

# **The Nature of the Beast**

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*Cohabitation and Pre-Nuptial Agreements*

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## THE NATURE OF THE BEAST

### INTRODUCTION

There is one universal truth for family law lawyers across Canada: there is no more daunting a task than the drafting of a prenuptial, postnuptial, or cohabitation agreement. Counsel are put in the untenable situation of crystal-ball gazing to contemplate both the future circumstances of the parties and the future direction of the law. When creating a prenuptial, postnuptial, or cohabitation agreement you can neither anticipate when the agreement will be subject to scrutiny nor anticipate the extent or nature of the future assets which may be governed by the agreement. We often deal with clients who are head over heels in love. They are struggling to even contemplate the prospect of the breakdown of their upcoming marriage while they are happily focused on wedding dresses and seating plans. The parties' mutual goal is to never need this Agreement and it is challenging to keep clients motivated if negotiations become time consuming or tense. They are often unaware of their own end goal for the agreement. As an extra kick, the request for strong binding enforceable prenuptial, postnuptial, or cohabitation agreement comes with the proviso that the client wishes to keep the process inexpensive and avoid extensive disclosure obligations. An impossible task!

As daunting a task as it is, knowing how to draft these types of agreements is an increasingly important skill in the practice of family law. Although the divorce rate has stabilized in recent years,<sup>1</sup> in Alberta more than 4 in 10 marriages continue to end in divorce.<sup>2</sup> Furthermore, the number of people living in common-law relationships has increased substantially. In 2006 more than 20% of people between the ages of 25-29 were living in common law relationships, and the rates of dissolution for common law relationships are even greater than the divorce rates.<sup>3</sup>

### DIFFERENCES BETWEEN PRENUPTIAL, POSTNUPTIAL AND COHABITATION AGREEMENTS

A **Prenuptial Agreement** is defined as a Contract:

“entered into by prospective spouses prior to marriage but in contemplation and consideration thereof; by it, the property or other financial rights of one or both of the perspective spouses are determined or are secured to one or both of them or their children.  
*Friedlander v. Friedlander*, 80 Wash.2d 293, 494 P.2d 208, 212.”<sup>4</sup>

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<sup>1</sup> “Nuptiality and divorce” <web: <http://www.statcan.gc.ca/pub/91-209-x/2004000/part1/divorce-eng.htm>>

<sup>2</sup> “4 in 10 1st marriages end in divorce: report” <web: <http://www.cbc.ca/news/canada/story/2010/10/04/vanier-study004.html>>

<sup>3</sup> “Nuptiality and divorce” <web: <http://www.statcan.gc.ca/pub/91-209-x/2004000/part1/divorce-eng.htm>>

<sup>4</sup> Black's Law Dictionary Sixth Edition; Centennial Edition (1891-1991)

**Mid or Postnuptial Agreements** are used when an already married couple runs into financial or marital difficulties and wish to define the financial consequences of a marriage breakdown without actually calling it quits. This can give comfort to a spouse who may be concerned about the other spouse's spending habits, risk taking with investments etc. and define the outcome of property "if and/or when" they are unable to resolve their differences.

Black's Law Dictionary states that a **Cohabitation Agreement** is defined as:

"A Contract between a man and a woman who are living together in contemplation of sexual relations and out of wedlock relating to the property and financial relations of the parties."<sup>5</sup>

Basically, a cohabitation agreement is for people who plan to reside together in a marriage like relationship without being married and a prenuptial agreement is an agreement in contemplation of marriage. A mid or postnuptial agreement is an agreement determining property and financial issues between parties that are already married.

Parties do not have to enter into agreements at the outset of their relationship. An increasing number of people are entering into agreements after they have been co-habiting or married for a period of time. A cohabitation agreement can be entered into mid-way through a common law relationship and still regulate division of property acquired throughout. In the case of *Scherf v. Nesbitt*,<sup>6</sup> the parties entered into a cohabitation agreement years after purchasing a home in which they lived together in a conjugal relationship. The cohabitation agreement gave each party ½ interest in the jointly owned home regardless of their initial or ongoing contributions to its purchased construction or maintenance. The court determined that the parties were entitled to share the net proceeds according to the written executed agreement between the parties.

## **WHAT YOU CAN AND CANNOT DO IN PRENUPTIAL, POSTNUPTIAL, AND COHABITATION AGREEMENTS**

### **A Legal Primer**

The first step in considering what you can and cannot do in a prenuptial, postnuptial, or cohabitation agreement is to consider how the parties' legal rights arise under the common law and statute law. It is essential that counsel review the common law and statute law, which give rise to the remedies that they intend to deal with. In the case of legislation, consider referring directly to the section. This is key to the enforceability of the agreement.

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<sup>5</sup> Black's Law Dictionary Sixth Edition; Centennial Edition (1891-1991)

<sup>6</sup> *Sherf v. Nesbitt*, 2009 ABQB 445