

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p style="text-align: center;">INTRODUCTION</p> <p>Purpose and currency of checklist. This checklist is designed to be used in conjunction with the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist, the FAMILY PRACTICE INTERVIEW (D-1) checklist, and the SEPARATION AGREEMENT DRAFTING (D-3) or the MARRIAGE AGREEMENT DRAFTING (D-4) checklist. This checklist is not specifically designed to relate to cohabitation agreements, although many of the provisions will apply. This checklist is current to September 1, 2018.</p> <p>New developments:</p> <ul style="list-style-type: none"> • Law Society Rules <ul style="list-style-type: none"> • Juricert password. When using the electronic filing system of the Land Title Office, a lawyer must not disclose the lawyer’s password or permit any other person, including an employee, to use the password or affix the lawyer’s e-signature (Law Society Rule 3-96.1). • Temporary articulated student restrictions. Temporary articulated students are restricted from making certain appearances in Supreme Court, but not Provincial Court (Law Society Rule 2-71(2)). • Electronic transfer of trust funds. The Rules were amended in December 2017, effective July 1, 2018, to allow lawyers to electronically transfer trust funds using an online banking platform (Law Society Rules 3-64(4) and (6) to (8); 3-64.1; 3-64.2; 3-65(1), (1.1), and (2); and 3-66(2)). For questions, contact trustaccounting@lsbc.org or 604.697.5810. • Client identification and verification. The Federation of Law Societies of Canada has proposed amendments to its Model Rule on Client Identification and Verification Requirements. If the Federation’s Council approves the amendments, they will be forwarded to the law societies for adoption. Changes to the Law Society of BC’s rules would require the Benchers’ approval and, if approved, may affect the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist current to September 1, 2018. • The Law Society Rules are published at www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules. <p>Of note:</p> <ul style="list-style-type: none"> • Fraud prevention. Lawyers should maintain an awareness of the myriad scams that target lawyers, including the bad cheque scam and fraudulent changes in payment instructions, and must be vigilant about the client identification and no-cash rules. See the “Fraud Prevention” page on the Law Society website at www.lawsociety.bc.ca/support-and-resources-for-lawyers/lawyers-insurance-fund/fraud-prevention. • Searches of lawyers’ electronic devices at borders. In response to the Law Society’s concerns about the searches of lawyers’ electronic devices by Canada Border Services Agency officers, the Minister of Public Safety advised that officers are instructed not to examine documents if they suspect they may be subject to privilege, if the documents are specifically marked with the assertion they are privileged, or if privilege is claimed by a lawyer with respect to the documents. View the Minister’s letter and Law Society’s response at www.lawsociety.bc.ca/our-initiatives/rule-of-law/issues-that-affect-the-rule-of-law. Lawyers are reminded to claim privilege where appropriate and to not disclose privileged information or their password to electronic devices containing 					

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<p>privileged information without client consent or a court order. See also “Client Confidentiality—Think Twice before Taking Your Laptop or Smart Phone across Borders” in the Spring 2017 <i>Benchers’ Bulletin</i> and “Crossing the border into or out of the United States” in the Spring 2018 <i>Benchers’ Bulletin</i>.</p> <ul style="list-style-type: none"> • Unmarried spouses. Family law agreements made before, during, or after a relationship between unmarried spouses (whether of the same or the opposite sex) are subject to judicial review for fairness on the same basis as agreements made between married spouses. Review the <i>Family Law Act</i>, S.B.C. 2011, c. 25 (“<i>FLA</i>”), Part 5, which provides for division of property between spouses (married and unmarried alike). Review <i>FLA</i>, Parts 3 and 4 regarding significant regime changes concerning children, and review <i>FLA</i>, Part 7, concerning support. • Incapacity and adult guardianship legislation. Amendments to the <i>Power of Attorney Act</i>, R.S.B.C. 1996, c. 370, and the <i>Representation Agreement Act</i>, R.S.B.C. 1996, c. 405, in effect March 25, 2015 (<i>Justice Statutes Amendment Act, 2015</i>, S.B.C. 2015, c. 6), provide for termination of powers of attorney or representation agreements upon separation of spouses if a spouse is, respectively, an attorney or representative. • Aboriginal law. If the client or the other party has ties to an Aboriginal community, special considerations may apply (e.g., see items 1.7 and 2.18.6 in the FAMILY PRACTICE INTERVIEW (D-1) checklist). Note the requirements of <i>FLA</i>, Part 10, Division 3, which provide for standing and notice in cases concerning Nisga’a and treaty First Nations children and treaty lands. Review the federal <i>Family Homes on Reserves and Matrimonial Interests or Rights Act</i>, S.C. 2013, c. 20, which pertains to the ability of First Nations to make rules about family residences on reservation lands and how those homes will be used and occupied upon the breakdown of a spousal relationship. Sections 13 to 52 apply to First Nations that have not enacted their own matrimonial real property laws. The Act applies to married and common-law spouses living on reserve lands where at least one spouse is a First Nations member or an Indian. It provides separate regimes for matrimonial property division for member and non-member spouses on reserve and is very different from the provincial legislation. Consider whether a lawyer with Aboriginal law experience should be consulted. Further information on Aboriginal law issues is available on the “Aboriginal Law” page in the “Practice Areas” section of the CLEBC website (www.cle.bc.ca) and in other CLEBC publications. • Additional resources. For detailed information about family practice, see the <i>British Columbia Family Practice Manual</i>, 4th ed. (CLEBC, 2006–); <i>Financial Issues in Family Law</i>, 2nd ed. (CLEBC, 2006–); annual editions of <i>Annotated Family Practice</i> (CLEBC); <i>Family Law Sourcebook for British Columbia</i>, 3rd ed. (CLEBC, 2002–); <i>Desk Order Divorce—An Annotated Guide</i> (CLEBC, 1999–); and <i>Family Law Agreements—Annotated Precedents</i>, 3rd. ed. (CLEBC, 1998–). 					

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<p style="text-align: center;">CONTENTS</p> <ol style="list-style-type: none"> 1. Initial Interview and Follow-up 2. Drafting the Agreement (Summary) 3. Concluding the Agreement 4. Closing the File <p style="text-align: center;">CHECKLIST</p> <p>1. INITIAL INTERVIEW AND FOLLOW-UP</p> <p>1.1 Confirm compliance with Law Society of British Columbia Rules on client identification and verification and complete the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist. Complete the FAMILY PRACTICE INTERVIEW (D-1) checklist.</p> <p>1.2 Review the applicable provisions of the <i>Family Law Act</i>, S.B.C. 2011, c. 25 (the “<i>FLA</i>”), starting with ss. 6 and 7, in drafting the terms of any family law agreement. Specific agreements are dealt with at s. 44 (parenting arrangements), s. 50 (guardianship), s. 58 (contact with children), s. 92 (property division), s. 127 (pension division), s. 148 (child support), and s. 163 (spousal support).</p> <p>1.3 Note that <i>FLA</i>, s. 6(5) allows a minor who is a parent or spouse to enter into and be bound by an agreement. (Sections 29 and 31 of the <i>Infants Act</i>, R.S.B.C. 1996, c. 223 on marriage contracts and settlements were repealed in 2011.)</p> <p>1.4 In the case of a separation agreement, consider whether the client might be best served by a separation agreement, by minutes of settlement embodied in a consent order, or by a consent order in a joint family action. Review <i>FLA</i>, s. 93 regarding the court’s jurisdiction to set aside a property division agreement, <i>FLA</i>, s. 148 regarding the court’s jurisdiction to set aside or replace a child support order, and <i>FLA</i>, s. 164 regarding the court’s jurisdiction to set aside spousal support agreements. If support reviews and variations or changes to parenting arrangements are contemplated, discuss with the client the differences between varying an agreement and varying an order, in terms of both law and process, and under both the <i>Divorce Act</i>, R.S.C. 1985, c. 3 (2nd Supp.), and the <i>FLA</i>.</p> <p>1.5 Determine the client’s wishes with regard to specific terms of the agreement (see the SEPARATION AGREEMENT DRAFTING (D-3) or the MARRIAGE AGREEMENT DRAFTING (D-4) checklist).</p> <p>1.6 Advise the client that a spouse’s interest in “family property” arises on separation (under <i>FLA</i>, s. 84). The triggering events provided for in the <i>Family Relations Act</i>, R.S.B.C. 1996, c. 128, no longer apply.</p> <p>1.7 Consider filing a Form P1 (Division of Pensions Regulation, B.C. Reg. 348/2012, under the <i>FLA</i>) to notify pension administrators of a party’s interest in the other party’s pension, pending a completed agreement.</p> <p>1.8 If the client or the other party has ties to an Aboriginal community, special considerations may apply (e.g., see items 1.7 and 2.18.6 in the FAMILY PRACTICE INTERVIEW (D-1) checklist); consider whether a lawyer with Aboriginal law experience should be consulted.</p>					

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<p>1.9 Request schedules of assets and liabilities from your client as well as supporting documents, if available.</p>					
<p>2. DRAFTING THE AGREEMENT (SUMMARY)</p>					
<p>2.1 Prepare an outline of the agreement indicating the clauses from your precedent file that will be included (see the SEPARATION AGREEMENT DRAFTING (D-3) or the MARRIAGE AGREEMENT DRAFTING (D-4) checklist; see also CLEBC’s <i>Family Law Agreements—Annotated Precedents</i> for precedents and discussion).</p>					
<p>2.2 Consider any tax implications for the disposition or transfer of assets. If uncertain, refer questions to a tax specialist. If there are any Aboriginal parties, consider the tax implications if a party is exempt from federal or provincial taxation.</p>					
<p>2.3 Consider and specify the principal facts and assumptions underlying the agreement. This will assist the parties and any reviewing lawyer or court to understand the basis of the agreement.</p>					
<p>2.4 Include formal or informal statements of assets and awareness of each other’s assets:</p> <ol style="list-style-type: none"> .1 Ensure that the agreement contains a specific assurance of the completeness and accuracy of each spouse’s asset disclosure, and indicates that each is relying on the other’s truthfulness. .2 Provide a method for resolving disputes if the statements later prove to be inaccurate (e.g., provide that undisclosed assets are deemed to be owned by the parties as tenants-in-common or that there is a rebuttable presumption that they will be divided 50/50). .3 Consider either recommending that the parties exchange sworn financial statements (particularly if the parties’ assets and debts are significant or complex) or providing the client with a written notice disclaiming any responsibility for checking the accuracy of their spouse’s statement of assets. Alternatively, insert a “whereas” clause confirming that no independent investigation of the value of property or liabilities has been made by the lawyers, and that the parties desire to make the agreement without such further investigation. Caution: the weight of opinion at CLEBC presentations on the <i>FLA</i> is that general provisions concerning disclosure likely will not be sufficient to protect an agreement from being set aside under <i>FLA</i>, s. 93(3) if disclosure has been inadequate. Specific disclosure of assets and values is recommended. .4 Where the client is incapable of checking the accuracy of their spouse’s statement of assets, consider and discuss retaining experts (e.g., valuator, appraiser, accountant). Document a client’s decision not to obtain valuations of significant assets and your recommendation that further investigations should be undertaken, to reduce the vulnerability of the agreement to court intervention later and to reduce the risk of a professional complaint. <p>2.5 Prepare the first draft of the agreement.</p> <p>2.6 Review the first draft, checking each clause to ensure that it achieves the client’s objectives, and checking the document as a whole to ensure that it is internally consistent. Make necessary corrections and prepare a second draft.</p>					

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<p>2.7 Send the second draft to the client with a request that the client review it in its entirety and note any changes or questions the client may have. (If sending the document electronically, remove metadata to prevent the reader from viewing draft changes in the document’s history.) Caution the client not to share the draft with the other party until you and the client have agreed that the draft is in order.</p> <p>2.8 Review the entire agreement with the client and discuss any proposed changes or questions. Make any changes required to the second draft. Send a copy of the revised draft to the client’s spouse or the spouse’s lawyer. (If sending the document electronically, remove metadata to prevent the reader from viewing draft changes in the document’s history.) Decide whether to send the draft “without prejudice”. If appropriate, confirm with the other party’s lawyer the other party’s contribution to the cost of preparing the agreement. Review any alterations with the client.</p> <p>2.9 If the client’s spouse does not have counsel, have the client’s spouse fully execute the agreement first and give the executed copy to your client for their signature to ensure that the agreement is returned. Consider providing a sufficient number of copies for execution to allow each spouse and their counsel to have an original copy.</p> <p>2.10 Satisfy yourself that there are no problems with regard to:</p> <ul style="list-style-type: none"> .1 Lack of certainty of terms. .2 Failure to disclose, fraud, or misrepresentation. .3 Undue influence. .4 Unconscionability. <p>2.11 Consider who will draw all required forms: e.g., irrevocable designation of beneficiary, authorization to insurer to give notice of default, authorizations to pension plan administrators, RSP rollover forms, and releases to and from any corporations in which the parties were involved and confirm with the client in writing. Consult experts as appropriate. Where third parties are involved (e.g., pension plan administrators or insurers) consider having them review the proposed wording to ensure effectiveness.</p> <p>2.12 Consider whether to draft non-expiring travel letters for minor children. Consider specific protocols for travel with children, including restrictions to countries that are signatories to the <i>Hague Convention</i>.</p> <p>2.13 Consider including a dispute resolution mechanism such as mediation or arbitration in the event of disputes. See <i>BC Code</i> rule 3.2-4 on a lawyer’s obligation to advise and encourage settlement of disputes.</p>					
<p>3. CONCLUDING THE AGREEMENT</p>					
<p>3.1 Where the other spouse has chosen not to obtain independent legal advice, ensure that they acknowledge (preferably in writing) that you have advised seeking legal advice, that they have refused, and that you have advised that you are not protecting their interests (see rule 7.2-9 of the <i>BC Code</i>).</p>					
<p>3.2 Where the client insists on signing an agreement against your advice, put your opinion in writing and confirm with the client that, notwithstanding your advice, the client has instructed you that they still wish to sign the agreement. Consider declining to take the client’s signature on an agreement you consider to be against their best interests (you might be called as a witness in the future).</p>					

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<p>3.3 Ensure compliance with relevant formalities:</p> <ul style="list-style-type: none"> .1 Under the <i>FLA</i>, an agreement may be verbal or written, unless specified. A “written agreement” is defined in <i>FLA</i>, s. 1(1) as an agreement in writing signed by all parties. .2 <i>FLA</i>, ss. 44(3), 58(3), 148(2), and 163(3) permit the specified agreements to be filed with the court (either Provincial or Supreme) for enforcement as a court order. Note <i>FLA</i>, s. 194 regarding the overlapping jurisdiction of the Supreme and Provincial Courts under the Act. If an agreement is to be filed in Provincial Court, do not put in a clause giving the Supreme Court exclusive jurisdiction over the agreement. .3 Formalities required by any other jurisdiction where property is located (e.g., recording of agreement, witnesses, statement/certificate as to independent counsel). .4 Description of real or personal property for filings under the <i>Land Title Act</i>, R.S.B.C. 1996, c. 250, or <i>Personal Property Security Act</i>, R.S.B.C. 1996, c. 359. <p>3.4 Consider obtaining an extra original signed separation agreement for filing under <i>FLA</i>, ss. 44(3), 58(3), 148(2), or 163(3). Note: under <i>FLA</i>, s. 99, notice of a property agreement may be filed in the land title office and, under <i>FLA</i>, s. 100 a financing statement in relation to a manufactured (mobile) home may be filed in the personal property registry.</p>					
<p>4. CLOSING THE FILE</p> <ul style="list-style-type: none"> 4.1 Send a copy of the agreement to other party or their counsel, if they are represented. 4.2 File with the Supreme Court or the Provincial Court, if so instructed (<i>FLA</i>, ss. 44(3), 58(3), 148(2), and 163(3)). 4.3 File notice in the land title office, if so instructed (<i>FLA</i>, s. 99). 4.4 Send notice of irrevocable designation of beneficiary to the insurance company or confirm the designation with the insurer, and request that written acknowledgment be sent to the policy holder. 4.5 Send notice of any agreement regarding pensions to the employer or pension trustee, requesting that acknowledgment be sent to your client. 4.6 Complete or confirm any transfers of property. 4.7 Complete or confirm filing of Canada Revenue Agency Form T2220 for transfer of RRSPs. 4.8 As soon as possible after completing the agreement, bill the client for your services rendered. Once again, outline in your covering letter how you have determined the fee. Remind the client to review and update any existing will, power of attorney, or representation agreement. 4.9 Close the file, and return original documents to the client, if required. For guidance, see <i>Closed Files—Retention and Disposition</i>, August 2017, Appendix B at www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/ClosedFiles.pdf for a suggested minimum retention and disposition schedule for specific documents and files (e.g., six years after pension payments begin; otherwise, 10 years after agreement, except where minors are involved). 					