

## INTRODUCTION

**Purpose and currency of checklist.** This checklist is designed to be used in conjunction with the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1), CLIENT FILE OPENING AND CLOSING (A-2), and FAMILY PRACTICE INTERVIEW (D-1) checklists. Lawyers should also refer to the SEPARATION AGREEMENT DRAFTING (D-3), MARRIAGE AGREEMENT DRAFTING (D-4), *CHILD, FAMILY AND COMMUNITY SERVICE ACT* PROCEDURE (D-6), POLYFAM AGREEMENT PROCEDURE (D-7) and/or POLYFAM AGREEMENT DRAFTING (D-8) checklists, as applicable. This checklist is not specifically designed to relate to cohabitation agreements, although many of the provisions will apply. The checklist is current to September 4, 2024.

## LEGEND



Checkbox



Important Reminder



Deadline or Limitation Date

## NEW DEVELOPMENTS

- **Supreme Court Family Rules.** Amendments to the Supreme Court Family Rules, B.C. Reg. 169/2009 came into effect on September 9, 2024 (B.C. Reg. 165/2024), including provisions allowing for affidavits to be sworn or affirmed by video conference.
- **Family Law Act.** Amendments to the *Family Law Act*, S.B.C. 2011, c. 25 (the “FLA”) received Royal Assent on May 1, 2023, including amendments to: rules applying to the presumption of advancement or presumption of resulting trust (s. 81.1); exclusions applying to excluded property (ss. 85(3) and 96); designations of limited members (s. 113(2)); disability benefits (s. 122); and calculation of a limited member’s proportionate share on death of a member prior to pension commencement (s. 124). The applicability of certain amendments may depend on whether the family law proceeding is a “pre-existing proceeding”, meaning a proceeding under the *FLA* respecting property division or to set aside or replace an agreement respecting property division, commenced before May 11, 2023.
- **Companion animals.** Provisions addressing pets as “companion animals” came into force on January 15, 2024, under s. 92 of the *FLA*. A companion animal is an animal kept primarily for the purpose of companionship, and spouses may make agreements over who has ownership of, or right of possession to, a companion animal (s. 92(e) to (g)).
- **Land Owner Transparency Act.** The *Land Owner Transparency Act*, S.B.C. 2019, c. 23 may affect the implementation of the division of real property in family law matters.
- **Transparency register.** The operative provisions of the *Business Corporations Amendment Act, 2019*, S.B.C. 2019, c. 15 came into force on October 1, 2020 (B.C. Reg. 77/2020), which may affect corporate matters in family law proceedings.

**OF NOTE**

- **Aboriginal law.** If the client or the other party has ties to an Indigenous community, special considerations may apply (e.g., see items 1.13 and 2.18.6 in the FAMILY PRACTICE INTERVIEW (D-1) checklist). Note the requirements of Part 10, Division 3, of the *FLA*, which sets out standing and notice in cases concerning Nisga’a and treaty First Nations children and treaty lands. The *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20, (the “*FHRMIRA*”) applies to married couples or common-law partners living on-reserve lands, where at least one spouse is a First Nation member. The *FHRMIRA* provides mechanisms for First Nations to create laws pertaining to matrimonial real property, and also sets out provisional federal rules for use until First Nations establish their own laws. Consider seeking the advice of a lawyer with experience in Aboriginal law. 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.
- **Tax alert.** As some aspects of a separation agreement may have significant tax implications for the parties, it is recommended the parties seek advice from their prospective tax advisors, especially if pensions or other property are involved.
- **Law Society of British Columbia.** For changes to the Law Society Rules and other Law Society updates and issues “of note”, see LAW SOCIETY NOTABLE UPDATES LIST (A-3).
- **Additional resources.** For detailed information about the drafting of family law agreements, see *Family Law Agreements: Annotated Precedents*, 3rd. ed. (CLEBC, 1998–).

**CONTENTS**

1. Preliminary Matters
2. Drafting the Agreement (Summary)
3. Concluding the Agreement
4. Closing the File

| <b>1. PRELIMINARY MATTERS</b> |   |                          |
|-------------------------------|---|--------------------------|
| 1.1                           | Conduct a conflicts of interest check. Complete the CLIENT FILE OPENING AND CLOSING (A-2) checklist, and refer to the FAMILY PRACTICE INTERVIEW (D-1) checklist.  | <input type="checkbox"/> |
| 1.2                           | Confirm compliance with Law Society Rules 3-98 to 3-110 for client identification and verification and the source of money for financial transactions, and complete the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1) checklist. Consider periodic monitoring requirements (Law Society Rule 3-110).   | <input type="checkbox"/> |
| 1.3                           | 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). | <input type="checkbox"/> |

|      |   |                          |
|------|---|--------------------------|
| 1.4  | 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.)   | <input type="checkbox"/> |
| 1.5  | 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 including a consent order in a joint family action. Review the court's jurisdiction to set aside a property division agreement ( <i>FLA</i> , s. 93), the court's jurisdiction to set aside or replace a child support order ( <i>FLA</i> , s. 148), and the court's jurisdiction to set aside spousal support agreements ( <i>FLA</i> , s. 164). 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> . | <input type="checkbox"/> |
| 1.6  | Determine the client's wishes with regard to specific terms of the agreement (see the SEPARATION AGREEMENT DRAFTING (D-3), the MARRIAGE AGREEMENT DRAFTING (D-4), the POLYFAM AGREEMENT PROCEDURE (D-7), and POLYFAM AGREEMENT DRAFTING (D-8) checklists).  | <input type="checkbox"/> |
| 1.7  | Advise the client that a spouse's interest in "family property" arises on separation (under <i>FLA</i> , s. 84).  | <input type="checkbox"/> |
| 1.8  | 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.  | <input type="checkbox"/> |
| 1.9  | If the client or the other party has ties to an Indigenous community, special considerations may apply (e.g., see items 1.13 and 2.18.6 in the FAMILY PRACTICE INTERVIEW (D-1) checklist); consider whether a lawyer with experience in Aboriginal law should be consulted.   | <input type="checkbox"/> |
| 1.10 | Request schedules of assets and liabilities from your client as well as supporting documents, if available.   | <input type="checkbox"/> |

|           |  |                          |
|-----------|--|--------------------------|
| <b>2.</b> | <b>DRAFTING THE AGREEMENT (SUMMARY)</b>  |                          |
| 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) checklist, the MARRIAGE AGREEMENT DRAFTING (D-4) checklist, or the POLYFAM AGREEMENT PROCEDURE (D-7) and POLYFAM AGREEMENT DRAFTING (D-8) checklists; see also <i>Family Law Agreements: Annotated Precedents</i> , 3rd. ed. (CLEBC, 1998-) for precedents and discussion). | <input type="checkbox"/> |
| 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 Indigenous parties, consider the tax implications if a party is exempt from federal or provincial taxation.   | <input type="checkbox"/> |
| 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.  | <input type="checkbox"/> |

|     |  |                          |
|-----|--|--------------------------|
| 2.4 | Include statements of assets and awareness of each other's assets:   | <input type="checkbox"/> |
|     | .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 in writing a disclaimer of 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. Sworn financial statements are highly recommended and are the best practice.  |                          |
|     | .4 Where the client has insufficient knowledge of 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 or liability insurance claim.  |                          |
| 2.5 | Prepare the first draft of the agreement.  | <input type="checkbox"/> |
| 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.   | <input type="checkbox"/> |
| 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.  | <input type="checkbox"/> |
| 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. Consider whether to send the agreement in a format in which changes can be made by the other lawyer/party.) Decide whether to send the draft to opposing counsel on a "without prejudice" basis. 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. | <input type="checkbox"/> |

|      |   |                          |
|------|---|--------------------------|
| 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.  | <input type="checkbox"/> |
| 2.10 | Satisfy yourself that there are no problems with regard to:   | <input type="checkbox"/> |
|      | .1 Lack of certainty of terms.  |                          |
|      | .2 Failure to disclose, fraud, misrepresentation, or money laundering. A lawyer must not negotiate the division of property involving a family asset that the lawyer knows or ought to know consists of the proceeds of crime. Note rule 3.2-7 of the <i>Code of Professional Conduct for British Columbia</i> (the "BC Code") and Law Society Rule 3-109.  |                          |
|      | .3 Undue influence and pressure.  |                          |
|      | .4 Unconscionability.   |                          |
| 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. | <input type="checkbox"/> |
| 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> .   | <input type="checkbox"/> |
| 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.   | <input type="checkbox"/> |
| 2.14 | Consider documentation regarding the ownership of or right of possession to a companion animal outlined in s. 92(e) to (g).   | <input type="checkbox"/> |

|           |  |                          |
|-----------|--|--------------------------|
| <b>3.</b> | <b>CONCLUDING THE AGREEMENT</b>  |                          |
| 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> ).  | <input type="checkbox"/> |
| 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). | <input type="checkbox"/> |

|     |   |                          |
|-----|---|--------------------------|
| 3.3 | Ensure compliance with relevant formalities:  | <input type="checkbox"/> |
|     | .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. Ideally, the signatures to the written agreement would also be witnessed ( <i>FLA</i> , s. 93).   |                          |
|     | .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.  |                          |
| 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.   | <input type="checkbox"/> |

|           |   |                          |
|-----------|---|--------------------------|
| <b>4.</b> | <b>CLOSING THE FILE</b>   |                          |
| 4.1       | Send a copy of the agreement to other party or their counsel, if they are represented.  | <input type="checkbox"/> |
| 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)).   | <input type="checkbox"/> |
| 4.3       | File notice in the land title office, if so instructed ( <i>FLA</i> , s. 99).   | <input type="checkbox"/> |
| 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. | <input type="checkbox"/> |
| 4.5       | Send notice of any agreement regarding pensions to the employer or pension trustee, requesting that acknowledgment be sent to your client.  | <input type="checkbox"/> |
| 4.6       | Complete or confirm any transfers of property.  | <input type="checkbox"/> |
| 4.7       | Complete or confirm filing of Canada Revenue Agency Form T2220 for transfer of RRSPs.   | <input type="checkbox"/> |

|     |  |                          |
|-----|--|--------------------------|
| 4.8 | Prepare a reporting letter and account as soon as practicable after closing. Remind the client to review and update any existing will, power of attorney, or representation agreement. | <input type="checkbox"/> |
| 4.9 | Close the file. See the CLIENT FILE OPENING AND CLOSING (A-2) checklist.   | <input type="checkbox"/> |