

# FAMILY

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### DOMESTIC AGREEMENTS

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## Chapter 9

### Domestic Agreements<sup>1</sup>

This chapter will use the terminology and procedure mandated by the Supreme Court Family Rules and Forms, B.C. Reg. 169/2009 (the “SCFR”), which come into effect on July 1, 2010.

#### [§9.01] Introduction to Domestic Agreements

Negotiated agreements are an important tool for resolving disputes or potential disputes between spouses and cohabiting parties. They give control to the parties and avoid the emotional and financial cost of prolonged litigation. The three most common types of domestic agreements are the following:

- (a) separation agreements, made on marriage breakdown or breakdown of a common law relationship;
- (b) marriage agreements, usually made by spouses at the beginning of their marriage or in anticipation of marriage; and
- (c) cohabitation agreements, made by parties who are not married and who are living together as spouses.

Drafting techniques for domestic agreements are beyond the scope this chapter. For special clauses, refer to the *Family Law Agreements—Annotated Precedents* (Vancouver: Continuing Legal Education Society of BC).

Strict adherence to any precedent is dangerous because a provision that is fair in one set of circumstances may be unfair in another. Lawyers must be creative when drafting provisions that are suitable to the particular needs and intentions of their individual clients.

A checklist is a useful guide when obtaining information from a client, discussing the proposed terms of the agreement, and drafting the agreement. See the checklists for “Family Practice Interview”, “Family Law Agreement Procedure”, “Separation Agreement Drafting” and “Marriage Agreement Drafting” in the Law Society of BC’s *Checklists Manual*: [http://www.lawsociety.bc.ca/practice\\_support/pcm.html](http://www.lawsociety.bc.ca/practice_support/pcm.html).

<sup>1</sup> **Pamela Rowlands** of Peterson Stark Scott, kindly revised this chapter in January 2010. Karen A. Iddins of Rees-Thomas & Company kindly revised this chapter in July 2004 and July 2005. Revised in August 2002 by Keith Bowman. Reviewed annually January 1996 to March 2001 by Diane M. Bell of Clark, Wilson, Vancouver.

Once negotiated and finalized, four copies of the agreement should be executed: one for the lawyer’s file, one for the client, one for the spouse and one for the spouse’s lawyer.

To help protect an agreement against a challenge, the parties must fully disclose all relevant financial facts. To achieve this, the parties should exchange comprehensive information concerning assets, liabilities, income and expenses. Optimally, the parties will execute sworn financial statements: alternatively, annex schedules of assets, liabilities, and (sometimes) monthly living expenses to the agreement.

#### [§9.02] Separation Agreements

##### 1. Introduction to Separation Agreements

A separation agreement is a contract between the parties that resolves the outstanding issues between them when their marriage or common law relationship comes to an end.

Separation agreements are not defined in the *Family Relations Act*. However, if the separation agreement is in writing, signed by both parties and witnessed, it could come within the definition of s. 61 (“marriage agreement” – see §9.03).

Once both parties sign the separation agreement, the lawyer should obtain instructions to draw up any documents that are required under the terms of the agreement (for example, irrevocable designation of beneficiary or transfer documents). Where applicable, the lawyer should send notice of an irrevocable designation of beneficiary to the insurance company, and send a copy of any agreement regarding these provisions to the employer or pension trustee. The lawyer should advise the client of all matters that he or she must attend to in order to implement the agreement: using a checklist is effective for this task.

##### 2. When to Use a Separation Agreement

Separation agreements can be used any time the parties are willing to negotiate a settlement of some or all of the issues between them.

A separation agreement gives the parties great flexibility and control in setting out their rights and their responsibilities now that their relationship has ended. It also is much less expensive than obtaining an order from the court, and the parties are much more likely to comply with a resolution of issues that they have negotiated than with something that is imposed by order.

### 3. Judicial Intervention in Separation Agreements

It is important for the parties to consider all future contingencies before they execute a separation agreement because it is intended to be a final settlement (unless there is an indication in the agreement to the contrary).

The courts generally favour the enforcement of agreements, and have been reluctant to interfere with the parties' contractual arrangements so long as they are fair and no material misrepresentations have been made. A significant factor in determining "fairness" is whether or not both parties have had the benefit of independent legal advice.

The courts apply contractual defences under the common law such as duress, undue influence, unconscionability, and mistake to set aside separation agreements.

In addition to the common law, there are statutory provisions that allow the courts to vary separation agreements under certain circumstances. Sections 65 and 68 of the *Family Relations Act* allow a court to vary a separation agreement in limited circumstances, generally those involving fairness.

The Supreme Court of Canada reviewed both the common law basis for judicial intervention (unconscionability) and the statutory basis under s. 65 (fairness), in *Rick v. Brandsema*, 2009 SCC 10. In this case the parties had settled on a division of assets during a time that the wife was "mentally unstable". The allegations were that the husband had taken advantage of the wife's vulnerable state and had deliberately undervalued and hidden assets. According to the Court, the trial judge "found that the wife was unstable at the time the agreement was negotiated and executed, and that the husband took advantage of this 'very significant' vulnerability by agreeing to a bargain that he knew was based on misleading financial information, due in part to his own deliberate non-disclosure" (para. 2). Abella J. notes that: "The circumstances of this case move us to consider the implications flowing from *Miglin* for the deliberate failure of a spouse to provide all the relevant financial information in negotiations for the division of assets. In my view, it is a corollary to the realities addressed by this Court in *Miglin* that there be a duty to make full and honest disclosure of such information when negotiating separation agreements" (para. 5). Abella J. supports the trial judge's conclusion that the husband's "exploitative conduct" (determined by his failure to make full and honest disclosure and taking advantage of his wife's known mental state) justified a compensation order different from the negotiated equalization payment because the agreement was unconscionable (para. 6). The parties to a separation agreement have a duty to

make full and honest disclosure of financial information to protect the integrity of the result of those negotiations (para. 47). "The deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation (para. 47).

In *Stark v. Stark* (1990), 26 R.F.L. (3d) 425 (B.C.C.A.), the Court held that it has jurisdiction to redistribute family assets, notwithstanding a separation agreement, when the property division in the agreement is unfair, having regard to:

- (a) the duration of the marriage;
- (b) the duration of the period during which the spouses have been living separate and apart;
- (c) the date when the property was acquired or disposed of;
- (d) the need of each spouse to become or remain economically independent and self-sufficient; and
- (e) any other circumstances relating to the acquisition, preservation, maintenance, improvement, or use of property, or the capacity or liabilities of the spouse.

## [§9.03] Marriage Agreements

### 1. Introduction to Marriage Agreements

Historically, agreements contemplating the break-up of a marriage were unenforceable as they were thought to be contrary to public policy. The proclamation of the *Family Relations Act* in 1979 reflected that British Columbians were ready to accept certain types of contracts that explicitly contemplate the dissolution of marriage.

Usually, a marriage agreement is understood to be an agreement made between spouses at the beginning of their marriage. Although the parties generally do not expect their marriage to fail, they recognize that there is a possibility that it will do so, and they want to provide for such an event.

These agreements may address matters arising during marriage, but more frequently are intended to resolve issues arising in the event of marriage breakdown.

The *FRA* defines "marriage agreement" in s. 61(2).

- (2) A marriage agreement is an agreement entered into by a man and a woman before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for

- (a) management of family assets or other property during marriage, or
- (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.

According to the definition these agreements deal with property and assets. The *FRA* allows the spouses to use a marriage agreement to provide for management of assets and division of property. In this way, couples can contract out of the statutory provisions that otherwise govern the division of assets on marriage breakdown (subject to s. 65 of the *FRA*).

A “marriage agreement” must be in writing, signed by both parties, and witnessed (*FRA*, s. 61(3)). While “marriage agreements” are subject to judicial reapportionment on the basis of fairness under s. 65, an “antenuptial” settlement is variable under s. 68. However, s. 68 will apply to a reapportionment if, for example, one of the formalities required by s. 61 is not met (*Connelly v. Connelly*, [1981] B.C.J. No. 313 (Q.L.)).

While more popular than when first made possible, marriage agreements still remain an exception rather than the rule.

## 2. When to Use a Marriage Agreement

Marriage agreements are ideally suited to people who have significant assets when they marry, or to those who may expect to inherit significant assets during the marriage. These agreements often are not well suited to couples that are about to enter into traditional marital relationships, with neither party having significant assets or prospects of a significant inheritance.

It is, of course, the client who decides whether a marriage agreement is appropriate. The lawyer’s role is to explain the pros and cons of entering into a marriage agreement, and, if a marriage agreement is desired, to draft an agreement that best meets the client’s needs and desires. The lawyer must also always pay attention to the reasonableness and enforceability of the agreement.

## 3. Judicial Intervention in Marriage Agreements

Jurisprudence in the area of marriage agreements is limited. The Court of Appeal has indicated that courts should treat marriage agreements with great deference (*Schaub v. Schaub* (1984), 63 B.C.L.R. 64 (C.A.)). However, it is safe to assume that unreasonable agreements will be suspect, even if the parties had independent legal advice.

An agreement entered into in contemplation of marriage should be executed as far in advance of the marriage as is possible under the circumstances. Agreements that are negotiated while wedding plans are being finalized, or that the parties execute on the way to a ceremony, create tremendous pressures and may incite claims of undue fairness or duress. Lawyers should advise clients that, even when time is short, it is not safe to assume that there will be no problem in having a marriage agreement executed after the marriage. Also, insist that the parties have independent legal counsel, whatever the circumstances.

In *Hartshorne v. Hartshorne*, 2004 SCC 22, the Court held that a marriage agreement is fair if the parties have full knowledge of its terms when it is entered into and the parties intend it to apply to the circumstances that exist when the agreement is made. This decision was based on a specific set of facts and time will tell if the courts in British Columbia will follow *Hartshorne* for most challenges to marriage agreements or if other cases will be distinguished based on their facts.

Even agreements that are reasonable when they are made may turn out to be unfair during the course of the marriage having regards to the criteria set out in s. 65 of the *FRA*. If a party does not comply with the terms of the agreement to such an extent that the court considers their actions amount to a fundamental breach, the court can find that they have repudiated the agreement. This finding may render the agreement unenforceable (*Smith v. Lau*, 2004 BCCA 443).

Applications to vary marriage agreements (under s. 68 of the *FRA*) are commenced by filing a notice of family claim (SCFR 3-1).

## [§9.04] Cohabitation Agreements

Historically, cohabitation agreements had been held to be unenforceable. They were perceived to be contrary to a public policy aimed at maintaining the sanctity of marriage. Now, however, courts will enforce reasonable cohabitation agreements. In the event of a separation, it is reasonable to expect that cohabitation agreements will be enforced in a similar way to a marriage agreement.

Section 89 of the *FRA*, read with the definition of “spouse”, provides that two people not married to each other (including same gender), who lived together in a marriage-like relationship for a period of not less than two years, are each responsible for the support and maintenance of the other having regard, among other things, to an express or implied agreement between them. As well, s. 28 provides that a father and mother of a child may provide, by written agreement, that they are joint guardians of the child and that one of them is sole

guardian.

As to property rights, *Pettikus v. Becker*, [1980] 2 S.C.R. 834 (S.C.C.) and *Peters v. Beblow*, [1993] 1 S.C.R. 980(S.C.C.), made it clear that the law of constructive trust will be applied by the courts to divide assets in the case of an unmarried relationship.

Additionally, the *FRA* provides that spouses (including unmarried and same-gender couples living in a marriage-like relationship) who made a written agreement between them are subject to Parts 5 and 6 of the Act (s. 120.1). The language indicates that cohabitation agreements are subject to reapportionment (under s. 65 of the *FRA*) on the grounds of unfairness. Furthermore, the fairness of the agreement will be considered within the context of determination and division of family assets under the *FRA*.

In *Johnstone v. Wright*, 2005 BCCA 254, the Court allowed the appeal and found that the cohabitation agreement was fair. In this case, the relationship had lasted six years and there were no children. The appellant was very wealthy, while the respondent brought very little into the relationship. The parties had kept their assets separate and the respondent had received gifts from the appellant such that she was in a much better financial position at the end of the relationship. The Court found that the agreement had defined the parties expectations and should not be varied.

### **[§9.05] Wills and Estates Considerations**

In estate proceedings, a court will consider the fact that a spouse has been provided for under a separation agreement. However, the agreement alone will not automatically support a conclusion that a testator has discharged his or her moral duty under the *Wills Variation Act*, R.S.B.C. 1996, c. 490.

If a party to a separation agreement dies before a divorce but after the agreement has been signed, the *Wills Variation Act* will apply even if the separation agreement contains a release to the contrary (*Wagner v. Wagner Estate* (1991), 85 D.L.R. (4<sup>th</sup>) 699 (B.C.C.A.)). A separation agreement is not an automatic bar to a claim under the *Wills Variation Act*, but is a factor that must be taken into consideration when assessing the claim against the estate (*Chutter v. Chutter* (2000), 74 B.C.L.R. (3d) 117 (C.A.)). See also Lynn Waterman's case comment (January 1992) 50:1 *The Advocate*.

Family practitioners should recommend to a client that the client consider revoking his or her will immediately following marriage breakdown. Clients also should be advised to make a new will when they separate. If there is no will, the estate may pass on intestacy to their separated spouse. Refer to ss. 14, 15 and 16 of the *Wills*

*Act*, R.S.B.C. 1996, c. 489, for methods of revoking a will. See also the *Practice Material: Estates*.

### **[§9.06] Minutes of Settlement and Consent Orders**

As an alternative to, or in conjunction with a separation agreement, the parties may consider resolving issues by way of minutes of settlement.

Minutes of settlement record a settlement of a family law case. They should deal with each claim made in the case.

Minutes of settlement should be drafted remembering that the result will be a court order, not a marriage agreement, a separation agreement, nor an ante-nuptial or post-nuptial marriage settlement.

It is common to subsequently incorporate the minutes of settlement into a consent order that is filed in court. Consequently, the parties should agree on the terms of a draft order and counsel should append it to the minutes of settlement, whenever possible.

Typically, counsel sign the minutes. However, prudent counsel insist on obtaining the signature of the parties to avoid future litigation since it is not uncommon for parties to a family law proceeding to assert lack of authority in an effort to circumvent a settlement.

The choice between minutes of settlement and a separation agreement, and the subsequent decision as to which, if any, of the terms of the minutes or agreement to include in a consent order, can be complicated. The complexity arises from the intertwining doctrines of *res judicata*, merger, and election, which are difficult to understand and to apply.

If proceedings are ongoing, counsel may choose minutes of settlement as an alternative to a written separation agreement. They may do so to save time, to make enforcement proceedings simpler, or to reduce the risk of further proceedings to set aside or vary the settlement.

In some cases it will be best to combine a separation agreement with a consent order. However, when doing so, counsel should ensure that any provisions in the agreement that can be and should be incorporated in the court order are incorporated, if the parties may need to enforce the provisions later.

Minutes of settlement are advantageous when time is important to settlement. Less time is spent arguing over details. If the issues are well defined and the parties' intentions clear and easy to express, the time saved may not be lost in subsequent disagreement over the wording of the order, or even on proceedings to enforce the settlement. Contrastingly, a consent order that is ambiguous, vague, or uncertain, may be difficult if not impossible to enforce and there is no judgment or separation agreement to assist.

Parties who agree on the terms of an order may obtain an order by consent without a court appearance. So long as their consent is endorsed on a draft order, the court is likely to accept the order so long as the interests of a child are preserved and the order appears unambiguous and intelligible on its face.

The court will endorse minutes of settlement. If a party refuses to consent to an order in the same terms as the minutes of settlement, the person seeking enforcement usually applies for a stay of proceedings, save for the enforcement of the settlement. Typically, however, an order is entered by consent.

A consent order cannot be appealed. Nor can a court vary the property provisions (*Mitchell v. Mitchell* (1982), 35 B.C.L.R. 392 (S.C.)). In *Mitchell* the court refused an application for variation of the terms of the settlement order on the ground that the minutes of settlement had merged with the consent order. The effect of merger is that no agreement exists for the court to vary. The existence of the minutes remains only as a fact to consider on a subsequent application to vary support. This is probably the case whether or not the minutes are appended to the order.

In many cases, the subject of concern about finality is not the property division, but the ongoing claim for spousal support. The effect of a consent order on a subsequent application to vary spousal support is unclear.

It is always open to a court to intervene with respect to support for a child. Parents cannot bargain away a child's right to support.

When an agreement is filed in the Provincial Court under s. 121, variation is available despite a provision stating that the agreement is final. There is no similar provision when an agreement is filed in the Supreme Court under s. 122.

A written agreement dealing with child custody or child or spousal support may be filed with the Provincial Court (*FRA*, s. 121) or with the Supreme Court (*FRA*, s. 122). The agreement is then enforceable as if the relevant provisions were contained in a court order.

To be enforceable in the Provincial Court, an agreement made before July 1, 1995, must be signed by the parties to it and accompanied by a consent in the prescribed form by the person against whom the provision is being enforced (s. 121(3) of the *Family Relations Act*). Consents are not required to agreements made after July 1, 1995.

If an agreement made before July 1, 1995 is to be filed in the Supreme Court under s. 122 of the *FRA*, a consent of every party to the agreement must also be filed. Consents are not required for agreements made after July 1, 1995.

When an agreement is filed in Provincial Court, it may be varied or rescinded by filing a new agreement or on application to the Provincial Court (*FRA*, s. 121(4)). Section 122 does not contain similar provisions for agreements filed in the Supreme Court. Therefore, filing with the Provincial Court may be best when the only issues are custody and support because it eases and reduces the cost of enforcement and permits variation with changing circumstances.