts with the client before he and I are satisfied with it.

You can then get the client in, have him/her sign and initial four copies and courier them to the other side. He meets with his client, has her sign and initial, and return two to you. The file is now complete.

Key Clauses: Releases & Waivers, Summary Judgment and Bifurcation

As mentioned previously, the Compact does not seek to manage the contents of what couples agree to in their contracts; it is only a code designed to strengthen and increase the chances that what has been agreed to will be upheld.

In order to further bolster these agreements, a few extra clauses are recommended for inclusion in every contract. These clauses are consistent with leading precedents in three Supreme Court of Canada family law cases: *Hartshorne v. Hartshorne,*[22] *Miglin v. Miglin*[23] and *Hyrniak v. Mauldin.*[24]

(a) Hartshorne

In *Hartshorne*, the parties signed a marriage contract on their wedding day. It preserved the right to spousal support but precluded any division of property, save and except for allowing the wife a 3% interest per year in the family home (owned by the husband) for each year of their marriage, up to a maximum of 49%.

At trial[25], the judge found the agreement was "unfair" as per the provisions of the British Columbia *Family Relations Act,*[26] and awarded the wife $1,415,000, which was approximately

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[22] *Hartshorne v. Hartshorne*, [2004] 1 S.C.R. 550, 2004 SCC 22 (Can LII).

[23] *Miglin v. Miglin*, (2003) SCC 24 (CanLII), [2003] 1 S.C.R. 103.

[24] *Hyrniak v. Mauldin*, [2014] 1 SCR 87; 366 DLR (4th) 641 (S.C.C.).

[25] *Hartshorne v. Hartshorne*, 1999 CanLII 5113 (B.C.S.C), var'd 2001 B.C.S.C. 1678 (CanLII).

[26] *Family Relations Act*, R.S.B.C., 1996, c. 128. Section 65, which is a different (and lower) standard from s. 5(6) of Ontario's *Family Law Act*, states:

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

(a) the duration of the marriage,

(b) the duration of the period during which the spouses have lived separate and apart,

(c) the date when property was acquired or disposed of,

(d) the extent to which property was acquired by one spouse through inheritance or gift,

$1,135,000 than she was entitled to pursuant to the terms of the agreement. The husband's appeal failed,[27] following which he appealed to the Supreme Court of Canada.

In granting the appeal and upholding the contract the Court emphasized that provided parties clearly intend to opt out of court involvement great deference should be given to their wishes. As Bastarache J. said, speaking for the majority:

> To give effect to legislative intention, courts must encourage parties to enter into marriage agreements that are fair, and to respond to the changing circumstances of their marriage by reviewing and revising their own contracts for fairness when necessary. Conversely, in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess the arrangement on which they reasonably expected to rely. Individuals may choose to structure their affairs in a number of different ways, and it is their prerogative to do so: see generally *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83 (CanLII).[28]

The court noted that by signing the agreement the parties entered their marriage with certain expectations on which they were reasonably entitled to rely. Their intention, as expressed in the agreement, was to leave each with what he or she had before the marriage. The court

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> (e) the needs of each spouse to become or remain economically independent and self sufficient, or
>
> (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

> the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.
>
> (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.
>
> (3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

[27] *Hartshorne v. Hartshorne*, 2002 B.C.C.A. 587 (CanLII).

[28] *Ibid* at 36.

noted, bluntly, that if the wife truly believed that the agreement was unacceptable at that time, she should not have signed it.[29]

The court further observed that parties are expected to fulfill the obligations they undertake in an agreement; it is not open for one to simply later state that he or she did not intend to live up to his or her end of the bargain. While it is true that in some cases agreements that appear to be fair at the time of execution may become unfair at the time of separation, depending on how the parties' lives have unfolded,[30] in a framework where parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement, particularly where independent legal advice has been obtained.[31]

Since the key question thus becomes whether the operation of the agreement will prove to be unfair (or "unconscionable" in Ontario) in the circumstances present *at the time of separation*, the following clause is recommended for all contracts:

> HARTSHORNE
>
> As required by the Supreme Court of Canada in the case of *Hartshorne v. Hartshorne*, in preparing this agreement Selma and Rick have discussed with each other and their solicitors their notions of fairness and the circumstances under which the terms of this agreement were negotiated. They agree and acknowledge that the terms of this agreement are presently fair and will always be seen by them to be fair in the future, regardless of what happens to either of them, and regardless of how their lives unfold after the execution of this agreement. Neither Selma nor Rick will attempt to have this agreement or any provision thereof set aside in the future on the grounds that their lives or financial arrangements unfolded differently than either had anticipated.

(b) Miglin

Not every marriage contract or cohabitation agreement contains full releases and waivers in respect of spousal support, but for those that do, counsel and the courts have to contend with the seminal case of *Miglin,* which directs that where an agreement contains a final release of spousal support a two-stage analysis is required.

The first stage considers the circumstances of the parties at the time the agreement was entered into, including issues such as financial disclosure, legal advice and balance in bargaining power. These will be adequately addressed by following the Compact.

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[29] *Ibid* at 65.

[30] Which the court called the "triggering event" instead of a "separation".

[31] *Ibid* at 67.

As discussed above however, a finding that an agreement is satisfactory at stage one does not end the inquiry. The court must assess whether circumstances have changed in ways that the parties may not have contemplated, whether the agreement is still in compliance with the objectives of the *Divorce Act* or whether enforcing the agreement in the circumstances as at marriage breakdown would lead to a situation that the court cannot condone. Yet it is *precisely* for this reason why couples often want a cohabitation agreement or marriage contract with full releases and waivers - to insulate themselves from the myriad of financial possibilities which could result had the parties not opted to decide for themselves how things will look upon separation.

For these reasons, and specifically because section 33(4) of the *Family Law Act* provides that a court may set aside a provision for support or a waiver of the right to support in a domestic contract and may determine and order support in an application although the contract contains an express provision excluding its application if the provision for support or the waiver to support results in "unconscionable" circumstances, every agreement containing full releases and waivers should contain the following language to ensure the court exercises its discretion in favour of not interfering with the contract:

MIGLIN

(a) Selma and Rick realize that their respective financial circumstances may change in the future, by reason of career reversals, loss of employment, retirement, lack of employment opportunities, contingencies of life including illness and disability, inheritances, adverse economic circumstances such as rising costs and inflation, the mismanagement of funds by themselves or others, financial reversals, poverty, or a general change in family conditions, *inter alia*. No such change in circumstances, whether catastrophic, drastic, radical, material, profound, unanticipated, foreseeable, foreseen, unforeseeable, unforeseen or beyond imagining, and no matter how extreme or consequential for either or both of them, whether or not the change is causally connected to the marriage, and whether or not such change arises from a pattern of economic dependency related to the marriage, will alter this Agreement, or entitle either party to support from the other or result in circumstances that one of them ever considers as "unconscionable" pursuant to section 33(4) of the *Family Law Act*.

(b) For greater certainty, Selma and Rick acknowledge that:

   (i) they are financially independent, do not require financial assistance from the other nor will they ever seek financial assistance from the other in the future;

   (ii) they have negotiated this Agreement in an unimpeachable fashion and that the terms of this Agreement fully represent their intentions and expectations;

(iii) they have had independent legal advice and all the disclosure they have requested and require to understand the nature and consequences of this Agreement and the implications of waiving support, and to come to the conclusion, as they do, that the terms of this Agreement, including the release of all spousal support rights, reflects an equitable arrangement for support in their cohabitation, marriage or upon a breakdown of the relationship;

(iv) the terms of this Agreement substantially comply with the overall objectives of the *Family Law Act* and the *Divorce Act* now and in the future, and Selma and Rick have specifically considered the provisions and factors set out in sections 30 and 33 of the *Family Law Act*, sections 15.2 and 17 of the *Divorce Act* and the *Spousal Support Advisory Guidelines*;

(v) they have been advised by their respective solicitors of rulings in the Ontario courts in which the court has awarded spousal support, notwithstanding that full releases of spousal support have been contained in an agreement. Selma and Rick require the courts to respect their autonomy to achieve certainty and finality in their lives and to enforce this Agreement and specifically this spousal support release;

(vi) this Agreement may be pleaded as a complete defence to any claim brought by either party for spousal support in contravention of this Agreement; and

(vii) the terms of this Agreement and, in particular, this release of spousal support, reflect their own particular objectives and concerns, and are intended to be a final and certain settling of all support issues between them. Among other considerations, Selma and Rick are also relying on this spousal release, in particular, upon which to base their future lives.

(c) If at any time, a party is unable to be self-supporting in whole or in part and the other party voluntarily assumes support directly or indirectly for the non self-supporting party, such voluntary payments will not constitute a waiver of the terms of the Agreement, particularly this spousal support release, nor will they create any future responsibility for support.

(d) Selma and Rick intend this paragraph of the Agreement to be forever final and non-variable. In short, they expect the courts to enforce fully this spousal support release no matter what occurs in the future. Neither of them will ever assert that the waiver of support in this Agreement constitutes "unconscionability" under section 33(4) of the *Family Law Act*.

(e) Selma and Rick agree that, as required by the Supreme Court of Canada in *Miglin v. Miglin,* this agreement has been negotiated in substantial compliance with the *Divorce Act* and under unimpeachable conditions. For clarity, this means that neither party was or is subject to any circumstances of oppression, pressure or other vulnerabilities.

(f) Selma and Rick hereby specifically sign this section in the presence of their respective counsel as witnesses (if applicable) and represent and acknowledge that they have been informed of the consequences thereof and are under no duress or misrepresentation. Both agree to be forever barred from making any claim against each other for spousal support, regardless of the circumstances that either may find themselves in after this agreement has been signed and that such circumstances will never be amount to circumstances that are "unconscionable" pursuant to section 33(4) of the *Family Law Act.*

______________________	______________________________
Witness	Selma Smith
______________________	______________________________
Witness	Rick Jones

Getting the parties to sign at the end of this section of the agreement in addition to the final page of the agreement is an added protection, designed to avoid later claims that "I only signed where my lawyer told me to and never read it."

(c) Hyrniak

In the event that notwithstanding the above-noted clauses, an attack is brought to set aside a contract or part of it, the following clause, consistent with the principles in the ground-breaking case of *Hyrniak v. Mauldin* released last year, should be included to give the defending party (and the court) the tools required to stop the claim from proceeding very far:

> HYRNIAK
>
> In the event either Selma or Rick ever challenges this contract or a part of it in court for any reason, the challenging party hereby consents to an order on motion by the defending party dismissing such claim with costs. The parties agree that such a motion shall be brought and granted by way of summary judgment and without the requirement of a case conference under the *Family Law Rules.*
>
> Selma and Rick understand that a motion for summary judgment dismissing such a claim means that no genuine issue for trial exists. Selma and Rick, once again, understand that the terms of this agreement are final and non-variable and that they both fully expect to adhere to such terms

> regardless of the circumstances they find themselves in in the event of a separation, regardless of how such separation may come to pass.

Although not available at the time this paper is being submitted, it is my understanding that changes to Rule 16 (Summary Judgment) in the Family Law Rules are imminent, changes that would more closely align the rule to the general principles set out in *Hyrniak*.

(d) Bifurcation

Nothing riles a client who thought his contract was impervious to attack like receiving a letter from an expert seeking a laundry list of financial disclosure dating back from prior to marriage – except, perhaps, a judge who orders it.

Not one single client who ever signs a contract with full releases and waivers ever thinks that will occur – yet it does. Judges are routinely faced with requests for financial disclosure in the face of contracts which, on their face, appear to make such disclosure irrelevant. This enrages clients seeking to uphold the contract, furthers litigation and increases the chances of destructive and expensive trials.

In the face of such requests, lawyers often move for a "bifurcation" order under Rule 12(5) of the *Family Law Rules* which provides as follows:

> 12(5) If it would be more convenient to hear two or more cases, claims or issues together or to split a case into two or more separate cases, claims or issues, the court may, on motion, order accordingly.[32]

If the terms of the Compact are followed, allegations of unfairness, duress and lack of disclosure will hopefully become a thing of the past. Further, when the suggested key clauses noted above in respect of *Hartshorne*, *Miglin* and *Hyrniak* are added in, it is hard to fathom of a situation that will cry out for redress from the court. However, in the unlikely event a contract negotiated by way of the Compact is ever challenged in court and the motion for summary judgment fails, all such contracts should contain a "bifurcation" clause which guarantees that in the event of a challenge, the issue of the validity of the contract shall be split and tried first – bifurcated – from the other claims (spousal support and/or equalization).

The benefits of such a clause are significant. It increases the chances that the case will settle before the first trial, as overturning the agreement will now require two trials, not one, which is an expensive proposition and requires a truly steely heart ready for a lot of difficult litigation. Similarly, in the event the first trial proceeds and the agreement is upheld, it increases the chance that the second trial will not occur. Third, it reduces the amount of disclosure and

[32] While by no means exhaustive, the following are noteworthy cases involving a judge having to wrestle with this issue: *Mantella v. Mantella*, 2006 CanLII 10526 (Ont. S.C.J.); *Simioni v. Simioni* (2009), 74 R.F.L. (6th) 202 (Ont. S.C.J.); *Baudanza v. Nicoletti* (2011), 11 R.F.L. (7th) 329 (Ont. S.C.J.); *C.M.G. v. R.G.*, 2013 ONSC 961 (Ont. S.C.J.); *Dillon v. Dillon*, 2013 ONSC 7679 (Ont. S.C.J.); and *Balsmeier v. Balsmeier*, 2014 ONSC 5305 (Ont. S.C.J.).

documentation required as the first trial will be limited only to whether the agreement should be upheld or not. If it is upheld, the losing party should pay significant costs and will be under significant pressure to accept the terms and move on with life. If it is set aside, only then will significant disclosure be required in order to assess what the spousal support and/or equalization should be.

Here is the precedent clause suggested for inclusion:

> BIFURCATION
>
> (1) Neither Selma nor Rick ever intend to set aside this agreement or a provision thereof. However, in the event either party ever attempts to do so and a claim for dismissal based on summary judgment fails, that party shall consent to an order that the trial of the matter shall be bifurcated such that the first issue to be tried is whether the circumstances at the time this agreement were negotiated justify a finding that this agreement should be found not to be valid. Only the parties' financial disclosure existing at the time this agreement was negotiated shall be producible for this part of the case.
>
> (2) Only in the event the court finds that the circumstances at the time this agreement were negotiated justify a finding that this agreement should be set aside shall each party be then at liberty to request from the other, and seek from court, financial disclosure in addition to the parties' income and net worth at the time this agreement was negotiated.

While of course no language in a contract can ever totally in and of itself preclude a court from assessing or analyzing whether the terms run afoul of the legislation, the combination of the Compact along with the above-noted clauses, in addition to the other customary clauses commonly included,[33] will hopefully lead to significantly fewer attacks on cohabitation agreements/marriage contracts in the future and even fewer successful ones.[34]

Final Thoughts: Pushing Back & Letting Go

Lawyers who intend to follow the Compact will benefit from knowing that their agreements are strong and will be upheld. Sometimes however, clients chafe and push back at the steps involved. Usually, this occurs mid-way through the process, because they have unrealistic

[33] Definition clause, severability clause, non-representation clause, governing law clause, amendment clause, general release clause, assignment clause, etc.

[34] This is not to say that every contract presently in existence is vulnerable. All contracts, even ones prepared in accordance with the terms of this paper, are vulnerable. The question is to what extent. Following the terms of the Compact establishes a standard by which the courts can more clearly and adequately assess the risk of vulnerability.

expectations about timing or cost and do not know how easy it is to set aside contracts when the basic fundamentals are not followed.

In order for the Compact to work smoothly, it is incumbent on both lawyers to explain, *from the outset, especially at the inquiry or consultation stage*, that there is a process, that it will take at least a few months and that each step is crucial to protecting the integrity of the agreement.[35] When the lawyer does a good job adjusting the client's expectations right from the beginning this way, the level of pushback is usually very small, although at times the lawyer may need to remind him of the progress being made, where the finish line is, what the next steps, and why each is important.

In the unusual event a client who appeared to be initially on board with the steps of the Compact later gives you a hard time and refuses to follow them, what to do? What of the client who informs you, a month before the wedding, that he and his bride-to-be have decided they do not want to move the wedding date, do not want to complete the steps after the honeymoon and want the contract drafted and signed this week?

The answer is simple: you tell the client two things. First, while it is his life and his choice, an agreement signed in such a fashion will be vulnerable to attack and it will be no fun wondering whether, if the marriage ever breaks down, it will or will not be set aside. Second, you as the lawyer will not participate in such an agreement. You have agreed to follow the terms of the Compact and have done so for good reason.

In the event the client persists, you simply politely and respectfully inform him he can pick up his file tomorrow with the appropriate refund cheque for all unused trust funds. While some clients may then back down and agree to stay the course until all steps are completed, many will not. To those clients, you should close up the file quickly, making sure to properly document what happened, and wish them well.

Conclusion

The steps in the Compact are designed to be followed in every single case involving a marriage contract or cohabitation agreement, regardless of the amount of money involved, the level of experience of counsel or the sophistication of the client. It is this level of consistency which, over time, will cause the Compact to become the routine way of doing these agreements. As they do, judges will have an easier time calling out those that should be set aside and firmly encouraging all the rest to stop wasting their time and money and follow its terms.

That is not to say that the steps and suggested clauses outlined in this paper are forever fixed and non-variable. As I said at the outset, this is simply an invitation, a proposal. I look forward

[35] I sometimes (crassly) tell clients that if the steps are not followed from beginning to end the client runs the risk that a judge will treat the agreement like toilet paper. While not the most professional of metaphors, it almost always brings home the point to clients that with a stroke of the pen, despite both parties' intentions at the time the contract is signed, the client's wealth can be slashed and lives upturned.

to consulting with colleagues, the bench, LAWPRO and the Law Society, and revisiting the terms every few years, with the expectation that new points will be added or revised.

By making this proposal and inviting all lawyers to follow the Compact, at the same time I wish to definitively state that I am not saying that all existing contracts which did not follow the Compact are invalid, unconscionable or even vulnerable to attack. That would be irresponsible. All I am saying is that the time has come for some clear uniformity in terms of how we as the Bar approach these contracts and the Compact is my attempt to help clear a path towards this goal.

I hope that you will seriously consider joining me in adopting the Compact as part of our daily practice. If this occurs, I am really looking forward to seeing an *increase* in the number of family lawyers prepared to take on these contracts, a corresponding *increase* in the number of these kinds of contracts being completed, and, most of all, a significant *decrease* in the amount of litigation over them.

Brahm D. Siegel, C.S.

March 30, 2015

MASTERING MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS: PRACTICAL INSIGHTS AND CREATIVE DRAFTING SOLUTIONS

FAMILY LAW

Setting Aside Marriage Contracts: Recent Cases and Important Takeaways

Kori Levitt and Daniel Bernstein, **Frodis Family Law (Toronto)**

Setting Aside Marriage Contracts: Recent Cases and Important Takeaways

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Frodis Family Law

Legislative Framework

In order to properly advise clients with respect to cohabitation agreements and marriage contracts, it is extremely important to not only understand the legislation that gives us the authority to do so, but also the law that gives the court the authority to set the contract aside.

Section 52 of the *Family Law Act* provides that two persons who are married to each other or intend to marry may enter into an agreement in which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage or on death, including,

a) ownership in or division of property;
b) support obligations;
c) the right to direct the education and moral training of their children, but not the right to decision-making responsibility or parenting time with respect to their children; and
d) any other matter in the settlement of their affairs.

Section 53(1) of the *Family Law Act* provides that two persons who are cohabiting or intend to cohabit and who are not married to each other have this same ability, and section 53(2) adds that if the parties to a cohabitation agreement marry each other, the agreement shall be deemed to be a marriage contract.

Section 56(4) of the *Family Law Act* allows a court, on application, to set aside a domestic contract or a provision in it,

a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
b) if a party did not understand the nature or consequences of the domestic contract; or
c) otherwise in accordance with the law of contract.

The phrase "otherwise in accordance with law of contract" refers to the fact that at common law, a domestic contract, like any other contract, may be set aside on the basis of unconscionability, undue influence, mistake, repudiation, duress or misrepresentation.[1]

Setting aside a marriage contract under s. 56(4) is a two stage process. Under the first stage, the court must consider whether the party seeking to set aside the agreement can demonstrate

[1] *Toscano v. Toscano*, 2015 ONSC 487 at para. 62.

that one or more of the circumstances set out in s. 56(4) have been engaged. If the court finds that this is the case, it moves on to the second stage and considers whether it is appropriate to exercise its discretion in favour of setting aside the agreement.[2] The burden of proof is on the party seeking to set aside the domestic contract.[3]

Every year, a significant number of parties to cohabitation agreements and marriage contracts seek to rely on section 56(4) to have their agreements set aside. Below are brief summaries of some of the most recent cases along with what you, as authors and advisors on these types of contracts, should take away from them.

Recent Case Summaries and Takeaways

***Pringle v. Pringle*, 2021 ONSC 3677 – Importance of Financial Disclosure**

The parties cohabited as unmarried spouses between 1995 and 1999, when they separated for the first time. The parties entered into a separation agreement in 2000 at which time some financial disclosure was exchanged. The parties subsequently reconciled and resumed their cohabitation in 2005. They were married on June 30, 2006. They separated on June 16, 2018.

Prior to the marriage, the parties met with a lawyer who drafted a marriage contract based on terms that were discussed at a joint meeting. The parties broadly discussed assets and debts but no financial statements, net worth statements or financial disclosure was exchanged.

The marriage contract excluded the husband's house (the matrimonial home) and cottage, as well as all other real estate owned by the parties, from equalization. It included an acknowledgment by the parties which confirmed that they each had read and understood their rights under the agreement, fully disclosed their financial information, and believed the agreement to be fair and reasonable.

In an attempt to address the lack of financial disclosure (and the lack of ILA), the acknowledgment even contained the following language: "We acknowledge that we have been advised that this agreement may later be interpreted by a Judge as being ineffective and non-binding because we chose not to prepare and give to each other complete financial statements and because we chose not to seek independent legal advice from our own personal lawyers".

The wife applied for an order to set the marriage contract aside. Justice Pierce found that she met the burden of establishing a lack of full financial disclosure and found that the court should exercise its direction to set the marriage contract aside.

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[2] *LeVan v. LeVan*, 2008 ONCA 388, *Moses Estate v. Metzer*, 2017 ONCA 767 and *Capar v. Vujnovic*, 2021 ONSC 4713 at para. 47.

[3] *Shair v. Shair, 2015 ONSC 5816 at para 44 (affirmed on appeal) and Verkaik v. Verkaik, 68 R.F.L. (6th) 293 (Ont. S.C.J.) at para 50 (affirmed on appeal)*

In so doing, his Honour emphasized the importance of financial disclosure prior to negotiating and entering into a marriage contract as follows:

> "In my view, it is not sufficient to simply disclose the nature of a party's asset without disclosing its value. To do so may be misleading…Exchanges of sworn financial statements or statements of net worth are a starting point for understanding what each party gains or loses upon entering into a marriage contract. They constitute a base line from which future gains or losses may be calculated should the agreement or a portion of the agreement be set aside. Indeed, without a disclosure of value, it may be impossible to accurately calculate the value of debts and assets at the date of the marriage in the event that the contract is set aside"

The court specifically found that the parties' broad discussions about their assets and debts, and the limited disclosure they exchanged in 2000 was insufficient. Subsection 56(4)(a) requires disclosure of significant debts or assets *at the time the domestic contract is made.* The court added that parties are not permitted to contract out of the obligation to disclose.

As an aside, the court also found that the parties could not have understood the nature or consequences of the marriage contract because neither party had independent legal advice. The importance of ILA is discussed in greater detail in the case below.

Takeaway #1: Exchange sworn financial statements or net worth statements which contain values for all of the parties' assets and debts and provide support for these values with proper financial disclosure. This is important so that the parties can appreciate what they are potentially gaining or losing by entering into the contract.[4]

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[4] If you are defending against a claim to set aside a marriage contrast on the basis of a failure to value assets, you may wish to consider the recent case of *Capar v. Vujnovic*, 2021 ONSC 4713 at paras. 54-58, where the court found that it was not necessary for the wife to provide the husband with the value of one of his properties as the husband was aware that the wife owned the asset, the property was clearly the subject of the marriage contract, the parties were living in the property at the time, and the husband could have requested that the wife provide information from which the value of the property could be ascertained, or taken steps to obtain that value directly. Relying on the Court of Appeal's decision in *Butty v. Butty*, 2009 ONCA 852, the judge in *Capar* held that the husband could not rely on his own failure to carry out his due diligence as a basis to avoid the marriage contract. Ultimately, the court concluded that there was no requirement in these circumstances for the wife to disclose the value of the property. The court also noted that s. 56(4)(a) does not contain the words "financial" or "value" to describe the nature of the disclosure of a significant asset. With this being said, it is still always best practice to provide full and frank financial disclosure, including values, in order to minimize the risk of a future challenge to a domestic contract.

***MacLeod v. MacLeod*, 2022 ONSC 2457 – Importance of ILA**

The parties met online in 2003 while the wife was living in Russia. They had a child together in 2005 and were married in Ontario on July 7, 2007. In the days leading up the wedding, they signed a marriage contract. They separated on February 1, 2018.

The agreement provided that upon a separation there would be no division of property but the husband would pay a specific quantum of periodic and lump sum support depending on the length of the relationship. The agreement acknowledged that the wife had engaged the services of a professional translator to assist her in understanding the terms of the Agreement. It then attached a certificate of independent legal advice for the husband, but not for the wife.

The wife sought to set the marriage contract aside on the grounds that she did not understand the nature or consequences of the agreement and that she had signed it under duress.

In relation to independent legal advice, Justice Shelston provided the following instructive comments:

> "Independent legal advice is not an essential requirement to have a valid domestic contract. The purpose of independent legal advice is to advise a party of their rights and obligations in relation to a proposed domestic contract. It is only after a party receives that information can a party make an informed decision about the advisability of entering into the domestic contract. When a person does not receive independent legal advice, the issue of a person's understanding of the nature or consequences of a domestic contract must be very carefully scrutinized by a trial court".

While the court accepted that the wife had read the agreement, translated into Russian, and that she understood the terms in a general sense regarding support and property, it found that because she received no independent legal advice, she had no understanding of any references to the *Divorce Act*, the *Family Law Act*, equalization of net family property or any of the other technical legal terms set out in the contract.

In light of the above, Justice Shelston found that the wife did not have any idea as to what property and support rights she was giving up and consequently she could not possibly understand the nature or consequences of the marriage contract that she signed. The court then exercised its discretion to set the contract aside with Justice Shelston stating:

> "By signing the marriage contract, Allen and Marina were opting out of the spousal support provisions of the *Divorce Act* and the equalization provisions of the *Family Law Act*. While Allen had the opportunity to have the agreement drafted by his lawyer and his lawyer explained the terms to Allen, Marina did not have independent legal advice, was unaware of her rights and obligations to both spousal support and an equalization

> of the net family property and, in my view, clearly did not understand the nature or consequences of this contract".

It is worth mentioning that in this case the agreement was inconsistent in that it mentioned that both parties had received independent legal advice, but then did not attach a certificate for the wife. This leaves open the question of whether an agreement that clearly spells out a party's refusal to obtain ILA might be more resistant to being set aside.

Takeaway #2: Try your very best to insist that the other party to the agreement obtains independent legal advice. While ILA is not an essential term of a valid domestic contract, if a party elects not to obtain ILA and the terms of the contract depart significantly from the presumptive statutory regime, there is a real risk that the agreement will be set aside under s. 56(4)(b). If the other party adamantly refuses ILA despite advice to obtain same, then make certain the agreement clearly and consistently spells this out.

***Gorman v. Sadja*, 2020 ONSC 6192[5] – Importance of Clear Language and Importance of Papering the Negotiation Process**

The parties were married in 1991. They signed a marriage contract a few days before the wedding. Both parties had counsel, but no disclosure was exchanged. The parties separated 27 years later.

The husband sought to set the marriage contract aside on the grounds that he: (1) received inadequate financial disclosure; (2) did not understand the marriage contract; and (3) signed the marriage contract under duress. Among other things, the contract provided that each party released all rights to, and interest in, any property owned by the other.

In relation to the second ground, the husband claimed that he did not understand that the contract only provided him with the right to half of the growth in the value of the family residence if the wife died, and not if they separated. Justice Faieta rejected this argument on the basis that the wording of the conditions was clear and plain on the face of the contract. In fact, on cross-examination, the husband even admitted that the terms were plain and unambiguous.[6]

In relation to the third ground, the court first defined duress as the "coercion of a person's will through illegitimate pressure, with one party dominating the will of another at the time that a contract is executed". According to Justice Faieta, the fact that the marriage contract was presented ten days before the wedding day did not amount to a coercion of the husband's will through illegitimate pressure. In making this finding, the court relied heavily on the fact that the

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[5] Frodis Family Law was trial counsel for the Applicant in this case.

[6] Similarly, in *Reynolds v. McCormack*, 2020 ONSC 999 at para. 57, a cohabitation agreement was upheld, in part, on the basis that the agreement "was in plain language, devoid of legalese".

husband had retained counsel who engaged in negotiations which resulted in significant changes being made to the initial draft agreement. Justice Faieta held that "[t]hose amendments speak loudly to the fact that the Respondent's will was not dominated at the time he signed the Marriage Contract".

Justice Faieta ultimately dismissed the husband's claim to set aside the marriage contract aside.

Takeaway #3: Always use plain and unambiguous language when drafting a contract and (particularly when drafting the operative terms) and always paper negotiations and changes to drafts so that it is clear there was negotiation and that neither party was under duress. See takeaway #4 below with respect to how this may benefit you when there is an upcoming deadline.

***Stupka v. Stupka*, 2012 ONSC 1133 – Timing Matters (especially when there are other red flags)**

The parties were married in Las Vegas on April 14, 1998 a mere five days after signing a marriage contract. The wife sought to set the agreement aside.

Justice Moore declared the contract invalid and unenforceable for the following reasons:

- Only five days separated the date of the agreement and the date of the wedding. The wife first saw the marriage contract on the day it was presented to her by the husband at which point she was directed to see a lawyer for ILA who had previously acted for the husband. The wife did not open the envelope or read the agreement before seeing the lawyer about it. She had never met with the lawyer before and the meeting only lasted for about 30 minutes.
- The agreement was entirely one-sided, benefiting only the husband, without reference to the best interests of the wife or their two children.
- While the husband had made some oral disclosure, his disclosure was neither complete nor entirely accurate.
- The wife did not have sufficient command of the English language or of his financial affairs to ask for information that may have assisted her in understanding the financial implications of the contract.
- The husband was a successful businessman who benefited from a clear knowledge and power imbalance at the time that he insisted on the contract.

Takeaway #4: It is best practice to ensure that marriage contracts are signed well in advance of the wedding date (or other deadlines). If this is not possible, then as in Gorman v Sadja (see takeaway #3 above), it may be sufficient to paper the file with proof that there has been significant negotiation and changes made to initial drafts and ensure that the other side has good counsel who has provided proper advice. However, it may still be safer to have the parties enter into a Standstill Agreement which is a document that ensures that neither party

will obtain any rights or obligations arising from the cohabitation or marriage for a specified period of time (i.e. 6 months) in order to provide the parties with sufficient time to negotiate and sign a more comprehensive marriage contract*.*

***Martin v. Giesbrecht Griffin Funk & Irvine LLP and Lavergne,* 2022 ONSC 1684 – A Cautionary Tale for Counsel**

Family law practitioners may recall the Ontario Court of Appeal's decision from 2014 in Martin v. Sansome, 2014 ONCA 14. The case is often cited in relation to unjust enrichment and trust claims between married spouses. However, it was also a marriage contract case. At trial, Justice Campbell set the parties' marriage contract aside based on the circumstances surrounding its preparation and signing. This portion of the trial decision was upheld by the Court of Appeal pursuant to s. 56(4)(b) on the basis that Ms. Sansome did not understand the nature and consequences of the domestic contract.

In 2022, this case returned to the Superior Court of Justice as a solicitor's negligence claim initiated by Mr. Martin who was suing the law firm of his former solicitor. Mr. Martin asserted that as a direct result of the marriage contract being set aside, he had incurred significant losses. He sought damages in the amount of $945,389.40.

By way of brief background, Mr. Martin was a member of the Mennonite community in Waterloo, Ontario. The parties were married in 1996. In early 2000, Mr. Martin and Ms. Sansome were in negotiations with Mr. Martin's parents regarding the potential purchase of the Martin family farm, which had been owned by the family since the 1830's. The negotiations were led by various elders in the Mennonite community. On January 24, 2000, the parties and their advisory committees reached an agreement whereby the farm would be sold to Mr. Martin and Ms. Sansome for $500,000. The closing date was scheduled for March 1, 2000. More than half of the funds were to come from Mr. Martin's parents and the remaining $201,000 was to be paid by the parties. Soon after the agreement was reached, Ms. Sansome refused to contribute to the $201,000 payment due to concerns about Mr. Sansome's prior bankruptcy and financial circumstances. As a result, Ms. Sansome was removed as a purchaser on the transaction and an Amended Agreement of Purchase and Sale ("APS") was prepared.

Mr. Martin and Ms. Sansome retained and met with a lawyer by the name of Mr. G to discuss the farm transaction. While the firm had initially been retained to act for the purchasers (both Mr. Martin and Ms. Sansome), following the amendments to the APS, the firm was essentially acting only for Mr. Martin as the sole purchaser of the farm. On April 3, 2000, at a meeting to sign the mortgage documents, Mr. Martin and Mr. G discussed what was necessary to protect Mr. Martin's interest in the farm in the event of a separation. Mr. G recommended a marriage contract and agreed to draft the contract.

On April 11, 2000, Mr. G gave his instructions to his junior to draft the marriage contract. She spent a total of 1.4 hours drafting the agreement. Mr. G's office did not communicate further

with Mr. Martin or Ms. Sansome until the morning of April 13, 2000 when they attended at Mr. G's office to sign the marriage contract and a variety of closing documents for the farm transaction. This was the first time that either party had seen the marriage contract. The document was signed by Mr. Martin just minutes after seeing it for the first time. At the time, Mr. G, who had no experience in family law, had never even read the document himself.

That morning, it suddenly occurred to Mr. G that Ms. Sansome needed ILA to sign the contract and a meeting was set up between Ms. Sansome and a nearby sole-practitioner (Ms. W.) for later that morning. Ms. Sansome arrived at Ms. W's office with an original of the contract which had already been signed by Mr. Sansome and Mr. G. Given the time constraints and Ms. W's significant visual impairments, Ms. W also did not read the marriage contract. Ms. W knew nothing about the parties, the real estate transaction or the marriage contract. Despite this, Ms. Sansome and Ms. W also signed the contract. According to the trial judge, Ms. Sansome "paid nothing and she received nothing" in exchange for Ms. W's signature. The marriage contract was executed and the farm transaction closed the following day as scheduled.

According to Mr. Sadvari who appeared as an expert at the hearing, the contract itself was actually quite typical in substance in that it allowed Mr. Martin to exclude his gifts and inheritance from the equalization calculation even if they were traceable to the matrimonial home. **Mr. Sadvari opined that the contract would have been enforceable but for Mr. G's actions.**

The court ultimately held that Mr. G's handling of the marriage contract constituted both a breach of the standard of care, and a breach of fiduciary duty, which caused or contributed to the marriage contract being set aside. This determination was based on the following important findings:

a) Mr. G acknowledged that he was incompetent to accept the mandate because of his inexperience and lack of expertise in family law.
b) Mr. G was in a conflict of interest – he owed fiduciary duties to both Mr. Martin and Ms. Sansome.
c) Mr. G caused the "colossal mess" which arose from the events of April 13, 2000 because he was rushed, he did not show the couple the marriage contract before 9:00 a.m. on that day, he had not read the marriage contract and did not explain it to the couple, he made a "last-minute and essentially useless referral" as a "hurriedly-contrived band-aid" and the marriage contract was signed within three hours of the parties first seeing it and just a day before the closing of the purchase of the farm.
d) Mr. G failed to disclose that he was not competent in family law or that he was in a conflict of interest that prevented him from acting for either party. He did not disclose to Mr. Martin that the enforceability of the marriage contract was compromised and that the April 14th closing date should have been deferred so that the parties could have time to properly review the marriage contract and understand its nature and consequences.

Takeaway #5:** ***Don't ever forget your duties and obligations!

- ***Only draft marriage contracts when you are competent to do so and can properly explain the parties' rights and obligations and what they are giving up.***
- ***Don't ever act when there is a potential conflict of interest.***
- ***Don't rush. It leads to otherwise avoidable errors.***
- ***Don't send the other party to an unqualified lawyer friend for last minute rubber stamping style ILA, it will be meaningless.***

Closing Remarks

In closing, many lawyers will not take on cohabitation agreements or marriage contracts for fear that they may risk liability in the future should the agreement be set aside. This is a valid concern. However, if you understand the legislation and have a solid grasp of the reasons why a court may set an agreement aside, then you can protect both yourself and your client. What you can glean from the case summaries above, is that courts are more likely to overturn a contract when there are a number of problematic factors, as opposed to just one. The key is therefore to always cover all of your bases and to make sure that the contract is written clearly and plainly, that the parties have exchanged comprehensive financial disclosure, that both sides understand the law and what they are giving up by having competent independent legal advice, that both sides have participated in the negotiation process and have asked questions or sought changes to the terms of initial drafts, and that neither party feels pressured or rushed to sign by a specified deadline. If you always follow these simple rules, then you can feel confident that you have done your job correctly.

MASTERING MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS: PRACTICAL INSIGHTS AND CREATIVE DRAFTING SOLUTIONS

FAMILY LAW

Unique Considerations when Preparing Agreements

Sarah Strathopolous, **Epstein Cole LLP (Toronto)**

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June 16, 2022 – Webcast

Prepared By: Sarah Strathopolous, Epstein Cole LLP

Recent Decisions of the Court of Appeal for Ontario:

- *Krebs v. Cote*, 2021 ONCA 467, 2021 CarswellOnt 9191, 333 A.C.W.S. (3d) 357, 57 R.F.L. (8th) 279, 459 D.L.R. (4th) 730, 156 O.R. (3d) 663 (Ont. C.A.)
- *Li v. Li*, 2021 ONCA 669, 159 O.R. (3d) 216, 338 A.C.W.S. (3d) 281, 464 D.L.R. (4th) 155, 63 R.F.L. (8th) 327 – leave to the Supreme Court of Canada dismissed (*Xiang Li v. Xiang-E Li*, 2022 CanLII 38782).

Separation / Reconciliation

In the recent decision of ***Krebs v. Cote***, 2021 ONCA 467, the Court of Appeal for Ontario looked at the impact of separation and reconciliation on cohabitation agreements. The Court of Appeal held that the long established common law reconciliation rule applicable to separation agreements (being that a separation agreement becomes void upon the reconciliation of the parties[1]) should not to be extended to cohabitation agreements.[2]

The parties began their relationship in 2006 and had an "off-and-on-again" relationship for many years, during which they lived in the husband's home. The parties resumed cohabitation sometime in December 2012/January 2013 and executed a Cohabitation Agreement. The Agreement provided, among other things, that the parties would be separate-as-to-property and upon breakdown of the relationship, the wife would vacate the husband's home upon payment of $5,000. Shortly thereafter, the parties separated again, the wife moved out, and she received $5,000 from the husband for vacant possession of his home. In 2014, the parties reconciled, married, and resumed cohabitation in the husband's home. In 2016, the parties discussed adding the wife to title to the home, but that was ultimately not pursued. In 2019, the parties separated for the final time.

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[1] Subject to any clause in the separation agreement overriding the common law rule or which would imply that the intent of the parties was that terms of the separation agreement would be carried out notwithstanding any subsequent reconciliation – See Ernikos v. Ernikos, 2017 ONCA 347, at para. 11; *Sydor v. Sydor*, (2003), 178 O.A.C. 155 (C.A.), para. 22; *Bailey v. Bailey*, (1982), 37 O.R. (2d) 117 (C.A); *Bebenek v. Bebenek*, (1979), 24 O.R. (2d) 385 (C.A.).

[2] The rule as it applies to separation agreements is also not absolute and is dependent on an interpretation of the parties' intentions, as evinced by the whole of the agreement (para. 17).

The wife commenced an Application, seeking among other things, an order that the Cohabitation Agreement was invalid, not binding on the parties, and was of no force or effect. Both parties had independent legal advice before signing the Agreement and the wife did not challenge the validity of the Agreement itself. Instead, the wife brought a motion for summary judgment to decide a question of law before trial pursuant to Rule 16(12)(a) of the *Family Law Rules*, being whether, as a matter of law, separation followed by reconciliation terminated a cohabitation agreement (para. 9). Although the notice of motion was confined to the question of law, the motion judge went on to make findings about the subjective intentions of the parties, and to interpret the Cohabitation Agreement (a matter of mixed fact and law) (para. 10). If the Cohabitation Agreement was not in force, among other things, the wife would have a right to an equalization of net family properties, calculated on the basis that the value of the home was included in the husband's net family property.

The motion judge declared that the Cohabitation Agreement was of no force or effect for three reasons (para. 12):

1) The common law principle that reconciliation terminates a separation agreement applied to cohabitation agreements.

2) The discussion about transferring title to the home in 2016 showed that the parties did not subjectively intend for their Cohabitation Agreement to apply in the event of a separation and reconciliation. This discussion was held to be “sufficient to rebut any presumption to the contrary". The motion judge went on to note that nothing in the agreed facts supported an intention that the Agreement would apply if there was a reconciliation, and nothing in the Agreement expressly dealt with the effects of a separation and reconciliation.

3) The motion judge held that the consideration for the $5,000 payment was the wife's relocation from the home. Since that triggering event had occurred and payment made, the terms of the Cohabitation Agreement were exhausted.

The husband appealed.

The Court of Appeal allowed the appeal, set aside the declaration that the Cohabitation Agreement is no longer of any force and effect, and substituted a declaration that the rights and obligations of the parties are governed by the Cohabitation Agreement they executed. Costs of $2,500 were awarded to the husband.

At paragraph 20, Pardu J. wrote: “Where the *raison d’être* of the agreement is separation and parties reconcile, the foundation for the separation agreement dissolves. I see no basis to extend this logic so as to void a cohabitation agreement following reconciliation of the parties. Under such circumstances, the reconciled parties have returned to the very state contemplated by the cohabitation agreement”. Notably, however, Pardu J. expressed that the Court of Appeal “would not go so far as to say there is a presumption in favour of the cohabitation agreement’s continued validity following reconciliation. The applicability of a cohabitation agreement to the

circumstances of the parties will depend on the interpretation of that agreement and the light it sheds on the intentions of the parties" (para. 20).

The Court of Appeal confirmed that the "words of the contract are central to the interpretive exercise" and deference is to be given to the motion judge. Pardu J. noted that the motion judge made extricable errors of law in his interpretation of the Cohabitation Agreement because he did not analyse the intentions of the parties at the time they entered into the Agreement nor the contractual language itself, but instead approached the interpretive process with the idea that the agreement had to contradict the application of the common law test (para. 25).

The Cohabitation Agreement at issue in this case envisaged cohabitation, marriage, divorce, separation, and death of a party, and there was nothing in this language that temporally restricted the application of the terms to cohabitation at a defined time or restricted the broad language to cohabitation before separation followed by reconciliation (paras. 26-27). That there could be multiple separations and reconciliations in the future would have been within the reasonable contemplation of these parties at the time the Agreement was signed. An ordinary person reading this Cohabitation Agreement would consider that if the parties cohabited under any circumstances, the Agreement applied (para. 27). The Cohabitation Agreement was intended to be long-lasting, noting "the parties have considered in developing this agreement future untold events, such as loss of income and major illness or disability", with broad releases of support, property and equalization (para. 28-29) and waivers (para. 31). Reading the contract as a whole, in the context of the relationship of the parties at the time it was signed, Pardu J. concluded that it was intended to apply despite a separation and subsequent reconciliation, preceding the final separation (para. 33).

In considering the $5,000 payment made by the husband pursuant to the Cohabitation Agreement, the Court of Appeal, again, noted that the scope of the contract and its application depends on the language of the contract and the interpretation given to that language. Pardu J. concluded that the broad language of the Cohabitation Agreement demonstrated an objective intention to have the Agreement apply in general to cohabitation, including that which follows a separation and reconciliation, and one could reasonably conclude that the $5,000 payment was intended to assist the wife with a move to her own accommodation (para. 38).

In the concluding paragraphs of the Court of Appeal's decision, Pardu J. importantly noted that while the rights and obligations of the parties are governed by the Cohabitation Agreement in this case, "…**there is no presumption that reconciliation brings an end to cohabitation agreements. Each particular cohabitation agreement must be interpreted in accordance with contractual principles to ascertain the objective intentions of the parties. Unquestionably, it would have been better if the cohabitation agreement had contained specific provisos dealing with the possibility of separation and reconciliation, making unnecessary this interpretive process**" (paras. 40-41).

Jurisdiction

In the recent decision of ***Li v. Li***, 2021 ONCA 669, the Court of Appeal for Ontario considered, among other things, the impact of domestic contracts on the analysis of jurisdiction to seek relief arising from the breakdown of a relationship. The Court of Appeal referenced *Krebs v. Cote,* and found that the failure to consider the parties' domestic agreements as central to the *forum non conveniens* analysis was an error in principle justifying intervention by the Court (para. 3).

The parties met and married in China. The wife was a Chinese citizen, who held Canadian permanent resident status until 2019. The husband was a Canadian citizen. The parties did not agree on their date of separation (the wife claimed they separated in 2016; the husband claimed they separated in 2018). In March 2018, the parties obtained a divorce certificate in China. The husband disputed the validity of this divorce.

The husband claimed he contributed work and resources to a series of family companies and real properties located in China, which were all in the wife's name. The wife disputed that the husband made any financial contributions to her assets, claiming she owned them before and during the marriage. The wife also owned two properties in Toronto and a bank account. The husband claimed he contributed to these assets as well. The wife denied this.

During the marriage, the parties signed a Marital Assets Agreement addressing the Chinese properties, which stated that the husband had no entitlements to the properties. In 2015, the husband signed a Letter of Commitment again stating that he lacked any interest in the properties. The parties also signed a Divorce Agreement in China, stating that all issues related to property, debts, and liabilities had been resolved through private negotiation. The husband disputed signing this agreement. In 2019, after the divorce, the parties negotiated the terms of a repayment agreement for money loaned by the husband to the wife. **All agreements were executed and witnessed in China.**

In 2020, the husband commenced an Application for various relief, including a declaration that the Chinese divorce not be recognized/enforced in Ontario and a declaration that Ontario has jurisdiction to determine the outstanding property and support issues between the parties (being equalization, spousal support, and the husband's trust claims over the property in Ontario). The wife refused to attorn to the jurisdiction and brought a motion to dismiss the husband's Application and to declare China the appropriate forum to determine any outstanding issues.

The motion judge concluded that Ontario had jurisdiction (applying "the real and substantial connection" test) because the husband was a Canadian citizen who primarily resided in Canada, the husband claimed a beneficial interest in an Ontario property, the wife regularly visited Ontario each year and obtained permanent resident status, there may be unfairness to the husband if Ontario does not assume jurisdiction, and the documents relevant to the trust claim would primarily be in Ontario (para. 27). The motion judge also found that Ontario was the more appropriate forum (applying the "*forum non conveniens*" analysis) because all the witnesses and evidence relating to

the trust claim (and spousal support) would be in Ontario, the "natural forum" for a claim to an interest in an Ontario property is Ontario, the wife would be able to present her case in Ontario without significant difficulty, and the husband may be out of time to pursue a claim for division of marital property in China (para. 28). Accordingly, the motion judge dismissed the wife's motion, and permitted the husband to proceed with his claims in Ontario.

The wife appealed.

Coroza J., writing for the Court of Appeal, allowed the appeal, stayed the husband's Application, and awarded the wife costs of $13,000. The Court of Appeal gave deference to the motion judge's conclusion that there was a sufficient connection to Ontario to establish jurisdiction *simpliciter* (para. 39), however, found that the motion judge erred in principle in her analysis on the issue of *forum non conveniens* for several reasons.

The Court of Appeal found that the motion judge ignored a very important factor — the existence of three signed agreements waiving the husband's entitlement to the assets and properties in China (para. 45). The Court referenced the recent decision of *Krebs v. Cote* (at para. 19) that "[p]arties should be encouraged to enter agreements to define their rights and obligations. Jurisprudential shoals upon which an agreement may founder unnecessarily do not advance that goal". The Court also noted the fact that, under Ontario law, there is a high bar to set aside a domestic contract that complies with the enforceability requirements of Section 55(1) of the *Family Law Act*: namely, that it is made in writing, signed by the parties and witnessed (paras. 45-46).

Coroza J. noted that to proceed with his claims for equalization or an interest in the properties covered by the Agreements, the husband would first have to seek to set those Agreements aside (para. 48). **The preliminary question of whether the Agreements could be set aside was found to be central to assessing the more appropriate forum** and the motion judge erred in considering the husband's claims in the Ontario property — and his potential entitlements to share in some way (whether by way of equalization or a direct property interest) in the wife's Chinese properties — without considering the question of setting aside the divorce and/or the Agreements about property (para. 51). With the Agreements as the proper focus, and given that the Agreement were all executed and witnessed in China, in the Chinese language, it was clear that China was the most appropriate forum for the dispute. [3]

The husband appealed. Leave to appeal to the Supreme Court of Canada was dismissed with costs.

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[3] Coroza J. also found that the motion judge's focus on the Ontario property overwhelmed her analysis of *forum non conveniens* (even though the location of the property is a factor that carries considerable weight on the jurisdiction inquiry) because, in this case, the far more valuable property interests were in China and governed by the Agreements in China (at para. 52).Coroza J. further noted additional errors related to the motion judge's interpretation of the husband's claims related to the property in China and Chinese law, and her analysis in terms of the husband's loss of a legitimate juridical advantage and the limitation period in China in the face of conflicting evidence (expert opinion).

<u>Practice Notes</u>

Termination Clauses

In advising clients and drafting cohabitation agreements, it is imperative that family law lawyers consider the parties' intentions regarding the duration of the agreement and include termination clauses that address the unique intentions/circumstances of the parties. Whether the intention is that the rights/obligations and waivers set out in the agreement will end upon the first separation or will continue for the long-term duration of the relationship (regardless of separations and reconciliations), the agreement should specify this. If the intention is that the rights/obligations and waivers set out in the agreement will end upon the occurrence of another event (such as the birth of a child, the completion of obligations under the agreement, etc.), again, the agreement should specify this.

A precedent termination clause is not included in the marriage contract template in Divorcemate (and there is no cohabitation agreement template), so this provision will need to be contemplated and prepared by the lawyer drafting the cohabitation agreement.

The termination clause can be as simple as "This Agreement ends on the earliest of the following….", which could include the parties' first separation (which should be defined in the agreement) or any other applicable events. Depending on the unique circumstances of the matter, however, the termination clause could be more complex.

In writing about the decision of *Krebs v. Cote* in "Domestic Contracts, 2nd Edition, Chapter 3. Cohabitation Agreements, IV. Cohabitation Agreement Clauses, § 3:82 Terms of Agreement" by Hugh G. Stark, Kirstie J. MacLise (which can be found in Thomson Reuters Westlaw Canada), the authors included the following example termination clauses for domestic contracts/cohabitation agreements [*the clauses have been updated to remove the British Columbia specific alternative language*] that can be included and revised to meet the unique intentions/circumstances of each agreement:

> *Termination After Five Years*
>
> This Agreement will terminate on ___________, 20_____, (referred to as the "Termination Date") being five years from the date the parties first cohabited provided that neither of the following events has occurred:
>
> (i) the parties have not cohabited for a consecutive period of 60 days between the date the parties first cohabited and the Termination Date *(insert:* and are not cohabiting on the Termination Date); or
>
> (ii) either or both parties have died.
>
> After the Termination Date this Agreement shall be of no effect whatsoever.

Termination if Child Born

This Agreement shall terminate if a child of the union is born and be of no effect whatsoever after that date *(insert:* provided that neither of the following events has occurred prior to that date):

(i) the parties have not cohabited for a consecutive period of 60 days between the date the parties first cohabited and the Termination Date *(insert:* and are not cohabiting on the Termination Date); or

(ii) either or both parties have died.

No Termination if Parties Separate and Reconcile

If the parties separate and then reconcile before they have divided their property and apportioned the responsibility for their debt pursuant to this Agreement (*insert:* and settled all other rights and obligations to one another arising from having cohabitated with one another (*insert:* or from their subsequent marriage to one another), then this Agreement shall remain in full force and effect.

Applicable Law And Interpretation Clause Precedent

In advising clients and drafting cohabitation agreements, it is also imperative that family law lawyers inform clients of the impact that signing a domestic contract in Ontario could have upon the determination of issues following a relationship breakdown and specifically consider the parties' intentions regarding whether they will live in the future.

A standard clause in domestic contracts signed in Ontario typically reads: "The interpretation of this Agreement is governed by the laws of Ontario, even if Jane and John are not living in Ontario at the date of the breakdown of the relationship". While this clause does not mean that the Ontario Courts will have exclusive jurisdiction to determine the issues upon a relationship breakdown, the Court of Appeal's decision in *Li v. Li* clearly illustrates that that the existence of such an agreement will be a factor considered. If clients have intentions to reside outside of Ontario following execution of the agreement, the implications of the agreement and future relocation should be carefully considered (including whether provisions should be incorporated in the agreement that address future jurisdictional issues).

MASTERING MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS: PRACTICAL INSIGHTS AND CREATIVE DRAFTING SOLUTIONS

FAMILY LAW

Applying the Collaborative Process to the Negotiation of Marriage Contracts and Cohabitation Agreements

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Goal of Cohabitation Agreement/Marriage Contract Negotiation

The goal of a Cohabitation Agreement/Marriage Contract negotiation is to create a binding contract that will stand up to scrutiny if challenged. The purpose is often to "protect" a party's assets, possibly acquired via generational wealth transfer or a previous separation, from equalization and/or being shared as equity in a jointly owned matrimonial home that was funded in unequal proportions. Often clients want to preserve their wealth for the next generation as they embark on their second or third marriage. The Cohabitation Agreement/Marriage Contract negotiation provides a couple with an opportunity to make a plan for their future that feels more predictable than waiting to see how the law would apply to the facts and circumstances at the time.

The top 10 features of an ideal negotiation of a Cohabitation Agreement/Marriage Contract are:

1. Full financial disclosure
2. Each party has their own lawyer to provide guidance and, of course, independent legal advice
3. Both parties and their respective lawyers are involved in the negotiation and drafting of the contract in a meaningful way
4. Neither party feels the other party or their lawyer is controlling the negotiation
5. The contract is not "unconscionable" and is reasonable in the circumstances
6. Both parties have time to think about and understand the options and the law
7. The parties feel comfortable and have time to consider and evaluate the options
8. Neither party feels coerced or forced to sign something that they don't understand or agree with
9. Both parties feel heard and understood
10. No resentment from the contract negotiation seeps into and taints the relationship

Overview of Collaborative Practice Process

The Collaborative Process is an out of Court dispute resolution process typically used to negotiate the terms of a separation agreement which is based on the following fundamental principles:

**Special thanks to Nicola Savin, Ellen Nightingale, and Deborah Graham for sharing their wisdom, insights, and precedents with me for this paper and presentation*

1. Interest based negotiation (also referred to as principled negotiation) inspired by the book *Getting to Yes* by Roger Fisher and William Ury of the Harvard Negotiation Project. Interest based negotiation has four cornerstones:
    a. Focus on the problem not the people, identify the issues at the outset
    b. Focus on the clients' goals and interests rather than positions
    c. Review relevant objective information
    d. Generate options that address both clients' goals and interests as best as possible
    e. Evaluate the options against the interests (and law)
    f. Parties agree on settlement terms
2. A Participation Agreement is signed which covers among other things:
    a. A commitment to full disclosure
    b. Authorization for members of the Collaborative Team to communicate openly
    c. What is without prejudice and what is not
    d. A commitment to good faith negotiations – no threats, no undue delay, open, honest communications, each party to consider the other's perspective in generating options
    e. A disqualification provision which states that parties must change lawyers (and their firms) if they decide to go to Court
    f. Terms and timelines for leaving process, if necessary
    g. Acknowledgement of limitation periods
    h. A status quo provision stipulating that there will be no material changes to assets, debts, etc.
    i. If a lawyer feels that their own client is in breach of the agreement, they have to withdraw, without disclosing why
3. Teams are created to support the clients as needed, and to be cost efficient. A team always has two Collaboratively trained lawyers and may also include:
    a. A neutral Collaborative Financial Professional who will gather the disclosure and prepare documents as agreed in consultation with the lawyers and clients such as: Financial Statements, Net Family Property Statements, support calculations, projections, reconciliation calculations;
    b. A neutral Collaborative Family Professional who may facilitate meetings with lawyers, clients, help lawyers understand dynamics of the clients and how to negotiate in a way that does not trigger either of them. They often also work directly with the clients on their Parenting Plan;
    c. Other jointly retained experts such as Collaboratively trained Business Valuators, Child Experts, etc.
4. Collaborative Process negotiations are structured with a view to moving forward with each step and reducing miscommunications. Steps in a Collaborative Process separation negotiation are generally:

a. The clients may first retain one or both Collaborative Lawyers or they might first engage a Financial Professional or Family Professional to have discussions about how to separate. The Financial Professional or Family Professional may suggest the Collaborative Process and refer the clients to Collaborative Lawyers.
b. After being retained by clients, the lawyers touch base and discuss each client's big picture perspective, any immediate issues, composition of the team, process design (meetings all together, pairs, triads, quads, etc.), team communication guidelines (eg. Can neutrals speak with a lawyer without the other lawyer present? When are updates expected and how?)
c. Clients are introduced to team members
d. Team members are engaged by clients, Participation Agreement may be signed at this point. Neutrals have their preliminary discussions with the clients.
e. A team call is scheduled to get everyone on the same page and identify who is doing what and address any pacing concerns. Immediate issues are identified and a plan put in place to deal with them. The team typically starts drafting an agenda in this meeting which will be prepared and circulated before the meeting with the clients.
f. The lawyers may ask their clients to complete a Goals & Concerns Questionnaire which helps the lawyers understand, in a cost efficient way, what is important to their own client. It is cost effective because the clients can take as much time as they want to answer the questionnaire and the information is usually much more detailed that what is discussed in a meeting. Lawyers share the relevant information in the Questionnaire to help each other understand what is important to the clients. Usually the documents themselves are not exchanged.
g. Each lawyer prepares with their own client for the first meeting including dealing with immediate issues, preparing them to talk about their goals and interests, reviewing the roles of the professionals, and the nature of a Collaborative negotiation.
h. A first meeting (aka “Launch” or “Foundational” meeting) is held so that clients can express their goals and interests and hear the goals and interests of the other party, issues are identified, plan the next steps, understand who is doing what. Any immediate issues will be dealt with in this first meeting to make sure that the clients are safe, each has enough money in the interim, living accommodations are acceptable and that the interim parenting arrangements are agreeable to both clients. In some cases, depending on readiness of the team and the clients, and the complexity of the situation, there may be a review of financial information. An agenda for the next meeting would be created.
i. After that first meeting, the Financial Professional gets working on the disclosure and the Family Professional works with the clients on parenting.
j. After each full meeting with the clients a Progress Report is prepared and circulated to the clients after the team has approved it. The Progress Report will

include homework items for the clients and professionals so is usually sent out within a week of the meeting so that everyone can prepare for the next meeting.

k. Before each meeting, each client meets with their respective lawyers (and neutral, if necessary) to prepare for the meeting using the agenda as a guideline.
l. Subsequent meetings are held to review financial information, and identify if further information or calculations are required. These may be done in pairs, triads, quads or all together with lawyers, clients and neutrals. A triad might include the Financial Professional, one of the lawyers, and that lawyer's client. In higher conflict situations, the Family Professional may also be involved in those meetings.
m. Concurrently with the financial/legal meetings, the Family Professional may be working on a parenting plan with the clients as well as helping them work through emotional challenges in the negotiation.
n. The professional team will meet as necessary to share information if there has been a development of significance to head off any issues, or to communicate information arising out of separate meetings with the clients.
o. When everyone is satisfied with the information, options are generated and evaluated. This may be done together in a meeting or separately. Often one client works on a proposal with input about what is important to the other client so that the proposal addresses both parties' goals and interests as much as possible. During this stage the Financial Professional might do projections to help clients evaluate options.
p. Options are tweaked with clients either together in a meeting or in separate triads until an agreement is reached. This is often very quick with a proposal being developed in a triad or quad and accepted on presentation to the other client or accepted with some relatively minor tweaks. Sometimes, in more emotionally complex situations, this stage can go on longer until both parties agree on the terms. The team would meet frequently to keep the focus on the problem not the people and help them avoid getting overly positional.
q. When the clients agree on the terms, the separation agreement is drafted with input from both lawyers (and often neutrals too), before it is circulated to the clients. The agreement usually gets finalized soon after it has been circulated to the clients as they don't typically have a lot of changes to make after the lawyers have agreed on the draft.
r. When clients and lawyers are satisfied with the agreement, it is executed and implemented. The Financial Professional may take a significant role in making sure the terms of the agreement are implemented, especially when a client is not used to dealing with financial matters.

<u>Using the Collaborative Process for Cohabitation Agreements/Marriage Contracts</u>

1. Marriage Contract/Cohabitation Agreement negotiations can often be trickier than separation negotiations for many reasons:
    a. It is impossible to predict the future. Any change to the way the *Family Law Act* applies can create inadvertent unfairness in certain circumstances.
    b. The idea of negotiating the terms of their separation as they are starting out their lives together is offensive and difficult for some.
    c. The clients may have very little information about their family's wealth and do not realize that there are structures in place, such as an estate freeze, which results in them having a substantial amount of wealth in the eyes of family law. They don't feel it is their money or wealth.
    d. The parents of the wealthy client might be driving the process but reluctant to provide detailed disclosure. They would rather their child and partner not know how much wealth there is.
    e. The wealth disparity can generate strong feelings between the couple. The less wealthy client might feel that they are being pressured to sign an agreement. This can negatively impact the relationship with their partner as well as their relationship with their partner's parents.
    f. Sometimes the clients are unwilling participants in this process since the issue is of more concern to the parents than the actual couple. They might just ask to be given whatever contract the lawyer thinks will work and they will sign it, which, of course, makes lawyers contemplate calling LawPro.
    g. The lawyer's advice could alienate their own client who may say "he/she/they would never cut me off, I'm not worried" and "I don't want his/her/their family's money" and "I don't need to know what the trust is worth".
    h. The lawyer's advice may cause a rift between the clients as they start their life together (or continue a relationship) or a rift with the parents of the clients. How information is framed is very important to delivering information that might be hard to hear.
    i. The clients may think this is a straight forward process and only start it a month before the wedding causing a stressful time crunch.
    j. Clients may have been married for a long time and something happens which leads them into a marriage contract negotiation. In some cases, the relationship is noy stable and they are hoping a marriage contract can help them stay together. Sometimes the marriage contract negotiation turns into a separation negotiation.

2. Using the Collaborative Process can help to address many of the challenges and achieve the top 10 features of an ideal Marriage Contract/Cohabitation Agreement negotiation set out above as follows:
    a. In discussions with the clients reframing the purpose of the contract from "protecting" assets from claims by the less wealthy client to "making a plan for their life together" feels less threatening.

b. Being in a process in which immediate issues, such a Standstill Agreement can be put in place quickly and respectfully.
c. Building trust between each lawyer and the other client helps promote free flowing and frank discussions.
d. Talking about the law in a neutral way helps clients understand why a contract is necessary in many cases. For instance, if a significant asset is gifted after the date of marriage and exists on the date of separation then it is excluded and not shared whereas if it is received the day before the marriage and exists on the date of separation then the increase in the value is shared.
e. Focussing on goals and interests and talking about the potential needs of children, helps keep the couple's focus away from legal positioning and towards making arrangements for their family together.
f. Addressing both clients' goals and interests, reduces the post-agreement resentment.
g. Having agendas, progress reports, regular meetings, helps to keep both clients engaged and involved in the process and keep it moving forward.
h. Having a Family Professional assist with the challenging emotional dynamics can help to have a smoother process, reduce post agreement resentment and bring the clients to the table to have the difficult conversations.
i. Being transparent about the parents' goals and interests, may help the clients engage in the process without straining the relationship between the parents and the couple.
j. Working with a neutral Financial Professional including a Chartered Business Valuator on the disclosure, helps to neutralize the process.
k. Transparency about the discomfort in sharing the information and why can be helpful to ward off feelings of suspicion or mistrust.
l. Avoiding strategizing and focusing on problem solving together helps clients feel they both have a say and neither controls the process or is trying to force a certain result.

3. Using the Collaborative Process for Cohabitation Agreements/Marriage Contracts is usually more streamlined than when used for a Separation Agreement negotiation. Common steps, which will be modified to fit the needs of each situation, are:
   a. Clients both retain Collaborative Lawyers
   b. A simplified Participation Agreement may or may not be signed (see section below on Participation Agreements in Marriage Contract/Cohabitation Agreement negotiations)
   c. If more time is needed, a Standstill Agreement is put in place immediately.
   d. Clients are sent the Goals & Concerns Questionnaire, either one each or, perhaps the couple will complete one together.
   e. A Financial Professional and/or Family Professional, or Chartered Business Valuator might be jointly retained depending on the situation and the emotional

and financial complexity. Since the cost of an expert may be prohibitive to one client, the more wealthy client will likely pay the fees which may impact the perception of neutrality. In some cases, it makes sense for the less wealthy client to hire (with financial assistance from the wealthier client) an expert to provide support and advice about the report being prepared by the expert retained by the wealthier client.

f. At the first meeting the clients will discuss their goals and interests, the lawyers will provide information about the law and types of marriage contracts, the clients will talk about what they had in mind for the terms of a contract.
g. In a more financially complex file, at a subsequent meeting, the CBV would present a Valuation Report on assets such as trust and business interests.
h. When the clients feel they have enough information, they will generate some options, evaluate and tweak them.
i. Based on the views of the team members and preferences of the clients, there may or may not be private meetings with lawyers, the Family Professional and/or the Financial Professional along the way.
j. The professional team will meet regularly to keep things on track. Often most of the work is done together with the clients, other than professional team meetings, with only the consultation and signing meeting done in private. If meetings are on Zoom, the breakout function can be used to quickly check in with clients privately, if necessary.
k. If a Family Professional is involved, there will be regular meetings with that professional who would also, likely, facilitate the meetings with the clients.
l. When the lawyers have a list of terms then they work on a draft together, often with embedded questions and comments that come up during the drafting process which will be answered separately with the lawyers or, often, together.
m. The agreement is tweaked, finalized and signed.

<u>Participation Agreements and Marriage Contracts</u>

There is some debate in the Collaborative community about whether a Participation Agreement needs to be signed for a Marriage Contract/Cohabitation Agreement negotiation.

The reasons for not having a Participation Agreement include:

1. There is no litigation so no need for a disqualification clause
2. There are disclosure obligations in law and the Participation Agreement might create a greater or lesser right making the contract more susceptible to challenge
3. The principles of the Collaborative Process can be followed by the professionals and clients without a Participation Agreement being signed
4. Each professional's retainer can include authorizations to share information
5. If the contract is challenged the lawyers and clients may need to rely on documents produced in the Marriage Contract/Cohabitation Agreement negotiation and the

Participation Agreement provisions making those documents without prejudice may limit access to relevant evidence.

The reasons for having a Participation Agreement include:

1. It helps focus the clients and professionals on an interest based model
2. It can be modified to take out the provisions dealing with Court and admissibility of documents produced in the process
3. Some marriage contract/cohabitation agreement negotiations turn into separation agreement negotiations. Having a Participation Agreement in place in those types of situations, makes the transition to the negotiation of a separation agreement easier.
4. Having the authorizations to communicate freely as part of the Participation Agreement signed by all (lawyers sign not as parties but as representatives), reduce missteps in the communications among the team and help to manage client expectations.

<u>Conclusion</u>

4. Whether a Participation Agreement is signed or not, applying the principles and approach of the Collaborative Process creates a negotiation in which clients feels safe, supported and heard which helps them have challenging discussions about their future and feel invested in the negotiation and the outcome. It also encourages teamwork, to produce the best contract possible for both clients, reviewing different scenarios together and evaluating the terms against the goals and interests expressed by the clients. This approach improves the chances that both clients will be satisfied and neither will be interested in challenging the contract in the future.

PRECEDENTS

1. Participation Agreement (for separation)
2. Participation Agreement (for marriage contracts/cohabitation agreements)
3. Goals & Concerns Questionnaire (for marriage contracts/cohabitation agreements)
4. Sample Agenda for first meeting

COLLABORATIVE PRACTICE PARTICIPATION AGREEMENT

Party1

and

Party2

1. Choosing the Collaborative Process

1.1 We choose the collaborative process to resolve the issues arising from our separation. In doing so, we agree to be respectful in our negotiations and to work together to achieve a mutually acceptable out of court settlement. We realize that we are responsible for the decisions we make. We understand that the process of separation takes place on legal, financial and emotional levels. We recognize that achieving our goals may require the assistance of professionals other than our lawyers.

2. Guidelines for Participation in the Collaborative Process

2.1 We agree to:

(a) deal with each other in good faith

(b) be respectful, constructive and timely in our written and verbal communication

(c) follow the problem-solving steps in Schedule A to resolve our concerns

(d) express our interests, needs, goals and proposals and seek to understand those of the other, and

(e) develop an array of options for settlement and use our best efforts to negotiate a mutually acceptable settlement.

2.2 We will not:

(a) use the threat to withdraw from the collaborative process or to go to court as a means of achieving a desired outcome or forcing a settlement, or

(b) take advantage of mathematical or factual errors and will instead identify them and seek to have them corrected.

2.3 Our children's best interests will be our priority. We agree that

(a) we will not discuss settlement issues with our children;

(b) we will minimize our children's exposure to conflict between us;

(c) we will not communicate through our children; and

(d) we will respect our children's right to have a loving and involved relationship with both parents.

3. Collaborative Lawyers

3.1 Lawyer 1 is the lawyer for Party 1. Lawyer 2 is the lawyer for Party 2.

3.2 Our lawyers and lawyers in their firms cannot represent us, in court or at arbitration now or in the future, in a proceeding related to this collaborative matter, including a review or variation, with the exception of an uncontested divorce and / or to obtain an order on consent of both parties.

3.3 While the lawyers share a commitment to the Collaborative process and the well-being of the family, each lawyer has a professional duty to represent his or her own client diligently, and is not the lawyer of the other party.

4. Jointly Retained Professionals

4.1 We may engage:

(a) a collaborative family professional

(b) a collaborative financial professional,

(c) other professionals such as actuaries, business valuators, tax experts, mediators, and experts regarding children's special needs, ("Jointly Retained Professionals")

4.2 Any issue with the services offered by a jointly retained collaborative professional will be discussed and reviewed within the context of the collaborative team.

4.3 We agree that our lawyers and jointly retained professionals may share information to co-ordinate efforts on our behalf.

4.4 On engaging other Collaborative professionals

(a) Schedule “B” will be signed with any Financial Professional

(b) Schedule “C” will be signed with any Family Professional.

(c) Joint retainers will be signed with any jointly retained *collaborative* professionals which retainers shall include a term stipulating that such professionals shall be bound by the terms of this Participation Agreement, unless otherwise specified in writing.

4.5 We agree to the use the assistance of a Collaborative intern or unpaid professional recently trained in the Collaborative process. A Collaborative assistant is bound by all the confidentiality provisions as any other Non-Party Participant. A Collaborative assistant’s responsibilities may include taking minutes during meetings and phone calls, helping to coordinate the Client’s and Collaborative Team’s schedules, and making copies and doing other administrative tasks during the meetings. (Optional)

5. Sharing of Information

5.1 We agree to share all information that may affect any choices or decisions that either of us has to make in this process.

5.2 We will make timely, full, candid and informal disclosure of information related to the issues we are negotiating.

5.3 We will promptly update information that has materially changed.

5.4 We will decide together how to collect and share all information and documentation regarding income, assets and debts. The form of this information exchange may be by:

(a) net family property statements

(b) net worth statements

(c) asset and debt summaries

(d) monthly budget summaries

(e) sworn financial statements, or

(f) other agreed upon formats.

6. Confidentiality

6.1 All oral and written communication and information exchanged within the collaborative process is confidential and without prejudice. The only exceptions are:

(a) Sworn financial statements, original financial documents and Statements of Family Law Value prepared by a pension plan administrator or by a jointly retained actuary.

(b) Any expert report or appraisal that we and the expert specifically agree in writing will not be confidential and without prejudice.

(c) If either of us seeks to set aside a domestic contract negotiated using the collaborative process, either party may choose to waive solicitor and client privilege.

(d) Either of us, or other professionals in this process, may provide information that they are obligated by law to report to the Children's Aid Society that a child may be in need of protection.

6.2 Subject to paragraph 6.1, we will not:

(a) use as evidence in court or arbitration any written or oral information or documents prepared or disclosed during the collaborative process including e-mails, voice mails, letters, progress notes, draft agreements, support calculations, schedules of the value of a business or income analysis prepared by an expert, net family property statements and worksheets, meeting notes, budgets, projections for settlement, or the reports, opinions or notes of any professional retained in the collaborative process, or,

(b) compel either lawyer or any other professional retained in the collaborative process to attend court or arbitration to testify or attend for examination under oath.

7. Beginning and Concluding the Collaborative Process

7.1 The collaborative process begins when we sign this agreement and it ends:

(a) upon the resolution of the matters addressed in the collaboration as evidenced by a written agreement that has been signed by both of us and witnessed, or

(b) upon termination of the collaborative process as described below.

8. Withdrawal by a Party

8.1 If either of us decides to withdraw from the collaborative process, we will provide written notice of the intention to withdraw to all professionals retained by us.

8.2 A party withdrawing from the collaborative process will wait thirty days before starting a court proceeding in order to permit both of us to retain new lawyers and make an orderly transition. We may bring this provision to the attention of the court to request a postponement of a hearing. We will provide a copy of this Agreement to our new lawyers.

8.3 The requirement to wait thirty days before starting a court proceeding does not apply if there is an urgent matter that requires the court’s intervention.

9. Change in Collaborative Lawyer by a Party

9.1 If either of us terminates the services of our lawyer, but wishes to continue with the collaborative process, we will provide written notice of this intention to all the collaborative professionals.

9.2 Within 30 days of giving such notice, the new lawyer will sign a new Participation Agreement or will sign an Acknowledgement, which states that the new lawyer has reviewed the Participation Agreement signed by the parties and confirms that he or she will represent the party in the collaborative process on the terms contained in the signed Participation Agreement.

9.3 If the new lawyer does not sign a new Participation Agreement or an Acknowledgement within 30 days, the other party will be entitled to proceed as if the collaborative process terminated as of the date when written notice was given.

10. Transfer of Collaborative File to Other Counsel

10.1 If a client instructs their collaborative lawyer to transfer the client's file to another lawyer, nothing in this Participation Agreement restricts the lawyer's obligation to transfer to the new lawyer all file contents and information which the lawyer is legally obligated to provide to the client and which will include documents prepared or obtained during the collaborative process.[1]

10.2 Documents which the collaborative lawyer may be obligated to transfer from his or her file to a new lawyer include, but are not limited to: e-mails between collaborative professionals or other third parties[2], transcripts of voicemails, letters, progress notes, draft agreements, support calculations, schedules of the value of a business or income analysis prepared by an expert, net family property statements and worksheets, budgets, projections for settlement, or the reports, opinions or notes of any professional retained in the collaborative process that are in that lawyer's file.[3]

11. Mandatory Termination By Lawyer

11.1 A lawyer must withdraw from the collaborative process if his or her client has withheld or misrepresented important information and continues to do so, refuses to honour this or other agreements, delays without reason, or otherwise acts contrary to the principles of the collaborative process referred to in this agreement.

11.2 A lawyer withdrawing under this section will only advise the other collaborative professionals that he or she is withdrawing from the collaborative process.

[1] See note 1 at end of PA re Law Society provisions re ownership of file documents.
[2] See Note 2 at end of PA re lawyer's obligations to transfer information to new counsel.
[3] See Note 3 at end of PA re on-going obligation of confidentiality per PA and evidence rules on transfer of file.

12. Responsibilities Pending Settlement

12.1 During the collaborative process, unless agreed otherwise in writing, we agree to:

(a) maintain assets and property,

(b) maintain all existing insurance coverage and beneficiary designations until dealt with in the collaborative process,

(c) maintain all existing health and dental benefit coverage,

(d) refrain from incurring any debts for which the other may be held responsible,

(e) maintain all beneficiary designations for pensions and RRSPs, and

(f) maintain the joint tenancy on any property.

13. Enforceability of Agreements

13.1 We may enter into temporary, partial or final agreements during the collaborative process.

13.2 Temporary, partial or final agreements must be in writing, dated, signed by both of us and witnessed. If either of us withdraws from the collaborative process or the process terminates, a temporary, partial or final written agreement is enforceable and may be presented to the court as a basis for a court order.

13.3 Only written agreements signed by both of us and witnessed will be enforceable in court.

13.4 Verbal agreements and concessions or statements of any kind made during the collaborative process are without prejudice, confidential and unenforceable against the other party.

14. Preservation of Legal Rights

14.1 This process is without prejudice to any rights either of us has arising from our relationship or its breakdown.

14.2 Our agreement to negotiate using the collaborative process is without prejudice to any rights either of us has to receive ongoing or retroactive child or spousal

support. Neither of us will raise a lack of written notice or the failure to commence court proceedings as a defence to any claim for retroactive or ongoing child or spousal support.

14.3 We acknowledge that our lawyers have advised us of the following limitation periods:

(a) For married spouses, that no action for equalization of net family property may be brought after the earliest of two years from our date of divorce or six years from our date of separation;

(b) That no trust claims or claims for unjust enrichment in relation to real property (land) may be brought after ten years from the date of separation;

(c) That no trust claims or claims for unjust enrichment against all other forms of property may be brought after two years from the date of separation;

(d) That no claims for retroactive child support may be brought once a child is no longer in full-time school or otherwise dependent.

(e) A court may or may not extend these limitation periods.

15. We agree that the date of separation is _____________ (Optional)

16. Limitation Period

If a limitation period is imminent or approaching, one of us may file court documents necessary to commence court proceedings to preserve the limitation period, and, notwithstanding the filing, we agree to continue the collaborative process. The consensual filing of court documents solely to preserve the limitation period or to obtain an uncontested divorce does not violate the Collaborative Practice agreement.

17. Acknowledgement of Commitment to Collaborative Process

17.1 We have read this Agreement in its entirety, understand its contents and agree to its terms.

17.2 This agreement may be signed by each of us separately. The separate agreements together constitute one and the same document.

Date:	202	______________________________ Party1
Date:	202	______________________________ Party 2
Date:	202	______________________________ Lawyer 1 I will represent Party 1 in this Collaborative process
Date:	202	______________________________ Lawyer 2 I will represent Party 2 in this Collaborative process

Note 1: The Law Society of Ontario provides materials discussing the ownership of file documents in Appendix 2 to its online Guidelines on File Retention and Destruction, https://lso.ca/lawyers/practice-supports-and-resources/topics/managing-files/file-retention-and-destruction/appendix-2-file-documents.

Key extracts of Appendix 2 are summarized below:

The following are some examples of documents in a client file and how a lawyer should deal with these documents:

Client's Documents
Subject to the right of the lawyer in appropriate circumstances to claim a solicitor's lien, a client is entitled to:

•Documents existing before the lawyer was retained;
•Originals of documents prepared by the lawyer for the client pursuant to the retainer such as a last will and testament, power of attorney, agreement, transfer and charge;
•Personal property of the client such as corporate seals.

Other Documents
Subject to the right of the lawyer in appropriate circumstances to claim a solicitor's lien, a lawyer in accordance with the law should either return the following documents to the client or give the client reasonable access to these documents:

•Copies of letters received from third parties;

- •Copy of letters sent by the lawyer to third parties;
- •Pleadings;
- •Cases;
- •Briefs;
- •Memoranda of law;
- •Pretrial Memoranda;
- •Draft documents prepared by the lawyer for the client; Document books;
- •Vouchers and receipts for disbursements made on behalf of the client;
- •Experts' reports.
- •Discovery and trial transcripts.

Lawyer's Documents
The lawyer is entitled to the following documents:

- •Original correspondence from the client including instructions from the client;
- •Copies of correspondence sent to the client;
- •Working notes, summaries or evidence and submissions to the court;
- •Tape recordings of conversations other than with witnesses;
- •Inter-office memoranda;
- •Time entries or dockets;
- •Accounting records and parts thereof that relate to the client matter;
- •Notes and other documents prepared for the lawyer's own benefit or protection and at the lawyer's own expense.

Lawyer's Duty to Transfer File Upon Discharge or Withdrawal from Representation
When a lawyer transfers a file upon discharge or withdrawal from representation additional considerations apply. In this regard, subject to the lawyer's right to a lien, the lawyer must deliver to or to the order of the client all papers and property to which the client is entitled and, subject to any applicable trust conditions, must give the client *all information* [emphasis added] that may be required in connection with the case or matter. In addition, the lawyer must cooperate with the successor lawyer or paralegal so as to minimize expense and avoid prejudice to the client. Section 3.7 of the *Rules of Professional Conduct* sets out the lawyer's obligations in this regard.

Note 2: All collaborative professionals must bear in mind that collaborative lawyers have professional obligations imposed by the Law Society and any written communication to the team (or indeed any relevant information shared with the team even if not preserved in writing) could be communicated or transferred to a client's new counsel (including litigation counsel) if that client's retainer of the initial collaborative lawyer is terminated.

Note 3: The fact that documents and information arising from the collaborative process are transferred to a non-collaborative lawyer does not affect the *admissibility* of those documents or information in any proceeding. The admissibility of evidence arising from the collaborative process would be determined in accordance with the confidentiality section of the Participation Agreement (section 6) as well as the applicable evidence rules pertaining to settlement privilege.

2020

Schedule "A"

COLLABORATIVE NEGOTIATION STEPS FOR EFFECTIVE PROBLEM-SOLVING

Step 1 BUILD THE FOUNDATION

- Introduction and overview of the collaborative process
- Identify our goals, needs, interests and concerns

Step 2 IDENTIFY ISSUES

- Determine issues to be resolved

Step 3 GATHER INFORMATION

- Identify what financial and other information we require
- Agree upon and initiate any joint valuations

Step 4 EXPLORE OPTIONS FOR RESOLUTION OF ISSUES

- Develop a realistic range of possible solutions

Step 5 EVALUATE CONSEQUENCES OF EACH OPTION

- Consider immediate and long-term implications on us and our children
- How well does the option meet our interests and goals?

Step 6 ARRIVE AT AGREEMENT

- Generate a settlement proposal that considers and reflects our goals, needs, interests and concerns
- Prepare a Separation Agreement incorporating our decisions

Schedule "B"

Sample
Financial Professional Agreement

1. The Financial Professional will assist clients and their legal representatives in reaching a financial settlement that reflects the needs of the clients and their family. In this role the Financial Professional has no authority or decision-making power but can help to ensure that financial outcomes meet client expectations by providing critical financial information. The Financial Professional can help the clients gather and understand financial information and examine options developed during the Collaborative process. More specifically, the Financial Professional can:

   - Help clients gather relevant financial information
   - Help the clients identify needs
   - Help clients understand the financial information and various options developed
   - Develop realistic budgets that reflect accurate future needs
   - Provide long-term cash-flow analysis
   - Illustrate potential long-term consequences of various settlement options

2. **Obligation to Provide Relevant Information:**

The clients agree to provide the Financial Professional with relevant financial information and understand that the Financial Professional will rely on this information, along with agreed upon assumptions, to develop her/his analysis. The clients agree that the Financial Professional will not be held accountable for any errors or omissions in his/her work product resulting from the client's failure to provide accurate, reliable and complete financial information.

3. **Independent Legal Advice:**

The Financial Professional provides supporting financial information and evaluations to be utilized by both the clients and their respective lawyers. The Financial Professional does not provide legal advice.

4. **Confidentiality:**

When other Collaborative team professionals are engaged, both clients consent to the exchange of information between the Financial Professional and other Collaborative team professionals. Clients must provide written consent for the release of any information to anyone who is not a Collaborative team professional.

5. No Court Appearance:

Should either client decide to move from the Collaborative process into a court process, all materials, including all content (both written and oral) of sessions with the Financial Professional will remain confidential and may not be used in any court proceedings between Party 1 and Party 2. Each client may release, for court or arbitration purposes, sworn financial statements, original financial documents and Statements of Family Law Value prepared by a pension plan administrator or by a jointly retained actuary. The clients agree that they will not require the Financial Professional, by subpoena or otherwise, to testify as a witness and/or to produce his/her records or notes in any subsequent litigation between Party 1 and Party 2. If either client subpoenas the Financial Professional and/or any of the records, notes or documentation produced by the Financial Professional during the Collaborative process, then the client who has issued the subpoena shall be deemed to have agreed to pay all the costs required for the Financial Professional to quash the said subpoena.

6. Withdrawal From the Collaborative Process:

If either client decides that the Collaborative process is no longer viable, he or she agrees to immediately inform the other client, the Financial Professional and all Collaborative team members in writing, about the decision to end the Collaborative process.

If either client wishes to end the engagement with the Financial Professional, in order to retain the services of a new Financial Professional or to proceed without the services of a Financial Professional, the client agrees to immediately inform the other client and all Collaborative team members in writing.

The Financial Professional reserves the right to withdraw from the case for any reason. The Financial Professional has an obligation to withdraw from the case if either client is not acting in good faith. Should the Financial Professional decide to withdraw, he/she agrees to inform the clients and all Collaborative team members in writing. If the Collaborative process has not been terminated, the withdrawing Financial Professional will make every effort to provide suitable referrals to other Financial Professionals to facilitate the engagement of a new financial Professional.

In the event of a decision to withdraw by any person, all incurred fees are due and payable.

7. No Product Sales and No Future Dealings:

The Financial Professional's responsibility in this role terminates once the settlement has been reached or the Collaborative process has been terminated. The Financial Professional may not work with either client post-settlement excepting as noted in this paragraph. The Financial Professional shall not take assets under administration or sell any financial products. The Financial Professional may assist either or both clients in the implementation of their settlement agreement and in a post-settlement evaluation if agreed upon as part of the Collaborative proceedings. It is critical that the Financial Professional maintain his/her neutrality even after negotiations have been concluded.

We have read the above agreement in its entirety, understand the content and agree to the terms.

Dated on , 202

Clients:	Financial Professional:
______________________________	______________________________
[full name of client]	**[name of Financial Professional]**
______________________________	
[full name of client]	

Schedule "C"

Sample
Collaborative Family Professional Agreement

1. The Role of the Collaborative Family Professional:

The Collaborative Family Professional can be helpful in assisting family members to move through the separation process in a positive way. Their role may include:

(a) **The Separation Coach**

- helps clients clarify their concerns;
- helps clients manage their emotions;
- helps clients develop effective communication skills and reinforce those skills;
- helps clients develop effective co- parenting skills; and
- helps clients develop a parenting plan.

(b) **The Child Consultant**

- is neutral;
- listens to each child;
- sensitizes parents to the needs of each child in the context of the divorce; and
- provides information to parents to help them in the development of their parenting plan.

(c) **The Facilitator**

- is neutral
- helps members of the Collaborative team to communicate more effectively at and between meetings
- helps manage client emotions to enable the process to be more productive and resolution-focused

Although the work may continue when the legal intervention is completed, Collaborative Family Professionals remain focused on assisting family members with the separation related issues.

2. Confidentiality:

When other Collaborative team professionals are engaged, both clients consent to the exchange of information between the Collaborative Family Professionals and other Collaborative team professionals. Clients must provide written consent for the release of any information to anyone who is not a Collaborative team professional.

Should either client elect to move from the Collaborative process into a court process, all materials, including all content (both written and oral) of sessions with the Collaborative Family Professionals, will remain confidential and may not be used in any court proceedings between the clients.

The clients agree that they will not require the Collaborative Family Professional, by subpoena or otherwise, to testify as a witness and/or to produce his/her records or notes in any subsequent litigation.

If either client subpoenas the Collaborative Family Professional's records or notes in any legal or administrative proceeding, then the client, who has issued the subpoena, shall be deemed to have agreed to pay all the costs required for the Collaborative Family Professional to quash the said subpoena

3. Confidentiality of Work with Children:

Should parents request that a neutral Child Consultant meet with the children, they agree that the Child Consultant will only provide them with verbal feedback about the children's concerns or thoughts. The parents further agree that the Child Consultant will not provide verbatim comments from the children, nor will he/she provide a written report.

Although the Child Consultant will encourage open communication between the children and their parents, the parents agree that the Child Consultant will not release information to them or to anyone, that the children have asked her to keep confidential unless she has reason to believe that the children's safety, or any other person's safety, is in danger.

4. Limitations to Confidentiality:

The clients have been made aware that there are certain times when the Collaborative Family Professional may disclose or are required to disclose information. These include reporting suspicions of child abuse to the Children's Aid Society; reporting information that suggests an actual or potential danger to human life or safety to the appropriate authorities; providing information to the courts as directed through subpoena, search warrant, or other legal order; for research or educational purposes on an anonymous basis.

5. Withdrawal from the Collaborative Process:

If either client decides that the Collaborative process is no longer viable and decides to end the Collaborative process, he or she agrees to immediately inform the other client, the Collaborative Family Professional, and all Collaborative team members in writing, about the decision to end the Collaborative process.

The Collaborative Family Professional reserves the right to withdraw from the case for any reason. Should the Collaborative Family Professional decide to withdraw, he/she agrees to provide written notice of withdrawal to the clients and their lawyers.

If the Collaborative process has not been terminated, the withdrawing Collaborative Family Professional will make every effort to provide suitable referrals to other Collaborative Family Professionals to facilitate the engagement of a new Collaborative Family Professional.

6. Limitations:

While the Collaborative process is not a guarantee of success and cannot eliminate past disharmony and irreconcilable differences, we believe it offers a positive method of developing a cooperative solution. For couples with children, it helps them move towards a positive co-parenting relationship.

We have read the above schedule in its entirety, understand the content and agree to its terms.

Dated on , 202

Clients:	Collaborative Family Professional(s):
[full name of client]	**[Name of Family Professional]**
[full name of client]	**[Name of Family Professional]**

COLLABORATIVE PRACTICE PARTICIPATION AGREEMENT

BETWEEN :

Party 1

("Party 1")

and

Party 2

("Party 2")

1. We have chosen to enter into this agreement to use the collaborative process to develop a Cohabitation Agreement/Marriage Contract.

2. We will work toward an agreement on all issues, including but not limited to financial issues, relating to our Cohabitation Agreement/Marriage Contract through negotiations based on our respective goals and interests.

3. This process is focused on our future well-being and the success of our relationship. The Cohabitation Agreement/Marriage Contract is intended to provide for our financial and other arrangements during cohabitation or marriage and on our separation or death.

4. Guidelines for Participation in the Collaborative Process:

   (a) We will deal with each other in good faith

   (b) Written and verbal communication will be respectful and constructive

   (c) We agree to follow the problem-solving steps set out in schedule "A" to resolve our concerns.

   (d) We will express our interests, needs, goals and proposals and seek to understand those of the other.

   (e) We will develop an array of options on the issues and use our best efforts to negotiate mutually acceptable terms on these issues.

   (f) We will not take advantage of mistakes made by another, but will disclose them and seek to have them corrected. We will immediately correct mistakes and advise of changes to information previously given.

   (g) We will give complete, honest and open disclosure and provide all relevant information.

5. Exchange of Information/Communication

   (a) We may decide to use a Dropbox link accessible by us and our lawyers and their staff to collect information in a common place.

   (b) We will decide together how to document our financial disclosure and, in particular, our respective incomes, assets and debts. We may do this by:

      i. Sworn or unsworn Financial Statement
      ii. Sworn or unsworn Net Worth Statement
      iii. Sworn or unsworn Statements of Income, Assets and Debts
      iv. Summaries or spreadsheets; and
      v. Other agreed upon formats.

6. We understand that in this process we are expected to discuss our interests and goals and that our lawyers will help us to do this.

7. We understand that each of our respective lawyers has a professional duty to represent each of us diligently and that each of our lawyers is retained to provide each of us with legal advice and information. We understand that we are each represented by our own lawyer, even though both lawyers share a commitment to the process and will work as a team to resolve all issues.

8. Where interests differ, each of us will use our best efforts to create proposals that are acceptable to both and that take the other person's perspective into consideration.

9. This process will end when:

   (a) we sign a Cohabitation Agreement/Marriage Contract. The Cohabitation Agreement/Marriage Contract will be an enforceable legal document which we can rely on and which will be binding on our respective estates in the future;
   (b) one of the lawyers or either of us withdraws from the process, as further set out in paragraphs 10 and 11 below. If we agree, the process can continue with a different lawyer or lawyers; or
   (c) If either lawyer believes her client is not abiding by this agreement, she must terminate the process; for example, if her client is withholding financial information.

10. Withdrawal of Party or Lawyer from Collaborative Process

   (a) If either of us decides to withdraw from Collaborative process, we will provide written notice of the intention to withdraw.

   (b) If either of us ends our professional relationship with his or her lawyer, but wishes to continue with the Collaborative process, he or she will provide written notice of this intention. The new lawyer will sign a new Participation Agreement within 30 days of the party giving notice. If a new Agreement is not signed within 30 days, the other person will be entitled to proceed as if the collaborative process was terminated as of the date notice was given.

11. Mandatory Termination of the Collaborative Process

    (a) A lawyer must withdraw from the Collaborative process if her client has withheld or misrepresented important information and continues to do so; refuses to honour agreements; delays without reason; or otherwise acts contrary to the principles of the collaborative process.

12. Privacy Policy

    (a) We consent to allow the lawyers to collect, use, disclose and retain personal information in order to provide services to us and to administer client time and billing data bases.

    (b) We may withdraw our consent to the collection, use disclosure and retention of our personal information as described above by giving the lawyers reasonable written notice. Our withdrawal of consent still allows the lawyers to use and disclose our personal information to collect or enforce payment of amounts owing as a result of our prior or continuing use of the Collaborative law firm.

13. Acknowledgement of Commitment to Collaborative Process

    We have read this Agreement in its entirety, understand its content and agree to its terms.

Dated at Toronto, this day of

____
Party 1

____
Party 2

I, Lawyer 1, confirm that I will represent Party 1 in the collaborative process hereunder.

____
Lawyer 1

I, Lawyer 2, confirm that I will represent Party 2 in the collaborative process hereunder.

____
Lawyer 2

Schedule "A"

Collaborative Negotiation
Steps for Effective Problem-Solving

Step 1 BUILD THE FOUNDATION

- Introduction and overview of the collaborative process
- Decide problems to be solved
- Consider the need for other professionals, such as family, child and/or financial specialists

Step 2 GATHER AND EXCHANGE INFORMATION

- Identify goals, needs and interests
- Identify what financial information is needed
- Agree upon and initiate any joint valuations

Step 3 IDENTIFY INTERESTS

- Prioritize goals, needs and interests – immediate and long-term – regarding issues and process

Step 4 IDENTIFY CHOICES

- Explore widest range of possible solutions
- Consider everything, rule out nothing

Step 5 EVALUATE CONSEQUENCES OF EACH CHOICE

- How would each option affect each person and the children?
- Consider immediate, intermediate, long-term impacts

Step 6 COME TO A DECISION AND IMPLEMENT DECISION

- Generate settlement proposals that satisfy interests of both
- What do you see as the best solution for both?
- Prepare Separation Agreement incorporating joint decisions

Client Goals and Concerns Questionnaire – Cohabitation Agreement/Marriage Contract

Name: ____________________________
Date: ____________________________

Part A:

1. What are your goals in preparing a cohabitation agreement/marriage contract?

2. Why are these important?

3. What are your most important worries / concerns / fears about negotiating the terms of a cohabitation agreement/marriage contract?

4. Why are these important?

5. What do you think your partner's most important goals are in preparing a cohabitation agreement/marriage contract?

6. Why do you think these are important to your partner?

7. What do you think your partner's most important worries / concerns / fears about a cohabitation agreement/marriage contract are?

8. Why do you think these are important to your partner?

9. What are your concerns/ fears / worries and hopes / beliefs of using this process?

10. What does conflict typically look like between you and your partner?
(i.e. silent withdrawal, angry outbursts, calm discussion, changes of mind, giving in, getting stuck)

11. Is there a pattern you would like to avoid / change during this process?
(i.e. always giving in, getting lost in the details, drawing early lines in the sand)

12. Do you have any concerns about your emotional well-being, physical health, mental health, capacity to make decisions, anger management, alcohol or drug use?

13. Do you have any concerns about your partner's emotional well-being, physical health, mental health, capacity to make decisions, anger management, alcohol or drug use?

Part B

1. How can I best support you during this process?
(i.e. What would your closest / wisest friend or family member worry about for you in this process?)

For questions 2 to 5 answer as if you were looking back 3 years from now and reflecting on the Collaborative Process:

2. What would have had to happen to cause you to be highly dissatisfied with the Collaborative Process and not recommend it to anyone? For you not to recommend me as a lawyer?

3. If this process were unsuccessful, how would you have contributed to its failure?

4. What would have had to happen for you to feel highly satisfied and recommend the Collaborative Process to anyone you cared about? To recommend me as a collaborative lawyer to anyone you cared about?

6. If this process were successful, how would you have contributed to its success?

7. Is there anything else you think it would be helpful for me to know?

First Collaborative Meeting

George & Frank

Via Zoom

July 4, 2022 from 2:30 pm to 5 pm

Agenda

1. Introductions
2. Sign Participation Agreement
3. George & Frank to discuss goals and interests
4. **Lawyer1** and **Lawyer2** to provide overview of cohabitation agreements (why we have them, what terms may be included, etc.)
5. **Lawyer1** and **Lawyer2** to provide family law information – property, support, matrimonial home – married vs unmarried
6. Discuss the condo; how it was purchased, ownership now and in the future, current value and options for handling in the agreement
7. Spousal support options
8. Any other terms?
9. Cost of process
10. Prepare further to do list/next steps/work to be done off line
11. Book next meeting

MASTERING MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS: PRACTICAL INSIGHTS AND CREATIVE DRAFTING SOLUTIONS

FAMILY LAW

Presentation
Kevin Caspersz, Shulman & Partners LLP (Toronto)
Katherine Robinson, Kain & Ball Professional Corporation (Mississauga)

ENFORCING OR SETTING ASIDE MARRIAGE CONTRACTS

Critical Case Law & Practical Advice

Kevin G. Caspersz, Shulman & Partners LLP

Katherine Robinson, Kain & Ball

CRITICAL
CASE LAW

FAMILY LAW ACT, S.56(4)

- On an application the court may set aside a domestic contract or a provision in it pursuant to s.56(4) of the FLA:

  (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made

  (b) if a party did not understand the nature or consequences of the domestic contract; or

  (c) otherwise in accordance with the law of contract.

LeVan v. LeVan

- Two-part test – paragraph 51
- "First, the Court must consider whether the party seeking to set aside the agreement can demonstrate that one or more of the circumstances set out within the provision [FLA s.56(4)] have been engaged.
- Once that hurdle has been overcome, the court must then consider whether it is appropriate to exercise discretion in favour of setting aside the agreement."

2008 ONCA 388

Doughtery v. Doughtery

Burden of proof - paragraph 11

"The burden is on the party seeking to escape the effect of the agreement to show that there are grounds for setting it aside"

2008 ONCA 302

TOSCANO V. TOSCANO

- Good Review of All Factors for Part 1 of Test
- s.56(4)(a) Failure to Disclose
  - "If a party enters into a marriage contract aware of any disclosure shortcomings, the party cannot then rely on those shortcomings as a basis for setting aside the contract" - *Butty v. Butty*, 2009 ONCA 852 at para 54.
  - "A party cannot resile from the consequences of failing to compel further disclosure unless that party can demonstrate that the financial disclosure provided was inaccurate, misleading or false" - *Quinn v. Epstein Cole LLP*, (2007) 87 O.R. (3d) 184.

2015 ONSC 487

Toscano v. Toscano

- s.56(4)(b) Failure to Understand
  - Independent Legal Advice?
  - Sophistication of client?
  - Negotiations?
  - Language barrier?

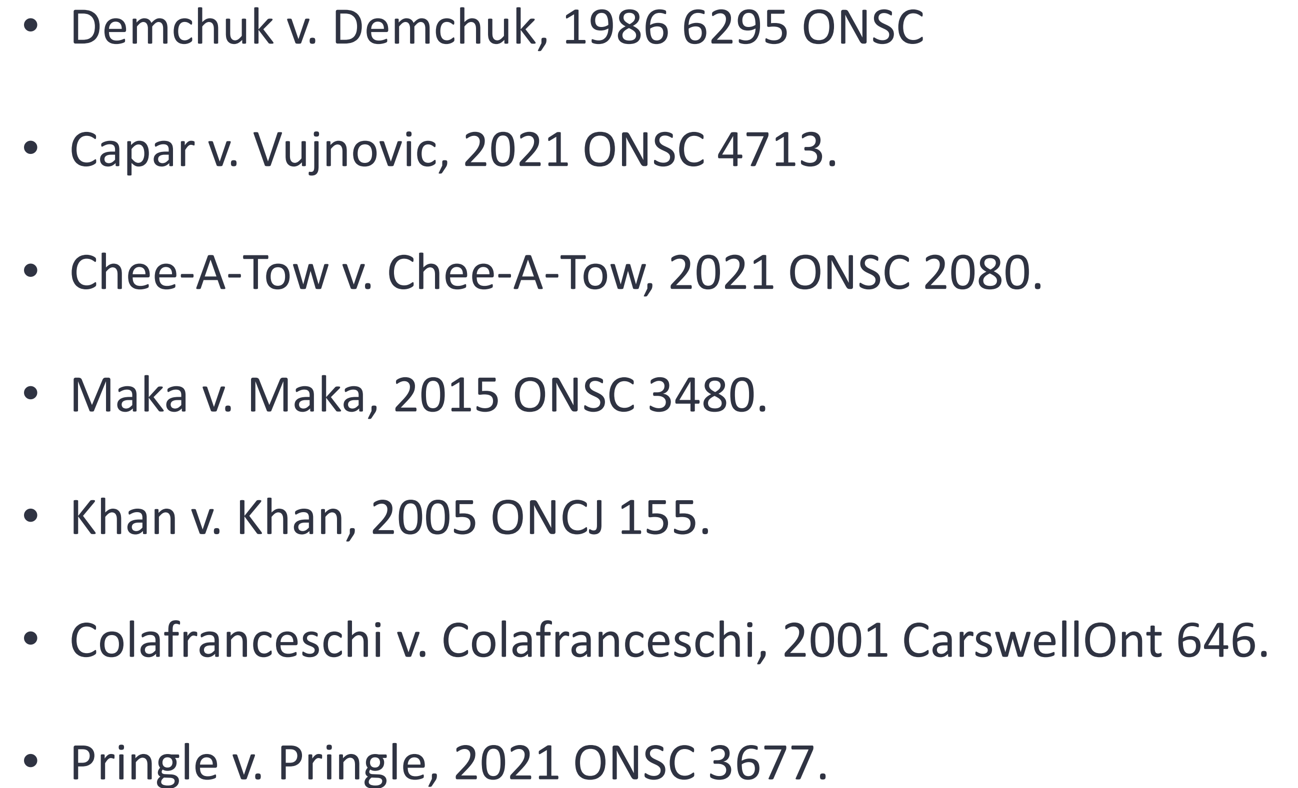
- 56(4)(c) Otherwise in accordance with the law of contract:
  - Unconscionability
  - Undue influence
  - Duress
  - Misrepresentation
  - Independent Legal Advice

TURK V. TURK

- Discretion in setting aside agreement (Part 2 of Test)
- Affirming principles in *Dochuk v. Dochuk*, 1999 O.J. No. 363 (ONCJ):
  - Whether there had been concealment of the asset or material misrepresentation;
  - Whether there had been duress, or unconscionable circumstances;
  - Whether the petitioning party neglected to pursue full legal disclosures;
  - Whether he/ she moved expeditiously to have the agreement set aside;
  - Whether he/ she received substantial benefits under the agreement;
  - Whether the other party had fulfilled his/ her obligations under the agreement.

2018 ONCA 993

CASE LAW
APPLIED


Demchuk v. Demchuk, 1986 6295 ONSC
Capar v. Vujnovic, 2021 ONSC 4713.
Chee-A-Tow v. Chee-A-Tow, 2021 ONSC 2080.
Maka v. Maka, 2015 ONSC 3480.
Khan v. Khan, 2005 ONCJ 155.
Colafranceschi v. Colafranceschi, 2001 CarswellOnt 646.
Pringle v. Pringle, 2021 ONSC 3677.

SETTING ASIDE

- No ILA present such that a party does not know what their rights and obligations are with/without a contract. The parties feel “better off” without an agreement.
- Non-disclosure induced a party to enter into the agreement. If the party had a full accurate picture of the other’s finances, they would have made an informed decision prior to signing.
- A party misunderstanding the fundamental nature and consequences of the agreement due to a deliberate lack of disclosure.
- Inability to freely negotiate the terms of the agreement.
- No clear understanding of the terms of the agreement which can be driven by factors such as, lack of ILA, cultural and/or language barrier.
- Significant inequality between the parties.
- Physical and/or emotional pressure to sign the agreement signifying that they are entering against their will.

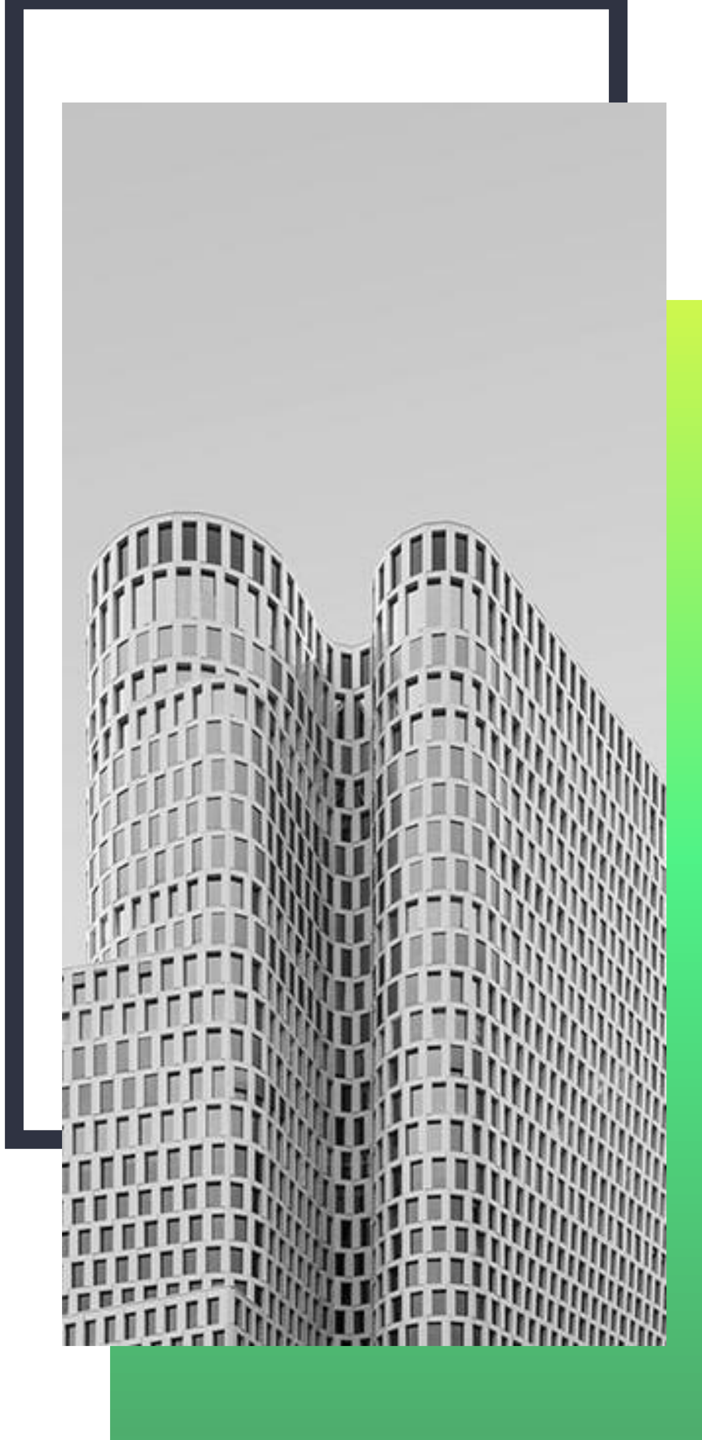
UPHOLDING

- Misunderstanding cannot be construed with misrepresentation.
- A domestic contract does not need to deal with *all* claims arising out of a separation, as long as they do not preclude a party from applying for them in the future.
- The significance of the non-disclosed asset must have a bearing on the outcome of the contract.
- A party cannot use, after the fact, his/her own failure to due their due diligence as a basis to set aside the agreement.
- Undue influence and duress ≠ remorse. Meaning, a party feels a sense of buyer's remorse for having signed a contract they did not reap the rewards after the fact.

PRACTICAL
ADVICE

56(4)(a) FLA:
Disclosure

- Essential to have some disclosure – more is better.
- Any requests made and refused?
- Obvious concealment of financial information?
- Significance of non-disclosure in entire scope of agreement?
- Would non-disclosure change the decision to sign?
- Misunderstanding the fundamental nature and consequences of the agreement due to the lack of disclosure.



56(4)(b) FLA:
Understand Nature and Consequences

- ILA for both parties?
- Is ILA independent?
- ILA should be more than a rubber stamp – review merits of agreement and how it differs from the law.
- Does the party understand what their rights and obligations are pursuant to the law?
- Is there a language barrier? Get a translation/ bilingual lawyer.

S.56(4)(C) FLA:
LAW OF CONTRACT

●Unconscionability ● Undue influence ● Duress ● Misrepresentation

- Screen for power imbalance and whether there is an unequal playing field.
- Verify that one party does not have an unfair influence over the other party.
- Ensure there is no finding of coercion or pressure directed onto a party such that they have no alternative but to submit.
- Ensure both sides receive ILA.
- Negotiate to ensure a *"fair"* agreement.
- Ask questions!

ANOTHER OPTION: S.33(4) FLA

33(4) The court may set aside a provision for support or a waiver of the right to support in a domestic contract and may determine and order support in an application under subsection (1) although the contract contains an express provision excluding the application of this section,

(a) If the provision for support or the waiver of the right to support results in unconscionable circumstances;

(b) If the provision for support is in favour of or the waiver is by or on behalf of a dependant who qualifies for an allowance for support out of public money; or

(c) If there is default in the payment of support under the contract at the time the application is made.

DRAFTING

- Start early
- Full financial disclosure, all requests must be answered
- Negotiations
- ILA on the merits
- Reporting letter

CHALLENGING

- Request lawyer's file
- Challenge as soon as possible
- Was the agreement followed?
- Were the significant assets disclosed?
- One-sided agreements are more vulnerable
- Credibility

Questions?

THANK YOU

Katherine Robinson, Kain & Ball

Kevin G. Caspersz & Claudia Macek
Shulman & Partners LLP

MASTERING MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS: PRACTICAL INSIGHTS AND CREATIVE DRAFTING SOLUTIONS

FAMILY LAW

Enforcing or Setting Aside Marriage Contracts
Kevin Caspersz, Shulman & Partners LLP (Toronto)
Katherine Robinson, Kain & Ball Professional Corporation (Mississauga)

Enforcing or Setting Aside Marriage Contracts

Kevin G. Caspersz, Senior Associate at Shulman & Partners LLP
Claudia Macek, Associate at Shulman & Partners LLP
Katherine Robinson, Senior Associate at Kain & Ball PC

<table>
<tr><th colspan="3">ESTABLISHING CASE LAW</th></tr>
<tr><td></td><td>LeVan v. LeVan, 2008
ONCA 388</td><td>Established the 2-part test when considering when/if to set aside a domestic contract:

(1) Consider whether the party seeking to set aside the agreement can demonstrate that one or more of the circumstances set out within the provision have been engaged.

(2) Consider whether it is appropriate to exercise discretion in favour of setting aside the agreement.</td></tr>
<tr><td></td><td>Toscana v. Toscano, 2015
OJ No 315</td><td>The ways in which a domestic contract can be challenged and set aside:

a) Failure to disclose

b) Did not understand (ILA)

c) Law of contract

• Unconscionability

• Undue influence

• Mistake

• Repudiation</td></tr>
</table>

		• Duress • Misrepresentation Discretion to set aside, as step 2 of test • Burden of proof on the party seeking to set it aside
	Butty v. Butty, 2009 ONCA 852	Established the principle whereby, "a party to a marriage contract cannot enter into it knowing of shortcomings in disclosure and then rely on those shortcomings as the basis to have the contract set aside" (para. 54)
	Quinn v. Epstein Cole LLP, (2007), 87 O.R. (3d) 184	Establishes the two-stage analysis when considering a claim to set aside a domestic contract for non-disclosure: (i) The party setting aside the contract must demonstrate that the other party failed to discharge its duty to disclose significant assets. The significance of an asset is assessed by measuring the value of the asset against a party's disclosed net assets. (ii) If a court finds that a party has failed to disclose a significant asset, the court must determine, in light of the facts of each case, whether it should exercise its discretion to rescind the domestic contract. The burden of proof lies on the party seeking to set aside the contract to persuade the court to exercise its discretion in its favour. The court will take into account a variety of factors in exercising its discretion.
	Turk v. Turk, 2018 ONCA 993	Cited with approval Dochuk v. Dochuk[1999] O.J. No. 363 for factors to consider when exercising discretion under step two of the test in LeVan. a) Whether there had been concealment of the asset or material misrepresentation;

		b) Whether there had been duress, or unconscionable circumstances; c) Whether the petitioning party neglected to pursue full legal disclosure; d) Whether he/ she moved expeditiously to have the agreement set aside; e) Whether he/ she received substantial benefits under the agreement; f) Whether the other party had fulfilled his/ her obligations under the agreement. Also – whether the non-disclosure was a material inducement to the aggrieved party entering into the agreement – how important the non-disclosed information would have been to the negotiations.
	Ruffudeen-Coutts v. Coutts, 2012 ONSC 6438	Established the element of duress whereby a party who relies on the argument of duress as the basis to set aside their consent, they must prove that they were subject to an illegitimate pressure to such a degree that their will was coerced.

SUPPORTING CASE LAW					
No.	**CASE**	**SUMMARY**	**DECISION**	**CHECKLIST: SETTING ASIDE**	**CHECKLIST: UPHELD**
1.	*LeVan and Levan*, 2006 03-ST-36181 <https://canlii.ca/t/1p8m9>	Parties were married for seven (7) years Wife is seeking to set aside the marriage contract, which the parties entered into two (2) days prior to their wedding due to the reasons enumerated at section 56(4) of the FLA. The husband's father developed a wealthy company and the family decided to protect their shares in the family business from someone outside the family through marriage,	Judge Backhouse explains that as a preliminary matter, the burden of proof rests on the party seeking to set aside the agreement to persuade the court to exercise its discretion in their favor if he/she satisfies one of the subsections of section 56(4) of the FLA. Judge Backhouse declares that the marriage contract is set aside based on the following: a. The failure to disclose was deliberate;	✓ Failure to disclose such that if done correctly, it is likely that the marriage contract would have been more favorable to one party or made the other party recognize how unfair the contract was, would refuse to sign it. ✓ Failure to understand the nature or consequences, where a party who is unable to understand the contract despite receiving independent legal advice.	

		by having all parties enter into a marriage contract. As such, when the parties got engaged the wife knew that the husband required her to sign a marriage contract to protect his shares in the family business. The executed marriage contract excluded the husband's very substantial business interests and severely restricted the wife's claim to support. At the time of signing, the wife was not presented with fulsome disclosure, nor did she understand the complex terms of the contract. The wife also claims she was misrepresented by the husband about the context of the contract, whereby the husband claimed it was solely for the purposes of protecting his shares in the family business, while the contract stated otherwise.	b. The husband misrepresented the purpose and extent of the contract; c. The husband interfered in the wife's receipt of independent legal advice; d. The wife did not understand the terms of the contract; e. The wife did not receive independent legal advice and some of the advice was wrong; and f. The contract was unfair.	✓ Misrepresentation of the stated purpose versus the actual nature and consequences of the contract.	

		The husband denies every creating conflict among the wife and her counsel. The wife alleges that she did not receive honest independent legal representation due to the husband's actions.			
2.	*Dougherty v. Dougherty,* 2008 ONCA 302 <https://canlii.ca/t/1wmjj>	A day before the parties' wedding, parties entered into a marriage contract in which they agreed to keep all of their real and personal property separate, but it did not deal with child or spousal support. After 17 years, the parties separated and the wife applied to set aside the contract, and the husband appealed the trial judge's decision. The wife argued that she rushed into signing the contract because the husband said it *must* be signed before they were married, which was taking place the following day.	Judge Rosenberg concluded that first and foremost, courts should respect private arrangements that spouses make for the breakdown of their relationship, particularly so where the contract was negotiated with independent legal advice. Secondly, simply because a party told the other that a contract had to be signed before the marriage, that this equates misrepresentation is false. Misrepresentation, pursuant to contract law, must be material and constitute an inducement,		✓ Respect private contracts entered into voluntarily and freely by parties, particularly where independent legal advice was present; ✓ Misunderstanding does not equate misrepresentation. There must be concrete evidence that the party was misrepresented and induced into

		She alleged that she did not read the contract and did not obtain independent legal advice. Further, she stated that she only thought the contract dealt with the homes they each owned prior to marriage. The wife also argued she did not get any financial disclosure from the husband, and only knew he was employed by Toronto Hydro and had a pension however, no evidence of the existence of any assets were disclosed. Judge Rosenberg found that the trial judge erred in his approach to the case, which means that his judgment is set aside, and the appeal allowed, based on the following: a. Courts should be hesitant to enforce domestic contracts → the	and cannot be construed with misunderstanding. When a signing party fails to read the contract carefully, one cannot find that it was a misrepresentation that induced the party to enter into the contract. Thirdly, because the contract does not deal with other issues (i.e. support or equalization) it does not mean that the contract ought to be set aside. As long as the contract does not preclude the signing party from applying for these claims in the future. Fourthly, not understanding the terms of the contract pursuant to s. 56(4) (b) cannot be raised when the signing party voluntarily and freely entered into the contract knowing fully why they were entering into it.		signing the contract. ✓ Contracts do not need to deal with all claims arising out of a separation, as long as they do not preclude a signing party from applying for them in the future. ✓ Failure to disclose a party's potential interest in the asset, does not signify that a party failed to disclose significant assets, such that the contract must be set aside.

		law is to the contrary. The burden is on the party seeking to escape the effect of the agreement to show that there are grounds for setting it aside. b. Misrepresentation on the part of the husband → in contract law, misrepresentation must be material whereby a reasonable person would consider it relevant to the decision to enter the contract and constitute an inducement. c. Contract did not provide for child and spousal support → there is no legal basis for setting aside an agreement dealing with property merely because it does not deal with support, especially child support. d. Failure to make financial disclosure → no evidence that the	Lastly, finding that a signing party *may* have had a "significant interest" in an asset that was not disclosed is not grounds sufficient to prove that the other party failed to disclosure "significant assets".		

		husband failed to disclose "significant" assets, and the contract cannot be deemed invalid because the parties contracted out of successor regimes for the distribution of property.			
3.	*Demchuk v. Demchuk*, 1986 6295 (ON SC) <https://canlii.ca/t/gbv69>	Parties were married for 16 years, when the wife learned that the husband was having an extra-marital affair. The wife was a homemaker during the entirety of the parties' marriage and the husband was the sole breadwinner. The wife argues that the separation agreement ought to be rescinded or amended on the basis that the husband failed to disclose a significant asset, namely his pension and deferred profit-sharing plan when the agreement was made.	Judge Clarke found that with respect to the negotiation of the agreement: a. Both parties had independent legal advice during the negotiations in the interim and at the final stage of execution; b. The agreement underwent numerous modifications over a span of five (5)- six (6) months with the participation from all parties (i.e. signing parties and their counsel);		✓ Independent legal advice free of duress and misrepresentation; ✓ Ensuring the signing party was aware at the time of signing, of the nature and consequences; ✓ Absence of concealment of a "significant" asset by a party;

		Moreover, the wife argues that she did not understand the nature and consequences of the agreement as a result and was induced to sign and was under duress at the time of signing. The wife also argues that she was led to believe that the significant asset, being the pension and deferred profit sharing was only a "few thousand dollars".	c. The wife understood the legal meaning and consequences of each clause and was not under duress at the time of signing. Moreover, the agreement was not misrepresented by the husband nor was he exercising undue influence from a superior bargaining position as the agreement was fair. With regard to the pension and profit-sharing plan, the judge concluded that: d. The wife was aware of the existence of the husband's pension and profit-sharing plan, and she had his monthly pay slips and personalized yearly statement which showed the		✓ Depending on the "significance" of the asset, there was adequate financial disclosure for the signing party to understand the assets' worth or value; ✓ Neglect of the signing party prior to the execution of the agreement to pursue full disclosure and subsequent failure to expeditiously seek a variation.

			annual deductions to the plan. e. The wife had adequate disclosure to have an approximate idea of the value of the plan; and f. The husband's future pension entitlement had little monetary liquidity when the agreement was made, and as such, did not constitute a significant asset within the context of s. 56(4) of the FLA; g. There was neither the catastrophic change of circumstances nor the unconscionability in the making of the contract or its terms that would compel the court to intervene under s. 56(4) to rescind in whole or		

			in part the separation agreement.		
4.	*Capar v. Vujnovic,* 2021 ONSC 4713 <https://canlii.ca/t/jh43r>	Parties married in May 2012 and separated seven (7) years later in 2019 and have one (1) child together. When the parties married, the wife owned a property prior to their marriage and lived there with her two (2) sons from a previous marriage. The husband moved into the home, and it became the matrimonial home. The parties entered into a marriage contract in November 2016, and both parties received independent legal advice. The terms of the marriage contract confirmed that the husband did not have an interest in the matrimonial home and was to be excluded from any division of property, equalization calculation or other method whatsoever in the event the parties separated. Moreover, this	Judge Emery outlines the 2-step process one needs to follow when presented with an application to set aside a marriage contract: 1. The party seeking to set aside the contract must demonstrate clearly that one of the circumstances enumerated in s. 56(4) FLA has been engaged. 2. It is the court who then must consider whether it is appropriate to exercise its discretion in favor of setting aside the entire agreement or a provision within it. Important to note is that fairness between the parties		✓ Adequate financial disclosure of significant assets does not necessarily mean the exact value of the asset. The obligation is on *both* parties to disclose and perform their respective due diligence prior to signing the contract. ✓ Misrepresentation and misleading are defenses used when there is a clear unequal playing field and the

		would apply to the value of any property that might be purchased in the future to the extent that a subsequent property was acquired through all or any portion of the proceeds from its mortgage or sale. When the matrimonial home sold, the parties purchased a new property, and took title as joint tenants. The wife submits that the husband made no contributions towards either property, while the husband states otherwise. The wife maintains that the marriage contract ought to be a defense to the husband's claim for equalization and for unjust enrichment. The husband, on the other hand, seeks an order setting aside the marriage contract on the grounds that; (1) the wife did not make the necessary disclosure required by law; (2) the husband failed to understand what rights or benefit he was giving up; and (3) the	is a guiding consideration under this step. Furthermore, Judge Emery concluded the following with respect to upholding a domestic contract: a. Adequate financial disclosure of significant assets is necessary to meet the requirement under the FLA, but it does not necessarily mean the value of an asset that the party knew or ought to have known. S. 56(4) (a) does not contain the words "financial" or "value" to describe the nature of the disclosure of the significant asset. Moreover, it is up to the challenging party to request said information and take the steps to obtain the value. The challenging party		signing party was not entering into the contract with their "eyes wide open". ✓ Undue influence and duress, not be misunderstood as meaning the same, but often work together, to prove that the party was not entering into the agreement voluntarily and/or freely. Cannot be misconstrued with "buyer's remorse".

		husband signed the marriage contract when the wife was exerting undue influence on him, and he was under duress.	cannot use, after the fact, his/her own failure to carry out their due diligence as a basis to set aside the contract. b. Failure to understand the nature and consequences based on the fact that a party was misled or misunderstood the contract, does not suffice as grounds to set aside the contract. When a signing party enters into the contract with their "eyes wide open" and more or less in an equal bargaining position, it is difficult to assume they were misled what they were giving up by signing the contract. c. Undue influence where one party has unfair influence over the other, is different than duress whereby the latter requires a finding that		

			there is a form of coercion or pressure directed onto a party so they have no realistic alternative but to submit to that party. This cannot be misconstrued with "buyers remorse" whereby a party experiences remorse for having signed a contract they do not reap the rewards after the fact.		
5.	*Chee-A-Tow v. Chee-A-Tow*, 2021 ONSC 2080 <https://canlii.ca/t/jf1z9>	Parties were married in 1992 in Guyana, and moved to Canada in 1993, and have three (3) children. Leading up to the execution of their separation agreement in April 2010, they started to have financial problems. In January 2010, the bank registered a notice on title to the matrimonial home, and the husband claims it is as a result of the wife's gambling debts. The wife argues that that it was the	Judge Sossin concluded that the agreement is set aside based on the following: a. A near-complete absence of financial disclosure suggests that the agreement does not reflect a true bargain between the parties. b. Despite a party's stated intent to sign an agreement notwithstanding the absence	✓ Deliberate withholding of financial information and disclosure from the other party prior to executing the agreement. ✓ A party misunderstanding the fundamental nature and consequences of the agreement due to the deliberate and intentional lack of disclosure and misrepresentation as to the	

		husbands gambling activity that is responsible for the growing family debts, and that she had no access to the family's financial information. In March 2010, the husband called the wife to the garage for a private conversation wherein they entered into a separation agreement. The wife argues that the husband said it wasn't a true separation agreement, just a way to protect the family assets from the government. This agreement, executed on April 19, 2010, stipulated that the wife waived all rights to support and agreed to transfer her proprietary interests in the matrimonial home to the husband solely and to may $45K of the outstanding 2nd mortgage on the property. Moreover, the wife was to vacate the home by the end of July.	of financial disclosure does not alter the conclusion that the agreement doesn't reflect a true bargain between the parties as the party's decision to ignore the independent legal advice was not an informed one, and it was based on a lack of information and misinformation. c. A party who has insufficient financial information to understand the nature and consequences of the agreement. d. Financial disclosure and understanding the nature of the agreement should not be distinct nor viewed in isolation; when the very lack of disclosure can make it difficult to understand the	true purpose of an agreement. ✓ The agreement is unconscionable and negotiated in a manner that exploited the other party's vulnerabilities such that the terms contained in the agreement deviate significantly from the legislative objective(s).	

		The wife lived in shelters thereafter and then moved in with her parents after being diagnosed with depression.	broader context of the contract. e. When an agreement deviates substantially from relevant legislative objectives, which is a result of the flawed bargaining process, taking advantage of a party's lack of sophistication, knowledge, trust and financial dependency, which could not be overcome through ILA.		
6.	*Turk v. Turk*, 2018 ONCA 993 <https://canlii.ca/t/hwg5c>	Parties were married for nearly 19 years and had two (2) children. They resolved all of their financial issues following their separation in 2008 and executed a separation agreement in April 2010. The parties divorced six (6) months Thereafter. Approximately four (4) years later, the wife sought an order to set aside the agreement pursuant to s. 56(4) FLA on the basis that the husband	Both the trial judge and appeal judge concluded that the agreement was valid based on the following: a. While incomplete disclosure rightfully attracts the risk of setting aside an agreement, legislation is clear that the failure to disclosure an asset does not necessarily attract	✓ Financial disclosure, while being an important tool to set aside a contract, it does not mean it is automatic. ✓ The significance of the non-disclosed assets needs to have a bearing on the outcome of the contract.	

		failed to disclose his significant assets. The trial judge agreed that the husband failed to disclose his interests in the family businesses he acquired during the course of their marriage and failed to disclose the payments he received from shareholder loans and capital income. The trial judge concluded that despite this non-disclosure, the value of the non-disclosed assets might have been significant but not "significant" pursuant to s. 56(4) FLA, in the context of the negotiation of the agreement, based on the following reasons: 1. The wife had obtained a very favorable settlement; and 2. The husband made substantial concessions during negotiations	that consequence. The burden of proof is on the party seeking to set aside the agreement. b. The significance of the non-disclosed assets makes the non-disclosure itself, significant. More specifically, the term "significant" must refer and be measured in the context of the entire relationship between the parties, and it should not be isolated from all the surrounding circumstances. Therefore, more disclosure would not have changed the outcome for the wife, as the assets would have no bearing on equalization or support.		

		and mediation that it would be unreasonable to simply input the value of the non-disclosed assets and assess the impact on the equalization payment or support. The wife argues that the trial judge made multiple errors in the analysis such as (1) placing the onus on her (the wife) to inquire into the existence and value of the husband's assets; and (2) determining that the non-disclosed assets were "significant".			
7.	*Maka v Maka*, 2015 ONSC 3480 <https://canlii.ca/t/gjbnb>	The parties were married in Nigeria in May 1990, and they have four (4) children. The parties separated in May 2001. In September 2010, the wife commenced an application only seeking a divorce, and the husband's Answer he sought to set aside the separation agreement signed in May 2001; equalization and division of	Judge Barnes believed this agreement should be set aside on the following basis: a. As there were no significant property, debts, liabilities, nor did the agreement deal with property issues at all, it is not acceptable the argument that there was no financial disclosure.	✓ The respective intentions of the parties before and after an agreement is signed must correspond to the nature of the agreement. ✓ If a signing party is not aware of the contents of the agreement.	

		family property, designation of matrimonial, partition and sale, decision-making responsibility of the children and variation/cancellation of child support arrears, spousal support and half of the wife's pension. The husband alleges that the wife failed to disclose assets, debt or liabilities existing at the time the agreement was signed. Moreover, he claims that the agreement was signed solely for tax purposes and the wife misled him as to her true purpose for the agreement. Also, he did not receive independent legal advice and is less educated that the wife. The wife, on the other hand, claims that the agreement was executed after it became clear that the parties had irreconcilable differences after renewing their vows. The wife also testifies that there was a witness	b. Despite there being no independent legal advice and the disparity in the parties' education levels, the signing party was aware of the contents of the agreement. c. Whether a party was misled on the real intent of the agreement, it is essential to examine the parties prior to and after the agreement was signed. d. The conduct after the agreement is signed was inconsistent with an intent to separate, and there the signing party was misled on the true intent of the agreement, as the parties' intentions were divergent.	✓ Assessing whether a party was misled, one must look at the relationship pre and post agreement to determine its real intent.	

		present while they signed, contrary to what the husband states.			
8.	*Dochuk v. Dochuk*, 1999 14971 (ON SC) <https://canlii.ca/t/1wb7p>	The parties were married in December 1982 and signed a homemade separation agreement which divided their assets and debts. In 1997, the wife brought a divorce action and sought to vary the support arrangements in the agreement as well as set it aside because she had not received independent legal advice when signing. Moreover, the wife pleaded that the husband failed to disclose the nature of his pension plan and the shares he held in the company he was employed by. First, the wife claimed that she only signed the agreement because she was fearful of the husband's reaction if she did not accept what was being offered. She explained that the	Judge concluded that it is the Court's discretion to set aside a domestic contract once a vitiating factor has been found. To that end, once a vitiating factor has been found, it is essential to contemplate whether the non-disclosure was a material inducement to the signing party entering into the agreement (i.e., how important the non-disclosed information would have been to the negotiations). Despite a party's willful non-disclosure, the other party was not misled based on the following:	✓ If the non-disclosed asset/debt materially induced the signing party to enter into the agreement ✓ If the signing party had had a full accurate picture of the opposing party's finances, he/she could have made an informed decision. ✓ The principal motivation of the parties was to negotiate a fair and equitable settlement; thus, the non-disclosure is paramount in obtaining a fair settlement.	

		husband was controlling and bad tempered and gave evidence of occasional violence. Husband denies all these allegations, only admits to having a bad temper at times. Judge concluded that the circumstances surrounding the preparation and execution of the agreement and the conduct of the wife concludes that the wife was not vulnerable to being preyed upon by the husband and therefore, the agreement was not unconscionable Furthermore, the wife alleges that the husband failed to disclose two (2) assets – the RRSP and his company shares. The husband's assertion that his error and his omission were inadvertent does not assist him. The Judge concluded that the undisclosed assets, worth $45,258.00 were "significant" in relation to the parties' disclosed net assets of	a. The signing party could have made further inquiries into the assets. b. Both parties chose to ignore legal advice and if they had not, they would have explored the impact the non-disclosure would have had on their assets. c. The principal motivation of the signing party was to have a swift resolution so they could purchase a new asset, and therefore, the non-disclosure would not have been an important factor in the negotiations because of their primary motivation.		

		$304,500.00. Therefore, the Judge concluded that the husband breached his duty to disclose significant assets. With that said, there was no evidence that the wife discovered the existence of these assets *after* the agreement was executed. The wife did know during the negotiations that the husband had these assets and showed lack of care in pursuing legal disclosure.			
9.	*Khan v. Khan,* 2005 ONCJ 155, 2005 CarswellOnt 1913	Parties married in religious ceremony in Pakistan and on the date of marriage they signed a marriage contract (aka "Nikah-Nama") barring the wife from claiming spousal support. The husband signed the contract by proxy while he was in Canada and the wife in Pakistan. After wife arrived in Canada, parties separated one (1) year later. The wife is seeking to set aside the waiver of spousal support and replace it with a	Judge Clark concluded that the contract is set aside based on the unconscionable nature, more specifically: a. The true definition of unconscionable is not influenced or guided by conscience; unscrupulous or unreasonable. b. No one explained the legal implications as the party did	✓ No opportunity for the signing party to freely negotiate the terms of the contract based on the circumstances. ✓ No clear understanding of the terms/provisions in the contract, driven by the lack of independent legal advice and/or cultural or language barrier. ✓ Significant inequality between the parties to the	

		support order. Husband signed a sponsorship agreement with the Government of Canada to financially support the wife for a period of 10 years. Wife claims that the husband was verbally, emotionally, and psychologically abusive to her and was completely financially dependent on him as a newcomer to Canada and had no bank account or access to money. She asserts she never married to gain entry into Canada. The husband, on the other hand, claims that she used him to gain entry into Canada and she knew what she was entering into when she signed the contract. Judge needs to determine if the marriage contract signed in Pakistan is (1) a valid domestic contract pursuant to Ontario legislation; (2) is it enforceable or should be set aside.	not receive independent legal advice. c. There was no opportunity to freely negotiate any of the terms/provisions. d. There was no clear understanding or appreciation of the implications of the agreement or of the rights/obligations created and affected by it. e. Vast inequality in bargaining power as the marriage had been arranged and therefore, no freedom to negotiate the terms of the contract. f. The principal motivation to sign the contract was created by the fact there would be no marriage if there was no contract. Therefore, the other	contract in bargaining power based on the circumstances. ✓ Take precaution as to the reason a signing party chose to sign the contract (i.e. due to cultural/religious reasons, and whether that had an effect or inability to comprehend the nature or consequences of the contract remains paramount.)	

		Judge concludes that (1) the contract is a standard binding contract as it contains the essential elements of a basic contract and confirms to the requirements per s. 55 FLA – in writing, witnessed and signed by both parties. Signing by proxy does not vitiate the contract. (2) A binding contract made outside Ontario is valid if entered in accordance with Ontario law. Moreover, the wife has the onus of proving on a balance of probabilities that the domestic contract is unconscionable.	party took advantage of an unconscionable inequality of bargaining power to induce the other to sign. g. Despite for cultural, religious reasons that might affect the party's lack of choice to sign the contract and it might not fall under a specific type of oppression pursuant to Ontario law, it does not change the fact that a party did not understand the nature or consequences of the contract and should be set aside.		
10.	*Colafranceschi v. Colafranceschi,* 2001 CarswellOnt 646	Parties were married in 1984, and six (6) weeks after marrying, the husband asked his pregnant wife to sign a marriage contract prepared by his lawyer.	Judge Heeney clearly outlines that based on the evidence surrounding the execution of the contract, that it must be *set aside* based on the following:	✓ Physical and/or emotional pressure from one party, forcing the other to sign means the latter is not entering into the contract freely and voluntarily and against their will.	

		This contract released all entitlement to spousal support, and parties exchanged no financial disclosure, no witness present, and wife did not receive independent legal advice. Wife claims she was subject to physical and emotional pressure to sign the contract. Parties ultimately separated in 1999, some 15 years after marriage, and had three (3) children. Wife had not worked outside the home during the marriage as she was a homemaker and raised the children. Six (6) weeks after marrying, the husband brought the contract home and told the wife to sign it as he felt she was "after his money". She said no, and he proceeded by pulling her ponytail from behind and said he wanted her to sign it. After much disagreement, the wife eventually agreed she would sign it, under the	a. The signing party was subject to physical and emotional pressure by the other party to sign the contract. b. The signing party signed it against their will. c. The signing party lacked the benefit of independent legal advice, it is only not convincing that the party understood the true nature and consequences of the contract they were entering into. d. Lastly, no exchange of financial disclosure of significant assets and liabilities was made for both parties at the time the contract was made and signed. When one party is	✓ No independent legal advice received and offered at the time of the creation of the contract and signing. ✓ No exchange of financial disclosure of significant assets/debts. In addition, a clear, obvious concealment of financial information.	

		condition that she wanted to go to his lawyer and talk to him. They went to the lawyer's office, and the contract was signed, although not witnessed by the lawyer or any 3rd party. Rather, the parties witnessed each other. Nor did the wife obtain independent legal advice nor did the lawyer recommend that she do so. Moreover, there was no financial disclosure despite her having a general idea of the assets he owned, she had no idea what they were worth or what his debts were. Husband relying on the contract signed to deny the wife any claim to spousal support. Wife is seeking to set aside the contract based on the above reasons. Based on the evidence, the Judge concluded that the contract itself reveals that the wife was *not* a driving	clearly unaware of what is going on in the background and the other party is going to great lengths to protect their assets against any legitimate claims of others. In addition, the contract is also *unenforceable* pursuant to s. 55(1) FLA on the basis that: a. The parties to the contract witnessed their signatures. Case law determines that a "witness" must be someone other than the party to the agreement.		

		force behind its preparation, contrary to the husband's statement. It deals with a total mutual release of spousal support and given the parties' employment status at the time of signing, is completely one-sided: the husband was a successful businessman and the wife quit her occupation to stay home and raise the children, and therefore facing a clear prospect of financial dependency at the time the contract was signed and had everything to lose by giving up her right to claim support. Similarly, the property provisions in the agreement clearly calculated to protect the husband's assets.			
11.	*Pringle v. Pringle,* 2021 ONSC 3677, 2021 CarswellOnt 7974	The parties cohabitated between the years 1995-1999 as unmarried spouses. Upon separating, both parties retained lawyers and negotiated a separation agreement.	Judge Pierce concluded that the marriage contract should be set aside on the following basis: a. No financial statements or financial disclosure was exchanged.	✓ Protections for spouses entering into a marriage contract = (1) full frank financial disclosure and (2) independent legal advice. Without satisfying	

		The agreement stipulated that the husband would pay the wife $10K, and the wife used those funds on a new home. During the negotiations, the wife learned that married spouses are entitled to more expansive rights compared to unmarried spouses. In 2005, the parties reconciled and resumed cohabitation, and both parties had their own children who are independent. The wife told the husband that if they were to resume cohabitation, they would need to get married. Thus, on June 30, 2006, the parties married. However, they separated a final time on June 16, 2018. The wife alleges that the contract is deeply flawed which is due to the lack of financial disclosure and lack of independent legal advice.	b. The fact that parties financially disclosed in the past when executing a pr4evious agreement, does not substitute for full financial disclosure in the preparation of the marriage contract years later. The FLA requires disclosure of assets/debts at the time the contract was made. c. Parties were unable to comprehend the nature and consequences of the contract because of the lack of independent legal advice. Moreover, they were not given general advice as to equalization and the increase in value of assets during marriage, nor their rights to the matrimonial home or spousal support.	this, spouses are unable to understand what they are getting or giving up by signing a contract. ✓ Previous financial disclosure does not substitute the obligation to disclose when a marriage contract is made. ✓ Independent legal advice absent such that a party does not know what their rights and obligations are pursuant to the law with or without a contract. Parties feeling "better off" without an agreement.	

		The husband on the other hand, submits that the courts should not interfere, and the contract should not be set aside, that it was fair and properly drawn out. The parties prepared wills, and their estates lawyer proposed they sign a marriage contract as well. He proposed that he could "do it all" instead of both of them hiring their respective lawyers. The contract stipulated the following: "the parties were to keep their own houses and camps, vehicles, pensions, RRSPs. Their children would be the beneficiaries of their parent's life insurance policies through work. Upon separation, assets would revert to the situation immediately before marriage." The wife testified that it was the parties' intention that the agreement	d. Due to the lack of independent legal advice, neither party understood their respective rights and obligations pursuant to the FLA with/without a marriage contract.		

		would make them equals in marriage, while protecting the value of assets brought into the marriage.			
12.	*MacLeod v. MacLeod,* 2022 ONSC 2457	Wife born in Russia, and was 53 at time of trial. Husband was 69 at time of trial. One child, born 2005. Parties married 2007 – 2018. Marriage contract finalized one day before marriage, with draft provided to wife just two weeks before that. Wife challenged marriage contract on basis that she did not understand nature or consequences and that she signed under duress. Claimed agreement was sent to her at the last minute, she did not understand some of the terms in the agreement, it was not translated into Russian and she was not told to get ILA.	Held that the terms of the agreement were set by the husband, rather than based on negotiations between the parties. "when a person does not receive independent legal advice, the issue of a person's understanding of the nature or consequences of a domestic contract must be very carefully scrutinized by a trial court" Held that the wife read the agreement in Russian and had a general understanding of the terms, but no understanding of the legislation and how the terms of the agreement differed from the law. Agreement specifically indicated that wife was to receive	Agreement set aside due to: ✓ No independent legal advice ✓ No knowledge of rights under the law ✓ Language barrier	

		Husband testified that he always wanted a marriage contract if he was to get married again, he had the agreement translated into Russian, and thought his lawyer would arrange for wife to have ILA. Emails between the parties entered as evidence.	ILA, but no ILA was provided. Therefore, agreement must be set aside. No duress found, as husband was willing to delay wedding until agreement was signed, but wife insisted on wedding on specific date.		
13.	*Stergiopoulos v. Von Biehler*	Agreement contemplated after the parties had already married in 2012. Terms for marriage contract one-sided in wife's favour. Husband refused to sign, and no further steps were taken. In May 2013 parties had an argument and police were called. Husband was arrested. Husband worked senior position at Department of National Defence and	Held that the husband had no other viable option but to sign the marriage contract with his career in the balance – emotional duress found. Agreement also found to be unconscionable due to division of assets that would drop net worth of the husband by $380,000 for no consideration from the wife.	Agreement set aside due to: ✓ Duress ✓ Unconscionability	

		was concerned about arrest impacting his job, ability to travel to the US and security clearance. Wife's position was that she would agree to the assault charge being dropped if the husband signed the one-sided marriage contract and if he met other specific terms. Husband met with a new lawyer who was not given notice of the pending charges or the conditions of the wife. Husband signed the agreement, contrary to the legal advice given. Application commenced immediately upon criminal charge being dropped, to set aside marriage contract.	Court preferred the evidence of the husband. Agreement set aside aside, and costs ordered to the husband.		
14.	*Martin v. Sansome,* 2014 ONCA 14 *Martin v. Giesbrecht Griffin Funk & Irving,* 2022 ONSC 1684	Parties had relationship of 18 years, including 10 years of marriage.	Court of Appeal upheld the trial judge's finding of setting aside the domestic contract. – "the	Agreement set aside due to: ✓ No independent legal advice and did not	

		Husband's parents were transferring farm property to husband, wife was told the day before the transfer that she had to sign a domestic contract waiving all rights to the farm. The wife was given "ILA" in the form of a 20-minute meeting with a blind lawyer who did not read the agreement or review it with the wife. Trial judge set aside the domestic contract on the basis of a lack of ILA and had no understanding of the nature and consequences of what she signed. The husband appealed (on this and other grounds).	evidence supporting these findings was overwhelming" NOTE: Second case is a cause of action against the lawyers who prepared the marriage contract for Mr. Martin, for negligence, breach of contract and breach of fiduciary duty. Mr. Martin sought damages totaling $945,389.40 representing the value of the equalization payment, legal fees and costs award, and interest on the mortgage to fund the payment. Held that solicitors liable for full amount sought due to incompetence, having a conflict of interest, and failing to disclose material risks.	understand consequences of signing agreement	
15.	*Gilliland v. Gilliland,* 2009 O.J. No 2782	Parties signed agreement the week before the wedding, at request of the	Agreement to agree not found. Considered:	Agreement set aside due to:	

		wife to protect any assets that she received from her parents. Agreement was prepared by wife's lawyer and was signed by husband without negotiations or ILA Agreement challenged by the wife. Wife contents that it was an agreement to agree, not an enforceable contract, and in the alternative, that the agreement needs to be set aside under 56(4) of the FLA.	"(a) would a reasonable observer conclude the parties were consensus ad idem? A party's subjective belief that he or she entered into a final and binding agreement is not determinative. (b) is there consensus on all essential terms or is the agreement vague and imprecise with additional terms to be later discussed or agreed upon? (c) Did the parties make their agreement conditional upon and subject to the execution of a formal document? Held that the "the contract may have exceeded the scope of the parties' original intentions. To that extent, I find that the parties did not understand the nature and consequences of the agreement"	✓ The parties did not understand nature and scope, because of significant changes between signing and circumstances at separation ✓ Evidence of the parties as to the intentions of the agreement was crucial here	

16.	*Stupka v. Stupka,* 2012 ONSC 1133	Wife sought to set aside marriage contract on basis of material non-disclosure and not understanding consequences of the agreement Wife had limited English. Husband prepared the agreement and wife saw it for the first time on the day it was to be signed, 5 days before the wedding. No financial disclosure was provided before the agreement was signed, but husband contends that he explained his financial situation verbally to the wife.	Held that the agreement is set aside. Agreement is one sided in the husband's favour, and husband did not provide complete nor accurate disclosure (and no supporting documentation). ILA provided was not independent as lawyer had previous retainers with the husband which were not disclosed to the wife. Further found that wife did not understand the nature and consequences of the agreement, including because of language barrier.	Agreement set aside due to: ✓ The disclosure not complete nor accurate, there was a power imbalance and the party spoke limited English. Moreover, the lawyer had a conflict of interest which was not disclosed.	
17.	*Campbell v. Szoke,* 2003 O.J. No.3471	Common law relationship of 17.5 years	Held that the husband "took advantage of the fact that [the wife] was dependent upon him and extracted her signature with	Agreement set aside due to: ✓ No disclosure ✓ No independent legal advice	

		Husband claimed throughout that they were not spouses and were employer/ employee Split time between Ontario and Florida Parties signed two agreements, cohabitation agreement waiving all support claims and employment agreement, both of which were signed by wife after significant delay and under protest	the threat that he would not take her to Florida with him." Held that with no ILA and no financial disclosure, the agreement "must" be set aside.	✓ Duress	

MASTERING MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS: PRACTICAL INSIGHTS AND CREATIVE DRAFTING SOLUTIONS

FAMILY LAW

Tools and Precedents for Drafting Marriage Contracts/Cohabitation Agreements and Advising Clients

Jennifer Gold, **Wood Gold LLP (Brampton)**
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Tools and Precedents for Drafting Marriage Contracts/Cohabitation Agreements and Advising Clients

By Laurie H. Pawlitza, Torkin Manes LLP and Jennifer Gold, Wood Gold LLP

Factors to Consider for Negotiating and Drafting Spousal Support Provisions in a Marriage Contract or Cohabitation Agreement

As lawyers negotiating and drafting a marriage contract or cohabitation agreement, we often have to assess the current facts in order to gage future risk. It's not uncommon to inform clients that we don't have a crystal ball when advising them that current plans can drastically change in the future. The client should feel comfortable with the spousal support (and property) provisions no matter what happens in the future. The client should also consider how agreed upon spousal support provisions affects their future decision-making regarding career, education, and family and household responsibilities. Under section 33(4) of the *FLA*, the court may set aside a provision for support or waiver of the right to support in a domestic contract, and may order support in an application under subsection (1) although the contract contains an express provision excluding the application of this section, if the provision: (1) results in unconscionable circumstances, (2) if the provision or waiver qualifies for an allowance for support out of public money or, (3) if there is a default in the payment of support under the contract at the time of application. The following checklist provides a list of factors that will assist you in fact gathering and assessing whether a contract may be unconscionable at the time of the contract and possibly in the future and whether it may be set aside in the future. It will inform your advice to your client as to whether the spousal support provisions agreed upon are likely to be upheld or risk being set aside.

☐ Age of the parties

☐ Income

☐ Children (current and plans for the future)

☐ Children from a previous relationship

☐ Plans for care of children

☐ Immigration Status

☐ Disability/Health (of either parties or children)

☐ Fertility issues

☐ Career path/trajectory/goals

☐ Educational goals

☐ Plans for the division of labour during relationship

☐ Business interests

☐ Employment income

☐ Other sources of income (ie. income from a trust)

☐ Future income potential

☐ Education

☐ Retirement age

☐ Retirement plans

☐ Caregiver responsibilities (present and future)

☐ Impact of property settlement on party's ability to be self-supporting

☐ Assets at the time of the contract

☐ Debts at the time of the contract

☐ Impact of child support

☐ Future inheritance

☐ Future need for support or increasing support in the future

☐ Future means to pay support or increasing support in the future

☐ Potential for a spouse to be in receipt of government assistance in future

☐ Future relocation to another jurisdiction

Confirming Enforceability Issues in Writing at the Outset of the Retainer

It is prudent to ensure clients are aware of enforceability issues <u>before</u> the contract negotiations begin and a contract is drafted. A sample memo is attached to this paper. <u>Any memo you provide to clients should be updated frequently to take new case law into account.</u>.

Some Precedent Spousal Support Provisions

Precedents are only a starting point for drafting. They need to be considered in the context of the client's needs and the uniqueness of each case.

DRAFT MEMO FOR CLIENTS ABOUT ENFORCEABILITY

LIMITATIONS ON THE USE AND ENFORCEABILITY OF MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS

While marriage contracts and cohabitation agreements have become increasingly popular in recent years, there has been much confusion and misinformation as to what can and cannot be done in either of these two domestic contracts. Secondly, cohabitation agreements and marriage contracts are subject to a number of procedural and substantive limitations. The purpose of this memorandum is to review some of the major concerns that you should be aware of before entering into a cohabitation agreement or marriage contract. References in this memo to marriage contracts include cohabitation agreements unless indicated otherwise.

1. Form of Domestic Contract

There are generally three types of domestic contracts: marriage contracts, cohabitation agreements, and separation agreements. A domestic contract and an agreement to amend or rescind a domestic contract are unenforceable unless made in writing, signed by the parties, and witnessed.

2. Content of Marriage Contracts

Two persons who are married to each other or intend to marry may enter into an agreement in which they agree on their respective rights and obligations under the marriage or on separation, on the annulment or dissolution of the marriage or on death, including,

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children, but not the right to decision-making responsibility or parenting time with respect to their children; and

(d) any other matter in the settlement of their affairs.

3. Content of Cohabitation Agreements

Two persons who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, including,

(a) ownership in or division of property;

(b) support obligations;

(c) the right to direct the education and moral training of their children, but not the right to decision-making responsibility or parenting time with respect to their children; and

(d) any other matter in the settlement of their affairs.

4. Effect of Marriage on Cohabitation Agreement

If the parties to a cohabitation agreement marry each other, the agreement shall be deemed to be a marriage contract.

5. Rights Re Matrimonial Home Excepted

Part II of the *Family Law Act* creates special rights with respect to a matrimonial home. Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home. A couple can have more than one matrimonial home at any given time. Provided that the definition is satisfied, residences such as the city house, the country cottage, and the Florida condominium could all qualify as matrimonial homes.

Part II of the *Family Law Act* provides that each spouse has an equal right of possession of any matrimonial home. The statute also provides that neither party can sell or mortgage a matrimonial home without the written consent of the other spouse.

A provision in a marriage contract purporting to limit a spouse's rights under Part II (matrimonial home) is unenforceable.

6. Domestic Contract Subject to Best Interests of Child

In the determination of a matter respecting the support, education, moral training, or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining to the matter where, in the opinion of the court, to do so is in the best interests of the child. For example, there have been many cases where the court has found that agreements respecting lump sum or monthly child support should not be upheld because it is the child who suffers from inadequate support.

7. Setting Aside Domestic Contract

A court may, on application, set aside a domestic contract or a provision in it:

(a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;

(b) if a party did not understand the nature or consequences of the domestic contract; or

(c) otherwise in accordance with the law of contract.

8. Failure to Disclose

A failure to make full financial disclosure may entitle the other spouse to avoid a domestic contract. We recommend that each party prepare a financial statement or a current statement of assets and liabilities and that both statements be appended to the domestic contract before it is executed. In preparing your financial statement or net worth statement, it is critical that it be both complete and reasonably accurate. In addition, the prevailing standard of practice includes providing corporate financial statements and personal income tax returns. If you are in doubt as to the value of particular assets, you may wish to indicate a range of estimated value. We would encourage you to obtain whatever valuations (of real estate, business interests, pensions, or chattels) that you may require in order to have confidence that your net worth statement is complete and accurate. You should include particulars of any assets which you expect to receive in the reasonably foreseeable future. The obligation to disclose is a positive one and is not dependent on the other spouse's request. You cannot contract out of or waive this obligation.

9. Understanding the Nature and Consequences of the Contract

In order to ensure that both parties understand the nature and consequences of the contract, each party must have independent legal advice. Each party should choose and pay the fees of his or her own solicitor. Before executing the contract, each party will meet with his or her own solicitor who will explain the contents of the contract, review the financial disclosure, answer any questions or concerns, satisfy himself or herself that each party is signing freely and without undue influence or duress, and will execute the certificate to that effect. The requirement of independent legal advice should not be waived and all parties are strongly recommended to obtain it.

10. Common Law Contractual Requirements

Like any contract, a domestic contract can be attacked on the basis of improper conduct by either party either at or prior to the execution of the agreement. Such grounds for attack include the following:

(a) Duress: A wrongful act or threat by one party which deprives the other of the exercise of his free will;

(b) Undue Influence: The abuse by one in whom a confidence is reposed by another of such confidence or authority for the purpose of obtaining an unfair advantage over the latter;

(c) Fraud: A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have

been disclosed, which deceives and is intended to deceive another so that the latter acts upon it to his or her legal detriment;

(d) Unconscionability: Where the terms of the agreement are so one-sided as to oppress one party or unreasonably favour the other;

(e) Fundamental Breach: A breach by one party of a fundamental term of the agreement which warrants relieving the other party from further performance;

(f) Other Equitable Grounds: The validity of a domestic contract may also be called into question on the grounds of inequality of bargaining power, unfair surprise, mistake, material misrepresentation or non-disclosure.

11. <u>Fairness</u>

In *Levan*, the Ontario Court of Appeal confirmed that when making a determination about setting aside a domestic contract, the courts may consider what is "fair":

> Although there is nothing in the governing legislation that suggests that fairness is a consideration in deciding whether or not to set aside a marriage contract, I do not see why fairness is not an appropriate consideration in the exercise of the court's discretion in the second stage of the 56(4) analysis. In my view, once a judge has found one of the statutory preconditions to exist, he or she should be entitled to consider the fairness of the contract together with the other factors in the exercise of his or her discretion. It seems to me that a judge would be more clearly inclined to set aside a clearly unfair contract than one that treated the parties fairly.

In light of the above, a party should be careful not to insist on terms in a marriage contract that a court might later consider to be unfair. For example, a party whose priority is to protect against property claims may be wise not to limit spousal support rights if doing so is likely to be viewed by a court as creating an "unfair contract". In other words, the party who wants the contract should avoid over-reaching.

12. <u>Abandonment</u>

Courts have on occasion found that parties have by mutual consent (and by their conduct) abandoned or rescinded a domestic contract. Although each of our standard domestic contracts provide that any amendment to it will be unenforceable unless made in writing and signed by each party before a witness, a court could nonetheless find that the parties have by mutual consent agreed to abandon some or all of their written agreement.

13. Setting Aside Support Provisions in a Domestic Contract

The *Family Law Act* provides that a court may set aside a provision for support or a waiver of the right to support in a domestic contract and may determine and order support (even though the contract may contain an express provision excluding the application of this section):

(a) if the provision for support or the waiver of the right to support results in unconscionable circumstances;

(b) if the provision for support is in favour of or the waiver is by or on behalf of a dependent who qualifies for an allowance for support out of public money; or

(c) if there is default in the payment of support under the contract or agreement at the time the application is made.

As a result, a provision in a domestic contract either limiting or precluding a claim for future support is very much subject to the discretion of the court at the time an application for support is made. The court can override an agreement that was fair and reasonable when it was executed if it would be "unconscionable" at the time of a court action to maintain the support agreement. The term "unconscionable" means "shocking to the conscience". The court will consider if the terms of the contract are "shocking" or "grossly unfair" to the party attempting to vary the agreement. Some of the factors that are considered in determining whether the spousal support provisions of a domestic agreement are unconscionable include the circumstances surrounding the execution of the agreement, the results of the support provisions of the agreement, and the parties' relative circumstances at the time of the hearing.

14. The Enforceability of the Spousal Support Provisions in a Domestic Contract

Where one party seeks spousal support in the face of a support release or time-limited support, the court has the jurisdiction to decline to follow the terms of the cohabitation agreement or marriage contract. When considering a support application, the existence of a domestic contract is one factor that will be considered; however, it is not the only factor.

Other factors include:

(a) The court will look at the circumstances under which the agreement was negotiated and executed. The court will also examine whether the agreement was or was not in substantial compliance with the *Divorce Act* at the time the agreement was signed by the parties;

(b) The court will also examine whether the terms of the agreement continue to or no longer reflect the original intention of the parties. The court will use this information to determine whether the agreement is in substantial compliance with the objectives of the *Divorce Act* at the time of the hearing;

(c) In addition, judges are directed to consider the autonomy, certainty and finality that the parties intended to achieve when they executed the domestic contract.

The court has the ultimate jurisdiction to vary or decline to vary the support provisions of a contract based on the facts of the case and the state of law at the time that the hearing takes place.

15. Enforceability of Marriage Contracts

The enforceability of support provisions in cohabitation agreements and marriage contracts will depend on whether the party claiming support meets the test set out in paragraph 14 above. While there may be no power under the *Family Law Act* to override the property provisions of a valid and enforceable domestic contract, a court does have the jurisdiction to override the property provisions of a contract that is invalid or unenforceable. When the court is considering whether any aspect of the agreement should be set aside, it will start from the premise that marriage contracts and cohabitation agreements are contracts that are entered into in good faith. As a result, the court will examine whether the parties were candid with each other on issues such as financial disclosure.

Whether or not a court will enforce a domestic contract will likely depend on all of the facts and surrounding circumstances, both at the time of execution of the contract and at the time of its proposed enforcement.

> As a result, a lawyer cannot give any guarantee that a marriage contract or cohabitation agreement executed today will be enforced by a court many years from now.

16. Dependant's Relief Claims

Where a deceased has failed to make adequate provision for the support of his/her dependant, Part V of the *Succession Law Reform Act* allows a court to order such provision as it considers adequate to be made out of the estate of the deceased for the proper support of the dependant. Such an order may be made regardless of any agreement or waiver to the contrary and regardless of the terms of the deceased's will.

17. Conflict of Laws

The *Family Law Act* provides that the property rights of spouses arising out of the marital relationship are governed by the internal law of the place where both spouses had their last common habitual residence or, if there is no place where the spouses had a common habitual residence, by the law of Ontario. If you presently have or if you acquire in the future ties to a jurisdiction other than Ontario, it is possible that you or your spouse may acquire rights or obligations under the laws of that other jurisdiction. While your domestic contract will attempt to deal with all assets wherever located and rights and obligations anywhere in the world, such provisions may not be enforceable in other jurisdictions. We do <u>not</u> have the expertise to advise you regarding the laws of another jurisdiction. If you feel that such issues may arise in your case, we recommend that you obtain proper independent legal advice from a lawyer who practices in whatever other jurisdiction(s) may be relevant in your case.

18. Non-Deductibility of Support Payments

The *Income Tax Act* provides that certain periodic payments made for spousal support pursuant to the terms of a court order or separation agreement may be deductible to the payor and taxable in the hands of the payee for income tax purposes. However, similar payments made pursuant to the terms of a marriage contract or cohabitation agreement do not satisfy the requirements of the *Income Tax Act* and are therefore not deductible to the payor nor taxable in the hands of the payee.

19. Future Changes in Legislation

Prior to 1978 when the *Family Law Reform Act* was enacted, Ontario law generally considered marriage contracts and cohabitation agreements to be unenforceable on the ground that they were contrary to public policy. This rule of common law was overridden by the provision in the *Family Law Reform Act* (now continued in the *Family Law Act*) which specifically allows for these domestic contracts. While it may be unlikely, there is always a possibility that future governments will either amend or repeal the current legislation, the result of which may be to either limit or preclude altogether reliance on these domestic contracts. As a result, you would be well-advised to keep informed as to future changes in the law, particularly those that may impact on the enforceability of your contract.

20. Gifts or Bequests

Most marriage contracts and cohabitation agreements do not prevent either spouse from making gifts (during their lifetimes) or bequests (pursuant to a will) to the other spouse. You should regularly update your will and your estate plan to ensure that they are consistent with the objectives of such agreements.

21. Changes in Your Personal Circumstances

The content of a marriage contract or cohabitation agreement is generally based upon the wishes and intentions of the parties, which in turn is based upon their current circumstances

and their reasonable expectations as to the future. In the event that significant changes occur in your personal or business lives (such as significant changes in assets or liabilities, changes in career paths, changes in residence outside of Ontario, the presence of children, retirement, illness, or otherwise), the terms included in your contract may no longer be appropriate. Accordingly, we recommend that you review your contract periodically (perhaps at the same time as you review or amend your will) to ensure that its contents are still appropriate and reflect your wishes notwithstanding the changes in your personal circumstances.

22. A Caution

Unlike your Will (which you can change from time to time without the consent of your spouse), a marriage contract can only be changed if both parties agree to the change. Although changed circumstances may render the terms of a marriage contract to be unfair, that fact alone will not give either party the right to demand an amendment to the contract. For this reason, parties are advised to consider the entire range of possible future circumstances in which they may find themselves and the possible impact of the contract in those circumstances.

Parties considering a marriage contract would be well advised to keep in mind the comments of the Court in *Ord v. Ord*, 2019 ONSC 1563 (CanLII) at 1:

> "Marriage contracts result in a world of second thoughts. Often signed with marriage pending, they speak to business at a time when those types of thoughts are foreign to the parties. Because of this, the negotiation of an agreement is often hasty and ill thought out. Notwithstanding this, marriage contracts are often of long-lasting effect, both during the marriage and after. The terms, which might have seemed fair at the time, may also result in seemingly inequitable situations resultant from waivers of spousal support or property claims after a long-term relationship, leaving one party in apparent poverty and without recourse to remedies that he or she might otherwise have on marriage breakdown."

I ACKNOWLEDGE THAT I HAVE READ CAREFULLY BOTH THE DRAFT AGREEMENT AND THIS MEMORANDUM AND THAT I UNDERSTAND THE CONTENTS OF BOTH.

Dated at ________________, this _____ day of ________________, 2022.

)
)
____________________________) ____________________________
Witness)

Spousal Support – parties rights are preserved but certain income sources excluded

1.1 Subject to the specific terms of this Agreement, Justin and Hailey do not intend to release any rights they may have against each other for Spousal Support in this Agreement. In the event of a Breakdown of the Relationship, each party will have such rights to receive financial support from the other and will be under such obligation to provide financial support to the other as are given or imposed upon each party by the *Family Law Act*, the *Divorce Act*, the *Succession Law Reform Act* and/or any other applicable legislation or law, now or in the future, at law or in equity.

1.2 In the event that Spousal Support is claimed from Hailey, income from the Hailey Brook Assets and any third party gifts and inheritances received during marriage will not be included in her income when determining the amount payable as Spousal Support. If Hailey claims Spousal Support, income from the Hailey Brook Assets and any third party gifts and inheritances received during marriage will be included in her income when determining the amount of Spousal Support she may receive.

1.3 In the event that Spousal Support is claimed from Justin, income from third party gifts and inheritances received during marriage will not be considered income when determining the amount payable as Spousal Support. If Justin claims Spousal Support, income from third party gifts and inheritances received during marriage will be included in his income when determining the amount of any Spousal Support he may receive.

Spousal Support - release

1.1 If the parties separate or if one party dies leaving the other surviving, neither party nor his or her estate upon or after the separation or death will be obligated to provide support for the other party.

1.2 Each party waives all rights and releases the other and his or her estate from all claims for support.

1.3 The parties hereto acknowledge that they are each self-supporting and not in need of support from the other. Both parties accept the terms hereof in full and final satisfaction of all claims and causes of action to spousal support after separation or death, whether it be under the *Family Law Act*, the *Divorce Act* or the *Succession Law Reform Act*, or otherwise under presently existing legislation or future legislation whether in this jurisdiction or any other jurisdiction. This Contract and this paragraph in particular may be pleaded as a complete defence to any claim brought by either party hereto to assert a claim for support after separation or the death of one of the parties.

1.4 The parties realize their respective financial circumstances may change in the future by reason of their health, the cost of living, their employment, financial mismanagement, financial reversals, inheritance, childcare responsibilities, caregiver responsibilities or otherwise. No change whatsoever, even if it be material, profound, catastrophic, not foreseeable or otherwise, will give either party the right to support from the other or permit either party to vary the above-noted support provision, pursuant to the *Family Law Act*, the *Divorce Act*, or any other statute or law.

1.5 Each party acknowledges that in waiving and releasing all rights to receive and to claim spousal support from the other, that:

(a) Each has considered his or her prospects now and for the future and his or her future financial security, whatever circumstances, catastrophic or otherwise, foreseeable or not foreseeable, may arise in the future, including possible career reversals, the lack of employment opportunities, effects of the Covid-19 pandemic, the contingencies of life including illness and disability, adverse economic circumstances such as rising costs and inflation, and the mismanagement of funds by themselves or others; and

(b) Each has negotiated the provisions of this Contract on the understanding that at no time in the future, under any circumstances, will either party seek or have a right to receive or claim support from the other or the other's estate.

1.6 Each party acknowledges that his or her solicitor has advised him or her of rulings from the Ontario Courts in which the court has awarded spousal support notwithstanding that full and final releases in respect of same have been contained in Cohabitation Agreements, Marriage Contracts, Minutes of Settlement or Separation Agreements previously entered into between the parties. Notwithstanding these rulings, the parties to this Contract agree and intend that no change in circumstances whatsoever including but not limited to those set out in subparagraph 1.5(a) above, shall entitle either party to apply to a court for spousal support. This Contract and this section in particular may be pleaded as a complete defence to any claim brought by either party for spousal support in contravention of the terms of this paragraph.

Spousal Support – lump sum payment and release

1.1 George and Amal are both self-supporting.

1.2 George and Amal expect that George's income will be greater than Amal's over the course of their relationship.

1.3 George and Amal agree to fix any right of Amal to spousal support and the obligation of George to pay spousal support. The parties agree and acknowledge that this payment is intended to provide them both with security and certainty in order to plan their financial affairs.

1.4 If there is a Breakdown of the Relationship, and subject to the indexing provision at paragraph 1.6, below, then George will pay to Amal a total one-time lump sum Spousal Support payment, to be calculated for the period from [the date the parties began Cohabiting] to the date of the Breakdown of the Relationship. For the purposes of this paragraph, if the Breakdown of the Relationship occurs between the anniversaries of the parties' cohabitation, for the period between the most recent anniversary and the Breakdown of the Relationship, Amal's support will be calculated for that part year as follows: the prior year's lump sum payment divided by 12, multiplied by the number of full months that have passed from the preceding anniversary of cohabitation. George's obligation to provide spousal support to Amal will be calculated as follows:

(a) If the Breakdown of the Relationship occurs on or after Year 1 but prior to Year 4 of Cohabitation George will pay to Amal a lump sum amount of $100,000.00 for each year of cohabitation that has passed during this period;

(b) If the Breakdown of the Relationship occurs on or after Year 4 but prior to Year 10 of Cohabitation, George will pay to Amal a lump sum amount of $350,000.00 for each year of cohabitation during this period, in addition to the amount referred to in 1.4(a) above; and,

(c) If the Breakdown of the Relationship occurs on or after Year 10 but prior to Year 15 of Cohabitation, George will pay to Amal a lump sum amount of $500,000.00

for each year of cohabitation during this period, in addition to the amounts referred to in 1.4(a) and 1.4(b) above; and,

(d) If the Breakdown of the Relationship occurs from on or after Year 15 Cohabitation onwards, George will pay to Amal a lump sum amount of $1,000,000.00 for each year during this period to the date of the Breakdown of the Relationship, in addition to the amounts referred to in 1.4(a), 1.4(b) and 1.4(c) above.

(e) The cumulative amount payable by George to Amal hereunder will never exceed $15,000,000, indexed in accordance with paragraph 1.6, below.

1.5 For greater clarity, if the period from the date the parties commenced cohabiting to the date of the Breakdown of the Relationship is 19 years, (and without taking into account any partial payment in the year of the Breakdown of the Relationship or indexing), George would pay Amal a total one-time lump sum Spousal Support payment of $1,250,000.00 calculated as follows:

Year 1 to + including Year 3:	$300,000.00
Year 3 to + including year 9:	$2,450,000.00
Year 10 to + including Year 14:	$2,500,000.00
Year 15 to + including Year 19	$14,000,000.00
Total:	**$10,250,000.00**

1.6 In addition, the one-time lump sum Spousal Support calculated pursuant to paragraph 1.4, shall be indexed annually in accordance with the All Items Consumer Price Index for the City of Toronto. For each year of support, the lump-sum spousal support accrued for that year shall increase by the indexing factor for April 1. An example of this calculation is set out as a Schedule (“Indexing Calculation”) to this Contract.

1.7 If there is a Breakdown of the Relationship, then George, or his estate, will pay Amal the one-time lump sum Spousal Support calculated pursuant to paragraphs 1.4 and 1.6 within six (6) months of the date of the Breakdown of the Relationship. Notwithstanding any other provision in this Agreement, if Amal predeceases George, there shall be no obligation on George to pay any Spousal Support to Amal’s estate.

1.8 The lump sum of spousal support paid by George pursuant to paragraphs 1.4 and 1.6 above, as the case may be, will not be included in the calculation of Amal's income for income tax purposes and will not be deductible by George in the calculation of his income for income tax purposes.

1.9 The parties agree that the terms of this paragraph 1 are non-variable and are a final and certain settling of all Spousal Support rights and obligations between them. Except for the payment from George to Amal pursuant to paragraphs 1.4 and 1.6, as the case may be, the parties waive and release all rights to receive spousal support from the other, now and in the future. The parties, at all times during their Cohabitation, marriage, or upon a Breakdown of the Relationship, are deemed to be self-supporting and responsible for their own support.

1.10 Except for the payment to be made pursuant to paragraphs 1.4 and 1.6 above [or upon the payment made by George to Amal at paragraphs 1.4 and 1.6, above]:

(a) George and Amal:

(1) waive all rights to spousal support;

(2) release each other and their heirs, executors and administrators from all claims and rights that each has to support;

(3) will not maintain, commence or prosecute or cause to be maintained, commenced or prosecuted, any action against the other for support;

arising out of their Cohabitation, marriage, or upon a Breakdown of their Relationship, under the their Cohabitation, marriage, or upon a Breakdown of the Relationship, under the *Family Law Act*, the *Divorce Act*, the *Succession Law Reform Act*, or under any other presently existing legislation or future legislation, whether in this jurisdiction or any other jurisdiction, except in accordance with this Agreement.

1.11 George and Amal realize that their respective financial circumstances may change in the future, by reason of career reversals, loss of employment, retirement, lack of employment opportunities, contingencies of life including illness and disability, childcare responsibilities, caregiver responsibilities, inheritances, adverse economic circumstances such as rising costs and inflation, the mismanagement of funds by themselves or others,

financial reversals, poverty, or a general change in family conditions, inter alia. No such change in circumstances, whether catastrophic, drastic, radical, material, profound, unanticipated, foreseeable, foreseen, unforeseeable, unforeseen or beyond imagining, and no matter how extreme or consequential for either or both of them, whether or not the change is causally connected to the marriage, and whether or not such change arises from a pattern of economic dependency related to the marriage, will alter this Agreement or entitle either party to support from the other except in accordance with this Agreement.

1.12 For greater certainty, George and Amal acknowledge that:

(a) they are financially independent and do not require financial assistance from the other except in accordance with this Agreement;

(b) they have negotiated this Agreement in an unimpeachable fashion and that the terms of this Agreement fully represent their intentions and expectations;

(c) they have had independent legal advice and all the disclosure they have requested and require to understand the nature and consequences of this Agreement and the implications of waiving support, and to come to the conclusion, as they do, that the terms of this Agreement, including the waiver and release above, of all spousal support rights upon payment of the lump sum support reflects an equitable arrangement for support in their Cohabitation, marriage or upon a Breakdown of the Relationship;

(d) the terms of this Agreement substantially comply with the overall objectives of the *Family Law Act* and the *Divorce Act* now and in the future, and George and Amal have specifically considered the provisions and factors set out in sections 30 and 33 of the *Family Law Act* and sections 15.2 and 17 of the *Divorce Act*;

(e) they have been advised by their respective solicitors of rulings in the Ontario courts in which the court has awarded spousal support, notwithstanding that full releases of spousal support have been contained in an agreement. George and Amal require the courts to respect their autonomy to achieve certainty and finality

in their lives and to enforce this Agreement and specifically this spousal support waiver and release upon payment of the lump sum support above;

(f) this Agreement may be pleaded as a complete defence to any claim brought by either party for spousal support in contravention of this Agreement;

(g) the terms of this Agreement and, in particular, this release of spousal support, reflect their own particular objectives and concerns, and are intended to be a final and certain settling of all support issues between them. Among other considerations, George and Amal are also relying on this spousal waiver and release, in particular, upon which to base their future lives.

1.13 If at any time, a party is unable to be self-supporting in whole or in part and the other party voluntarily assumes support directly or indirectly for the non-self-supporting party, such voluntary payments will not constitute a waiver of the terms of the Agreement, particularly this spousal support release, nor will they create any future responsibility for support.

George and Amal intend this paragraph 1 of the Agreement to be forever final and non-variable. In short, George and Amal expect the courts to enforce fully this spousal support waiver and release no matter what occurs in the future.

INDEXING CALCULATION

Assume there was a breakdown after the fifth anniversary of cohabitation. The following is an example of the indexing calculation for the $100,000 per year of spousal support for the first four years, and for the fifth year at $350,000:

Assume the change in the Consumer Price Index for All-Items for Toronto not seasonally adjusted between:

a) April 1, 2022 and April 2, 2023 is 4% (0.04 is the indexing factor);
b) April 1, 2023 and April 1, 2024 is 3% (0.03 is the indexing factor);
c) April 1, 2024 and April 1, 2025 is 3% (0.03 is the indexing factor);
d) April 1, 2025 and April 1, 2026 is 4.5% (0.045 is the indexing factor);
e) April 1, 2026 and April 1, 2027 is 4.5% (0.045 is the indexing factor).

Lump sum payable after the fifth anniversary in 2027 would be calculated as follows:

a) 2022-2023: $100,000 x 1.04 = $104,000;
b) 2023-2024: $104,000 x 1.03 = $107,120;
c) 2024-2025: $107,120 x 1.03 = $110,333.60;
d) 2025-2026: $110,333.60 x 1.045 = $115,298.61.

For the first four years, the lump sum would be $115,298.61 x 4 = $461,194.44.

For the fifth year, the amount payable to be added to the $461,194.44 would be calculated as follows:

a) $350,000 x 1.04 = $364,000;
b) $364,000 x 1.03 = $374,920;
c) $374,920 x 1.03 = $386,167.60;
d) $386,167.60 x 1.045 = $403,545.14;
e) $403,545.14 x 1.045 = $421,704.67.

Amount payable for the 5th year = $421,704.67.

Total payable under this example would be:

$461,194.44 + $421,704.67 = $882,899.11

To determine the indexing factor, refer to the Consumer Price Index tables on the Statistics Canada website at http://www.statcan.gc.ca/tables-tableaux/sum-som/.

NOTE: This is an example only.

MASTERING MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS: PRACTICAL INSIGHTS AND CREATIVE DRAFTING SOLUTIONS

FAMILY LAW

Domestic Contract Checklist - Property

Hilary Jenkins, **McKenzie Lake Lawyers (London)**

Family Law
Domestic Contract Checklist - Property

Client Name: ______________________________ Checklist Completed: ________________________________

Initial Client Consultation

- **Does the client seeking a domestic contract attend the consultation alone?**
  - ☐ **If not:**
    - who is with them:____
    - What is the nature of the relationship:____
    - Does that person have an interest in any of the items that will be addressed in the domestic contract:____
- **Does the client want:**
  - ☐ Cohabitation Agreement
    - Date of cohabitation:____
  - ☐ Marriage Contract
    - Date of marriage:____
- **Client**
  - ☐ Date of birth:____________________________________
  - ☐ Level of education:____
  - ☐ Employment status:____
  - ☐ Gross annual income:____
  - ☐ Sources of income:____
- **Other Party**
  - ☐ Date of birth:____________________________________
  - ☐ Level of education:____
  - ☐ Employment status:____
  - ☐ Gross annual income:____
  - ☐ Sources of income:____

Family Law
Domestic Contract Checklist - Property

- **What property is involved?**
  - ❑ Family/matrimonial home
    - Address:____
    - Who owns the property currenty:____
    - Is it anticipated that ownership change:____
  - ❑ Vacation property
    - Address:____
    - Who owns the property currenty:____
    - Is it anticipated that ownership change:____
  - ❑ Any other real property (investment property, farm property, rental property)
    - Address:____
    - Who owns the property currenty:____
    - What is the client's or other party's interest:____
    - Is it anticipated that ownership change:____
    - Address:____
    - Who owns the property currenty:____
    - What is the client's or other party's interest:____
    - Is it anticipated that ownership change:____
    - Address:____
    - Who owns the property currenty:____
    - What is the client's or other party's interest:____
    - Is it anticipated that ownership change:____

Family Law
Domestic Contract Checklist - Property

- **What business(es) is/are involved?**
  - ❑ **Name:**____
    - Nature of business:____
    - Ownership structure:____
    - What is the client's or other party's interest:________________________________
    - Is it anticipated that ownership change:___________________________________
    - Does the client or the other party work for the business:_________________________
    - Is it anticipate that the client or the other will work for the business:__________________
    - What role will the client or the other party have in the business:____________________
    - Will they receive renumeration? If so, how:_________________________________
    - What assets are held by the business:_____________________________________
    - What liabilities are held by the business:___________________________________
  - ❑ **Name:**____
    - Nature of business:____
    - Ownership structure:____
    - What is the client's or other party's interest:________________________________
    - Is it anticipated that ownership change:___________________________________
    - Does the client or the other party work for the business:_________________________
    - Is it anticipate that the client or the other will work for the business:__________________
    - What role will the client or the other party have in the business:____________________
    - Will they receive renumeration? If so, how:_________________________________
    - What assets are held by the business:_____________________________________
    - What liabilities are held by the business:___________________________________

Family Law
Domestic Contract Checklist - Property

- ❑ **Name:**____
  - Nature of business:____________________________________
  - Ownership structure:____________________________________
  - What is the client's or other party's interest:__________________________
  - Is it anticipated that ownership change:___________________________
  - Does the client or the other party work for the business:____________________
  - Is it anticipate that the client or the other will work for the business:_______________
  - What role will the client or the other party have in the business:_________________
  - Will they receive renumeration? If so, how:__________________________
  - What assets are held by the business:____________________________
  - What liabilities are held by the business:__________________________

- **What trust(s) is/are involved?**
  - ❑ **Name:**____
    - Nature of the trust:____________________________________
    - Trustees:____
    - Beneficiaries:_______________________________________
      - Income:______________________________________
      - Capital:______________________________________
    - What is the client's or other party's interest in the trust:____
    - Nature of the trust:____________________________________
    - What is the purpose of the trust:____________________________

Family Law
Domestic Contract Checklist - Property

- ❑ **Name:**____
    - Nature of the trust:____
    - Trustees:____
    - Beneficiaries:____
        - Income:____
        - Capital:____
    - What is the client's or other party's interest in the trust:____
    - Nature of the trust:____
    - What is the purpose of the trust:____
- ❑ **Name:**____
    - Nature of the trust:____
    - Trustees:____
    - Beneficiaries:____
        - Income:____
        - Capital:____
    - What is the client's or other party's interest in the trust:____
    - Nature of the trust:____
    - What is the purpose of the trust:____

Family Law
Domestic Contract Checklist - Property

Other Property:

Assets (bank accounts, RRSPs, pensions)

1. ____
Type Ownership Approx. Value Possession

2. ____
Type Ownership Approx. Value Possession

3. ____
Type Ownership Approx. Value Possession

4. ____
Type Ownership Approx. Value Possession

5. ____
Type Ownership Approx. Value Possession

6. ____
Type Ownership Approx. Value Possession

Liabilities or debts (student debt, credit card debt, mortgages, line of credits)

1. ____
Type Ownership Approx. Value Possession

2. ____
Type Ownership Approx. Value Possession

3. ____
Type Ownership Approx. Value Possession

4. ____
Type Ownership Approx. Value Possession

5. ____
Type Ownership Approx. Value Possession

6. ____
Type Ownership Approx. Value Possession

Family Law
Domestic Contract Checklist - Property

DURING THE CONSULTATION I EXPLAINED:

- ❑ **Who is the client, if multiple parties attend**
  - Ensuring that client and lawyer both acknowledge who will provide the instructions
  - Ensuring client understands who's interests the lawyer is representing
- ❑ **Asked the client why they wanted or the other party wanted a domestic contract**
  - Confirmed client's health
  - Inquired about domestic violence
  - Inquired about consequences of not signing a domestic contract (within relationship, family, business, etc.)
- ❑ **What can be included in a domestic contract**
  - Ownership in or division of property
  - Support obligations
  - The right to direct the education and moral training of children
    - **Cannot include the right to decision-making and/or parenting time of children**
  - Any other matter in the settlement of their affairs
  - Treatment of matrimonial home **(for marriage contracts only)**
    - For example, which property will be considered the matrimonial home
    - Only the portion of the property that "may reasonably be regarded as necessary to the use and enjoyment of the residence" (FLA s. 18(3)). This may come into play where the matrimonial home property also used for a family business or farm
  - That the contract cannot alter spouse's possessory rights to matrimonial home
  - Release of claims for constructive and resulting trusts
    - This is important when one has a farm or family business they seek to protect or keep within the family.
- ❑ **What is full financial disclosure from both parties**
  - Provide list to client of what disclosure will be required of them
  - Advise what disclosure the lawyer will be requesting from the other party
  - Review all disclosure to ensure the contract will accurately to avoid future costly litigation
    - For example, in *Butty v Butty* 2009 ONCA 852, a piece of farmland was described as one parcel when in fact it was two. The trial judge set aside the contract but this was overturned on appeal as it was an innocent misrepresentation.

Family Law
Domestic Contract Checklist - Property

- ❑ **What are the consequences of not providing financial disclosure**
  - Non-disclosure is knowingly hiding an asset, debt or other liability
    - For example, a trust which shielded business assets was not disclosed in *Solcz v Solcz* 2021 ONSC 8457.
      - The exclusion meant that the wife would receive a smaller equalization and spousal support payment than imagined when signing the contract. The court exercised their discretion because it was unfair to the wife, and would have caused hardship.
  - Ensure that the lawyer communicates importance of full financial disclosure and the consequences of not providing disclosure
- ❑ **Explained the importance of independent legal advice**
  - Both parties to the contract will need their own lawyer to:
    - Provide the party with independent legal advice
    - Negotiate on their behalf
- ❑ **Received instructions to prepare/ advise on a domestic contract**

Family Law
Domestic Contract Checklist - Property

DURING THE SIGNING THE DOMESTIC CONTRACT, I CONFIRM:

- ❑ I obtained and reviewed financial disclosure from my client and the other party
- ❑ I provided my client's financial disclosure to the other party in advance of the contract being prepared
- ❑ I reviewed/drafted the domestic contract to ensure that it adequately protects my client's interests
- ❑ The domestic contract is consistent with my client's instructions
- ❑ The terms of the contract are enforceable
- ❑ I have reviewed the contract with my client
- ❑ I have highlighted and explained the risks and consequences of the contract
- ❑ My client has confirmed that he or she understands the contract in full
- ❑ I have inquired and I am satisfied that my client is signing the contract voluntarily and that he or she was not subject to any duress or undue influence

AFTER THE DOMESTIC CONTRACT IS SIGNED

- ❑ I provided my client with a copy of the fully executed domestic contract
- ❑ I sent a reporting letter outling the terms of the domestic contract with my account

MASTERING MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS: PRACTICAL INSIGHTS AND CREATIVE DRAFTING SOLUTIONS

FAMILY LAW

Tackling Spousal Support
Dealing with Property

Three Hypothetical Scenarios

THREE
HYPOTHETICAL
SCENARIOS

SCENARIO 1: JUSTIN AND HAILEY

- Couple in their 20s, getting married in 6 months
- Hailey is an occupational therapist and earns $80,000 a year; Justin is a business consultant and earns $150,000 a year
- Hailey's parents have asked Hailey to retain a lawyer to draft a marriage contract because they want to protect their wealth
- Hailey's family has a family trust and a family business - the trust owns shares of business and Hailey is a beneficiary of the trust
- Hailey does not work in the family business right now, but she may end up working in the family business in the future
- Justin and Hailey are hoping to have kids but not in the immediate future
- Justin owns a condo and is renting it out as an income property
- The couple is renting a condo together right now. They might move into the condo owned by Justin, but they are not sure.
- Justin would have wanted to share their wealth as per the law should they separate and would not have considered a marriage contract, but now that there is a contract, he wants to make sure that it is fair

SCENARIO 2: BENJAMIN AND ANDERSON

- Both are in their 60s
- Both have grown children
- Benjamin is retired and has wealth but his kids are dependent on him
- Anderson is a high school principal with a good pension but not a lot of cash wealth - his kids are not dependent on him
- They are jointly purchasing their downtown dream home - Benjamin will contribute $700,000 to the down payment and Anderson will contribute $100,000
- They plan to contribute equally to the mortgage and household expenses
- Each wants to make sure that their assets eventually go to their children

SCENARIO 3: GEORGE AND AMAL

- George in his late 50’s – he is an executive of a big company with an annual income of $3 Million
- George has two children from a previous marriage- both in university
- Amal is in her 30’s – she is a personal fitness trainer and trying to grow her online presence as an influencer
- They live in George's 10-million dollar house
- George has been divorced twice but is so in love with Amal that he is not that worried about it; however, the lawyer, who represented him in his two previous divorces is concerned about protecting his income and assets
- George is really focused on making Amal happy
- Amal is ambitious and thinks her business will become something; but she is also enjoying the high class lifestyle with George, including travelling, taking private jets, and going out to fancy restaurants

MASTERING MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS: PRACTICAL INSIGHTS AND CREATIVE DRAFTING SOLUTIONS

FAMILY LAW

Estate Considerations When Drafting Cohabitation and Marriage Agreements*

Jenna Preston, **Nelligan O’Brien Payne LLP (Ottawa)**
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***With permission from Erin Lepine and Rebekah Schultz**

Estate Considerations When Drafting Cohabitation and Marriage Agreements

Erin Lepine and Rebekah Schultz

Preparing a marriage agreement or a cohabitation agreement is one of the few moments in a family law practice where the lawyer gets to work with the client in a context caused by happy events – the parties may be moving in together, buying a home together, or even planning a wedding. These happy moments are a cause for celebration by the parties, but the lawyers working on the file must not forget the importance of the work being done when advising on and drafting these domestic contracts. Clients will rely on the terms in their domestic agreement when setting up their financial circumstances going forward, and the terms in a domestic agreement can directly impact the estate planning needs of a client. Being able to identify issues potentially effecting client's future estate rights and obligations is crucial to drafting a strong and successful domestic agreement.

Estate Releases

First and foremost, it is critical that any marriage or cohabitation agreement include a properly drafted estate release. At a minimum, the estate release should specify three major issues upon the death of their spouse:

a) Whether the spouse agrees to give up any rights upon death, such as whether they agree to discharge any claim for a share in the estate if the deceased passes away intestate, rights to dependent support pursuant to the *Succession Law Reform Act* ("SLRA"), the option of claiming an equalization payment pursuant to the *Family Law Act* ("FLA"), and/or discharging executor rights under the *Trustee Act*;

b) What rights the spouse will be entitled to upon death, such as whether a spouse will be entitled to proceeds of an insurance policy or pension plan if they are named as the designated beneficiary; and

c) Whether a spouse has the right to convey, transfer, devise, or take title of any asset of the estate, provided they have the required written instrument.

In addition to these general requirements, a beneficial estate release needs to also anticipate any upcoming changes to the law, as well as consider what provisions are made in any existing wills, beneficiary designations and Powers of Attorney that are already in place. The lawyer drafting these agreements must also advise the client about whether or not the existing estate planning documents of a client need to be updated as a result of the terms of the marriage or cohabitation agreement. Essentially, any estate release included in a marriage or cohabitation agreement should be as exhaustive as possible, taking into consideration the balance of the agreed upon terms between the parties.

The consequences of an improperly drafted estate release in a cohabitation agreement can be significant, potentially altering the intentions of the deceased after their death. The case *Kilitzoglou v. Curé,* is a prime example of the issues that can result when an estate release in a cohabitation agreement does not align to the other terms within the agreement.[1]

In *Kilitzoglou v. Curé*, the deceased, Albert Curé ("Mr. Curé"), commenced a common-law relationship with the plaintiff, Helen Kilitzoglu ("Ms. Kilitzoglu"), in September 1997.[2] In 2005, they entered into a cohabitation agreement which specifically provided that Ms. Kilitzoglu could continue to live in the home registered in Mr. Curé's sole name for three years following

[1] *Kilitzoglou v Curé,* 2018 ONCA 891 [*Kilitzoglou*].
[2] *Ibid,* at para 4.

Mr. Curé's death, and for the trustees of Mr. Curé's estate to pay for the ordinary and reasonable costs of the residence until the home was sold, or, in the event that three years had passed, a provision that Ms. Kilitzoglu may remain in the home provided that she pays the sum of $140,000.00 and thereafter pays for her "*ordinary and reasonable costs of maintaining the said residence from her own resources*".[3] However, the cohabitation agreement also included multiple releases. Specifically, the cohabitation agreement included:

a) A support release specifying that both parties released any rights they may acquire to "*maintenance, support, alimony, corollary relief or any other payment of money or transfer of property*";[4]

b) An estate release which specified that all rights each other may acquire in the estate of the other and pursuant to the SLRA and FLA were released;[5] and

c) A general sweeping release that Mr. Curé and Ms. Kilitzoglu released, dismissed and waived all claims and right he or she may acquire with respect to the property of the other.[6]

Evidently, the multiple releases outlined above and the continuing interest for Ms. Kilitzoglu to remain in Mr. Curé's home with her expenses being paid were highly conflictual. On one hand, Mr. Curé and Ms. Kilitzoglu had agreed that they would not have any financial obligations toward one another, but, in the same contract, Mr. Curé had also agreed to financially provide for Ms. Kilitzoglu after his death by allowing her to remain in the home and live virtually expense free for the first three years following his death.

[3] *Ibid,* at paras 4, 48, 6.
[4] *Ibid,* at para 48.
[5] *Ibid,* at para 52.
[6] *Ibid,* at para 55.

In April 2007, Mr. Curé passed away.[7] Mr. Curé's Last Will and Testament, dated April 18, 2002, appointed his two daughters as his estate trustees and sole beneficiaries of his estate.[8] Mr. Curé did not update his Last Will and Testament after entering into the cohabitation agreement with Ms. Kilitzoglu. Mr. Curé's Last Will and Testament did not name Ms Kilitzoglu as a beneficiary of his estate in any manner, nor did he specify in his Will Ms. Kilitzoglu's right to remain in the home following his death. However, Mr. Curé's Estate Trustees (his daughters) allowed Ms. Kilitzoglu to remain in the home for three years following Mr. Curé death, honouring the terms of the cohabitation agreement which superseded the Will. Unfortunately, problems with this arrangement arose after the three-year mark, when Ms. Kilitzoglu began to have an obligation to pay for her own ordinary and reasonable costs of living in the home. Ms. Kilitzoglu claimed that even after the initial three-year period of residing in the home, Mr. Curé's estate was still responsible for all mortgage, capital expenses and capital improvements.[9] Mr. Curé's daughters (the Estate Trustees) disagreed and believed that those expenses constituted Ms. Kilitzoglu's "*ordinary and reasonable costs*" for which she should be solely responsible.[10]

At trial, the Superior Court of Justice agreed with Ms. Kilitzoglu's position, but the matter was then appealed to the Court of Appeal of Ontario. The Court of Appeal held that the dominant theme of the cohabitation agreement was that each party would remain financially independent from one another; the Court of Appeal specifically outlined each and every release within the cohabitation agreement in support of this theme.[11] As such, it was ordered that Ms. Kilitzoglu was responsible for all reasonable costs of maintaining the residence (including realty taxes and property insurance,

[7] *Ibid,* at para 5.
[8] *Ibid,* at para
[9] *Ibid,* at para 22.
[10] *Ibid* at para 7.
[11] *Ibid,* at para 56.

and with no reasonable exclusion for any purportedly ‘capital’ costs) and that Ms. Kilitzoglu must reimburse Mr. Curé’s estate for all ordinary expenses it had paid for three years after the death of Mr. Curé.[12]

The issues in *Kilitzoglou* could have easily been avoided if the estate release provisions had been properly drafted. The multiple releases should have specified that Ms. Kilitzoglu was releasing all her entitlements to support and to Mr. Curé’s estate, except for her right to remain in the home for three years following death, with the ordinary and reasonable costs of the residence being paid by Mr. Curé’s estate.

It also very likely would have been helpful for Mr. Curé to have updated his Will to reflect the new intentions with the home. Or, at the very least, for Mr. Curé to have attached his existing Will to the cohabitation agreement and specify within the domestic agreement that although Ms. Kilitzoglu was not a beneficiary to his Will, he still wanted to provide for her care after his death through the continued interest in his solely owned home. By specifying Mr. Curé’s intentions and ensuring that the releases were coherent with the remaining terms of the agreement, Mr. Curé’s true intentions could have been known and this litigation would not have been necessary.

Dependent Support

Another critical component of drafting a cohabitation agreement is being knowledgeable of potential dependent support issues that may arise between the parties. Pursuant to Part V of the SLRA, if a spouse dies without making adequate provisions for support, then the deceased’s estate can be required to pay support to the former spouse.[13] In assessing the amount and duration of dependent support that a former spouse may be entitled to receive from the estate, the Court

[12] *Ibid,* at para 81.
[13] *Succession Law Reform Act,* R.S.O. 1990, c. S. 26, s. 58 [*SLRA*].

considers 19 factors, including whether there is any agreement between the deceased and dependent and whether there has been a previous distribution or division of property made by the deceased in favour of the dependent by way of agreement or under court order.[14]

While the Court may consider whether an agreement was made between the deceased and former spouse, it is notable that the Court *always* has the discretion to set aside a provision of a domestic contract that limits support. The Court has this authority pursuant to section 63(4) of the SLRA and in particular, pursuant to section 33(4)(a) of the FLA which states that the Court can set aside a waiver of support where it results in "*unconscionable circumstances*".[15]

The threshold of what constitutes "*unconscionable circumstances*" to warrant setting aside a release of dependent support in a cohabitation agreement, marriage agreement, or other domestic contract is high. In *Scheel v. Henkelman,* the Court analyzed the concept of unconscionability and advised that it is not simply improvident or unfortunate results.[16] Rather, it is a result that would shock the conscience of the Court.[17] With this said, a properly drafted cohabitation agreement or marriage agreement that clearly outlines the terms for dependent support can ensure that the Court would not find any unconscionability and save an estate from having to pay any dependent support.

In *Phillips-Renwick v. Renwick Estate,* the parties began cohabiting in 1994 and in 1995 they entered into a cohabitation agreement that released one another from a share in their property before or after death and released each other from any spousal support claims. However, the cohabitation agreement specifically provided Ms. Phillips-Renwick with a life interest in the home (subject to her paying certain expenses), and acknowledged that any beneficiary designations made

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[14] *Ibid,* s. 62(1)(m)(n).
[15] *Ibid,* s. 63(4); *Family Law Act,* R.S.O. 1990, c. F.3, s. 33(4)(a) [*FLA*].
[16] *Scheel v. Henkelman,* 2001 CarswellOnt 28 at para 21 [*Scheel*].
[17] *Ibid.*

in her favour would survive.[18] In 1998, Mr. Renwick made a Will. The parties subsequently married in 2000.[19] Approximately two months after their marriage, Mr. Renwick passed away. Per the provisions of the SLRA at the time, Mr. Renwick's Will from 1998 was invalidated due to the marriage (and, as a result, Mr. Renwick was deemed to have died intestate).[20] The terms of the cohabitation agreement remained enforceable.

Following Mr. Renwick's death, Ms. Phillips-Renwick sought to either set aside the cohabitation agreement or obtain support from Mr. Renwick's estate as a surviving dependent spouse.[21] Ms. Phillips-Renwick claimed that she was still entitled to dependent support despite the cohabitation agreement based on the fundamental principles of spousal support as set out in the Supreme Court of Canada decision, *Miglin v. Miglin*, and in particular because she had not received independent legal advice before signing the agreement.[22]

The Court ultimately upheld the cohabitation agreement and held that Ms. Phillips-Renwick was <u>not</u> entitled to dependent support from the estate. The Court came to this decision for two main reasons.

First, the Court held that Mr. Renwick had adequately provided for Ms. Phillips-Renwick through beneficiary designations that had passed outside of the estate and the living interest in Mr. Renwick's home. Ms. Phillips-Renwick received approximately $100,000.00 as a beneficiary and via the terms of the cohabitation agreement a living interest in the deceased's home. The Court found that these entitlements were significant given that the balance of the estate was only approximately $80,000, the parties were only married for a brief period of two months before Mr.

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[18] *Phillips-Renwick v. Renwick Estate,* 2003 CarswellOnt 3107, at para 1 [*Renwick*].
[19] *Ibid.*
[20] *Ibid,* at para 34.
[21] *Ibid,* at paras 1-3.
[22] *Ibid,* at para 58.

Renwick passed away, neither party had legal dependents, and Ms. Phillips-Renwick was relatively young (in her 50's) and in reasonably good health.[23]

The Court also found that Ms. Phillips-Renwick was not entitled to dependent support due to the terms of the parties' cohabitation agreement. The Court noted that if adequate provisions have already been made to support the former spouse, then the terms of a cohabitation agreement should not be overturned.[24] In addition, the Court found that this cohabitation agreement in question met the two requirements as set out in *Miglin* for spousal support. The circumstances of negotiating the agreement were proper. There was no imbalance or vulnerability between the parties, and the substance of the agreement met the objectives as listed at section 15.2(6) of the *Divorce Act* by reflecting an equitable sharing of the economic consequences of the marriage and its breakdown. Both parties understood the nature and effect of the cohabitation agreement, did not want to co-mingle their assets and liabilities, were mature individuals at the time of signing and contemplated that upon the death of either party, the survivor should not be entitled to bring any claims against the estate.[25] The Court noted that although Ms. Phillips-Renwick did not have proper independent legal advice when she signed the contract, that is not in and of itself enough to set aside the cohabitation agreement.[26] Ms. Phillips-Renwick had consulted with a lawyer during the negotiation process and there was no evidence that Mr. Renwick had exerted any undue influence over Ms. Phillips-Renwick to sign the contract.[27]

[23] *Ibid,* at paras 62-66.
[24] *Ibid,* at para 73.
[25] *Ibid,* at paras 76, 79, 81.
[26] *Ibid,* at para 48.
[27] *Ibid,* at paras 44-48.

Phillips-Renwick v. Renwick Estate therefore provides several key takeaways for drafting a cohabitation or marriage agreement that will withstand scrutiny from the Court against dependent support claims. The parties to a domestic agreement should:

a) Ensure that there is adequate support already provided for their spouse at the time of their potential death. What constitutes adequate provisions is entirely relative to the size and nature of the spouse's estate, the needs of the specific spouse, and consideration of the assets passing outside of the estate. A spouse must ensure that any provisions are commensurate with the value of their projected estate and reflects the length of the relationship between the parties (i.e., the longer the marriage, the greater the provisions needed). In addition, the specific needs of the spouse should be contemplated. Does the spouse have health concerns? Is the spouse employed? Does the spouse have other dependents to care for? If the answer to any of these questions is yes, then the provisions for support should similarly increase.

b) Once adequate provisions have been made for a spouse, the domestic agreement terms must be fairly negotiated. This includes exchanging fulsome financial disclosure and taking steps to ensure that both parties understand the nature and effects of the agreement. It is ideal for both parties to have independent legal advice ("ILA") in this process, however, failure to have ILA will not always be sufficient to set the agreement aside. Where a party is signing a cohabitation or marriage agreement without ILA, there should be some acknowledgement in the agreement or a Waiver of ILA signed by the unrepresented spouse to confirm that they were advised to seek ILA and had been given the opportunity to do so prior to signing the agreement.

c) Finally, any dependent support release terms must be clearly outlined. As noted above, the drafting party must ensure the specific terms of what should occur upon the death and what rights (if any) the survivor has to make a claim against the estate for support. It also further advisable to reference the Court's legislated discretion to set aside cohabitation agreements pursuant to section 63(4) of the SLRA and 33(4)(a) of the FLA (as amended). By including these sections in your agreement, it provides further evidence to the Court that both parties were aware of the Court's discretion and have still chosen to release any entitlement to dependent support in the future.

Beneficiary Designations Passing Outside of the Estate

A cohabitation or marriage agreement must also contemplate what the parties expect in relation to beneficiary designations for life insurance policies, pensions, and/or retirement savings funds and the how these benefits are expected to flow following the death of a party. This issue is particularly important if a spouse to a cohabitation agreement was previously married or in a prior common-law relationship which resulted in financial obligations.

The case *Vladescu v. CTV Globe Media Inc.* demonstrates the conflict that can occur where beneficiary designations conflict with the terms of a domestic contract and consequently, the entitlements of a former spouse versus a new spouse.[28]

The plaintiff in *Vladescu v. CTV Globe Media Inc.,* namely Fiorina Vladescu ("Ms. Vladescu") was the former spouse of the deceased, Gabriel Filotti ("Mr. Filotti").[29] They were married in 1998 and separated in 2001.[30] Upon separation, Ms. Vladescu and Mr. Filotti entered

[28] *Valdescu v. CTV Globe Media Inc.,* 2012 ONSC 4233, at para 37.
[29] *Ibid,* at para 4.
[30] *Ibid,* at para 5.

into a separation agreement whereby Mr. Filotti agreed that Ms. Vladescu would be entitled to his survivor pension benefits.[31] The separation agreement stated as follows:

> *"The husband further agrees that should he cohabit with another person or remarry, **he will make all possible efforts** to enter into a Cohabitation Agreement or Marriage Contract wherein the wife's rights under this paragraph are recognized and his future wife or common-law wife releases all rights or claims of any kind or nature whatsoever to his pension."* [Emphasis Added][32]

In April 2004, Mr. Filotti married his second wife, Natalia Garanovscaia ("Ms. Garanovscaia").[33] After their marriage, Mr. Filotti submitted a change of beneficiary form and sought to designate Ms. Garanovscaia as the primary beneficiary of his pension benefits.[34] Mr. Filotti did not enter into a cohabitation agreement with Ms. Garanovscaia that precluded her rights to his pension, as was required pursuant to his separation agreement with Ms. Vladescu. As such, and upon Mr. Filotti's death, CTV (the pension plan administrator) advised Ms. Vladescu that she was not the rightful 'spouse' to the pension plan and that Ms. Garanovscaia would receive the pension benefits.[35]

The Court was tasked with determining whether Ms. Vladescu, the former spouse, or Ms. Garanovscaia, the current spouse, should be entitled to the pension benefits. The Court determined that the wording of the separation agreement term requiring Mr. Filotti to enter into a new cohabitation agreement was extremely important. Since the separation agreement only specified that he needed to "*make all possible efforts*" to enter into a new cohabitation agreement, it only

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[31] *Ibid,* at para 8.
[32] *Ibid,* at para 23.
[33] *Ibid,* at para 28.
[34] *Ibid.*
[35] *Ibid,* at para 32.

contemplated what *might* be necessary if Mr. Filotti was to cohabit or remarry with another person and did not sufficiently protect Ms. Vladescu's beneficiary interest in the pension plan benefits.[36] Accordingly, Mr. Filotti's change of beneficiary form was binding and Ms. Garanovscaia, as the surviving spouse, was entitled to receive the pension benefits.[37]

This case serves as a cautionary tale for all parties. Had the terms of Ms. Vladescu and Mr. Filotti's separation agreement explicitly *required* Mr. Filotti to enter into a cohabitation agreement with a new spouse to solidify his former wife's interest in his pension benefits, it seems likely that the Court would have found in favour of Ms. Vladescu, the first wife, and denied the pension benefits to his second wife, Ms. Garanovscaia. Further, if Mr. Filotti had entered into a cohabitation with Ms. Garanovscaia but failed to preclude her rights to his pension, then the Court would have had to grapple far more with contradicting terms between the separation agreement and cohabitation agreement.

As such, when drafting a cohabitation agreement, it is absolutely necessary to ask whether either party has previously entered into a separation with a former spouse and if so, to ask to see a copy of that separation agreement (or court order, where applicable) to determine what on-going obligations may exist between the former spouses that may impact what can be agreed upon between the parties to the new marriage or cohabitation agreement. If the party does have prevailing obligations under a separate domestic contract or court order, it would be prudent to either specifically reference these obligations/designations in any new cohabitation agreement or to help that party in negotiating a release of their obligations or change of beneficiary before executing a new cohabitation agreement. By taking the time to get background information about

[36] *Ibid.*
[37] *Ibid,* at para 64.

your client's relationships, assets, and on-going obligations to other spouses, it could save all parties a significant headache in the future of trying to fight over who should be entitled to beneficiary proceeds and which contract truly prevails.

New Considerations Related to Cryopreserved Genetic Materials

Due to the significant scientific, social, and legal developments that have occurred in the area of assisted reproduction and family planning, it is becoming increasingly common for individuals and couples to have cryopreserved genetic material in storage. Many people who have cryopreserved sperm, eggs or embryos do not think to mention this detail to their lawyers when meeting to discuss the terms of a domestic contract such as a marriage agreement, cohabitation agreement or separation agreement. Lawyers should be canvassing this consideration with clients as a matter of course to identify cases where these issues may arise. Lawyers also need to be aware of how this could impact the advice they need to be giving to their clients.

The *Assisted Human Reproduction Act* and the corresponding Consent Regulations allow for the use of genetic material after death where consent has been granted in writing by the person during their lifetime. Any consent granted in writing can be withdrawn, however, the withdrawal of consent must also be in writing.[38]

Lawyers must also be aware that the SLRA was amended in 2017 to expand the definition of child to include "*a child conceived and born alive after the parent's death*" subject to specific conditions in s 1.1(1) of the *SLRA* being met.[39] If the specific conditions in the SLRA are met, a

[38] *Consent for Use of Human Reproductive Material and In Vitro Embryos Regulations*, SOR.2007-137.
[39] *Succession Law Reform Act*, RSO 1990, c S.26, s 1(1)(b).

child of the deceased who is conceived and born after the deceased's death could acquire rights to share in the estate or rights for support as a dependent of the deceased.

Typically, any genetic materials being cryogenically stored by a fertility clinic in Canada are accompanied by consent forms and contracts signed by the parties at the time the materials were retrieved for storage. These forms usually include specific directions on what will happen to the genetic material upon death – whether or not they will be destroyed, donated for research, or perhaps pass onto an intended beneficiary (intuitively being the spouse of the deceased party). These forms are generally signed at the clinic and without the benefit of legal advice in advance.

A prudent lawyer will canvass what their client's intentions are with regard to any cryopreserved sperm, eggs or embryos in the event of a separation or death. If the client does not wish to have children born from their cryopreserved genetic material following their death, then the marriage agreement or cohabitation agreement can be used as a means to withdraw that consent, in writing. Similarly, if the client intends on permitting their spouse to conceive a child using the cryopreserved genetic material after death, then setting out those intentions in writing, in the context of a cohabitation agreement or marriage agreement would be appropriate. Setting out a client's intentions in relation to their cryopreserved genetic material in a written agreement between spouses will provide the parties with clarity and certainty, and in some cases doing so will protect the estate from unintended claims by children conceived and born after the death of the parent.

Conclusion

Clients rely on their lawyer to know the applicable laws and advise them of their options when preparing a domestic agreement. In the same way that a client relies on their lawyer for the law, they inadvertently rely on their lawyer to do a fulsome investigation of the relevant facts.

Failing to properly investigate the facts can result in a marriage or cohabitation agreement that does not adequately provide for a client's needs. Similarly, failing to consider how the specific facts effect the totality of the circumstances can result in an agreement that is internally inconsistent, unenforceable, or at risk of being set aside by the court.

Many of these risks can be minimized in the early stages of a file by asking pointed and specific questions of a client's circumstances and by paying close attention to the details of the file. Lawyers must then think through each detail in so far as how they may affect the more standard terms that are included in the precedents that all lawyers work from, particularly standard form releases. Drafting terms that are specific to each and every client is a must, particularly when working in the area of marriage agreements, cohabitation agreements, and their impact on estate planning needs.

MASTERING MARRIAGE CONTRACTS AND COHABITATION AGREEMENTS: PRACTICAL INSIGHTS AND CREATIVE DRAFTING SOLUTIONS

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