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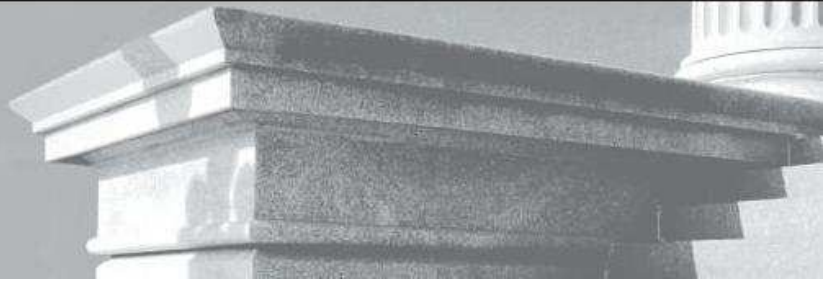
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## **Cohabitation Agreements in Ontario**

DISCLAIMER: Please note that the information provided in this DL Guide is NOT legal advice and is provided for educational purposes only. Laws are subject to change and without notice. This DL Guide may be outdated. If you need legal advice with respect to preparing, drafting, negotiating, and resolving disputes concerning cohabitation agreements in Ontario, Canada, you should seek professional assistance (e.g. make a post on [Dynamic Lawyers](#)). We have Toronto, Ottawa, Hamilton, Brampton, Mississauga and other Ontario lawyers registered to help you. You can contact **Michael Carabash** directly at [michael@carabashlaw.com](mailto:michael@carabashlaw.com).

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### What is a Cohabitation Agreement?

A Cohabitation Agreement is a written contract between two people who are cohabiting or intend to cohabit and who are not married. The Cohabitation Agreement deals with the parties' respective rights and obligations during and after their cohabitation (or on death) and can deal with things like: ownership or division of property, support obligations, the right to direct the education and moral training of children, and any other matter in the settlement of their affairs (s. 53 of the Ontario *Family Law Act*). Importantly, a Cohabitation Agreement CANNOT say who will have custody of, or access to, children if the relationship ends. Finally worth mentioning is that a Cohabitation Agreement does not need to deal with all rights and obligations concerning the relationship: it can only be concerned with one asset (e.g. a house) or one obligation (e.g. support to one party upon termination).

### When are they used?

Cohabitation Agreements are used by cohabiting persons and common law spouses when they are or intend to cohabit with each other and want certainty, predictability and control their financial affairs in case the relationship breaks down.

### What are the legal requirements for a Cohabitation Agreement?

The legal requirements for a Cohabitation Agreement in Ontario include the following:

1. The parties must make full disclosure of their financial assets, liabilities, income and expenses;
2. The contract must be in writing and signed by each party before a witness; and
3. The contract must be entered into voluntarily (i.e. no duress, undue influence, unconscionability, etc.).

It is advisable that each party retain separate legal counsel to protect their rights and promote their interests. Family law lawyers can help draft, negotiate, and explain cohabitation agreements to you. The last thing you want is for one party to claim that he or she did not understand the Cohabitation Agreement, entered into under duress, and did not receive independent legal advice concerning it!

**How can Cohabitation Agreements be challenged?**

A Cohabitation Agreement can be challenged in various ways relating to the substance (i.e. terms and conditions) of the Agreement or the process in which it was entered into. For more general information about this topic, please refer to the DL Guide entitled “**Is My Legal Form Valid and Enforceable?**” The Ontario *Family Law Act* also outlines various ways in which these Agreements can be challenged by a party.

To begin, a party can make an application to a court to have a Cohabitation Agreement – in whole or in part – set aside on the basis under section **56(4)** that:

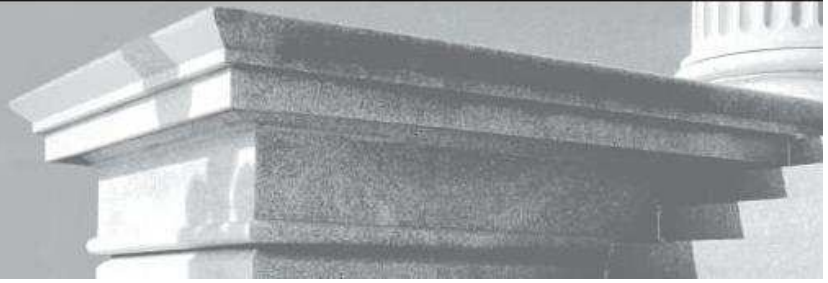
- (a) a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
- (b) a party did not understand the nature or consequences of the domestic contract; or
- (c) otherwise in accordance with the law of contract.

In *Loy v. Loy*, [2008] W.D.F.L. 351, the Ontario Superior Court of Justice reviewed the jurisprudence concerning section 56(4). In that particular case, Mrs. Loy had challenged the validity of a Marriage Contract (which, like a Cohabitation Agreement, is called a domestic contract) which she had entered into. The Court found no grounds to set aside that domestic contract. Here is the Court’s reasoning under section 56(4):

**Section 56(4)**

**174** This section of the *Family Law Act* gives a court the power to set aside a provision or an entire agreement, if it falls within one of the enumerated categories. Mrs. Loy has submitted that the domestic contract in this case should be set aside due to a lack of financial disclosure and a lack of independent legal advice. She also submits that Mr. Loy pressured her to sign the contract and that she did so under duress. Duress would be a factor the court could consider under section 56(4)(c) as otherwise in accordance with the law of contract.

**175** In *Hartshorne*, (2004), 47 R.F.L. (5th) 5 (S.C.C.), the Supreme Court of Canada reiterated that the approach to be taken in determining the weight to be accorded to an agreement is the two-stage analysis laid out in *Miglin*, 2003 SCC 24, and, further, that there is no "hard and fast" rule regarding the level of deference accorded to marriage agreements as compared to separation agreements.



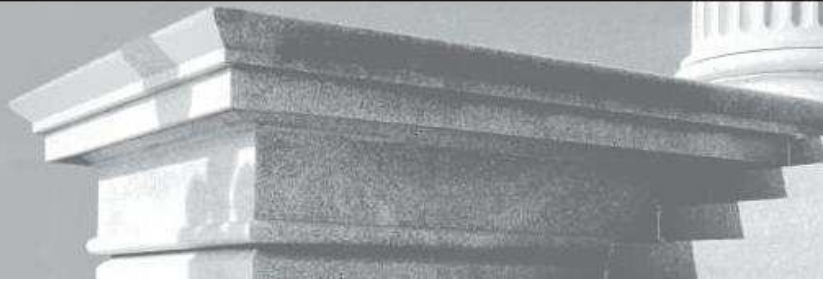
**176** In *Rosen*, (1994), 3 R.F.L. (4th) 267 (Ont. C.A.), the Ontario Court of Appeal confirmed that courts do not have a general discretion to set aside contracts that appear to be unfair. It is only where the bargain reaches the level of unconscionability that the contract should be set aside.

**177** In *LeVan*, (2006), 82 O.R. (3d) 1 (Ont. S.C.J.), Backhouse J. held that the proper approach under s. 56(4) is to first determine if a claimant can bring him or herself within one of the enumerated subsections. If the claimant is successful, then it must be determined whether the court should exercise its discretion in favour of setting the contract aside.

### **Failure to Disclose**

**178** Under subsection 56(4)(a) if substantial assets or liabilities were not disclosed, then a court has discretion to set aside the agreement. In *LeVan*, Backhouse J. held that this section places a positive duty on every spouse to make complete, fair and frank disclosure of all financial circumstances before the parties enter into the contract. Notwithstanding this requirement, not every breach will result in setting aside the agreement. Justice Backhouse, relying on *Dochuk v. Dochuk*, (1999), 44 R.F.L. (4th) 97 (Ont. Gen. Div.) and *Demchuk v. Demchuk*, (1986), 1 R.F.L. (3d) 176 (Ont. H.C.) set out the factors to be taken into consideration when exercising judicial discretion, including whether:

- (a) there has been concealment of the asset or material misrepresentation;
- (b) there has been duress, or unconscionable circumstances;
- (c) the petitioning party neglected to pursue full legal disclosures;
- (d) the petitioning party moved expeditiously to have the agreement set aside;
- (e) the petitioning party received substantial benefits under the agreement;
- (f) the other party has fulfilled his or her obligations under the agreement;
- (g) the non-disclosure was a material inducement to the aggrieved party entering into the agreement.



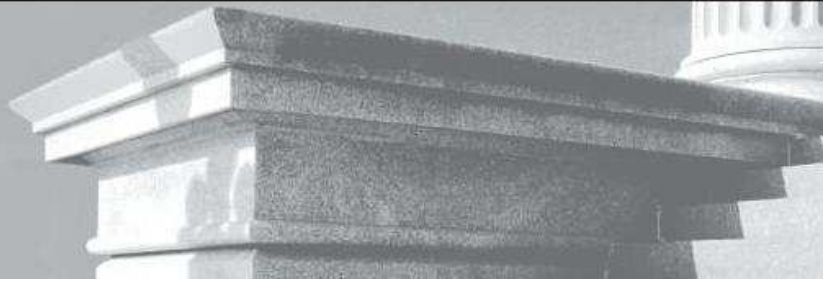
**179** In *Baxter v. Baxter*, (2003), 41 R.F.L. (5th) 23 (Ont. S.C.J.), similar to *LeVan*, a list of factors relevant to the court's discretion in setting aside an agreement due to lack of financial disclosure was enumerated:

1. Whether the funds existed at the time of the signing of the agreement;
2. Whether the party seeking to set aside on this basis knew the facts were different than originally stated but decided not to inquire further about details, or neglected to pursue full legal disclosure;
3. Whether there was concealment or misrepresentation;
4. Whether there was duress, or unconscionable circumstances;
5. Whether the non-disclosure was material; how important would the non-disclosed information have been to the negotiations;
6. Whether the agreed-upon terms are reasonable and fair; would they have been different had all the facts been known;
7. Whether the request to set aside is made expeditiously.

### **Examples of Cases Decided Under s. 54(4)(a)**

**180** In *Baxter*, the husband had disclosed the existence of shares to his wife during settlement negotiations, and provided a valuation of the shares as of the date of separation; however, he did not disclose that they had been sold for \$2.95 million post-separation. Justice Olah held that while the sale would not effect the net equalization payment, it was relevant to the determination of child and spousal support. In light of the provision in the minutes of settlement that the division of property and quantum of child support were "inextricably intertwined", the agreement was set aside for non-disclosure.

**181** In *LeVan*, the husband had deliberately failed to disclose his income and assets and misrepresented the purpose and extent of the contract to the wife. Additionally, the husband had interfered in the wife's receipt of independent legal advice. Because of the cumulative weight of all the factors, Backhouse J. exercised her discretion to set aside the marriage contract.



**182** In *Armstrong v. Armstrong*, [2007] W.D.F.L. 255 (Ont. C.A.), the Ontario Court of Appeal reversed the trial judge's findings with respect to disclosure. The Court held that the wife was aware of the husband's assets and had as much ability to value them as he did, therefore there was no ground upon which to set aside that part of the agreement.

**183** The financial disclosure in the Loy marriage contract was not detailed and contained only estimates as to "global net worth" for each party. However, Mrs. Loy did not seek further disclosure, which, in fact, would have indicated that Mr. Loy had overestimated his worth in the agreement.

**184** The Applicant did not suggest she would not have signed the marriage contract if she had more complete financial disclosure. I accept the Respondent's submission that such a position would not make sense given the fact that more complete disclosure would have revealed that the Applicant had significantly underestimated her net worth while the Respondent had significantly overestimated his. The Applicant cannot rely on her own failure to provide accurate disclosure to set aside the contract. The Respondent disclosed his income.

### Independent Legal Advice

**185** The *Family Law Act* does not require independent legal advice a prerequisite to the formation of a domestic contract, nor is it a requirement at common law: *Somerville v. Somerville*, [2005] W.D.F.L. 1957 (Ont. S.C.J.). Rather, independent legal advice is closely related to s. 56(4)(b), under which a marriage contract may be set aside if a party did not understand the nature or consequences of the contract.

**186** In *Hartshorne*, the Supreme Court of Canada noted that:

[i]ndependent legal advice at the time of negotiation is an important means of ensuring an informed decision to enter an agreement.

**187** In *Atkinson v. Atkinson*, [1990] W.D.F.L. 1135 (Ont. H.C.), Ross J. stated that:

in reference to the significance of independent legal advice...what must be considered is whether the parties freely and willingly entered into the bargain.

**Examples of Cases Decided Under s. 54(4)(b)**

**188** In *Settle-Beyrouty v. Beyrouty*, (1996), 24 R.F.L. (4th) 318 (Ont. Gen. Div.), the parties executed a marriage contract and each acknowledged receipt of independent legal advice. The wife alleged in her application for support that she did not respond truthfully when asked by the respondent's lawyer whether she had obtained independent legal advice. She submitted that, as she did not receive independent legal advice, she did not understand the consequences of the marriage contract. Justice Dunnet held that courts should be loathe to set aside an agreement where a spouse did not avail himself or herself of the opportunity for independent legal advice. According to Dunnet J., the wife was

intelligent, articulate and well-educated. She [was] employed in a responsible position. I have no doubt that she was aware of the nature and contents of the contract and she understood them.

**189** In *Keough v. Keough*,(2005), 248 Nfld. & P.E.I.R. 165 (N.L. T.D.), the Newfoundland and Labrador Supreme Court determined that an agreement concerning the matrimonial home resulted in inequity for the husband, since it excluded him from having any interest in the property. The husband had been given an opportunity to seek independent legal advice but decided not to pursue it. The Court upheld the agreement since the husband signed of his own free will and understood the nature and consequences flowing from the contract.

**190** Mrs. Loy was familiar with domestic contracts and the role that legal advice should play in executing them, since she had signed an agreement with the aid of a notary public in her first marriage. Further, as mentioned above, there was no urgency in signing the contract as a wedding date had not been set, the parties were living in different countries and her immigration status had not been resolved. Mrs. Loy is an educated, intelligent woman who would have understood the seriousness of the agreement. Although she had the means and time to seek legal advice, she chose not to. As held in *Beyrouty*, a court should be loathe to set aside a domestic contract where a party chose not to seek independent legal advice.

**191** The position of the parties at the date of separation is not a significant departure from the reasonable expectations each party would have had at the time the contract was negotiated. I find that Mrs. Loy's lack of employment is not related to the marriage or the separation but is of her own choosing. No explanation was provided as to why she has not become certified in Canada or why she cannot undertake employment of any kind.



**Financial Disclosure**

**192** Under s. 56(4)(a), an entire contract may be set aside if a party has failed to disclose significant assets. Although the disclosure in the marriage contract was not detailed, Mrs. Loy did not seek further disclosure. In fact, Mr. Loy overestimated his net worth in the agreement; therefore, this argument is not persuasive.

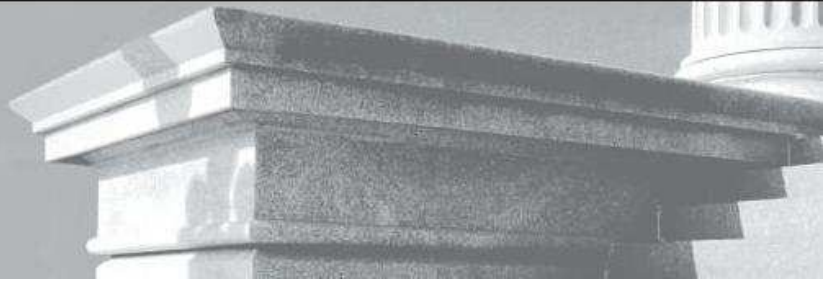
**193** Under s. 56(4)(b), an entire contract may be set aside if a party did not understand its' nature or consequences. Mrs. Loy argues that she did not receive independent legal advice and, hence, could not understand the contract. However, Mrs. Loy is an intelligent, educated, businesswoman who had previous experience with marriage contracts in her native South Africa. Although she may not have been familiar with Canadian law, she did not seek independent legal advice and signed the contract freely. A court should be loathe to set aside a contract when a party did not avail herself of independent advice.

**194** The Applicant knew what she was doing when she relocated herself and her children to Canada. She knew the income she was giving up by leaving the two businesses behind. The Applicant has not attempted to explain why she is not able to earn any income at all. She was able to persuade a bank to loan her money to purchase two condominiums during the marriage without any financial assistance or backing from Mr. Loy.

In *Loy v. Loy*, Mrs. Loy also challenged the validity of the domestic contract on the basis of section 33(4) of the *Family Law Act*. That section says that a Court may set aside a provision for support or a waiver of the right to support in a Cohabitation Agreement and may set support:

- (a) if the provision for support or the waiver of the right to support results in unconscionable circumstances;
- (b) if the provision for support is in favour of or the waiver is by or on behalf of a dependant who qualifies for an allowance for support out of public money; or
- (c) if there is default in the payment of support under the contract at the time the application is made.

Once again, however, the Court disagreed with Mrs. Loy and found no reason to set aside the provision of support in the domestic contract before it. Here is the Court's reasoning with respect to section 33(4):



**Section 33(4)**

**162** Section 2(10) of the *Family Law Act* provides that a contract is determinative of the rights between the parties unless the *Act* provides otherwise. Section 33(4) is one of the ways that the *Act* "provides otherwise". Under this section, a court may not set aside an entire agreement; rather, only a provision for support or a waiver of the right to support may be overruled. Since s. 33(4) is concerned only with support, the property arrangement in the agreement cannot be altered [footnote: In fact, if the domestic contract is held to be valid (i.e. not set aside), then a court cannot alter the property provisions since there is no power to do so in the *Family Law Act*].

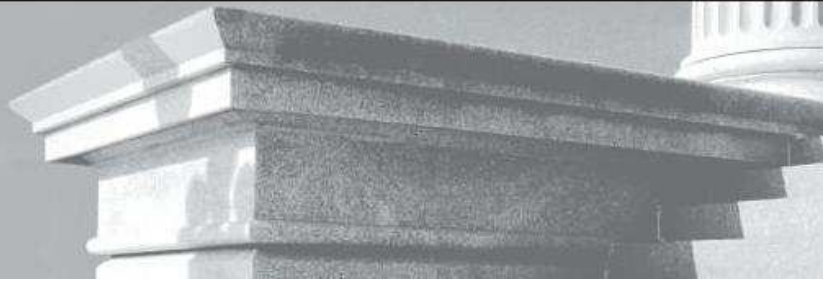
**163** The relevant subsection in this case is s. 33(4)(a), that is, "the provision [...] results in unconscionable circumstances".

**164** *Scheel v. Henkelman*, (2001), 52 O.R. (3d) 1, 11 R.F.L. (5th) 376 (Ont. C.A.), a decision of the Ontario Court of Appeal, discussed several important aspects of s. 33(4)(a). First, the Court of Appeal held that the section is directed only to unconscionable circumstances and not entire agreements:

The use of the phrase "results in" in s. 33(4)(a) means that the subsection is not directed to unconscionable agreements, but to unconscionable results of a provision waiving support. An agreement which was fair and reasonable when it was signed, may, through circumstances that occur in the future, result in unconscionable circumstances at the time of a support application.

**165** The Court discussed the meaning of "unconscionable" in the subsection. Adopting the discussion of the Ontario High Court in *Newby v. Newby*, (1986), 56 O.R. (2d) 483 (Ont. H.C.), it was held to mean "shocking to the conscience of the Court". The factors to be considered in determining whether unconscionable circumstances have resulted are:

(a) the circumstances surrounding the execution of the agreement, including the fact that each party was represented by competent counsel, the absence of any undue influence, the good faith and the expectations of the parties;



(b) the results of the support provisions of the agreement, including any hardship visited upon a party; and

(c) the parties' circumstances at the time of the hearing including their health, employability and ability to maintain their life-style.

Also, blameworthy conduct may be considered by the Court.

### **Examples of Cases Decided Under s. 33(4)(a)**

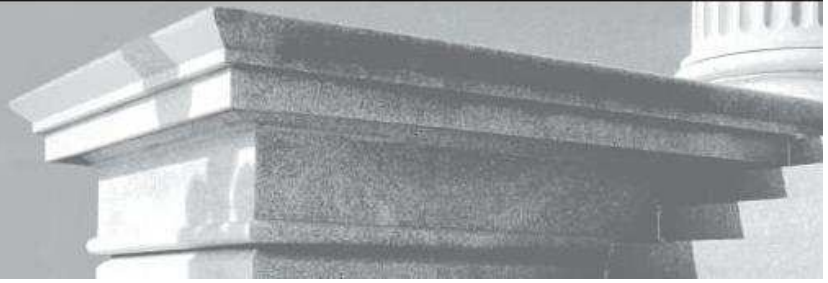
**166** In *Scheel*, the applicant woman was living on a meagre monthly pension following the breakup of her 11-year cohabitation with the respondent, who had assets approaching \$3 million. The Court of Appeal held that it was clear the woman was enduring significant economic hardship and that the man had the ability to support her. Give the relative circumstances of the parties, it would be shocking to the conscience to require the woman to live on her modest pension. The Court awarded the woman monthly, indefinite support.

**167** In *Mongillo v. Mongillo*, 2007 CarswellOnt 2731 (Ont. S.C.J.), a recent case concerned with s. 33(4)(a), Wood J. determined that the circumstances at the time of application were not so extreme as to be unconscionable. Even though the wife was unable to earn any significant amount of money due to ongoing health problems and had been influenced by the husband's father during the negotiations, the waiver of spousal support had not caused the degree of hardship that one would expect. Indeed, the wife had received a gift of one-half the value of a home from the husband's father and the option was available to free up this capital. Justice Wood also reiterated that simply because unforeseen circumstances have caused hardship to one party does not mean that a properly negotiated domestic contract shall be overridden by s. 33(4). A review of *Scheel* and *Desramaux v. Desramaux*, (2002), 216 D.L.R. (4th) 613 (Ont. C.A.) (wife forced to live on savings as she was limited to baby-sitting to support herself. The agreement for time-limited support was premised on the assumption that she would be self-sufficient within five years, which was unrealistic and had not occurred) led Wood J. to conclude that:

In each of these decisions, the Court of Appeal took into account the present circumstances of the parties. In each case, it also clearly took into account in [sic] the conduct of the parties while they were together and subsequent to their separation. In each case, the party seeking support was destitute or close to it, and the party from whom support was sought lived an affluent lifestyle and had amassed significant assets. As well, in each case, the court found some element of blameworthiness in the conduct of the party from whom support was sought.

**168** The provision waiving support in the Loy marriage contract is not "shocking to the conscience of the Court". The parties had both been married before and both had children from their first marriage. Each party was a successful business person and financially independent. The first factor to evaluate is the circumstances surrounding the execution of the agreement. Both parties had the opportunity to obtain independent legal advice prior to signing the contract; there was no interference by Mr. Loy with Mrs. Loy's ability to obtain this advice. Mrs. Loy claims to have been pestered by Mr. Loy to sign the agreement; however, she must have realized there was no urgency in signing as a wedding date had not been set, the parties were living in different countries and her immigration status had not been resolved. Mrs. Loy had previous experience with domestic contracts and is an educated, intelligent woman who would have understood the seriousness of the agreement. She had the means to seek legal advice and chose not to, for whatever reason.

**169** The financial circumstances of Mrs. Loy at the time of hearing are not clear. She states she has not looked for work or received any income other than the temporary spousal support since separation. She provided no explanation for why she cannot seek some employment. She has not taken any steps since separation to become certified as an accountant in Canada since separation. She has taken no steps in Canada to upgrade except for two night courses at Wilfred Laurier University in 1999. She testified she is continuing in her correspondence program and has nearly completed a Bachelor's degree in Management. This degree will be her third post-secondary education program. Yet, she offers no explanation as to why she cannot secure employment. In fact, she stated in cross-examination that she has not made any efforts to seek employment since the separation in February 2005.



**170** The circumstances that Mrs. Loy claims have resulted in financial hardship to her cannot be described as unforeseen. She knew what she was doing when she left South Africa to live in Canada with her children. Mrs. Loy's net worth at the time of separation was \$881,212.00. She had the financial ability to purchase two condominiums during the marriage without any financial contribution from Mr. Loy. She was able to persuade a bank to finance these purchases. She is not destitute.

**171** I find that there is no blameworthy conduct on the part of Mr. Loy with respect to the execution of the contract. He did not place undue duress upon Mrs. Loy. I am satisfied that Mr. Loy and Mr. Lang did everything they could to direct Mrs. Loy to seek independent legal advice. I accept the evidence of Mr. Lang that he urged Mrs. Loy to seek independent advice from an Ontario lawyer, being aware that she had a sister who practiced law in South Africa. Mrs. Loy's evidence is not credible. She states that she did all that she could to retain a lawyer familiar with Ontario law. Her efforts did not have to stop after she signed the contract. She did not marry Mr. Loy until 5 months after the contract was signed. If there was something in the contract she did not understand when she signed it she had a lot of time to obtain the advice or information she needed before she married Mr. Loy. As an educated and experienced businesswoman Mrs. Loy would know the importance of a contract. Whether or not she understood Canadian law is not as significant as the fact that she certainly would know that she was signing a document that impacted on her future rights and obligations.

**172** I accept Mr. Loy's evidence that there was no urgency to the signing of the contract in February 1997.

**173** There is no evidence to suggest the parties were not equal bargaining partners or that one preyed upon the other.

### **Tips to avoid having an invalid and unenforceable Cohabitation Agreement**

Based on the jurisprudence, here are some tips to avoid having your Cohabitation Agreement rendered invalid and unenforceable by a Court:

**Provide Adequate Disclosure**

Adequate disclosure depends on the circumstances. Clearly, the list of assets, liabilities, income, etc. listed in Schedule “A” is a great start. But what about providing values? If it’s possible to put down approximate values of the most substantial items (e.g. assets, liabilities, etc.), then that would be a good idea. Sometimes, the person making disclosure can only guess – perhaps based on their knowledge.

**Negotiate the Agreement**

There will always be some issues that have to be negotiated, regardless of how significant or trivial they may appear to some people. The fact of the matter is that evidence of negotiation (i.e. that a party reviewed and put forward their own position – and perhaps even compromised to get a result) strengthens the view that the Agreement is valid and enforceable. Negotiating also means giving enough time for the parties to review and revise the Agreement; rushing things before the period of cohabitation begins could be disastrous!

**Get Independent Legal Advice**

To avoid having a party later claim that they didn’t understand or appreciate the nature or consequences of the Agreement is to make sure that they receive independent legal advice. This also helps avoid arguments that they were pressured or threatened into signing. One “no-no” that can be easily avoided is referring the other party to a lawyer. There are lots of lawyers out there who can review the Agreement, advise the other party, and render a certificate of independent legal advice; leave it to the other party to do this for themselves. Things can look bad for you if you arrange to do it for them!

**Draft Appropriately**

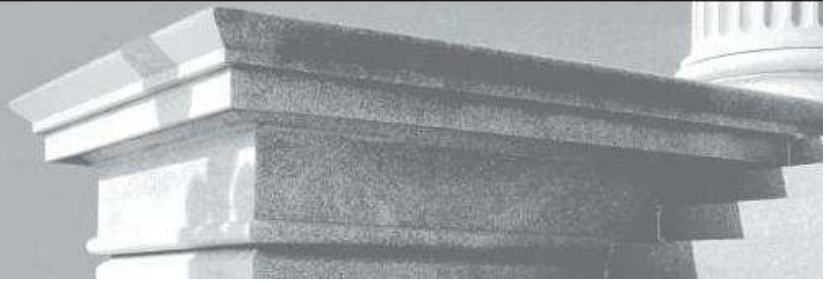
The final agreement should reflect the negotiated agreement between the parties. Clear and simple language should be used. This will prevent the other side from saying that they didn’t understand the terms of the agreement. It will also help prevent a court from using its own interpretation to fix things. Remember: mistakes will not be looked upon favourably – particularly against the party who drafted the final Agreement!

### Is Independent Legal Advice Required?

Independent legal advice is NOT a formal requirement under the *Family Law Act* (or under the common law) to have a valid and enforceable Cohabitation Agreement. That said, its presence helps to eliminate (except in the most exceptional circumstances) the ability for one party to have a court set aside the Cohabitation Agreement on the basis that it did not understand “the nature or consequences of the [Cohabitation Agreement]” or to set it aside “otherwise in accordance with the law of contract”. Basically, having an independent lawyer gives the impression that the lawyer’s knowledge and understanding is transferred to the party (because of the solicitor-client relationship and because it makes common sense). If it didn’t mean that, then the idea of having independent legal advice would be meaningless. One other thing: it is best not to have a party or their lawyer recommend a lawyer for the purpose of obtaining independent legal advice.

### What happens if a Cohabitation Agreement is set aside?

If a court sets aside a Cohabitation Agreement, then that Agreement will not apply to the termination of the parties’ relationship. So what COULD govern the ownership or division of property and support obligations? To begin, the *Family Law Act* COULD apply. Granted, that *Act* does not address the issue of ownership or division of property for cohabiting parties. That said, if the parties are not married and have cohabited continuously for a period of at least 3 years, then spousal support obligations MAY be imposed. Those obligations could also arise if the parties to a Cohabitation Agreement are not married and have cohabited in a relationship of some permanence and are the natural or adoptive parents of a child. If the cohabitation ends because one of the parties dies, then the *Succession Law Reform Act* could impose support obligations on the deceased party’s estate. That *Act* COULD apply if the parties were spouses (as defined above under the *Family Law Act*) and the deceased spouse was providing support or was under a legal obligation to provide support immediately before his or her death. Here, if the deceased spouse failed to provide proper support for the remaining spouse, the latter could apply to the court for proper support. Finally, with respect to ownership or division of property, one of the parties may be able to assert a right based on a doctrine of **UNJUST ENRICHMENT**, **CONSTRUCTIVE TRUST**, or **RESULTING TRUST**. I’ll discuss these equitable doctrines in greater detail next.



### **UNJUST ENRICHMENT**

The doctrine of unjust enrichment is not found in any statute. Rather, it is an old judge-made law that allows one party to claim compensation from another party on the basis of an unjust enrichment. 3 requirements must be met in order for a common law spouse to claim unjust enrichment:

- (1) an enrichment enjoyed by the other spouse;
- (2) a corresponding deprivation suffered by the complaining spouse; and
- (3) the absence of a juristic reason for the enrichment.

Now, if these 3 elements exist, then a common law spouse may be entitled to damages. Where simply having the other spouse pay money is not enough, then the doctrine of CONSTRUCTIVE TRUST comes into play.

### **CONSTRUCTIVE TRUST**

If there was an unjust enrichment and there was a link between the contribution that founds the action and the property in which the constructive trust is claimed, then the complaining spouse may receive an ownership interest in that property. To recap, the idea behind a constructive trust is as follows. The common law relationship ends. Only one spouse holds title to property. If there was an unjust enrichment and monetary damages would not be a sufficient remedy, then the complaining spouse may receive an ownership interest in the other spouse's property.

### **RESULTING TRUST**

When common law spouse separate and only one of the spouses own a property, the Court will ask whether or not there was an agreement or **COMMON INTENTION** that the other spouse was to take a beneficial interest in that property. The court will look to the facts and circumstances surrounding the acquisition, or improvement, of the property. If the spouse with no title in the property has contributed, directly or indirectly, in money or money's worth, to acquire or improve the property, the doctrine of resulting trusts is engaged. An interest in the property is presumed to result to the one advancing the purchase moneys, or part of the purchase monies. So when will a Court find **COMMON INTENTION** if there is no agreement? The Court will have to glean this from the conduct of the parties if it is not expressly made. The Court will look at



financial arrangements in acquiring or maintaining the property. The Court may also look at who benefited from the property (either directly or indirectly).

So, there you have it: UNJUST ENRICHMENT, CONSTRUCTIVE TRUST, and RESULTING TRUST.

Next, I'll review some examples of how courts have applied these doctrines to actual real life cases.

**Peter v. Beblow: CONSTRUCTIVE TRUST + 100% interest in FAMILY HOME**

In *Peter v. Beblow*, [1993] 1 S.C.R. 980, the Supreme Court of Canada considered whether a partner in a long-term common-law relationship could claim restitution for contributions made to the family home during the period of cohabitation. The Supreme Court found that the common law wife had maintained the family home through work in cooking, cleaning and landscaping – which helped preserve the property and saved the common law husband large sums of money which he used to pay off his mortgage and purchase a houseboat and a van. The trial judge found that the common law husband had been enriched, that the common law spouse had not been compensated, and that there was no juristic reason (e.g. gift, contract) for the enrichment. As such, the common law wife had a claim for UNJUST ENRICHMENT (see my previous blogs for more about this). Now, since it was difficult to provide the common law wife a monetary award, the doctrine of CONSTRUCTIVE TRUST came into light. This remedy was appropriate because the common law wife had established an UNJUST ENRICHMENT AND was also able to establish a link between the contribution that founds the action and the property in which the constructive trust is claimed. On these grounds, the Supreme Court did not disturb the trial judge's findings, stating that the house reflected a fair approximation of the value of the common law wife's efforts in acquiring the family assets.

**Gauci v. Malone: CONSTRUCTIVE TRUST + 20% interest in FAMILY HOME**

In *Gauci v. Malone*, [2009] O.J. No. 2627, the Ontario Superior Court of Justice was dealing with a situation similar to that in *Peter v. Beblow* (discussed above). The parties cohabited for 7 years before ending their relationship. One of the issues that arose was the common law wife claiming a CONSTRUCTIVE TRUST over the family home. The Court cited *Peter v. Beblow* and found that the common law wife had improved

the backyard and garden areas of the home and was primarily responsible for childcare, meals, and house care. Through her efforts, despite not being compensated, the common law husband and the property had been enriched. There was no juristic reason for the enrichment. As such, the court found that the common law spouse had made out an UNJUST ENRICHMENT claim. Now, given that the common law husband did not have discretionary funds available to pay, the Court concluded that a monetary award was not appropriate and therefore gave her a 20% ownership interest in the family law pursuant to the doctrine of CONSTRUCTIVE TRUST. That amount would not be realized or paid to her until the home was sold or until her two children were no longer dependents.

**Rendell v. Normore: UNJUST ENRICHMENT + \$20K**

In *Rendell v. Normore*, [2008] O.J. No. 3287, the Ontario Superior Court of Justice dealt with the issue of whether a woman could assert claims against her former partner based on RESULTING or CONSTRUCTIVE TRUST or UNJUST ENRICHMENT. The parties had been together for 4 years. During that time, the man purchased a family home in his name and made all mortgage and other payments (e.g. utilities, taxes, etc.) related to the home. The woman claimed an interest in the house and property purchased by the man during the time they lived together. The Court first looked at whether the woman could claim a RESULTING TRUST. Recall that, for a RESULTING TRUST to be established, there must be a common intention expressed or implied between the parties such that the woman would have had an interest in the property. The Court could find no evidence of such an intention. The parties conducted themselves in a manner that demonstrated that they had no intention of giving the woman any interest in the property. It was purchased and maintained solely by the husband, and purposely structured this way by the parties. SO NOT RESULTING TRUST CLAIM was found. What about CONSTRUCTIVE TRUST? Well, in this regard, the Court found that the woman had made some financial contribution to the relationship and property from her work and services (e.g. paying for household bills, food, gas, renovations, etc.). But the Court concluded that CONSTRUCTIVE TRUST was not an appropriate remedy since the man had made a more significant contribution to the relationship and the property. Thus, in the grand scheme of things, the Court ordered the man to simply compensate the woman \$20,000 because he had been unjustly enriched by the woman's work and services.

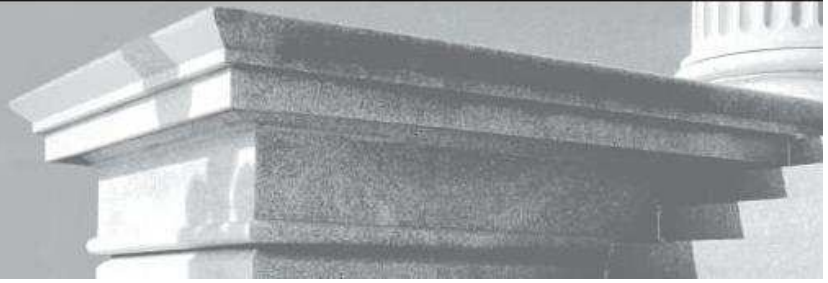
**Robichaud v. Anderson: CONSTRUCTIVE TRUST +\$43K**

In *Robichaud v. Anderson*, [1989] O.J. No. 3031, the Ontario District Court deal with a situation involving a common law husband seeking an interest in the family home which the common law wife owned. That husband also sought half the proceeds of an investment home which the parties had acquired together through an investment. The parties had been together for over 11 years. The court found NO common intention for the husband to have an interest in the home (so NO RESULTING TRUST); that said, the Court concluded that the husband had an interest in the home on the basis of CONSTRUCTIVE TRUST. The Court reasoned that the husband had shared living expenses, contributed time and labour to improving the property, and claimed that the common law wife had promised him a 1/2 interest in the property. The Court found that the husband had established an UNJUST ENRICHMENT CLAIM and that monetary damages in the amount of \$43,300 was appropriate. The Court ordered the family home to be sold to pay for this amount. With respect to the investment property, the Court found no evidence supporting the husband's claim for unequal division of the proceeds. The investment agreement provided for equal division, and this was ordered.

**Hollaway v. Devenish: NO UNJUST ENRICHMENT, CONSTRUCTIVE OR RESULTING TRUSTS**

In *Hollaway v. Devenish*, [2009] O.J. No. 5008, the Ontario Superior Court of Justice had to deal with competing claims for property between former long-term common law spouses. Both spouses asserted resulting and constructive trust claims. The common law wife sought an entitlement to assets that, after the date of separation, was registered in the husband's name and assets that remained in his possession based upon her contribution of services of money to their acquisition. Specifically, she wanted proceeds from the sale of the husband's cottage. For his part, the common law husband claimed a beneficial interest in her pension and pay equity settlement. He also claimed she made no material contribution to the cottage and that it was never his intention that she would possess a beneficial interest. The Court rejected the wife's claim of UNJUST ENRICHMENT towards the cottage (hence, there was no CONSTRUCTIVE TRUST remedy available). The Court came to that conclusion on the basis that, while her husband may have benefited from her work and financial contributions towards the cottage, she had benefited by using the cottage rent free for several months and enjoyed a reduced rate of interest on her join loan by virtue of the collateral mortgage. In other words, there was no deprivation on the wife's part, as required by the doctrine of UNJUST ENRICHMENT. The claim to a RESULTING TRUST also failed as there was no evidence of any COMMON INTENTION: the husband always considered the cottage his and nothing suggested otherwise.

After dispensing with the wife's claims, the Court next turned to the husband's. The wife had received a pay equity settlement from her employer. The husband argued that he was entitled to it based on a CONSTRUCTIVE or RESULTING TRUST. He argued that he had provided support to her during her training and as she advanced in her employment (e.g. by paying for things like courses, gas, transportation, meals, maintaining the household, etc.). With respect to the RESULTING TRUST issue, the Court found no evidence of a common intention that he have a beneficial interest in the funds. It was always the wife's intention – as seen from her conduct – that these funds be kept entirely for her sole benefit. She put the funds into her RRSP account. Furthermore, there was no evidence of any contribution of some sort by the husband towards the acquisition or maintenance of those funds. The wife worked very hard at her job and advanced accordingly. She worked while taking courses, which were paid for by her employer. So the husband had not made any direct or indirect contribution towards her career advancement. With respect to CONSTRUCTIVE TRUST, the husband could not establish that he had suffered a deprivation that corresponded to her enrichment. So that argument failed to. Finally, with respect to the wife's pension, the Court found no common intention that the husband be entitled to it (so NO RESULTING TRUST) and the husband could not demonstrate any contribution made by him towards her employment or pension. While the wife received a benefit (i.e. the pension plan), the husband did not suffer from any corresponding deprivation. So there was no justification for UNJUST ENRICHMENT or CONSTRUCTIVE TRUST.



### When does a Cohabitation Agreement terminate?

A Cohabitation Agreement generally provides for the circumstances under which it terminates. These circumstances could include, for example:

- the parties marrying each other;
- the parties get married and then divorce each other;
- the parties marry each other and enter into a Marriage Contract;
- either of the parties die;
- the parties cease to cohabit with each other (as defined in the Cohabitation Agreement); or
- after a set period of time or on a particular date.

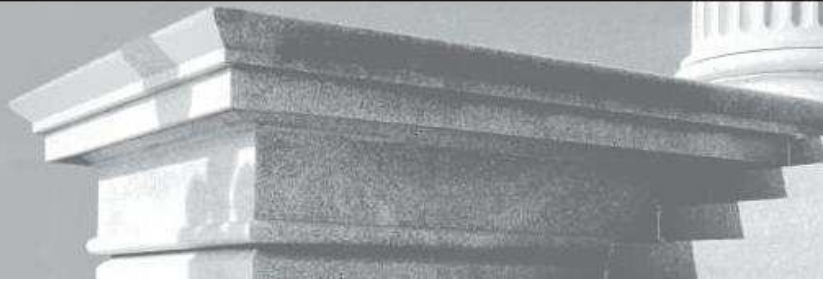
Interestingly, the Ontario *Family Law Act* provides that, if the parties to a Cohabitation Agreement marry each other, that Cohabitation Agreement (assuming it does not terminate on marriage) “shall be deemed to be a marriage contract”: section 53(2). But remember: so long as a Cohabitation Agreement deals with a matter that is also dealt with under the *Family Law Act*, the Cohabitation Agreement will prevail (unless the *Family Law Act* says otherwise). What does this all mean? Basically, unless the Cohabitation Agreement is silent or the parties agree otherwise a Cohabitation Agreement is NOT AUTOMATICALLY cancelled when two cohabiting parties get legally married.

### Terms of a simple Cohabitation Agreement

In what is to follow, some of the terms and considerations for a simple Cohabitation Agreement will be discussed.

#### Introductory Clause

Here, you’ll need to properly identify (using the full legal names) the parties, the nature of the document (i.e. it’s a Cohabitation Agreement), and the date of the Cohabitation Agreement. Keep in mind that the date of the Cohabitation Agreement may be different from when the parties started or plan to start cohabiting. This distinction may be important and you should be mindful of it.



### Background

The background section gives the context and purpose of the Cohabitation Agreement. It may simply note that the parties are cohabiting or intend to cohabit, whether they are living in a home, and whether they have children (either together or from separate relationships). The background section will also typically indicate that the parties are not legally married. The purpose of the Cohabitation Agreement is typically to allow the parties to specify their rights and obligations during and after cohabiting with each other with respect to things like property, support, and education of children. It cannot deal with things like custody and access to children.

### Definitions

The definitions that appear in a Cohabitation Agreement can include the legislation that will be referred to throughout (e.g. *Family Law Act*, *Divorce Act*, *Succession Law Reform Act*, etc.), and terms such as “cohabit”, “property”, “ownership”, and “support”. Sometimes, “breakdown of the relationship” or “cessation of cohabitation” is defined in this section so that the parties understand the circumstances in which the agreement will come to an end. For drafting purposes, it may make more sense to put these types of definitions in the termination section (i.e. where they are relevant).

### Domestic Contract

This section simply notes that the Cohabitation Agreement is meant to be a “Domestic Contract” under the *Family Law Act* (Ontario) and supersedes and is in full satisfaction of the rights under that Act (so long as the Act says so).

### Effective Date

As previously noted, the date that the agreement is signed is not necessarily the same date that the Cohabitation Agreement comes into effect. This may be at a future date and is up to the parties to determine.

### Survival upon Marriage

This part is of utmost importance. If the Cohabitation Agreement does not terminate on the parties' getting married, then it is deemed to become a marriage contract. This may not be what the parties intended. It's also a sensitive area that the parties should think long and hard about because spousal support and equalization of net family property (i.e. evenly splitting the accumulated net wealth of both spouses during the time of their marriage) are governed by the *Family Law Act* unless a marriage contract specifies otherwise and is entered into properly. If it **IS** intended that the Cohabitation Agreement survive marriage, then the Cohabitation Agreement will need to address issues such as support, equalization of net family property, and the matrimonial home upon termination (i.e. annulment) of the marriage. If the Cohabitation Agreement is not meant to survive the parties' marrying each other (and says so), then these things won't need to be addressed. Think this over and get a lawyer's help if you need to consult with a professional.

### Support Obligations

A Cohabitation Agreement could go either way when it comes to support obligations. On the one hand, each party could acknowledge that they are not dependent on the other for support, will be responsible for their own support, will not assert any claim to support from the other at any time, and will release the other from all obligations to provide support. On the other hand the Cohabitation Agreement could create an obligation on one of the parties to pay a certain amount of support during or even after the period of cohabitation. This may reflect the reality that one of the parties is economically dependent on the other and would experience or anticipate economic disadvantage arising out of the end of the relationship.

### Ownership and Division of Property

This section will deal with how the parties' property will be divided upon termination of the Cohabitation Agreement. The parties may have already decided a certain percentage or simply say that they get whatever they put into the relationship during its term. The parties may want to also evidence here how much they've contributed (e.g. buying a house together or in a joint account). Property rights can be waived and the parties can release each other from claims to the other's property. The parties can also waive rights they may have to property under doctrines of trust.

### Release against Estate of other Party

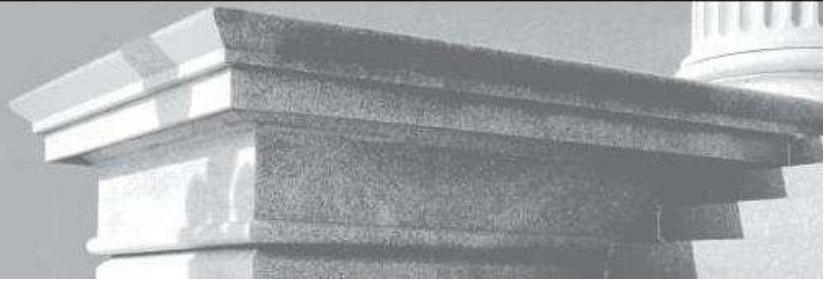
Here, the parties agree not to make claims against the other party's estate when they die. This provision may become relevant in the case of intestacy (i.e. one of the parties dies without a will) or where a Will is involved. This provision may also become relevant where a party is a spouse under the *Succession Law Reform Act* and is asserting a claim as a dependent to proper support from the deceased spouse's estate.

Worth mentioning is that the language of the release is of utmost importance. If a release is too general, it may not succeed in covering things which the parties may have intended. For example, in *Dimma v. Algoma Steel Corp* (1979), 98 D.L.R. (3d) 160, the Ontario High Court of Justice held that a general release in a separation agreement (a type of domestic contract, just like a Cohabitation Agreement) did not prevent a wife from getting her deceased husband's pension benefits. The separation agreement between the husband and wife provided a release "from all claims and rights that (she) may have, had, or afterwards may acquire: (b) upon the death of the other, under the laws of any jurisdiction". The Court held that this language only prevented the wife from claiming statutory rights, but not contractual rights, such as pension benefits, or the ability to dispose of assets under a Will.

Similarly, in *Re Saylor* (1984) 3 D.L.R. (4th) 434, the High Court of Justice held that a general release in a separation agreement did not prevent a wife from claiming that she was a dependent and entitled to support under the *Succession Law Reform Act*. In this case, the wife and husband's separation agreement contained a general release which said that the parties accepted the terms of the agreement "in satisfaction of all claims and causes of action each now has ... including ... claims and causes of action for ... possession of or title to property, and any other claims arising out of the marriage of the husband and the wife". Now, after the husband died, new legislation (the *Succession Law Reform Act*) came into force. Under that legislation, a dependent of a deceased could apply to the court for proper support from the estate. The wife claimed entitlement to the matrimonial home, which she had previously transferred to her deceased husband as part of the separation agreement. The Court held that the general release did not prevent her from claiming a right to the matrimonial home. Among other things, the Court held that the language of the release was clear enough only to bar *inter-vivos* claims, BUT NOT CLAIMS AGAINST ESTATES!

The lessons to be learned from these cases (and others) is that you must be as precise and comprehensive as possible if you wish to prevent a party to a Prenuptial Agreement from making claims at common law, statute, equity, trust, or in contract.





### General Terms

The end of the Cohabitation Agreement generally includes terms such as:

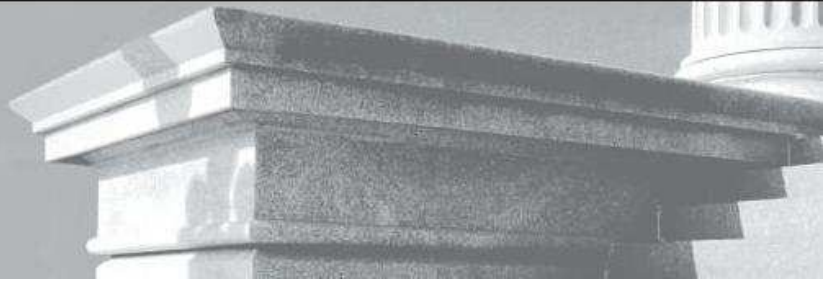
- **Acknowledgments:** the parties acknowledge that they have received full financial disclosure from the other side, understand the nature and consequences of the agreement, have had independent legal advice, and are entering into the agreement freely.
- **Amendment:** can this be done at all, for example, by both parties consenting in writing?
- **Entire Agreement:** i.e. this agreement supersedes all other agreements – whether oral or written – relating to the same subject matters in the agreement
- **Governing Law:** which jurisdiction governs the interpretation and enforcement of the agreement?
- **Interpretation:** singular vs. plural; masculine vs. feminine, section headings, etc.
- **Severability:** in case one provision is struck down and rendered invalid doesn't invalidate the rest of the agreement
- **Survival of Terms:** which terms, if any, survive the expiration or termination of the agreement?
- **Waiver:** no failure or delay of a party to enforce or exercise its rights under the agreement constitutes a waiver

### Schedule A

This Schedule is more like a checklist for the parties to go over and make sure they provide the other party with fair, full, and accurate financial disclosure as of the date that they are entering into the Cohabitation Agreement. This schedule will assist the parties in disclosing their real and personal property, including homes, vehicles, business interests, annuities, appliances, furniture, jewelry, securities and investments, etc.

### Execution

To execute a Cohabitation Agreement, the parties must sign in the presence of a witness. It is a good practice to have both parties and the witness initial the bottom right hand corner of every page. It's also a good idea to have the witness swear an Affidavit of Execution to the Cohabitation Agreement, and attach it to the Agreement itself. Finally, it's recommended that the parties have at least 2 copies of the Cohabitation Agreement.



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