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Why a Prenuptial or Cohabitation Agreement?

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Couples should consider these agreements as it allows them to make decisions on financially sensitive issues and execute control over their finances without being caught by surprise of a law that they do not know of or understand.

PRENUPTIAL AND COHABITATION AGREEMENTS DO NOT JUST PROTECT THOSE WHO HAVE SIGNIFICANT ASSETS - THEY OFFER CERTAINTY AND PREDICTABILITY .

Prenuptial and cohabitation agreements are for anyone looking at starting a new relationship, thinking of moving in with their partner, have a blended family, or are concerned over the distribution of their estate following death. These agreements do not solely protect those who have significant assets – they offer certainty and predictability for people on their financial situations, both during their relationship and should the relationship break down.

More and more people want to control their ‘financial fate’ and not be caught by surprise of a law that affects their finances in a way they did not know of or understand. A prenuptial agreement allows people to make decisions about sensitive

A DIFFERENCE OF FINANCIAL PHILOSOPHY IS ONE OF THE LEADING CAUSES OF MARITAL BREAKDOWN AND, THROUGH A PRENUPTIAL AGREEMENT, CAN BE ADDRESSED AT THE BEGINNING OF A RELATIONSHIP.

financial issues at a time when there is no conflict - the beginning of a relationship. A difference of financial philosophy is one of the leading causes of marital breakdown, and can be addressed at the beginning of a relationship with a prenuptial agreement. The couple who has a prenuptial agreement will know exactly the extent of their financial obligations, both during the relationship and, should it ever happen, at its end.

A cohabitation agreement is almost identical to a prenuptial agreement, except for a few details, most noticeably its name. The agreement contains many of the same clauses, and addresses many of the same issues as a prenuptial agreement; however, it does not assume the two individuals will be marrying. If you are already married, a marriage agreement can address these issues. The names change, but the terms of all three of these agreements look very similar.

There are three key components to consider in creating a fair and enforceable prenuptial agreement or cohabitation agreement. First is good communication with your (future) spouse or partner. Second is an understanding of the financial circumstances of your (future) family. Third is legal advice – the law requires you to understand your legal entitlements, both now and in the future, before you waive them. A prenuptial agreement is a legal contract that will take priority over the family law legislation in your jurisdiction, or replace it entirely. Failure to obtain legal advice will be detrimental, if not fatal, to the enforcement of your agreement. Why go through the effort of putting together such an agreement just to have it later set aside?

If you are thinking of whether you require a prenuptial, cohabitation, or marriage agreement, there are several issues to consider¹:

1. *Ownership of property, in general.* This is often the first, and most significant issue, that is addressed. Do you want to protect

¹ REMEMBER THAT THESE ARE GUIDELINES AND ARE NOT THE ONLY OPTIONS AVAILABLE TO YOU. THIS IS NOT MEANT TO BE A SUBSTITUTE FOR LEGAL ADVICE – TALK TO A LAWYER. YOUR LAWYER CAN ASSIST YOU WITH DETERMINING THE PROPER STRUCTURE OF YOUR AGREEMENT THAT SUITS YOUR INTENTIONS FOR YOU AND YOUR RELATIONSHIP, AS WELL AS GIVE YOU OPTIONS YOU DID NOT CONSIDER.

the assets that you own now? What about any growth in value? How is property acquired during the relationship shared, if the relationship breaks down? A prenuptial agreement should have a general principle for the ownership of property, and then often sets out exceptions. Common examples include:

- Spouses never obtain a claim against each other's property, unless they specifically decide to share it by placing it in joint names;
- Spouses do not share in property that they own before the relationship, but share in any growth or new assets acquired during their relationship; and,
- Spouses start sharing in property after a specified period of time, for example two years after the date of marriage, or the date they move in to live together.

2. *Specific property.* Specific items can be identified for a treatment different than the general rule. A good example of this is the family home. If one spouse is moving into the other's home, how will this affect its ownership? Who will pay for the mortgage and maintenance costs? How will the equity be shared? Who will keep the home if the relationship breaks down?
3. *Day to day finances.* The expectation for both spouses to contribute financially to the relationship, or not, is something that should be considered in your prenuptial or cohabitation agreement. Will you each be responsible for your own day to day finances? Is there to be an identified contribution to the joint living expenses? If you are living in your spouse's home owned prior to the relationship, are you obliged to help pay the mortgage?
4. *Supporting each other if the relationship ends* – i.e. Spousal Support. This is a sensitive topic, and is often omitted as either too difficult to address, or unnecessary, as both spouses are happy in their new relationship. However, the issue of Spousal Support is one of the most vigorously litigated issues on separation, costs couples the most in legal fees, and causes the most hard feelings or estrangement between spouses. It should be addressed in your prenuptial agreement.

SPOUSAL SUPPORT IS OFTEN OMITTED AS TOO DIFFICULT TO ADDRESS, HOWEVER, IS ONE OF THE MOST VIGOROUSLY LITIGATED ISSUES ON SEPARATION AND SHOULD BE ADDRESSED IN YOUR AGREEMENT.

Consider whether or not both spouses are to remain fully employed and self-sufficient. If not, what type of compensation should be paid if one spouse sacrifices a career for lifestyle, or the relationship. Being silent on this issue in the prenuptial agreement may avoid an uncomfortable conversation at first, but may lead to a much greater problem in the future.

5. *Estate matters.* Will a death be treated the same way as a separation? Even if it is not, remember that a Will can be changed at any time at the decision of the individual. Your prenuptial agreement can only be changed with a further agreement between both you and your spouse. Therefore, if you want to ensure that you keep the home in the death of your new spouse, put it in your prenuptial. This issue is especially important to individuals approaching retirement, who have children, or anyone who wants to ensure that their intentions for estate matters match those of their spouse.

This is not an inclusive list, and you may be concerned about a very specific issue. Contact a lawyer to receive specific information and advice that relates to your circumstances. To make the most of your investment of time and money with a lawyer, use the attached checklist to prepare for your meeting.



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Warren is a trained Collaborative Law lawyer and mediator. Also a member of the BC Bar, Warren practices results-oriented family law in Calgary, Alberta, Victoria, British Columbia, and points in between. Since being called to the Alberta Bar in 2002, Warren has adapted his practice to keep clients out of the courtroom and in control of their own family and legal affairs. With an understanding that most people do not want to conduct a highly litigious and public separation and divorce, Warren utilizes methods and processes that empower the client to reach settlement that works for both the individuals and the families involved.

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