



Estates, trusts and wealth management

Marriage and cohabitation agreements

Briefing

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There can be many good reasons to enter into a Marriage or Cohabitation Agreement. Perhaps there are children from a previous relationship who need to be protected. There may be a significant difference in the net worth of the parties. Perhaps one of the spouses expects to receive an inheritance that is meant to remain in the family, or owns a business that could be negatively impacted by a family law claim.

Whatever the reason for putting a Marriage or Cohabitation Agreement in place, it is helpful to understand from the outset the process involved and the issues most commonly addressed.

The process

- Each party will need to be represented by his or her own lawyer. That is because if a party doesn't fully understand the nature and effect of the Agreement, that can be a ground for having it set aside or varied in the future.
- At the start of the process, a determination should be made as to the law that is likely to govern the property and support rights of the parties should the relationship end. The place where the parties intend to marry, where they will reside and where their assets are located are all relevant factors. If the law of a foreign jurisdiction might apply, a lawyer qualified to practice in that jurisdiction should be retained to review the Agreement and confirm that it would be enforceable there.

- Prior to signing the Agreement, the parties should disclose to one another in writing their assets and liabilities, including values. Generally, a list of the assets and liabilities of each party is attached as a schedule to the Agreement. If a party is a beneficiary of a trust, depending upon applicable law, his or her beneficial interest in the trust may be considered to be an asset for the purposes of financial disclosure. Failure to properly disclose assets can also be a ground for varying or setting aside an Agreement.
- Often, one of the parties will meet with a lawyer to discuss what might be included in the Agreement. That lawyer will then prepare a first draft of the Agreement and review it with his or her client. If the content of the Agreement is acceptable, the draft Agreement will be given to the other party for review with his or her own lawyer.
- It is wise to allow at least 6 months for the negotiation and drafting of a Marriage or Cohabitation Agreement. Regardless of the length and quality of the relationship, negotiating an Agreement is often a time consuming and stressful process. It isn't something a couple should be dealing with in the weeks and days leading up to a marriage.

The content

- Marriage and Cohabitation Agreements sometimes cover a multitude of issues, including property rights, support obligations, the division of household responsibilities and child care. They can deal with obligations while the marriage is ongoing, the rights of the spouses if it breaks down, and subject to the comments below, what happens if one of the spouses dies. Usually, it's best to keep the content of an Agreement focused on significant financial issues and allow other concerns to be addressed more informally between the parties.
- Where one party has received or expects to receive a significant gift or inheritance from a family source, the goal may simply be to protect that gift or inheritance, any increase in its value and any income earned from it.
- Matrimonial homes are often given special treatment. In some cases, parties may agree to share the value of a matrimonial home on a breakdown of the relationship regardless of where the money to purchase it came from. In other cases, the parties may agree that the spouse who did not contribute to the value of the home will acquire a share of it that increases proportionately with the duration of the marriage. There are also many other ways to deal with a matrimonial home that can be considered.
- Marriage and Cohabitation Agreements should be drafted so as to appear fair at the time when they are signed to a Court which might be asked to consider that issue later. An overly one sided Agreement providing, for example, that the spouse with fewer assets will receive little or nothing in the event of a marriage breakdown regardless of the length of the marriage and regardless of whether children are born of the relationship, is more likely to be varied or set aside in the future.

- The Wills, Estates and Succession Act (“WESA”) of British Columbia provides that if a Will does not make adequate provision for the proper maintenance and support of the testator’s spouse and children, the Court may, in an action commenced by or on behalf of the spouse or a child, order that the provision it thinks is adequate, just and equitable be made out of the testator’s estate. Under current law, it is not possible for spouses to give up their will variation rights under WESA prior to the death of one of them. Notwithstanding this prohibition, a Marriage or Cohabitation Agreement between parties residing in British Columbia may still set out what is to happen if one of them should pass away. It may also express a wish that, if an application is made pursuant to the will variation provisions of WESA, the Court give effect to the provisions of the Agreement. While such a wish would not be binding on the Court, it would be taken into account along with all other relevant facts, and may be important in terms of persuading the Court to uphold the Agreement on the death of one of the spouses.

Costs

The legal costs associated with the preparation of a Marriage or Cohabitation Agreement can vary a great deal depending upon how complicated the terms of the Agreement are and how time-consuming the negotiation process is. If the Agreement is being entered into at the request or suggestion of one party or his or her parents, that party or those parents will often agree to pay the related legal fees of the lawyer representing the other party.

Conclusion

There are many other issues that should be considered in the context of Marriage and Cohabitation Agreements. The lawyers in our estates, trusts and wealth management group would be pleased to discuss them with you.

Contacts

If you would like further information, please contact:

Riley R. Burr

Tel +604 641 4944
riley.burr@nortonrosefulbright.com

Margaret Mason, QC

Tel +604 641 4905
margaret.mason@nortonrosefulbright.com

Laura West

Tel +604 641 4935
laura.west@nortonrosefulbright.com

Jules Charette

Tel +514 847 4450
jules.charette@nortonrosefulbright.com

Barry Segal

Tel +416 216 4861
barry.segal@nortonrosefulbright.com

Martina Zanetti

Tel +604 641 4941
martina.zanetti@nortonrosefulbright.com

Nikki Hildebrand

Tel +604 641 4914
nikki.hildebrand@nortonrosefulbright.com

Chris Speakman

Tel +604 641 4835
chris.speakman@nortonrosefulbright.com

Katherine Gach

Tel +604 641 4840
katherine.gach@nortonrosefulbright.com

Kirsten H. Jenkins

Tel +604 641 4894
kirsten.jenkins@nortonrosefulbright.com

Amanda Stacey

Tel +416 216 2440
amanda.stacey@nortonrosefulbright.com

Lauren Coady

Tel +604 641 4970
lauren.coady@nortonrosefulbright.com

Dion Legge

Tel +403 267 9438
dion.legge@nortonrosefulbright.com

Carmen S. Thériault

Tel +604 641 4937
carmen.theriault@nortonrosefulbright.com

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